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Italian and Spanish complaints on unitary patent to be rejected?

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On 11 December 2012 Advocate General Yves Bot delivered his conclusions on the complaints brought by Italy and Spain against the Coucil's decision to proceed through enhanced cooperation to the adoption of the unitary patent regulation, and proposed the CJEU to reject the complaints.

As many will remember, the discussions on the adoption of the unitary patent regulation took the turn of enhanced cooperation (a procedure contemplated by the Treaties whereby a limited group of Member States proceed to the adoption of a specific piece of legislation which will eventually have effect only in their territories, and not in those of the non participating Member States) when it became apparent that Spain and Italy could not and would never accept the proposed language regime. According to the latter, the official languages of the unitary patent would be English, French and German only and, more important, the unitary patent would have effect in all Member States without the execution of translations of the patent in the Member States' official languages. In the summer of 2011, both Spain and Italy resorted to the CJEU requesting the annulment of the council's decision to proceed with enhanced cooperation, on a number of grounds, the main ones being that a unitary patent cannot be established by means of enhanced cooperation under Article 20(1) TEU as such an institution would be in the exclusive competence of the EU (and not in the competence shared between the EU and the Member States), that the unanimity requirement as regards the language regimes of unitary intellectual property titles expressly provided for by Article 118 TFEU would been breached, and that the decision resulted in misuse of powers to the extent that it was a way to exclude Spain and Italy from the negotiations, rather than achieving integration between the other Member States.

Firstly, in the view of Advocate General Bot, the unitary patent would fall within the area of internal market which, unlike the area of competition, is not in the exclusive competence of the European Union. In particular, the fact that the regulation concerns the institution of a unitary patent – i.e. a measure that would by definition seem to be a prerogative of the EU and not in the competence of the Member States – would be irrelevant as what only counts is whether the subject matter (industrial property) belongs to an area of exclusive competence, and not the nature of the specific measure involved. As regards the explicit requirement of unanimity of Article

118 TFEU, Advocate General Bot resolved the issue by noting that the rules on enhanced cooperation (Articles 326 and subs. TFEU) expressly state that when unanimity is required, unanimity must be referred to participating Member States only. As regards misuse of powers, there would be no evidence that the purpose followed by the Council was that of excluding Italy and France from the discussions or forcing them to accept the proposed language regime. In general terms, the Advocate General also pointed out that the review of the CJEU on the Council's decision to proceed with enhanced cooperation will have to be a limited review, taking account of the necessary discretion of the Council in assessing, on the basis of numerous elements, the effects of the enhanced cooperation and the various interests at stake and thereupon making political choices on matters within its own area of responsibility.

As we all know, the unitary patent package issue is extremely complex. What can be said on this specific chapter of the story is that these Advocate General conclusions, which may be correct from a dogmatic point of view, miss the opportunity to contribute to the overall discussion, really. The language issue is not *"just an issue"* on which Spain and Italy have diverging opinions with the rest of the Member States. It is an extremely important political issue, for obvious reasons. Furthermore, some may remember that when the Advocates General were asked to deliver an opinion on an initial project of the unified patent court, they pointed out that the project was no good exactly on the language regime, as imposing English, German or French as the language of litigation to litigants of other nationalities would have been in breach of their right of defence. Wouldn't a similar point apply to the language regime of the unitary patent? In any event, at least from a strictly Italian perspective (but this is not a problem for the Advocates General or the CJEU, but for the Italian government) it is difficult to understand the logic of opposing, as Italy is doing – the creation of a unitary patent and, on the other hand, remaining – as Italy is also doing – in the negotiations for a unitary patent court which would have exclusive jurisdiction, besides on unitary patents, on European patents designating Italy as well….

As to whether it is likely that the CJEU will follow these AG conclusions, one may even think that the CJEU may be tempted by the opportunity of stopping a process in which the only clear thing is that nobody wants the CJEU having any form of jurisdiction on the unitary patent regulation, so much so that negotiators struggled to try and keep any substantial law provision on infringement (famous Articles 6-8) out of the regulation.

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