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Mr Alexander Schaub
Director-General
Internal Market DG
European Commission
200 rue de la Loi
1049- Bruxelles

26 February 2004

THE SECRETARY GENERAL

Dear Mr Schaub,

Alex,

Thank you for your letter of 9 February 2004 in response to our assessment of the current package regarding the Community Patent.

As you are well aware, UNICE considers the Community Patent a tool of major importance for Europe's competitiveness and innovation as part of the Lisbon agenda and has been a fervent supporter of the Commission proposal.

Member States agreed in Lisbon in 2000 *"to ensure adoption of a Community Patent that will provide simple, inexpensive to obtain and as comprehensive in its scope as the protection granted by key competitors, Community-wide patent protection"*.

However, UNICE cannot support the current compromise that brings into question the basic principles of the Community Patent system, merely for the sake of reaching a political agreement that does not correspond to the needs of the users of the patent system and does not contribute to Europe's competitiveness.

One of the key elements of the Community Patent system is the unitary character, i.e. the same scope of protection in all Member States of the European Union. Any compromise which deviates from this principle does not bring an improvement over the current system. It is therefore unacceptable that the translations of the patent claims should have any legal effect, and that, depending on the translations, the Community Patent might have different effects in different parts of the EU.

Current proposals giving a legal effect to translations will be the source of uncertainty, distortion of competition and endless litigation with the risk of (temporary) compulsory licences in one or more Member States. Furthermore, they basically eliminate the possibility for the right holder to enforce his patent against an infringer in cases of linguistic differences, as the infringer would always claim incorrect translations. Sacrificing the unitary character to differences in translated claims is clearly in full contradiction with the goal of competitiveness.

With regard to the argument that the provision of Article 24c as proposed is "far more advantageous for the patent holder than the system in force under the European Patent Convention", we disagree. First of all, it has to be recognised that approximately 70 % of all patent infringement cases in the EU concerning patents granted under the European Patent Convention are filed in one Member State – in Germany. The decision rendered in the German action is then used as a basis for a settlement in the remaining Member States of interest – this is the practical reality. The question of different scope in different countries in the European bundle patents is therefore not a really crucial question, as it is rarely discussed at all. With the proposed Community Patent regulation and the provisions on the legal effect of the translated patent claims, the patent holder could not avoid discussing different scopes of his patent in different languages.

In your letter, you make a cost comparison between the Community Patent and the European Patent. However, even if the Community Patent on the basis of the latest proposals is somewhat more economical than the European bundle patent (until the London protocol is ratified) this is not the right comparison to be made. The comparison should be made between the Community Patent and the patent systems of the EU's main competitors (USA and Japan).

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. The comparison between the EU and its major world competitors in terms of the resources devoted to R&D remains unfavourable. At a time when the EU wants to increase R&D expenditure from 1.9% to 3% of GDP, a competitive Community Patent system can contribute to this challenging goal. Nevertheless, with the current proposals, Community Patent protection would still cost € 79,401 compared with € 17,577 in the USA, 4.5 times more expensive, according to estimates made by French industry.

I hope that you understand that our criticism is made in a constructive way in order to ensure that the EU provides its companies with an instrument that can really improve their competitiveness. We have always recognised the efforts of DG Internal Market to provide industry with the instrument it needs and we trust that you will pursue your efforts to convince Member States to ensure adoption of the Community Patent users are asking for.

I remain at your disposal and would like to discuss this further with you.

Yours sincerely,

best regards,

Philippe de Buck

