The Consultation on Future Patent Policy in Europe
Position Paper WGEPL/0601

version 1.1

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Contents

1 Document Control

1.1 Authorship

This document was written by the FFII Working Group on European Patents and Law. Editors were Benjamin Henrion and Pieter Hintjens.

1.2 Availability

The latest version of this document can be found at: http://consultation.ffii.org/Downloads.

1.3 Copyright

1.4 Accuracy

While the FFII has taken all reasonable steps to ensure the accuracy and neutrality of the contents, this document is provided for information purposes only.

1.5 Feedback

Please send your feedback and questions to consultation@ffii.org.

2 Introduction

2.1 The Community Patent Consultation

Available at launch of consultation procedure on 16 January 2006:

- http://europa.eu.int/comm/internal_market/indprop/docs/patent/consult_en.pdf
- http://europa.eu.int/comm/internal_market/indprop/docs/patent/consult_fr.pdf

Available after 24 January 2006:

- http://europa.eu.int/comm/internal_market/indprop/docs/patent/consult_de.pdf

Available after 3rd March 2006:

- http://europa.eu.int/comm/internal_market/indprop/docs/patent/consult_es.pdf
- http://europa.eu.int/comm/internal_market/indprop/docs/patent/consult_nl.pdf

2.1.1 Key Point-of-view

"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 en effective IPR system in the EU."

2.1.2 Deadline

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.

2.1.3 Questionnaire

As we learned from our supporters the questionaire is too technical and hard to understand for the majority of affected stakeholders. The procedure appears strongly biased in favour of patent holders, and serious flaws with the current system are not addressed at all. We therefore provide a background analysis of the questionaire for you which helps you to understand the consultation document.

It is also common pratice to submit a more general statements or position papers to consultations of the Commission. However, we recommend to keep your response close to answering the original questionaire of the Commission.

2.1.4 Post Your Answer

Send your answers to Markt-D2-patentstrategy@cec.eu.int or by paper mail to:

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Mr Erik Nooteboom
Head of Unit
Industrial Property Unit
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European Commission
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2.2 Validity of The Consultation Procedure

The questionnaire describes the Community Patent as a "priority" for the EU. It discusses a subject that is at the forefront of international debate about how far intellectual property rights are actually needed in order to stimulate science, the arts, and the economy.

However, for such an important proposal as the Community Patent, the questionnaire, and the process behind it, has serious failings that we must highlight.

2.2.1 Inaccessibility to the General Public

The questionnaire, and supporting documentation, are not accessible to a general public, not even to the proported audience of businesses that are affected by patents:

1. The questionnaire was initially only provided in three languages (now five), instead of the official languages of the twenty-five current member states plus Bulgaria and Romania.
2. There is no supporting documentation except the texts of draft treaties and previous resolution, material that is unreadable by the general public.
3. The supporting documentation (the official documents) are not provided in all the official languages of the twenty-five current member states plus Bulgaria and Romania.

This inaccessibility creates real barriers to businesses operating outside the zones of the supported languages and which should be replying to the questionnaire.

We would have liked to see:

1. A translation of the questionnaire into every language of the EU so that all affected parties had a fair chance to respond.
2. Clear explanatory documents, approved by an independent expert committee, on the pros and cons of the current patent system that the Community Patent seeks to redress; on the EPLA (which is undocumented except for the treaty text); and on the 2000 Community Patent proposal.

2.2.2 Opaqueness of the Process

The consultation procedure lacks transparency, and it is unclear why a small-to-medium enterprise should respond, especially given the lack of guarantees that the significant effort required to respond would be worthwhile:

1. There is no explanation of how the collected information will be used and made available to the public. In previous consultation procedures, we have seen large numbers of responses discarded as being "not representative".
2. There is no explanation of the procedure itself.

This opaqueness severely damages the credibility of the consultation procedure, and damages the credibility of any legislation that would be produced as a result of it.

We would have liked to see:

1. A clear statement about the way the collected information will be processed and used, especially with respect to the relative weight given to small, medium, and large businesses that respond.
2. A clear explanation of the consultation procedure, and what steps are taken to ensure that it is representative and fair.

2.2.3 Lack of Due Process

The consultation procedure lacks due process, and show signs of being prepared in order to justify upcoming legislation, rather than being an honest solicitation of public opinion:

1. The timescale (ten weeks) is fairly short.
2. The short timescale is compounded by the inaccessibility of the process. A firm operating outside the UK, France, or Germany, and lacking native and expert skills in the relevant areas, would have to hire translators and lawyers to analyse the questionnaire and the supporting documentation. This is not feasible within such a short timescale.
3. There has been no effort to educate the target audience of the consultation on the substance: no information campaigns wider than a simple press release, no accessible an well documented websites, or supporting materials.

The lack of due process leads to severe doubts as to purpose of the consultation procedure.

We would have liked to see:

1. A campaign to inform the broader public about the current functioning of the European patent system and the reasoning behind the proposal for a Community Patent. This campaign should be run in all 27 states;
2. Public debates organised in at least one, and preferably several of the members states, to actively solicit views and feedback on the proposal;
3. A properly written and translated introduction to the EPLA, so that we do not need to attempt to read the draft treaty, a technical document that is not available in all the languages of the Union.

2.2.4 Biased Point-of-view

The questionnaire exhibits a clear bias in favour of extended patent holder rights:

1. There are many references to the need to make it easier for patent holders to assert their rights, while there is no mention of the need to protect industries from the effects of patent inflation;
2. The criteria of subject matter has been dropped from the list of main patentability criteria (section 4, point 1), which implies that the authors accept EPO TBA case law, and thus accept the validity of software and business process patents;
3. The pertinent issues of software patentability, EPO accountability, and separation of powers in the patent system are completely absent from the questionnaire, though these problems are probably the most significant ones in the patent system, and the ones that any new legislation should address.

The biased point-of-view leads the reader to suspect that the document was largely drafted with EPO assistance, and is not designed to solicit debate on the real issues, but rather get rubber-stamp approval for a directive that would endorse EPO TBA case law, and would worsen, not correct, the current imbalances of power and institutional interest in the patent system.

We would have liked to see:

1. Independent studies to decide on the real problems with the current patent system, before proposing some assumed problems and a set of solutions to these;
2. A much better appreciation of the risks of a bad patent system, and of bad patents, rather than a simplistic recapitulation of the dogma of the need to protect the rights of patent holders, with no questioning of how and why those rights were granted.

2.2.5 Lack of Independent Oversight

The consultation procedure is conducted with no independent oversight:

1. No independent or democratically-elected body is involved in the analysis of the answers to the consultation, nor the drafting of any consequent legislation.
2. There is evidence that special interests were aware of, or even involved in the consultation procedure, long before it became public (from the prepared reactions by several large software firms).

The lack of independent oversight brings the entire consultation procedure into severe disrepute.

We would have liked to see:

1. A committee of independent and representative experts, coming from the legal, and business domain, and whose task it would be to draft the questionnaire, prepare explanatory texts, organise information campaigns and the public debate, collect answers, and assemble these into a set of concrete recommendations;
2. The exclusion of the EPO, professional lobbyists, and politicians from this committee.

2.2.6 Conclusions

The major failings in this procedure mean that civil society must choose to either ignore the procedure, question it, or participate and hope to be taken into account.

The FFII has decided that it will question the validity of the procedure, based on the serious lack of accessibility, which means that a majority of EU businesses are completely excluded from answering.

However, we also recommend participation, for those businesses that are able to do so, since this will demonstrate to what extent businesses in the "wrong countries" are affected.

This document provides analysis, comment, and typical answers that we have helped a number of businesses to develop. You may find this information useful in phrasing your own answers.

3 Background Information

3.1 Hayek on Patents

"The problem of the prevention of monopoly and the prevention of competition is raised much more acutely in certain other fields to which the concept of property has been extended only in recent times. I am thinking here of the extension of the concept of property to such rights and privileges as patents for inventions, copyright, trademarks, and the like. It seems to me beyond doubt that in these fields a slavish application of the concept of property as it has been developed for material things has done a great deal to foster the growth of monopoly and that here drastic reforms may be required if competition is to be made to work.... Patents, in particular, are specially interesting from our point of view because they provide so clear an illustration of how it is necessary in all such instances not to apply a ready-made formula but to go back to the rationale of the market system and to decide for each class what the precise rights are to be which the government ought to protect."

Source - F. A. von Hayek, "'Free' Enterprise and Competitive Order". In Individualism and Economic Order, Chicago: U. of Chicago Press. 1948. 113-114.

3.2 Round 3

In January 2006 Hartmut Pilch answered a question by the press: "Does this restart the debate over CII patents? Why or why not?"

"It restarts the push for software patents, without a debate. But there wasn't much of a debate during the past two pushes either.

"The term "CII" was a propaganda term, designed to avoid a debate. Anyone who uses this term implicitely agrees that computer programs, when described in the language of patent claims, can qualify as "inventions" under Art 52 of the European Patent Convention (EPC) and are therefore patentable subject matter (which said article says they are not).

"In 1999-2000, there was a debate. The Commission and EPO proposed that software and business method patents are needed in Europe, and for that reason the law (European Patent Convention) must be changed. The proponents lost the debate. That was round 1 of the European software patent struggle.

"Then came round 2 with the term "CII" in the title of a directive proposal. Anyone who quoted the title had to agree to the underlying assumption. That way they thought they could win without a debate, but they failed again.

"Now comes round 3. It started in July 2005, when the proponents of software patentability agreed to drop the directive and push for the Community Patent instead. Just as in November 2000, when they agreed to drop the EPC revision plan and push for a wordplay directive instead.

"The Community Patent plan doesn't even mention the subject of software, although, make no mistake about it, software patentability is one of the main drivers of these plans.

"Instead of directly imposing software patentability, the proposal is now to remove the patent system even further from legislative review by any democratically elected parliament. Thus in effect legislative power is handed over to a few top judges and to the circle of administrative officials that is running the European Patent Office and the EU Council's patent policy working party. There are even moves to explicitly make EPO case law binding on the new EU patent institutions. Of course all this goes without mentioning the word "software" or "computer", but the underlying issue is clearly understood.

"The Community Patent has failed for 25 years due to resistance from many quarters within the patent lobby itself. If now suddenly this resistance can be overcome, there isn't much need to explain what is the driving force that is overcoming it."

3.3 The Community Patent

The "European Community" is represented by the Commission, the Parliament, and the Council of Ministers.

The "Community Patent" means that the Community would join the EPC as the 32nd signatory. If the 25 members states want to modify their Community Patent law, it would not be possible without the agreement of other signatories of the EPC and non-members of the Union, namely Monaco, Lichtenstein, Turkey, and Iceland. Possibly, it could also be blocked by other countries signing the EPC in the near future.

When the Commission represents the Community at the EPC and other similar bodies (TRIPS, WPC, WIPO), its mandate is given by the 25 Council members. This mandate is currently not (but probably should be) approved by the EU Parliament.

3.4 EPLA vs. Community Patent

The European Patent Litigation Agreement, in combination with the London protocol, would achieve most of the effect of the Community Patent, but would be passed without any parliamentary involvement.

This difference is important. We have at least three possible routes for a trans-EU patent system:

1. The Community Patent as a Council Framework decision. Such a legislative procedure is currently running, but is deadlocked in the Council over translation disagreements. This procedure does not require involvement of the European Parliament, but requires unanimity in the Council.
2. The Community Patent, in a co-decision procedure, in which Parliament can vote on the directive and ammend it if necessary. In this case, only a qualified majority is required in the Council.
3. EPLA + London Protocol, in an inter-governmental procedure, in which Parliament is excluded from the process.

Largely the three routes arrive at the same end-point, but all but one bypass any chance to exert direct democratic control over the process. It is also unclear - to us, from the EPLA draft treaty text - whether the third route would take EPO TBA case law or the EPC text as its basis.

3.5 The European Patent Office

In 1973, a number of European countries signed the Convention of Munich, also known as the European Patent Convention (EPC) which established the European Patent Office (EPO). This convention cannot be changed without the agreement of all signatories. For example, article 52.2 of the EPC specifically lists computer programs among achievments that are not inventions. In 2000, a diplomatic conference tried and failed to remove this exclusion, lacking unanimous agreement.

The EPC is interpreted by the EPO's Technical Boards of Appeal (TBAs) and its Enlarged Board of Appeal (EBA). These TBAs and the EBA have, over time, adapted their interpretations of the EPC so that computer programs and business methods are in fact patentable. (See http://www.european-patent-office.org/legal/gui_lines/e/c_iv_2_3_6.htm).

This evolution has happened in parallel with case law in the US, where the Supreme Court has ruled that "everything man-made under the sun" can be claimed in a patent.

However, TBA case law is not binding for EPC signatory countries. In most member states, there has not even been any litigation concerning patents whose granting was based on the "further technical effect" doctrine under which software and business method patents are granted by the EPO (and which the Commission wanted to codify in the software patents directive). And in those member states where such patents have been litigated, the outcome almost always disagrees to a more or lesser extent with TBA and EBA case law.

The result is that while software cannot, by law, be patented, the EPO has granted large numbers of software and business process patents (which we often together call "soft patents"), which patent holders then try to validate on country-by-country basis, often with inconsistent results.

3.6 The Cost of Patenting

For firms that seek patents (and broadly, this means either very large firms, or very specialised patent firms), the current situation is a clear barrier to wider application of their patents.

For firms that do not seek patents (and broadly, this is most firms that are of small-to-medium size), the current situation is a clear barrier to open trade within the EU, as products that may be legal in one country are illegal in another.

For economists and analysts, software and business method patents represent an extreme example of the expansion of exclusion rights, i.e. in which the state grants a monopoly in return in the hope for a contribution to a wider good.

3.7 Single Patent Court

A single European Patent Court could reject the abusive teachings of the EPO such as the notion of a "further technical effect" or the circumvention of Art 52(2) EPC by the "as such" provision in Art 52(3). However, the idea to establish a single European patent court is a trap because the patent movement will make sure that only judges will get appointed who intend to 'rubberstamp' EPO case law and thus 'software patents'. As political control of the patent system continues to be weak, the patent movement will further control substantive rules and a political mandate over patent policy will vanish.

'Judicial governance' is no solution, it is the reason for unbalance in the patent system. The software patents problem can only be solved by substantive clarifications as proposed by the FFII. Judicial bodies lack competence to change substantive rules, and fundamental changes by TBA interpretation exceeding their competence have to be reversed by the legislator.

4 The Questionnaire

4.1 Introduction

The following comments and typical answers are more useful if you have a printed copy of the questionnaire to use as a reference. (See http://consultation.ffii.org/Downloads).

The FFII has analysed the consultation procedure and questionnaire, and provides:

1. An in-depth analysis of the problems with the current patent system, since we consider this information to be essential for anyone who wishes to understand and answer the questionnaire usefully.
2. Comments and analysis on each section of the questionnaire (See http://consultation.ffii.org/Downloads).
3. Typical answers that we have helped SMEs to write for the questionnaire. You may use these as the basis for your own answers, but we hope you will express your own opinion (as long as it is factually correct, it will have a bigger impact than a standard answer).
4. You can also find background information in the answers to the Commission questionnaire by Florian Mueller (see http://www.no-lobbyists-as-such.com/PATSTRATpositionpaper.pdf) and his introduction (See http://www.no-lobbyists-as-such.com/PATSTRATquickfacts.pdf).

4.2 Section 1 - Basic Principles and Features

4.2.1 General Comments

The Commission talks about maintaining some kind of balance between the interests of the users of the patent system on one hand, and society on the other hand. The problem with this starting point is that patent law is not about a balance between patent holders and the rest of society when it comes to substantive rules (patent design).

Interests of patent holders only exist once a patent system is put in place. There are no interests prior to the patent system's existence, otherwise "a natural rights" teaching is assumed (where inventors have a natural or inherent right to a monopoly because of the work they did). Such a natural rights theory is not accepted by law scholars nor economists as far as the patent system is concerned (to a certain extent it is in copyright).

This part of the questionnaire is centered around the design of patent law, or substantive rules (why have patent system, what can be patented). The balancing only comes in later, at the application level: after you have decided you want patents and where you want them, then the balancing can be used to fine tune everything (e.g. exceptions for interoperability, competition policy, public health etc).

The patent system is a public incentive system. Interests of the "users" are secondary. Primary are public policy objectives, i.e. promoting innovation whatever the lawmaker decides. In other words, the general interest of all society must always take precedence over the rights granted to patent holders.

If this cannot be guaranteed, the patent system damages innovation, prevents sharing of technological knowledge, harms the business environment, and obstructs free and open competition.

4.2.2 Analysis

The European Patent Convention Art 52 sets clear substantive rules on the scope of patentability, but the European Patent Organisation's Technical Boards of Appeal (EPO TBAs) have blurred these substantive rules with their own inventions of terms such as "technical contribution" and "further technical effect".

These TBA teachings are not followed by many national courts and this results in legal uncertainty, since patents granted by the EPO are not necessarily enforceable in all EPO member states.

Where the EPO TBA has exceeded its competences in order to widen the scope of patentability, clear and precise rules have to be reset. Any decision about the scope of Patent law lies in the competence of the legislator respective to the contracting parties. The European Commission must therefore restore the EPC 52 rules and clarify them where such clarifications are needed.

A clear focus should lie on patent quality and strict definitions of what can be covered and what can not be covered by patent law.

'Balancing' the substantive rules applying to patentability can only happen if supported by an economic and social rationale. Therefore, such changes should happen under supervision of directly democratically elected bodies, so as to ensure an appropriate amount of checks and balances.

It is FFII's view that such a policy can only succeed after a fundamental and real separation of powers in the European Patent Organisation, which currently combines the legislative, executive, and judicial branches in a single organisation, creating a damaging conflict of interests. To wit, the ongoing expansion of the patent system at any cost is mainly promoted by the patent office itself, not our elected representatives.

In addition, as restriction of competition lies at the heart of the rights granted by a patent, FFII strongly supports the proposal to develop a stronger role for competition policy in the use of patents as an economic tool.

4.2.3 Questions

1.1 - Do you agree that these are the basic features required of the patent system:

- 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.

1.2 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?

4.2.4 Answers

1.1 - The most basic feature of the patent system is that we should only consider to apply it where required in order to guarantee continued or increased innovation, and prevent its expansion in areas where it is counterproductive. Substantive rules and due regard for other interests are means which can be used to guarantee this feature, but are only secondary to this goal. Only afterwards tertiary features such as costs and litigation enter the picture.

Our main concern is that there is too much focus on secondary and tertiary features at this time, which does not help if the assumed raison d'\195\170tre of the patent system is ignored. For example, the definition of patentable subject matter keeps being expanded, and attempting to codify this expansion in "clear rules" (as with the software patents directive) does not help against this worrying evolution.

We therefore think that focussing on aspects of the patent system and improving these on their own is a wrong approach, and that a higher level innovation policy is required. Patent policy is only one part of such an innovation policy, and all modifications to the patent system should be done based on said innovation

policy.

1.2 - The main feature of the patent system should be that the patent system itself is only a (small) feature of a larger innovation strategy. We would like to see more assurance that the mechanisms of the patent system produce "good" patents, i.e. patents which are needed by the market and by society. We would like to see clearer exclusion of subject matter for areas where patents have not been demonstrated to generate innovation.

We would like to see the burden of proof moved to those who seek to extend the patent system, rather than those who are affected by patents. We would like to see proportionality in the patent system so that highly lucrative and long-term patents cannot be claimed for innovations that are cheap to produce or for which the chance of independent rediscovery is very high. Limiting the patent system to "applied natural science", as was the case traditionally, is a good rule of the thumb to avoid such problems.

A stronger institutional role of competition policy authorities provides checks & balances to the patent system. Patents are restrictions of competition in order to achieve policy goals such as to incite innovation. The current administrative rule of the patent system does not take into account anti-competitive effects but usually sides with the interests of the users. Competition policy authorities should also get enabled to file invalidation lawsuits or oppositions against questionable patents which distort competition, esp. where affected individual market players cannot afford to oppose them (opposition market failure).

1.3 - Currently, patent policy is mainly formed by:

- The patent offices. Especially in case of the European Patent Organisation, the situation is worrying. Its Administrative Council can change the "Implementing Regulations", as well as Parts II to VIII and Part X of the European Patent Convention, thereby taking on the role of legislator. Additionally, TBAs and EBA of the European Patent Office take on the role of judiciary by changing the interpretation of the EPC.
- Civil servants with close ties to the patent system. In general, the people sitting on the EPO's Administrative Council are also involved with the member state patent offices, and are also the primary advisors to legislators regarding patent law (e.g. most of these people sit on the Council's "Working Party on Intellectual Property (Patents)" where they draft legislation, and they also advise governments how to vote on the proposals they write).
- The largest customers of the patent system, who keep trying to push the boundaries of what is patentable and what is not further and further, and even sit on the "Standing Advisory Committee" to the EPO (SAPECO). The Commission proposal of the software patents directive was also written in close cooperation with these companies and their representative organisations, without involvement of others.

The best way to take into account the public interest would be to:

- Clearly separate the legislative, judiciary and executive tasks in the patent system. As a consequence, do not adopt Community law based on case law developed by an executive office with its own judiciary, which even cannot be appealed at a Community Court (because that executive office is not part of the Community).
- Move away from judicial governance to economic governance with full respect of a legislative mandate.
- Open up patent policy making process to society at large as opposed to entrenched and self interested (software) patent rightsholders. Strenthem transparency of the Council working group. Strengthen oversight of competition policy authorities.
- Keep in mind that the patent system is but one tool available in innovation policy making, and one which should only be applied when appropriate and not at will ("more patents" is not the same as "more innovation", and in various situations can actually result in less innovation).

- Encourage more economic research.

4.3 Section 2 - Community Patent as Priority for EU

4.3.1 General Comments

The features we would like to see in the Community Patent are:

1. An assertion of democratic control over the patent system.
2. A clear and solid separation of executive, legislative, and judicial powers, in the process of defining patent law, granting patents, and handling patent litigation. There should be an EU parliamentary enquiry committee on the independence of the EPO Technical Board of Appeal (TBA) and Enlarged Board of Appeal (EBA), and the results of this committee should be the basis for using the EPO TBA case law as the basis for the Community Patent, or not.
3. The restoration of the EPC article 52, and undoing of EPO TBA case law concerning said article, which has allowed the patenting of damaging software and business methods. This should be compliant for eg. with current case law in Poland which is contrary to EPO TBA concerning definition of patentable subject matter (invention and technical contribution).

4.3.2 Analysis

Dealing with translation costs does not remove the danger of either ruinous litigation costs to small to medium enterprises, or of anti-competitive and abuse factors, which any move towards a pan-European system of patent litigation would risk enabling.

Community accession to the EPC should be based on reinforcing the clear exclusion of software and business methods from patentability rather than rewarding EPO slide, while addressing the problems of accountability and separation of powers.

According to the draft texts, Community Patents will be Community titles (Council Text, consideration 7, page 7), issued by the EPO, a non-Community organisation.

Accordingly there will be no appeal possible against granting these Community titles before a Community court (Commission proposal 2.4.5.2 page 15), or any other independent court. Further still the Community will have no influence at all on granting these Community titles and as a result, from the Community perspective, these titles are unaccountable.

The Community Patent proposal makes the EPO's Enlarged Board of Appeal the highest authority on granting practice. In turn the Community Patent Court / European Court of Justice will be the highest court in infringement / invalidity cases respectively. As a result two separate legal systems are created, allowing different interpretations of the European Patent Convention. This gives one organisation the right to grant patents, and another the right to invalidate them.

4.3.3 Questions

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?

4.3.4 Answers

2.1 - The most important point is to separate the executive, legislative and judicial powers which are all currently performed by the EPO to some extent, as mentioned above. This implies that the EPO's

TBAs/EBA case law must not form the basis of community law, otherwise we discard the current patent laws and their interpretations by national judges in all member states. Even the UK, whose case law is closest to the EPO's case law, is still quite a bit more strict than the EPO.

The European Community should not accede to the European Patent Convention in a way which hands over full authority on granting Community patents to a non-Community body (namely the EPO and it's TBAs and EBA). Special care has to be taken too, that accession to the EPC does not lead to Community law made by the EPO, bypassing the Community's constituting treaties, bypassing the European Commission and Parliament.

For the Netherlands and other countries, the Community Patent will also introduce retroactive liability. The Community Patent thereby will make it profitable to apply for broad, vague and trivial patents, with goal of sending out infringement notices after some years. Since going to court will often be too expensive, SMEs will have to pay. The result: the Community Patent will make legal extortion profitable.

Belgium already has retroactive liability, but for a shorter period. The currently proposed retroactive period is longer than the one in force in the US. It is ironic that abuse and extortion of this retroactive period has led to a call for reform in the US, while Europe is in danger of going even further on this point.

4.4 Section 3 - European Patent System and EPLA

4.4.1 General Comments

The underlying assumption of this section seems to be that patent costs and the lack of cross-European patent enforcement are the principal problems to be solved. It is FFII's view that there are more serious problems with the current patent system, namely the lack of accountability of the EPO resulting in its practice of granting patents that enter domains which should not be patented, risking severe negative economic consequences.

The current national litigation process is fully compliant with the requirement for separation of powers and thus produces better case law, which has kept the EU ICT sector relatively free from harmful software patent litigation.

The only parties who are handicapped by the current national patent litigation systems are very large firms who seek patents across all EU countries. Most firms are well-treated by national patent systems and courts. We do not feel that that multinational firms represent an economic majority. To the contrary, they are typically monopolistic in tendancy and their voice must be treated as being heavily biased towards self-interests.

4.4.2 Analysis

Any attempt to change the framework of pan-European patent litigation will have either an overall positive or negative effect on European competitiveness. On the basis of the EPOs current slide towards a US style system of unfettered software and business method patentability without true accountability, the risk to the Europe's competitiveness and the Lisbon agenda is considerable.

All appointments to any special court tasked to deal with European wide patent litigation must to be based on the principle of independence from the administrative body responsible for issuing the patents, whether at a national or European level. Therefore any draft statute which would allow current or former Technical Board of Appeal EPO judges to qualify is clearly unacceptable.

The EPO patent system must be replaced by an EU patent system. We recommend specifically that the Community should take over European Patent Organisation's legislative role. The European Patent Office should be turned into a Community Agency and in addition, a European Patent Court should be a Community court.

Taken together with the creation of a separate Community Innovation Office that would coordinate various innovation policy measures, we would protect the balance essential to the instrument of patent policy as well as Europe's competitive framework.

4.4.3 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?

4.4.4 Answers

3.1 - If the EPLA were to enforce the high-quality patents defined by EPC article 52, this could have a positive impact. If the EPLA were to enforce the EPO TBA case law (and thus enforce software and business method patents), the results would be catastrophic.

After all, the current "legal uncertainty" regarding software patents keeps various litigants at bay and is partially responsible for the absence of a US like litigation climate in Europe. This is clearly demonstrated by the fact that many software patent lawsuits are filed in the UK (Trading Technologies vs various makers of software for stock exchanges, NTP vs RIM), where case law is closest to the EPO case law.

3.2 - It should be possible to litigate a Community patent before a Community court, based on Community law made by Community legislators (and not by an unaccountable TBA or EBA of the EPO). This court should be independent of any Community or other Patent Office.

Regarding national patents, the most logical decision is to keep the possibility to have them litigated in national courts. This is convenient in terms of geography, language, and culture. Given that European Patents are more or less collections of national patents, at least the possibility to go to a national court should be kept.

The most important feature is that it must always be possible to appeal to a court which is not bound by case law of the executive (the various patent offices), since such judicial independence is a basic requirement of our justice system.

4.5 Section 4 - Approximation and Mutual Recognition of National Patents

4.5.1 General Comments

These questions try to lay the groundwork for passing the Community Patent directive under a co-decision procedure, meaning the law would need a qualified majority in the Council, and a majority in Parliament.

The basis for this legal process would be that the current patent system acts a barrier to the free movement of goods and services within the EU.

4.5.2 Analysis

The current problems in the European patent system have arisen not between member states but because EPO granting practice is not in line with its own rules, which national courts continue to observe.

There are areas where the current system acts as a distortion of competition, particularly where patents are used as non-tariffic trade barriers. These are areas that the competition authorities should investigate.

4.5.3 Questions

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.

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?

4.5.4 Answers

4.1 - Software and business method patents give rise to significant trade barriers and distortions of competition within the EU. In some member states, such as Poland, these patents are not granted and appeals to rejections based on subject matter are consistently turned down by courts. In other member states, such as the UK, granting practice and case law follows the EPO practice more closely. This puts British companies operating in Poland at a competitive disadvantage and acts as a trade barrier when Polish companies try to enter the UK market.

4.2 - Software and business method patents mean that producers and consumers of software are exposed to arbitrary litigation when they export their services to another EU country. Our business is affected in that we are unable to determine accurately whether our products and services are "legal" in other member states, so we are exposed to a significant and unmanageable risk if we decide to export.

There is also no insurance available for software patent infringement, and experience of e.g. Miller Insurance Services Ltd has shown that the reason for this is the fact that it is impossible for a company to provide a profitable insurance service in the current patent granting climate. (See: http://en.eu.ffii.org/sections/bxl0411/program/)

4.3 - We notice that the "subject matter" criterium is missing from the list in point 1. Subject matter is a critical criterium, since it is on this basis that the EPO has granted tens of thousands of software and business process patents. The three options 1-3 are all unclear with respect to the rules on subject matter, and the question of whether EPO TBAs' case law overrides the EPC and interpretations of national courts, or not.

Regarding option 3 in particular, mutual recognition by patent offices of patents granted by another EU Member State opens the possibility that applicants start to shop around to find the patent office that most readily grants their applications. The Community Patent is intended to reduce forum shopping, but this option would actually increase that problem.

A recodification of EPC 52 substantive patent law exclusions and further clarifications are needed to:

- Prevent the enforcement of software patents and business method patents granted by the EPO within the European Community. * Enable control of the European Union over the EPO patent pratice which will be forced to review its policy. * Reinstall political governance of the patent system.

4.4 - All proposals must come back to the basic question: does the system guarantee good patents, transparency, and accountability?

Further the EU has to prevent that EPC 52 exclusions will get weakened by further international substantive patent law harmonisation, trilateral diplomatic negotiations or TRIPs reform. Therefore the European Union has to make sure that parliaments may exercise their full control over diplomatic negotiations by the EU or member states.

As long as the problem with EPO software patents prevails the EU shall seek to strengthen Interoperability by legislative safeguards to indemnify affected software producers and E-Commerce.

4.6 Section 5 - General

4.6.1 Questions

We would appreciate your views on the general importance of the patent system to you.

Please answer the following questions on a scale of 1 to t10 (10 is very important, 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?

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?

4.6.2 Answers

These questions must be answered 'personally', describing how patents affect you, your business, your customers. A generic answer would not have much influence. You can answer this question in your own language, the Commission will translate it. Be careful with the scale of 1 to 10.

5 Annex

5.1 FFII Requests in Order to Clarify Non-patentability of Software

The legal principles needed to exclude software and business methods from patentability are quite clear. The FFII has attempted to summarise them as "Ten Core Clarifications".

The 10CC were drafted as core amendments to the failed EU Softwarepatent Directive proposal.

These principles were in June/July 2005 confirmed by political majority of the European Parliament. They were supported by four political groups (PES, Greens, GUE/NGL, IND/DEM), and substantial parts also by three other other political groups (EPP/ED, ALDE, UEN). The European Parliament clarification on software patentability should be included in any proposal introducing the Community Patent (Articles of the Software Patent Directive (11979/1/2004 - C6-0058/2005

- 2002/0047(COD)) and numbers of the amendments in brackets

The aim is now to defend the substantive provisions of Article 52 of the European Patent Convention against abusive case law interpretation ("as such" tricks, weakening of technical requirement e.g "further technical effects"-teaching) and any direct or indirect codification thereof.

5.1.1 Definition of "Computer-Aided Invention"

A "Computer-aided invention", also inappropriately called "computer-implemented invention", is an invention in the sense of patent law the performance of which involves the use of a programmable apparatus.

5.1.2 Definition of "Computer Program"

A "computer" is a realisation of an abstract machine consisting of entities such as input/output, processor, memory, storage space and interfaces for information exchange with external systems and human users. "Data processing" is calculation with abstract component entities of computers. A "computer program" is a data processing solution which can, when described in a predefined language, be executed by computers.

5.1.3 Objects of Product and Process Claims

A computer-aided invention may be claimed as a product, that is as a programmed apparatus, or as a process carried out by such an apparatus.

5.1.4 Exclusion of Program Claims

A patent claim to a computer program, either on its own or on a carrier, shall not be allowed.

5.1.5 Freedom of Publication

The creation, publication or distribution of information can never constitute a patent infringment.

5.1.6 Negative Definition of "Field of Technology"

While products and processes in all fields of technology are patentable inventions regardless of whether or not they involve computer programs, the subject matter and activities within the computer programs are not patentable on their own.

5.1.7 Positive Definition of "Technical" and "Field of Technology"

"Technology" is applied natural science. "Technical" means "belonging to a field of technology".

5.1.8 Negative Definition of "Contribution"

A computer-aided invention shall not be regarded as making a technical contribution merely because it uses better algorithms so as to reduce the need for processing time, storage space or other resources within the data processing system. Accordingly, innovations involving computer programs which do not solve any problems of applied natural science beyond the improvement of data processing efficiency shall not be patentable. Computer-aided inventions are not considered to make a technical contribution merely because they make better use of data processing resources such as processing time or storage space.

5.1.9 Positive Definition of "Contribution" and "Invention"

An "invention" is a contribution to the state of the art in a field of technology. The contribution is the set of features by which the scope of the patent claim as a whole is considered to differ from the state of the art. The contribution must be technical, that is, comprise technical features and belong to a field of technology. Without a technical contribution, there is no patentable subject-matter and no invention. The technical contribution must fulfil the conditions for patentability. In particular, it must be novel and not obvious to a person skilled in the art.

5.1.10 Freedom of Interoperation

Wherever the use of a patented technique is necessary in order to ensure interoperability between two different data processing systems, in the sense that no equally efficient and equally effective alternative non-patented means of achieving such interoperability between them is available, such use is not considered to be a patent infringement, nor is the development, testing, making, offering for sale or licence, or importation of programs making such use of a patented technique to be considered a patent infringement.

See also	**http://swpat.ffii.org/papers/europarl0309/amends05/juri05**