



Advancing Industry's View On Intellectual Property Since 1920

TRADE MARKS PATENTS & DESIGNS FEDERATION - TMPDF

PP5/07

Commission Communication COM (2007) 29-03-07 to the European Parliament and to the European Council

Enhancing the Patent System in Europe

TMPDF comments

1. INTRODUCTION

During the first quarter of 2006, the Commission consulted users and others on a future patent policy for Europe. The TMPDF response to that consultation has been published as policy paper PP 11/06.

The present communication follows up that consultation. We very much welcome the communication and the Commission's obvious desire to improve the patent system as a whole within Europe. We appreciate the emphasis in the communication on the driving force of patents in encouraging innovation, growth and competitiveness, on the need for granted patents to be of high quality, the need to support SMEs and the need to facilitate knowledge transfer.

However, we have reservations concerning the Commission analysis of the existing system. In particular, the present communication overstates the supposed fragmentation of the single market for patents and the need for a Community patent, involving integrated litigation arrangements, as a key objective of policy, while it underplays the major problem of the language regime at European level. As opposed to underplaying the language problem, the communication overstates the advantages of integrated judicial arrangements.

While we accept that the establishment of a patent system in Europe incorporating integrated patent litigation arrangements is, in theory at least, a desirable objective, provided that the patents are of high quality and can be obtained at a sensible cost, and that the system includes high quality, efficient and trustworthy judicial arrangements, we do not consider that it should be regarded as a key objective. Certainly, it is not an objective to be, as an end in itself, by making compromises that lead to a sub-optimal system. The Commission should in the first place give attention to the existing system in Europe, by seeking improvements in balance, accessibility and cost effectiveness in national systems. Furthermore, the European Patent Organisation (EPO) should make great efforts to increase the efficiency of patent grant, particularly in the opposition/appeal stages.

Some major issues are discussed below.

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2. THE PATENT SYSTEM AT EUROPEAN LEVEL

The Commission places great emphasis on the supposed fragmentation of the single market for patents. In fact, the success of the single market, the increasing uniformity of products across Europe and the effective harmonisation of substantive patent law at national level, through the impact of the European Patent Convention (EPC) and the 1975 resolution on the adjustment of national patent law, have meant that European industry is already served well, and in a reasonably unified way, at the European level by the national patent systems. There is no longer a major or pervasive problem to be solved by a Community patent or other form of integrated litigation system (though for some, an integrated system will have advantages).

Very many companies, except perhaps those in regulated sectors such as pharmaceuticals, find that patents in 2-4 of the larger national markets, obtainable through the EPO, are sufficient to protect their interests throughout Europe. This is evidence that the single market is operating so effectively that very many companies do not need Europe-wide patent coverage or remedies to achieve commercial objectives. This needs to be borne in mind in these discussions, particularly when considering costs.

The major problem with the current system in Europe concerns languages and translations, which are discussed below. As a lesser but nonetheless urgent matter in relation to the single market, further Commission action to demand that the restrictive rules in many member states concerning address for service and/or domiciliary and qualification requirements for professional representatives should be liberalised is essential. This would remove unnecessary barriers to access to the national systems. We have pointed this out in other submissions. Another problem with the current system in Europe is the slowness of the procedure in the EPO, particularly in the opposition/appeals procedure. The delays involved create considerable legal uncertainty. Great efforts should be made by the EPO to increase efficiency and to reduce delays as far as possible.

Moreover, although the Commission communication emphasises the problems of litigating under national patents in several jurisdictions, the need for this is rare. It has been estimated that no more than 5-10% of patents that are litigated are litigated in more than one jurisdiction simultaneously. One action in a larger state that provides relatively trustworthy judicial decisions is sufficient in most cases to dispose of the dispute across Europe. This is especially relevant when considering the cost effectiveness of an integrated European litigation system as would be established under EPLA (the proposed European Patent Litigation Agreement). Costs for parties to litigation in this system, according to estimates in the Commission communication, would be about twice those in national jurisdictions (other than the UK). Thus, litigation at European level, in most cases, is likely to add to the costs of the parties.

We note also that the Communication states that "big patent cases ... are mainly litigated before the Courts in the UK where the litigation costs are highest in Europe". Consideration needs to be given as to why this is the case. Could it be that the very procedures which give rise to these costs are regarded as being important to the big cases?

Cost comparisons can be misleading indicators to relative competitiveness, since lower costs will benefit foreign competition as well as European industry, probably more so, since Commission figures show that more applications to the EPO originate outside the EU than within it. It might be anticipated that if the cost of procuring and litigating patents is reduced, non-EU companies will obtain more

patents and enforce them more often against companies based in the EU. Thus, ironically, EU business interests could be detrimentally affected by cost-driven reform.

While we consider that it is imperative that there should be major reductions in costs in relation to the language regime (see below), cost reductions should not be achieved at the expense of quality in the grant process or in the judicial arrangements.

3. LANGUAGES AND TRANSLATION - CURRENT CONCERNS

We cannot emphasise strongly enough that the most serious problem and cost in the patent system at European level concerns languages and translation. The cost of validating a bundle of European patents issued by the EPO, by translation within a strictly limited time for a significant number of states, is excessive and is the major factor that makes patenting in Europe so much more costly than patenting in say the United States or Japan. By comparison with this, litigation problems are minor. All patents suffer as a result of the vast and unnecessary translation costs and bureaucratic requirements (see below). By contrast, very few patents are litigated and litigation costs in Europe are generally (except for some cases in the UK) much lower than in the United States.

While we understand the cultural significance of the diverse array of languages within the European Union, it is important to appreciate that patent specifications are technical, not cultural, in nature. Patents convey technical information and are originally drafted in the language(s) of technology. For the most part, they are of greatest interest to people concerned with their technical content *at the time of first publication*, not when the patent is granted several years later. Most patents in Europe are issued by the EPO and at the time of first publication are in one of the three official languages of the organisation. Anyone concerned with the technical content of patent specifications that will have effect in his/her country must therefore be able to comprehend these languages.

The language/translation problem as concerns European patents would be greatly alleviated by the ratification by a large number of EPO member states of the Agreement on the Application of EPC Article 65 (the London Agreement). Under this agreement, states having an official language which is one of those of the EPO would not require a translation of the patent specification, while other states would only require claims to be translated (when the specification is in an EPO language prescribed by them), unless and until a dispute involving the patent arose.

Because the London Agreement would involve dramatic cost savings in relation to all EPO granted patents, rather than by the relatively few that are litigated, entry into force of the London Agreement would, at a stroke, save far more in costs for patent holders than reform of the litigation system.

Ratification and entry into force of the London Agreement for a large number of EPO member states is the most important development that could occur in the near future to improve the patent system in Europe.

4. LANGUAGES AND TRANSLATION - THE FUTURE COMMUNITY PATENT

The proposals for a Community patent raise the possible requirement that translations of at least the patent claims, if not the whole specification, would

have to be provided in the 23 languages of the European Union. This would be ruinously expensive, not just in terms of the actual fees to be paid to translators and the potential lack of enough of them for some of the languages involved, but also because of the dangers in the accompanying bureaucracy (e.g., deadlines, certification) and in the appalling legal consequences of missing or erroneous translations.

This is probably the most important and difficult issue holding up the introduction of the Community patent. While we have indicated that the Community patent should not be seen as a key objective, we do accept that it could be important to many users. It is therefore necessary that the language/translation problem should be resolved. The most effective solution would be to adopt a single language - English - for Community patent purposes.

We suggest that the Commission should, as a first step, seek ideas from stakeholders. It should (after holding a hearing if necessary on this single issue) in which possible approaches to simplifying the language regime of the Community patent should be explored¹. At the same time, the Commission should endeavour to persuade member states that the issue must be resolved in a way which reflects the interests of stakeholders in the patent system and that multi-language compromises designed to support the cultural heritage have no part in what should be a pragmatic decision.

5. QUALITY

The Commission communication notes the essential requirement that European and Community patents should be of high quality when granted and should be delivered in a timely and efficient manner. It is also very important that the judicial arrangements under which Community patents are to be litigated should deliver high quality, trustworthy, decisions.

Granted patents should have a high presumption of validity, following high quality search and examination. We anticipate that the Community patent will be delivered by the EPO. While the EPO has a good reputation as regards the quality of its work, substantial improvements in quality control, with external monitoring, are required and should be applied to the Community patent. (We have commented on such matters in previous papers.) Moreover, efficiency should be improved such that, as far as possible, there are no long delays either in grant or in the delivery of Appeal Board decisions. Long delays increase the legal uncertainties in the system.

Litigation arrangements should ensure that high quality, trustworthy, decisions are produced. This means that judges and other adjudicators must be suitably competent, not only in patent law but also technically, and should fully understand the cases before them. Procedures should be transparent and fair to the parties involved and there should be the right of appeal to a central court where again the judges are both legally and technically competent..

¹ It might be observed that the language regime envisaged in the 1975 Community Patent Convention was in some ways not as onerous as the one presently contemplated, in that there was more flexibility concerning the timing of translations. The effect of late translations is an issue that might be explored. *However, this observation should not be taken to imply that TMPDF could accept that "late" translations, or indeed any translations, should be required in advance of a dispute. We have no objection to them being required in the event of a dispute.*

Quality is vital and should not be sacrificed for the sake of reducing cost or releasing funds to pay for expensive matters of form such as translations.

6. OPTIONALITY OF INTEGRATED JUDICIAL ARRANGEMENTS

We agree that work should continue in search of an agreement on an integrated European litigation arrangement that will cover both current European patents and possible future Community patents. We consider that work should continue on the basis of the work done on EPLA, though we have previously expressed some major concerns about the EPLA proposal which will have to be addressed if we are to support to an EPLA system. (Our concerns are set out in our previous submissions concerning EPLA.)

The prospect of reaching an agreement on an integrated litigation system in the context of EPLA, that all EU/EPC member states would join, must be small. As already contemplated, a smaller group should proceed with an agreement on an integrated system. Others could join when they felt able (much as membership of EPC has grown over the years). It would be for member states to opt in to the system. If the system were to apply eventually to Community patents, it would be necessary at that point for all EU member states to participate, otherwise the problem of a Community patent that could not be litigated in the same way in all member states would need to be evaluated.

Even more importantly, ***use of an integrated litigation system for the litigation of European patents should be optional for patent owners*** - owners should not be forced to use an integrated system in which they might have no confidence or experience and where the consequences might be the loss of a whole bundle of patents rather than a single patent. Neither should they be required to defend against a centralised revocation action (other than as a counter-claim) unless they agree. ***The current draft EPLA requirement that the integrated system should become mandatory after 7 years should be abolished.***

7. THE COMMISSION COMPROMISE

We agree that it would probably **not** be sensible to have two different integrated litigation systems following the introduction of a Community patent. The call on resources would be too great to justify two systems, and the patents involved - European or Community - should all have been granted under the same conditions, with the same effect (in the territory in which they apply) vis a vis third parties. While we have substantial reservations about aspects of the proposed EPLA system, as we have explained in other position papers, nevertheless in substance it could form a basis for a good approach to an integrated system. We therefore consider that future work should use it as a basis. It should be adjusted so that Community patents can be handled if and when they are created. European patents as granted at present do not come directly within the competence of the European Court of Justice and thus we are not in favour of option B as referred to in the Commission communication.

Clearly, the Commission must participate in this work and the mechanics for this must be worked out - that must be decided between the member states and the Commission and an appropriate mandate given. While the Commission has competence for matters involving the Community patent, it does not clearly have any direct competence in relation to European patents, so structures might be difficult, but member states might invite the Commission to make a proposal for a joint integrated system, based on EPLA.

We consider that there is no role for the European Court of Justice in relation to the interpretation of the EPC, except where questions under existing Community law (such as exhaustion of rights) fall to be decided. It should not be difficult to provide that the courts in the integrated system should have the power to determine issues arising in the context of patent cases (relating to licenses, for example), and to be able to refer questions concerning existing Community law to an appropriate part of the ECJ, in the same way that national courts can do this.

Only when a Community patent system comes into operation will there be any place for the ECJ to rule on questions of patent law - and we urge that if and when this occurs, a specialised panel of judges with technical and patent law experience must be set up to deal with those issues.

8. INTEGRATED JUDICIAL SYSTEM- DETAIL

We consider that it is important that some basic rules are established at an early stage in relation to an integrated judicial system, since we are aware that there is pressure from some states that any common court should have regional chambers that use national judges and national procedures, with litigants submitting their cases directly to the regional chamber of their choice.

We accept the case for regional chambers. There should be no more than one per large member state or regional group of states unless pressure of work shows a need for more than one. Details of operation should be worked out on the following principles. All cases should be submitted to a central registry which will allocate them under clear rules, having regard to the domiciles of the parties etc., to an appropriate regional chamber. The judges in a regional chamber should be fully competent both technically and in patent law. The judges assigned to individual cases should be of different nationalities and backgrounds. They could be peripatetic, rather than being permanently assigned to a single chamber. Rules concerning the language of proceedings must be established, preferably limited to the EPO official languages, and it may be appropriate to provide interpretation for judges as well as for parties.

All regional chambers should follow the same new European" rules of procedure, including rules concerning evidence, cross examination, discovery, etc., not the local national rules. It can not be overstated that these rules will be key to the acceptability of the system. They should be developed, as a first step to an integrated litigation system, with the participation of all stakeholders.

There should be appeal to a single central court, where again the judges should be both technically and legally competent.

TMPDF

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NOTE: TMPDF represents the views of UK industry in both IPR policy and practice matters within the EU, the UK and internationally. This paper represents the views of the innovative and influential companies which are members of this well-established trade association; see list of members page 7.

TMPDF members 2007

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