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Enhanced cooperation: which will prevail in Luxembourg, law or politics, on 1 July?

Miquel Montaña (Clifford Chance) · Thursday, June 12th, 2014

1 July appears to be a date prone to attract landmark historical events. On 1 July 1751, for example, the first issue of Denis Diderot & Jean Le Rond d' Alembert's *Enciclopedia* was published in Paris. On the same day, 47 years later Napoleon Bonaparte invaded Alexandria. It was also on 1 July when the III modern Olympic Games were launched in St. Louis in 1904. And it will be another 1 July, this time in 2014, when the Court of Justice of the European Union ("CJEU") will meet in Luxembourg to hear the action brought on 22 March 2013 by the Kingdom of Spain ("Spain") against the European Parliament and the Council of the European Union (Case C-146/13), a dark cloud on the horizon of the European patent with unitary effect.

Readers will remember that in this action Spain seeks for the CJEU to declare legally non-existent Regulation (EU) No. 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection and, in the alternative, to annul said regulation entirely. In the alternative, Spain asks the CJEU to annul: (a) Article 9(1) in its entirety, and Article 9(2) in the terms set out in the fifth plea in law in support of the action; (b) Article 18.2 in its entirety, and all references in Regulation No. 1257/2012 to the Unified Patent Court as the judicial regime for the European patent with unitary effect ("EPUE") and as the source of law for the EPUE. The readers will also remember that there is a second action pending against Regulation (EU) No. 1260/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.

The main arguments used in the action against Regulation (EU) No. 1257/2012 may be summarised as follows: Spain alleges that there has been a breach of the rule of law principle because the EPUE will be a title granted by the European Patent Office ("EPO"), whose acts are not subject to judicial review. Interestingly, this was a reproach already made by Jochen Pagenberg – in rather harsh terms – in an article published in 2010 (*The ECJ on the Draft Agreement for a European Community Patent Court – Hearing of May 18, 2010*, published in *IIC*, Vol. 41, No. 6, 2010, at 695. Spain also challenges the legal basis of Regulation (EU) No. 1257/2012 on the grounds that it does not really introduce measures guaranteeing the uniform protection envisaged in Article 118 of the Treaty on the Functioning of the European Union ("TFEU"). In relation to this, Spain adds that there has been a misuse of powers through the use of the enhanced cooperation mechanism for purposes other than those provided in the treaties. Spain then contends infringement of Article 291(2) TFEU and, in the alternative, misapplication of the so-called Meroni case law on the regulation of the system for setting renewal fees and for determining how

these fees will be distributed. Spain also uses the arguments based on the misapplication of the so-called Meroni case law from another angle, that is, in connection with the delegation to the EPO of certain administrative tasks relating to the European patent with unitary effect. Lastly, Spain denounces the breach of the principles of autonomy and uniformity in the application of European Union law, in relation to the rules governing the entry into force of Regulation (EU) No. 1257/2012.

These reproaches should not come us a surprise. For example, Martin Lamping already flagged as early as October 2011 (*Enhanced Cooperation – A Proper Approach to Market Integration in the Field of Unitary Patent Protection?*, published in *IIC*, Vol. 42, No. 8/2011, at 879), that stretching the muddy waters of enhanced cooperation did not appear to be the right foundation to sustain this amazingly complex edifice. More recently, Prof. Manuel Desantes, former Vice-President of the EPO, has provided a very detailed account of the legal flaws prompted by the political realities that led most member states to stretch the enhanced cooperation route (*Le «paquet Européen des brevets», paradigme du chemin à rebours: de la logique institutionnelle à la logique intergouvernementale*, just published in *Cahiers de Droit Européen*).

Interestingly, the main argument (“The CJEU will not have the guts...”) against the legal concerns voiced from Academia is political rather than legal. Certainly, the fragile legal underpinning of this project, no doubt caused by the dearth of political consensus, will put to test Luxembourg’s testosterone in this case. As we approach another historical 1 July, we will all grow intrigued to learn which will prevail, law or politics, on that date.

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