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European Court of Justice Trashes Planned Unified Patent Litigation System

Thorsten Bausch (Hoffmann Eitle) · Tuesday, March 8th, 2011

The Court of Justice of the European Union (CJEU) has now issued its long awaited Opinion 1/09 on the draft agreement concerning the creation of a unified patent litigation system (UPLS). As is well known, this draft agreement drew on many provisions introduced for the first time by the European Patent Litigation Agreement (EPLA) and provided, inter alia, for the establishment of a European and Community Patents Court (PC).

It is probably fair to say that the key idea of both EPLA and UPLS was to establish a patent litigation system that (a) puts an end to present day nation-by-nation litigation, which is both costly and inherently likely to sometimes produce different results in different courts, (b) pulls together best practices from IP litigation in various member states, and (c) places a great emphasis on the need to have specialized patents courts dealing exclusively with patent matters, rather than general courts who usually neither have the technical background nor the experience it takes to decide on complicated questions of fact and of law that often times require a thorough technical understanding of the patented invention at stake and the state of the art.

It goes without saying that both the patent profession, the existing patent judiciary and industry would be quite unhappy to compromise with requirement (c). Legal certainty and acceptability of court decisions in the patent field requires some degree of predictability of a court's decision, which can only be safeguarded by specialized tribunals. Efficiency reasons support specialized tribunals as well. The last thing that the majority of users of the patent system wants is a litigation system where a completely inexperienced court in one EU member state may invalidate a patent with effect for the whole (or a substantial part) of the territory of the EU, and where the final decision is put in the hands of the likewise unspecialized CJEU.

Or, in other words, the patent world does not want the same court system that was established for community trademarks.

Be that as it may, the CJEU did not particularly like the idea of a specialized European and Community Patents Court which would replace the courts of the EU Member States in their function as patent courts and against the decisions of which no appeal to the CJEU was provided. It seems that in the CJEU's view this is a pretty fundamental matter. The CJEU held [66|: "As is evident from Article 19(1) TEU, the guardians of that legal order and the judicial system of the European Union are the Court of Justice and the courts and tribunals of the Member States." So it seems that any further or other guardians would undermine the legal order and the judicial system

of the EU, because that existing system is "complete" (CJEU at [70]). Hm. This writer's first thought when reading this was: "what a pity for Europe as a patent place". And the second one: Perhaps Europe should now think of a more substantial reform of its judicial system.

Why? Because the present situation seems to amount to a judicial deadlock. The patent world wants and needs specialized (European) patent courts and we have a specialized European Patent Office including Boards of Appeal that work successfully, despite not being a EU institution. But the CJEU quite clearly stated this [89]: "While it is true that the Court has no jurisdiction to rule on direct actions between individuals in the field of patents, since that jurisdiction is held by the courts of the Member States, nonetheless the Member States cannot confer the jurisdiction to resolve such disputes on a court created by an international agreement which would deprive those courts of their task, as 'ordinary' courts within the European Union legal order, to implement European Union law and, thereby, of the power provided for in Article 267 TFEU, or, as the case may be, the obligation, to refer questions for a preliminary ruling in the field concerned."

The CJEU might possibly accept a European Patent Court if it is not an international court (as one would need to deal with EP patents from non-EU member states) but a true court common to all (or a number of) Member States, situated, consequently, within the judicial system of the European Union, and if its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the European Union. However, such a court has not been proposed as of yet.

The final verdict [89] on the Patent Court as put before the CJEU could not have been clearer and goes far beyond the opinion of the Advocates General:

"Consequently, the envisaged agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law."

What next? The Commission, in a hasty press release, says that it "welcomes the delivery of the Court of Justice's opinion". Whether it only welcomes the delivery of the opinion as such, rather than the substance thereof remains to be seen. A (more) careful analysis has been promised. The Commission's primary goal seems to be to continue with its project of providing "unitary patent protection" through enhanced cooperation (i.e. not unitary, if this word is supposed to mean "throughout the EU") by all means and the Commission does not want to lose momentum. However, one wonders what a unitary patent is good for and whether it will be accepted by the users, if it can (presumably) be invalidated by any competent national court of any EU member state participating in the enhanced cooperation. Maybe the Commission and the Member States should take the necessary time to carefully think about the consequences of the CJEU's opinion in more depth. It is definitely not the case that the litigation aspect of a EU patent and the establishment of the "unitary patent protection" have nothing to do with each other.

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