STUMBLING BLOCK FOR THE PROPOSED EUROPEAN PATENTS COURT

For several decades, the European Union (“EU”) has tried to create a unitary EU patent, i.e. a uniform patent which would have equal effect across Europe and could be granted, transferred and enforced in a unitary way throughout the EU. Instead, we still have European Patents that are examined centrally by the European Patent Office, but once granted operate as independent national patents in up to 38 countries. In addition to the unitary EU patent, there are proposals to introduce a single judicial system for enforcing European Patents and future unitary EU patents (the “Patents Court”).

Progress on both the unitary EU patent and the Patents Court has been slow, and fraught with political and institutional obstacles. Some advances have been made in recent months, but are now jeopardized by the March 8, 2011 opinion of the Court of Justice of the EU. The objections raised by the Court of Justice have the potential for delaying, or possibly derailing, reform of the patent system in Europe.

Court of Justice Ruling

The Court of Justice was asked to rule on whether the draft agreement for a Patents Court is compatible with the relevant EU treaties. In today’s 21 page opinion, the Court of Justice unequivocally concluded that the draft agreement is not compatible with the EU Treaty or the Treaty on the Functioning of the EU.

The proposed Patents Court would be an international court outside of the EU’s institutional and judicial framework, with a distinct legal personality under international law. Such a court would have a duty to interpret and apply EU patent law and other aspects of EU law such as the charter on fundamental rights, laws in relation to other intellectual property rights, and competition law provisions. The Court of Justice acknowledged that the interpretation of EU law by an international court was not inevitably incompatible with EU law. However, it is not permitted for Member States to grant an exclusive jurisdiction to an international court which deprives national courts of the power to implement EU law or request preliminary rulings from the Court of Justice. Because the proposed Patents Court would have exclusive jurisdiction on patent issues, national courts would be deprived of any power, including of the power to request preliminary rulings from the Court of Justice, in this regard.

The Court of Justice’s other key objection arises from the principle that a Member State should be obliged to make good damage caused to individuals as a result of breaches of EU law. If a decision of the Patents Court were in contravention of EU law, there is no mechanism for seeking a financial remedy from a Member State, or bringing proceedings for infringement of EU law.
Implications for Patent Reform in Europe

The Court of Justice’s fundamental objections to the proposals for the Patents Court cannot be solved easily. The Commission has issued an optimistic press release, stating that it will work quickly to find an appropriate way forward in relation to the Patent litigation system. Realistically however, the whole structure of the Patents Court might have to be reassessed. Any new proposal would have to be submitted to the Court of Justice, at which point various other obstacles might be raised. This possibility has been highlighted by the Advocates General’s Opinion of July 2, 2010, which criticised a number of details of the draft agreement for the Patents Court regarding its rules on jurisdiction and the language of proceedings. The Court of Justice has not yet analysed these issues.

Ironically, the ruling comes at a time when the long-standing political deadlock on the language issue concerning the unitary EU patent is on the verge of being resolved. On March 10, the Competitiveness Council is expected to agree on a Council decision authorizing enhanced cooperation in the area of the creation of unitary EU patent protection. 25 out of 27 Member States and the European Parliament agree with the use of enhanced cooperation to overcome the Spanish and Italian objections regarding the language regime for the unitary patent. However, despite Commission statements to the contrary, many in industry feel that progress on the unitary patent will be futile unless an enforcement system can be put in place. In light of the Court of Justice’s Opinion, the prospect of putting in place all the complex pieces that are required to reform Europe’s patent system remains distant.

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