

The European Patent Reform – The oral hearing on Spain’s actions at the CJEU

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On 1 July 2014, the European Court of Justice (CJEU) held an oral hearing on Spain’s nullity actions against the Regulations on the “unitary patent” and its language regime. Although the three-hour hearing does not allow any direct conclusions on the Court’s position, the “unitary patent package” might face new difficulties whatever the outcome of the proceedings will be. A report from Luxembourg.

I. Spain’s actions against Regulations No 1257/12 and 1260/12

As is well known, Spain has taken legal action against the EU Regulation on the creation of the “unitary patent” (Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17/12/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection; afterwards “Reg 1257/12”) as well as against that on the respective translation regime (Council Regulation (EU) No 1260/2012 of 17/12/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements; afterwards “Reg 1260/12”), demanding their nullification, alternatively a partial nullification in relation to individual provisions, namely Art. 9(1), (2), 18(2) Reg 1257/12 and Art. 4, 5, 6(2), 7(2) Reg 1260/12.

1. Proceedings C-146/13 – Spain v European Parliament and Council of the European Union re Regulation No 1257/12

In relation to Regulation No 1257/12, case no C-146/13, Spain brings forward six arguments for its nullification.¹

First of all, a violation of the principle of the Rule of Law is alleged, as the “unitary patent” will be granted by the European Patent Office (EPO), the acts of which were not subject to adequate judicial control.

Furthermore, it is argued that Regulation No 1257/12 does not constitute an act of the European Union, it lacked at least a suitable legal basis since there was no uniform protection as envisaged in Art. 118(1) TFEU.

Moreover, the decision to use the procedure of “enhanced cooperation”, in which both Regulations were adopted, is said to be based on a misuse of power, since it had been used for purposes different from those set out in the Treaties.

Additionally, the system for setting the renewal fees for the “unitary patent” and the key for their allocation to the EU Member States are claimed to violate Art. 291(2) TFEU, respectively the “Meroni” case law of the CJEU. Said case law is also considered to be violated in that the administration of the “unitary patent” is delegated to the EPO (Art. 9(1) Reg 1257/12).

Finally, Spain objects a violation of the principles of autonomy and uniformity in the application of European Union law insofar as the Regulation’s entry into force depends on that of the Agreement on a Unified Patent Court (afterwards “UPCA”) in Art. 18(2) Reg 1257/12 and Art. 89(1) UPCA.

2. Proceedings C-147/13 – Spain v Council of the European Union re Regulation No 1260/12

The proceedings on Regulation No 1260/12 have the case no C-147/13. Here, Spain bases its nullification request on five arguments.²

The first is a violation of the principle of non-discrimination with regard to persons whose language is not German, English or French, as the language regime in favor of these languages was not proportionate.

Further, the legal basis of Art. 118(2) TFEU chosen for the Regulation is claimed not to support its Article 4, while also a violation of the principle of legal certainty would be given.

The fourth argument sees a violation of the “Meroni” case law in that the Regulation delegates to the EPO the administration of the planned compensation scheme for translation costs and the publication of translations (Art. 5(1), 6(2) Reg 1260/12).

Finally, also for Regulation No 1260/12 Spain objects a violation of the principle of autonomy of the Union law, since its entry into force depends on that of the UPCA as well (Art. 7(2) Reg 1260/12 and Art. 89(1) UPCA).

3. Intervening parties in proceedings C-146/13 and C-147/13

In both proceedings, the defendant side is supported by a number of interveners. In the oral hearing, Belgium, Denmark, Germany, France, Great Britain, the Netherlands, Sweden, Hungary and the European Commission supported the respective defendant(s).

¹ A summary is accessible on the information page of the case at curia.europa.eu.

² A summary is accessible on the information page of the case at curia.europa.eu.

II. The oral hearing on 01/07/2014

For both proceedings, C-146/13 and C-147/13, the oral hearing was held on 01/07/2014 at 9:00 a.m.

Prior to the hearing, the CJEU had apparently referred the parties to its decision of 22/01/2014 in matter C-270/12³ and asked them to comment on its relevance for the present proceedings, most likely in relation to the delegation of tasks against the background of Art. 290 and 291 TFEU and the “Meroni” case law. Furthermore, the parties had obviously been asked to avoid the repetition of arguments which were presented in writing already. The defendants and their interveners had been requested to coordinate their statements and to avoid repetitions, so that each intervener only commented on specific arguments, beyond this referring to the defendants’ statements.

In view of the overlapping of the arguments brought forward in both actions, no distinction was made in the oral hearing between the two proceedings; the arguments were discussed together.

The hearing started with an explanation of the arguments asserted by Spain, followed by the replies of the defendants and their interveners, the emphasis of the discussion being on the aspects lack of legal basis of Regulation No 1257/12 and the topic of Art. 291 TFEU, respectively the “Meroni” case law.

Different from the course of the oral hearing and for the sake of clarity, the parties’ statements are afterwards presented separately for each argument. The contents of the mentioned statements are partially based on the respective German language simultaneous interpretation. For the avoidance of repetitions, not all of the statements are reproduced here. The contents of the parties’ previous written submissions are unknown.

1. Violation of the Rule of Law

Spain’s representative started by emphasizing that the proceedings at the EPO, which has been selected as the granting authority of the “unitary patent”, did not guarantee a level of judicial control meeting the requirements defined by the Rule of Law.

This topic is of utmost relevance, especially after interlocutory decision R 19/12 of the EPO’s Enlarged Board of Appeal of 25/04/2014, in which respective deficits have, in principle, been confirmed – by a panel of the EPO itself! In her “Statement of Position” in proceedings 1/09, the CJEU’s opinion on the initial structure of the unitary patent judiciary, Advocate General *Juliane Kokott* had already expressed doubts in relation to the possibilities of judicial review at the EPO.⁴ In Germany, there are currently three constitutional complaints pending at the Federal Constitutional Court, objecting that the level of

legal protection at the EPO violates the German Constitution.

In the oral hearing at the CJEU, this argument did not play an independent role, but was discussed in detail in the context of Art. 291 TFEU and the “Meroni” case law.

2. Violation of Art. 291 TFEU / the “Meroni” case law

The largest part of the oral hearing dealt with the question whether the delegation to the EPO of administrative tasks in relation to the “unitary patent” constitutes a violation of Art. 291 TFEU and the “Meroni” case law of the CJEU respectively and what the impact of decision C-270/12 is in this context.

The representative of Spain underlined the position that no valid delegation of competences had taken place, as this would necessarily require an adequate level of judicial control as well as the compatibility with Union law. However, in the present context, the delegation of tasks to the EPO was deficient insofar already as its acts were not subject to adequate judicial control.

The defendants and their interveners objected this, stating that decision C-270/12 had confirmed the continuing applicability of the “Meroni” case law and that the principles set out in it could be transferred to other situations. In the present case, however, the case law would already not be applicable, although the requirements defined by it would nonetheless be fulfilled.

On the aspect of the tasks transferred by Art. 9(1) Reg 1257/12, the Council’s representative commented that the EPO would be part of a “specific context” here. As the European Union was not allowed to join the European Patent Convention (EPC), it could not delegate any respective competences either, those were therefore necessarily the responsibility of the Member States. Furthermore, the EPO’s decisions were subject to an administrative complaint, so that an adequate level of legal protection was guaranteed. In addition, he referred to Art. 9(3) Reg 1257/12, according to which the Member States participating in the “enhanced cooperation” were obliged to ensure an effective legal protection before the national courts against decisions of the EPO made pursuant to the tasks delegated to it under Art. 9(1) Reg 1257/12.

The representative of Germany agreed with the Council’s statement, arguing that neither Art. 291 TFEU nor the “Meroni” case law were applicable in the present case. The Member States could still make use of their competences under Art. 142 ff. EPC, they would not lose them through the Regulation. Instead, she claimed, the European Union made use of its competences only insofar as a patent with uniform protection was created. This had come into existence as a legal title of international law – under the EPC – and would be attributed effect for the Union only in a further step. Therefore, the Member States remained competent to make use of the respective

³ United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union.

⁴ Cf. Statement of Position in proceedings 1/09, para. 71 f., accessible at www.xup.in/dl.99229904.

rights and duties under the EPC and to execute the respective administration.

This position was shared by Sweden's representative. She argued that Art. 291 TFEU was not applicable, as the Regulations would not delegate any competences. Instead, these competences under the EPC still rested with the Member States.

3. Lack of a legal basis

A further focus of the hearing was the aspect of whether the "unitary patent" Regulation No 1257/12 had been validly based on Art. 118(1) TFEU.

Spain's representative indicated that Art. 5 of the Regulation only contained a referral to external legal sources, especially to the UPCA. Thus, she claimed, an essential element of the Regulation was replaced by a mere referral to an intergovernmental Agreement, the latter thereby forming the basis of "a figure under Union law", which was not sufficient for Art. 118(1) TFEU. As a consequence, due to the lack of a legal basis, the Regulation could already not be considered as having come into existence.

According to the European Parliament's representative, the Regulation had a firm basis in Art. 118(1) TFEU as it created a patent with uniform effect. Art. 118(1) TFEU would not force the legislator to shape the uniform protection in a certain manner.

The representative of Denmark commented that the Regulation had a "solid legal basis", although the solution was "a bit unusual". He said that Art. 3(2) was the key provision of Regulation No 1257/12, according to which the "unitary patent" provided for uniform protection and an equal effect in all the participating Member States. He said that the "uniform protection" in that sense was also mentioned in Art. 118(1) TFEU, the Regulation's purpose being exactly the creation of such "uniform protection". Art. 5(3) Reg 1257/12 brought about an interaction with the national law of the Member States, while a uniform application of the provision was guaranteed by way of the UPCA.

Germany's representative remarked that in relation to the content and the limitations of the rights from the "unitary patent", Art. 5(3) Reg 1257/12 referred to the national law of the Member States as a "regulatory framework", especially to the UPCA and its Art. 25 to 30. This reference would not mean a violation of Art. 118(1) TFEU, since the Regulation could only be interpreted in a manner that avoided impairing its aims via the UPCA. Art. 25 to 30 UPCA had to be interpreted in a similar manner.

4. "Enhanced cooperation" is based on a misuse of power

On the argument that the procedure of "enhanced cooperation" which was chosen for the adoption of both Regulations, was based on a misuse of power, Spain's representative commented that this cooperation neither had the

aims provided for in the Treaties, nor would it be compliant with Union law.

This position was rejected especially by the representatives of the European Parliament and of Denmark, advising that through the "enhanced cooperation", the legislator had not used and other motives than those set out in Art. 20 TFEU, so that there was no indication of a misuse of power.

5. Violation of the autonomy of Union law

The connection between the entry into force of both Regulations with that of the UPCA was justified by the representative of Sweden, stating that such link was necessary as, without an effective legal protection, the "unitary patent" was "useless". This had also been emphasized in recital 25 of Regulation No 1257/12, as she remarked. Beyond this, the UPCA made sure that uniform provisions would apply to each "unitary patent".

6. Violation of the principle of non-discrimination by the language regime

The last of Spain's arguments discussed was the purported discriminating effect of the language regime in favor of German, English and French. Spain's representative explained that also cost reductions for companies allegedly caused by this solution could not constitute a justification, since the system would not guarantee that all companies benefitted from such reductions equally.

The representative of Belgium replied that the planned system fully met the requirements defined by the CJEU, for instance as set out in matters C-361/01⁵ and C-274/11⁶. The additional costs of the previous system were, amongst others, caused by the expenses for translations, while the chosen solution aimed at reducing just these costs.

A similar statement was given by the European Commission's representative. She said that it was not mandatory under Art. 118(2) TFEU to equally use all official languages. Besides, according to her, the CJEU's decision in case C-361/01 had shown that it was possible to use only part of the official languages without causing discrimination. According to her, the requirements set out in this decision were met in the present case. Additionally, it was said to be necessary for the "unitary patent" to produce significant cost savings as to ensure its attractiveness. This purpose was considered served by the chosen language regime.

7. The position of the Court

The Court followed closely the statements of the parties and the interveners, but no remarks were made which would allow any inferences as to what its position may be. No questions were asked – not even by the Judge Rapporteur *Marko Ilešič* or the Advocate General *Yves*

⁵ Christina Kik v Office for Harmonisation in the Internal Market, judgment of 09/09/2003.

⁶ Kingdom of Spain and Italian Republic v Council of the European Union, judgment of 16/04/2013.

Bot –, but several of the judges took notes during the individual statements. At the end, it was announced that the Advocate General will deliver his opinion on 21/10/2014, before the hearing was closed at about noon.

III. Analysis and outlook

The course of the hearing does not allow to deduce any trend for the outcome of the proceedings. Particularly noticeable were the argumentative struggles on the defendant side in relation to Art. 118(1) TFEU and the justification of the “referral solution”, which, however, taking into account the unusual approach, does not come as a surprise. Also the defendants’ attempts to present the level of judicial review at the EPO as adequate were not fully convincing, bearing in mind the respective doubts recently communicated in decision R 19/12 by an EPO panel. Not quite surprisingly, the defendants and interveners were also repeatedly playing the “political card”, stressing the political desire to create a “unitary patent” after decades of negotiations.

Regardless of what the outcome of the proceedings at the CJEU will be, it might be difficult for the “unitary patent package” to avoid new problems.

Should the Court fully reject Spain’s actions, it would, first and foremost, accept the approach of the “incorporating referral” in relation to the legal basis of Art. 118(1) TFEU, according to which the provisions on contents and limitations of the rights from the “unitary patent” are “drawn” into the Union law from the national law of the Member States, especially the UPCA, via Art. 5(3) Reg 1257/12.⁷ In principle, these provisions from substantial patent infringement law would then also have to fall in the CJEU’s interpretation competences. However, as set out elsewhere already,⁸ after the European Council summit in June 2012, the British Prime Minister *Cameron* had publicly made his approval of the “patent package” dependent on the condition that the CJEU does not get such competences over the “unitary patent”.⁹ Consequently, irrespective of whether one deems such competence of the CJEU for the interpretation of substantial patent law desirable or not – the latter always seemed to have been the position of a large majority of the professional and user circles –, such outcome would raise the question whether, under these circumstances, Great Britain is still in a position to ratify the UPCA. However, as this ratification is a mandatory requirement for the Agreement to enter into force which, vice versa, – as explained – is in itself necessary for the entry into force of Regulations No 1257/12 and 1260/12, even a

rejection of the Spanish complaints could mean new problems for the “unitary patent package”.

On the other hand, should the CJEU allow Spain’s complaints to their full extent and nullify the Regulations, this would mean that the “unitary patent” and its language regime could at least not enter into force in the form currently set out in the Regulations. As such, this would have no immediate consequences for the UPCA, since its entry into force is required for that of the Regulations, while such dependency does not exist the other way round. Due to the fact that it covers the “unitary patent”, the UPCA contains several references to Regulations No 1257/12 and 1260/12, but, in principle, it could also enter into force without the “unitary patent” – of course, limited to the “classical” European patents, insofar as they are subjected to the competence of the Unified Patent Court.

However, it can be doubted whether this would really be a practically feasible approach. The political sphere has always promoted and negotiated the “unitary patent”, its language regime as well as the patent court system as a “package” and subject to the condition that this “package” constitutes an inseparable whole. It was also adopted as such. Therefore, if after the elimination of two of three components of this “package”, especially after the further failure to create a unitary European patent title which would have become a reality in this situation, one wanted to go on implementing the court system as if nothing had happened, this would certainly require explanation and justification.

Of course, between these two extremes of a complete confirmation of the attacked Regulations and their complete nullification, there are, in principle, a number of other outcomes of the proceedings imaginable, bearing in mind the auxiliary requests demanding a nullification of individual provisions in the two Regulations. However, in respect of the close connection between the two Regulations and having regard to the contents of the individual provisions attacked by the auxiliary requests, even the partial nullification of one Regulation could have consequences not being too different from a complete nullification.

A first impression of the CJEU’s possible approach and its implications for the further implementation of the “unitary patent package” will be given in the opinion of the Advocate General which – as mentioned – is scheduled to be announced on 21/10/2014. Until then, the floodgates for speculation remain opened widely.

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⁷ For more details on this cf. *Stjerna*, The European Patent Reform – Prof. Tilmann, the Roman god Janus and the requirements of Article 118(1) TFEU, accessible at www.stjerna.de/requirements-118-1-tfeu/?lang=en.

⁸ Cf. *Stjerna*, The European Patent Reform – New problems ahead?, accessible www.stjerna.de/new-problems/?lang=en.

⁹ Cf. House of Commons, Hansard Debates, Col. 586, [accessible at bit.ly/3aZxRo9](http://bit.ly/3aZxRo9).

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