Thank you very much for initiating this consultation.

As a response to the above identified questionnaire kindly find enclosed the submission of the Finnish Association of Corporate Patent Agents representing the patent active companies in Finland.

We are available for any further clarification.

Looking forward to follow the development of the matter.

Yours sincerely,
Finnish Association for Corporate Patent Agents

Kim Finnilä
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?

The features noted are essential.

1.2 Are there other features that you consider important?

There are three main features that are even more important. They are consistency and predictability of the grant procedure, reliability as well as consistent quality throughout all stages of the prosecution.

This forms the base, on which validity and scope of protection can be judged.

Quality should not suffer e.g. in attempts to meet the so-called Paris criteria, i.e. achieving grant within a specific time.

In certain fields of technology pendency time is not an issue and in other fields a speedy grant procedure is favourable. However, in view of compromise, for reasons of consistency and predictability a given pendency time has advantages, also in view of third party interests.

1.3 How can the Community better take into account the broader public interest in developing its policy on patents?
The Community focus should be on the competition aspects related to the patent system. In some areas of technology patents are used to develop and constitute parts of standards. Presently there is some misuse in this area.

The WTO TRIPs agreement would naturally have to be complied with.
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-patent-costs_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?

The basic idea of uniform jurisprudence is clearly desired.

However, the proposed language requirements are too costly and undermine legal certainty by providing legally binding claims in several languages.

A centrally located first instance court is not sufficient in view of access to justice. The proposed dispute language regime is apt to lead to legal uncertainties in addition to accumulative costs due to interpretations, translations and other complexities as a consequence of different judges', party/representative, and documentation languages.

This would place especially SMEs in jeopardy, due to limited personnel and financial resources of such companies.

The lack of technical competence of the tribunal (only legally qualified judges) gives rise to questions with respect to sufficient expertise for judging patent cases. The capacity of such a tribunal might also not be sufficient, taking into account that the current amount of patent cases is about 1000 cases/year.

The Community patent system is generally said to be more economical than the present European patent system, the EPC, whereby reference is made to validation costs, etc. The expensive part of the European patent system is the litigation arrangement. There are no studies available on the economic impact of the proposed Community jurisdiction and what affordability in this sense could mean.

For many companies, especially SMEs, a Community wide protection is neither necessary nor desirable. Protection is sought in strategically important markets. Translations and annuities of a Community patent would thus only result in an excessive burden.
The common political approach also defines various changes to the European patent procedure and the role of NPOs nationally and in the European patent system that are not up-to-date with the present plans within the European Patent Organisation. Said changes are said to provide a more economic system for the users, but seemingly such promises lack a realistic base.
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 non-infringement, 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/eppla/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 4412001) and the Directive on enforcement of intellectual property rights through civil procedures (Directive 2004/48/EC). [http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/1/195/1_19520040602en00160025.pdf]

It appears that there are three issues to be addressed before EU Member States may become party to the draft Litigation Agreement:

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

   - the EPLA (WPL 10/05) of 07.12.2005 already has been brought into line with Community legislation

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

   - kindly see below

(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.

   - a conflict between EPLA (and its potential scope of all the EPC Contracting States) and the Community court system (covering the Community Member States) is not in line with a development of competitive Europe, particularly innovation in all fields of technology in the whole of Europe. Presently the European Commission is an observer and can thus follow that the EPLA would be compliant with Community legislation.
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?

The EPLA would give a courts system with a national presence of a first instance court and with a central appeal court, which would provide for uniform jurisdiction. In addition an advisory body, the Facultative Advisory Council would be available for opinions based on request by national courts.

The EPLA would thus be a first step towards a harmonized and uniform European patent system by also covering the litigation aspect.

The EPLA contains a disadvantage for countries with an official language other than one of the three official languages of the EPC. This is a disadvantage for both the judges and the parties/representatives who would have to deal with difficult legal-technical issues in another language than their own. The EPC contains some provisions giving help in this matter. This could perhaps be extended to the EPLA as well.

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?

The national patent systems should be kept and the national patents should remain subject to the jurisdiction of national courts.

As the EPLA is an optional agreement, a number of EPC Contracting States will most probably remain outside this agreement, at least initially, if and when the EPLA enters into force.

The national patent laws of the EPC Contracting States has been harmonized with the EPC and these contain the necessary substantive rules in this respect.

In order to provide a competitive Europe (and Community) measures should be taken to achieve a harmonisation also with respect to litigation. The draft statute of the European Patent Court has provisions with regard to different nationalities of judges in the court panels, an arrangement for appointing persons with insufficient experience of patent law as assessors and subsequently to appoint said assessors as judges after they have achieved the necessary competence, as well as a system of rotation of judges.

This naturally would only apply for EPLA Contracting States. Such a system could, however, be encouraged to be extended to all EPC Contracting States in order to enhance harmonised litigation in Europe as a whole.

A corresponding instance to the Facultative Advisory Council (discussed above under point 3.1) instead of being limited only to ruling on points of law, could perhaps be given the instruments to provide preliminary rulings on both fact and law.
A three layer court system does not seem to be a rational approach. The number of qualified persons available and the number of patent cases litigated in Europe would not provide for having a successful and efficient two-layer pan-European court system in addition to the national courts systems already existing.

The London Agreement is a first attempt to simplify the language regime of the present European patent system in the post grant phase. The next step would then be a one language regime, which would seem to have both legal and economic advantages.

It has to be kept in mind that the patent system is two-phase, prosecution up to grant involving a great number of cases, and possible enforcement, involving only a very small number of cases. Achieving a single language regime in the first phase, would consequently also have a considerable economic impact. Clearly, at this point of development, an agreement to this effect would not seem realistic. This is perhaps something to for the future. In the meantime, however, development should be sought step by step.

There should be a way to integrate the Community patent jurisdiction (CFI, ECJ) to the by then existing pan-European court system in the event a Community patent would be arrived at for the whole of Europe.
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?

The various national litigation jurisdictions and thereto related varying judgements and highly varying costs result in some distortion of competition. Of course, only a limited number of issued patents are subject to litigation. To some extent, this might be influenced by risks envisaged to be encountered by possibly varying judgements and high accumulated costs, whereby enforcement is refrained from due to lack of resources.

4.2 To what extent is your business affected by such differences?

This affects the companies employing the patent responsible persons in our membership.

4.3 What are your views on the value-added and feasibility of the different options (1)–(3) outlined above?
Substantive patent law is sufficiently harmonised by the existing harmonisation measures, including the EPC, in Europe. There exists some different interpretations in substantial matters in some countries, but they will most probably be equalized in the near future, as the present system matures and more states accede to the EPC. Any general or sectoral harmonisation efforts by the Community are not seen to be necessary at this moment. Specific sectoral approaches might cause other conflicts.

Due to the variations in NPO practices, i.e. offices carrying out substantive examination to non-examining offices, including offices registering patent applications as patents without any examination, there should absolutely not be any form of mutual recognition of patents in Europe.

Such an approach would also be to the detriment of any common European litigation system.

The EPC exists, it can be improved, improvement is under way, and the present European patent system forms the base for uniform substantive examination resulting in granted patents fulfilling the prevailing patentability criteria.

4.4 Are there any alternative proposals that the Commission might consider?
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?

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?

5.3 How important to you is the patent system in Europe compared to the patent system worldwide?

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?

5.5 Are there other issues than those in this paper you feel the Commission should address in relation to the patent system?

The Commission could seriously endeavour in developing and improving IP education, awareness and the service structure of the NPOs reflected upon with regard to the role of the NPOs.

Raising the general level of IP education (lower and higher level) and understanding, especially patents being an instrument for enhancing and focusing innovation and spreading technical knowledge, and the thereto related patent application processes and competitor monitoring would foster the growth and improve the technological competitiveness of Europe.
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?

An association of patent attorneys in the industry.

(b) The name of your organisation/contact person:

**Kim Finnilä, President**

**Finnish Association for Corporate Patent Agents**

Our association comprises over 200 members representing more or less all patent active companies in Finland.

(c) Your email address:

kim.finnila@awekip.fi

(d) Your postal address:

**Kim Finnilä**

President

**Finnish Association for Corporate Patent Agents**

c/o AWEK Industrial Patents Ltd Oy, P.O. Box 230, FIN-00101 HELSINKI, Finland

(e) Your organisation’s website (if available):

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?

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

(c) If you are a company: how many employees do you have?

(d) What is your area of activity?
(e) Do you own any patents? If yes, how many? Are they national / European patents?

(f) Do you license your patents?

(g) Are you a patent licensee?

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

(i) Do you have any other experience with the patent system in Europe?