Response to EU Patent Consultation

Introduction: the Professional Contractors Group and its members

PCG is the cross-sector representative body for freelance contractors and consultants in the UK. Its members provide their services to a range of clients using their own one or two-person companies. They work in IT, engineering, project management, oil and gas extraction, marketing and many other sectors. PCG has campaigned for consistency, clarity and common sense in intellectual property rights in Europe and, owing to a significant number of members working in IT, has a particular interest in the issue of software patents.

Freelancing is an increasingly common mode of working throughout Europe. A study commissioned by PCG in 2005 and conducted by Small Business Europe showed that there are an estimated 15 million people working freelance in the EU and that this trend is increasing. Freelancing gives the EU's economy a skilled and flexible workforce that offers it a significant competitive advantage in the global economy: this advantage must be protected and developed further if the Lisbon goal of making the EU the most competitive economy in the world is to be realised.

This response will set out the general principles of PCG's approach to IPR before answering the questions posed in the consultation document.

How freelance contractors and small businesses use IPR

Freelance consultants and contractors typically supply their services to larger clients. Any IPR generated during the course of this work will generally remain with the client and the contractor is not able to access it to develop a revenue stream.

While developing new and innovative products for clients, however, the risk of infringing other people's IPR usually rests with the contractor: if such an infringement occurs, it is the contractor who would face legal action, not the client.

Freelance contractors therefore do not generally have an interest in securing IPR for themselves; but they do have an interest in the IPR regime being fair and transparent.

It is a myth that SMEs would make greater use of patents if they were cheaper and more information about them was available. While it is true that in a small number of cases one or two really good patents might be very profitable for a business, in practice this is hardly ever the case.

No small company can ever amass a portfolio of patents that would allow them to trade access with large corporations: SMEs will always be excluded from patent thickets.

Moreover, even if a small company did have a patent, it would lack the resources to defend that patent against infringement by a larger competitor. For smaller firms, therefore, patents are generally worthless: however much they cost, their cost is greater than their actual value.

Patents can, therefore, create an uneven playing field: a small firm use patents to protect its innovations against infringements by a larger firm. At the same time, it cannot defend itself against a claim of infringement from a larger firm, even if that claim is spurious. Patents can therefore be used as a weapon against small firms by their larger competitors.

Freelance small businesses and other SMEs also use other means of protecting their IPR: they often use the free protection offered by copyright; they might exploit a market niche, first mover advantage or simple secrecy. Their main concern is developing the product swiftly and effectively.

General considerations regarding patent regimes

Systems for protecting intellectual property should exist in order to serve the public good by fostering economic growth.

When patents were originally developed, the rationale was that the holder would be obliged to share his knowledge and so serve the public good. This idea was made redundant many years ago by the advent of learned technical and scientific journals: details of almost all innovations are now published in these. A clear rationale is therefore needed for the patent system which does not rely on the supposed benefits of sharing knowledge.

Patents represent a *quid pro quo* between the holder and society: a patent grants the exclusive right to use an invention for a fixed length of time, which is granted in return for the holder having developed the innovation in the first place. But this *quid pro quo* must be fair: nobody should be granted an exclusive right to use something if developing it was a trivial task that anybody could have accomplished.

Patents should be awarded for technical inventions using controllable forces of nature. Inventions of this type require significant investment that is worthy of protection by patents. Other forms of innovation are better suited to other forms of IP protection.

A key question when assessing patents or any other protection of intellectual property must be: would the innovations protected by this system have been developed if it did not exist? Very often the answer is yes. The most restrictive forms of IPR, such as patents, must therefore only be deployed when it can be proved that they are necessary in order to secure innovation. If the innovation would happen without them, they should not be imposed.

PCG believes that patents should be of high quality, readily searchable and within appropriate scope. The systems by which patents are administered should be fully transparent and democratically accountable in order to ensure that they serve the interests of the public good.

Before any reform of the patent system is undertaken, full consideration must be given to the risks presented by an unsuccessful patent system. Any patent system that reduced innovation or competition would be a disaster for the EU. At a time when the Lisbon Agenda is seeking to make the EU the world's most competitive economy, and when the challenges posed by the emerging economies of China and India are becoming ever-more clear, reforming Europe's patent system must be done extremely carefully to avoid destroying Europe's competitiveness.

Any patent system must put the needs of the society and the economy it is created to serve before the interest of patent holders.

A multiplicity of motivations for innovation exists, particularly in the field of software, where many developers make their products freely available. Any IPR system must acknowledge this fact and take full account of it.

The Community Patent proposals

A Community Patent that offered affordable patents valid in all EU member states would effectively remove patenting from the sphere of influence of individual nation states. National patent offices would not be shut down, but few if any companies would wish to go through national offices when pan-continental protection is available from one patent. Is it desirable for patenting to be moved into the sphere of the EU and away from the member state?

Such a change could be seen as desirable if it would remove barriers to trade within the internal market. Is there any evidence that such barriers are indeed created by the patent regime?

PCG's position is that there would be nothing wrong in principle with a Community Patent, providing that the patents issued under it are of high quality and within appropriate scope, and that the governance of the new patent regime is fully democratically accountable. This would preclude placing such a regime in the hands of the European Patent Office in its current form.

A single European Patent Court would be welcomed by PCG so long as:

- it is an EU institution
- its judiciary are totally independent from all legislative and executive processes involved in the granting of patents
- it begins formulating its own case law in line with the European Patent Convention and does not build on existing EPO case law.

Problems with existing European patent systems

It is often said that more patents can be seen as the effect of more innovation: the more patents are issued, the more innovative and therefore competitive the economy is deemed to be. This is not necessarily the case.

So-called "patent inflation" negates the first of these points: if more and more patents are issued, this does not necessarily mean that more and more innovation is taking place. Instead, it could simply indicate that the patents being issued are for more trivial products and processes.

In point of fact, the number of patent applications filed at the European Patent Office has risen from 110,000 in 1998 to 180,000 in 2005: an increase of 60%. It cannot be claimed with any credibility that Europe has increased its innovation by 60% in seven years; this trend is instead an indication of declining standards at the EPO.

The first country or trading bloc to reduce patent inflation and issue only high-quality patents will gain an immediate competitive advantage by becoming a highly attractive location for innovation.

It is also often said that patents cause innovation and that without a patent system innovation would not take place. This is open to question as a general rule, although there can be little doubt that the protection offered by patents has historically acted as an incentive to at least some innovators.

Software patents

i)Software is not patentable and should not be made patentable by a Community patent

There are hundreds of thousands of software developers working all over the world. With such a large amount of work being done, it is inevitable that independent rediscovery will be a regular phenomenon in software development: one developer devises a new way of doing something without being aware that someone else has already done the same thing. If software were to be made patentable, developers would be handed a disincentive to innovate: the possibility of being penalised for such independent rediscovery would represent an uncontrollable business risk.

Software development is in no way capital-intensive. Software can be, and regularly is, developed by one person working alone on an ordinary computer. It therefore does not need or deserve to be given the protection awarded to capital-intensive innovation.

The effort required to develop a new piece of software is involved in the coding and testing. It is not the initial idea that takes the effort and therefore not the idea that should be protected. This is why copyright is the ideal means for protecting software: it protects the code, not the idea. Patents would protect the idea itself, which is a wholly inappropriate protection.

Software is not patentable in principle. As nothing more than a set of instructions, albeit to a computer and in a language that most people do not understand, software should be no more patentable than the rules of chess.

Where freelance businesses develop software, they rely on copyright to protect it. This protection is free and automatic. The copying of as little as 1.7% of a program's code has been found to be infringement of copyright in the past. This is excellent protection.

ii)The EPO is in need of reform owing to its policy on software patents

Article 52 of the European Patent Convention explicitly stated that computer programs are not patentable subject matter. This is in line with long-standing practice that was instigated for good reasons and should not be disregarded.

The EPC established the European Patent Office, which grants existing European patents. The EPO's Technical Boards of Appeal and Enlarged Board of Appeal were created to interpret the Convention and have produced a considerable body of case law. There is some controversy over whether the TBAs and EBA have interpreted the Convention correctly or whether they have distorted the boundaries of what is and is not patentable by a process of judicial creativity. This is made more controversial by their lack of independence from the EPO, the body on whose decisions they are supposed to arbitrate.

Certainly the judgments of national courts have very often not agreed with the judgments of the TBAs and EBA; the latter have tended to uphold patents far more readily than national courts have done. It is revealing to note that national courts, constituted with a full separation of powers from national executives and legislatures, have developed a body of case law far more consistent with the EPC than the TBAs and EBA have.

If the EPO is to have a role in a Community Patent system, it must therefore be extensively reformed. Alternatively, it should be excluded from the new system and a new body created from scratch.

iii)Consequences of making software patentable

If software were to be made patentable, independent developers would be handed a disincentive to innovate: the possibility of being penalised for such independent rediscovery would represent an uncontrollable business risk. Hundreds of thousands of small businesses would be forced to cease trading across Europe.

Two-thirds of the EPO's software patents have been granted to American and Japanese companies. Making these patents enforceable against European companies would be disastrous for Europe and do immense damage to the Lisbon Agenda.

The experience of the USA, where software is patentable, has shown that companies divert resources away from innovation and into using their existing patent portfolios to extract licensing fees from other developers; small developers who cannot use their own portfolios to bargain with are often forced out of business. They cannot afford to defend themselves against claims by larger companies and so are forced to concede, irrespective of whether or not the claim is justified or accurate.

Many businesses develop or commission bespoke software systems for their own internal use. It is unrealistic to expect these companies, who might embark on creating a new piece of software only once a decade, to have to contend with the intricacies of patent law.

Moreover, if software were to be made patentable, small and independent developers who are not able to use large patent portfolios to bargain with other patent-holders would be forced from the market. With less competition, the cost of bespoke software for all businesses would rise.

This dramatic decline in competition and innovation would come at exactly the time when the EU is attempting to respond to the rise of Asian competitors by making the EU the most competitive economy in the world. The Lisbon Strategy would be undone by this alone.

Answers to the Questionnaire

1.1

These are all valid rules for a patent system. They can, however, be expanded upon.

- The clear rules referred to in the consultation document must be fixed and permanent: it is not acceptable for case law to transgress them and for this transgression then to be recognised by changing the rules.
- A patent system should be regarded as just one part of an IPR framework, which should in turn be just one part of an integrated innovation strategy. A full strategy for innovation should be developed before any changes are made to the patent system.

1.2

Other features that can be added to those outlined in Section 1 are:

- Patents should be granted only in fields where it can be proved that they are required in order to guarantee innovation.
- A patent system should be designed and operated to benefit society and the economy and not to benefit patent-holders at the expense of these.
- Patents should be limited to technical inventions using applied natural science.
- A patent system should be regarded as just one part of an IPR framework, which should in turn be just one part of an integrated innovation strategy. A full strategy for innovation should be developed before any changes are made to the patent system.
- A patent system must comply with the rules as set out at its inception and not deviate from them over time.
- A patent system should be open to challenge by competition authorities if it is suspected of restricting competition unduly or to the detriment of society and the economy.
- A patent system must have as low an error rate as possible: to this end, the patent authorities should not be rewarded on the basis of the number of grants made, as this would lead to it being in the system's interest to grant patents incorrectly.
- Patents should not be available for subject-matter where it is difficult to identify and assess the prior art.

1.3

There are many ways in which the Community can take on board the broader public interest when developing its policy on patents.

- A patent system must have a full separation of powers, unlike the current EPO in which the judicial function is not independent from the executive and legislative functions.
- Any changes to the patent system must be done with the needs of society and the economy in mind, and not the needs of patent-holders or prospective applicants.
- A patent system must prevent patent inflation, which damages the economy by exposing businesses to the unnecessary risk of infringing trivial patents.

2.1

There are several features which an effective Community patent must offer and which are not always featured in the common political approach.

- The Community patent must be democratically controlled and accountable.

- The mechanisms around the Community patent must have a full separation of legislative, executive and judicial functions, unlike the current EPO in which the judicial function is not independent from the executive and legislative functions.
- The Community patent system must not be based on current EPO case law, which does not respect the EPC, is routinely contradicted by the national courts of most member states for this reason and would therefore be unacceptable to most member states.
- Community patents should be administered wholly within the EU. The EPO should therefore not be used to administer them in its current form: either it should be substantially reformed and brought within the EU, or a new body should be created.
- The Community patent as outlined in the consultation document would effectively move patenting out of the sphere of member states and wholly to EU level: it seems unlikely that anyone would wish to apply for individual national patents when a Community patent will do the same job throughout the whole of the Union. The case for patenting to become the prerogative of EU-level institutions must therefore be made and must also be accepted by member states.
- The Community patent must not allow for patent inflation: the cheap availability of trivial patents would drag many businesses into a mire of legal uncertainty and bureaucracy as many day-to-day aspects of their business could be subject to patents.
- In any patent system it is vital that patents can be searched so that others can avoid infringing existing patents. Community patents must therefore be available in as broad a range of translations as possible: two or three languages would not be sufficient.

3.1

The advantages or disadvantages of the proposed EPLA rest largely on what kinds of patents are issued.

- It should be noted that most national courts of member states, which have a full and proper separation of powers, have produced a case law which is in line with the EPC and strongly at variance with the case law of the EPO.
- If the EPLA is introduced in such a way as to enshrine current EPO case law, the economic consequences for the EU could be highly damaging:
    - Two thirds of EPO patents granted on computer programs are held by American and Japanese firms: these would all suddenly be made enforceable against their European competitors.
    - Small firms unable to operate in a patenting environment would be forced to close: this would reduce the competitiveness of the EU software market.
    - With fewer software companies in the marketplace, the cost of bespoke software for all businesses would rise.
    - The easy availability of trivial patents for business methods or software could threaten all businesses in Europe with having to try to avoid accidental patent infringements, which would represent an uncontrollable business risk.
- There should be an EU Patent Court and a separate EU Patent Office.
- There should also be a separate EU Innovation Office, to co-ordinate the role of patents within the broader innovation strategy (see 1.2 above)
- The proposed self-financing of parts of the EPLA system would create incentives for the ready issuing of patents and thus cause patent inflation as it has with the EPO. It would also cause the patent system to be biased in favour of the large companies who make the most applications, as has also happened with the EPO. A patent system should not be financed by the fees paid by applicants.
- It is not acceptable for former EPO judges to be allowed to qualify for the new special court as proposed; the EPO's impartiality has been compromised as above.

3.2
The most important consideration is that high-quality patents are issued. Beyond this, the ideal litigation scheme is a secondary consideration. PCG's preference would be for national patents to be litigated in national courts or, if the case can be made as per 2.1 above that patents should be a wholly EU matter, for EU patents litigated in an EU court.

4.1
There can be little doubt that the existing patent regime can give rise to free trade and competition within the EU.

- National courts' patent case law can vary between member states, and in particular can be at variance with the case law of the EPO. This creates confusion, in which a company might be reluctant to trade outside its country of origin because the patent system creates too many legal uncertainties.
- On the specific issue of computer programs, it can be seen that the fastest and most significant developments in computers, for instance the internet, happened in a patent-free environment. Making software patentable would not only be technically incorrect, but would slow innovation and harm competition.

4.2

- Freelance small businesses usually bear the risks associated with infringement when developing new products for their clients.
- Freelance small businesses are therefore often unwilling to supply innovative services in other member states because of the risk of accidental infringement in a patent regime with which they are infamiliar.
- It has proved impossible to create insurance products against unintentional patent infringements: insurance providers who have tried it in the past have found it impossible to do so profitably.

4.3

- The "subject matter" criterion must be fully integrated into all of the above options: without it, patents may be granted and enforced in areas where they should not be.
- Option 3 would produce forum shopping and a "race to the bottom" as member states competed to attract patent applicants by making their patent law more lax.
- Option 1 would be the most preferable of the three options, providing that the transposition of the EPC into Community law is correctly implemented and EPO case law therefore rendered redundant.

4.4
PCG urges the Commission to ensure that any further proposals are considered relative to the key criteria for any patent system as set out in the consultation document and above.

5
PCG answers all the below questions with reference to the known general concerns of freelance small businesses.

5.1

- 4/10, as the patent system in Europe is fairly clear and only really affects freelance small businesses when seeking to trade cross-border.
- If the system is changed to the detriment of freelance small businesses, its importance would be 8/10: many of them would risk being closed down.

5.2

- 3/10, as SMEs do not generally use patents. By definition, they will never be able to amass patent portfolios which will allow them to trade for access with other companies.

5.3

- 7/10, as reform of the worldwide patent system is not currently creating uncertainty for freelance small businesses, but reform of the European system is.
- That said, it is well-known that European software firms generally do not trade in the USA because software is patentable there.

5.4

- Freelance small businesses do not generally use patents: the IPR in innovations they create generally rests with their clients, so they cannot use patents to generate additional revenue streams.
- Freelance small businesses are exposed to the risks of infringement, unintentional or otherwise; but in practice existing patents are too difficult to search and in any case knowing infringement carries greater penalties than unintentional infringement.

5.5

- In addition to the issues raised in the paper, the Commission should consider an integrated innovation strategy; no action should be taken on patents until this strategy is in place and the whole of the IPR regime has been assessed in this context.

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