Kluwer Patent Blog

‘Spain would have been better off inside the Unitary Patent and the Unified Patent Court’

Kluwer Patent blogger · Tuesday, October 20th, 2015

Now that Italy has changed its mind and joined, Spain has become the only EU member state to stay out of the Unitary Patent (UP) system. How good or bad is this for the country and its companies? And will anything change because of the CJEU’s rejection of the Spanish complaints against the UP on 5 May 2015? Kluwer IP Law spoke to the Spanish Office of Patents and Trademarks, a number of companies in Spain and the Spanish IP law firm Balder.

Over the last months debate has intensified why Spain stays out of the new European patent system, although it has been embraced by all other EU member states. Even Italy decided to join, after the CJEU had rejected the Spanish challenges to the UP system on 5 May 2015.

In an earlier article on this blog, the Spanish Employers Organization (CEOE) explained it ‘strongly supported the position of the Spanish Government’. The CEOE criticized the ‘unbalanced and discriminatory language regime’ of the UP system and the negative effects it would have on the competitiveness of Spanish enterprises, especially SMEs.

In answer to recent questions by Kluwer IP Law, the Spanish Office of Patents and Trademarks (OEPM) ‘underlined the consensus between all the stakeholders involved regarding the Spanish position. It is the result of participation of all the players: big companies, SMEs, universities and the main political parties. We are convinced that all the sectors have been heard and there is no prevalence of any voice.’

But a conversation last week with a Catalunya based technology company, made clear that they don’t share this view. ‘Last year, we went to a seminar about the Unitary Patent system, mostly to learn about its developments and implications for a company like ours, and we were quite surprised to hear a representative of CEOE explain that Spain would stay out. Apparently, we had been too busy with other things and missed out on the opportunity to have our say. And the same happened to other companies and organizations, we guess. So now the position of the CEOE, whose IP committee is headed by a patent attorney, has become the position of Spain.’

Kluwer IP Law also spoke to Magnus Stiebe, partner at Balder IP Law. He is critical of the influence in Spanish politics of patent attorneys, which was questioned earlier in an article by the

IAM Blog. 'It disturbs me to hear law firms argue the new system can only be bad for Spanish science or for SMEs, because it is not that simple. And some IP law firms basically live from translating and validating European patents and this would disappear under the Unitary Patent system. So many people, including myself, think that when such firms argue against the UP, this may be due to their own interests, and not so much about the interests of Spanish industry and science. Not all Spanish patent attorneys are against the UP and some think it will be an interesting challenge for the profession.'

The spokeswoman for the OEPM refuted the accusation that patent attorneys would be against the UP due to their own interests: 'What the IAM article says could be interpreted as a lack of professionalism of the Spanish patent attorneys firms, which we do not agree with. Patent attorneys of several countries will lose the same source of income and their countries have joined the UP system, so we do not think that loss of work is a factor.'

Several organizations that were contacted by Kluwer IP Law declined to comment on the Spanish position regarding the UP system. One of them, however, said the Spanish choice to stay out means a missed opportunity: 'With the OHIM office in Alicante, Spain has an important role concerning the European protection of trademarks and designs, but it is completely missing out on getting its share of facilities and expertise, which the UP system or the Unified Patent Court could have brought.'

Magnus Stiebe

Although Magnus Stiebe distrusts the motives behind at least part of the lobbying in favour of the Spanish 'no', this certainly doesn't mean he is enthusiastic about the UP system. On the contrary: 'It is a mess. Quoting Dr. Ingve Stjerna, I would say: this is a sub, sub, sub, suboptimal compromise. The language arrangement is awkward and costly and will imply a lot of unnecessary translations. During litigation the language of proceedings may switch, from for example Italian, to French, to German! An English-only system would have been far more logical. And not unimportantly, I'm convinced this would have persuaded Spain to join as well. Actually, Spain argued in favor of an English-only system. I believe it was France that refused, and thereby we missed the chance to have a system in one language that all Europeans – at least all involved with technology and IP – can be expected to understand.

Especially for SMEs who are accused of infringement and litigated before the UPC – there are many SMEs who compete with German and French companies – the language regime is a major drawback, and they find this unfair. If the CEOE argues that the UPC with the current language regime may be bad for many Spanish SMEs, that is not completely unfounded.'

Still, Stiebe thinks Spain would have been better off inside the UP and UPC. 'Maybe the UP system is not all what Spain wanted, but sometimes you have to accept that you do not get exactly what you want. Had we joined, then our judges would have participated, we could have tried to influence developments from within. I have many colleagues in the Spanish IP profession who think the same: the UP system is crappy, but if we do not step in, we will kind of remain behind the other countries. And that is maybe not a good idea, especially if you consider things in the long-term perspective.'

After the 5 May 2015 CJEU decision, the question is what this means for Spain. Will it, just like Italy, join the Unitary Patent after all?

According to the OEPM, 'the CJEU decision opens a new period and will lead to a new discussion where all the sectors involved, both private and public, will be invited and the most convenient decision for Spain will be adopted.' Magnus Stiebe says the authorities are 'extremely silent' about 5 May 2015, although it is a hot topic and lobbying *sotto voce* is going on. He thinks at some point things may change and then everybody will say: 'This had to come.'

Magnus adds that what he has expressed is his personal opinion, not necessarily shared by his partners and colleagues at Balder. He also says that he is not really interested in lobbying, his work is 'to make the best out of the system for his clients, be it a UPC system or not'.

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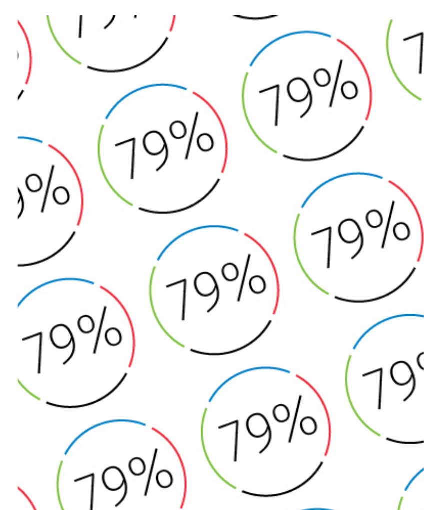

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This entry was posted on Tuesday, October 20th, 2015 at 10:31 am and is filed under Spain, Unitary Patent, UPC
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