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**SUBJECT:** **Report on the STOA  
(Scientific and Technological Options  
Assessment)  
Workshop  
of the European Parliament on  
“Policy options for the European patent system”  
in Brussels, 14 June 2007**

**PURPOSE:** For information

**DISTRIBUTION:** Delegates

**REPORT**  
**on the STOA**  
**(Scientific and Technological Options Assessment)**  
**Workshop**  
**of the European Parliament on**  
**“Policy options for the European patent system”**  
**in Brussels, 14 June 2007**

On 14 June 2007, the working group established by the STOA (Scientific and Technological Options Assessment) of the European Parliament for the assessment of “Policy options for the European patent system” presented their final draft paper in a workshop held at the European Parliament in Brussels.

**I. The (Draft) Report of the Working Group**

The report is available under [http://www.tekno.dk/pdf/projekter/patent-system-STOA/p07\\_STOA\\_Background\\_document\\_and\\_report.pdf](http://www.tekno.dk/pdf/projekter/patent-system-STOA/p07_STOA_Background_document_and_report.pdf). The working group has given a strong support of the creation of a Community patent accompanied by a European Patent Court dealing with litigation on European patents, although this system still seems to be difficult to introduce in the near future. The policy options presented in this report should be seen as to improve the current functioning of the patent system, especially to stimulate innovation and the diffusion of knowledge. The working group recognised differences between the main patent systems of the world and acknowledged that challenges to other patent systems of the world and in particular, the US system, may not exist in Europe, or may not be as bad as they are elsewhere (and therefore the US patent system being exposed to severe scrutiny at present).

As the main challenges for the European patent system, the following issues were identified:

1. The rapidly increasing demand for patent rights is putting strain on the system and could jeopardise patent quality in the European patent system.
2. The high speed of introduction of new technologies makes it harder to determine the adequate scope of patents granted. Too broad patents should not be granted within the European patent system.
3. A rise in defensive and strategic patenting behaviour was observed which may lead to “patent thickets”, the effects of such patent thickets should be alleviated within the European patent system.
4. Trading rights and licensing activities should not divert resources from actual innovation.

5. Increased interest in the European patent system should be connected to greater transparency and the involvement of more experts, politicians and stakeholders in the future development of the system.

It was held by the working group that “the general premise of this report is that the patent system has so far had a positive influence on levels of innovation”. However, the policy options recommended were seen as suggestions for improving the present European system. The policy options of the working group are the following:

1. Insertion of the economic mission of the patent system in the European Patent Convention.
2. Enhancing governance within the European Patent System.
3. Improving quality aspects in regard to patentability standards and patent grant procedures.
4. Dealing with emerging technologies.
5. Increasing access to patented inventions.
6. Facilitating defensive publications.

#### 1. Insertion of the economic mission of the Patent System in the EPC

In order to “facilitate better understanding of the purpose of the [EPC] system among the wider public” the mission statement should be inserted into the preamble of the EPC. This is not intended to change the EPC but to provide clearer guidance than currently exists as to how subsequent changes of the regulatory environment might take place. The following wording was suggested as a first draft for insertion as a preamble into the EPC:

“The granting of patents serves the purpose of enhancing social and economic welfare by means of encouraging inventions and their diffusion. The protection provided by patents should be sufficient to ensure proper incentives to inventors. This should imply that patents should be granted in a proportionate and transparent manner, so as to ensure legal certainty”.

#### 2. Enhancing governance of the European Patent System

By

- establishing a standing committee within the European Parliament, which would focus on improving patent awareness among parliamentarians,
- creating a link between the European Parliament’s standing committee and an independent and external advisory body,
- encouraging dialogue between the standing committee and the external body to deal with broader economic and social questions arising from trends and practices within the patent system,

- developing regular and public communication of patent policy decisions made by the Administrative Council of the European Patent Organisation,
- ensuring a stronger patent competence in the Commission, and greater consultation of interested parties, the working group believes that the governance of the European patent system is enhanced.

Specifically the patent awareness within the European Parliament (but also within the Commission and the EPO) should be enhanced by an Internal Parliamentary Standing Committee on Patents and an External Advisory Body to the European Parliament (“Standing Committee on Patents”). These two committees should work closely together. The external advisory body would be independent of regulatory bodies and agencies and would exist to examine the impact of the European patent system on the innovative sector, and other sets of interests in society. The findings it gathers and views it expresses will be part of a formalised dialogue with the European Parliament and specifically, its standing committee on patents. This sort of body would be composed of experts in law, economics, and patent related matters. An involvement of various practitioners and stakeholder such as consumer groups was highly recommended by the working group.

An increased participatory environment within the EPO is requested as well as an increased participatory environment within the Commission (for an improved involvement of the users as well as scientists, NGOs and consumers).

### 3. Improving patent quality in regard to patentability standards and patent grant procedures

Under this option, the working group identified the following measures:

- Introduce measures to counter-balance the pressure to grant a patent.
- Discourage the filing of lengthy and overly complex patent applications.
- Reduce the possibility for applicants to unduly prolong or complicate the examination procedure.
- Involve third parties in the collection and evaluation of information on prior art.
- Give financial incentives to applicants to make their application public before the 18-month limit.
- Raise the standards for the inventive step requirement.

The working group believes that strong and well-equipped patent offices operating according to clear and strict rules are needed to maintain the right balance in order to sustain a good quality patent system. Such a system provides for patents that protect true inventive achievements, give an incentive to invest in innovation and offer legal security to its holders. Although the Working Group realised that many criticisms of the patent system, like the accusation of delivering “trivial patents” are often based on evidence from outside Europe, it is nevertheless felt that also with respect to the European patent system the quality of

the output of that system has to be reviewed critically. Remarkably, the working group recommended “raising the bar” as a key policy option in order to promote that the patent system continues to perform its basic functions now and in the future.

It is urged to strictly apply patentability standards i.a. with the following measures:

- Provide patent offices with enough means to carry out a full and comprehensive search and examination, even in situations of back-logs and a growing workload.
- Introduce quality management mechanisms in order to promote and monitor that consistent and predictable decisions are taken.
- Recognize that refusal of applications normally requires a greater time investment than the grant of a patent.
- Stress that (examining) patent offices are not created to grant patents but to prevent patents for claimed inventions that do not live up to the required standards.
- Increase the awareness that patent offices are there to serve the general public interest and not the specific interests of applicants.
- To take measures that discourage the filing of lengthy and overly complex applications, for example by introducing considerable page and claim fees.
- To review the procedural options for applicants, with the aim of reducing the possibilities to unduly prolong or complicate the examination procedure.
- Collection of up-front observations from competitors or other interested parties that might be affected by the grant of the patent (similar to the “Peer to Patent Project” of the USPTO).

#### 4. Dealing with emerging technologies

The patenting of emerging technologies was identified as raising special concerns regarding the application of the patentability requirements (novelty, inventive step,..) by the patent authority, i.e. the individual examiner. In emergent technologies such as biotech, the amount of information available is considerably less than for mature technologies and might also be much more difficult for examiners to obtain. This imposed special challenges to the examiner determining what is the prior art. In order to meet this challenge, the working group recommends the allocating of additional resources to EPO examiners through for instance, the use of external expertise used on a consultancy and voluntary basis. In this way the examiners and the EPO would be able to assess the prior art more correctly. Moreover, on-going deliberations on what is patentable or not should be ensured (also by reflecting on the mission statement mentioned under 1. above).

#### 5. Increasing access to patented inventions

In further proposals for “clearing” patent thickets and provide easier access to patented technologies, the working group proposes to explore and support more flexible, non-exclusive exercises of patent rights, such as license of right or collective rights management models, such as patent pools and clearing houses.

#### 6. Facilitating defensive publications

Defensive publishing instead of patenting is a strategy to gain a freedom to use and block patenting. This is done for a long time in industry areas such as software but also in specific fields of gene technology. The working group recommends using a publicly available database for such defensive publication of inventions, also in order to make this information more accessible.

### **II. The Workshop on 14 June 2007**

In the present workshop, the working group members explained the policy options to the attendees (members of the European Parliament and interested parties (whoever is interested in the list of attendees, please let me know). The explanations were made according to the written (draft) report, although it was indicated that the last option (#6) will not be presented in the final paper, because it was regarded as being only of minor importance compared to the other options (# 1 to 5).

In the discussion, a few of the attendees had the possibility to raise some questions. Many of the questions did not deal with the report but with more general matters regarding the patent system in Europe. Generally, the report was welcomed as it proposed some constructive elements for future discussion. It was also mentioned that the European patent system is more expensive than others, for example the US.

### **III. Statement and Comment**

Opportunity was given to me to have a short comment on the report on behalf of FICPI.

I commented that I missed a general (political) statement towards the Lisbon aims of the EU in becoming the most innovative region world wide within the next future. In becoming the world-wide innovation leader, the growing use of the patent system is an essential (but of course not sufficient) tool. Therefore, since this was a political paper, a clear dedication to innovation and, consequently, to the patent system is missing. Although it is fine that under the option “Enhancing governance of the European Patent System” especially improving patent awareness among parliamentarians is recommended, however, parliamentarians are not the ones that will file the patents. It is SMEs or universities who should get better

access to and information about the patent system. Instruments to enhance patent awareness of creative and innovative European SMEs and universities are therefore urgently needed. This would have been an important policy option which is also missing from the report.

Furthermore, I could not restrain from making a short comment on the proposed introduction of a mission statement into the preamble of the EPC, especially with respect to the passage that “The granting of patents serves the purpose of enhancing social and economic welfare by means of encouraging inventions and their diffusion”. I pointed to the risk that the need to enhance “social and economic welfare” by a patent could be interpreted as an additional patenting requirement, for example in addition to industrial applicability. Would a patentee then has to prove for each case that the invention enhances social and economic welfare (bear in mind that there is an “and” between “social” and “economic”, implying that enhancing economic welfare might not be enough to fulfil this requirement !).

With respect to the “raising the bar” for inventive step because of the rising application numbers I – intentionally provokingly – asked whether the bar will be lowered again when the application figures go down again in the future.

In contrast to the statements of others, I opposed to the view that the European patent system is too expensive and therefore preventing the patenting for SMEs or universities. I stated that the cost for filing an application in the US is about the same as for filing a European application (slightly higher official fees and slightly lower costs for the patent attorney in EP equals out slightly lower fees and slightly higher attorney cost in the US). However, the quality of the search and examination provided by the EPO is generally regarded as being significantly higher than that provided by the USPTO. The comparability of costs between the US and EP holds true until grant, whereafter the costs in the EP system is significantly higher. These costs occur at a later point in time when an applicant usually knows whether the invention will be important or not. In the first case, higher costs are not relevant (especially if he gets a high quality patent), in the latter case, the patent will not be further pursued and the invention is therefore available for everyone. The patent registers are not overly burdened.

In the discussion by the working group, the question of costs (or cost difference to other patent systems) was regarded as being of secondary importance. If it costs more to obtain a high quality patent – so it be.

The fear that patentability requirements could be changed by these policy options (EPC preamble; “raising the bar”) was also shared by others, for example CompTIA in a first preliminary written comment already being available at the workshop ([www.comptia.eu](http://www.comptia.eu)).

The comments were welcomed and the need for further information of the Members of the European Parliament was acknowledged. The STOA announced that further meetings will be organised and the interested parties will be invited to these meetings.

*Daniel Alge*  
*25 July 2007*