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The Advocate General on the Spanish “unitary patent” challenges: A Statement of (Op-)position

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On 18 November 2014 Advocate General *Yves Bot* delivered his Statements of Position (afterwards “Opinions”) in terms of Spain’s nullity actions against the two Regulations on the “unitary patent”, his recommendation to the CJEU being a rejection of the complaints. Upon a closer examination, the impression arises that especially the Opinion in case C-146/13 largely tries to avoid any contextual debate of the critical aspects raised, e. g. in relation to the adequacy of legal protection at the European Patent Office (EPO). Not least in view of the recent events at the EPO, culminating in the suspension of a Boards of Appeal member by the President, the question arises to what extent the Statements of Position can form a suitable basis for the Court’s decision at all.

I. The Opinion in matter C-146/13

As is well known, Spain’s nullity action in matter C-146/13 is directed against the Regulation on the creation of the “unitary patent” (Regulation (EU) No 1257/2012; afterwards “Reg 1257/12”), while that in case C-147/13 deals with the Regulation on the respective translation regime (Council Regulation (EU) No 1260/2012; afterwards “Reg 1260/12”). This article will focus on proceedings C-146/13, but there is some overlap with issues raised in matter C-147/13.

Of the seven arguments raised in Spain’s action against Reg 1257/12 (Opinion C-146/13, para. 20 ff.; subsequent references to paragraphs without citing the source are from Opinion C-146/13), this post will concentrate on two, namely that of a violation of the Rule of Law principle through the involvement of the EPO in the grant and administration of the “unitary patent”, and that of a violation of the autonomy of Union law by tying the entry into force of Reg 1257/12 to that of the Agreement on a Unified Patent Court (afterwards “UPCA”).

Since the parties’ submissions are not publicly accessible, the statements on their positions are based on the respective information given in the Opinion itself. Due to the fact that English versions of the Opinions are still not available today (25 January 2015), the citations used here are translations of the respective sections in the German language version.

1. Violation of the Rule of Law by involving the European Patent Office

Spain argues that the procedure for granting a European patent is not subject to any judicial review guaranteeing a correct and uniform application of Union law as well as the protection of fundamental rights, therefore being incompatible with the constitutional requirements set out in Art. 2 TEU (Treaty on European Union). The judicial bodies of the EPO were not independent and their decisions not subject to legal review by a court, so that it could not be allowed to integrate the EPO into the Union's legal order through Reg 1257/12 and the competences attributed to it therein in relation to the "unitary patent" (para. 28 f.).

Advocate General *Bot* rejected Spain's argument, since the legality of Reg 1257/12 could not depend on whether *"the EPO's decisions on the grant of European patents are compatible with Union law"* (para. 61), the EPC system not being part of the Regulation (para. 47 f.). Apart from that, the EU Member States, which were also Contracting States of the EPC, *"have never regarded the possible impacts of EPO decisions on the grant of patents as a violation of their constitutional principles"* (para. 45).

The clinical separation of the granting history of a European patent and the procedural framework governing it from the examination of the Regulation's legality as conducted by the Advocate General appears arbitrary. If the Regulation means to create an independent "unitary patent" – which is the legislator's intent (cf. e. g. recitals 7 and 14 and Art. 3(2) Reg 1257/12) –, its legal assessment cannot be separated from the underlying European patent and the respective procedures as, ultimately, they continue to form a part of the protective right. Union law builds on this protective right and, through the Regulation, attributes to it certain legal effects. If the values specified in Art. 2 TEU are taken seriously, the procedural backgrounds of the European patent cannot be ignored and the circumstances of its creation accepted as it stands, indifferently attributing to it legal effect for the Union. Instead, it should be ensured that this patent originates from a procedure fulfilling the requirements of Union law as laid down in, for instance, Art. 2 TEU.

The deficits at the EPO in relation to the Rule of Law, which were clearly addressed already in the Statement of Position in proceedings 1/09 by the Advocate General in charge there (cf. here, paras. 71 ff.), have recently been emphasized by the imposition of a "house ban" on a member of the Boards of Appeal by the EPO President on 3 December 2014, for an alleged dissemination of defamatory material against someone at the EPO management level. Regardless of the seriousness of the alleged offense, one thing is clear: The procedure for taking disciplinary action against a member of the Boards of Appeal in set out quite clearly in Art. 23(1), 11(4), 10(2) lit. h) EPC. As no immediately applicable legal basis for the direct enactment of such measure by the President is visible, this would mean that he, as a member of the EPO executive, interfered with a judicial body of the EPO beyond his legal powers. The deficits of the EPO structures with regard to the Rule of Law, presently the lack of independence of the Boards of Appeal, could hardly be demonstrated to the public in a much clearer manner!

These events happened roughly two weeks after the publication of the Opinions, so that they could not be covered therein. However, in the light of these incidents, the CJEU will need to consider whether the Rule of Law issue can really be ignored as suggested by the Advocate General.

2. Violation of autonomy and uniformity of Union law

As its seventh and final argument, Spain objects a violation of the autonomy and uniformity of Union law, because Art. 18(2) Reg 1257/12 allowed the Member States to decide by themselves whether the Regulation shall become valid for them or not. Should a Member State not ratify the UPCA, the Regulation would not become valid for it and the Unified Patent Court would not obtain exclusive jurisdiction for deciding about the "unitary patent" there. The latter would therefore lack unitary effect in this State, violating the principles of autonomy and uniformity of Union law (para. 145).

The Advocate General is of a different opinion. For him, there is such a close relation between Reg 1257/12 and the UPCA that it would be logical to make the entry into force of the Regulation dependent on that of the UPCA, even if this happened at the expense of legal certainty (para. 184). He also denies that the Member States are free to decide about the entry into force of Reg 1257/12, because, under the principle of sincere cooperation in Art. 4(3) TEU, they were obliged to ratify the UPCA as to avoid a violation of European law (paras. 179 f.)

The Advocate General emphasizes this alleged "ratification obligation" of the Member States in different passages of his Opinion (cf. paras. 88, 94 and 179 f.), pointing this out seems to be one of his core issues. However, the existence of such obligation is doubtful. As it is said in recital 25 of Reg 1257/12, the ratification of the UPCA takes place in accordance with the national constitutional and parliamentary procedures of the Member States. This is also set out in the UPCA (Art. 84 (2) UPCA).At least in Germany, part of this constitutional procedure is the possibility of holders of potentially affected fundamental rights – which can also be legal persons, even if established under foreign law – to request the assessment of a ratification statute for an international Agreement by the Federal Constitutional Court (BVerfG) for its compatibility with fundamental rights (cf. *Stjerna*, "Unitary patent" and court system – Compatible with Constitutional Law?, accessible here). Therefore, regardless of the activities by the government and the Parliament, the entry into force of a UPCA ratification statute could still be subjected to a respective examination by the BVerfG. The Court has repeatedly underlined its respective investigation competences and also indicated that it considers these to be perfectly compatible with said principle of sincere cooperation from Art. 4(3) TEU (cf. BVerfG, judgment of 30 June 2009, 2 BvE 2/08 and others, para. 240, accessible here).

After all this, Spain's discussed pleas can at least not be rejected with the arguments given by the Advocate General. To the contrary, there are reasons which are just as good to regard these pleas justified, calling for a nullification of Reg 1257/12.

II. The Opinion in matter C-147/13

As indicated, some of the arguments presented in proceedings C-146/13 are also put forward in Spain's nullity action against Reg 1260/12 on the translation regime for the "unitary patent". The central aspect, rejected by the Advocate General, seems to be the alleged violation of the principle of non-discrimination on grounds of language by the limitation to the trilingual system established in Reg 1260/12.

III. Outlook

The present Opinions seem to endeavor avoiding any confrontation with the controversial issues and to take the easiest way to come to a rejection of the complaints. The impression arises that it is sought to achieve a predefined result, without having well-founded arguments supporting it. This may imply that a serious discussion of subject matter is possibly not wanted, because all the institutions involved anyhow wish to nod the “unitary patent package” through. One decisive aspect will be whether, despite the neglect in materially dealing with this issue in the Opinion, the CJEU will be prepared to tackle the situation at the EPO. Should they avoid this or not deal with it exhaustively, the focus will shift to the national Constitutional Courts to resolve this inacceptable situation. The Court’s judgments should be given in spring 2015.

This post is a shortened summary, a more detailed assessment can be found in the author’s article “Unitary patent and court system – Advocate General’s Statements of Position: Superseded by reality?” which is available for download in German and English language here.

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This entry was posted on Monday, January 26th, 2015 at 10:17 am and is filed under Spain, UPC
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