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THE  
GENERAL COUNCIL  
OF THE BAR OF IRELAND

Director: Jerry Carroll

**Private & Confidential**

Anne Coleman Dunne  
Head of Section,  
Intellectual Property Unit,  
Department of Jobs, Enterprise and Innovation,  
23 Kildare Street,  
Dublin 2.

31<sup>st</sup> January 2014

**Re: Submission of the Bar Council in respect of the Decision as to whether to establish an Irish version of the Unified Patent Court**

Dear Ms Dunne,

I attach for consideration a submission prepared by the Bar Council in the above matter.

The Bar Council is available, if necessary, to clarify or provide additional information in relation to the submission.

With Kind Regards.

Yours sincerely

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Jerry Carroll  
Director



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**SUBMISSION OF THE BAR COUNCIL  
IN RESPECT OF THE DECISION AS TO WHETHER TO ESTABLISH  
AN IRISH DIVISION OF THE UNIFIED PATENT COURT**

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**30 JANUARY 2014**

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## **SUMMARY OF THIS SUBMISSION**

- 1. This document has been prepared by the Bar Council in consultation not only with members of the Bar with experience in patent litigation both in Ireland and abroad, but also with two retired members of the judiciary who are leading, internationally-recognised, specialists in this field, being Ms Justice Fidelma Macken SC (formerly of the Court of Justice of the EU and the Supreme Court) and Mr Justice John Cooke SC (formerly of the General Court of the EU and the High Court). All are united in their grave concern at the prospect of Ireland deciding not to have an Irish division of the Unified Patent Court and instead participating in a regional court in the UK, and are united in their view that the opportunity should now be taken to host a Local Division of the Unified Patent Court in Ireland and to designate a division of the Irish High Court as a 'Technology Court'.**
- 2. Patents are the essential mechanism by which the results of innovation, research and development in high technology fields are protected, and are particularly prevalent in key sectors for Ireland such as medical research & life sciences, pharmaceuticals and digital technology.**
- 3. Ireland – which will have to hold a referendum in order to ratify the Unified Patent Court Agreement - is given the express option under the Unified Patent Court Agreement of establishing a Local Division of the Court and this has been confirmed by the Council of Ministers.**
- 4. A decision not to establish a Local Division in Ireland of the Unified Patent Court to deal with European Patent and Unitary Patent disputes arising in Ireland, and instead to join a Regional Division based in the UK, would convey the impression to investors that the intellectual property of high tech industries is not of real concern to Ireland, that Ireland in reality “*does not do patents*”, and that, despite the expertise available in Ireland, industries based in the high-tech centres such as Galway (life sciences), Cork/Limerick (pharmaceuticals) and Dublin (internet, computing and communications) will now have to find a remedy in the United Kingdom. On the face of it, such a decision would cut across the work over many years by the State's agencies responsible for attracting inward investment in promoting the country as an ideal, cost-effective, competitive “one-stop-shop” location for high-tech and knowledge-based enterprises.**

5. It is highly unlikely that this is the impression that Ireland wishes to put forward, but it will be the inevitable consequence of a decision not to establish a Unified Patent Court in Ireland. This damaging impression will be exploited by Ireland's competitors in seeking to attract high tech investment, including the UK.
6. The UK is, for instance, giving consideration to establishing a Local Division in Scotland (and possibly other locations in the UK). The impression given to foreign investors if Ireland has no Local Division, but Edinburgh or Birmingham have Local Division(s), can only be profoundly damaging.
7. The UK authorities regard and actively promote the English legal establishment centred in London (comprising the Law Courts, the services of the Bar and the major law firms) as a world centre for legal services. There can be little doubt that were Ireland to adhere to a regional patent division of the Unified Patent Court based in the UK, that decision would be exploited by their inward investment agencies in persuading potential investors to choose the UK rather than this country for their new factories or research units. Ireland simply cannot afford to hand the UK development agencies this critical marketing tool.
8. A decision by the State not to establish a Local Division in Ireland of the Unified Patent Court to resolve disputes in respect of European Patents and the new Unitary Patent in the State, and instead to join in a Regional Division of a court sitting in London, is a decision to hand over the provision of legal services in connection with those disputes to the UK.
9. Such a decision runs the very real risk of the loss of employment in legal services in the field of intellectual property in Ireland. It will certainly result in a loss of work, existing experience and knowledge in that sector.
10. Patent and high technology cases have been very successfully dealt with by the Irish courts, especially using the fast-track procedures of the Commercial Court. The Government should therefore turn this issue to Ireland's advantage by taking the opportunity to establish a Local Division of the Unified Patent Court in Ireland whilst also designating a division of the High Court as a "Technology Court", modelled on

**the already successful Commercial and Competition Courts. This will send the strong message to Irish businesses and foreign businesses considering investing here, that Irish people can provide both the necessary technological skills and the necessary specialised legal skills that the high tech industries require.**

- 11. The UK already has such a specialised technology and intellectual property court and is using that fact to enhance its attractiveness as a centre for innovation and R&D.**
- 12. Ireland has to contribute to the costs of the Unified Patent Court in any event, whether based in Dublin or London and the Bar Council cannot identify any significant additional costs associated with the establishment of a Local Division in Ireland.**
- 13. Opting for a regional court in London will impede access to justice for businesses based in Ireland that find themselves engaged in patent disputes and will require those businesses to pay the level of legal costs applicable in the UK legal services market, which in this field are much higher than legal costs associated with patent disputes in Ireland.**
- 14. Legal services should be regarded as a sector within the economy which is capable of generating foreign earnings for the country. It is important that there be a recognition at Government level of the benefits that the legal sector can bring to the Irish economy from foreign earnings.**
- 15. A decision to join a Regional Division in London will deprive the State of the VAT and income tax generated by the provision of legal services in connection with these disputes in the State, a revenue which already covers the costs to the State of providing the judicial and court services and venue, leaving a surplus for the Central Fund. Those receipts will in effect be transferred to the UK Exchequer.**

## **A. PROPOSED DECISION OF THE MINISTER**

1. It is understood that the Minister for Jobs, Enterprise and Innovation intends to make a decision imminently upon the question of whether to establish an Irish Unified Patent Court, or instead to join a Regional Division of the Court with its seat in the United Kingdom. This document seeks to assist the Minister by providing the Bar Council's views on this important question.

## **B. BACKGROUND TO PROPOSED DECISION**

### ***The Present Patenting System***

2. Under the present system Irish patents can be obtained by direct application to the Irish Patent Office or alternatively (since 1992) by applying to the European Patent Office under the European Patent Convention (EPC) for a European Patent designating the State. The EPC provides for the grant of a European patent which takes effect as a bundle of national patents granted under the laws of the Contracting States to the Convention.
3. Ireland is a relatively heavy user of the European Patent system: per million of population, applications made to the European Patent Office annually from Ireland have run for several years at a level approximately 30% higher than applications originating from the UK.<sup>1</sup>
4. Whilst EU Member States have similar rules as to the conditions for grant of a patent, the acts which constitute an infringement of a patent and the circumstances in which a patent should be revoked, until now there has been no single European Patent for the EU nor a single European court ensuring uniform application of these rules. This will now change.

### ***New Unitary Patent and Unified Patent Court***

5. EU Regulation 1257/2012 provides for a Unitary Patent taking effect across 25 Member States of the EU<sup>2</sup> which may be sought on application to the European Patent Office.
6. The Agreement on a Unified Patent Court of 19 February 2013 provides for the establishment of a Unified Patent Court with exclusive competence both in respect of

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<sup>1</sup> In 2012 there were 638 patent applications made to the EPO from Irish residents, with 6695 made by UK residents.

<sup>2</sup> Spain and Italy are not participating.

disputes arising in connection with the new Unitary Patents and also existing European Patents, including of course those designating Ireland.<sup>3</sup>

7. It is provided that the Court shall consist of a Court of First Instance, a Court of Appeal and a Registry. The Court of First Instance shall have a central division with a seat in Paris and with sections in London (for human necessities (i.e. healthcare), chemistry and metallurgy) and Munich (for mechanical engineering, lighting, heating, weapons and blasting).
8. The ratification by Ireland of the Agreement will require an amendment to the Constitution providing for the role of the new Court in the administration of justice.

### ***Option to Establish a Local Division of the Court or Join a Regional Division***

9. Article 7(3) provides that *“a local division [of the Court of First Instance] shall be set up in a contracting Member State upon its request in accordance with the Statute [of the Court].”*
10. Article 7(5) provides that *“a regional division shall be set up for two or more contracting Member States, upon their request in accordance with the Statute. Such contracting Member States shall designate the seat of the division concerned. The regional division may hear cases in multiple locations.”*
11. The Court of First Instance is to sit in panels of three judges with a multinational composition.
12. Were Ireland to establish a Local Division, the panel will consist of one judge from Ireland, and two judges drawn from a pool of judges made available from other Member States.<sup>4</sup> If Ireland joins a Regional Division with the UK, the panel will consist of two judges who are nationals of the participating Member States, together with one judge drawn from the pool.<sup>5</sup> However, it is clear under the EU Agreement that a single judge can sit to hear patent cases.

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<sup>3</sup> During a transitional period of 7 years, Article 83(1) provides that actions for infringement or revocation of a European patent may still be brought before national courts, and the transitional period may be extended for a further 7 years depending upon the extent of the ongoing use of the national courts: Article 83(5).

<sup>4</sup> Article 8(2). The judges are to be “legally qualified”, i.e. must possess the qualifications for appointment to judicial office in a Member State”: Article 15(2).

<sup>5</sup> Article 8(4). It is not required that on a panel there be one judge from each of the participating Member States in a Regional Division, and thus a case between two Irish businesses before a Regional Division in the UK may be determined by a panel which would not include the Irish judge.

13. It is important to note that under Article 17(3) of the Agreement the exercise of the office of a judge of the Unitary Patent Court shall not exclude the exercise of other judicial functions at national level by that judge.<sup>6</sup>

### ***Jurisdiction of the Unitary Patent Court***

14. The competence of the new court includes actions for infringement of Unitary Patents and Irish patents granted under the EPC; applications for interlocutory injunctions restraining the carrying out of infringing acts; injunctions freezing assets; and actions for revocation of patents, amongst other matters.<sup>7</sup> Actions are to be brought, according to Article 33, before the Local Division hosted by the contracting Member State where the infringement has occurred or where the Defendant is based, or (if applicable) before the Regional Division in which the relevant Member State participates and where the infringement occurred or the Defendant is based. Whilst revocation claims are, by Article 33(4), to be brought before the central division, this does not apply in the common situation where there is an action for infringement already pending before a Local or Regional Division.

### ***Funding for the Court***

15. Contracting Member States participating in Regional Division are to jointly provide the facilities necessary for the Court.<sup>8</sup> It is anticipated that the Court would be self-funding after an initial period of 7 years, and until then under Article 37(3) Member States are required to make a contribution calculated by reference to the number of European patents having effect in their territory and the number of actions with regard to them brought before their national courts in the 3 years preceding entry.

16. The present draft Rules of Procedure for the Unified Patent Court (31 May 2013) are very much modelled upon the procedure of the Continental civil law systems and will certainly constitute a dramatic departure from what Irish, US and UK parties are familiar with in patent litigation in those common law jurisdictions, and it may be doubted how satisfied these parties will be with the curtailed form of hearing prescribed in the draft Rules. It is envisaged that the Court will primarily base its determination in a case upon the written evidence and submissions placed before it, unlike the common law system, with its emphasis upon testing

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<sup>6</sup> Under Article 19 of the Agreement a training framework for appointed judges shall be established with regular meetings to discuss developments in patent law and to ensure the consistency of the Court's case law.

<sup>7</sup> Article 32 of the Agreement.

<sup>8</sup> Article 37.

the veracity and weight of the evidence through a process of cross-examination of witnesses. Cross-examination may only occur if permission is granted in advance at an earlier interim hearing (Rule 113(2)), with the court endeavouring to complete hearings in a single day.

### **C. VIEWS OF THE BAR COUNCIL**

17. Before setting out our views as to whether the State should opt for the establishment of an Irish division for the Unified Patent Court, or rather should join with a UK Regional Division, the Council wishes to make a few initial observations.

#### ***Some Preliminary Observations***

18. Firstly, the Bar Council welcomes the creation of the Unitary Patent and the establishment of a Unified Patent Court as positive developments and indeed sees them as offering an opportunity to enhance the position of the State as a centre for research and development.
19. Secondly, whilst it certainly is the case that there is at present a limited amount of patent litigation in Ireland and thus there is no dedicated “Patent Bar” in Ireland, nonetheless the Bar Council sees a very clear public interest for the State in the outcome of the decision to be made by Government in respect of whether or not to establish an Irish division of the Unified Patent Court, and it is this interest which has led the Bar Council to make this submission to Government. Nonetheless, this submission is informed by the views of members of the Bar and retired members of the judiciary with extensive experience in patent and other intellectual property litigation, both before the courts of Ireland and the Court of Justice and Court of First Instance of the EU, and thus we believe that it merits favourable consideration by the Government in its decision-making process on this issue.
20. Thirdly, we note that the Department of Jobs, Enterprise and Innovation stated in a consultation paper:-

*“given that in Ireland, we have only 4 or 5 patent litigation cases proceeding through our court system per year [...] this may well require us to opt for setting up a division outside our jurisdiction outside our division by joining a regional division in another contracting Member State.”*

21. However, the notion that there is a pressure upon the State to join a UK Regional Division due to the low level of patent litigation is clearly misplaced. It is extremely important to stress that the Agreement expressly gives a country with less than 50 patent cases per year the option to establish a Local Division, subject to drawing two out of the three judges required for hearings from the pool of judges. The existence of this option was reinforced by the European Union Council of Ministers at their meeting of 3/4 December 2009, which resolved that:<sup>9</sup>

*“divisions in a contracting state where, during a period of three successive years, less than 50 cases per year have been commenced, should either join a regional division of a critical mass of at least 50 cases per year or sit in a composition where one of the legally qualified judges is a national of the contracting state concerned and two of the legally qualified judges, who are not nationals of the contracting state concerned, come from the pool of judges to be allocated to the division on a case by case basis.”* (emphasis added)

22. Fourthly, we note that, as pointed out in a recent memorandum from Arbitration Ireland<sup>10</sup> which, we understand, has been passed to the Minister, legal services should be regarded as a sector within the economy which is capable of generating foreign earnings for the country. It is important that there be a recognition at Government level of the benefits that the legal sector can bring to the Irish economy from foreign earnings. The ‘brand’ of barrister, senior counsel and solicitor is recognised internationally. Relatively few countries have such an established brand. Critically, our nearest neighbour has been exploiting that brand.

23. We turn now to our views upon the question of the desirability of establishing an Irish division of the Unified Patent Court.

### ***A Significant Opportunity for the State to Advance its Research and Development Agenda***

24. Ireland is already a centre for the production of high technology, in particular in the fields of pharmaceuticals, life sciences and digital technology. It is believed that the State agencies also hold valuable patents in the agriculture and aquaculture fields. Government policy has

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<sup>9</sup> Paragraph 15 of press release 17076/09, at page 14.

<sup>10</sup> 12 June 2013, *Memorandum on the International Legal Market and Irish Legal Services* by Colm Ó hOisín SC.

already identified that the long term economic well-being of the State is dependent upon the State becoming a centre for research and development in these and other high technology fields.

25. Patent law and other forms of intellectual property law provide protection for the intellectual output of research and development and to allow businesses to reap the benefit of that investment. Those laws also permit businesses to carry out their research and development unfettered by groundless threats of infringement proceedings by providing remedies against those threats, including by the revocation of unmerited patents.
26. It is therefore essential that the State not only ensures that businesses engaged in research and development in Ireland have access to individuals with technology skills, but also ensures that those businesses have access to individuals with legal skills in the protection of the fruits of that research and development through patents and other forms of intellectual property.
27. If Ireland is to be a centre for research and development it is critical that the entities carrying out that research and development know that the skills are available to establish protection for their intellectual property, whether in the form of patents or otherwise, and also know that there are skilled practitioners available to assist them in the enforcement of those rights and, just as importantly, to defend them against improper assertions of intellectual property rights by others.
28. The provision of these forms of legal services in the field of intellectual property protection go hand-in-glove with the provision of the technological skills that create the new technologies.

### ***The Opportunity to Establish a Technology Court***

29. In the view of the Bar Council the necessity to appoint an Irish judge to the Unified Patent Court creates the opportunity for the designation of a division of the Irish High Court as a “Technology Court”, similar to the existing Commercial and Competition Courts, which will offer fast-track management of proceedings concerned with technology with, critically, consistency and use of gained experience in the disposal of cases.<sup>11</sup>

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<sup>11</sup> Under the former patent legislation in place until 1992 it was provided that there was to be a patent judge (who was Mr Justice Declan Costello for a lengthy period) who would hear patent litigation, thus recognising the importance of consistency and gained experience. It should be stressed that the designated Judge of the Technology Court, just as with the existing Competition Court, would of

30. Indeed, it was the experience of parties in a recent extremely complex patent action in Ireland (with world-wide effects), heard before the Commercial Court, that the ability and competence of the judge hearing the matter was exceptional, that the case management of the Commercial Court lent itself to the speedy disposal of the case, and that the case was disposed of at less cost than incurred in parallel proceedings litigated in the United Kingdom.
31. The UK Government has actively facilitated the establishment of the UK as a centre for legal services in the field of technology, which has benefited litigants, business and the UK Exchequer. This is reflected in the establishment of a plethora of court divisions such as the Intellectual Property Enterprise Court, the Patents Court and the Technology and Construction Law Court.
32. It is important to note that Ireland, in terms of income tax and VAT returns, already gains very significantly from the provision of legal services in the intellectual property field and it has the opportunity to greatly enhance those returns if the provision of those services in the State is fostered, which the Bar Council is of the view can be done at very little cost.

***No Significant Additional Costs Associated with an Irish Division of the Court Identifiable***

33. The Bar Council has been unable to identify any significant costs associated with the decision to establish a Local Division: it is required that there be an Irish judge on the Unified Patent Court in any event, and Ireland is required to make contributions towards the budget for the Unified Patent Court for the first seven years of its establishment.
34. The designation of a judge of the High Court – who should preferably also be the judge appointed to the Irish Local Division of the Unified Patent Court – as the judge of the proposed Technology Court appears highly unlikely to result in any additional costs for the State.<sup>12</sup> The volume of litigation before that court will expand as Ireland develops its position in high technology innovation.

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course sit in the other divisions of the High Court when not dealing with matters before the Technology Court.

<sup>12</sup> Article 35.5 of the Constitution prohibits judges of the High Court from holding any other office or emolument. In the event that this raises a query about the adoption of this approach, it can be addressed as part of the necessary Constitutional amendments to be put to the People to permit ratification of the Unified Patent Court Agreement.

35. Of critical importance is that technology litigation will be case-managed by a judge with gained experience in the field, including experience gained as a judge of the Patent Court, making clear that Ireland is serious in making the claim that it is a **true** centre for research and development.

***Risks and Costs Associated with Not Establishing an Irish Division of the Unified Patent Court***

36. We emphasise the opportunity that the appointment of an Irish judge to the Unified Patent Court and the establishment of an Irish division offers but we must also point out the dangers and risks associated with a decision not to establish an Irish Division of the Unified Patent Court.

37. In the Bar Council's view there are real dangers to Ireland's role as a centre for research and innovation, dangers to access to justice for Irish-based business and significant costs – including a loss of revenue to the State - associated with opting not to have an Irish Unified Patent Court.

*(1) Damage to Ireland's Standing as a Centre for R&D and as a Place to Invest*

38. A decision by the Government that disputes concerning the new Unitary Patents and existing European Patents designating Ireland should be determined in the UK, and therefore inevitably handled utilising UK-based legal services, will be seen as conveying the message that, whilst Ireland claims to have the *technology* skills to be a centre for the carrying out of research and development, it admits that it lacks the essential *legal* skills to ensure the facilitation of innovation and the protection of its fruits.

39. In our view it is essential that the State can say with confidence to its own citizens and businesses, as well as to foreign businesses investing in Ireland, that Ireland is able to provide a high quality of justice in disputes concerned with high technology, in a court in Ireland, and without the need to go elsewhere. Joining a UK Regional Division is likely to be perceived by businesses (especially foreign businesses considering investment in Europe), and portrayed by Ireland's competitors, as an admission that Ireland is unable to do so.

40. One of the key factors in a decision on whether to establish such a local court - a decision which has been the subject of considerable debate in a number of jurisdictions - is the extent to which the country in question seeks to present itself as a centre for the advancement of

research and development. Ireland has, for many years now, properly recognised that its future in the global economy lies in the high-tech, high value-added area of development. It goes without saying that the Minister will be aware of this key approach, both in the context of inward investment and also in the context of how future trends in education will be tailored to fulfil the needs of high technology sectors.

41. A suggestion that the key ingredient in that development – protection of the fruits of innovation by patents - will no longer be the subject of access to an appropriate court in Ireland not only gives the impression that intellectual property is not of real concern to Ireland, but worse, will suggest to investors that Ireland in reality “*does not do patents*”, and that despite the expertise available in Ireland, industry will now have to find a remedy in the United Kingdom. It is highly unlikely that this is the impression that Ireland wishes to put forward, but is an inevitable consequence, even if an inadvertent consequence, of a decision not to establish a Local Division of a Unified Patent Court in Ireland.
42. That decision, if made, will convey the message that Ireland simply does not concern itself with patents, which is a message that contradicts Ireland’s entire policy in seeking to attract investment in high-tech industries. In the Bar Council’s view, the sending of that message will cost jobs in innovative industries.

*(2) Employment & Financial Losses from Handing Over Provision of Legal Services to the UK*

43. If a decision is made not to establish a Local Division, that will undoubtedly impact jobs in the various sectors providing services to those requiring patent advice and legal services in Ireland. It cannot be doubted that if Ireland does not have a Unified Patent Court that will seriously undermine the ability of all service providers to compete for the provision of such services with those located in London. That in turn will not just impact incomes: it will impact existing jobs and the ability to create future jobs in this field.
44. A decision to export our patent litigation, in particular in respect of European patents, to the UK, as well as undermining the claim of the State to be a centre for research and development, also deprives the State of the tax and VAT returns to be earned from the provision of those services in the State, whilst instead conferring the benefit thereof on the UK Exchequer.
45. The reality of the matter is that a decision that entities based in Ireland will have to litigate in the UK in respect of Unitary Patent and European Patent disputes is a decision to opt out of

competing with the UK in respect of the provision of legal services regarding the protection of high technology. As the example of the Netherlands – which has a thriving legal services industry in this field – demonstrates, it is possible for a smaller country to successfully compete with its larger neighbours in this field.

46. A decision not to establish an Irish division would result in the loss of an opportunity to establish a credible Irish technology court and therefore make a credible claim that Ireland offers first class legal services in the field of patent and other intellectual property protection, and so responds adequately to the needs of the various high tech industries that Ireland is seeking to draw to its shores, whether it be medical device and life science industries in Galway, the pharmaceutical industry in Cork and Limerick, or the digital industries in Dublin.
47. It inevitably will result in an irrecoverable loss of existing expertise in the field of patents, both amongst Irish legal service providers and the judiciary based in Ireland.
48. The emphasis on the limited number of patent cases before the Irish courts each year in the Department's consultation document is, with respect, therefore to miss the critical point that the provision of legal services in the State in the field of high technology – including the provision of an effective venue for dispute resolution – is an essential part of a credible offering of the State as a centre for research and development, and is essential if the State is to gain financially from the provision of those services in the future. Indeed, it might be noted that the handful of patent cases presently before the Irish courts each year almost certainly generates direct and indirect revenue for the State far in excess of any costs to the State associated with the provision of the judge and other overheads.
49. It is also very important to stress that there is a real potential for more businesses to opt to have their patent disputes heard in Ireland and so for patent litigation before the Irish courts to grow. In the analogous field of trademarks and passing off, there was little litigation in Ireland up until the 1980s when cases heard in Ireland were first reported in a leading UK law report, the Fleet Street Reports. This brought to the attention of foreign companies the value of bringing proceedings in this jurisdiction in these fields, and the capacity of the Irish courts to handle those disputes, and the amount of litigation grew substantially. This occurred because of the increased awareness of the value of intellectual property rights in Ireland, on the part of both foreign undertakings looking at Ireland for investment and home-based enterprises moving into international fields. Recent patent cases successfully disposed of in Ireland have drawn significant attention in the field of intellectual property abroad.

### *(3) Damage to Access to Justice*

50. It would also appear to the Bar Council that a decision not to establish a Local Division of the Court will expose businesses based in Ireland to the very much higher costs associated with the UK market and impede their access to justice. The legal costs associated with patent litigation in the UK are extremely high – as indeed was noted by the Department in its earlier consultation document – and this is in part a reflection of the fact that in the UK market there is a considerable demand for legal services in the patent field with the result that clients are prepared to pay high levels of fees with a view to ensuring the best advice and representation. As matters stand, UK patent practitioners seeks far higher fees than those based in the State, reflecting different market conditions in the UK.
51. To require entitles based in Ireland, either when suing to protect their patent protection rights, or when defending themselves against unmerited claims of patent infringement, to participate in that UK market and meet the fees of that market places a significant and unnecessary burden upon them.
52. It is important to bear in mind that patent litigation in the State is not just about large corporations: in particular there are cases before the Irish courts concerned with European patents involving Irish SMEs as either plaintiffs or defendants, or both. The additional cost and logistical burden of having to conduct that litigation in the UK is very considerable.
53. In short this is a choice. Unlike many legal instruments generated by the EU institutions which impact the sovereignty of Member States, Ireland has a choice which impacts on its sovereignty. It can decide to export the determination of legal disputes involving its citizens and corporations to a Court sitting in London or it can decide to establish a Local Division to ensure that such disputes are resolved in Ireland through a procedure involving an Irish judge. If the choice is made not to establish a Local Division in Ireland then the direct result will be that any patent holder (large or small) will be the subject to the risk of being sued in London and will be obliged to commence any litigation involving the patent in London.

### *(4) Loss of Influence*

54. As noted above, the establishment of a court using civil law procedures to address Irish patent disputes is a dramatic change – especially for US and other businesses in the State which are familiar with common law systems – and to take the further step of sending that

litigation to the UK for resolution lessens Ireland's opportunity to adjust that new process to the needs of Irish-based litigants. Not having an Irish division would also appear to be very likely to reduce Ireland's influence in shaping that system to those needs.

55. The Bar is aware that the European Patent Office (EPO) was recently addressed by a former member of the Supreme Court of Ireland, and the EPO was particularly interested in discussing further the possibility of adapting the case management procedures existing in the Commercial Court in Dublin to hearings of the European Patent Office, and were extremely impressed by the manner in which certain recent patent cases in Ireland had been handled.

#### **D. RECOGNITION BY THE UK GOVERNMENT OF STRENGTH OF CORRESPONDING CONCERNS IN THE UK**

56. Considerations such as those set out above have led the UK Government to give favourable consideration to the establishment of a Scottish Local Division of the court (and possibly other Local Divisions), and repeated assurances have been made in this regard. On 22 May 2013 a House of Lords debate which addressed the new court was told by Viscount Younger that:-

*“the [UK] Government are working very closely with the devolved Administrations to ensure that the needs of users throughout the United Kingdom are considered. Ensuring local access to justice is a key element of the Unified Patent Court and that is why the agreement makes provisions for setting up local divisions of the court...”*

57. On 23 July 2013 Viscount Younger told the House of Lords that:-

*“While it is not possible to say for certain how many local divisions may be hosted in the UK, I can give your noble Lords every assurance that the Government are open to locating local divisions in different parts of the UK. The Government are working closely with the devolved Administrations and the court services in Scotland and Northern Ireland as well as England and Wales to ensure that the needs of businesses throughout the United Kingdom are taken into account.”*

58. The concerns that have led the UK Government to make these statements about Local Divisions within the UK apply all the more strongly in the case of Ireland; and the damage to

Ireland's standing were there to be a number of Local Divisions in the UK and none in Ireland is obvious.

## **E. CONCLUSION**

59. In the Bar Council's view, the establishment of an Irish division of the Unified Patent Court, preferably in tandem with the designation of a division of the High Court as a Technology Court, represents a real opportunity for Ireland to enhance the credibility of its message that it is a centre for research and development, and for the State to gain revenue from the provision of legal services in the State which are essential for the protection of research and development. On the other hand, a decision not to establish an Irish division means that Ireland will be opting out of the gains that it can make from the provision of legal services in this field and instead conferring those returns upon the UK Exchequer, and limiting opportunities for growth and employment in the high technology sector by undermining Ireland's message that it is truly a centre for research and development. It will also impede access to justice for, in particular, Irish SMEs and force them to participate in a UK specialised legal services market where far higher legal costs reflect greater demand.

**END**