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Unified patent litigation system incompatible with EU treaties – AG opinion

Brian Cordery (Bristows) · Tuesday, August 24th, 2010

The Court of Justice of the European Union ("CJEU") has been asked to consider whether the draft agreement for the proposed European Patent Litigation System is compatible with the European Union treaties. On 2 July 2010, Advocate General Kokott provided an opinion (which has only recently been made publicly available) advising the CJEU to find that, in its current draft, the proposed agreement is incompatible with the treaties.

Background

The original request for a ruling was made by the Council of the European Union on 6 July 2009, which asked the CJEU to answer the following question: *"Is the envisaged agreement creating a unified patent litigation system (currently named 'European and Community Patents Court') compatible with the provisions of the Treaty establishing the European Community?"*

The envisaged agreement was for a Community patent to be granted by the EPO under the provisions of the European Patent Convention ("EPC"), which would have unitary and autonomous character, producing equal effect throughout the EU, and whose dealings (e.g. assignment, validity, lapse) would apply to the whole of the territorial area.

Furthermore, a draft international agreement, to be concluded between the EU Member States, the EU, and the non-EU contracting states of the EPC, was also drawn up by the European Council. This would create a court having jurisdiction in respect of litigation relating to European and Community patents, and termed the European and EU Patents Court ("EEUPC"). The EEUPC would be composed of a court of first instance, comprising a central division and local and regional divisions, a court of appeal, and a registry. The EEUPC would also be given the authority to refer questions to the CJEU regarding the interpretation of the EU treaties or the validity and interpretation of acts of the institutions of the European Community.

The EEUPC agreement also provides for a specific system of languages which is based on the official language of the state in whose territory the local or regional division of the court of first stance was located, although each contracting state would be able to derogate from this and appoint one of the three languages of the EPO (i.e. English, French and German) as the language of procedure of its local or regional division. The working languages of the central division would also be limited the three current working languages of the EPO.

These conclusions were adopted on 4 December 2009 and the oral hearing before the CJEU was held on 18 May 2010.

The AG opinion

The opinion initially concluded that the reference was admissible, and that the CJEU had jurisdiction to issue an opinion in this case. Also, the establishment of an international body situated outside the institutional scope of the EU was not per se incompatible with the EU treaties. However, it was important that the EU did not delegate powers to an international body or transform into its legal system acts issued by an international body without ensuring that effective judicial control existed, exercised by an independent court that was required to observe EU law and that was authorised to refer a preliminary question to the CJEU for a ruling, where appropriate.

In the opinion of Advocate General Kokott, the draft agreement was not sufficient to ensure compatibility with the EU treaties. This was on the basis that:

• the guarantees contained in the draft agreement for ensuring full application and respect of the primacy of EU law by the European and EU Patents Court (EEUPC) are insufficient;
• the remedies available in case of breach of EU Law by the EEUPC and in case of failure to comply with its obligation of reference for a preliminary ruling are insufficient;
• the language regime before the central division of the EEUPC (being limited to the current working languages of the EPO) might violate the rights of a person to defend a claim in the official language of their home state; and
• the draft agreement, read in the light of all the measures contemplated in matters of patents, does not meet the need to ensure an effective court control and a correct and uniform application of EU law in the administrative litigation relating to the grant of Community Patents.

The CJEU is not obliged to follow the opinion of the Advocate General, and it is it not known when the CJEU will issue its judgment. However, if the Court were to follow the opinion, it would throw into serious doubt whether the proposed strategy for creating a unified patent litigation system, and the future intention to include a Community patent within this system, will be possible to achieve in the near future. The involvement of the CJEU in any patent litigation system, with the inevitable delay that preliminary references introduces into litigation, as well as the inability of the system to limit the number of working languages would both appear at present to be insurmountable hurdles to overcome for the proposed system in its current form. Whether the CJEU will follow the Advocate General's opinion is therefore eagerly awaited.

Original French Opinion 1/09
Informal English language translation of Opinion 1/09

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