

## **FUTURE PATENT POLICY IN EUROPE**

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**European Commission  
"Charlemagne" Room S3  
Rue de la Loi 170  
Brussels**

### **Preliminary findings: issues for debate**

## **I. FACTS AND FIGURES**

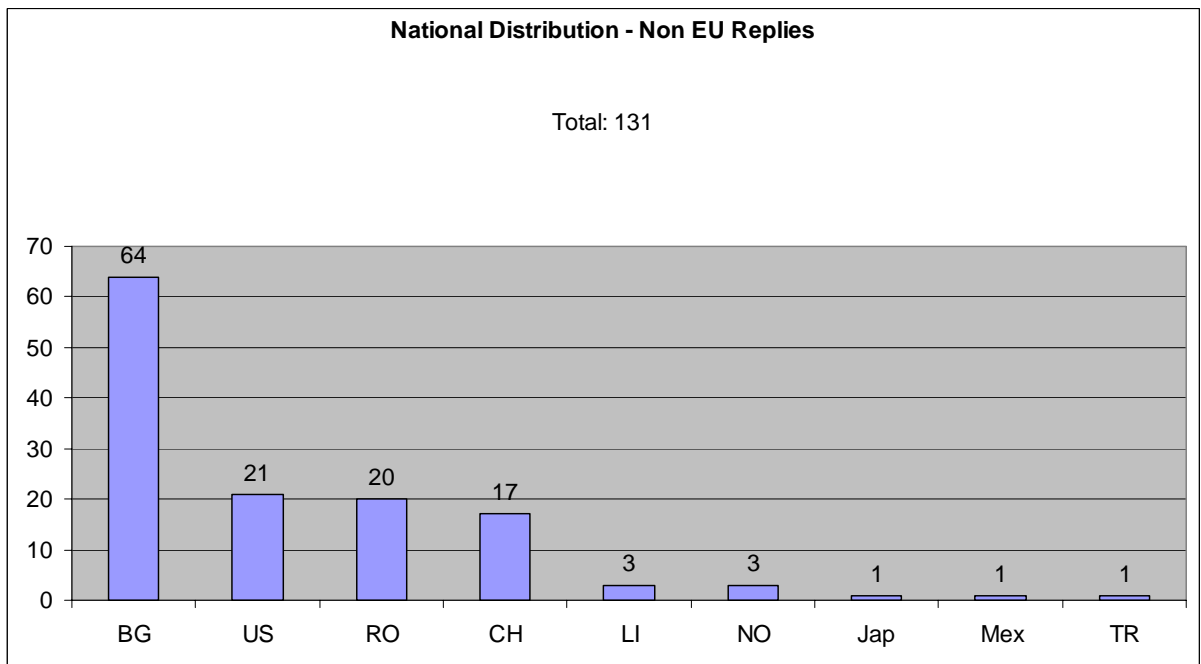
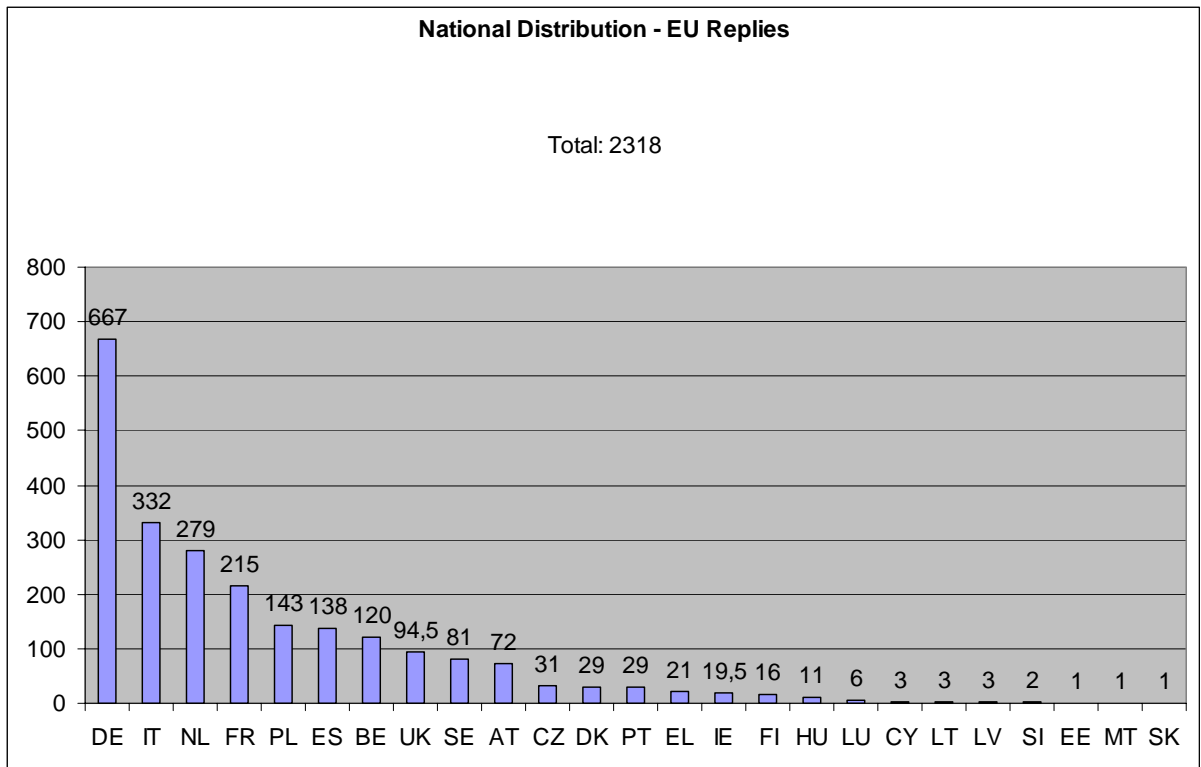
The consultation was launched on 16 January 2006 with the aim of collecting stakeholders' views on the patent system in Europe. The deadline for submitting replies to the questionnaire expired on 12 April 2006 after an extension from the initial date of 31 March.

DG MARKT received an impressive number of 2515 replies. Out of those, 1493 were original individual replies, including the 664 replies from the SME Panel consultation tool explained below. The remaining responses can be divided into groups of identical "pre-fabricated" position papers submitted by members or sympathizers of professionals (patent attorneys) or interest groups (open source).

While Industry widely participated in the exercise, the participation rate was higher in the most patent dependant sectors: ICT, pharmaceutical, chemical, automotive, consumer electronics, biotechnology, mechanical industries (see annex 1).

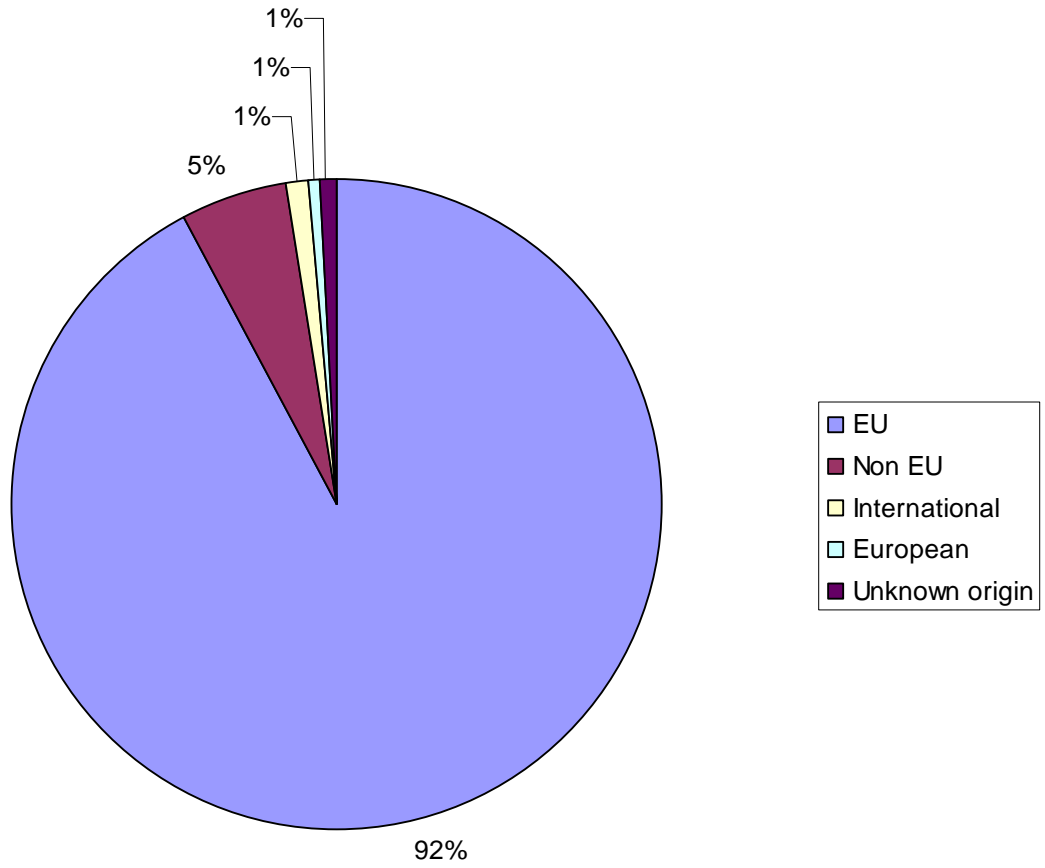
In parallel, an identical consultation was launched with European SME's via a tool developed for that purpose by DG Enterprise. Specialists from the Euro Info Centres conducted the survey based on the consultation questionnaire and drew up local reports which were then compiled into national reports sent to the Commission on 14 June. In total, 664 SME's from 14 Member States and the two acceding countries, representing a wide array of industrial sectors, participated in the survey.

The following charts show the number of respondents according to different categories such as nationality, size of company, branch of industry etc.



### National Distribution - All Replies

Total: 2515

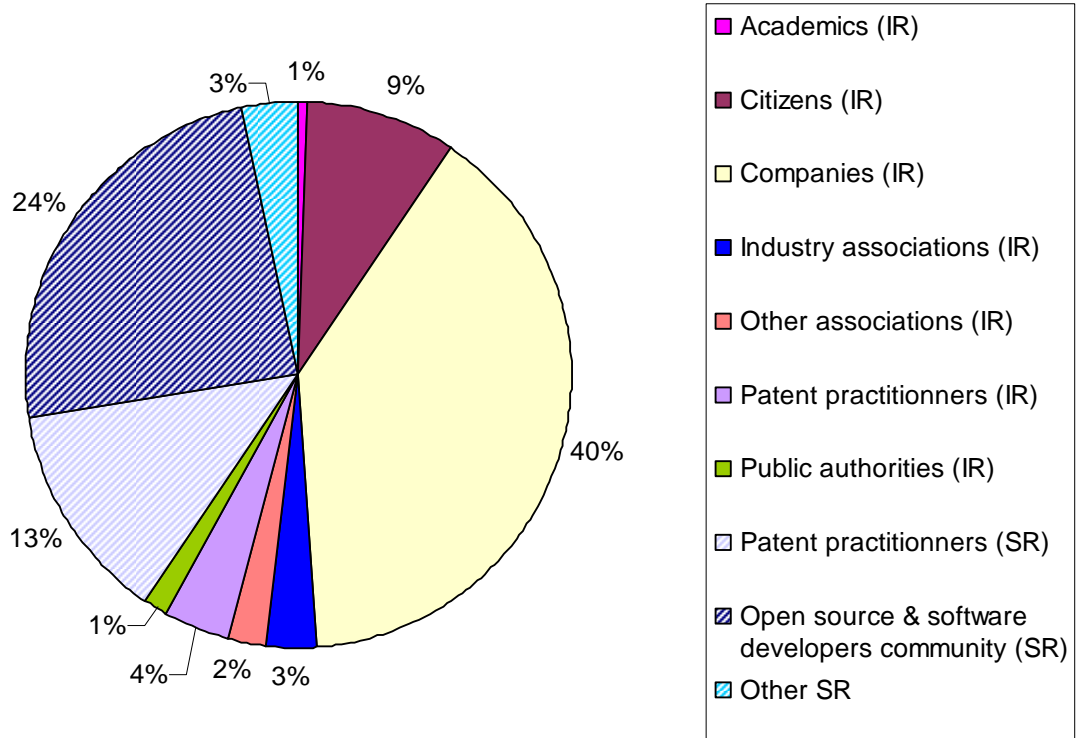


### Categories of stakeholders - All Replies

Total number of replies ----- 2515

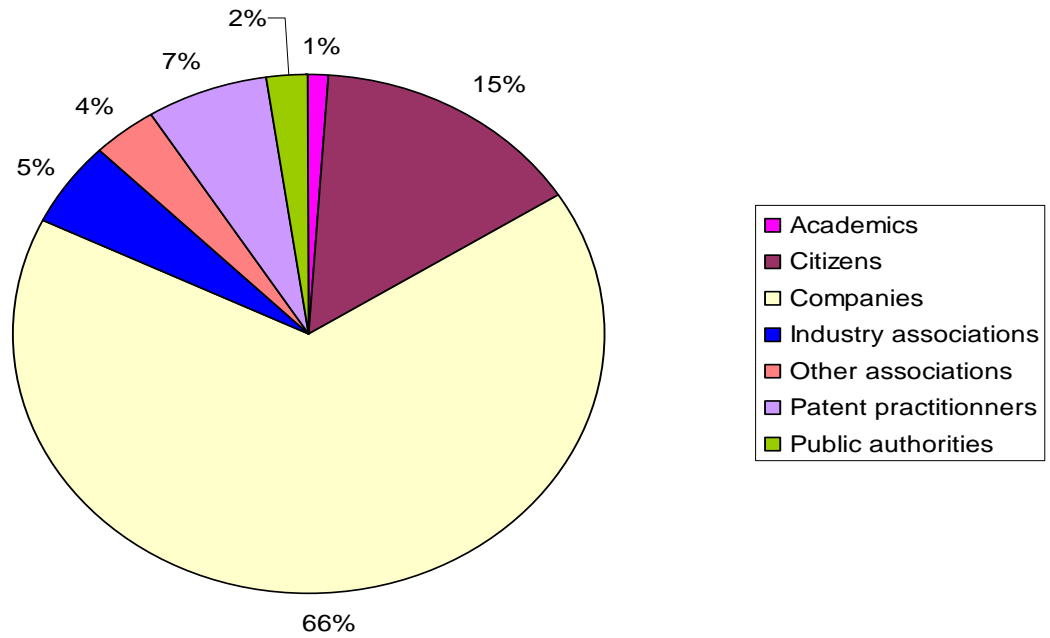
Total individual replies (IR) ----- 1493

Total standard replies (SR) ----- 1022



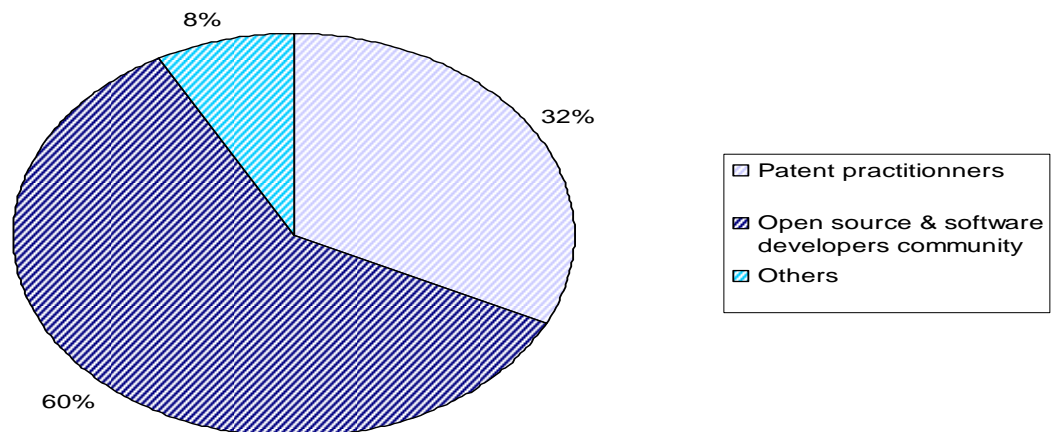
### Categories of Stakeholders - Individual Replies

Total: 1493



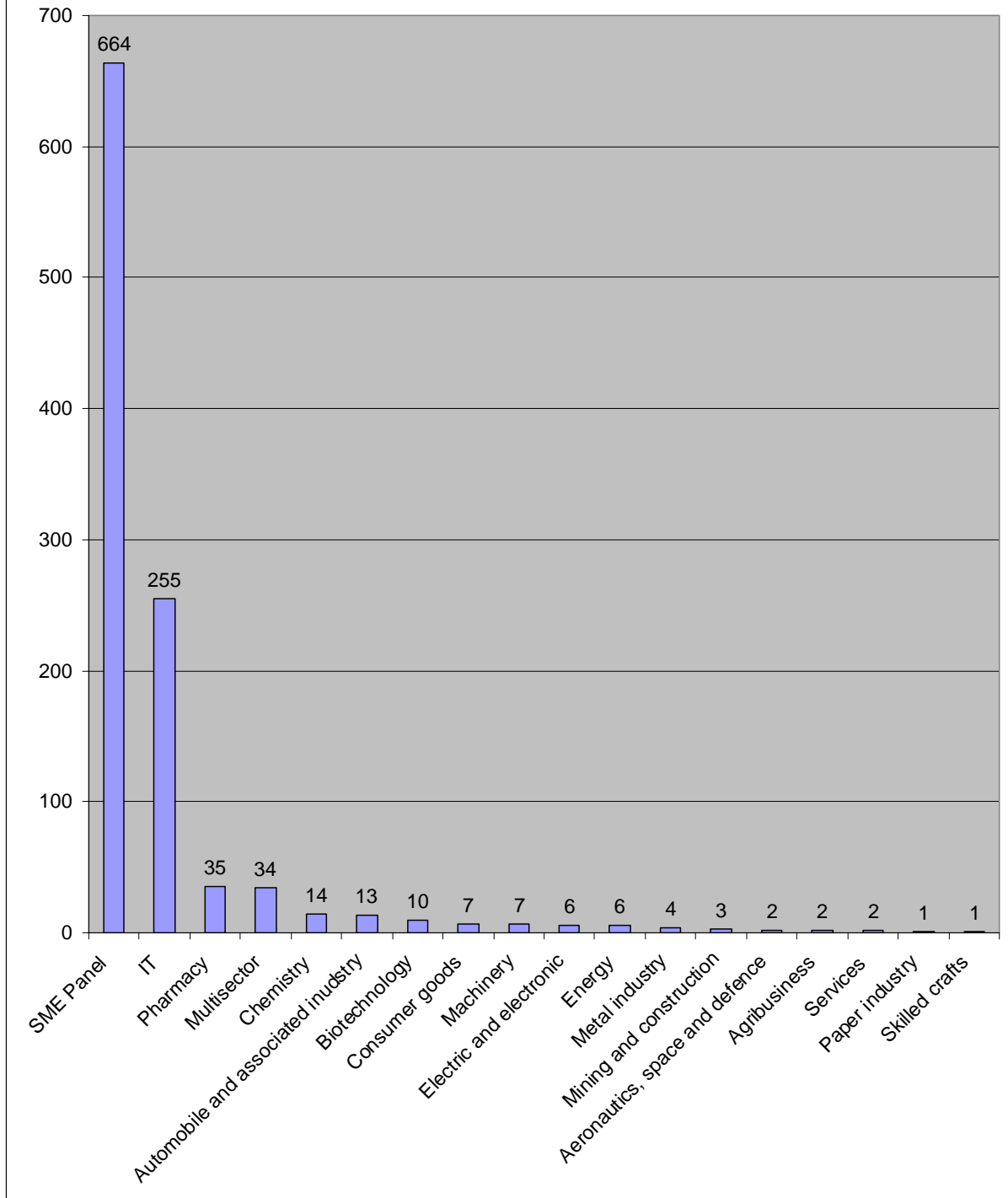
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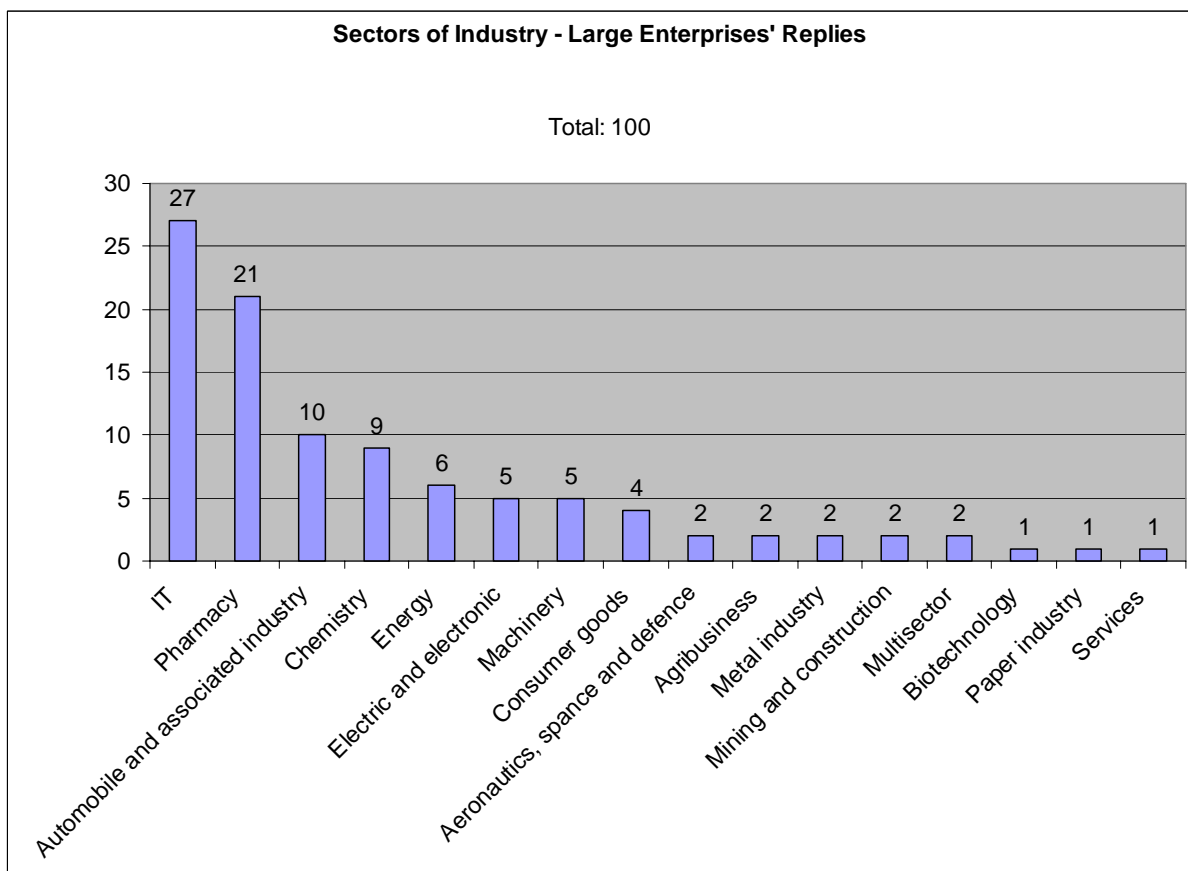
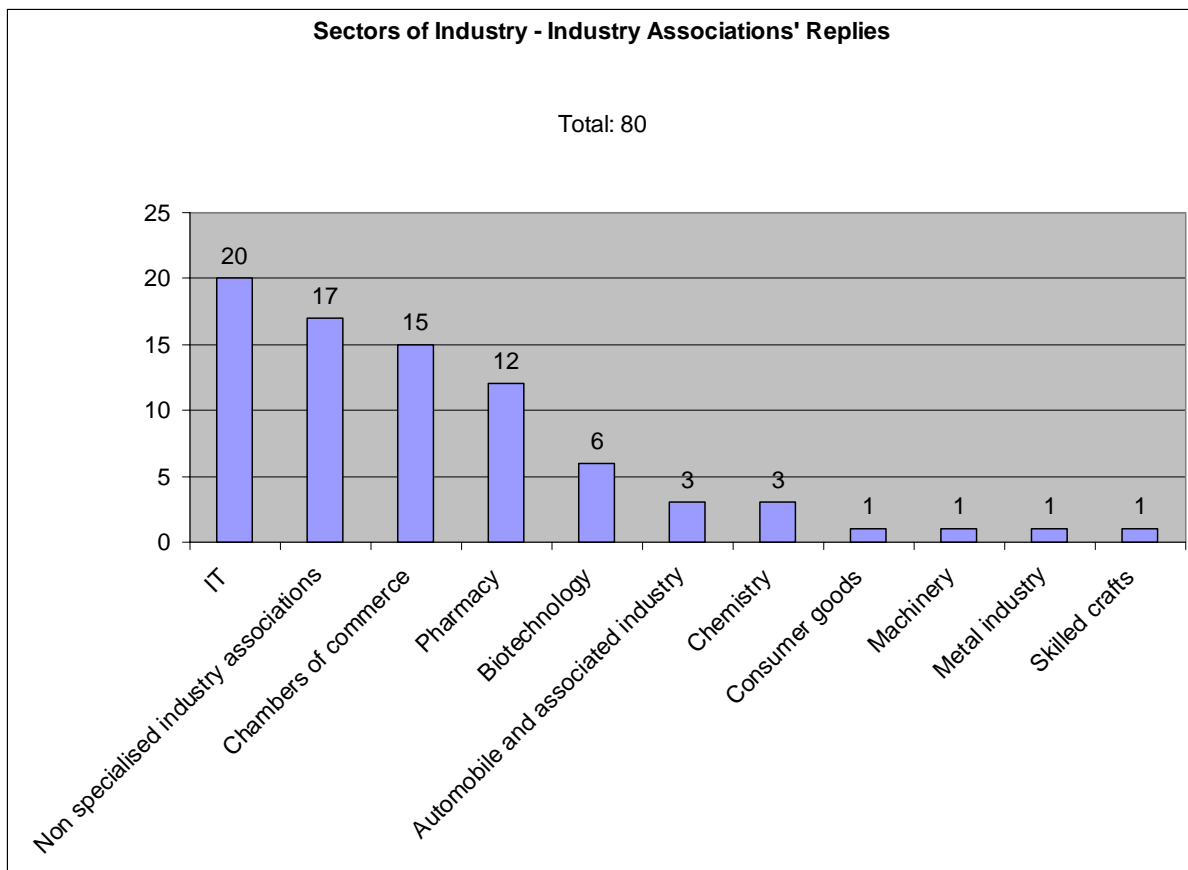
Total: 1022



### Sectors of Industry - Companies and Industry Associations' Replies

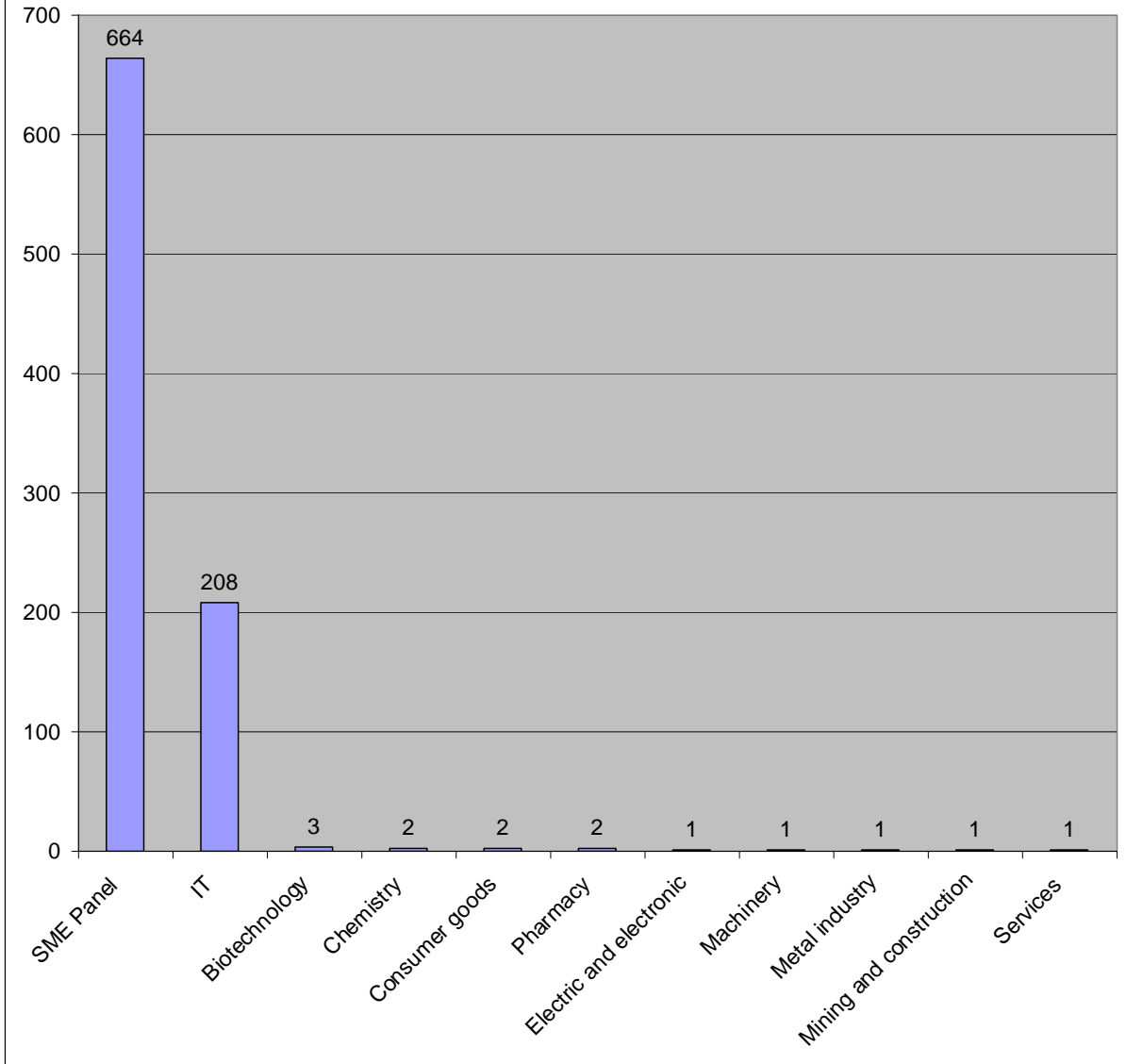
Total: 1066





### Sectors of Industry - SMEs' Replies

Total: 886





## II. FINDINGS

### SECTION 1: BASIC PRINCIPLES OF PATENT LAW

Although respondents generally agree with the characteristics identified by the Commission in its consultation document, some point to additional features, while a number of stakeholders stigmatise the absence of any reference to what they perceive as essential qualities of any patent system.

Industry generally (representatives such as UNICE, MEDEF but also sectoral associations as well as individual companies) insists on the need to develop a comprehensive innovation policy in Europe in order to respond to challenges from the US, Japan and emerging economic powers such as China and India, which all have in recent years invested substantial effort in making innovation policy a top priority. UNICE specifically points to the need to facilitate technology transfers based on solid legal framework and to the fact that the system is unattractive and difficult for the SME's. Some proposed assistance to SME's in the form of help in prior art searches, subsidies for the first 10 patent applications, help in searching competitors' patent portfolios as a role for the national patent offices (NPOs).

The SME community underlined the following issues: costs (where easy access to technical information must be balanced with cost of translation – English only) and licensing of patents (defensive patenting must be prevented). To this end, regular evaluations of granted patents, their commercialisation and character of patent disputes should be conducted.

Industry also underlines the quality of both grant and enforcement processes as key in a patent system. The IT industry, represented by EICTA, identifies patent quality as a primary issue of concern. On one hand, patents must be rendered as incontestable as possible. This is not to be achieved by enlarging patentability criteria and a lax review system, but via a re-evaluation of the inventive step requirement through a quality control system and rigour in examination and prior art search. Another feature identified by this group of stakeholders was the necessity to ensure full compliance with the WTO TRIPS system.

The IT SME's and professionals (a submission prepared by the FFII was endorsed by over a thousand respondents, counting corporate and individual software developers, other IT professionals and academics among them) points out to the fact that the patent system is driven by the public incentive rationale and as such must have the promotion of innovation as its primary objective while interests of users remain a secondary concern. As a result, the patent system should only cover areas where its productivity in terms of increased innovation and knowledge dissemination are proven. Secondary to the objective of promoting innovation are the substantive patent rules which define patentable subject matter and ensure that the primary objective is respected. Only in third place come issues on which the consultation was focused: cost and litigation structure. The IT SME community believes this focus to be erroneous and proposes to first engage in a debate on the primary and secondary objectives.

The patent attorney community, while divided by nationality in some respects, was largely united on basic principles. Some (FICPI) underlined that the dispute resolution system should be "cost-effective" rather than inexpensive in order not to compromise its quality. However, a recurring theme was the necessity to apply high quality standards which alone can guarantee that all users are served without

favouritism. This implies quality of patent searches and rigorous examination and keeping timelines which are not unreasonably detached from the constraints of the market. Finally, FICPI emphasises that although the patent system is a necessary prerequisite for innovation in a free market, it is far away from being sufficient.

German patent attorneys insisted in their collective institutional reply that there is no reason for a political debate on principles concerning patent protection in view of ethical behaviour, protection of the environment, health protection, or freedom of information. According to the Institute, this also holds with regard to software and biotechnology. Polish patent attorneys pointed to the necessity to ensure proper balance between interests of patent holders and those of the general public and to guarantee equal accessibility to the system for small corporate or individual applicants, as well as for multinational players. They also point to the TRIPS compliance. Finally, they underline the necessity to grant citizens access to the patent system in their own language. Other national patent attorneys' also plead in favour of multiple-language regimes.

## **SECTIONS 2 AND 3**

### **Preliminary statement**

This preliminary statement stems from stakeholders' submissions referring to any proposal aiming at reduction of patenting costs and/or at putting in place jurisdictional arrangements. Industry, small and big alike, gave priority to the underlying concern that reducing cost of obtaining and maintaining a patent will increase the number of incoming applications and hence the workload of patent offices. This in turn is likely to have an adverse effect on the quality of patent searches and examination and therefore could result in the increased granting of low quality patents. Also, cost reduction is tantamount to a decrease in cumulative amount of fees paid to patent offices possibly leading to a decrease in expenditure on the much needed search and examination procedures. It is therefore of utmost importance to foresee patent quality enhancing solutions which would accompany any possible cost reduction of patent grants. Furthermore, the rules of procedure of any future jurisdictional arrangement must contain safeguards against Community-wide or even larger enforcement of low quality patents, including protection against the destructive practices of "patent trolls", especially dangerous for the ICT industry. These are lawyers and investors who buy cheaply or assume control over paper patents, mistakenly granted largely to failed companies. The trolls can then use these patents to threaten the entire industry with a court order no matter how minor the feature that has been patented is.

### **COMMUNITY PATENT**

Industry (big and small), as well as other interest groups, generally support the Community Patent as a way of addressing problems of the patent system. It is seen as the initiative which will deliver value-added for European industry under the Lisbon agenda.

A limited number of stakeholders reject the Community Patent outright and in whatever form, giving preference to the EPLA as a response to patent problems in Europe. The most radical approach was shown by the German Patent Attorneys who dismiss the EU Community Patent as proposed with the common political approach, and ask the Commission to withdraw that proposal. In particular, the Institute of German Patent Attorneys is unhappy with the litigation arrangements proposed for the EU Community Patent, as it foresees just one centralised court. Also the language regulation under the Community Patent is considered to be inadequate.

Industry on the other hand agrees that the Community Patent is the right way forward. However, stakeholders unequivocally reject the deal currently on the table – the 2003 Common Political Approach. The rejection is caused by mainly two aspects: an unsatisfactory language regime and inadequate jurisdictional arrangements.

There are two extremes in the language regime preferences: those who unequivocally support a single language patent and those who want full translations into all official EU languages immediately upon grant.

The language regime currently proposed is rejected by those who advocate a simplified (preferably a single language) regime and by supporters of a multilingual arrangement alike. Opinion divides according to the size of the responding company although there is division within the SME community itself, Eurochambers opting for

English-only as the preferred solution, whereas other SME's claim multiple language regime. Patent lawyers tend to agree with those of SME's who want multilingual arrangements. A division also appears on the national basis: countries such as Portugal, Spain, Italy, Greece, Poland and some stakeholders in France advocate a multilingual regime based on arguments of access to information which must be granted in the language of their citizens. For industry, whatever the regime finally adopted, it must offer a unitary, *affordable* and competitive patent ensuring legal certainty through a unified Community jurisdiction, which the current proposal does not do because the unitary character of the patent is abrogated by universal translation requirements and legally binding claims in different languages.

A compromise solution is put forward by FICPI: the Community Patent does not have to cover all the Member States provided that it has a unitary character in those it does cover. This would imply the use of the existing EPO structures for patent grant and the transformation of a European Patent covering some or all of the EU Member States into a Community Patent. A patent would be granted in centralised proceedings at the EPO based on substantive patent law as laid out in the EPC; litigation initiated and conducted in the language of the defendant or of the court designated according to Brussels Regulation choice of court rules, using the existing structures such as those designed for the CTM with the final referral to the ECJ (and preferably to a specialised IP chamber).

Other stakeholders recommend putting the initial Commission proposal back on the table for negotiations. It is evident however, that the industry is not interested in a Community patent which does not offer advantages over the existing system of bundled European patents.

Beside the language regime, another necessary characteristic of a Community Patent system put forward by a large majority of respondents is that judges must have solid legal and technical experience. Clear procedural rules are absolutely vital.

Vodafone, and other stakeholders from this sector, is concerned that availability of a Community Patent on the market would raise costs by raising the number of patents granted (without improvement of quality) thus multiplying the costs of examinations. Secondly, risk of infringement would cover all of Europe making risk assessment considerably more difficult. This concern might in fact limit the number of patent applications where the potential patentee is not sure about the "strength" of his invention and the subsequent patent. However, lowering cost might have an adverse effect by attracting more patent applications leading to more workload and possibly to more "weak" patents being granted thus endangering innovation. Vodafone states that any COMPAT proposal must guarantee confidence in granted patents, and this can be achieved by raising the search and examination quality (by raising test levels – so costs increase), by placing more responsibility on the applicant to disclose prior art (e.g. as in the US the information disclosure statements) and finally setting up a Community IP Court. These proposals are not specific to COMPAT but apply to any jurisdiction proposal.

## **EUROPEAN PATENT LITIGATION AGREEMENT AND LONDON PROTOCOL**

The London Protocol, where mentioned, is a clear priority for industry. Its adoption would have an immediate effect on the attractiveness of European patents, as it would make them more affordable both in terms of cost and simplicity of use.

France has so far not ratified the London Protocol and its approval is a condition sine qua non of the Agreement's entry into force.

However, on 17 May 2006, the French National Assembly recommended the rapid ratification of the London Agreement in its report presented to the French Prime Minister. The French Senate, followed in the steps of the Assembly making the same recommendation in a report adopted on 30 May 2006<sup>1</sup>. The initiative is now in the hands of the French government.

Both industry and patent attorneys seem to favour the Community's involvement in the European Patent Litigation Agreement (EPLA). This preference flows from the general opinion that the existing patent system based on the EPO and the EPC works well and outstanding problems relate to the lack of unitary jurisdiction. Some also believe that it could act as a precursor for the Community patent and its jurisdictional system. Support for EPLA is not presented as incompatible with support for the Community Patent except for the response peculiar to the German patent attorneys' community who express uncontested support for EPLA only. They also favour a decentralised regime which would preserve the current status of highly specialised German first instance patent courts, with a centralised jurisdiction further up the litigation process.

Although there is widespread support among industry for Community involvement in the EPLA initiative, there does not seem to be consensus on the exact details of the system and there are obvious disparities among stakeholders when it comes to the character of the EPLA court (e.g. degree of centralisation, nature of the local first instance courts). However, although stakeholders mostly called for a centralised jurisdiction during the first attempts to introduce a Community Patent, this tendency is now reversed with big and small industry alike insisting on a local first instance specialised courts in order to preserve proximity and accessibility of justice, with a centralised Community and/or EPLA appeal court in order to guarantee uniform interpretation of the law.

An additional problem is highlighted by the patent attorneys (FICPI). At this stage, neither the Community Patent nor the EPLA proposal provide for a full competence of the court with respect to patent proceedings. Competence with respect to ownership, interpretation of licensing contracts, transfer of rights to patent, questions of exhaustion and contractual obligations, although essential and a prerequisite for any court dealing with patent infringement issues, is not foreseen for any of the potential courts. FICPI proposes therefore that any future Community patent system should rely on such (already existing) national or regional chambers with local judges

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<sup>1</sup> *The Senate decided that the cost-benefit analysis pleads in favour of the ratification by France of the London Protocol. Furthermore, this ratification must not lead to a long-term blockage of the COMPAT. As a result, the working group suggests to the government to rapidly engage in talks with Germany and Spain with the aim of presenting a common proposal to the Finnish Presidency and re-launching negotiations on COMPAT in order to deliver under the German Presidency.*

who are also competent to act on legal questions being only indirectly connected to the technical fact of infringement. They are also not the only stakeholder to point to the Community Trademark system as a model for the Community Patent.

UNICE (and most of the industry) attaches great value to the draft EPLA but highlights issues of cost and exorbitant length of proceedings which should be addressed in the common rules of procedure. It also favours centralisation only at appellate level.

EICTA (supported by other industry) states that EPLA is a much needed solution and points to the optional character as its essential feature, one which will guarantee the quality of the adopted rules by avoiding too many compromised solutions; the Lugano Convention and Regulation 44/2001 should govern the relationship between members and non-members.

EGA (and industry at large) points out that the central issue is the technical and legal competence of the centralised court, as its decision in validity and infringement proceedings creates a single ruling valid across the entire territory.

EFPIA is one of the few stakeholders who point out that EPLA benefits might be overstated because the risks and costs have not been fully appreciated. If it is true, as statistics seem to suggest, that cost of litigation in a centralised court would be twice that of proceedings in France or Germany, and if most patents are in practice currently enforced in only one jurisdiction, then mandatory litigation in a centralised court will only increase costs without discernable advantage. EFPIA also has concerns about the quality of decisions similar to those of EGA.

The SME community for its part urges the Commission to think of an effective dispute resolution system based on mediation. In parallel, the court litigation system must be based on a network of local first instance courts in every MS having relevant technical knowledge. Full centralisation would go against the principles of subsidiarity and proportionality.

It is evident from a large number of contributions across sectors that the procedures (including language arrangements) to be followed by EPLA courts will be key to whether they will be capable of delivering high quality cost-effective means of litigating patents. Until those issues are clarified, unqualified support from industry will not be forthcoming.

## **SECTION 4: HARMONISATION AND MR**

There is very little support for harmonisation. Stakeholders are of the opinion that the patentability criteria are de facto harmonised by a number of international instruments, the most important of them being the European Patent Convention (EPC). Any outstanding pre-grant issues are not perceived as barriers to the smooth functioning of the Internal Market.

Among stakeholders, some sectors have particular concerns not applicable in others. Vodafone points out in its submission the issue of interoperability and standardisation, essential to the telecom industry. Differences in interpretation can be problematic if use of a particular technology – especially core technologies - is prevented in different territories.

Mutual recognition is rejected almost unanimously at this stage: individual National Patent Offices are seen to apply diverging rules and standards resulting in patents having very unequal value. However, some stakeholders suggest that there should be more cooperation among NPO's in the areas of awareness rising or services rendered to patent system users, such as SME's.

### **RESPONSES FROM THE SME PANEL**

There is no unanimity among the SME and at times nationality and size difference result in disparities being bigger than in the big industry. It is necessary to distinguish the micro IT enterprises here which generally have an anxious attitude towards the patent system as a whole. Any reform or initiative, be it introduction of a Community Patent or else, is viewed as a potential backdoor for introducing software patents, a concept which a large majority of them oppose. Also, general knowledge of the patent system among them is often lacking. Small, non-ICT enterprises do not oppose the patent system as such but attest of a similar uneasy approach towards it because, not having the necessary knowledge, they feel overwhelmed by the procedures they perceive as complicated and expensive. Another concern is that even a good patentable invention does not grant them equal footage with the big players.

Finally, there are the medium-sized enterprises which appear to be a lot more comfortable with the patent system and generally have sufficient knowledge of both their national and the European patent systems. Their main area of concern is cost and they fear any prospect of litigation against big companies.

Many SME are unable to comment on the details of the Community Patent, the EPLA, mutual recognition and harmonisation, because they often lack experience to assess the lengthy and complicated proposals. However, they tend to have an opinion on the issue of languages and litigation without necessarily referring to a concrete initiative.

Despite the aforementioned differences, SMEs generally ask for simplicity of the system and clarity of rules. As a result, they are opposed to the idea of combining several patent systems. Some (Austrian, Swedish) suggest a "Cassis de Dijon" system of mutual recognition of patents whereby the invention would be registered at the national patent office, that registration being valid all over Europe. Such a patent would be subject to unitary rules but any dispute or litigation would be handled in the patent holder's country.

Others, (Belgian SMEs) would prefer one European court with EPLA valid in all EPC contracting states. German, Polish, Irish and Spanish SMEs are very much in favour of the Community Patent provided that it is rapidly adopted. They favour an English only regime for the sake of simplicity and comprehension. An opposing view, favouring a multilingual regime, is taken by some Portuguese and Italian SMEs who also propose that patent litigation in 1<sup>st</sup> instance be handled by the Chambers of Commerce to reduce cost and provide the much needed assistance of patent specialists. The Polish SMEs give the example of the Community Trademark system as a good model for the patent system in Europe.

Many SME fear the possible coexistence of several patent systems. The Irish SMEs believe this situation "would be a disaster". Together with the Portuguese and Swedish SMEs, they also emphasize the need for more flexibility outside the EU (US, Brazil, Mexico were given as examples) and the need for common international patent rules.

Finally, the vast majority of SMEs emphasize the need for preferential treatment in their favour, in the form of a differentiated and simplified cost and procedural structure of obtaining and maintaining the preferred single EU patent.



## **CONCLUSION**

Basic principles which need to guide the patent system in Europe are:

- patent system must provide an incentive for innovation provided that patentability criteria are rigorously respected
- it must ensure the diffusion of scientific knowledge and technologies by an efficient, transparent and complete publication of patent documentation
- it must facilitate the transfer of technology
- it must be available to all players on the market
- it must offer legal certainty to the patentee and the users

Stakeholders are first and foremost concerned about maintaining and improving patent quality in Europe in order to avoid the shortcomings of some patent offices such as the USPTO. Industry is unanimous that innovation and competitiveness do not depend on the *number* of patents granted every year but on their *quality* and on the level of *legal certainty* which they provide. Cooperation with the EPO is considered crucial in this respect.

Furthermore, information and awareness activities must be enhanced so that industry and citizens are better informed of the value of Intellectual Property Rights and of how to use them. Industry is also concerned about the inadequate regulatory framework for technology transfer in Europe.

An idea of setting up an "advisory body", which would give opinions or recommendations on legal issues concerning patents, was presented by the Finnish government in its submission. This body could be, for example, a part of the European patent organisation and would help resolving diverging national interpretations on the scope of the European patents. One idea, to leave patent litigation at first instance to national courts, is popular with other stakeholders (especially the smaller business and individuals who are concerned about maintaining judicial proximity in the future patent jurisdiction).

Although there is widespread preference for the Community Patent as a way forward, stakeholders do not wish to have one at any price and in particular not on the basis of the key elements of the 2003 CPA. What they are looking for is an improvement over the current situation, a truly unitary high quality patent. If this cannot be achieved quickly and without major political compromises affecting the usefulness of the final solutions, then some stakeholders go as far as urging the Commission to withdraw its proposal and concentrate its resources on other issues, while many point to the EPLA as a possible solution to the current shortcomings.

Some stakeholders (many SME associations and organisations) put forward the idea of setting up regulatory framework for mediation as a means of alternative dispute resolution in patent cases, with the exclusion of issues of validity of a granted patent. This suggestion merits further reflection and its viability should be analysed.

Whatever the outcome of efforts on the Community Patent, stakeholders look favourably at EPLA as lack of uniform litigation for European Patents is the main obstacle to an efficient patent system in Europe.