FEMIPI

Fédération Européenne des Mandataires de l'Industrie en Propriété Industrielle | Europäischer Verband der Industrie-Patentingenieure | European Federation of Agents of Industry in Industrial Property

FEMIPI POSITION PAPER

FEMIPI, the European Federation of Agents of Industry in Industrial Property, representing 11 national associations totalling more than 3500 patent professionals working in the European industry

having considered the Questionnaire published by the European Commission "On the patent system in Europe"

invites the European Commission to pay due consideration to the position as outlined in the following responses.

Section 1 - Basic principles and features of the patent system

1.1 Do you agree that these are the basic features required of the patent system (see the questionnaire)?

Yes, the features mentioned are essential for a patent system.

The quality of the decisions, taken in the course of the patent process, is of essential importance and must take priority over the above mentioned features. This quality must not be sacrificed or even merely impaired by endeavours to meet the above criteria (which are however also desirable and important).

The European Patent Convention (EPC) and the national patent laws of the Member States already contain the necessary clear substantive rules.

Procedural law has been substantially harmonized by EU Regulation 44/2001 and EU Directive 2004/48/EC.
Due regard must be paid to public policy interests. However, a patent is a right of exclusion and by no means a right to use the patented subject matter. With regard to competition, ethics, environment, healthcare and access to information, attention must be paid to the relevant specific laws.
A patent system has to remain essentially focussed on patentability requirements, validity conditions, scope and enforcement. The internal coherency and transparency of a patent system are in our view instrumental to meeting the expectations that are expressed as “quality of life for the benefit of all in society” that as such go far beyond the role of a patent system.

1.2 Are there other features that you consider important?

The user must continue to be able to choose between various existing and/or future systems.
EU legislation has to be TRIPs compliant.
Uniform legal protection must be guaranteed with specialized, and in particular technical, expertise on the part of the judges, geographically accessible courts of the first instance and an acceptable solution to the language problem (only one legally binding text in one of the three official languages of the EPO or even more preferably just one language (English) for the procedure).

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

The broad public interest is already built in the current patent system through the requirement that the patent specification be comprehensive, clear and complete, and through the automatic publication of the application, at a very early stage thereby teaching to the competition new ideas not knowing what excactly the granted scope will be. This is intrinsically pro-competitive.

The protection of intellectual property must be paramount in the Community.
Innovations provide our economic basis and our competitive advantage on the global market.
Information policy and education on the subject of intellectual property must be considerably improved.
A change in political awareness is needed. The protection of intellectual property is too important to be allowed to be governed by singular interests of the Member States.
The EPC represents a successful and well-functioning system which should be improved to more fully meet the needs.

Section 2 - The Community patent as a priority for the EU

2.1 By comparison with the common political approach [March 2003], are there any alternative or additional features that you believe an effective Community patent system should offer?

A greater legal certainty through a unified jurisdiction is strongly desired.
We reject the "common political approach" for the following reasons:
The language requirements would be too costly. In addition, they would destroy the required legal certainty; a Community patent could not be truly uniform if several legally binding texts existed in several languages.
The three-language system of the EPO would be recommendable without the requirement for translation on validation.
A user-friendly first judicial instance would need to be geographically accessible. In addition, such a court system would need to be able to cope with the current number of legal disputes (approximately 1000 cases). The proposed system would also not provide the required technical expertise of the court.
The judges would not have any technical expertise. An expertise which is however highly valued by users.

If the above items are not rectified, the proposed Community patent system should be abandoned since it will only generate costs .

Section 3 - The European Patent System and in particular the European Patent Litigation Agreement (EPLA)

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?*

Legal uniformity between the Member States of the European Patent Organisation would be important even without the existence of a Community patent, in view of the more than 800,000 granted EP patents.

The EPLA, providing for a European Patent Court, presently appears to be the only realistic project for improving the desired unification of procedural law.

The advantages of the EPLA would be in particular:

greater legal certainty,;

a uniform jurisdiction would facilitate extrajudicial settlements of disputes;

the high technical expertise of the judges.

In addition the EPLA would provide a suitable basis for any future harmonization steps.

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 EPLA patent litigation scheme is strongly supported by FEMIPI.

National patents should remain subject to the jurisdiction of national courts. It is noted that the EPLA contains features allowing national judges to obtain more experience in handling patent matters by participation as judges or assessors in the EPLA courts.

All European patents should be subject to the jurisdiction of the EPLA courts as regards those EPC states that join the EPLA. This applies to both existing and future European patents, and to both European patents that are Community patents should any Community patent system enter into force, and to European patents that are not Community patents.

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?

The legal framework has already been harmonized by, for example, the Strasbourg Convention, TRIPs and the EPC. Thus, there is no need for a harmonization directive.

The fact that there are partial differences in the interpretation of these standards by the various courts within the EPC Member States cannot be solved by a harmonization directive but only by a European Patent Court.

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

FEMIPI is not aware of any figures assessing the economic impact.

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

There is no need whatsoever to pursue any of the three options (1) to (3).

(1) and (2): In particular, there is no need to introduce new Community law with regard to any patentability criteria whether such criteria are general (i.e. novelty, inventive step or industrial applicability) or specific (i.e. relating to a particulat technical field) in nature.

The EPLA would provide a basis for the needed uniform jurisdiction and should be positively supported.

(3): Mutual recognition of patents will have a disastrous effect on the quality, not only the absolute but also the variations, of granted patents. Even more dangerous would be a validation scheme, "supervised" by the European Patent Office, of patents granted by the individual Member States whereby not only unnecessary duplication of work, higher costs and prolongation of the granting procedure results but also a "European Patent" of the lowest patent quality due to forum shopping and involvement of offices which in the past never conducted substantive examination. Finally, the validation would mean a transfer of essential activities in the substantive examination process, which is unacceptable as it is in contrast to the basic feature of the EPC that a European patent is only granted after a uniform substantive examination.

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

The ratification of the London language protocol should have priority. All that is needed for this protocol to come into effect is ratification by France. Every effort should therefore be made to support this.

As soon as the London language protocol and the EPLA have come into effect, further developments to provide for a Community patent (which is uniform, economical and legally reliable) may be envisaged.