



# ICLG

The International Comparative Legal Guide to:

## Patents 2019

**9th Edition**

A practical cross-border insight into patent law

Published by Global Legal Group, in association with CDR, with contributions from:

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## 1 Patent Enforcement

### 1.1 Before what tribunals can a patent be enforced against an infringer? Is there a choice between tribunals and what would influence a claimant's choice?

In Ireland, patents are governed by the Patents Act 1992, as amended (the “Irish Patents Act”). The Patents Rules 1992, as amended, prescribe related procedural rules. Ireland has no specialist patent court but patent proceedings are generally heard in the Commercial List of the Irish High Court. Cases heard in the commercial division are subject to a case management system which ensures that they progress in the most efficient and cost-effective manner possible.

Short-term patents, which last for a maximum period of 10 years, may be enforced in the Circuit Court, Ireland’s second-highest court of first instance.

An application for revocation may be brought before the Controller of Patents, Designs and Trade Marks (the “Controller”) or before the court. If there are any related proceedings pending before the court, a revocation action may only be brought before the Controller with leave of the court.

### 1.2 Can the parties be required to undertake mediation before commencing court proceedings? Is mediation or arbitration a commonly used alternative to court proceedings?

Mediation is a process that is used voluntarily by the parties to a dispute. However, the Mediation Act 2017 (“Mediation Act”) (effective as of 1 January 2018) places an obligation on parties to consider mediation and to confirm to the court that they have considered mediation. The Mediation Act imposes cost sanctions for unreasonably failing to engage in mediation.

Yes, mediation and arbitration are an increasingly common alternative to court proceedings. The Mediation Act is expected to lead to a further increase in the use of mediation as an effective dispute resolution mechanism in this jurisdiction.

### 1.3 Who is permitted to represent parties to a patent dispute in court?

Parties may be represented by qualified solicitors and barristers, with solicitors preparing the case and barristers arguing it before the court at trial. While, in principle, solicitors have a right of audience in all Irish courts, it is usual to instruct a barrister.

### 1.4 What has to be done to commence proceedings, what court fees have to be paid and how long does it generally take for proceedings to reach trial from commencement?

Infringement proceedings may be commenced by a Plenary Summons. Revocation proceedings in the court are commenced by a Petition grounded upon Particulars of Objection setting out the grounds for revocation. At any time before the close of pleadings, either party can apply to have the proceedings transferred into the Commercial List. There is a fee of €5,000 to have the case entered into the Commercial List. There are no other significant court fees related to commencing proceedings. Nominal stamp duty is payable when issuing proceedings and filing affidavits.

The Commercial Court will actively case-manage the proceedings and issue directions for exchange of pleadings, discovery, witness statements, legal submissions and any motions required along the way. It is common practice for the parties to agree directions for the exchange of pleadings in advance.

The procedural stages from filing proceedings to trial are as follows:

- Issue of Plenary Summons (infringement) or Petition (revocation).
- Entry of Appearance.
- Delivery of Statement of Claim together with Particulars of Infringement (or Particulars of Objections).
- Delivery of Defence and Counterclaim (if any).
- Reply and Defence to Counterclaim (if any).
- Discovery.
- Exchange of Witness Statements and Legal Submissions.
- Trial.

During the course of the exchange of these pleadings, the parties have the opportunity to raise interim particulars (i.e. targeted questions) to elicit information from the other party to assist with the preparation of their case. A Notice for Particulars will usually be raised following delivery of the Statement of Claim and the Particulars of Infringement or Particulars of Objection.

There is no set time limit within which a case has to reach trial before the court. The time taken will depend on the complexity of the case and whether there are pre-trial disputes in relation to discovery. Patent actions in the Commercial List generally reach trial within 12–18 months from commencement. Parties have an automatic right of appeal and currently parties can expect to wait up to 12–18 months for an appeal hearing before the Court of Appeal. This timeframe can be shortened where the appeal is considered urgent or if it involves a very net point of law.

### 1.5 Can a party be compelled to disclose relevant documents or materials to its adversary either before or after commencing proceedings, and if so, how?

Yes. Discovery generally arises once the exchange of pleadings between the parties has closed. Discovery may be carried out voluntarily by agreement between the parties or, if the parties fail to agree (which is more typical), by order of the court following an application by one or both parties. Depending on the volume of discovery sought and ordered to be made, this process can typically take two to four months to complete.

Each party issues a written request for voluntary discovery from the other party of specific categories of documents now or previously in its possession, power or procurement, relevant to the dispute. This request must comply with the following requirements:

- Parties must stipulate the exact categories of documents that they require.
- Requests must be confined to documents that are material to the issues in dispute and necessary for the fair disposal of the proceedings or for saving costs.
- A reasonable amount of time must be provided for discovery to be made.

In addition, experiments can be ordered by the court, on application by either party.

### 1.6 What are the steps each party must take pre-trial? Is any technical evidence produced, and if so, how?

Each party must set out its case in the exchange of pleadings referred to in question 1.4 above, witness statements (including experts) and written legal submissions.

In an infringement action, the Statement of Claim sets out the particulars of the wrong alleged against the defendant, and is delivered with the Particulars of Infringement. These particulars outline which of the patent claims are alleged to be infringed.

If the defendant is disputing the validity of the patent in suit, it delivers its Defence together with Particulars of Objection. The Particulars of Objection state every ground on which the validity of the patent is disputed.

All technical evidence and related expert witness statements are produced by the parties in advance of the trial, usually at an agreed time. Opposing experts are often directed by the court to meet in advance of the trial in order to narrow down the issues in dispute as much as possible.

### 1.7 How are arguments and evidence presented at the trial? Can a party change its pleaded arguments before and/or at trial?

Expert witnesses prepare and deliver expert reports in advance of any trial. In patent cases, it is frequently agreed that the witness statements shall be taken as evidence in chief (i.e. they are taken as read into the record). The experts can then provide oral testimony at the trial and are cross-examined as to their evidence in chief.

Written legal submissions are exchanged in advance of trial, and oral legal submissions are made by both parties at the opening and closing of the trial.

An amendment of pleadings may require the permission of the court, which will generally be allowed provided irreparable prejudice is not suffered by the other party.

### 1.8 How long does the trial generally last and how long is it before a judgment is made available?

Patent trials involving infringement and/or validity can take anywhere from three to six weeks, depending on the technical complexity of the case and the number of witnesses involved. Judgment is usually reserved following the end of the trial and can be expected approximately one to three months later.

### 1.9 Are judgments made available to the public? If not as a matter of course, can third parties request copies of the judgment?

Yes, judgments are published and available on the Courts Service website – [www.courts.ie](http://www.courts.ie) – and in the Irish Reports.

### 1.10 Are courts obliged to follow precedents from previous similar cases as a matter of binding or persuasive authority? Are decisions of any other jurisdictions of persuasive authority?

As a common-law jurisdiction, the doctrine of precedent applies in Ireland. There are two concepts under Irish law which are relevant to assessing the weight which an Irish court will give to related decisions from other jurisdictions. The Irish High Court has previously distinguished between: (i) a case in a foreign jurisdiction where the same legal principles arose, where the foreign judgment would have the status of persuasive authority; and (ii) a case where foreign litigation touches upon the same actual matters, rather than the same legal principles. As regards the latter concept, the principle of the comity of courts requires that the courts in Ireland should not lightly depart from a decision on the same issue made by a court of competent jurisdiction in another country which had to deal with that issue as part of litigation.

In the absence of any precedent on a particular issue, Irish courts will often look to the case law of other, particularly common-law, jurisdictions for guidance. Historically, Irish courts have often demonstrated a preference to follow the decisions of the English courts and such decisions are of persuasive authority in Ireland.

### 1.11 Are there specialist judges or hearing officers, and if so, do they have a technical background?

There are no specialist patent judges in Ireland, but the Commercial Court judges will have patent trial experience. The Irish Patents Acts provide that the court may request the assistance of a specially qualified assessor where necessary. The court must request such assistance if the parties request it to.

### 1.12 What interest must a party have to bring (i) infringement, (ii) revocation, and (iii) declaratory proceedings?

- (i) A patent proprietor or exclusive licensee may initiate an infringement action. Where an exclusive licensee brings the action, the proprietor must be named as a defendant to the proceedings, or else joined as a co-plaintiff so that they have sufficient notice of the action. Similarly, where there is more than one proprietor of a patent, each proprietor has standing to bring an action and any remaining co-proprietors should be named as co-defendants to the proceedings.
- (ii) Any person may initiate revocation proceedings before the court or the Controller.

- (iii) Any person may apply for a declaration that he has not acted in a manner that infringes a patent, provided that he has first written to the proprietor (or licensee) for written acknowledgment that he is not infringing and has been refused such acknowledgment. For declaratory relief in “groundless threats” proceedings, the plaintiff must be a person aggrieved by such threats.

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**1.13 If declarations are available, can they address (i) non-infringement, and/or (ii) claim coverage over a technical standard or hypothetical activity?**

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Such declarations can address non-infringement and may, if the court deems appropriate, address claim coverage in respect of a technical standard and/or hypothetical activity.

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**1.14 Can a party be liable for infringement as a secondary (as opposed to primary) infringer? Can a party infringe by supplying part of, but not all of, the infringing product or process?**

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Yes. A patent proprietor has the right to prevent indirect use of an invention (Section 41 of the Irish Patents Act). Indirect use of an invention occurs where one party supplies another with means for putting a patent proprietor invention into effect without the patentee’s consent. The supplying party must know (or should know) that those means are suitable and intended for putting the invention into effect.

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**1.15 Can a party be liable for infringement of a process patent by importing the product when the process is carried on outside the jurisdiction?**

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Yes. Section 40(c) of the Irish Patents Act confers on the patent proprietor the right to prevent third parties from importing a product obtained directly by a process which is the subject-matter of a patent in Ireland.

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**1.16 Does the scope of protection of a patent claim extend to non-literal equivalents?**

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The scope of protection of the patent is determined by the claims. Patents are interpreted purposively in Ireland, with the claims of the patent being interpreted by the “skilled addressee”, using the description and drawings as an aid if necessary.

The Protocol on the Interpretation of Article 69 of the European Patent Convention applies to the interpretation of claims in Ireland. The Protocol requires that, in determining the scope of a claim, a balance should be found which combines a fair protection for the patent proprietor with a reasonable degree of legal certainty for third parties as to what is covered by the claims.

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**1.17 Can a defence of patent invalidity be raised, and if so, how? Are there restrictions on such a defence e.g. where there is a pending opposition? Are the issues of validity and infringement heard in the same proceedings or are they bifurcated?**

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Yes, invalidity may be raised as a defence to infringement proceedings in the following circumstances: (i) by way of defence to infringement proceedings; (ii) by way of defence to a “groundless threats” action; and (iii) as a stand-alone court application for revocation of the patent.

In addition to court proceedings, it is possible to bring stand-alone proceedings to invalidate a patent before the Controller as long as no court proceedings are underway and the Controller does not otherwise consider that the matter is more appropriate to be determined by the court.

The issues of infringement and validity are usually dealt with simultaneously at the same trial: any defence to a claim for infringement on grounds that the patent is invalid would generally be coupled with a counterclaim by the defendant for invalidity of the patent.

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**1.18 Other than lack of novelty and inventive step, what are the grounds for invalidity of a patent?**

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A patent may be revoked on the grounds that:

- The subject-matter of the patent is not patentable under the Irish Patents Act.
- The specification of the patent does not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.
- The matter disclosed in the specification of the patent extends beyond that disclosed in the application as filed.
- The protection conferred by the patent has been extended by an amendment which should not have been allowed.
- The registered proprietor of the patent is not entitled to it (by reason of fact that he is, for example, neither the inventor nor his employer).

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**1.19 Are infringement proceedings stayed pending resolution of validity in another court or the Patent Office?**

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Irish infringement proceedings are susceptible to being stayed, particularly when opposition proceedings are pending before the European Patent Office (“EPO”), but this has to be on application to the court arguing the merits of the stay. There is no automatic right to have proceedings stayed by virtue of the existence of a validity challenge to a patent in a foreign court. This is because a finding of invalidity of a corresponding patent by a foreign national court has no legal effect on the validity of an Irish patent under Irish law. However, the Irish court may decide to stay the proceedings upon request by the parties if it is practical to do so in the circumstances.

Leave of the High Court is required to take revocation proceedings to the Controller, if court proceedings are pending in relation to the patent. Conversely, infringement proceedings may be stayed by the court where the Controller’s decision in respect of a patent’s validity is pending.

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**1.20 What other grounds of defence can be raised in addition to non-infringement or invalidity?**

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Consent, whether express or implied, is a defence to patent infringement. Section 42 of the Irish Patents Act provides for a defence in circumstances where the effect of the patent relates to:

- Acts done privately for non-commercial purposes.
- Acts done for experimental purposes.
- The preparation for individual cases in a pharmacy of a medicine in accordance with a medical prescription.
- The use of the invention on board foreign-registered vessels or aircraft.
- Acts done with a view to satisfying marketing authorisation requirements for medicinal or veterinary products.



### 1.21 Are (i) preliminary, and (ii) final injunctions available, and if so, on what basis in each case? Is there a requirement for a bond?

Preliminary and final injunctions are available from the Irish courts. An interim injunction can be granted *ex parte* but they are rare in a patent infringement case in Ireland. The grant of a preliminary injunction is an equitable remedy under Irish law and therefore it is ultimately at the court's discretion to grant it or not.

Preliminary injunctions are typically granted after a hearing with all parties present and, while temporary, will in most cases last until trial. The probability of obtaining a preliminary injunction in the context of a pharmaceutical patent is higher where the infringing drug is not yet being marketed to the public or has only just launched.

The Irish courts will grant a preliminary injunction where the party seeking the injunction establishes that:

- There is a serious issue to be tried.
- Damages are not an adequate remedy.
- The "balance of convenience" favours an injunction.

The Irish courts will grant a final injunction in circumstances where the plaintiff is successful at the trial of action, where there is an act to be restrained on an ongoing basis, and where damages alone are not an adequate remedy.

There is no requirement to provide a bond. Instead, the plaintiff must provide an undertaking as to damages to the court to compensate the defendant in the event that the preliminary injunction is later held to have been wrongly granted.

### 1.22 On what basis are damages or an account of profits assessed? Are punitive damages available?

A successful plaintiff in Irish patent proceedings may seek damages, or as an alternative, an account of the defendant's profits (but not both). An account of profits is based on the principle of restitution (or unjust enrichment). The focus is therefore on the gain made by the infringing party. In assessing the appropriate damages to be awarded, an Irish court will seek to place the patent owner in the same financial position as he would have been in had the infringement (direct or indirect) not taken place.

Punitive damages are typically not awarded in IP infringement cases in Ireland.

### 1.23 How are orders of the court enforced (whether they be for an injunction, an award of damages or for any other relief)?

A party must comply with any judgment or order, under which it is directed to pay money, to refrain from doing something or to deliver any personal or real property to another. Where a party does not comply with such an order, a court may make orders for sequestration, attachment and committal. Where an order against a company has been wilfully disobeyed, attachment against the directors/officers of the company and/or sequestration against the property of the directors/officers may be considered.

### 1.24 What other form of relief can be obtained for patent infringement? Would the tribunal consider granting cross-border relief?

In addition to injunctions or damages (or an account of profits) the following reliefs may be sought:

- An order requiring the defendant to deliver up or destroy any infringing product.
- An order requiring that information regarding the origin and distribution networks of infringing goods be disclosed.
- An order requiring the dissemination and publication of the judgment at the defendant's expense.
- Costs.

There are no guiding Irish decisions from the Irish courts in relation to cross-border relief.

### 1.25 How common is settlement of infringement proceedings prior to trial?

Settlement of infringement proceedings prior to trial is reasonably common.

### 1.26 After what period is a claim for patent infringement time-barred?

A claim for patent infringement is time-barred six years from the date of the first infringing act.

### 1.27 Is there a right of appeal from a first instance judgment, and if so, is it a right to contest all aspects of the judgment?

There is an automatic right to appeal in Ireland. A decision of the High Court may be appealed to the Court of Appeal with a further right to appeal to the Supreme Court. As an appeal is a review of the judgment from the court of first instance, no new evidence may be adduced save for in exceptional circumstances. It is open to the parties to seek a stay or enforcement of any High Court order pending an appeal to the Court of Appeal, depending on the justice to the parties of granting a stay or not.

### 1.28 What are the typical costs of proceedings to first instance judgment on (i) infringement, and (ii) validity? How much of such costs are recoverable from the losing party?

The cost of proceedings will depend on the complexity of the matter, the length of the trial and amount of pre-trial applications involved. Proceedings for infringement and invalidity are usually dealt with concurrently by the Irish courts.

### 1.29 For jurisdictions within the European Union: What steps are being taken in your jurisdiction towards ratifying the Agreement on a Unified Patent Court, implementing the Unitary Patent Regulation (EU Regulation No. 1257/2012) and preparing for the unitary patent package? Will your country host a local division of the UPC, or participate in a regional division? For jurisdictions outside of the European Union: Are there any mutual recognition of judgments arrangements relating to patents, whether formal or informal, that apply in your jurisdiction?

In Ireland, ratification of the UPC Agreement will require a referendum to amend the Constitution. The Irish Government has indicated its intention to establish a local division of the UPC. No date has currently been set for the referendum.

## 2 Patent Amendment

### 2.1 Can a patent be amended *ex parte* after grant, and if so, how?

Yes. An application to amend after grant can be made to the Controller and will be advertised for the purposes of facilitating any third-party objection within a prescribed timeframe. Such an application cannot be made where proceedings concerning the validity of the patent are before the courts or the Controller (section 38(1) of the Irish Patents Act).

### 2.2 Can a patent be amended in *inter partes* revocation/invalidity proceedings?

Yes. The court (or the Controller) may permit the amendment of a patent as part of invalidity proceedings subject to such terms as to advertising the proposed amendment and as to costs, expenses or otherwise as the court or the Controller thinks fit. Irish courts have also held that the application for amendment must be made before the trial of the invalidity action so as to be heard at the same time and therefore cannot be taken post trial with the benefit of hindsight (Section 38(2) of the Irish Patents Act).

### 2.3 Are there any constraints upon the amendments that may be made?

Yes. Section 23(3) of the Irish Patents Act provides that amendments that extend the subject-matter disclosed in the application as filed or that extend the protection conferred by the patent are invalid.

## 3 Licensing

### 3.1 Are there any laws which limit the terms upon which parties may agree a patent licence?

Patent licences are subject to provisions of competition law (Irish and EU). There are also statutory restrictions on patent licences containing conditions that directly or indirectly would prevent or restrict a party using a third party's product or process and/or that would require a party to acquire from another party a product not subject to the patent, with limited exceptions. (Section 83 of the Irish Patents Act.)

### 3.2 Can a patent be the subject of a compulsory licence, and if so, how are the terms settled and how common is this type of licence?

Yes, the Irish Patents Act provides that the Controller may order the grant of a compulsory licence, provided that the patent has been in existence for three years, on the grounds that:

- A demand in the State for the subject-matter of the patent is not being met or is not being met on reasonable terms.
- A demand in the State for a product which is protected by the patent is being met by importation other than from a member of the WTO.
- The establishment or development of commercial or industrial activities in the State is unfairly prejudiced.

- A patent owner is unable to exploit his patent without infringing his rights deriving from a first patent (but only to the extent necessary for such exploitation and provided that the invention involves an important technical advance of considerable economic significance in relation to the invention claimed in the first patent).

Such applications are made to the Controller and settled based on the terms of the application or at the Controller's discretion, subject to certain statutory requirements. Compulsory licensing of patents is also available in Ireland where such licences relate to the manufacture of pharmaceutical products for export to countries with public health problems, and applications are also made to the Controller in that regard.

## 4 Patent Term Extension

### 4.1 Can the term of a patent be extended, and if so, (i) on what grounds, and (ii) for how long?

It is not possible to extend a standard 20-year patent save in accordance with EU Regulations concerning Supplementary Protection Certificates for medicinal and plant protection products. The criteria for obtaining the relevant extension are set out in those Regulations. The Regulations also govern the calculation of the extended period which is limited in any event to no longer than five years following expiry of the patent or 15 years from the date of authorisation for the product, whichever is the earlier.

## 5 Patent Prosecution and Opposition

### 5.1 Are all types of subject matter patentable, and if not, what types are excluded?

The Irish Patents Act expressly provides that the following subject-matter/activities are not patentable "as such":

- Discovery, a scientific theory or a mathematical method.
- An aesthetic creation.
- A scheme, rule or method for performing a mental act, playing a game or doing business, or a computer program.
- The presentation of information.

In addition, the following subject-matter or activities are not patentable in any circumstances:

- An invention, the commercial exploitation of which would be contrary to public order or morality (in this regard, the mere fact that such exploitation is contrary to law does not of itself render it contrary to public order or morality).
- A plant or animal variety or an essentially biological process for the production of plants or animals other than a micro-biological process or the products thereof.
- A method for treatment of the human or animal body by surgery or therapy and a diagnostic method practised on the human or animal body.

### 5.2 Is there a duty to the Patent Office to disclose prejudicial prior disclosures or documents? If so, what are the consequences of failure to comply with the duty?

No, there is no such obligation.

### 5.3 May the grant of a patent by the Patent Office be opposed by a third party, and if so, when can this be done?

No. Revocation proceedings will be necessary to challenge an Irish patent. A European patent designating Ireland can be opposed at the EPO within the prescribed process and timeframe there.

### 5.4 Is there a right of appeal from a decision of the Patent Office, and if so, to whom?

Yes, within a three-month timeframe. Such an appeal is heard before the High Court (with an application possible to the Commercial List of the High Court) and involves a full rehearing. A further appeal can be made from the High Court to the Court of Appeal on a question of law only.

### 5.5 How are disputes over entitlement to priority and ownership of the invention resolved?

Disputes are typically resolved in the High Court. A party may apply, within two years of a patent being granted, for a determination as to entitlement to ownership of the patent. Disputes as to entitlement to priority generally arise in the context of revocation proceedings.

### 5.6 Is there a “grace period” in your jurisdiction, and if so, how long is it?

Yes, six months.

### 5.7 What is the term of a patent?

A patent lasts for 20 years from the filing/priority date. Provision is also made in Ireland for a short-term (10-year) patent which is subject to less stringent patentability criteria, i.e. it is clearly not lacking an inventive step.

## 6 Border Control Measures

### 6.1 Is there any mechanism for seizing or preventing the importation of infringing products, and if so, how quickly are such measures resolved?

Yes. Ireland has given full effect to Regulation (EU) No. 608/2013 of the European Parliament and Council allowing customs authorities to deny entry and destroy counterfeit and pirated goods in certain circumstances.

## 7 Antitrust Law and Inequitable Conduct

### 7.1 Can antitrust law be deployed to prevent relief for patent infringement being granted?

The Irish courts have not used competition law as a basis to refuse relief for patent infringement. However, Irish patent law is subject to EU and national competition law, so it is possible that this could be used as a basis in future cases.

### 7.2 What limitations are put on patent licensing due to antitrust law?

Please refer to questions 3.1 and 7.1 above.

## 8 Current Developments

### 8.1 What have been the significant developments in relation to patents in the last year?

A Constitutional Referendum allowing for the adoption of the Unified Patent Court is expected to be held in 2018.

### 8.2 Are there any significant developments expected in the next year?

It is possible that the Unified Patent Court might be adopted, subject to international developments on the issue.

### 8.3 Are there any general practice or enforcement trends that have become apparent in your jurisdiction over the last year or so?

Recent judgments from the Irish High Court demonstrate the difficulty for a patentee to obtain injunctive relief.

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## A&L Goodbody

We remain the largest IP team in the Irish market, reflecting the volume of transactions and wide range of clients for whom the team provides IP advisory services. We are delighted to have been recognised as "Ireland's Intellectual Property Law Firm of the Year 2018, 2016, 2014 and 2013" by Managing Intellectual Property and feel this endorsement is a reflection of our leading position in the market. The success of this approach is reflected in our ability to win mandates on nearly all of the significant IP cases that come before the Irish courts, and in the scope of our advisory work. We have acted in over 80% of the patent cases litigated in Ireland over the past 10 years, and have been involved in all the cutting-edge technology and ISP litigation to come before the Irish courts.



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