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Supreme court rejects requesting opinion from ECJ on TRIPS

Miquel Montañá (Clifford Chance) · Thursday, December 15th, 2011

Over the last few years, Spanish Courts have struggled to resolve an avalanche of cases where the core of the discussion was the legal effects of TRIPS on the effects of the Reservation made by Spain when it joined the European Patent Convention in 1986. According to this Reservation, patents filed before 7 October 1992 would have no effect in Spain insofar as they protected chemical or pharmaceutical products as such. In particular, in these cases Spanish Courts have been called on to decide whether the non-discrimination principle introduced in article 27.1 of TRIPS had any effect on the patents originally affected by the Reservation.

In a recent judgment dated 21 November 2011, the Supreme Court (Administrative Chamber) declined to request a preliminary ruling from the ECJ on the interpretation of articles 27.1 and 70 of TRIPS. The Supreme Court noted that in its judgment of 11 September 2007 (case C-431/05 Merck v. Merck Generics), the ECJ already highlighted that in the areas covered by TRIPS where Community law has not yet been harmonized, such as patent law, and which therefore fall within the competence of Member states, Community law neither requires nor forbids the legal system of the Member states, or their judicial authorities, to allow private parties to directly invoke TRIPS' provisions.

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