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PATSTRAT

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EUROPEAN COMMISSION
Internal Market and Services DG

Knowledge-based Economy
Industrial property

Brussels, 09/01/06

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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:

Mr Erik Nooteboom

Head of Unit

Industrial Property Unit

Internal Market and Services Directorate General

European Commission

1049 Brussels

Belgium

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_notices_en.htm#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?
- 1.2 Are there other features that you consider important?
- 1.3 How can the Community better take into account the broader public interest in developing its policy on patents?

To take into account the broader public interest a patent system must be democratically controllable.

Before patents generate any benefit, they first impose a burden on society by restricting freedom. Freedom is a primordial value of democracy and market economy, which may not be restricted without clear evidence that such a restriction benefits the public.

Therefore the basic features of a patent system should be the interest of the community as a whole and in the long term

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-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?

Don't know

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/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/eur-lex/pri/en/oj/dat/2004/l_195/l_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
- (2) the relationship with the EC Court of Justice must be clarified
- (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?
- 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?

Don't know

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?
- 4.2 To what extent is your business affected by such differences?
- 4.3 What are your views on the value-added and feasibility of the different options (1) – (3) outlined above?
- 4.4 Are there any alternative proposals that the Commission might consider?

Don't know

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

- 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?

8

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

10

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 critical aspect is software patents. As an employee of a SME we rely heavily on software to build our services infrastructure. We develop our software and/or reuse other Open Source projects.

We cannot operate with the uncertainty of a bloated patent system and we have not the resources to protect our software with patents.

The best develop method for us is the Open Source model, for which the major threat by now are 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?

As a citizen

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

Tex.NET TELECOMUNICAZIONI s.r.l. - Niccolo Rigacci

(c) Your email address:

consulten@rigacci.org

(d) Your postal address:

**Via Volta, 54
59100 Prato
Italy**

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

<http://www.rigacci.org/>

(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?

Italy

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

No

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

10

(d) What is your area of activity?

Network services, software

(e) Do you own any patents? If yes, how many? Are they national / European patents?

We don't own patents

(f) Do you license your patents?

(g) Are you a patent licensee?

No

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

No

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

We followed with great concern the Proposal on Software Patents by the Commission and the Council of Ministers approved in may 2004 (that was against what the Parliament voted in june 2003). We got big relief when the Parliamente rejected the directive in july 2005.

Please either email us at:

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Or send your response by post to:

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