UNICE
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COMMUNITY PATENT

UNICE POSITION PAPER

1. ENLARGEMENT, COMPETITIVENESS AND INNOVATION

The historic step forward accomplished by the enlargement of the EU will not, by itself, guarantee satisfactory economic growth and prosperity in a market of 453 million consumers if the EU does not improve its competitiveness[1], in particular through more innovation and R&D.

Intellectual property, and more particularly patents, have become during the last years a tool of major importance for the competitiveness of enterprises. Innovation is the source of welfare as it constantly provides new products, improved performances and new technology. But innovation requires significant investments and risks. Patents give a chance to those who take risks and invest money in innovation to have a legitimate payback.

The USA and Japan have established the clear and direct connection between the level of investments in R&D and the existence of an affordable patent system. This applies for both private and public investments in R&D. The comparison between the EU and its major world competitors in terms of the resources devoted to R&D remains unfavourable[2]. The President of the Commission recently indicated that 40% of the research undertaken by large European companies is performed outside the territory of the EU.

An enlarged Union with enhanced diversity (not least diversity in languages, that will grow up from 10 official languages to 19) will pose serious institutional challenges to the functioning of the Union.

At a time when the EU wants to increase R&D expenditure from 1.9% to 3% of GDP, an affordable Community Patent System can contribute to this challenging goal. We recall that the Council Lisbon 2000 summit fully endorsed this request and set the deadline of December 2001 that unfortunately was missed.

[1] According to the "competitiveness" classification, that is compiled every year by the International Institute for Management Development (www.imd.ch), the three major Member States of the Union, Germany, Great Britain and France (the EU as a whole is not considered in that classification) are placed respectively at the 15th, 16th and 22nd position, whereas the USA remains the undisputable leader. Japan finds itself in the 30th position.

[2] According to OCDE data, the EU spends some 1.93% of its GDP, compared with 2.69% and 2.98% respectively of the USA and Japan.

2. THE PROPOSED COMMUNITY PATENT AND THE ISSUES OF "UNITARY CHARACTER", "AFFORDABILITY", "QUALITY" AND "LEGAL CERTAINTY".

Several key elements of the proposal for a Regulation to create a Community Patent (COMPAT) presented by the Commission on August 2000 were welcomed by UNICE, since the proposal was based upon the concepts that the Community Patent:

a) should be of a unitary character and valid in the whole territory of the EU;
b) should be affordable and competitive in terms of costs;
c) should be of high quality, and should make use of and coexist with the present EPO system;
d) should guarantee legal certainty, based upon an integrated Community Court specialised in patent matters, with exclusive competence for both infringement and validity issues[3].

Unfortunately subsequent developments occurred in negotiations among Member states have brought about a substantial degradation of the Commission proposal.

2.1 UNITARY CHARACTER

UNICE notes with satisfaction that developments at Council level have not brought into question the unitary character of the Community Patent as contained in the Commission proposal.

2.2 AFFORDABILITY

In its August 2000 proposal the Commission estimated that an average European Patent costs three to five times higher than a US or Japanese patent[4].

The affordability of the Community Patent was brought into serious question by discussions at Council. Further to these developments, the applicant will be required, at the time of the grant of the patent, to file a translation, at his own costs, of the claims in all official Community languages (11 at present and 19 with enlargement).

UNICE has always supported the use of English only because it is the most cost-effective solution. In this context, translation of the claims into all EU languages would result in an excessive increase in the costs of the Community Patent[5] with the effect that important segments of industry will not use it.
Such a requirement:

- does not serve the interest of disseminating information to users and competitors, as they mostly rely on English-language databases;
- does not ensure legal certainty because the claims alone - even if translated - will not be enough for a reasoned and thorough evaluation.

[3] We note, however, that UNICE has very important concerns about several other elements of the proposal including elements relating to substantive law.
[4] According to the Commission proposal an average European Patent designating 8 contracting states costs in total € 49,900, of which € 12,600 represented the cost of translations. We note, however, that many companies do not ultimately maintain patents in 8 contracting states and that to assess the desirability of the Community Patent to such companies on this basis may be flawed.
[5] In a speech Commissioner Bolkestein indicated that if patent claims had to be translated into all EU languages (19 after enlargement) the translation costs would go up to € 6,954, i.e. 3 times more expensive than under the Commission proposal (estimated at € 2390). If both the claims and the abstract were translated into all languages translation costs would be € 11,500. This would lead to excessive costs and no improvement of competitiveness.

2.3 QUALITY OF THE COMMUNITY PATENT AND ROLE OF EPO

A very large majority of UNICE's members oppose an outsourcing of search/examination activities by the EPO to National Patent Offices (NPOs), as outlined in the Common political approach of May 16 2002[6].

Such developments at Council level concerning the role of the NPOs should be considered detrimental to the quality and uniformity of the Community Patent and the necessary role of the EPO, as well as discouraging the use of the Community Patent System.

This does not mean that an enhanced relationship between NPOs and the EPO should not be considered and sought.

In this context, UNICE notes and welcomes a proposal by the EPO to improve the synergies between itself and the NPOs, as embodied in a document submitted at the EPO Administrative Council of October 2002[7].

2.4. THE ISSUE OF LEGAL CERTAINTY FOR PATENTS IN EUROPE

A) COMMUNITY PATENT JURISDICTION

A reliable jurisdictional system providing consistent and efficient enforcement is an indispensable element of a Community Patent System. Industry must be confident that legal certainty is guaranteed by the jurisdictional system. This requires the establishment of an integrated judicial system including common courts of first and second instance and common rules of procedure.

Crucial factors in establishing a common judicial system acceptable to industry include a workable language regime and experienced patent judges in both instances, including technically trained judges. To be operational in patent litigation, the language regime must require neither extensive translations nor unrealistic linguistic abilities on the part of judges.

Existing judges must be used efficiently as a joint resource for deciding cases regarding European and Community Patents. Judges will need to deal with European patent cases during the long period when the number of Community Patent cases will remain low. This will also contribute to developing a consistent case law for Community and European patents, which will be essential for confidence in the legal certainty.

B) EUROPEAN PATENT LITIGATION AGREEMENT

As there is a need for a Community Patent, there is also a need of improving the European Patent System. The Community Patent is to be based on the European Patent Convention (EPC).

An urgent improvement is to introduce a reliable system for consistent and efficient enforcement of European patents by creating a common judicial system for litigating

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[6] According to the "Common political approach" of 16 May 2002:
- the national patent offices (NPO) of Member states, having an official language other than the three languages of the EPO, may "on behalf of the EPO and at the request of the applicant"carry out "any task up to and including novelty searches in their respective language";
- the NPOs of Member states, having as their official language one of the three EPO languages, which have experience of cooperating with the EPO, may, if they so wish, carry out search on behalf of the EPO;

[7] See Doc. CA/147/02 on "Mastering the Workload";

infringement and validity disputes. The need to avoid the harmful effects of the disparities of current national procedures is common to Community and European patents – and so are the means. A coordination of the judicial systems for Community and European Patents is essential for industry in order to enhance consistency and efficiency in the enforcement of patents within the Community and among the EPC Member States.

Industry supports work on drafting such an integrated judicial system, including common rules of procedure and a common court of appeal, as mandated by the Governmental Conferences in Paris in June 1999 and in London in October 2000, as vigorously as it supports the creation of a Community Patent.

The result of this work – European Patent Litigation Agreement (EPLA) – is not an alternative to the creation of the Community Patent System but rather a first step to improve patent litigation within the Community. An operational common patent judiciary under EPLA will be a basis for providing patent judges with the appropriate experience in the start-up phase of the Community Patent judiciary.

In view hereof, UNICE welcomes the wide support of the work on EPLA among the EU Member States and urges that the relation between a Community Patent and EPLA be considered on Community level and compatible solutions be established for the benefit of both industry and the Community Patent.

3. CONCLUSIONS

a) UNICE reiterates its strong support for the creation of a unitary, affordable, of high quality and guaranteeing legal certainty Community Patent System;

b) UNICE confirms its general support to the August 2000 Commission proposal, read in the light of the above comments;

c) UNICE considers that political compromises have already placed the package far away from the instrument that industry needs if it wants to compete with its main trading counterparts;

d) Therefore, UNICE urges the EU Council Presidency to accelerate efforts in order to secure adoption of a Community Patent that will meet the above-mentioned requirements and be a supportive tool for Europe's innovation and competitiveness;

e) UNICE urges the Commission to take a more pragmatic attitude towards the work under way for the EPLA and to consider attentively the said work and the specific solutions embodied therein;

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