Response to Questionnaire On the patent system in Europe

General remarks

It is appreciated that the European Commission has taken this initiative of gathering views of the patent system in Europe.

Section 1

1.1

We agree that the four points given are basic features of a patent system. However, we would like to add the following views with respect to the specific points:

Regarding the first point, it is natural that substantive rules should be clear so as to provide for predictability with respect to what can be patented and not. But, at the same time, substantive rules must also be flexible enough to allow for a patent system that can cope with new technological fields and the general development of society for the future.

Regarding the second point, cost effectiveness is a major point for the European patent system. If the companies in Europe, and in particular SME’s cannot find it affordable to protect their own home market, they will inevitably end up in a position where non-European competition (Asia and US in particular) may effectively hamper economical growth in Europe.

Regarding the fourth point, abusive use of patents may be clearly defined with respect to public interest issues and proper counter measures legislated to avoid such abuse of rights. As abusive use could for instance preventing products to enter a market where the products have a major interest for the public be considered. It should be remembered that patents by their nature have a monopolistic nature and that the same anti-competitive rules that normally apply for the European Union cannot apply to the same extent.

1.2

There are two other features that we regard as being of significant importance for the patent system.

First, the quality of patents must be high. By quality we mean that the patent office has made an extensive search for prior art and applied a qualified examination with respect to patentability criteria. In particular the criteria of inventive step must be construed with a higher level of quality given its subjective nature. Lack of quality does not only penalize the patent owners (thinking they have a valid patent) but also competitors (hesitating to use known technology due to presence of a patent) and the general public (loosing their trust in the patent system as a means of providing economic gain for Europe).

Secondly, the recent events with respect to the Computer Implemented Inventions (CII) directive, discussions regarding the biotech directive (patents on genes) and the discussions regarding downloading (file sharing) and copyright shows that there is a growing public interest about intellectual property (IP). It is therefore of utmost importance that proper and true information is spread among the public and politicians with little or no
knowledge of IP so as to ensure a constructive and sensible discussion environment for these issues instead of allowing propagandistic methods to take precedence.

With respect to the patent system it should be remembered that it is made for commercial actors in the marketplace and is not directed towards (or against) individuals. Any non-commercial use related to patented products or methods is allowed.

1.3

Clear and detailed information about the purposes of the patent system as well as its impact on the market as a whole and for individuals should be distributed. This also includes putting the patent system in Europe in perspective to the economy world wide.

Section 2

Although the common political approach did reach an important milestone, it must be stressed that it is still insufficient to provide a basis for a proper community patent.

The conflicting problem of a single patent for EU and the diversity of languages within EU must be solved in an appropriate manner for the patent system. An appropriate solution was found for the community trade mark (four official languages), but a similar solution is not foreseeable for the patent system due to the larger amount of written documentation (in complete application as well as claims). Having translations into all EU languages of the claims only would still go against the very basis of the need for a community patent.

The existing EPC system provides for a way of cutting costs in obtaining national patents throughout Europe. Thus, the EPC-way is cheaper than supplying national patent applications (at least if more than 3-4 national patents are sought). The basis for the EPC, however, is that in the end the regional European Patent will be become a number of national rights. This is true even after EPC 2000 will enter into force in 2007.

For SME’s and other entities having their market in a limited part of the EU, national patents (either sought nationally or via EPO) have historically been a balance of present and future market situation. An SME that intends to expand into new markets within EU, must have ensured their patent rights at the time of applying for the patent. For many SME’s this leads to an unsatisfactory situation since they cannot afford to protect too many local (national) markets for the future with patents. The downside of course being that others may eventually compete on those additional local markets by using the invention itself.

A community patent - to be attractive to SME’s and even smaller entities (as well as private individuals hoping for license incomes on their inventions) - must therefore be comparable with other major markets such as Japan and USA (and in a longer run China) with respect to costs. A comparison with a number of national patents (e.g. 5 designations in the EPO) is not sufficient as that cost would quite probably produce an increase in patent application investments for many SME’s. A strong community patent would give SME’s better possibilities to expand the market step by step and increase growth possibilities.

A community patent that is too expensive for SME’s will ultimately work against economy growth in Europe.
Section 3

3.1

The advantages of a pan-European litigation system is that a higher level of harmonization in view of determination of damages and determination of infringement and validity of patents than the present national litigation system. There should also be great cost savings in that all issues can be solved in one litigation instead of a plurality of litigations. Abusive tactics such as torpedoes can also be avoided.

The disadvantage could be language problems, in particular for SME's in small countries and a drain in local IP-knowledgeable advisors.

3.2

The ideal patent litigation scheme should be transparent, cost efficient, predictable and provide clear judgments.

Whether this is possible given three co-existing patent systems is a difficult question.

Section 4

4.1

We are not aware of any clear distinctive differences in application in practice between member states, at least not to an extent that bars free movement or distorts competition.

Section 5

5.1

On the scale of 1 to 10, this would have to be a 7.

5.2

On the scale of 1 to 10, this would have to be a 10.

5.3

On the scale of 1 to 10, this would have to be a 7.

5.4

N/A