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The Court of Justice of the European Union (CJEU) Hears the Spanish Challenge to the European Unitary Patent

SPEED READ

Despite the progress that has been made towards launching the European unitary patent system and the Unified Patent Court, Spain continues to actively oppose the changes to the extent that today the CJEU heard the second legal action brought by Spain in relation to the system.

In this piece, as well as reporting on the salient points of Spain's challenge and providing a summary of today's hearing, we consider what the implications of this new challenge may be for the European unitary patent system, and how the CJEU could try to maintain the political consensus without betraying its own constitutional case law.

Background

Earlier today, the CJEU heard the action brought by the Kingdom of Spain in March 2013 in respect of the European Regulations that create the European Patent with Unitary Effect (the **Regulation**) and that contain translational arrangements.¹

While many are gearing up for the launch of the unitary patent system and the selection of the judges for the Unitary Patent Court (**UPC**) is well under way, Spain is still actively resisting the implementation of the system. It is asking the CJEU to annul the two regulations mentioned above, which are at the heart of the unitary patent system.

The action, brought against the European Parliament and Council of the European Union, represents the second

¹ Regulation (EU) no 1257/2012 of the European parliament and of the council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection and Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.

challenge to the new European unitary patent system to be brought before the CJEU. On 16 April 2013, the CJEU rejected an early challenge that was aimed at annulling the Council's decision to allow an enhanced cooperation procedure to create a unitary patent system. In that case, the CJEU held that the Council had not exceeded its mandate. The current challenge from Spain is directed at the legal basis of the unitary patent system and is thought to have a greater prospect of success. Readers will also remember that the CJEU had held that a previous draft of the UPC Agreement was incompatible with EU law, essentially because the UPC would not have had the power to refer preliminary questions to the CJEU on the interpretation of EU law and because the participating Member States would not have been liable for violations of EU law by the UPC².

² Opinion 1/09 of 8 March 2011.

THE MAIN ARGUMENTS

This latest challenge contains no fewer than seven arguments against the legality of the Regulation. Two of these particularly stand out.

“The legal basis for the Regulation is inappropriate”

The first argument technically relates to the question of whether the legal basis chosen for the Regulation is adequate. In fact, it calls into question the fundamental choice made by the Regulation, i.e. to not make the issues of patent validity and infringement questions of EU law and thus reviewable by the CJEU.

Indeed, readers will remember that an earlier draft of the Regulation contained provisions (Articles 6 to 8) that defined the scope of protection of the European Patent with unitary effect (the **Unitary Patent**). Many prospective users of the system opposed this drafting, however, arguing that the aim of the system was to create a specialist patent court system and that the inclusion of Articles 6 to 8 would make the question of patent infringement a matter of EU law, thereby giving the CJEU the final word in this respect (as it has in trademark matters). This led to a late amendment of the

Regulation, with the current Articles 5 to 7 replacing the criticised provisions. Under these new provisions, the scope of protection of a European patent with unitary effect is defined through a reference to the conflict of laws rules of one of the participating Member States, by the UPC Agreement (Articles 25 to 27), i.e. an international treaty that does not constitute EU law and which the CJEU has thus no power to interpret.

Spain's challenge, then, argues that the creation of the Unitary Patent in fact does not harmonise the Member States' laws, as Unitary Patents will be granted (or refused) by the European Patent Office (**EPO**), which does not apply EU law, and their scope of protection will not be harmonised by EU law either. Hence, according to Spain, the legal basis of the Regulation, namely Article 118 TFEU on the approximation of legislations, is inadequate, as no approximation or harmonisation is legally achieved.

On the other hand, the Regulation in fact does achieve some degree of harmonisation since, through the indirect referral by Article 5 of the Regulation to Articles 25 to 27 of the UPC Agreement; the scope of protection of Unitary Patents will be the same in all participating Member States. However, it remains true that this harmonisation takes

place outside the scope of the EU legal system, and purposefully so.

"The EPO cannot be delegated with powers under the unitary patent system"

The second point of contention is in regard to the apparent hybrid of both the EU and EPO having authority under the new unitary patent system. Under the new system the EPO has certain administrative tasks relating to the Unitary Patent (e.g. collecting annual fees for unitary patents and administering a compensation scheme for reimbursement of translation costs). Spain relies on the European *Meroni* doctrine which says (among other things) that a European authority cannot delegate powers with a wide margin of discretion, and that any delegated powers should be accompanied by guarantees of judicial review. Based on these principles, Spain argues that it was not legally valid to delegate decisions on matters such as renewal fees to the EPO, because this power involves the delegation of too much discretion and because the actions and decisions of the EPO are not subject to judicial review, since it is not an EU entity.

TODAY'S HEARING

Today's hearing was by no means the final stage of these proceedings: the Advocate General is still to render his opinion prior to the Court ruling on Spain's challenge. However, following the hearing, a few points are noteworthy.

First, unusually for a case of this kind, the European Commission has chosen not to participate in the written proceedings, whereas it usually intervenes to support the legality of EU law provisions challenged before the Court. This prompted speculation that there might be a lack of enthusiasm on the Commission's part for the compromise that was eventually found, and particularly Articles 5 to 7 discussed above. At today's hearing, the Commission's intervention remained very limited, as it only defended the linguistic regime. It did not take position on the fundamental substantive issues raised by the Spanish

challenge. This could be seen as a confirmation of the Commission's reservations on the system.

To the contrary, a number of Member States participating in the UPC intervened to support the legality of the Regulation. Today no less than eight Member States presented arguments to the Court: Belgium, Denmark, France, Germany, Hungary, the Netherlands, Sweden and the UK. They all argued (together with the Council) that the *Meroni* doctrine does not apply because in fact powers are not delegated from an EU institution to the EPO. According to these parties, Member States act in their (national) capacity as Contracting States of the European Patent Convention. Also, the argument was made that, should the Court apply the *Meroni* doctrine, all the conditions of the doctrine were fulfilled and therefore the institutional balance is safeguarded.

What will come next?

On the delegation of powers argument, recent case law of the CJEU does suggest that the Court's view on the issue of delegation of powers is slowly shifting. In its decision of 22 January 2014 regarding the European Security and Markets Authority (**ESMA**) the CJEU took a more practical view of the *Meroni* doctrine in the interest of the functioning of the internal market. It held that delegation of powers to ESMA indeed did not correspond to any of the situations described in the specific provisions in the Treaty. Nonetheless, the delegation of powers to ESMA was justified because it was part of a series of rules and measures to ensure financial market stability. The Court explicitly referred to the necessity for specific technical and professional expertise in the particular field. It seems that a similar line of reasoning could be applied to the current Spanish challenge.

However, on the issue of the legal basis for the Regulation, if the CJEU finds merit in Spain's argument, it will be left in a very difficult position.

On the one hand, striking down the Regulation might undo the result of 40 years of protracted negotiation, thus potentially delaying the possibility of a unified European patent system by decades. On the other,

dismissing Spain's challenge could require the Court to depart from its established case law on basic principles regarding the way EU harmonisation functions, thereby calling into question the essence of the EU construction process. Furthermore, the Court might be tempted to adopt some more creative strategies in reaching its conclusions. It might possibly, to limit the encroachment on the principles of EU harmonisation, hold the system to be legal only insofar as the substantive law applicable to Unitary Patents remains effectively harmonised (through Articles 25-27 of the UPC Agreement). Or it might give an interpretation of Article 5 of the Regulation that would constructively consider the issue of Unitary Patent infringement to be a matter of EU law; while such an outcome would save the Regulation, it would directly contravene the drafter's intention of excluding the CJEU from patent litigation.

The next step will be for the Advocate-General to give his opinion on the case, which is expected to be published on 21 October 2014. The Court will then render its final decision, probably toward the end of this year. Its holdings will be of paramount importance to the future of the patent litigation system in Europe

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