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NOTE

from: General Secretariat
to: Friends of the Presidency Group (Patents)
Subject: Creating a unified patent litigation system
- Note from the Luxembourg delegation

Delegations will find annexed a note from the Luxembourg delegation regarding the discussions on the above in the Friends of the Presidency Group (Patents).

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Creating a unified patent litigation system

Note from the Luxembourg delegation

Luxembourg supports the idea of a single European patent and thus favours the creation of an effective, unified litigation system to avoid a proliferation of different patent cases in different courts.

In its opinion 1/09 of 8 March 2011, the Court of Justice of the European Union (hereinafter "CJEU") cites a number of fundamental difficulties which lead it to conclude that the draft international agreement submitted with a view to achieving the objective of a unified litigation system is not compatible with the provisions of the TEU and the TFEU.

Both the Commission (in an initial non-paper, Annex II to 10630/11 PI 54) and the Hungarian Presidency (new draft international agreement, 11533/11 PI 68) seek to address the CJEU's concerns.

However, the suggestions for making the draft international agreement compatible with primary EU law raise a whole series of questions, which are set out in this note.

Any solution to the problem of how to create a unified patent litigation system has to hold water in institutional terms and, of course, be fully in line with the CJEU's opinion.

Questions

(1)

Pursuant to Article 19(1) of the TEU, Member States' courts and the CJEU are the guardians of the European Union's legal order and judicial system.

Article 267 of the TFEU provides for direct cooperation between the CJEU and national courts to ensure full application and uniform interpretation of Union law in all the Member States.

The national courts thus have the task of implementing Union law as "ordinary" courts within the EU legal order, with the power, or, as the case may be, the obligation, to refer questions to the CJEU for preliminary ruling.

In the CJEU's opinion 1/09, it criticises any judicial arrangement that would deprive Member States' national courts of this task by replacing them with an international court with no real link with Member States' judicial systems.

How is this fundamental concern, which the CJEU reiterates in the "Miles" judgment of 14 June 2011 (case C-196/09), to be addressed ?

(2)

In the Commission's non-paper (Annex II to 10630/11 PI 54) and under the new draft international agreement (11533/11 PI 68), it is proposed that an international patent court be set up by an agreement concluded between the Member States themselves. The European Union would not be party to it.

However, this international agreement would require the EU *acquis* to be adjusted (in particular, the "Brussels I" Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) and is likely to affect it.

In keeping with the "AETR" case law and Article 3(2) of the TFEU, the EU has exclusive competence to conclude an international agreement insofar as its conclusion may affect common rules or alter their scope.

Would exclusive competence to conclude this agreement not lie with the EU?

(3)

The new international court would apply and interpret not only future regulations implementing enhanced cooperation on the single patent, which would form part of the EU *acquis* for the participating states, but also the TFEU rules on the internal market and the Charter of Fundamental Rights.

Under these circumstances, even if there were no exclusive EU competence, is it legally possible for EU Member States to set up an international court between themselves, to apply EU law (primary law, Charter of Fundamental Rights, secondary legislation) without the EU being involved in the conclusion of the agreement setting it up?

(4)

Safeguards are needed to ensure that the international patent court abides by Union law. It is accordingly proposed to stipulate that infringement proceedings may be brought against all the contracting Member States jointly if the international patent court infringes Union law.

Article 258 of the TFEU allows the Commission to bring proceedings against a Member State if it considers that that Member State has failed to fulfil an obligation under the Treaties.

Is Article 258 of the TFEU a sufficiently solid legal basis to authorise the Commission to bring proceedings against the contracting Member States for collective failure to fulfil an obligation, resulting in some cases in joint liability, if EU law is infringed by the international court?

(5)

Would a system of this type, of joint liability by contracting Member States, not imply that each of the Member States would have to waive its option under Article 259 of the TFEU, whereby any Member State may refer a matter to the CJEU if it considers that another Member State has failed to fulfil an obligation under the Treaties? Would systematically depriving the Member States of an option laid down by the Treaties be valid?

(6)

Subject to certain conditions, CJEU case law has developed the principle that a Member State may be held liable for damage incurred by individuals as a result of infringements of EU law which are attributable to it, especially where the infringement derives from a ruling by the Member State's court of last resort.

If EU law is infringed by the international patent court, it is suggested that the Member States participating in the court should be held jointly and severally liable.

This raises two questions:

As there are no detailed EU rules on State liability for damage caused to individuals by infringements of EU law, the State concerned would have to make reparation for the damage suffered under national liability law. If the contracting Member States are jointly and severally liable, under what legal framework will the details of rights to reparation be determined?

Joint and several liability by the Member States implies tangible financial reparation. How far will the cost of this reparation be shared between the Member States participating in the international court ? The reference to "proportional compensation" in Article 14c(3) of the new draft international agreement does not really solve the problem.

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