



EUROPEAN COMMISSION
Internal Market and Services DG
Knowledge-based Economy
Industrial property

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Questionnaire

**on Intellectual Property Rights and
on the patent system in Europe**

INTRODUCTION

The field of intellectual property rights has been identified as one of the seven cross-sectoral initiatives for the Union's new industrial policy as set out in the Commission Communication launched on 5 October 2005. Stimulating growth and innovation means improving the framework conditions for industry, which include an effective IPR system.

This consultation covers two aspects of Intellectual Property Rights:

■ **Section 1** concerns general Intellectual Property Rights (IPR). This section aims to identify existing national measures concerning IPR, and to gain an indication of problems faced by SMEs. A series of recommendations, based on these results, could be proposed to Member States in order to improve the existing legal framework.

■ **Sections 2 to 6** focus in particular on the patent systems in Europe. Views of SMEs are sought on the patent system in Europe, and what changes if any are needed to improve innovation and competitiveness, growth and employment in the knowledge-based economy. The questions focus on the overall legal framework. Accompanying measures, such as information, awareness raising or support training, are outside the scope of these sections.

In 1997, the Commission launched the idea of a Community Patent in its Green Paper on promoting innovation. This was taken up by Heads of State and Government in the conclusions of the Lisbon European Council of March 2000, who called for a Community patent to be available by the end of 2001. The Community Patent proposal, establishing a unitary system of patent protection for the single market, has formally been on the table of the Council since 2000 but overall agreement is yet to be achieved. 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 an effective IPR system in the EU.

The document that follows contains a number of questions: In answering them we would invite you to be as detailed as you can. Supporting evidence and statistics are also welcome.

On the basis of the feedback the Commission intends to organise a hearing in Brussels in early summer 2006.

PRIVACY STATEMENT

Please be sure to **indicate** if you **do not consent** to the **publication** of your personal data or data relating to your organisation with the publication of your response.

The contact data provided by the stakeholder make it possible to contact the stakeholder to request a clarification if necessary on the information supplied.

By responding to this consultation you automatically give permission to the Commission to publish your contribution unless your opposition to publish your contribution is explicitly stated in your reply. The Commission is committed to user privacy and details on the personal data protection policy can be accessed at:

http://europa.eu.int/geninfo/legal_notices_en.htm#personaldata

For further information please contact Ms Virginie Cossoul at virginie.cossoul@fcis.cec.eu.int or at +32.2.287.15.34.

Section 1 – Practical use of Intellectual property Rights by SMEs

1. What use does your company make of Intellectual Property Rights in the sector?

The 2005 European Innovation Scoreboard shows a diverse use of intellectual property rights across countries and sectors. Industry and service sectors have very different levels of patenting for example. Chemicals firms are less engaged in design activity than in trademark or patenting. Industry companies appear to need to patent more to reach similar level of innovativeness.

Question 1.1: Which percentage of products is protected by registered intellectual property rights in your organisation and in the sector as a whole?

Question 1.2: What part of the turnover of your organisation do these products represent and what are the revenues drawn from the licensing of IPRs?

2. Reasons for using Intellectual Property Rights

The question is what the reasons are behind different levels of use of intellectual property rights. Is it for example related to the level of R&D, or the products produced by the sector. Are there strategic reasons for not using intellectual property rights, for example preference for using trade secrets. Do companies perceive obstacles to using intellectual property rights, such as time of procedure, costs, or potential difficulties in enforcement?

Question 2.1: Which are the main reasons for companies for using or not using protection of intellectual property rights?

Question 2.2: Are potential problems/risks with the enforcement of patents seen as a reason not to patent? Could you provide practical examples of problems with enforcement?

3. Correlation between Intellectual Property Rights and innovation performance

The question is how the use of design and patents is correlated with the innovation performance per sector. Does it for example lead to more products new to market, or exports?

The first analysis suggests that there is a clear correlation. “Electrical and optical equipment” and “chemicals” are the sectors that patent the most, and are among the top innovative sectors. However several sectors show a significant deviation where, for example “fabricated metal products” firms use designs much more intensively than their innovation performance would suggest. In industry there is also a lower correlation between the use of trademarks and innovation as for services.

Question 3.1: How does intellectual property rights contribute to innovation in your organisation and in your sector?

4. Potential and need for government support

The question is how policy measures impact on the use of intellectual property rights on the one hand and the correlation with innovation on the other hand. Policy measures can have an effect on the number of rights registered but also on what use companies make of their intellectual property rights. For example lower registration fees for SMEs or support in applying is expected to lead to a higher number of applications. Fiscal incentives for licensing are aimed at increasing the use of IPR.

Question 4.1: What kind of measures is present in the sectors? How do you assess them?

Question 4.2: Is there a need for government action at national or EU level? If so, which type of government action would have the strongest impact on the use of IPR, seen the responses to question 3?

Section 2 - Basic principles and features of the patent system

The idea behind the patent system is that it should be used by businesses and research organisations to support innovation, growth and quality of life for the benefit of all in society. Essentially the temporary rights conferred by a patent allow a company a breathing-space in the market to recoup investment in the research and development which led to the patented invention. It also allows research organisations having no exploitation activities to derive benefits from the results of their R&D activities. But for the patent system to be attractive to its users and for the patent system to retain the support of all sections of society it needs to have the following features:

- 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.

2.1 *Do you agree that these are the basic features required of the patent system?*

2.2 *Are there other features that you consider important?*

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

Section 3 – The Community patent as a priority for the EU

The Commission's proposals for a Community patent have been on the table since 2000 and reached an important milestone with the adoption of the Council's common political approach in March 2003 [<http://register.consilium.eu.int/pdf/en/03/st07/st07159en03.pdf>; see also http://europa.eu.int/comm/internal_market/en/indprop/patent/docs/2003-03-patent-costs_en.pdf]. The disagreement over the precise legal effect of translations is one reason why final agreement on the Community patent regulation has not yet been achieved. The Community patent delivers value-added for European industry as part of the Lisbon agenda. It offers a unitary, affordable and competitive patent and greater legal certainty through a unified Community jurisdiction. It also contributes to a stronger EU position in external fora and would provide for Community accession to the European Patent Convention (EPC). Calculations based on the common political approach suggest a Community patent would be available for the whole of the EU at about the same cost as patent protection under the existing European Patent system for only five states.

Question

- 3.1 *By comparison with the common political approach, are there any alternative or additional features that you believe an effective Community patent system should offer?*

Section 4 – The European Patent System and in particular the European Patent Litigation Agreement

Since 1999, States party to the European Patent Convention (EPC), including States which are members of the EU, have been working on an agreement on the litigation of European patents (EPLA). The EPLA would be an *optional* litigation system common to those EPC States that choose to adhere to it.

The EPLA would set up a European Patent Court which would have *jurisdiction* over the validity and infringements of European patents (including actions for a declaration of non-infringement, actions or counterclaims for revocation, and actions for damages or compensation derived from the provisional protection conferred by a published European patent application). National courts would retain jurisdiction to order provisional and protective measures, and in respect of the provisional seizure of goods as security. For more information see [http://www.european-patent-office.org/epo/epla/pdf/agreement_draft.pdf]

Some of the states party to the EPC have also been tackling the patent cost issues through the London Protocol which would simplify the existing language requirements for participating states. It is an important project that would render the European patent more attractive.

The European Community is not a party to the European Patent Convention. However there is Community law which covers some of the same areas as the draft Litigation Agreement, particularly the "Brussels" Regulation on Recognition and Enforcement of Judgments (Council Regulation no 44/2001) and the Directive on enforcement of intellectual property rights through civil procedures (Directive 2004/48/EC). [http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_195/l_19520040602en00160025.pdf] It appears that there are three issues to be addressed before EU Member States may become party to the draft Litigation Agreement:

- (1) the text of the Agreement has to be brought into line with the Community legislation in this field
- (2) the relationship with the EC Court of Justice must be clarified
- (3) the question of the grant of a negotiating mandate to the Commission by the Council of the EU in order to take part in negotiations on the Agreement, with a view to its possible conclusion by the Community and its Member States, needs to be addressed.

Questions

- 4.1 *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?*
- 4.2 *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?*

Section 5 – Approximation and mutual recognition of national patents

The proposed regulation on the Community patent is based on Article 308 of the EC Treaty, which requires consultation of the European Parliament and unanimity in the Council. It has been suggested that the substantive patent system might be improved through an approximation (harmonisation) instrument based on Article 95, which involves the Council and the European Parliament in the co-decision procedure with the Council acting by qualified majority. 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.
- (4) More limited harmonisation picking up issues which are not specifically covered by the European Patent Convention.
- (5) 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.

To make the case for approximation and use of Article 95, there needs to be evidence of an economic impact arising from differences in national laws or practice, which lead to barriers in the free movement of goods or services between states or distortions of competition.

Questions

- 5.1 *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?*
- 5.2 *To what extent is your business affected by such differences?*
- 5.3 *What are your views on the value-added and feasibility of the different options (1) – (3) outlined above?*
- 5.4 *Are there any alternative proposals that the Commission might consider?*

Section 6 – 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):

- 6.1 How important is the patent system in Europe compared to other areas of legislation affecting your business?*
- 6.2 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?*
- 6.3 How important to you is the patent system in Europe compared to the patent system worldwide?*

Furthermore:

- 6.4 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?*
- 6.5 Are there other issues than those in this paper you feel the Commission should address in relation to the patent system?*

Please help us understand the range of stakeholders by providing the following information:

- (a) In which Member State do you reside / are your activities principally located?
- (b) Are you involved in cross-border activity?
- (c) How many employees do you have?
- (d) What is your area of activity?
- (e) Do you own any patents? If yes, how many? Are they national / European patents?
- (f) Do you license your patents?
- (g) Are you a patent licensee?
- (h) Have you been involved in a patent dispute?
- (i) Do you have any other experience with the patent system in Europe?