

Of TRIPs and traps: the interpretative jurisdiction of the CJEU over patent law

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ABSTRACT

Of all intellectual property rights the protection of patents is the least harmonised within the European Union. So, when an issue of substantive protection of patents has arisen in the past, the Court of Justice of the European Union (CJEU) paid deference to national law. This is why the decision of the CJEU in *Merck Genericos* (Case C-431/05 *Merck Genéricos Produtos Farmacêuticos* [2007] *ECR I-7001*) was no surprise; the CJEU clarified that the interpretation of the substantive patent provisions of the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) lie outside its jurisdiction and Member States can decide according to national law whether to grant direct effect and how to interpret the TRIPs provisions on patents.

That was all true before the entry into force of the Lisbon Treaty. Since then, the question of direct effect and the interpretation of the patent provisions of the TRIPs agreement has acquired a new dimension, as the EU has obtained *exclusive competence* to conclude trade agreements relating to the commercial aspects of intellectual property rights.

Whether EU exclusive competence requires the CJEU to interpret the patent provisions in TRIPs and, if so, in what way, is the subject matter of a recent reference to the CJEU for a preliminary ruling from the Athens Court of First Instance (Polimeles Protodikio Athinon). In *Daitchi Sankyo* (Case C-414/11 *Daiichi Sankyo and Sanofi-Aventis Deutschland*, pending) the national court asked the CJEU, if in cases where national patent law protected only the process of manufacture of the pharmaceutical at the time of the filing of a patent application, whether after the adoption of TRIPs, the patent also protects the pharmaceutical product as such.

Within this framework, the proposed paper aims to clarify whether the CJEU has acquired a legal basis for extending its interpretative jurisdiction in the realm of patent law. In that regard, it revisits the Court's jurisprudence on the direct effect and interpretation of the TRIPs agreement and in particular its patent provisions, it discusses the impact of EU exclusive competence on the CJEU's jurisdiction over TRIPs, and analyzes the implications of a CJEU interpretative jurisdiction over TRIPs on the development of EU patent rules.