Spain's challenge to the Unitary Patent and Languages Regulations

Spain has been unsuccessful in its challenge to the Unitary Patent and Languages Regulations.

Submitted 6 May 2015
Applicable Law European Union
Topic Intellectual Property > Patents
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The European Court of Justice has rejected Spain’s challenges to the Unitary Patent Regulation (EU Regulation 1257/2012) and the Languages Regulation (EU Regulation 1260/2012). Although the case did not concern the Unified Patent Court Agreement, the credibility of the new court might have been damaged had the Spanish challenges succeeded. The judgment means that European patents which are granted on or after the date when the Unified Patent Court opens for business, can be designated as Unitary Patents and will take effect across all the UPC member states, and that the Languages Regulation, which limits translations and thus cost, will apply to such patents.

An observation by the Court that the conditions for granting European patents remain governed by the European Patent Convention and will not be EU law, will be greeted with relief by those who fear that the Court of Justice may take jurisdiction over substantive patent law issues.

Spain did not take part in the process of “enhanced cooperation” which led to the Unitary Patent Regulation and the UPC Agreement, and UP will not give protection in Spain: Spain remains opposed to the new system in which the Spanish language is not on equal footing with the three EPO languages. Spain had advanced several pleas in law to try to have the Regulations declared illegal, or annulled, in whole or in part.

Unitary Patent – Case C-146/13

Two potentially piercing challenges were advanced by Spain, and then followed a string of more technical - though by no means trivial - pleas. The first overarching challenge was that the Regulation was in breach of Article 2 TEU (formerly the Maastricht Treaty), which enshrines respect for the Rule of Law. In the UPC system, patent applications which on grant are designated as unitary patents (just like patents granted as traditional “bundle” patents) are examined and granted by the European Patent Office (EPO), which is not an institution of the European Union. A decision of the EPO is unreviewable in the EU courts. It was Spain’s contention that the Regulation was thus an abdication of the EU’s authority to an unaccountable international body. The Court of Justice rejected this argument, noting that the Regulation simply set out the conditions under which a patent previously granted by the EPO could be given unitary effect; the Regulation does not incorporate the conditions for granting patents into EU law - they remain governed by the European Patent Convention.

Spain’s second overarching challenge was that the Regulation was without legal basis. The Regulation does not set out
what acts would constitute infringement of a unitary patent; rather, it refers to the law on infringement of the country whose laws apply to the patent as an object of property. The Regulation was passed under Article 118 TFEU (formerly the Treaty of Rome) which permits the EU to create European intellectual property rights to provide uniform protection. Spain argued that simply referring to a specific national law was not creating a European right. The Advocate-General had rejected this plea, finding that there were sufficient substantive provisions for this to be more than an "empty shell" of a Regulation. The Court of Justice largely agreed with the Advocate-General, finding that the aim in Article 118 of "uniform protection" was advanced by the "guarantee that the designated national law will be applied in the territory of all the participating Member States".

Two more technical challenges arose from the doctrine which was set down by the Court of Justice in 1958 in Meroni v High Authority. This doctrine prevents the EU from delegating power to the Member States - competences of the EU should stay competences of the EU. Spain contended that the Regulation effectively ceded rights to the group of Member States joining the UP. In the alternative, or further, Spain contended that the Regulation had the effect of gifting discretionary authority to the EPO, and in particular because the EPO would be setting the level of fees and translation costs for the UP. These pleas failed before the Court of Justice, the Court noted that under Article 291(1) TFEU, Member States could - indeed were required to - legislate to implement binding EU acts, and found that the "EU legislature did not delegate any implementing powers which are exclusively its own under EU law to the participating Member States or the EPO". Renewal fees and translation costs were not centrally administered by the EU in the first place.

Spain also argued that the UPC Agreement undermined the scope of EU law: Spain claimed that the power to create a patents court rested with the EU. Further, because of the conditional start date of the Regulation (after 01 January 2014 or the coming into force of the UPC Agreement, the latter of which is dependent on 13 states ratifying the UPC agreement, including UK, France, and Germany), Spain argued that EU law had become inappropriately dependent on the actions of Member States. Both these claims failed at law, however: the former was inadmissible, because the Court of Justice has no jurisdiction over non-EU treaties (such as the UPC Agreement); the latter was found to be a "partial and temporary derogation" proportional to legitimate aims.

Languages Regulation (Case C-147/13)

Spain's main attack on the Languages Regulation codified discrimination on the grounds of language, because it favoured the three official EPO languages, English, French, and German, and so was "an exception to the principle that the official languages of the European Union have equal status". Further, citizens of the Union should have access to translations into their own language of texts which confer rights in the Union. The Court of Justice undertook a proportionality analysis, and determined that the Regulation aimed to have a "uniform and simple translation regime", and that the "legitimacy of such an objective cannot be denied". The translation scheme was found to be appropriate to achieve this aim, and that they did not go beyond what was necessary to achieve the aim.

Spain's other challenges, which were similar to those against the UP Regulation, were also rejected.

Conclusion

With the Regulations having been upheld on all counts, the new UPC package, including the unitary patent and the language regime, comes one step closer. Had the Court of Justice struck down the two Regulations, it would not have been disastrous: by any stretch of the imagination, the unitary patent is attractive only to patentees who designate a large number of member states and do not wish to abandon some but not all designations in the later stages of the patent's life. Nevertheless, the option of such unitary coverage is something patentees should not rule out entirely, and it will be attractive for some.
See our article The Unitary Patent - who is it for? for further information.

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