Community, cooperation, coercion and coexistence

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The event that sparked off this concatenation of alliterative ‘c’s was the announcement by the European Parliament that it had given its consent to the creation of a common patent system for the Member States of the European Union. This consent is unprecedented since, unlike the case of earlier pan-European rights—the Community trade mark, registered and unregistered designs, and plant varieties rights—the common patent system that has been approved does not cover the entire territory of the European Union. Two important and industrially sophisticated Member States, Italy and Spain, have signalled not merely a reluctance to go along with their 25 fellow Member States but a firm refusal.

There is no legal requirement to reach consensus, since the EU’s Lisbon Treaty has now put into place an enhanced cooperation procedure. With the Council’s blessing and Parliament’s consent, the cooperating countries can press ahead, leaving Italy and Spain in the cold but leaving the door open to them to join the 93-per-cent-of-the-Community patent at any time. The two are in linguistic sulk mode: both Italian (inexplicably) and Spanish are official languages for the purposes of the Community trade mark and registered design rights, but neither is a working language for the purposes of the European Patent Office which has, since 1978, made do very well with English, French and German alone.

Although a unitary patent covering 25 of the 27 Member States can be expected to bring some cost savings, the extent to which they do so, and the possibility of countervailing scenarios in which the cost of the European patent system increases, have not yet been the subject of detailed predictive calculations; nor, at this stage, can they be. A reduction in the cost of translating patent applications is welcome—especially since most patent translations are presumed never to be read—and will in probability be huge, so what extra costs might be incurred that will give rise to anxiety?

At present, each application made to the European Patent Office results in the grant of a basket of more-or-less identical national patents, each of which is free-standing in the sense that, once the threat of an EPO post-grant Opposition has passed or been survived, the continued validity and scope of protection conferred by the EPO is in the hands of national courts alone. Some may regard it as invalid, while others uphold it; some may find it infringed by the very act that other courts consider to lie beyond its claimed monopoly.

In contrast, an enhanced patent of the kind currently being proposed is an all-or-nothing creature. If it is valid, it is valid throughout its territories; if invalid, it confers no protection anywhere in the enhanced cooperation zone. At this point, the threat to issue invalidity proceedings, for example, becomes much more serious; both those who defend patents and those who attack them will have to consider how much to fund a much more valuable piece of litigation.

In the case of small- and medium-sized enterprises, it is not just a question of how much to spend but how to raise the funds that are needed—or how to manipulate the various options, which may be both potentially lucrative and expensive, of third party funding, after-the-event insurance, and so on.

The experience of the USA is not closely comparable, since that jurisdiction’s patent laws are different and it has a long, well-established, and relatively homogenous litigation culture compared with that of Europe of today, or even Europe over the next two decades or so. However, if it can be shown that, in behavioural terms, the patenting, licensing, trolling, and patent-destroying strategies practised in a single mega market are qualitatively different to those where the market is composed of many smaller countries, the patent litigation spend which we see in the States today may be that which we experience in Europe tomorrow.

One final factor to consider is the separate status of Italy and Spain: will businesses neglect investment there (which seems improbable for commercial and industrial reasons), or treat them as a sort of conjoined Mediterranean zone for legal and marketing purposes? Will separation result in extra local work for patent professionals, creating a local vested interest which those inside the enhancement zone will envy? In a few years, we should start to know.