

Law professors petition against the Unitary Patent Package – but are the arguments correct?

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A petition called “The Union cannot be stripped of its powers by the Member States: the dangerous precedent of the patent package”, signed by more than 40 law professors, retired law professors and lawyers was published on the IPKat blog on Friday 13 March 2015.¹ The timing of this petition is remarkable. One would have expected such a petition to be published around the time when the Council Decision authorising enhanced cooperation in the area of the creation of unitary patent protection of 10 March 2011 (2011/167/EU) was published, or maybe early 2013, when both the Unitary Patent Regulation, the Regulation on Translation Arrangements and the Unified Patent Court Agreement (UPCA) had become available to the public. Instead, it is published in between the Advocate-General’s opinion on the Spanish appeals against the two Regulations and the expected judgment of the Court of Justice of the European Union on those appeals.

The key message is that it would not be acceptable for the European Union to abandon its powers in favour of the Member States, as the first sentence claims. This in itself already is a very strange statement, as if the powers of the EU Member States would have derived from the sovereign powers of the EU. Of course, it is the other way around. The EU Member States have delegated part of their sovereign powers to the EU, in order for the EU to create EU-wide harmonisation in specific areas.

The issue with patent law is that the EU has failed to achieve such harmonisation for almost 40 years. Since the creation of the European Patent Convention (not an EU instrument), many attempts have been made to create a Community Patent and a litigation system to enforce such a patent, but unfortunately without success. In view of that history, it is rather bold to state that “the Member States will have succeeded in stripping the Union of one of its powers”. Actually, the potential power was attributed by the Member States to the Union, but the Union failed to make proper use of that power, even though not the institutions of the Union, but primarily some Member States are to be blamed for this.

Subsequently, the petition seems to mix up the issues of the enhanced cooperation itself and a specific detail that was introduced later on, namely moving the provisions on patent infringement from the Unitary Patent Regulation to the Unified Patent Court Agreement. It seems to suggest that both are the result of “pressure from certain lobbies”.

The initiative for enhanced cooperation was started when it became clear that there was no way to achieve the desired harmonisation at EU level. The CJEU has already established in its judgment of 16 April 2013, C 274/11 and C 295/11 in the appeals of Spain and Italy against the enhanced cooperation, paragraph 55 - 57, that “the legislative process undertaken with a view to the establishing of a unitary patent at Union level was begun during the year 2000 and covered several stages. (...) It is apparent too that a considerable number of different language arrangements for the unitary patent were discussed among all the Member States within the Council and that none of those arrangements, with or without the addition of elements of compromise, found support capable of leading to the adoption at Union level of a full ‘legislative package’ relating to that patent” and actually until the moment when the request for enhanced cooperation was made “there was still

¹ <http://ipkitten.blogspot.nl/2015/03/the-eu-patent-package-dangerous.html>

insufficient support for any of the language arrangements proposed or possible to contemplate". The CJEU therefore found that in accordance with Article 20(2) TEU the enhanced cooperation was requested "as a last resort, when it (is) established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole".

Even then, the effort was directed towards the participation of as many EU Member States as possible. The decision for enhanced cooperation was taken at the request of 25 of the then 27 Member States of the European Union, including Poland but with the exception of Italy and Spain. Later on, Italy signed the Unified Patent Court Agreement and currently it is reconsidering its position on the Unitary Patent. It is rather strange to claim that a harmonisation of patent law, which is pursued by almost all EU Member States, but blocked by just one or two because of alleged national interests, would be contrary to EU principles just because it is achieved through an enhanced cooperation.

However, the petition also goes into some details of the enhanced cooperation which the signatories view as being in conflict with EU law, mentioning specifically Articles 5, 7 and 18 Unitary Patent Regulation. First of all, it is argued that it is wrong that the Unitary Patent Regulation no longer contains the substantive law on the exclusive rights of the proprietor (in other words: the provisions on infringement). This indeed was a political decision, aimed at limiting the involvement of the Court of Justice. There was broad political support and broad industry support for this decision. The phrase "pressure from certain lobbies" tries to taint this support in a somewhat misleading way. Of course, in an ideal Union there would be a Community Patent and the Court of Justice would have the full and final say on the autonomous interpretation of substantive and procedural patent law. However, based on the experience of the Member States that currently host a considerable amount of patent litigation, this would require a sufficient number of judges versed in handling patent matters, preferably in a specialized IP chamber of the Court. That is not the current situation. For perfectly understandable reasons, CJEU judges are recruited on the basis of different capabilities that meet the current major demands of the EU. Unfortunately, this is a bit of a chicken-and-egg situation. Once the CJEU has a sufficiently large number of IP cases to handle, there will be room for a specialized IP chamber at the CJEU and for recruiting specialized judges for that chamber. As long as this is not the case, there will be insufficient confidence to entrust the final say on patent law to the CJEU.

Nevertheless, Article 5(2) Unitary Patent Regulation does provide "the scope of that right and its limitations shall be uniform in all participating Member States in which the patent has unitary effect". In addition, Article 20 UPCA provides that "the Court shall apply Union law in its entirety and shall respect its primacy" and Article 21 provides that "as a court common to the Contracting Member States and as part of their judicial system, the Court shall cooperate with the Court of Justice of the European Union to ensure the correct application and uniform interpretation of Union law, as any national court, in accordance with Article 267 TFEU in particular. Decisions of the Court of Justice of the European Union shall be binding on the Court". Basically this means that the UPC Court of Appeal has an obligation to refer questions on the uniform scope of the Unitary Patent to the CJEU where appropriate.

Article 7 Unitary Patent Regulation has a different background. The Member States felt that the law of property is an essential part of their national sovereignty. Therefore, the Unitary Patent as an object of property is subject to national law. However, the same rule is contained in Article 16 Community Trademark Regulation and in Article 27 Community Design Right Regulation. In that view, what is wrong with Article 7 Unitary Patent Regulation from an EU perspective?

It is unclear what the petition's reference to Article 18 Unitary Patent Regulation is aimed at. This provision regulates the entry into force of the Regulation and the connection to the Unified Patent Court. The aim is to ensure that Unitary Patents only apply in Member States where the Unified Patent Court has jurisdiction, as the purpose is to create a unitary right which is enforced by a supranational court. There has never been any EU court for the enforcement of civil rights; the enforcement of Community Trademarks and Community Design Rights is allocated to national courts. Why would that be all right, but the allocation of such enforcement to a supranational court wrong?

By the way, the petition suggestively says that the Unified Patent Court Agreement is "signed by some of the Member States", but actually it was signed by no less than 25 Member States, with the understanding that Croatia will join in due time.

The next point raised is that amending the scope of protection of Unitary Patents is now left up to the Contracting Member States of the Unified Patent Court Agreement. As mentioned above this would be a consequence of the refusal of a very small minority of EU Member States to effectively support the harmonisation of patent law. In addition, the provisions on the scope of protection in the UPCA are derived from similar provisions in the Community Patent Convention (versions of 1975 and 1989). That Convention never entered into force, but was basically voluntarily incorporated into national patent law across the EU. In theory, there might be a desire to amend this 40 year standing tradition, but in practice this is a rather theoretical problem.

More importantly, this allegation is clearly wrong. The EU can amend the scope of protection and the enforcement of Unitary Patents, both through Regulations and through Directives. On the basis of Articles 20 and 24(1)(a) UPCA these take priority over the provisions of the UPCA itself and in addition all UPCA Contracting Member States have an obligation to fully implement EU Directives, including through amending the UPCA. Already existing examples of EU law that overrule the UPCA are the Biotechnology Directive (98/44/EC), the Doha Regulation ((EC) 816/2006), the Medicinal Products Directives (2004/27/EC and 2004/28/EC), the Enforcement Directive (2004/48/EC) and the Anti-Piracy Regulation ((EU) 608/2013). Obviously, the compliance with these EU law instruments is overseen by the CJEU, which is confirmed by the UPCA, which is even reinforced by a joint liability of the UPCA Contracting Member States as provided by Article 22 UPCA.

The petition even adds the European Patent Convention to the problem, which is a pre-existing instrument. However, the petition again is wrong. For example, for the 28 EU Member States, the Biotechnology Directive takes priority over the European Patent Convention in putting limitations to patentable subject matter, as confirmed by Articles 20 and 24(1)(a) UPCA.

The petition then refers to the Advocate-General's opinion in the Spanish appeal cases, which claims that those EU Member States that signed the request for enhanced cooperation are under an obligation to sign and ratify the Unified Patent Court Agreement, but the petition fails to mention that in the view of the Advocate-General this is a consequence of EU law, more specifically Article 4(3) TEU, of course in combination with their own voluntary request for enhanced cooperation of these Member States.²

Indeed, if a Member State that signed the request for enhanced cooperation would be forced to sign and ratify the Unified Patent Court Agreement, its decision to join the Unitary Patent Package would not depend on a decision by the European Parliament or by the national parliament of the Member State concerned. In practice however, that may only apply to Poland (assuming that the other Member States will ratify as planned). Italy and Spain did not sign the request for enhanced

² Opinion of Advocate-General Bot of 18 November 2014, C-146/13, paragraph 94.

cooperation and Croatia was not yet an EU member State, so they are not affected. Besides, the decision to start a court action against Poland would be subject to democratic control.

The Rules of Procedure of the Unified Patent Court (a “significant, detailed collection of procedural rules”) are subject to indirect democratic control. The Rules of Procedure are adopted, after a prior opinion of the European Commission, by the Administrative Committee (Article 41(2) UPCA), which Committee is composed of one representative of each Contracting Member State, having one vote each (Article 12 UPCA). Amendment also requires consultation of the European Commission. Of course, the representatives will act on the basis of a mandate from their government, which mandate is subject to democratic control within that Member State. Therefore, the statement that the Rules of Procedure fall outside any form of parliamentary control is false. The suggestion in the petition that a law should be subject to judicial control is rather strange, as this is in direct conflict with the separation of powers. In as far as a procedural law would be in violation of fundamental right, the Unified Patent Court can of course set aside such a rule, but this is a rather theoretical situation given the quality of the current draft of the Rules of Procedure; fundamental rights have specifically been taken into account in the drafting.

The signatories state that “the questions raised over, and, we hope, the annulment of, Regulation 1257/2012 are a signal and urgent reminder to the EU’s lawmakers that it is incumbent on them alone to exercise the legislative powers invested in them and not to divest themselves thereof in favour of the Member States”. It is questionable whether there indeed is a principle of law that EU sovereignty takes priority over national sovereignty. However, stating that it is incumbent on EU lawmakers to exercise their legislative powers to achieve effective harmonisation of patent law and patent enforcement at EU level is something that I wholeheartedly support. Unfortunately, the CJEU has already established in 2013 that this objective is not achievable in the near future.

The petition has a noble cause, which however cannot be achieved in practice, at least not in the near future. The Unitary Patent and the Unified Patent Court currently are the next best solution, which is achievable in practice at short notice. In my view they provide a lawful and balanced solution which helps create a level playing field for the protection of innovation between Europe and other relevant regions, such as the US.

Of course, this is open for debate. It is a pity however that the authors of the petition do so by including arguments that are incorrect.