



Representation before the European and Community Patent Court

Introduction

The Federation represents IP intensive companies in the United Kingdom - a list of members is attached. Our member companies are extensively involved with IP in Europe and internationally. Not only do our companies own considerable numbers of IP rights, both in Europe and elsewhere, but they are affected by the activities and IP rights of competitors. They may be either plaintiffs or defendants in IP related court actions, here and elsewhere.

IP Federation comments

For many years, the IP Federation has been supportive of the European Commission's efforts to reform the patent system in Europe. In particular, we have welcomed both the idea of a Community-wide patent right and the establishment of an integrated court system which allows both this instrument and existing European Patents to be litigated within a high quality transnational framework (the European and European Union Patent Court (EEUPC)). We believe that if these objectives are implemented optimally, they have the potential to simultaneously reduce the burden of litigation costs and improve legal certainty for all in Europe. For these reasons, we, as significant users of the system, have been willing participants in the debate and have consistently expressed our views on these matters in what we hope is a constructive and pragmatic way.

There are a number of dimensions to these two initiatives but here we wish to confine our views to one particular matter: the question of representation before the future EEUPC and our belief that European Patent Attorneys should have a right of audience therein. This matter is currently addressed in Article 28 of the draft Agreement which will establish this Court and reads as follows:

- (1) Parties shall be represented by lawyers authorized to practice before a Court of a Contracting State.
- (2) Parties may alternatively be represented by European Patent Attorneys who are entitled to act as professional representatives before the European Patent Office pursuant to Article 134 of the European Patent Convention and who have appropriate qualifications such as a European Union Patent Litigation Certificate.
- (2a) Representatives of the parties may be assisted by patent attorneys who shall be allowed to speak at hearings of the Court in accordance with the Rules of Procedure.

Whilst we have previously expressed our views on these provisions in an

earlier policy paper [PP07/09](#)¹, we now take this opportunity to reiterate and amplify our thinking further.

As alluded to above, a long standing complaint from users of the patent system in Europe is that it is expensive, unpredictable, inconsistent in its effect across Member States and in some instances very slow. We have previously argued that one approach to partially addressing these problems is to ensure that the new Court itself is staffed by judges who are both experts in patent law and able to readily comprehend complex technical evidence and arguments. This, we think, is not only an inevitable consequence of the increasing complexity of technology itself but also an acknowledgement that substantive patent law has significantly increased in its sophistication since the European Patent Convention came into being some forty years ago. As a consequence, we believe it is absolutely essential that the new Court is both expert and highly specialised.

In a corresponding way, we also think that there is a need to ensure that those who represent clients before the new Court are equally expert and specialised. It therefore seems to us that any system which denied direct representation to European Patent Attorneys (EPAs), the largest body of technically qualified legal persons in Europe with a deep understanding of both patent law and science, would be both inconsistent and sub-optimal. This is the more so given that, in the field of patent law, EPAs and specialist patent lawyers have overlapping and in some instances identical skills. Furthermore, they operate within a professional framework of conduct and disciplinary proceedings overseen by a recognised professional body (the European Patent Institute) which for all practical purposes is identical in its effect and severity to those bearing upon their lawyer counterparts.

We therefore remain supportive of the current text of Article 28 which provides that EPAs will be eligible representatives before the new Court if they have obtained a mandatory European Union Patent Litigation Certificate.

Detailed explanation

There are three reasons why opening up representation to suitable qualified EPAs makes sense. First, for some years now all Registered Patent Attorneys in the United Kingdom have had litigation rights before the Patents County Court in London and furthermore those who have an additional litigator's certificate can also practice before the High Court. Thus, there is already a precedent in a Member State for the adoption of this particular provision. It is our opinion that this opening-up of representation in the UK has generally been seen as a positive development by users and there are a number of examples where, because of it, impecunious parties have had access to justice which would otherwise have been denied to them. Certainly we know of

¹ In policy paper [PP06/10](#), we have, further, dealt with the very important question of privilege before the Court. This is quite separate issue from that of representation by European Patent Attorneys with litigator's certificates under Article 28. Indeed, a key point made in [PP06/10](#) is that privilege needs to extend to communications with legal advisers who do not qualify to act as a representative under Article 28, including European Patent Attorneys who have no litigator's certificate, appropriate European nationally-qualified advisers, and appropriate non-European advisers.

no case where a litigating party has been significantly disadvantaged or had problems by choosing this mode of representation. On the contrary it has actually had a beneficial effect by eliminating unnecessary duplication of representatives and advisers. We therefore think that this successful model can be safely replicated in the new court system to the advantage of litigants across the whole of Europe.

Secondly, since its inception, it has been the practice of the European Patent Office to allow EPAs to represent their clients in opposition and appeal proceedings without further qualification. And often these proceedings are complex multi-party disputes where the validity of extremely valuable business-critical rights is in dispute. Again, the experience in this area has been overwhelmingly positive with many senior EPAs practising in various Member States now enjoying a significant reputation for the quality of their written submissions and advocacy. This success is based in part on the requirement that, during their qualification, EPAs pass an examination in opposition practice including how to put together the sort of statement of case and subsequent replies which will likely form the procedural backbone of the new Court. It would indeed be a bizarre outcome if EPAs could act as representative in *inter partes* opposition proceedings before the EPO but not in essentially identical validity proceedings before the new Court.

Finally, it should be recognised that in their day-to-day practice many EPAs (especially those in industrial practice) render advice on both infringement and validity issues. Furthermore Registered Patent Attorneys in the United Kingdom are specifically examined on both these matters as part of their qualification training. We are therefore convinced that many EPAs already possess the ability to deal with issues of infringement and validity to the standard likely to be required by the new Court. In fact, their skills will in almost all cases already be far superior to those of the average generalist lawyer who rarely has actual experience of legal or administrative proceedings related to patents yet who will nonetheless receive an automatic right of audience.

Further points

Notwithstanding the above, we are strongly supportive of the idea of the European Union Patent Litigators Certificate especially if it awarded on the basis of a true test of both competence and procedural knowledge. In our view, this will help fill gaps in people's knowledge and prevent the inexperienced or unwise getting out of their depth to the detriment of judicial efficiency or worse their client's interests. We also think that the existence of such a certificate will be very helpful in ensuring public confidence in the new system. Finally, it could be very helpful in embedding common procedural practices in the new Court from the outset; something we believe could pay dividends given that in the new Court's early days representatives will be coming from the background of their own local Member State's judicial practices. For this reason alone, we believe that consideration should perhaps be given to the idea of requiring that *all* representatives should obtain a litigator's certificate in some form or equivalent training.

Consideration could perhaps be given to this being in two parts covering respectively legal and technical understanding.

Concerns have been expressed about the idea of EPA representatives which are grounded in the observation that the remit of the new Court will stretch beyond purely questions of infringement and validity (although we understand these cases to be relatively rare). However, whilst this is a legitimate concern, we do not see it as an insurmountable hurdle. For example if, in accordance with Article 28(2a), lawyers can be assisted by EPAs if the need arises, we see no reason why the reverse cannot be true: EPAs could involve specialised lawyers to assist them with the preparation of their case if there was an obvious experience gap. And of course it will always be open to clients to choose a specialist patent lawyer over an EPA if the nature of the case makes it prudent for them to do so.

Conclusion

To summarise, the IP Federation is strongly supportive of the current version of Article 28. We believe that opening up representation to suitably certificated EPAs will not only be a progressive step in line with the general objective of improving the patent system in Europe but that specifically it will ensure wider choice and therefore better access to justice for all; especially for those high technology SMEs which will likely be the bedrock of the European Union's future economic well-being. This after all was the intention behind patent reform in Europe in the first place.

IP Federation
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IP Federation members 2011

The IP Federation (formerly TMPDF), represents the views of UK industry in both IPR policy and practice matters within the EU, the UK and internationally. Its membership comprises the innovative and influential companies listed below. It is listed on the European Commission's register of interest representatives with identity no: 83549331760-12.

ARM Ltd
AstraZeneca plc
Babcock International Ltd
BAE Systems plc
BP p.l.c.
British Telecommunications plc
British-American Tobacco Co Ltd
BTG plc
Delphi Corp.
Dyson Technology Ltd
Eli Lilly & Co Ltd
ExxonMobil Chemical Europe Inc
Ford of Europe
Fujitsu Services Ltd
GE Healthcare
GKN plc
GlaxoSmithKline plc
Hewlett-Packard Ltd
IBM UK Ltd
Infineum UK Ltd
Merck Sharp & Dohme Ltd
Microsoft Limited
Nokia UK Ltd
Nucletron Ltd
Pfizer Ltd
Philips Electronics UK Ltd
Pilkington Group Ltd
Procter & Gamble Ltd
QinetiQ Ltd
Rolls-Royce plc
Shell International Ltd
Smith & Nephew
Syngenta Ltd
The Linde Group
UCB Pharma plc
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