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Spanish nullity actions against “unitary patent” Regulations: The CJEU, the procedures at the EPO and the impact on the Unified Patent Court Agreement

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In Spain’s nullity proceedings against the “unitary patent” Regulations, Advocate General *Yves Bot* will shortly deliver his Statement of Position, i. e. his suggestions on how the Court should decide these matters. One of the many objections raised in these proceedings relates to the involvement of the European Patent Office (EPO), the procedures of which are criticized, amongst others, for lacking a sufficient level of legal protection. This aspect, which is also the subject of a number of constitutional complaints in several EU Member States and complaints at the European Court of Human Rights, might also affect the ratification process for the Unified Patent Court Agreement (UPCA).

1. Proceedings C-146/13 and C-147/13: Advocate General Statements of Position

As it has recently been formally announced by the CJEU, the Advocate General will give his Statements of Positon on the Spanish nullity actions against Regulations No 1257/12 and 1260/12, constituting the “unitary patent” and the respective language regime, on 18 November 2014. This comes more rapidly than expected after the delivery date of 21 October 2014, initially envisaged in the oral hearing on 1 July 2014, had been cancelled in, so it seems, as much silence as possible. Anyhow, now the “professional circles” should soon get at least an initial idea of what the CJEU’s position might be with regard to the number of legal objections raised in relation to the two Regulations in question.

2. The EPO procedures and the Rule of Law

Apart from the legitimate doubts on whether Article 118 TFEU can be relied on as a legal base, the probably greatest legal issues result from the planned involvement of the EPO in the granting and administration of the “unitary patent” as doubts have been voiced on the compatibility of its procedures with basis legal standards like an adequate legal protection, reflected, for instance, in the possibility to request legal review of EPO decisions by an independent court – a property which the EPO judicial bodies do not fulfil.

One of the strongest statements in that respect came from the CJEU itself during the Court’s

first contact with the “patent package”, the opinion proceedings in which it dealt with and ultimately denied the compatibility of the structure envisaged in the initial draft international Agreement for the creation of a European patent judiciary with European law (Opinion 1/09). In her Statement of Position, the Advocate General in charge in these proceedings, *Juliane Kokott*, addressed the core of the problem in very clear terms (ibid., para. 71 f.):

“71. In fact, the decisions of the EPO concerning patents can only currently be reviewed by the internal chambers of appeal created within the EPO, excluding any judicial appeal before an external court. There is no possibility of the European Court of Justice ensuring the correct and uniform application of Union law to proceedings taking place before the chambers of appeal of the EPO. (…)

72. The European Union should not either delegate powers to an international body or transform into its legal system acts issued by an international body without ensuring that effective judicial control exists, exercised by an independent court that is required to observe Union law and is authorized to refer a preliminary question to the Court of Justice for a ruling, where appropriate.”

However, she also indicated how these shortcomings might be resolved (ibid., para. 73):

“73. These requirements can certainly be satisfied in different ways. A possible extension of the competences of the future PC [Patent Court] to include administrative proceedings against decisions of the EPO is just one of the options that may be contemplated. Another option that may be contemplated is the creation of an administrative patent court which should be authorized, unequivocally, to refer to the European Court of Justice for a ruling on a preliminary question. Under the principle of institutional balance, it is not up to the Court to indicate which of these different options should be given preference, within the scope of this opinion.

74. However, according to the information available to the Court within the scope of this opinion, administrative proceedings against decisions of the EPO are not dealt with by any of the different measures currently being studied with regard to patents. Administrative proceedings do not appear to play a role either in the draft agreement setting up the EC or within the scope of the European Union’s accession to the EPC.

75. Under these conditions, it should be noted that, in its current state, the draft agreement, read in the light of all the measures contemplated with regard to patents, does not satisfy the requirement of effective judicial control over the granting of patents or the desire for a correct and uniform application of Union law.”

Of course, the subject of proceedings 1/09 was an international Agreement while the currently pending proceedings C-146/13 and C-147/13 deal with EU Regulations. However, the relevance of the problem of whether adequate legal protection is guaranteed in EPO proceedings, due to its involvement in the grant and administration of the “unitary patent”, remains unchanged. It also remains unresolved as the competences of *“the future Patent Court”* mentioned in Ms *Kokott’s* proposal, now termed the “Unified Patent Court”, include reviewing some decisions of the EPO (cf. Article 32 (1) lit. i) UPCA), but not all of them. For example, in relation to an EPO decision rejecting the grant of a patent a possibility of independent judicial review, as far as can be seen, is still not provided for. Insofar, the

situation described by *Juliane Kokott* remains unresolved and it will be interesting to see how the Advocate General in proceedings C-146/13 and C-147/13 will address this point in his upcoming Statement of Position.

3. Constitutional complaints against EPO procedures

The CJEU's position on this aspect will also be closely monitored by a number of courts in EU Member States, notably in Germany, the UK and the Netherlands as well as by the European Court of Human Rights, where complaints are currently pending against EPO decisions, arguing a violation of several fundamental rights. In that regard, the CJEU will decide not only proceedings C-146/13 and C-147/13, but it will, at least insofar as there is a procedural overlap, also map the route for the other courts where complaints in relation to EPO procedures are pending.

4. Relevance for the UPCA ratification process

Due to the fact that the UPCA provides for interweaving the activities of the Patent Court with those of the EPO, the latter being the granting authority for the patents dealt with by the Patent Court and the EPC being a legal source to be applied by both of them, the upcoming CJEU decisions might also have an impact on the UPCA ratification.

Here, Germany might play a special role since, on the one hand, it is one of the three countries the ratification by which is obligatory for the UPCA to enter into force, while, on the other, its legal system provides for the interesting possibility to challenge the ratification of an international Agreement like the UPCA directly at the Federal Constitutional Court and request a review as to its compatibility with fundamental rights.

Widely unknown, this option is generally available to anyone enjoying the protection of fundamental rights from the German Constitution which, in principle, is the case for natural as well as for judicial persons, and regardless of whether they have a place of residence or a business seat in Germany. The decisive factor is a possible violation of a legal position owned by the respective natural/legal person which enjoys fundamental right status under the German Constitution. In the UPCA context, for instance, anyone holding a patent or patent application having or seeking effect for Germany which would fall into the scope of the UPCA, i. e. granted "classical" European patents or respective applications (cf. Article 3 lit. c) and d) UPCA), might, in principle, be affected in his fundamental right to property as well as in his rights to an effective legal protection and to a fair trial and might be able to request the mentioned review by the Federal Constitutional Court.

This is probably worth to keep in mind while waiting for the CJEU decisions in matters C-146/13 and C-147/13, resting assured that issues which are not resolved by the CJEU might still be brought to legal assessment elsewhere – and before the UPCA can enter into force.

This post is a shortened summary, a more detailed assessment of the aspects discussed can be found in the author's article "Unitary patent" and court system – Compatible with Constitutional Law?" which is available for download in German and English language here.

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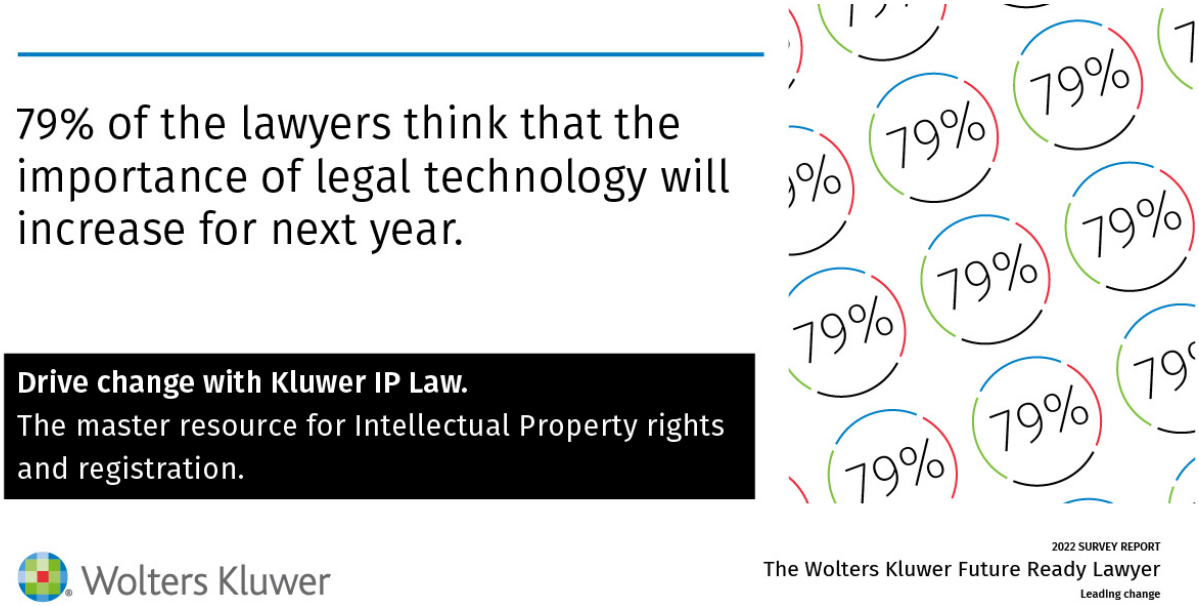

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