



Reports of Cases

Case C-146/13

Kingdom of Spain
v
European Parliament
and
Council of the European Union

(Action for annulment — Implementing enhanced cooperation — Creation of unitary patent protection — Regulation (EU) No 1257/2012 — First paragraph of Article 118 TFEU — Legal basis — Article 291 TFEU — Delegation of powers to bodies outside the European Union — Principles of autonomy and uniform application of EU law)

Summary — Judgment of the Court (Grand Chamber), 5 May 2015

1. *Approximation of laws — Industrial and commercial property — Patent right — European patent with unitary effect — Regulation No 1257/2012 establishing the conditions for implementing unitary effect — Purpose*

(European Parliament and Council Regulation No 1257/2012, Arts 1(2) and 2(b) and (c))

2. *Acts of the institutions — Choice of legal basis — Criteria — Regulation No 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection — Adoption on the basis of the first paragraph of Article 118 TFEU — Lawfulness*

(Arts 4 TFEU and 118, first para., TFEU; European Parliament and Council Regulation No 1257/2012)

3. *Action for annulment — Pleas in law — Misuse of powers — Meaning*

(Art. 263 TFEU)

4. *Acts of the institutions — Regulations — Implementation by Member States — Obligation to implement legally binding Union acts — Meaning — Setting by Regulation No 1257/2012 of the level of renewal fees for European patents so as to allow the European Patent Office to carry out the tasks which must be entrusted to it by the Member States participating in enhanced cooperation regarding unitary patents — Included — Infringement of Article 291 TFEU owing to the delegation of implementing powers to those Member States and not to the Commission or the Council — None*

(Art. 291(1) and (2) TFEU; European Parliament and Council Regulation No 1257/2012, Art. 9(1)(e) and (2))

5. *EU institutions — Exercise of powers — Delegation — Delegation to the European Patent Office or to the Member States participating in enhanced cooperation regarding unitary patents — None*

(European Parliament and Council Regulation No 1257/2012)

6. *Action for annulment — Jurisdiction of the Courts of the European Union — Review of the lawfulness of an international agreement or a measure adopted by a national authority — Not included*

(Art. 263 TFEU)

7. *Acts of the institutions — Regulations — Direct applicability — Implementing powers of the Member States — Lawfulness*

(Art. 288, second para., TFEU; European Parliament and Council Regulation No 1257/2012)

1. Regulation No 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection is in no way intended to delimit, even partially, the conditions for granting European patents — which are exclusively governed by the Convention on the Grant of European Patents and not by EU law — and does not incorporate the procedure for granting European patents laid down by that convention into EU law.

Instead, it necessarily follows from the characterisation of Regulation No 1257/2012 in Article 1(2) thereof as ‘a special agreement within the meaning of Article 142 of the Convention on the Grant of European Patents’ that that regulation merely (i) establishes the conditions under which a European patent previously granted by the European Patent Office pursuant to the provisions of that convention may, at the request of the patent proprietor, benefit from unitary effect and (ii) provides a definition of that unitary effect.

(see paras 30, 31)

2. The choice of the legal basis for a European Union measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure.

Regarding the aim of Regulation No 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, based on the first paragraph of Article 118 TFEU, the objective of that regulation is the creation of unitary patent protection and the provisions of that regulation give expression to the EU legislature’s desire to provide uniform protection in the territory of the participating Member States. It follows that the unitary patent protection established by that regulation is apt to prevent divergences in terms of patent protection in the participating Member States and, accordingly, provides uniform protection within the meaning of the first paragraph of Article 118 TFEU. Accordingly, that provision is an adequate legal basis for the adoption of Regulation No 1257/2012.

In that regard, the first paragraph of Article 118 TFEU enables the EU legislature to establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union. That provision, inserted into the FEU Treaty by the Treaty of Lisbon, specifically refers to the establishment and functioning of the internal market, which falls within an area where the European Union has shared competence under Article 4 TFEU. In addition, with regard to the expression ‘throughout the Union’ used in that provision, since the power

conferred by that article is exercised within the ambit of enhanced cooperation, the European intellectual property right so created and the uniform protection given by it must be in force, not in the Union in its entirety, but only in the territory of the participating Member States.

(see paras 39-41, 43, 44, 51, 52)

3. See the text of the decision.

(see para. 56)

4. The setting of the level of national renewal fees for European patents and the share of distribution of those fees, referred to in Article 9(2) of Regulation No 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, constitutes the implementation of a legally binding Union act for the purposes of Article 291(1) TFEU. The amount of those renewal fees must necessarily cover the expenses generated by the European Patent Office in carrying out the additional tasks given to it by the participating Member States pursuant to Article 143 of the Convention on the Grant of European Patents. Those tasks are intrinsically linked to the implementation of the unitary patent protection introduced by Regulation No 1257/2012.

Furthermore, it cannot be validly held that uniform conditions are needed for the purposes of implementing Article 9(2) of Regulation No 1257/2012, such that the delegation of implementing powers to the participating Member States would infringe Article 291(2) TFEU. Although Article 9(1)(e) of that regulation provides that the participating Member States are to give the European Patent Office the task of collecting and administering renewal fees for European patents, there is nothing in that regulation stating that the amount of those renewal fees should be uniform for all the participating Member States. Moreover, it necessarily follows from the characterisation of Regulation No 1257/2012 as a special agreement within the meaning of Article 142 of the Convention on the Grant of European Patents, and from the fact that the setting of the level of renewal fees and the share of distribution of those fees is the responsibility of a select committee of the Administrative Council of the European Patent Organisation, that it inevitably falls to the participating Member States, and not to the Commission or the Council, to adopt all the measures necessary for the purposes of implementing Article 9(2) of that regulation, given that the European Union — unlike its Member States — is not a party to that convention.

(see paras 73-75, 78, 81-83)

5. Given that the EU legislature did not delegate any implementing powers which are exclusively its own under EU law to the Member States participating in enhanced cooperation in the area of the creation of unitary patent protection or the European Patent Organisation, the principles laid down by the case-law of the Court on the subject of the delegation of a discretionary power cannot apply.

(see paras 84, 87)

6. See the text of the decision.

(see paras 101, 102)

7. The direct application of a regulation, provided for in the second paragraph of Article 288 TFEU, means that its entry into force and its application in favour of or against those subject to it are independent of any measure of reception into national law, unless the regulation in question leaves it to the Member States themselves to adopt the necessary legislative, regulatory, administrative and financial measures to ensure the application of the provisions of that regulation.

That is the situation for Regulation No 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, as the EU legislature has left it to the Member States, for the purposes of ensuring the application of the provisions of that regulation, to adopt several measures within the legal framework established by the Convention on the Grant of European Patents and to establish the Unified Patent Court, which — as is stated in recitals 24 and 25 of that regulation — is essential in order to ensure the proper functioning of European patents, consistency of case-law and hence legal certainty, and cost-effectiveness for patent proprietors.

(see paras 105, 106)