

The European patent court system of the future

Overview of the statement of position of the CJEU's Advocates General

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CJEU AGs statement of position

Context of AGs' statement of position

- Request for an opinion by the Council
- Hearing on 17 May 2010
- Official document not available
(advice to be given in closed session)
- **Unofficial** document on line
www.eplawpatentblog.com
http://www.eplawpatentblog.com/2010/August/2010-07-02_Opinion_AG_FR%5B1%5D.pdf
- Court's opinion expected late 2010

Four problems

- *"The guarantees contained in the draft agreement with a view to ensuring the full application and observance of the **pre-eminence of Union law** by the PC are insufficient (§ 78 to 93)*
- ***The remedies available in the event of the PC's infringement of Union law** and in the event of non-observance of its obligation to effect a preliminary reference pursuant to article 48 paragraph 1 of the draft agreement are insufficient (§ 104 to 115)*
- *The **linguistic system faced by the central division** of the PC may affect the rights of defence (§ 121 and 122)*
- *The draft agreement, read in the light of all the measures contemplated concerning patents, does not satisfy the requirement of ensuring effective judicial control and a correct and uniform application of Union law in **administrative proceedings concerning the granting of Community patents** (§ 68 to 75)"*

(§ 78 to 93)

Pre-eminence of Union law

- **Article 14 bis, paragraph 1 b) of the draft agreement:**
"(1) When hearing a case brought before it under this Agreement, the Court shall respect Community law and base its decisions on:
 - ▶ *(a) this Agreement;*
 - ▶ *(b) directly applicable Community law, in particular Council Regulation (EC) No ... on the Community patent, and national law of the Contracting States implementing Community law;"*
- **Advocates General opinion:**
"82. In its current wording, article 14 bis, paragraph 1 b) of the draft agreement therefore risks creating the impression that the future Patent Court will not be required to take into account, in its judgments, either the treaties or the fundamental rights and general principles of Union law, or even the relevant directives on the matter."

(§ 78 to 93)

Pre-eminence of Union law

- **State of the art**

article 14 *bis*, paragraph 1 b) of the draft agreement

- **Problem**

"the future Patent Court will not be required to take into account, in its judgments, either the treaties or the fundamental rights and general principles of Union law"

- **Solution**

*"92. In view of the importance that Union law, particularly primary law, may have in disputes between individuals concerning patents, the Advocates General consider that **its ranking must be established without ambiguity in the draft agreement.***

The determination of this ranking should not be left to the free assessment of the future Patent Court."

(§ 104 to 115)

Pre-eminence of CJEU

- **Article 14 *bis*, paragraph 1 b) of the draft agreement:**

(1) When a question of interpretation of the Treaty establishing the European Community or the validity and interpretation of acts of the institutions of the European Community is raised before the Court of First Instance, it may, if it considers this necessary to enable it to give a decision, request the Court of Justice of the European Communities to decide on the question. Where such question is raised before the Court of Appeal, it shall request the Court of Justice of the European Communities to decide on the question."

- **Advocates General opinion:**

"104. Certain Member States participating in the opinion consider, however, that the draft agreement does not provide sufficient remedies for the case where the Patent Court infringes its obligation of referring to the Court of Justice preliminarily or, more generally, its obligation to observe Union law. The Parliament has also raised doubts in this connection.

105. The Advocates-General share this point of view."

(§ 104 to 115)

Pre-eminence of CJEU

■ State of the art

Article 14 *bis*, paragraph 1 b) of the draft agreement

■ Problem

"the draft agreement does not provide sufficient remedies for the case where the PC infringes its obligation of referring to the Court of Justice preliminarily or, more generally, its obligation to observe Union law."

■ Solution

"113. As pointed out by France in particular, a choice of different options would be available in order to guarantee the correct and uniform application of Union law in disputes falling under the competence of the future PC. Consequently, one could consider submitting judgments of the PC Court of Appeal to the control of the European Court of Justice, pursuant to article 262 TFEU. This control could be exercised in different ways: by an appeal on points of law (open to parties to the dispute before the PC Court of Appeal), by an appeal in the interests of the law (open to the Commission and/or to the Member States and/or to the EPO, along the lines of the former article 68, paragraph 3, EC) or even by a re-examination mechanism (along the lines of the provisions of article 256, paragraphs 2 and 3, TFEU)."

(§ 104 to 115)

Pre-eminence of CJEU

3 solutions

1. an appeal on points of law

(open to parties to the dispute before the PC Court of Appeal)

2. an appeal in the interests of the law

(open to the Commission and/or to the Member States and/or to the EPO, along the lines of the former article 68, paragraph 3, EC)

3. *« The Council, the Commission or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this title or of acts of the institutions of the Community based on this title. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become res judicata. »*

(§ 104 to 115)

Pre-eminence of CJEU

3. a re-examination mechanism

(along the lines of the provisions of article 256, paragraphs 2 and 3, TFEU).

"2. The General Court shall have jurisdiction to hear and determine actions or proceedings brought against decisions of the specialised courts.

*Decisions given by the General Court under this paragraph may exceptionally be subject to **review by the Court of Justice**, under the conditions and within the limits laid down by the Statute, **where there is a serious risk of the unity or consistency of Union law being affected.***

*3. The General Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute. Where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the Court of Justice for a ruling. Decisions given by the General Court on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, **where there is a serious risk of the unity or consistency of Union law being affected.**"*

(§ 121 to 122)

Linguistic system of the central division

- **Article 29 of the draft agreement:**

(5) The language of proceedings at the central division is the language in which the patent concerned was granted."

- **Advocates General opinion:**

" 121. The situation is clearly more delicate, however, when the country where a company must be summoned does not participate in any local or regional division of the PC Court of First Instance. In such a case, the dispute would be brought before the central division of the PC Court of First Instance, and the language of the proceedings would be that of the patent, namely German, English or French. Consequently, a company may be summoned in law in a language in whose choice neither its country of origin nor the country where it carries out its commercial activities has participated. In the absence of any provision in the draft agreement allowing the central division to depart from the rule of the language of the patent or allowing the defendant to obtain translations of procedural documents, this linguistic system appears to be unacceptable with regard to observance of the rights of defence."

(§ 121 to 122)

Linguistic system of the central division

- **State of the art**

(5) The language of proceedings at the central division is the language in which the patent concerned was granted."

- **Problem**

In the absence of any provision in the draft agreement allowing the central division to depart from the rule of the language of the patent or allowing the defendant to obtain translations of procedural documents , this linguistic system appears to be unacceptable

- **Solution**

Include a provision in the draft agreement allowing the central division to depart from the rule of the language of the patent or allowing the defendant to obtain translations of procedural documents

(§ 68 to 75)

Granting of Community patents

- **The draft agreement:**

Absence of any provision or any study regarding changes to be brought to administrative proceedings against decisions of the EPO as regards the future Community patents

- **Advocates General opinion:**

*"71. In fact, the decisions of the EPO concerning patents can only currently be reviewed by the internal chambers of appeal created within the EPO, excluding any judicial appeal before an external court. There is no possibility of the European Court of Justice ensuring the correct and uniform application of Union law to proceedings taking place before the chambers of appeal of the EPO. On this important point, the legal situation concerning Community patents is therefore fundamentally different from that concerning Community trade marks.
72. The European Union should not either delegate powers to an international body or transform into its legal system acts issued by an international body without ensuring that effective judicial control exists, exercised by an independent court that is required to observe Union law and is authorized to refer a preliminary question to the Court of Justice for a ruling, where appropriate."*

(§ 68 to 75)

Granting of Community patents

■ **State of the art**

Absence of any provision or any study regarding changes to be brought to administrative proceedings against decisions of the EPO as regards the future Community patents

■ **Problem**

Lack of effective judicial control, exercised by an independent court that is required to observe Union law, on the decisions of the EPO concerning patents

■ **Solution**

"73. These requirements can certainly be satisfied in different ways. A possible extension of the competences of the future PC to include administrative proceedings against decisions of the EPO is just one of the options that may be contemplated. Another option that may be contemplated is the creation of an administrative patent court which should be authorized, unequivocally, to refer to the European Court of Justice for a ruling on a preliminary question. Under the principle of institutional balance, it is not up to the Court to indicate which of these different options should be given preference, within the scope of this opinion."

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Thank you