

# EUROCHAMBRES Position Paper 2006

## POSITION ON FUTURE PATENT POLICY IN EUROPE



*March 2006*

## SUMMARY OF EUROCHAMBRES' POSITION

- EUROCHAMBRES strongly supports the European Commission's efforts to re-start discussions to reach an effective patent system in Europe. The lack of progress on an EU wide patent regime significantly hinders the innovation potential of European enterprises, especially SMEs.
- SMEs are discouraged when they try to protect their inventions in the single European market as nearly as many patent systems exist as there are EU countries. In addition, language barriers pose a huge problem. A simplified regime must be adopted.
- Any new development must ensure maximum efficiency and fair costs for all companies, particularly small innovative ones. EUROCHAMBRES strictly opposes any compromise that will make the application for a European patent more expensive than the existing system.
- Litigation about patent rights is another critical issue. It implies high costs that can be disproportionate to the capacity of SMEs. An efficient system with low costs for legal protection must be made available in all Member States. Voluntary low cost Alternative Dispute Resolution systems - like mediation – could be a solution and therefore should be encouraged.

### Section 1 – Basic principles and features of the patent system

#### Question 1.1 Do you agree that these are the basic features required of the patent system?

European Chambers of Commerce agree on the basic features of the patent system as put forward by the consultation questionnaire.

While working on the transparency, effectiveness and accessibility of the process for obtaining a patent, we recommend:

- to concentrate on making the patent system user friendly
- to look for fast procedure as well
- to make it affordable for all enterprises, including SMEs
- to use ICT to its full potential in order to reach this goal.

#### Question 1.2 Are there other features that you consider important?

The issue of costs is very important for our members. EUROCHAMBRES urges the Commission to look for any possibility to decrease the actual cost.

Among others, the translation costs are key. A balance has to be made between the interests of having easy access to the technical information about the patent and the translation cost to be incurred.



European Chambers urge a simplified scheme for languages. We are in favour of working with one language only (English)<sup>1</sup>.

EUROCHAMBRES stresses that in the objective of the Lisbon goals, the commercialisation/licensing of patents is of keen interest. Measures must be adopted to ensure that defensive patenting and other negative behaviours do not arise.

The issue of clarity and harmonisation of patent terms is considered as improving access to patent information. Clear rules on the prolongation of the patent are also urged.

### **Question 1.3 How can the Community better take into account the broader public interest in developing its policy on patents?**

European Chambers welcome the open discussion about the use and future of the patent system initiated by the Commission. The most effective option to take the broader public interest into account in developing policy on patents is through consultation with relevant representative organisations, including stakeholder groups such as EUROCHAMBRES. Regular evaluations of patents granted, commercialisation and the number and character of patent disputes are important indicators in building legitimacy for a patent system.

In addition to that, there is a need to increase awareness among entrepreneurs of the potential of industrial property rights. EUROCHAMBRES encourages wide publishing of patents, open databases and best practices.

Another issue is whether there is a need to consider other public interests (environment protection, health protection, and ethical aspects) when processing a patent application. We stress that a patent does not give the right to use the patented object. Therefore, the process of granting a patent should be independent of possible specific legal regulation applicable to the end product.

## **Section 2 – The Community patent as a priority for the EU**

### **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?**

European Chambers are in favour of a Community patent system which would offer a significant reduction of the overall costs and better transparency to all businesses. There is, however, no clear commitment that it will be the case at this stage.

As far as costs are concerned, there is a need to find an adequate solution for the translation problem (as discussed in question 1.2). However, there is a need to dramatically reduce the costs for granting and maintaining a Community patent as well. The benchmark should not be the high costs of the current system but those of the most important competitor countries, namely the US and Japan<sup>2</sup>.

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<sup>1</sup> This agreement reached within the Chamber network is not shared by the French Chambers who prefer on this point the agreement as reached by the Council in 2003 related to the Community Patent (3 main languages with partial translation in the other EU languages) nor by the Spanish Chambers who stress the importance for all businesses to have access to quality technical information in their native languages.

<sup>2</sup> A comparative overview of the Commission in its proposal on the Community Patent shows that the annual maintenance costs of €16.790 for a patent in Europe are much higher than those in Japan with €5.840 and of the US



As far as transparency and accessibility are concerned, we stress the necessity of helping SMEs to find information regarding patents and to obtain patent protection. In this regard, the national patent offices are important local contacts, which should play a crucial role in consulting and translating at moderate fees. Overall, it is important, that also the national patent offices are integrated in the procedures of a Community Patent System.

We must add that there is no point in arguing that a Community patent available for the whole EU should be approximately the same cost as a patent protection under the existing European Patent system for five states if the need of the end user, the SME, is only linked to the market of one Member State. That SMEs still need a cost effective access protection in one country that will not be more expensive that it is now.

### **Section 3 – The European Patent System and in particular the European Patent Litigation Agreement**

European Chambers urge the European Commission to think of effective dispute resolution processes first. Mediation has proved to be very efficient in the resolution of IPR disputes and patent disputes in particular. Its flexibility and cost effectiveness makes it a champion. Therefore, important efforts must be undertaken to create awareness about the potential of mediation processes<sup>3</sup>.

Nevertheless, there are a limited number of cases where mediation is not the most appropriate way to solve the patent dispute and that is the reason why we need to progress on efficient court procedure as well.

#### **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?**

The current system makes multiple litigations inevitable, diverging decisions possible, allowing forum shopping. The creation of a European Patent Court within the European Patent Convention (EPC) would allow for a homogenous interpretation of the harmonized patent law. It would also ensure higher competency and more transparency.

It is essential, nevertheless, especially in the interest of small and medium enterprises, to foresee local Courts of First Instance in every Member State with the relevant technical knowledge. A full centralization of the litigation system is going against the principles of subsidiarity and proportionality. The European Patent Litigation Agreement (article 7) plans the possibility of locally decentralized First Instance Judgment Committees and could be seen as a step in the right direction.

On the basis of this EPLA, or on another basis, the Commission should clarify the questions of competences, concerning how far appropriate solutions for a uniform enforcement mechanism can be found. There is also a need to have full harmonisation of the patentability criteria.

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with €2.730. Another localization disadvantage is caused by the average representation costs in Europe of €17.000, compared with the US of €5.700 and Japan of €8.450.

<sup>3</sup> E.g. the UK Patent Office is just about to launch its own mediation scheme. On this particular issue, read K. Mackie, “mediating trademark or patent disputes”,

[http://www.cedr.co.uk/index.php?location=/library/articles/trade\\_mark\\_disputes.htm](http://www.cedr.co.uk/index.php?location=/library/articles/trade_mark_disputes.htm).



### **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?**

The Commission should at first qualify the “ideal dispute resolution scheme”. Chambers of Commerce urge the Commission to explicitly recognise the interest of mediation in settling IPR disputes. We suggest the Commission should organise a workshop on this issue to better understand the pros and cons of this efficient dispute resolution technique. EUROCHAMBRES is willing to help the Commission in exploring this option further.

An efficient litigation scheme is absolutely necessary as well. We insist on the importance for SMEs to have a fair access to justice.

## **Section 4 – Approximation and mutual recognition of national patents**

### **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?**

There are differences in the substantive law and in its application between Member States which give rise to barriers to free movement or distortion of competition.

When a company develops a product which is patented in one Member State (MS), it is not sure that it will be either patented, either get the same scope of protection due to the differences in the patentability reservations either be enforced in the same way in other MS. This can influence the company in the deployment of its products across Europe.

The different procedures to apply for the patent and the translation difficulty are other barriers to free movement.

Some companies, especially SMEs, can have more financial difficulties to get patent protection all across Europe due to application, maintenance or translation costs. It is also more difficult for such companies to go to court in countries where they don't know the legal system, the language and where legal costs are very high. This offers unfair advantage to well established, larger companies that are more used to patent procedures and enforcement action<sup>4</sup>.

### **4.2 To what extent is your business affected by such differences?**

Within our large network of 19.000.000 business members, many are not affected by patent rules because they have few or no research and innovation activities. However, those who invest in research and innovation claim that they are indeed affected by such differences. One of the most common problems is the length and cost of procedures to act against any infringer.

Another sector affected is the one of consultants in the patent field. They face difficulties in acting according to the different rules in each country.

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<sup>4</sup> E.g. Polish companies - SMEs in particular – facing the listed barriers are very reserved to apply for patents. Thus their competitive position towards foreign companies, especially big ones, is much lower.



### **4.3 What are your views on the value-added and feasibility of the different options (1) – (3) outlined above?**

Option 1 (bringing the main patentability criteria of the EPC into Community law) presents the most advantages as this will achieve uniformity and legal certainty.

A result of such an approach would be that for questions of interpretation the European Court of Justice could be involved and in consequence a uniform interpretation could be ensured. In our opinion, this approach could only make sense, if the European Court of Justice could foresee the required measures to guarantee a professional technical expertise of the deciding judges.

Option 2 (more limited harmonisation) is another acceptable option as long as the European Union (and consequently the Member States) becomes a signatory of EPC. However we prefer option 1.

Option 3 (mutual recognition) is the least advantageous option. The proposed mutual recognition of patents would often result in a double examination, if the intended “validation” is to be understood as a re-examination. The practice of the national patent offices do not yet seem to have the necessary amount of homogeneity, which such an approach would require.

Therefore, European Chambers believe that mutual recognition as such is not feasible (quality of patent offices examinations, differences in national laws).

### **4.4 Are there any alternative proposals that the Commission might consider?**

We wish to highlight the difficulties arising when one patent application is granted but another patent application was introduced on the same subject matter before that, but published later. Clear European rules would reduce disputes related to that uncertainty.

## **Section 5 – General**

**We would appreciate your views on the general importance of the patent system to you. On a scale of one to ten (10 is crucial, 1 is negligible):**

### **5.1 How important is the patent system in Europe compared to other areas of legislation affecting your business?**

An effective patent system is very important for the most innovative companies in Europe. Given that Europe is reliant on becoming a truly knowledge-based economy, effective protection of that knowledge must be offered to our innovators and enterprises.

However we highlight our concern about the fact that in some countries, businesses are not applying much for European patent protection. There would be an interest to analyze whether the cause is linked to a low level of R&D activity in those countries, linked to cultural reasons or linked to the constraints of a complex European patent framework.

European Chambers rank it 7,1.



## **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?**

The patent system is the most important system and its importance is increasing. Compared to other Intellectual Property Rights, new inventions and their implementations to industrial area are the most vital assets for the business enterprises, which enable them to further achieve competitiveness. Member companies regularly seek advice on patents in different sectors. The growing biotechnology, nanotechnology and information technology sectors show this unequivocally.

It is worth mentioning that the cost of the community trademark and design are continuously decreasing and that a similar process is a must regarding the patent.

European Chambers rank it 7,7.

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

The patent system in Europe is of higher importance for our businesses as their main business partners and activities are located in Europe. However, its importance cannot be divorced from its relation to other patent regimes all over the world.

It would be beneficial and advantageous to have a single and unique global system. We urge the Commission to pursue efforts to reach a fair global protection for the businesses who invest in research and innovation.

The importance may vary depending on the branch of industry to which it is concerned along with the scale of growth of such industry, its development and especially single markets on which the companies perform their activities.

European Chambers rank it 7,5.

**Furthermore:**

## **5.4 If you are responding as an SME, how do you make use of patents now and how do you expect to use them in future? What problems have you encountered using the existing patent system?**

The main problems reported to us by our members that are using the existing patent system relate to high costs; tedious, laborious and time-consuming procedures; language problems; ineffective and costly real protection of patent rights; and non-uniformity of systems. As a result, they don't make extensive use of patents. The situation is, however, expected to improve if an effective and cost efficient patent system is put in place in Europe.

## **5.5 Are there other issues than those in this paper you feel the Commission should address in relation to the patent system?**

We believe that the Commission's paper covers the most important issues in relation to the patent system.



The acknowledgement and the level of information of small and medium sized enterprises in the area of the protection of intellectual property rights must be improved. It would be desirable that the EU encourages, in a material and ideal manner, these information activities carried out by representative business organizations<sup>5</sup>.

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<sup>5</sup> E.g. The Chambers of Commerce in the Austrian Länder organize 'information days' for Patent law, and give instructions for the use of the existing possibilities or the French campaign <http://www.pi-r2.org>.



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This position paper has been produced by EUROCHAMBRES; the Brussels based Association of European Chambers of Commerce and Industry.

EUROCHAMBRES is the sole European body that serves the interests of every sector and every size of European business and the only one so close to business. EUROCHAMBRES has member organisations in 44 countries representing a network of 2,000 regional and local Chambers with over 19 million member companies. Chamber members employ over 120 million employees.

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