ECJ Declares Proposed European and Community Patents Court Unconstitutional

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On 8 March 2011, the European Court of Justice handed down its Opinion No 1/09, in which it found that the proposed agreement on the community patents court is not compatible with the provisions of the European Union Treaties. This seems to have dealt a fatal blow to the prospects of a single unified system in the near future.

Although the European Patent System was implemented 33 years ago, there is still no unified system for patent enforcement in Europe. This means that patents are currently litigated on a national basis, leading to forum shopping, multiple actions and increased costs.

Various proposals have been put forward over the years but have foundered primarily on two fundamental issues: language and the processes for litigation.

The latest attempt by the European Commission to resolve this situation involved the resurrection of the Community Patent (providing for a single unitary patent covering the whole European Union) coupled with a new Community Patents Court.

On 8 March 2011, however, the European Court of Justice (ECJ) handed down its Opinion No 1/09, in which it found that the proposed agreement on the Community Patents Court is not compatible with the provisions of the European Union Treaties. This seems to have dealt a fatal blow to the prospects of a single unified system in the near future.

The essentials of the ECJ's reasoning can be found in paragraph 89 of the Opinion, which reads as follows:

. . . 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 Justice 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.

Because the substance of the ECJ's objection to the proposed supranational patents court is the divestiture of power from the national courts and from the ECJ itself, it now appears that any supranational patents court system in the European Union cannot have exclusive jurisdiction to hear patent actions and therefore presumably would have to exist alongside the existing routes for litigating patents in Europe. Thus, rather than unifying and simplifying the patent litigation system in Europe, any supranational patents court system may merely provide yet another forum for potential litigants and add yet another layer of complexity to an already cumbersome system of potential conflicts, inconsistencies and forum shopping.

It is conceivable that, instead of creating a new patents court with exclusive jurisdiction, Member States could grant the right to hear patent cases to a specialised panel of the General Court, with a right of appeal to the ECJ. However, that would mean giving the ECJ ultimate control over patent law in the European Union. Given the efforts of the ECJ so far in the area of trade marks, this is not an option favoured by industry.

The ECJ's opinion does not appear to have had any adverse impact on the Member States' interest in creating a unitary patent valid in the territory of all the participating countries. The European Council of Competitiveness Ministers on 10 March 2011 authorised the launch of "Enhanced Co-operation" among EU Member States for the creation of a unitary patent title. This means that the 25 Member States in support of a unitary patent title will move forward with the objective of agreeing unanimously among themselves on a unitary patent that would be valid across the territory of the 25 participating Member States. Italy and Spain are staying outside the process for the time being because they object to the fact that the unitary patent system would operate in English, French and German to the exclusion of Spanish and Italian.

In the absence of an agreed unitary system for litigating such patents, it is difficult to see how such a proposal can be implemented from a practical point of view.