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A Swiss perspective of the European Court of Justice's Opinion of 8 March 2011

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As we all know, with its opinion of 8 March 2011, the **European Court of Justice (ECJ)** opined that the envisaged Unified Patent Litigation System (UPLS) is not compatible with the law of the European Union. The main debate is about the influence of the ECJ in patent matters. The patent communities in the Member States of the European Union do not seem to be keen on extending the ECJ's jurisdiction in patent matters and it is likely that patent practitioners in EPC Member States that are not members of the EU are still less.

In its opinion, the ECJ points out that the founding treaties of the European Union have established a legal structure that prevails over the laws of the Member States and possesses its own institutions. The guardians of this legal structure, responsible for ensuring the full application of the European Union Law, are the ECJ in cooperation with the courts of the Member States. Once the law of the European Union is infringed by the national court of a Member State, the current judicial system provides for opportunity to bring a case before the ECJ.

The ECJ further states that contrary to the above arrangement, the proposed European and EU Patents Court (EEUPC) is outside the institutional and judicial framework of the European Union and is vested with exclusive jurisdiction over a significant number of actions brought by individuals in the field of patents. The EEUPC takes the place of national courts in that field and is obliged to interpret and apply, inter alia, European Union law. In doing so, however, the national courts would be deprived of their role as "ordinary" courts in the legal order of the European Union. In addition, the UPLS would deprive the ECJ of its powers to reply, by preliminary ruling, to the questions of the national courts. In case of a violation of the European law by the EEUPC, no infringement proceedings would apply and no financial liability of a Member State would arise. Therefore, according to the ECJ, the EU Member States cannot confer jurisdiction to a court created by an international agreement.

The opinion of the ECJ raises various questions as to whether it will ever be possible to establish a unified patent litigation system compatible with the law of the European Union that also satisfies the interests of patent holders, possible defenders, and practitioners.

Even though rejected by a great number of patent professionals, a possible solution could be to increase the influence of the ECJ in the proposed patent judicial system. However, this solution is not perfect as it will certainly delay proceedings and it will be highly questionable whether the countries which are not part of the EU would be willing to submit their cases to the ECJ-

jurisdiction. With respect to this, a possibility to reach a compromise remains open. For example, a litigation system that would allow consideration of the different approaches of the EU Member States as well as other states participating in the EPC. One of the more key questions in this regard is the following: Would it be possible to introduce a judicial framework for different appeal proceedings depending on whether the appeal concerns a ruling issued by a regional chamber of an EU Member State or a Non-EU Member State? It is doubtful whether the EU and its Member States would accept such a splitting.

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This entry was posted on Saturday, March 12th, 2011 at 3:14 pm and is filed under Procedure, Switzerland
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