FUTURE PATENT POLICY IN EUROPE

PUBLIC HEARING – 12 JULY 2006

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

REPORT

On July 12, DG Internal Market and Services held its public hearing on the future patent policy in Europe.

The hearing encountered the same vivid interest as the preceding written phase of the consultation. Prior to the debate, DG Internal Market published a document containing succinct preliminary results of the 2515 responses it received, which also set out issues to be discussed. The hearing was based on those findings and its structure mirrored that of the questionnaire.

The debate kicked off with a welcome speech by Mr Thierry Stoll, Acting Director General of DG MARKT. Next, Mr Erik Nooteboom, Head of the Industrial Property Unit presented preliminary findings of the Commission's consultation. Next, Mr Giuseppe Gargani, President of the Legal Affairs Committee of the European Parliament, introduced the session on the Community Patent in a much welcomed address where he expressed his support for a Community Patent based on a simple linguistic regime. Professor Michal Du Vall of the Uniwersytet Jagiellonski of Cracow then provided an unorthodox lively introduction to the session on Basic Principles of Patent Law.

The afternoon session kicked off with a speech by Ms Marja-Leena Rinkineva on behalf of the Finnish Presidency, followed by the introduction of the session on EPLA by Mr Vincenzo Scordamaglia, Honorary Director General of the EU Council. He retraced the lengthy saga of the development of a patent jurisdiction in Europe and pleaded for the much awaited adoption of such a jurisdiction.

In total, 39 pre-selected stakeholders spoke on during allocated 5 minute slots and divided among the four sessions of the debate. At the end of the hearing, additional time was devoted to an open debate where 22 participants intervened in 3 minute on any issue of concern.

The afternoon session included a speech made by the President of the European Patent Office, Professor Alain Pompidou, followed by a presentation of the preliminary results of a study commissioned by DG MARKT on the economic and social value of patents.

The hearing ended with a speech by Commissioner McCreevy where he announced the follow-up to this consultation. The speech is available at: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/453&format=HTML&aged=0&language=EN&guiLanguage=en

RESUME

Debate No 1: Basic principles of the patent system: 6 interventions

There was general consensus that the current system should be improved and that a clear IP policy for Europe should be implemented.

The most highlighted issues were: quality of the patents, legal certainty and predictability of the system in order to enhance and maintain the competitiveness of the EU. The importance of **a**ccess to the patent system was emphasized.

There was general support to maintain the EPO as the centre of the system with the support of national patent offices and the Commission. Duplication of work among the patent offices should be reduced as much as possible.

The representative of a consumer, health care and education association raised some concerns regarding the ethical framework. It was argued, in particular that: patents on life, patents on human bodies "as such" or its parts "as such" should be rejected. The issue of patents for diagnosis was a further topic.

Some proposals on alternative dispute resolution like mediation or arbitration were made and examples of current practices in WIPO were pointed out.

One university representative suggested the introduction of a grace period.

Debate No 2: Harmonisation and mutual recognition: 6 interventions

All participants agreed on the importance of substantive patent law **harmonization** and that it is *de facto* achieved at EU level by the European Patent Convention (EPC). Although some substantive issues were identified as not yet harmonised (computer implemented inventions (CII), trivial patents and ethic-related issues), there is agreement that no Directive on patent harmonization is needed. Also, some mentioned the importance of the Agreement on Trade-related aspects of intellectual property rights Treaty (TRIPS) with respect to harmonisation.

The idea of **mutual recognition** was widely rejected, perceived as a threat for the current "well functioning" grant system and not feasible given significant differences in experience and expertise among national patent offices.

Some stated that the aim of the national patent offices 5NPOs) should be to reach the same level of quality as delivered by the EPO (guidelines or soft-law could help harmonise national standards). In this respect, some rejected the idea of an EPO "certificate of quality" since it would increase its current workload. Also, issues of training and of work carried out by patent examiners, as well as education exercise on patents vis-à-vis the general public, were raised.

The importance of a future mutual recognition among trilateral offices (EPO, USPTO and JPO) was highlighted. For that purpose, a Substantive Patent Harmonization Treaty (SPLT) is seen as helpful.

Other proposals: need for quick actions to fulfil the Lisbon agenda; further coordination between the Commission-DG MARKT and EPO, the Commission should start negotiating EPLA and the European Community should accede to the EPC.

Debate No 3: Community Patent

Most participants in the debate supported the concept of a Community patent, however "not at any price".

SME interests claimed that a Community patent in line with the 3d of March 2003 Council compromise was too costly for them. However, it was also suggested to provide for the grant of patents in "the SME's own language" combined with translations of the claims in all other Community languages. Some research institutions proposed to provide for an "English only" language regime.

Various industry and Member States representatives considered that a Community framework for patents is a priority and called for a compromise package. One participant suggested in case that all efforts failed for achieving a package deal to pursue COMPAT by virtue of enhanced co-operation of certain Member States. One speaker, whilst wholeheartedly supporting EPLA, suggested abandoning COMPAT all together.

Consumers' representatives asked for the carrying out of "independent studies" concerning the issues addressed in the consultation and suggested a patent system involving remuneration rights instead of restricted acts.

Other issues of concern in this debate were trivial patents, patent quality and the need for promoting interoperability.

Debate No 4: Jurisdiction

The majority of participants favoured changes to the current patent litigation regime to prevent conflicting interpretations in multi-jurisdictional cases. To succeed, the following features were identified: simple and rapid procedures, simplicity of access (proximity to courts), legal clarity and predictability through a certain level of centralization, reasonable costs, specialised judges and an appropriate language regime.

Some participants pleaded for the development of alternative dispute resolution, such as arbitration and mediation, as providing rapid and less costly solutions that could be helpful, in particular to SMEs.

The majority of participants supported the draft European Patent Litigation Agreement (EPLA). The main reason for the support is the right balance between simple access to courts (regional divisions) and legal certainty through centralization (second instance) that draft EPLA is seen to achieve. Participants also describe the language regime as appropriate and welcome its specialised (technical) judges who would guarantee high quality decisions (high quality patents). The necessity for a uniform set of rules of procedure was stressed. It was stated that an EPLA court was always needed, independently of a COMPAT court, in order to deal with the European bundle patents.

Concerns relating to the draft EPLA centre on costs and the independence of judges. Some participants pointed out that EPLA would force plaintiffs that might otherwise have gone for litigation in only one country, to bear the costs under EPLA, which were two to three times higher than those incurred by litigation in one country (example Germany or France). In practice, only a small percentage of cases actually involve multi-jurisdictional litigation. It was stressed that the higher costs would make it harder for SMEs to enforce their patents and also to defend themselves. A further concern was raised that under EPLA the administration would control the judiciary and that judges would not be independent but taking the same decisions as the EPO (e.g. with regard to software patents). They would be appointed and re-appointed by the same people running the EPO and could hold positions at the EPO at the same time as being judges.

A number of participants stated that an EPLA court and a COMPAT court could function side-by-side, while at least one participant felt that, ultimately, there should be just one patent litigation system in Europe.

At least one intervening participant suggested that a patent litigation system should be modelled on the existing system of Community trade mark courts with national, specialised courts dealing with patent litigation.

Final Open Debate

Many participants stressed the fact that the daily life of SMEs should be better taken into account by the patent system:
- in relation to cost, which can kill innovation;
- in relation to their ability to understand and use the patent system (assistance services).

Other points made: the importance of quality of patents; lack of competitiveness of Europe on the global stage; the need for an easier access for inventors; the need to increase public awareness; the fact that the introduction of exceptions would destroy the economic incentive; the fact that patents are harmful for open standards (need for a clear definition of these standards by the Commission); and the importance of the separation of powers.

Community Patent:

The majority of speakers were in favour of a Community Patent, but opposed to the 2003 common political approach.
Opinions diverged on the language regime: some favoured a one-language (or at least a very limited number of languages) approach, while others considered that such an approach would be discriminatory and would made access to information regarding technology difficult (translations should be put on the web).
Concerning the jurisdictional aspects, several speakers stressed the importance of technically educated judges and of regional chambers at first instance level.
Some speakers supported FICPI's proposal (i.e. COMPAT not necessarily in all MS and a jurisdiction system inspired by the trademark and design system). Several speakers pointed to the fact that COMPAT and EPLA can coexist and that there should be a synergy between them.

EPLA:

The majority of participants were in favour of EPLA (centralisation makes Europe one of the big players on the global stage). Some of them considered that this is THE way forward and that it should be implemented as soon as possible with the involvement of the European Community. Other stakeholders suggested that the EU be part of the EPC and accept the London Protocol and EPLA.
Some pointed to the following features of EPLA: practical and pragmatic agreement, clear procedural rules, optional character, high quality decisions, experienced courts, lower costs than actually foreseen by EPO (States should cover some of the costs).

Harmonisation and Mutual Recognition

While a participant expressed its opposition to both options, another one stressed the need for a harmonisation concerning the breeders' exemption (plant varieties).