Questionnaire

On the patent system in Europe
INTRODUCTION

The field of intellectual property rights has been identified as one of the seven cross-sectoral initiatives for the Union's new industrial policy as set out in the Commission Communication launched on 5 October 2005. Stimulating growth and innovation means improving the framework conditions for industry, which include an effective IPR system.

In 1997, the Commission launched the idea of a Community Patent in its Green Paper on promoting innovation. This was taken up by Heads of State and Government in the conclusions of the Lisbon European Council of March 2000, who called for a Community patent to be available by the end of 2001. The Community Patent proposal, establishing a unitary system of patent protection for the single market, has formally been on the table of the Council since 2000 but overall agreement is yet to be achieved. The Commission remains convinced that an affordable Community Patent would offer the greatest advantages for business: we owe it to industry, investors and researchers to have an effective patent regime in the EU. Commissioner McCreevy has stated his intention to make one final effort to have the proposal adopted during his mandate. Until the time and conditions are ripe for that effort, the interim period should be used to seek views of stakeholders on an effective IPR system in the EU.

Views are therefore sought on the patent system in Europe, and what changes if any are needed to improve innovation and competitiveness, growth and employment in the knowledge-based economy.

Please note that this consultation focuses on the overall legal framework. Accompanying measures, such as information, awareness raising or support training, are outside the scope of consultation.

The document that follows contains a number of questions: In answering them we would invite you to be as detailed as you can. Supporting evidence and statistics are also welcome. On the basis of the feedback the Commission intends to organise a hearing in Brussels in early summer 2006.

This consultation is open to all, and will be closed on 31 March 2006.

The Commission services will publish a report on the outcome of this consultation. It will be available on the Internal Market and Services Directorate's General website.

Please either email us at: Markt-D2-patentstrategy@cec.eu.int Or send your response by post to:

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**PRIVACY STATEMENT**

Please be sure to **indicate** if you **do not consent** to the **publication** of your personal data or data relating to your organisation with the publication of your response.

The contact data provided by the stakeholder make it possible to contact the stakeholder to request a clarification if necessary on the information supplied.

By responding to this consultation you automatically give permission to the Commission to publish your contribution unless your opposition to publish your contribution is explicitly stated in your reply. The Commission is committed to user privacy and details on the personal data protection policy can be accessed at:

[http://europa.eu.int/geninfo/legal notic...personaldata](http://europa.eu.int/geninfo/legal notic...personaldata)

For further information please contact Ms Grazyna PIESIEWICZ at grazyna.piesiewicz@cec.eu.int or at +32.2.298.01.24.
Section 1 - Basic principles and features of the patent system

The idea behind the patent system is that it should be used by businesses and research organisations to support innovation, growth and quality of life for the benefit of all in society. Essentially the temporary rights conferred by a patent allow a company a breathing-space in the market to recoup investment in the research and development which led to the patented invention. It also allows research organisations having no exploitation activities to derive benefits from the results of their R&D activities. But for the patent system to be attractive to its users and for the patent system to retain the support of all sections of society it needs to have the following features:

– clear substantive rules on what can and cannot be covered by patents, balancing the interests of the right holders with the overall objectives of the patent system

– transparent, cost effective and accessible processes for obtaining a patent

– predictable, rapid and inexpensive resolution of disputes between right holders and other parties

– due regard for other public policy interests such as competition (anti-trust), ethics, environment, healthcare, access to information, so as to be effective and credible within society.

1.1 Do you agree that these are the basic features required of the patent system? Agreed

1.2 Are there other features that you consider important? The importance of investigating Prior Art with sufficient expertise and resources. Since the courts are the ultimate test there is a risk that too much benefit of doubt is given to the patent applicant by Patent Offices on the basis that any problems can be settled in court. The problem with that is that litigation is an enormous cost barrier for all but the largest of corporations.

1.3 How can the Community better take into account the broader public interest in developing its policy on patents? The Community needs to be extra vigilant where a patent practice area is widespread: this is to be distinguished from the patent application area: i.e. we all use toothbrushes but a very small number of companies make toothbrushes, whereas masses of people write software and masses use software. There is a public interest here as software practice touches on society in ways that niche manufacturing does not.
Section 2 – The Community patent as a priority for the EU

The Commission's proposals for a Community patent have been on the table since 2000 and reached an important milestone with the adoption of the Council's common political approach in March 2003 [http://register.consilium.eu.int/pdf/en/03/st07/st07159en03.pdf; see also http://europa.eu.int/comm/internal_market/en/indprop/patent/docs/2003-03-patentcosts_en.pdf]. The disagreement over the precise legal effect of translations is one reason why final agreement on the Community patent regulation has not yet been achieved. The Community patent delivers value-added for European industry as part of the Lisbon agenda. It offers a unitary, affordable and competitive patent and greater legal certainty through a unified Community jurisdiction. It also contributes to a stronger EU position in external fora and would provide for Community accession to the European Patent Convention (EPC). Calculations based on the common political approach suggest a Community patent would be available for the whole of the EU at about the same cost as patent protection under the existing European Patent system for only five states.

Question

2.1 By comparison with the common political approach, are there any alternative or additional features that you believe an effective Community patent system should offer? Disagreement over the Computer-Implemented Inventions clauses in the community patent system also led to failure of harmonization. Butler Group recommends decoupling the question of pure software patents and other patents. This will progress the harmonization process in areas where there is broad agreement. Software patents are a special case – to ignore this aspect seriously undermines the effectiveness of the EU economy. The reason that it is a special case is that the practice (i.e. construction of software) and application (use of software) are both mass markets. Therefore legislation on software patents affects almost the whole community: individuals and business. The special case can then be debated and addressed in isolation: with due attention to the areas of concern. The biggest concern is prior art and the stringency of technical innovation tested for by patent awarding bodies. The evidence to date is that lack of expertise, and possibly insufficient resources, have prevented the right decisions being made in the past. The danger is a repeat of these mistakes under any new system. The EU needs to convince the community that it is putting sufficient resources to ensure software experts review software patent applications. It also needs to ensure that patent awarding bodies are never financed on the basis of volume of patents awarded (such as occurs in the US) – as this creates a conflict of interest.
Section 3 – The European Patent System
and in particular the European Patent Litigation Agreement

Since 1999, States party to the European Patent Convention (EPC), including States which are members of the EU, have been working on an agreement on the litigation of European patents (EPLA). The EPLA would be an optional litigation system common to those EPC States that choose to adhere to it.

The EPLA would set up a European Patent Court which would have jurisdiction over the validity and infringements of European patents (including actions for a declaration of noninfringement, actions or counterclaims for revocation, and actions for damages or compensation derived from the provisional protection conferred by a published European patent application). National courts would retain jurisdiction to order provisional and protective measures, and in respect of the provisional seizure of goods as security. For more information see [http://www.european-patent-office.org/epo/epla/pdf/agreement_draft.pdf]

Some of the states party to the EPC have also been tackling the patent cost issues through the London Protocol which would simplify the existing language requirements for participating states. It is an important project that would render the European patent more attractive.

The European Community is not a party to the European Patent Convention. However there is Community law which covers some of the same areas as the draft Litigation Agreement, particularly the "Brussels" Regulation on Recognition and Enforcement of Judgments (Council Regulation no 44/2001) and the Directive on enforcement of intellectual property rights through civil procedures (Directive 2004/48/EC). [http://europa.eu.int/eurlex/pri/en/oj/dat/2004/l195/l19520040602en00160025.pdf] It appears that there are three issues to be addressed before EU Member States may become party to the draft Litigation Agreement:

(2) the relationship with the EC Court of Justice must be clarified

(1) the text of the Agreement has to be brought into line with the Community legislation in this field

(3) the question of the grant of a negotiating mandate to the Commission by the Council of the EU in order to take part in negotiations on the Agreement, with a view to its possible conclusion by the Community and its Member States, needs to be addressed.

Questions

3.1 What advantages and disadvantages do you think that pan-European litigation arrangements as set out in the draft EPLA would have for those who use and are affected by patents? Overriding considerations should be: simplification of process pan-EU, legal validity of patents pan-EU, lowering of costs for patent applicants pan-EU, and increasing stringency of patent application review in respect of technical innovation.

3.2 Given the possible coexistence of three patent systems in Europe (the national, the Community and the European patent), what in your view would be the ideal patent litigation scheme in Europe? There needs to be one system.
Section 4 – Approximation and mutual recognition of national patents

The proposed regulation on the Community patent is based on Article 308 of the EC Treaty, which requires consultation of the European Parliament and unanimity in the Council. It has been suggested that the substantive patent system might be improved through an approximation (harmonisation) instrument based on Article 95, which involves the Council and the European Parliament in the co-decision procedure with the Council acting by qualified majority. One or more of the following approaches, some of them suggested by members of the European Parliament, might be considered:

1. Bringing the main patentability criteria of the European Patent Convention into Community law so that national courts can refer questions of interpretation to the European Court of Justice. This could include the general criteria of novelty, inventive step and industrial applicability, together with exceptions for particular subject matter and specific sectoral rules where these add value.

2. More limited harmonisation picking up issues which are not specifically covered by the European Patent Convention.

3. Mutual recognition by patent offices of patents granted by another EU Member State, possibly linked to an agreed quality standards framework, or "validation" by the European Patent Office, and provided the patent document is available in the original language and another language commonly used in business.

To make the case for approximation and use of Article 95, there needs to be evidence of an economic impact arising from differences in national laws or practice, which lead to barriers in the free movement of goods or services between states or distortions of competition.

Questions

4.1 What aspects of patent law do you feel give rise to barriers to free movement or distortion of competition because of differences in law or its application in practice between Member States? Pure software patents are responsible for disharmony across the EU – this area needs to be addressed.

4.2 To what extent is your business affected by such differences? Butler Group is an IT analyst company that provides advice to its subscribers on a range of business issues concerned with Information Technology (excluding legal issues).

4.3 What are your views on the value-added and feasibility of the different options (1) – (3) outlined above? Option (1) is preferable as it provides a stronger framework for resolving disputes.

4.4 Are there any alternative proposals that the Commission might consider? It may make sense to set up a special body to deal with software patents as this requires expertise not available within the existing patent offices (on the evidence of software patents already awarded).
Section 5 – General

We would appreciate your views on the general importance of the patent system to you. On a scale of one to ten (10 is crucial, 1 is negligible):

5.1 How important is the patent system in Europe compared to other areas of legislation affecting your business? 10 – this is in particular reference to software patents and the potential creep of business processes and mathematical algorithms into the patent system. These areas need far more involved debates between legislative bodies and the community at large (public and business).

5.2 Compared to the other areas of intellectual property such as trade marks, designs, plant variety rights, copyright and related rights, how important is the patent system in Europe? 10 - Patents are crucial in some areas of industry, particularly those that require substantial early investments – such investments need protection. Patents are a necessary part of a modern industrial economy and contributory to successful industry.

5.3 How important to you is the patent system in Europe compared to the patent system worldwide? 10 - EU patent law affects the success of business in Europe: it is especially important to get it right and use the implementations in other (non-EU) countries as case studies to see what lessons can be learned. The EU commissioned report on the state of affairs in the USA was a missed opportunity as the report ignored substantial miss-practice and litigation problems in the US system.

Furthermore:

5.4 If you are responding as an SME, how do you make use of patents now and how do you expect to use them in future? What problems have you encountered using the existing patent system? Butler Group is an IT analyst company that provides advice to its subscribers on a range of business issues concerned with Information Technology (excluding legal issues).

5.5 Are there other issues than those in this paper you feel the Commission should address in relation to the patent system? There needs to be a review of pure software patents already granted (estimated at about 30,000) in member states. The validity of these patents needs to be addressed as there are many instances of prior art being ignored. This issue of prior art undermines confidence in the patent system. Unlike niche areas, where any mistakes have a low impact within a particular circle, mistakes with software patents affect the vast majority of people in the community. Software development is an activity practiced by nearly every business and this will grow as more reliance is placed on the Internet and Information Technology. Repercussions of mistakes in software patent awards have a huge impact. As a first step in instilling public and business confidence in the legislative bodies, the EU Commission needs to orchestrate a review of all extent software patents.
(1) If you would like the Commission to be able to contact you to clarify your comments, please enter your contact details.

(a) Are you replying as a citizen / individual or on behalf of an organisation? Replying on behalf of Butler Group.

(b) The name of your organisation/contact person: Butler Group. Michael Azoff.

(c) Your email address: michael.azoff@butlergroup.com

(d) Your postal address: The Firs, Toad Lane, Elston, Newark NG23 5NS, UK

(e) Your organisation’s website (if available): www.butlergroup.com

(2) Please help us understand the range of stakeholders by providing the following information:

(a) In which Member State do you reside / are your activities principally located? UK / EU

(b) Are you involved in cross-border activity? Yes

(c) If you are a company: how many employees do you have? About 500, including parent company Datamonitor.

(d) What is your area of activity? IT industry analysts

(e) Do you own any patents? If yes, how many? Are they national / European patents? No

(f) Do you license your patents? N/A

(g) Are you a patent licensee? N/A

(h) Have you been involved in a patent dispute? N/A

(i) Do you have any other experience with the patent system in Europe? Michael Azoff has personally made a patent application in the UK and also held registered trademarks.
Please either email us at: Markt-D2-patentstrategy@cec.eu.int Or send your response by post to:

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