European Software Association:
Response to the European Commission's Consultation on the Patent System in Europe

The European Software Association has identified key questions on the questionnaire, which was sent out as part of the public consultation on the patent system in Europe. The members of the Association have sent their feedback to the questions. The responses have been collated and follow hereto. Should the Commission want to know more about the European Software Association's position on intellectual property (IP) issues, the European Software Association is pleased to refer to its general position paper (*ISVs and intellectual property protection in Europe.* Freedom to choose the best IP protection). Also, the Association is ready to further discuss any specific IP issue, such as the patentability of computer-implemented inventions and to respond to additional questions that the Commission would have. The European Software Association considers that patentable subject matter should continue to be limited to technical solutions, and neither reduced nor expanded (for example to cover business methods.)

In general, the European patent system appears to work pretty well, at least in comparison with the US system, and members of the European Software Association have not encountered the difficulties created by trivial or dubious patents. In the US, too many low quality patents have been granted and this is one of the reasons, which explains the on-going attempt to reform the patent system in the US. The European Software Association thus insists that Europe should avoid the excesses and mistakes of the US patent system, and maintain a restrictive approach for granting patents, as it is the case up to now. This is not to say that the patent system in Europe cannot be improved. Patents are too expensive and the litigation system too complex. The Commission's actions should focus on those two practical issues rather than try to build a new system. The improvements can be done within the existing legal framework through the creation of a common court system and the adoption of administrative measures (reduced fees for SMEs, reduced delays in decisions on oppositions, etc.).

1. ***Do you agree that [(i) clear substantive rules on what can be covered by patents, (ii) transparent, cost effective and accessible processes for obtaining a patent, (iii) predictable, rapid and inexpensive resolution of disputes, and (iv) due regard for other public policy interests] are the basic features required of the patent system?***

   (i) The law must provide clear patentability criteria and clear rules regarding what can be protected or not through patents, taking into account our digital era and the new technologies.

   (ii) Efforts have to be made on the costs aspect. It is indeed not acceptable that European SMEs must pay three times more for getting patents than their US counterparts. Besides, the cost of litigating and enforcing European patents in different countries remains high. Until those issues are solved, patents will not appear very attractive to European entrepreneurs.

   (iii) In addition to the cost aspect, "predictability" is the keyword. What is not acceptable is the lack of consistency that companies sometimes face due for instance to the discrepancies between the interpretation by national courts of a same set of claims or the different standards applied to grant an injunction. Those differences sometimes lead to different results in court (see the so-called "Epilady" case between Improver and Remington).

Predictability could be enhanced if a common Court system such as the one provided by the draft European Patent Litigation Agreement is adopted and if the judges are adequately trained and have an extensive experience and expertise in patent matters.
(iv) Intellectual property and patent policy issues must not be subjugated to, for example, competition law or other public interests. Patent law already incorporates an adequate balance of interests. In designing the future patent system, the Commission should pay attention to the promotion of innovation and the improvement of the competitiveness of the European industry, which are at the core of the patent system. Other objectives, such as environment, are better dealt with in other bodies of the law.

2. ***Are there other features that you consider important?***

§ To further improve the quality of examination, more rigorous examination of the criterion of obviousness should be adopted by the patent offices and/or an improved and faster opposition procedure should be put in place.
A workable system of compulsory license already exists at national level. It is legitimate that third parties could claim the use of a patented technology where the patents are not turned into an (commercial) application (by the patent owner or licensee) within a reasonable time frame and where the patent owner abusively refuses to grant a license. If a company sits on a patent to stall the market or block competition, the patent office or any other public authority should be able to impose a license under the conditions defined in Article 31 TRIPs and in national laws.
§ A better system for searching and collecting prior art is also required, in order to guarantee that the novelty of the claimed invention be thoroughly assessed. More cooperation between the main patent offices is required for improving the data collected and their management.
§ A single application procedure is already available to get a pan-European protection. A uniform application procedure partly solves the geographically limited scope of patents; no other system such a mutual recognition system is needed.
§ Patentability should continue to be limited to technical solutions, for example those implemented in computer programs, and not reduced or expanded (for example to include business methods).
§ The requirement that patents are published is a fundamental rule of the patent system. An inventor has to completely disclose his invention if he wants to get a protection for a limited period of time. The disclosure requirement should thus remain an essential feature of a balanced patent system. Disclosure and publication enable third parties to build on the technical knowledge made available thanks to the patent process.

3. ***What advantages and disadvantages do you think that pan-European litigation arrangements would have for those who use and are affected by patents?***

A pan-European system for litigating patents is preferable, as it ensures consistency in judgements, and avoids multiple legal proceedings brought in different countries.
Thanks to a single action, it will be possible to enforce a patent in several countries. Of course, a good litigation system requires that said Court should include experts in patent law and even technical expert if needed. Such a system would ensure quality and efficiency and resolve the current lack of harmonization in Europe.

In the EPLA Court system, regional chambers could be set up, which could partly satisfy the legitimate demand of parties in patent infringement cases to have a judge in their vicinity.
A drawback may be that the EPLA system is planned to be optional (but the optional character of EPLA might as well facilitate its final adoption by the Member States).
It is important that the legal costs of the proceedings before the EPLA Court remain moderate. .

4. ***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?***

For companies, which base their protection on copyright, the patent system can appear less important. Because of the remaining confusion about the possibility of patenting software solutions and of the high cost of patenting in Europe, fewer companies opt for patent protection than copyright protection. Copyright thus remains the most common system of protecting computer programs.

However there are great advantages to the patent system in terms of effectiveness of the protection and creation of value (patents are a valuable asset for companies).

We don't think that all the different IPR protection systems can be compared since they are not protecting the same aspects of software and they do not reward the same investments, as exposed in the European Software Association paper on IPR.

All forms of IPR protection systems are important to our industry if we are to continue to innovate and develop. IPR protection systems, including patents, are in our best interest. We are therefore very interested in participating in any effort to contribute to an improved patent system in Europe.

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