ECJ Advocate General Rejects EU Patent Litigation Scheme

Abstract

ECJ Advocate General has found that the EU centralized patent litigation system recently proposed by the Council of the European Union does not comply with EU law. In her opinion, amongst the various incompatibilities, she stressed that the proposed linguistic system would violate the rights of defence. This opinion constitutes a blow to the efforts to finally reach the long-awaited EU patent litigation scheme. The blow would be even stronger should the ECJ confirm the opinion in question.

Legal context and facts

ECJ Advocate General, Professor Juliane Kokott, has been clear. In her opinion - rendered on July 2nd 2010 and made available at the end of August – she stressed that the proposal for an EU patent litigation system envisaging a centralized court is incompatible with EU treaties. Indeed in June 2009 the Council of the European Union had requested the ECJ to verify the compatibility of the new patent litigation scheme with EU law. Advocate General's opinion is not binding and the issue will be considered again by the ECJ.

Efforts to build up a pan-European patent litigation system have been really intense in the last decade. The last effort was the adoption by the Council of the European Union of the Draft Agreement on the European and Community Patents Court (EEUPC): the very same draft which has been rejected by the Advocate General.

Analysis

The proposed agreement is meant to create a new title of intellectual property and cause the accession of the EU to the European Patent Convention (EPC), which has

been signed thus far by 38 European countries. This new title would form part of the bundle of rights granted by the European Patent Office (EPO).

The future pan-European patents court should enjoy exclusive jurisdiction over infringement and validity issues regarding all European patents (ie patents now granted by EPO) and EU patents (ie the proposed unitary title valid and effective in all the EU territory); yet patents granted by national offices would be outside its jurisdiction. Decisions from EEUPC would have effect in those territories where the litigated patent is in force.

The proposed draft should aim *inter alia* at (i) maintaining patent litigation costs as low as possible and (ii) providing European patent owners (and particularly SMEs) with better access to justice.

The first aim is very important. The proposed centralized scheme is meant to overcome the main flaw of the current system, i.e. that companies whose patents are infringed throughout Europe are forced to litigate in each single state: a flaw which has made European-wide patent enforcement cumbersome and multiplied costs.

Yet, according to the Draft Agreement in question, “centralization” would be coupled with “local presence”. Indeed the envisaged Court of First Instance - in addition to being equipped with a central division - should consist of both local and regional divisions: this would guarantee patent owners a facilitated access to justice.

Said that, the Advocate General has found that the guarantees contained in the Draft Agreement for ensuring application and respect for the primacy of EU law, and the remedies available in case of violation of EU law by EEUPC, are insufficient.

One convincing argument used by the Advocate General is related to language issues. She basically stressed that the proposed linguistic system is incompatible with the rights of defence, as it is possible that under certain circumstances a defendant is

brought before the central division of the Court of First Instance where cases are only heard in English, German and French (see paragraph 121 of the opinion quoting Articles 15-*bis* and 29(5) of the Draft Agreement as well as Articles 14 and 70 of the EPC). A defendant could therefore be obliged to defend a case by using a language (English, German or French) which is neither the language of its country of origin nor that of the state where it carries out its commercial activities (eg Spanish and Italian defendants). This is – to Advocate General's eyes - incompatible with the rights of defence, unless a rule is included allowing the central division of the Court of First Instance to derogate from the language rule or permitting the defendant to get translations of the procedural documents.

Practical significance

Advocate General's opinion constitutes a blow to the EU countless efforts to finally reach a centralized patent litigation scheme: a system which – it should be borne in mind - aims at reducing disputes' costs and thus meeting right owners' needs. The blow would be even stronger should the ECJ confirm *in toto* the opinion in question.

On the one hand, there is no doubt that the lack of a centralized system is detrimental to EU competitiveness: for example, it is also because of such lack that obtaining a patent in Europe costs roughly ten times more than in the US. This really constitutes an obstacle to the growth of European industry and discourages R&D activities.

On the other hand languages difficulties – which have always constituted an obstacle to a centralized EU patent system – cannot be underestimated. The Advocate General has rightly underlined that under certain circumstances the envisaged linguistic system is likely to affect the rights of defence. In particular, Spanish and Italian companies (as well as all other companies located in countries in which French, English and German is not a language ordinarily spoken) may face great difficulties in

defending patent-related cases: which also would affect industrial development in those countries.

A balance between the two above needs should be found. It is to be hoped that a good solution is finally reached, i.e. a solution which is capable of reconciling the need to reduce costs of patent-related disputes in Europe with the right of all companies and individuals to face litigations by using their own languages.