

Mr Apostolos Tsohatzopoulos

Minister for Development
President of the Competitiveness Council of the
European Union
Leoforos Mesogion 119
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THE SECRETARY GENERAL

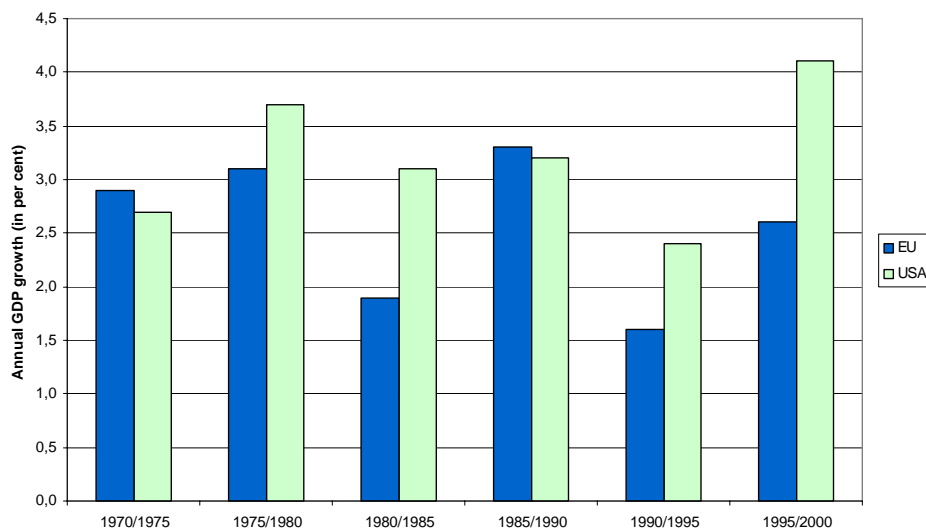
Dear President,

On 3 March 2003 the Competitiveness Council of the European Union will meet and discuss issues which are crucial for European business.

Competitiveness is of essential importance for business. UNICE is therefore increasingly concerned about the fact that Europe is becoming less competitive. Growth rates are not taking off. The economies of several Member States are near stagnation or even in danger of recession.

It is beyond doubt that the causes for this situation are homemade: although the world economy has slowed down overall, our main competitor, the United States, is still experiencing higher growth rates. The widening differential in growth rates between the USA and the EU in recent years rings an alarm bell for the long-term growth potential in Europe:

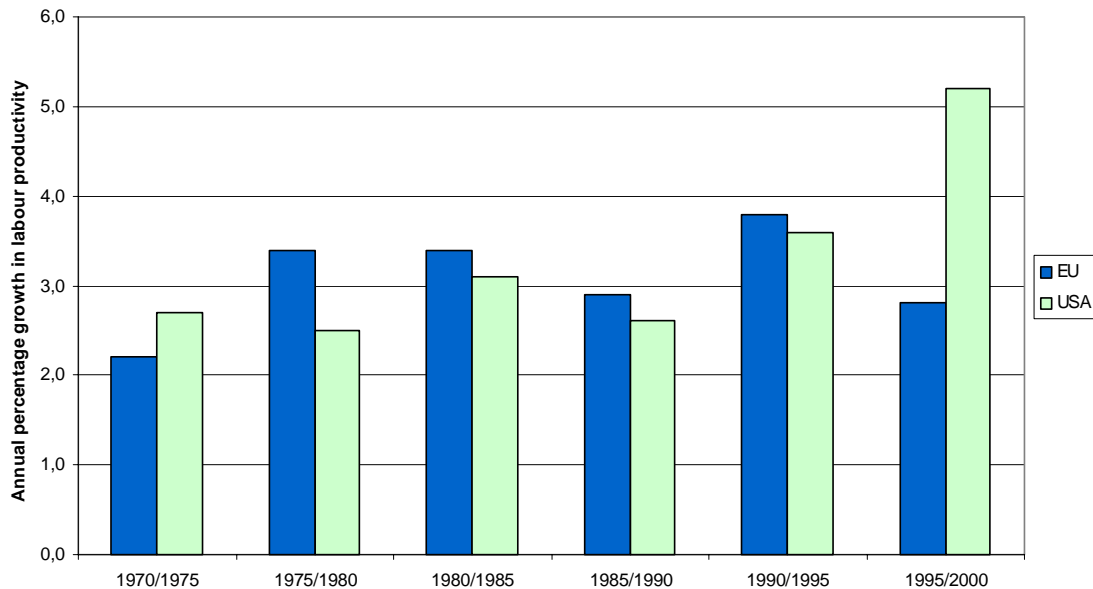
GDP Growth 1970 – 2000 Comparison EU-USA



Source: Karl Aiginger, Stanford University / Austrian Institute of Economic Research (11/2002)

The USA benefits from an entrepreneur-friendly environment, which makes businesses more ready to react to changes and seize new opportunities. Productivity growth has been consistently higher thanks to better use of new technologies in the production process as well as more adaptable labour markets. The value chain in the US adds higher value to its products:

Average Growth in Productivity 1970 – 2000, Manufacturing Industry



Source: Karl Aiginger, Stanford University / Austrian Institute of Economic Research (11/2002)

We all know that Europe needs structural reforms quickly in order to reach the Lisbon goal of Europe becoming the most competitive knowledge-based economy in the world by 2010. This was also the core message of the Spring Report published by the European Commission in January.

The Competitiveness Council on 3 March is the last chance to send a positive signal of political will to act ahead of the Spring Council. It is in your hands to take concrete decisions and thus help make the Spring Council a success.

In this letter UNICE identifies the most important elements on your agenda and gives recommendations on the decisions that need to be taken. Please ensure that it is distributed to all the members of the Competitiveness Council.

For a more comprehensive view of European business on structural reform priorities please consult our report “Lisbon Strategy Status 2003” available on the UNICE website. (www.unice.org)

1. Green Paper on Entrepreneurship [agenda item 1. ii) a)]

Entrepreneurship is key to growth and job creation. UNICE urges adoption of a coordinated approach to entrepreneurship policy, involving all the relevant policy-makers at European, national and regional level, to provide a coherent and comprehensive response to the needs of entrepreneurs. Europe does not yet fully recognise the role of entrepreneurship in

creating wealth and does not sufficiently promote entrepreneurship, especially vis-à-vis young people. Entrepreneurship has to be at the heart of any strategy that aims to achieve the Lisbon goal and it is of primary importance that a business environment is created that brings down barriers to business development and growth and balances the risks and rewards of entrepreneurship. For European companies one of the main problems is tax and administrative burdens and UNICE therefore strongly recommends that particular attention is paid to reducing these burdens. Lower costs and taxes for business, simplicity and less red tape are necessary for more dynamic entrepreneurship in Europe.

2. Communication on industrial policy in an enlarged Europe [Agenda item 1. ii) b)]

Business strongly supports the thrust of the Commission's communication, on which UNICE has commented in the attached Opinion dated 26 February 2003.

UNICE calls on the Competitiveness Council to formulate recommendations and take initiatives with a view to ensuring that the conclusions of the Brussels European Summit (20-21 March 2003) on the Lisbon strategy:

1. underline the crucial importance of injecting fresh impetus into initiatives for EU industrial policy;
2. underline the crucial importance of developing all EU policies taking account of their effects on the development of industry, in particular its competitiveness;
3. confirm the importance of horizontal EU measures to promote industrial competitiveness, while inviting the Commission to move forward with analyses and proposals designed to improve the framework conditions in some sectors. The Competitiveness Council should also organise itself to become an effective platform for mutual information on national policies and dissemination of best practices for improving the business environments;
4. endorse the concept of sustainable development advanced by the industrial policy communication;
5. establish the principle of joint management, between the Competitiveness Council and the other Council formations (environment, health, transport, energy, etc.), of dossiers which have strong implications for European industrial competitiveness.

3. European Research and Innovation [agenda item 1. iii]

UNICE considers that the Commission's Communication on "More research for Europe-towards 3% of GDP", COM (2002) 499, which acknowledged that the framework conditions for private investment have to be improved, is a good basis for identifying the policies and priority measures that need to be developed by Member States and the EU.

Industry strongly hopes that the second Commission Communication, announced for May 2003, will contain guidelines for "best practices" to increase R&D spending in Europe to 3% of GDP by 2010, as decided by the Barcelona European Council in March 2002.

UNICE is concerned by the fact that the Government Budget Appropriations or Outlays on R&D (GBAORD) of some large EU countries such as Germany, France, Italy and the United Kingdom hardly changed between 1995 and 2001 or have even declined slightly as a

percentage of GDP. It is also very worrying to see that EU public R&D spending on “industrial production and technology” dropped from 12.5% to 10% of the EU’s total GBAORD over the period 1991-2001.

Future challenges require an increase in public and private R&D efforts. UNICE therefore insists that corrective measures should be undertaken immediately.

4. Sustainable Development – Chemicals Legislation Package [agenda item 6.]

UNICE urges the Competitiveness Council to become fully involved in the various stages of examination of the Commission’s proposals. Its contribution will be essential to ensure that these proposals preserve the competitiveness of producers and users of chemicals, and are well in line with the concept of sustainable development defined in the communication on industrial policy. The Council will have to be particularly attentive to the risk that producers of chemicals could stop manufacturing certain products because of unwieldy and costly procedures for registration, authorisation and evaluation. This situation could have dramatic impacts on downstream users, mainly SMEs, resulting in job losses.

5. Community Patent [agenda item 7.]

Promoting innovation in Europe is one of the main elements of the Lisbon strategy. Innovation is closely linked to a strong system of intellectual property rights, more particularly patents. As things currently stand, European innovators are at a disadvantage when it comes to obtaining and enforcing patents compared with their competitors.

Industry needs the Community Patent and this is why UNICE has expressed its support to the Commission proposal to create a Community Patent, as a unitary title, granted for and valid in the whole territory of the EU.

Nevertheless, UNICE considers that political compromises have already moved the current package well away from the instrument that business needs if it wants to compete with its main trading counterparts.

The Spring Summit has been set as the new deadline and, UNICE urges the Competitiveness Council to assess the Commission proposal as a whole compared with the objective set in Lisbon of adopting a Community Patent that can support EU competitiveness, and to examine further ways of reducing the cost of the proposed instrument in order to secure a Community Patent that can meet users needs in terms of quality, affordability and legal certainty.

The latest UNICE position paper on Community Patent is attached.

6. Directive on patentability of computer-implemented inventions [agenda item 13.]

UNICE supports the broad intention of the Commission proposal for a Directive on the patentability of computer-implemented inventions, in order to remove the current legal uncertainty surrounding the patentability of software-related inventions.

This harmonisation initiative is important for Europe’s innovation and economic development in a market that will otherwise be dominated by the USA and Japan if European companies are to be excluded from access in this market.

The Danish presidency compromise has to a large extent tightened up the Commission proposal making it more consistent and including a provision that would allow program products to become eligible for patent protection.

Building on this document, UNICE urges the Competitiveness Council to discuss the proposal in a constructive and effective way, ensuring that the foreseen harmonisation fully meets users' needs without jeopardising the quality of the patent system in Europe or putting at stake the well-functioning of the Internal Market.

Yours sincerely,



Philippe de Buck

Annexes : UNICE opinion on the new EU industrial policy proposed by the Commission
(26.02.2003)
UNICE position paper on « Company patent » (25.02.2003)

Cc : Permanent Representatives of Member States to the European Union (Coreper)

INDUSTRIAL DYNAMISM IN EUROPE NEEDS STRONG BACKING

UNICE OPINION ON THE NEW EU INDUSTRIAL POLICY

PROPOSED BY THE COMMISSION

Turn concept into action and results

UNICE strongly supports the Commission's launching of a wide-ranging initiative with a view to encouraging a flourishing industrial sector, which is a vital source for growth and employment in Europe¹, as shown by the following data:

- Europe's industry today accounts for a quarter of real net output in the internal market and provides 45 million jobs.
- European industry is an important buyer of products from the service sector in Europe. Both sectors are complementary. Dynamism in the service sector, above all in its higher-quality segment, would not be sustainable without an industrial base that is internationally competitive.
- In foreign trade with third countries, European industry generates an export surplus of € 55 billion.

The only way for this industrial policy initiative to become a major building block for reaching the Lisbon objective of making Europe the most competitive region in the world by 2010 is to move now from an industrial policy *concept* to *actions* and produce *concrete results*. This should be done with an ambitious and offensive mindset, determined to capitalise on Europe's strong assets.

If a results-oriented strategy is not implemented, the consequence will not only be that the future development of European industry will be jeopardised but also that entire sections of this industry will leave Europe. Another consequence will be that Europe will lose resources and important levers for contributing to sustainable development.

1. Get moving

The Greek Presidency and the European summit on 20 and 21 March 2003 must now give major political impetus with a view to:

- incorporating industrial policy objectives throughout the European agenda;
- submission, by the Commission, of specific action proposals;
- triggering new work methods in the Commission and Council which make it feasible to achieve the objective of balancing and integrating all EU policies which have repercussions for industrial development and competitiveness.

The Competitiveness Council should be the champion and driving force energising these efforts. Results can only be achieved if both the Commission and the Member States together develop a coherent vision on the future of manufacturing industry in Europe.

¹ "Industrial policy in an enlarged Europe" – Communication of the European Commission of 11/12/2002 (COM 2002-714)

2. The Communication's basic thrust is correct, but some inescapable economic and regulatory reforms are crucial for success

The Commission's new industrial policy concept is well articulated, with its combination of horizontal policies and sectoral initiatives aimed at improving the specific operating framework of certain sectors. The right emphasis is placed on most of the horizontal policies that UNICE has advocated as being essential for industrial competitiveness, namely:

1. establish a legislative, regulatory and financial framework conducive to entrepreneurship
2. promote innovation, knowledge and research
3. ensure access to a competent and skilled workforce
4. improve the integration of EU policies that have an impact on industrial competitiveness
5. develop innovative approaches for promoting sustainable industrial development, preserving competitiveness, and
6. gain further access to international markets, under conditions of fair competition.

It is however *essential to put a much stronger emphasis on the following three major fields of action* :

- competitive access to the basic infrastructures of the economy
- competitive prices for services of general interest which are not, or not completely, liberalised (e.g. water industry, local public transport, waste, energy, etc.)
- an enhanced innovation strategy promoting greater concentration and greater effectiveness in R&D efforts, definitely resisting a "picking winners" approach.

In addition, if the new industrial strategy is to deliver the intended results, Europe must *quickly come to grips with* two fundamental issues i.e.:

- *the functioning of the internal market, and*
- *the coherence of its mass of legislation, both European and national. .*

Finally, a European policy to strengthen industrial competitiveness can only be genuinely successful if governments are prepared to *carry through structural reforms to labour markets and social security systems*.

3. Industry is Europe's key asset for sustainable development

Industry is not a laboratory for regulatory experiment. As rightly stressed by the Commission, it is "a cornerstone of the EU's sustainable development strategy" and its competitiveness is a necessary ingredient in the latter's success.

Implementation of this holistic vision presupposes *rigorous use of impact assessment for all major EU policy initiatives*, taking account of economic, employment and environmental impacts. Looking forward to the systematic use of such extended impact assessment by the Commission by 2004, UNICE requests that this triple evaluation be envisaged already in 2003 not only for the "pilot" measures presently identified but also for two current major Commission proposals, i.e. the chemicals policy and transport infrastructure pricing.

Promoting self-regulation and co-regulation, as alternatives to the traditional command-and-control regulations, should be systematic in the preparation of environmental initiatives and in policy discussions on market instruments for sustainable development.

The design and evaluation of the latter must consider

- environmental effectiveness and economic efficiency ;
- policy coherence ;
- sustainability impact, with particular focus on the international competitiveness of business and industry².

Finally, it is essential for *the Commission to acquire a correct vision of the actual cost burdens on European industry and place the latter in its international context*, taking account in particular of corporate taxation, non-wage labour costs (social charges and taxes not related to the salary mass), energy taxes, environmental charges (including those linked to the Kyoto commitments), transport taxes and infrastructure charges, and expenditure on services of general economic interest, etc.

4. Concluding proposal

UNICE backs the idea proposed by Mr Voscherau, President of CEFIC, at the “Industrial Policy” conference organised by the Commission on 21 January 2003, of setting up an *Industry Advisory Board* which would act as a steering body to make sure that the industrial policy agenda is carried forward.

As a follow-up to the initiatives it took before and after the Commission internal seminar on industrial policy (10 July 2002), UNICE is prepared to offer its collaboration, with some major industry sectors, in order to put in place this Advisory Board, which should comprise industry personalities at the highest possible level.

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² cf UNICE contribution of September 2002 on market instruments for sustainable development

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 competitiveness¹, 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 unfavourable². 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 EU, 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 OECD 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 issues³.

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 patent⁴.

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 Patent⁵ 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.

2.3 QUALITY OF THE COMMUNITY PATENT AND ROLE OF EPO

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.

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 2002⁶.

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 2002⁷.

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 infringement and validity disputes. The need to avoid the harmful effects of the disparities of current national procedures is common to Community and European

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";

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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