

Workshop on "EU Patent Policy" Organised by BEPA September 19th 2007

Main conclusions

In the EU, the issue of unification of the European patent area is high on the policy agenda. The Community Patent has been Regulatory Action n°1 in the Community Lisbon Program since 2000; unfortunately it has not been completed. Currently the discussion is concentrated on translation costs and litigation, trying to convince Member States to align on the London Protocol and EPLA.

With the European patent system at crossroads, the purpose of the workshop "EU Patent Policy" was to bring together academic experts with policy makers across the various DGs dealing with patent policy issues. That there was a real need for this was confirmed by all participants. The program, list of participants and presentations can be found on the BEPA website (http://ec.europa.eu/dgs/policy_advisers/activities/conferences_workshops/index_en.htm). What follows is a short summary of the discussion¹.

From a policy perspective, the mission of a patent system is to encourage innovation and the diffusion of technology. However, changes in technology and firm strategies have strained the current system's ability to achieve this mission. Patent offices all around the world are flooded with applications.² New more complex technological fields are emerging (software and biotechnology), new actors (universities), new company strategies (patent portfolio building and patent "flooding", patent trolls), new innovation organisations (start-ups, research joint ventures, networks, public-private partnerships...).

Confronting all these challenges will require significant changes to the current system. If we want to improve the efficiency of the system, we need to understand better how it currently works: what strategies do patent applicants and holders follow; how they interact with the system. Economic research can provide helpful insights. The presentations in the morning session by the academic economic experts tackled a number of important issues faced by the current system.

Quality of patents: The current surge in patent applications could be seen as good news, if it would be a reflection of more innovations, but it is also at least partly troubling. An increasing number of claims per patent, an increasing patent-to-R&D ratio, increasing delays in patent applications, and an increasing use of divisionals, all point to a strategic use of patents which is directed more toward preventing others from innovating, rather than to reap the rewards for innovation. The current surge in patent applications, particularly if it reflects more "low quality" applications, or applications on marginal inventions, raises the question on what the effect will be on the *quality of the patents granted*. Questionable patents granted can raise costs and prevent competition and innovation that otherwise would benefit consumers. Although the problem for the moment seems to be less acute at EPO than at USPTO, in Europe concerns are also mounting quickly.

Cost of patenting: The costs of patenting include not only the costs upfront when applying, but also the costs of maintenance (renewal fees) and enforcement (litigation costs). High translation costs explain a large part of the higher costs of applying for a patent in Europe. But although the US may have a lower cost for applying, it has a more costly and slower process of litigation. Since research shows that demand for patents is elastic with respect to fees, particularly for smaller firms, this would suggest the use of fees as a policy instrument (cf infra).

Value of patents: In the wake of the "open innovation" paradigm, companies are increasingly interested in acquiring and selling technology externally. Although we can see markets for

¹ The text reflects the views of the participants. It does not commit the European Commission.

² The number of patent applications at EPO was >200000 in 2006, a 150% increase since 1995.

technology becoming more important, there is still a feeling of potential left unexploited. For technology markets to be able to function smoothly, clear IPR regimes, delivering high-quality patents, are important. Patents, by facilitating trade in technology, allow for specialization. In addition, having patents can make it easier for firms to raise capital. Especially small firms and catch-up countries could benefit from better developed markets for technology.

The afternoon session was devoted to discussing the **policy implications**. It is clear that the system as it currently stands in the EU, needs to be reformed if it wants to be able to address its challenges. A good patent system needs to be able to deliver on three fronts: costs, quality and enforceability (litigation). These fronts cannot be dealt with in isolation: without tackling the quality issue, reducing costs will lead to a flooding of applications, including “bad” ones, and will put a lot of strain on any litigation system.

A community wide patent system (including jurisdiction) would help, avoiding the expense, inconvenience and confusion of uncoordinated national systems. But it is only part of the policy response. A perhaps even more important question is what this more uniform patent system would look like. And alternatively, in the absence of a community wide patent system, changes need to be considered to the current system. A number of clear **recommendations** arose during the discussion:

- The application and interpretation of the patent system must take place in the light of economic considerations. For this, the patent system should have a clear **mission** enshrined in its founding convention, stating the purpose of the patent system.³
- For the EU to have a more important impact on reforming the current system requires a well functioning **relationship between the EC and EPO** (European Patent Office).
- Patent Offices' **incentives** should be based not only on number of patents granted, but also take into account the quality of the patents granted and allow for equally balanced incentives to refuse applications.
- Attention in patent office practice and litigation should focus more on patent **portfolios** rather than only on individual patents.
- Making patents cheaper for everybody may not be the best route to follow in view of the patent flooding phenomenon. The **fees for patenting** need to be more differentiated, stimulating the “good” applications and weeding out the “bad” applications. Claim-based fees, non-linear pricing with a price penalty for excessive divisionals, can be powerful instruments to improve the overall quality of patents;
- A differentiated fee structure should also be considered, granting **lower fees to young, innovative enterprises**, for who patents and the cost of obtaining them are important. Lower patent fees for smaller firms are already in place in the US and have proven successful.
- In view of favouring entrepreneurship, the patent system must accommodate emerging technical fields, which are fast moving areas. **Flexibility** (i.e. the possibility for applicants to react to unexpected drifts) is therefore an attribute that should be integrated in the broader notion of “patent quality”.
- Reforms to the patent system should take into account **interactions** with other policy areas, more particularly the broader innovation policy agenda, as well as competition policy. For instance, special actions to reduce the cost of patenting for young innovative companies will only stimulate the entry, innovative capacity and growth of these firms, if other framework conditions are in place.
- More **evidence and analysis** should be available to guide patent policy reforms. The participants in the workshop from both sides expressed their desire to further intensify the dialogue.

³ The European Patent Convention (EPC), which laid the foundations for the European Patent Office (EPO), has no explicit mission of the patent system included.