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NEW VISION OF THE EU PATENT PROTECTION: PATENTS WILL BE CHEAP, BUT NOT AVAILABLE IN NATIONAL LANGUAGES

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1. INTRODUCTORY REMARKS

The traditional European patent system based on the European Patent Convention (Munich 1978) making possible to obtain protection through the unique European patent in chosen European coutries, is now facing difficulties. The reason is the compulsory validation of granted European patents in all chosen countries, including the translation into the official language of each country. The costs of those translations are so enormous, that the patent protection in Europe becomes too expensive and implicates an obstacle to the technological development in the EU. This is the main reason why the EU tries to establish a specific EU protection on the basis of a unique EU patent, which would be cheap and effective. The new EU patent system is supposed to operate within the current European Patent Convention as its special segment.

The way to achieve this goal is to reduce considerably translation costs eliminating the compulsory translation of granted patents into languages of all EU Member States. This may become a problem, since the patent description, constituting the main part of the patent document, specifies the extent of the patent protection. If not available in the language of the EU Member State of protection, it would be difficult to require any person (enterprise) in such state to refrain from using the patented invention or the patented method.1

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1 Let us remind new EU competencies brought by the Lisbon Treaty. New Art. 118 of the Treaty on the Functioning of the EU stipulates:

In the context of the establishment and functioning of the internal market, the European Parliament

and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures

for the creation of European intellectual property rights to provide uniform protection of intellectual

property rights throughout the Union and for the setting up of centralised Union-wide authorisation,

coordination and supervision arrangements.

The Council, acting in accordance with a special legislative procedure, shall by means of regulations

All legal duties and obligations of individuals imposed by the law must be available in the national language. This is obvious for legal rules. Let us examine now translation requirements for EU law as such and for international treaties.

2. EU LAW

Regulation 1/58 imposes compulsory official publication of all EEC (now EU) legal regulations in official language versions of all Member States. However, it does not determine legal consequences of the absence of a particular language version. We can find the solution in the ECJ judgment Skoma-Lux (C-161/06). A regulation not yet published in the official language of a particular Member State is nonetheless valid and effective for that State, but cannot be applied against an individual of that State. This judgment proceeds from former ECJ case law.

In the judgment in Case C-98/78 Racke the Court stated, that an act adopted by a Community institution, such as the regulation at issue in the main proceedings, cannot be enforced against natural and legal persons in a Member State before they have the opportunity to make themselves acquainted with it by its proper publication in the Official Journal of the European Union.

The Court has held that the principle of legal certainty requires that Community legislation must allow those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them, which may be guaranteed only by the proper publication of that legislation in the official language of those to whom it applies (see also, to that effect, Case C-370/96 Covita , Case C-228/99 Silos and Case C-108/01 Consorzio del Prosciutto di Parma and Salumificio S. Rita.2

The principles of legal certainty and equality of citizens are safeguarded, inter alia, by the formal requirement of proper publication of legislation in the official language of the person to whom it applies (see Case C-209/96 United Kingdom v Commission and Case C-108/01 Consorzio del Prosciutto di Parma and Salumificio S. Rita).3

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establish language arrangements for the European intellectual property rights. The Council shall act

unanimously after consulting the European Parliament.

2 Paragraphs 37 and 38 of the judgment Skoma-Lux C-161/06.

3 Acknowledgment of the referring court shared by the author. Paragraph 21 of the same judgment.

Conclusions of the Court: The principle of legal certainty requires that Community legislation must allow those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them, which may be guaranteed only by the proper publication of that legislation in the official language of those to whom it applies. Observing fundamental principles of that kind is not contrary to the principle of effectiveness of Community law since the latter principle cannot apply to rules which are not yet enforceable against individuals.4

The message of the ECJ case law seems to be clear: An individual cannot be affected for the breach of its legal duty which has not been laid down in a manner making it available to him, it means in his language.

3. INTERNATIONAL TREATIES

A similar solution has been adopted in most countries for international treaties: Provisions of an international treaty can be applicable to an individual only after the official publication of the translated text. Art. 10 of the Czech Constitution provides: Promulgated international treaties binding on the Czech Republic and approved by the Parliament, become constituting parts of the Czech legal order (i.e. are binding on individuals).

What means "promulgated"? The sense of that term is determined by the Act on the Collection of Laws and International Treaties (Official Journal). Promulgation means the official publication of the treaty in one of the original languages (authentic text) and also in the Czech language as its official translation. It seems necessary to remind that authentic text of a treaty is only the language version in which the treaty has been signed. Czech translation is official, but not authentic. Individuals may rely on the Czech text, but in the case of a discrepancy between the authentic text and the official Czech translation the authentic text prevails. Anyway for Czech individuals it is guaranteed that the official Czech translation provided by the State is always available.

We now can conclude that the availability of the official text in the national language is guaranteed for EU law and international treaties.

4. EU PATENT

EU patent is not an EU regulation nor an international treaty. It is an administrative act, i.e. a public law act, granting the patent to an individual, but having general effect (erga omnes). This document provides a public law protection to the owner of the patent. Consequently, it is prohibited to any unauthorized person to use the

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4 Paragraph 1 of the Summary of the Judgment Skoma-Lux 161/06.

patented invention for the production of protected products. The "patented invention" means the technical solution described in the patent.

Legal implications of the granted patent are the following ones: It is prohibited, without the consent of the patent owner, to use the patented invention as it is described in the patent specification. This is a legal obligation to refrain from a certain conduct. This prohibited conduct must be described and the description must available in the way understandable to the addressee. This is the reason for which so far European (EPO) patents must be translated into languages of States where the protection is claimed. This is the core of the problem: those multiple translations guarantee the legal security, but are too expensive.

The solution envisaged by the EU5 is based on Art. 14 para. 6 of the European Patent Convention: The whole description of the patented invention will be available in the language of filing (English, French or German) and the claims6 will be translated into two other official EPO languages. No further translations will be required.7

For the transitional period, which is intended to take 12 years, following rules have been proposed:

During a transitional period , a request for unitary effect shall be submitted together with the following:

(a) where the language of the proceedings (the application) is French or German, a full translation

of the specification of the European patent into English; or

(b) where the language of the proceedings is English, a full translation of the

specification of the European patent into any official language of the

participating Member States that is an official language of the Union (i.e. the language of the applicant).

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5 Proposal for a Council Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, doc. COM(2011) 216 final, 2011/0094 (CNS), 13.4.2011

6 Claims are the decisive part of the patent description, that relatively briefly defines the substance of the invention, i.e. what is really new and consequently protected.

7 Art. 3 of the draft regulation mentioned in note 5.

This will ensure that the whole patent specification will always be available in English.8

It means that an EU patent protected in the Czech Republic will not be available in the Czech language. Is that acceptable? A granted patent imposes to all other potential users a negative obligation to respect the patent, i.e. to refrain from using the patented invention for the production of their own products. They are legally forced to refrain from a behaviour not specified in their own language. There are two basic consequences of this strange situation:

1. The users (producers) will be obliged to translate themselves the description of a granted patent into their language. There is no guarantee that their translation will be correct.

2. In the case of a dispute, the owner of the patent will have to provide the translation of the patent into the language of the defendant, otherwise he would not be able to claim his patent rights. It is logical, but a bit late. If the defendant had the access to the text of the patent in its language before, probably he would respect it.

In both cases the translation into the other language would be made on the private law basis.

The envisaged solution to impose solely the English, French or German versions to users of all EU countries is very problematic. A compromise solution could be to translate into official languages of all countries of protection not the whole specification of the patented invention, but only the patent claims of each granted patent effective in the EU. Patent claims contain the description of the protected solution and are relatively brief. The costs of the translation of claims into all EU languages would not cause catastrophic costs for applicants and in the same time would ensure a sufficient degree of legal certainty. Unfortunately, this solution has been rejected by the EU Council and some Member States.

The comments made by some Czech lawyers and other experts are very sceptical. Some say, that the general knowledge of the English, French or German languages is not sufficient for the understanding of a highly technical text using a very special terminology. The violator of patent rights could act in good faith without any knowledge about the exact extent of rights that he is in fact violating. Any person must have the access to the contents of the patent specification that he is supposed to respect.9 The access to the text available only in a foreign language is therefore not sufficient.

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8 Ibid., Art. 6

9 Sources of mentioned remarks: http://euractiv.cz/podnikani-a-zamestnanost/clanek/schudny-kompromis-nad-evropskymi-patenty-je-mozna-na-svete-008093 and http://euractiv.cz/podnikani-a-

Apparently, this is a conflict between economic interests of applicants and the legal certainty of others. The draft regulation is aware of this problem, but the envisaged solution is far to be satisfactory. In the case of a dispute relating to a European patent with unitary effect, the patent

proprietor should provide at the request and the choice of an alleged infringer, a full

translation of the patent into an official language of the participating Member State in

which either the alleged infringement took place or in which the alleged infringer is

domiciled.10 It means that the "violator" will learn about the extent of rights that he has inadvertently violated only after having been sued by the patent owner. This is unacceptable.

The solution proposed by the EU does not take into account that the efforts to make the patent protection in the EU cheaper must not affect the legal certainty of enterprises. The comparison of costs of the patent protection in the EU and the USA does not make sense.11 The USA are one country with one language, while the EU is a community of 27 countries with 23 different languages. Consequently, the EU unitary patent can never be as cheap as the US patent, since languages of different member countries must be respected, otherwise the patent protection based exclusively on three leading languages is very doubtful and would lead to conflicts emerging from lack of understanding the extent of protected rights.

As a final appropriate compromise solution, we repeat again, is that the translation of the whole patent specification into languages of all countries of protection is dispensable, but the patent claims must be available in all languages.

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zamestnanost/clanek/prekladat-ci-neprekladat-patenty-tot-otazka-006362, cited November 15, 2011

10 Art. 4 of the draft regulation mentioned in note 5.

11 It has been calculated that the patent effective in the whole EU is now five times more expensive that the patent protecting the invention in the USA.