

Intellect Position Paper On the Draft Agreement on the European Patent Judiciary 11 July 2008

Introduction

Intellect is the UK trade association for the IT, telecoms and electronics industries. Its members account for over 80% of these markets and include blue-chip multinationals as well as early stage technology companies. These industries together generate around 10% of UK GDP and 15% of UK trade. Intellect provides a singular voice for these industries across all market sectors, and is a vital source of knowledge and expertise on all aspects of the technology industry.

Intellect has already articulated its broad position both on the Community Patent and on the European Patent Jurisdiction in our response to the 2007 Commission Consultation “Enhancing the Patent System in Europe” – see Annex.

Since then, Intellect has been impressed by the energy with which the Presidency and Commission have sought to make progress particularly on the European Patent Jurisdiction dossier. However, we have some serious concerns about the fundamental aspects of the system now being proposed.

It is Intellect’s view that any new European litigation system must bring **real improvements for users** compared with the system we have today, and not just offer a politically expedient solution. Intellect is concerned that, in several key respects **what has been proposed so far does not seem to meet this objective**.

Any patent litigation regime has ramifications far beyond actual litigation. It impacts the risk of doing business in Europe for all innovative companies. Even the most minor nuance of a litigation system can significantly affect the behaviour of the industry. Designing a brand new patent litigation system from scratch has the potential to dramatically change the competitive landscape around innovation.

In order for Europe to maintain a **pro-competitive** climate **conducive to innovation**, it is imperative that any new European patent litigation system delivers the **highest quality, cost-effectiveness, efficiency, legal certainty and reliability**. In particular, these are imperative to strike a **fair balance between the parties in litigation, namely the patent owner and those accused (rightly or wrongly) of infringement**.

In fact, the current patent litigation system in Europe is functioning reasonably well and thus **Intellect does not see the creation of an EU-wide patent litigation system as an end in itself**. There is no need to make progress at any price, and we would certainly not want to see any kind of compromise solution which would be less favorable for litigants or introduce more business risk or legal uncertainty than the current system. In other words, we would prefer “no change”, i.e. maintain the current nationally-based litigation system, to a bad pan-European regime.

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Background and ICT context

The ICT sector is highly innovative and invests heavily in research and development in Europe. As a sector, ICT is one of the most significant and prolific users of the European patent system generating substantial numbers of patents.

The ICT sector is characterised by complex technology products that typically include many hundreds, if not thousands of patented inventions. Additionally there is a high degree of standardisation and interoperability, implying the use of technologies that may have been developed by others.

Consequently, the ICT sector is notoriously vulnerable to actual, and threatened, patent infringement actions. Therefore, Intellect is especially concerned to achieve a patent enforcement regime which reflects a fair balance between implementers of technology and patent owners in order to maintain a pro-competitive climate conducive to innovation in Europe.

Structure of this Paper

In the first part of this paper we focus first on the three principles of the proposal which are generally seen as the most controversial, namely (1) the so-called “split jurisdiction”, (2) the composition of panels at first instance, and (3) the language of proceedings.

In the second part we address additional aspects which are of concern to the ICT sector, namely (1) opt-out from exclusive jurisdiction, (2) scope of jurisdiction, and (3) avoiding unreasonable injunctions in Europe.

PART I – GENERIC ISSUES

1. Split Jurisdiction (Bifurcation)

The proposal introduces the concept of “splitting” infringement and validity between the local/regional and central divisions respectively (“bifurcation”).

Intellect is opposed to a split jurisdiction because it introduces a non-level playing field for the parties. It is important that patent claims are interpreted in the same way for infringement and validity, at the same time, and by the same court. Staying infringement proceedings is expensive and time wasting and could exacerbate the language problem where two courts use two different languages. A split system also could provide opportunities for one or other of the parties to gain unfair tactical advantages over the other party for example through delays and “forum shopping” or even seeking to interpret the claims differently at different times. .

Furthermore several of the more detailed provisions for determining the process to be followed in the case of counterclaim in various circumstances need further consideration. For example, there should not be any asymmetry as between an infringement counterclaim and a validity counterclaim. Specifically the plaintiff should be able to determine whether the whole case is heard by the central division. Also, there is no reason why a declaration for non-infringement pending before the central division has to be terminated once an infringement action is started in a local or regional division. If the split jurisdiction remains (but Intellect hope it will not) all these kind of provisions will need to be adjusted to ensure a fair balance for all parties in order not to chill competition.

2. Composition of Panels

(a) Competence and Experience

It is important that all the judges on every panel in all divisions are competent and have substantial knowledge and experience of patent law, with exposure to international patent matters. This is crucial because, unlike the situation today, the judges will have the power to grant pan-European injunctions (i.e. covering all EU and EPC States), similarly to render a patent valid throughout Europe.

Furthermore a limited – preferably single - language regime (see section 3 below) would help in the appointment of competent judges because it would not impose a further, and in our view unnecessary, burden on the qualification of judges. The more official languages there are, the more of a challenge it will be for all the judges, both at first and second instance, to have the linguistic skills to be capable of properly comprehending the case and delivering sound judgements. It will be challenging enough to find bi-lingual judges, let alone multi-lingual judges.

(b) Nationality

All divisions should be independent of, and uninfluenced by, national practices, attitudes and traditions prevailing in the national system(s) of the state(s) concerned. In order to achieve this objective, panels of judges must be truly mixed nationality.

(c) Technical judges

We believe that technically competent judges are an essential component of any European court system for ensuring the delivery of robust judgments, especially in complex technology areas like ICT. However, we believe that a distinction needs to be recognised between a technical specialist (which a judge could never be) and a technically competent judge.

The national and regional divisions need to have the same level of technical expertise as the central division.

Importantly, technically competent judges are needed no less for deciding infringement as for determining validity. Furthermore, with technical judges on all panels, there seems to be no justification whatsoever for splitting jurisdiction for infringement and validity between different divisions as all panels and divisions would have the same technical competence.

3. Languages

The proposal does nothing to simplify the language regime. On the contrary, it introduces an even **more complex and costly language regime** than we have today. Litigation would still be conducted in many languages (even including non-EU languages in the case of litigation started in a non-EU EPC Contracting State). Unlike the current situation, however, the parties would not know beforehand which language will ultimately be used. Under the proposal, the language of proceedings may not be decided until after a case has been started. Worse still, the “split jurisdiction” between local/regional and central divisions means that different parts of the same case could be conducted in two different divisions and in two different languages.

Intellect is in favour of a limited/single language regime. If one language is not politically achievable, the proceedings should be in the language of the patent, i.e. one of the EPO official languages. A compromise “exception” might be where the parties are both of the same nationality and agree to use their common language.

PART II – ADDITIONAL ASPECTS OF CONCERN TO THE ICT SECTOR

1. Opt-out from the exclusive Jurisdiction (for European patents)

Conferring exclusive jurisdiction on the new European Patent Court after a relatively short transitional period (even 7 years is short in patent litigation terms), and before it has established a proven track record, would create substantial new risks and legal uncertainty for doing business in Europe. The European ICT industry has much at stake and will have to live with the consequences of the new system for years and decades to come.

The option should remain open for owners of European patents (as opposed to Community patents) to litigate nationally at least until the European court has a proven track record and that all Member/Contracting States are in agreement about that. Of course, the option for litigants to use national courts would not be applicable for Community patents since they are not national rights.

2. Scope of Jurisdiction

Questions of patent infringement - especially in the ICT sector - are often tied up with other non-patent matters, such as for example, questions of competition law, or contract law (e.g. interpreting a patent license agreement), and frequently quantum of damages. Intellect would like to see the new European Patent Court having a wider scope of jurisdiction to deal with all ancillary issues, rather than leaving such jurisdiction with the national courts. Otherwise, the new system could become considerably more complex, cumbersome and costly to use and co-ordinate than patent litigation is today, as many cases would have parallel or bifurcated proceedings in the new European Court and in one or more national courts, leading to possible inconsistencies, inefficiency, uncertainty and delays.

3. Avoiding Unreasonable Injunctions in Europe

The new system must be designed with safeguards to avoid EU/EPC-wide injunctions being granted automatically or unreasonably, particularly on patents of dubious validity. Even the *risk* of such injunctions could chill innovation and reduce competitive risk taking in Europe and beyond.

The Court should be obliged to weigh the interest of the parties and take into account the potential harm caused to both parties by granting or denying an injunction. Relevant factors that should be taken into account include: (a) the fact that a patent may cover only one small aspect of a complex technology product including many hundreds or thousands of patented inventions, and (b) the fact that a patent owner may not be manufacturing or commercialising the invention.

Both infringement as well as validity decisions need to be of the highest quality and reliability, and made by competent, experienced patent judges in the same court at the same time.

ANNEX

Intellect response to the Communication from the Commission to the European Parliament and the Council

COM (2007) 29.03.07 “Enhancing the Patent System in Europe”

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Intellect welcomes the Commission’s Communication, which touches on many issues such as the quality and cost of patents, support for SMEs, knowledge transfer, and patent litigation insurance, but focuses predominantly on EU litigation arrangements and sets the Community patent as a key objective for Europe.

We do, however, question one of the fundamental premises in the Communication – that the lack of a Community patent means there is necessarily a fragmented single market for patents and that this somehow has a negative impact on Europe’s competitiveness on the world stage.

On the contrary, as discussed in more detail below, the combined effects of globalization, the success of the European Patent system, the long delay in developing a workable Community Patent, and the effective operation of the internal market mean in practice that there should be less emphasis on the Community Patent as a sole objective, and more focus on achieving a more effective patent framework in Europe through the European, national and Community patent systems.

Although Intellect, in line with most stakeholders, does not see a need for any further harmonisation of substantive patent law in Europe, we do see stimulating innovation and creativity in Europe and enhancing Europe’s competitiveness both internally and globally as the primary objectives of this patent initiative. We therefore believe that improvements to the patent system that will make it function more effectively must be the top priorities of any proposed reform.

Importantly, we see the single main political challenge that lies ahead is the question of languages. The cost of translations makes patenting and proposed Europe-wide litigation schemes dramatically more expensive than they need to be, taking it out of the reach of many small and medium size enterprises (SMEs) altogether. Put bluntly, translation costs are crippling the European patent system. Users of the patent system, virtually without exception, are crying out for a patent regime in Europe, which has minimal, or no translation costs, preferably using English only. Admittedly this means there is a price to pay in terms of cultural diversity. But the stark choice here is between cultural diversity and Europe’s long-term competitiveness in the global economy.

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We encourage the Commission, the European Parliament and the Council not to shrink from addressing even the most daunting political challenges if we are to make real progress.

Community Patent

For Intellect, a Community patent remains a *desirable*, but not an *essential* goal.

The close alignment of national patent laws and the European Patent Convention among Member States means that in practice today the European patent and national patent systems together broadly meet the ICT sector's needs.

Although there is still room for improvement in some procedural details of the European patent system, the combined effects of globalization and the internal market mean in practice a Community patent must offer significant cost, quality and efficiency advantages to be of any use to industry, at least in the ICT sector.

The most important requirements for any Community patent system remain: (1) that it is cost-competitive compared not only with EPC and national routes in Europe, but also with patent systems in the other major jurisdictions, especially the US and Japan, and (2) that it is reliable, both in terms of award and enforcement.

Concerning language, the only viable solution is to minimize translation requirements as far as possible and, although politically challenging, an English language only approach would be the most cost-effective solution.

As it is not necessary or even desirable in every case to have a patent for the whole of the EU, it is important that users should always have a choice of routes for obtaining patents in Europe, namely via the EPC, national patent systems, or the Community Patent. It is important for example that an SME whose activity is limited to the domestic market can obtain a national patent to protect itself. Intellect would not like to see a system where any kind of Community patent became the only route for patenting in Europe.

Integrated Jurisdictional System for Patents

Intellect welcomes the Commission's compromise proposal (Option C) and we support the view expressed in the Communication that "consensus could be built on the basis of an integrated approach which combines features of both EPLA and a Community even after any transitional period, unless and until all Member/Contacting States unanimously jurisdiction". We hope that Member States will rise to this challenge and diligently seek to find a workable consensus around Option C.

We also share the aspiration that the eventual "creation of a Community patent should not be put in jeopardy" by any further work on a European patent litigation regime. Likewise, we do not believe that reforms to the European patent system, whether by way of litigation improvements or simplification to its translation regime, should be held hostage to any Community Patent.

We can agree with the sentiment that there should not be "duplication with two competing jurisdictions on patent litigation in Europe" but only to the extent that it applies to Community patents. As explained in more detail below, we believe that national courts should continue to have parallel jurisdiction for European patents for their own territory, agree otherwise.

In this context, Intellect agrees that the improvement of the jurisdictional system for patents should be tackled as a first step and that this work may help pave the way for progress on the creation of an affordable and legally-secure Community patent.

Having said that, however, the current patent litigation system in Europe is functioning reasonably well and thus Intellect does not see the creation of an EU-wide patent litigation system as an end in itself. So, there is no need to make progress at any price, and we would certainly not want to see any kind of compromise solution which would be less favorable for litigants or introduce more business risk or legal uncertainty than the current system. In other words, we would prefer “no change”, i.e. maintain the current nationally-based litigation system, to a bad pan-European regime.

Concerning the question of a Community framework, Intellect is less concerned about the legal constitution of the litigation regime, but more about ensuring that any new common European system delivers against the following key requirements which we would summarise as an **optional, accessible, robust, efficient, cost-competitive and reliable European litigation system with technically competent judges and jurisdictional scope extending to related non-patent matters. Litigants should retain the option to continue using existing national courts to litigate European patents in individual Contacting States (as now), in addition to litigating national patent matters.**

By “**accessible**” we mean that there should be an appropriate degree of proximity to the parties and relevant circumstances of the case, notably the territorial application of the patent or place of infringement. We agree with the principle proposed in Option C that there should be a limited number of first instance chambers as well as a fully centralized appeal court which would ensure uniformity of interpretation.

By “**robust**” we mean the decisions will be of high quality and legally reliable, even at first instance. This will be of paramount importance as a pan-European jurisdictional system will bring the new possibility of multi-territorial effect both for revocation of patents as well as the award of injunctions and damages (because revocation, damages and injunctions would apply to all designated States in a European patent and throughout the Community in the case of a Community patent). These broader territorial effects could only have legitimacy in the hands of a professional, high-quality, dependable and respected court and litigation system.

By “**efficient**” we mean that cases will be handled and decisions delivered in reasonable timescales. We do not want to see a system where the courts are caught up in backlogs and delays.

By “**cost-competitive**” we mean that the cost should represent a saving in multi-territory litigation - clearly one of the objectives of a new pan-European system. But we see no reason why the cost should not also be affordable for litigants wishing to use the new system primarily to address infringements principally occurring in one or two territories. Today, for example, an SME wanting to enforce its patent in its domestic market or in the country where infringing manufacture occurs can do so and will incur litigation costs only for that one country. It would be an unfortunate and unnecessary barrier if that same SME was confronted with significantly higher costs for litigating the same patent in a European court to achieve exactly the same end result (namely stopping an infringer in the home market).

We believe that **technically competent judges** are an essential component of any European court system for ensuring the delivery of robust judgments, especially in complex technology areas like ICT.

Note that we are advocating **double-optionality**, meaning:

1. **Optional for Member States** to join, i.e. an “opt-in” model for countries to join as and when they are ready, at least with respect to European patents. This allows the step-by-step adoption by individual Member States following the same model that was so tremendously successful for the European Patent Convention (EPC).

Ideally all EPC contracting states (including all EU Member States) should be on board, but realistically we see an “opt-in” solution may be the only viable way to get a multi-jurisdictional European patent litigation system off the ground. We believe an “opt-out” model would be a non-starter.

2. **Optional for litigants** to choose whether to use the EU or national route for litigation of *European* patents, which are by definition a bundle of national rights, with the national courts retaining jurisdiction only for their own country. Specifically, in the case where a third party challenges validity (except by way of counterclaim to an infringement action), the patent owner should have the final say on which route (national or European) to use. This optionality for litigants should be permanent or remain available at least until the European court has a proven track record and that all Member/Contracting States are in agreement about that.

Having more than one court system with jurisdiction to hear patent matters is not in itself a bad thing, although we do see that it would be beneficial if the same European litigation regime also had jurisdiction for a future Community patent and, of course, the option for litigants to use national courts would not be applicable for Community patents since they are not national rights.

Additionally, however, we could envisage a system where appeal from the national courts of first instance was also to the centralized European patent appeal court (but with the decision in such a case having effect only for the specific Member State concerned), if such a constitution was legally possible within the Community framework. This would ensure uniformity of interpretation between the new European Court structure and the national courts of first instance also.

When we say “**jurisdictional scope extending to related non-patent matters**” we are alluding to the fact that questions of patent infringement - especially in the ICT sector - are often tied up with other non-patent matters, such as for example, questions of competition law, or contract law (e.g. interpreting a patent license agreement), and frequently quantum of damages. Rather than the European Patent Court having exclusive jurisdiction over infringement and validity issues, it would be helpful if this same court also had jurisdiction to deal with all ancillary issues, rather than leaving such jurisdiction with the national courts. Otherwise, the new system could become considerably more complex, cumbersome and costly to use and co-ordinate than patent litigation is today, and such a split jurisdiction would lead to possible inconsistencies, inefficiency, uncertainty and delays.

Languages:

As indicated above, Intellect sees the question of languages as the main political challenge that lies ahead if we are to make progress on pan-EU litigation or a Community patent.

In this context we believe that in addition to confronting the political challenges due to the impact on cultural diversity, we believe it would be constructive to explore and examine new and innovative approaches to the language regime.

For example, in a order to help promote a limited/single language regime in a Community-law based litigation regime, a compromise "exception" to the single language might be where a defendant whose infringing acts are restricted to her home country would have the right/option to chose to use her own language, but in no other case. Alternatively (or additionally) judges may be given the discretion to decide the language of the proceedings after hearing the parties on this point, with the default being the single/limited 'official' language.

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