

Response of Microsoft to the Commission's Consultation on the Patent System in Europe

Microsoft welcomes the opportunity offered by the Commission to express its views on the future of the patent system in Europe at a time when the promotion of technological innovation is seen as a major issue. A well-functioning and accessible patent system is indispensable for promoting European competitiveness – investment, research, skills and employment. Adequate patent protection is particularly important as Europe faces increasing competition from emerging economies. It's important to note that for the patent system to work effectively, patent quality must be a top priority. Microsoft supports efforts toward continued improvements in the quality of patents being granted in Europe and worldwide.

In its response, Microsoft has chosen to consolidate the Commission's questions into five general themes (the numbering of the Commission's questions has been retained):

- Section 1. Features and Role of the Patent System**
- Section 2. A Well-Designed Community Patent**
- Section 3. Need for a Patent Litigation System**
- Section 4. Absence of Major Divergences in Patent Laws**
- Section 5. Importance of the Patent System**

Section 1. Features and Role of the Patent System

Questions

1.1. 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?

1.2. Are there other features that you consider important?

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

Yes. We agree that a well-functioning patent system should include clear substantive rules and would add that such rules already exist under the current European patent system. As such, there is no need for further legislation regarding patentability (subject matter) and conditions of protection (in particular, novelty and inventiveness).

The existing rules, as defined by the European Patent Convention (EPC), the Strasbourg Convention and the national patent laws which implement them, offer the right framework as to what can be patentable and under which conditions. The provisions of the EPC and the Strasbourg Convention adequately address the substantive conditions for patent protection, the scope of patents, and exceptions to patentability. No additional approximation of the substantive patent rules is required. By way of comparison, it's worth noting that the legal instruments which define the subject matter and conditions of protection of other intellectual property rights, including the European Directives harmonising copyright or trademark law, offer a similar level of certainty as to the definition and conditions for protection of IP rights.

As is the case with any statutory instrument, however, legal certainty does not derive solely from the wording of the statute: it also depends on the consistency in their interpretation by the courts. We would support improvements to the dispute resolution system that would allow a uniform case law to develop under a centralised patent court (at the appellate level). The proposals to amend the litigation system in Europe and to create further consistency between national case law would improve overall legal certainty in this area.

To be attractive, a patent system also requires well functioning processes. Cost-effectiveness, reliability, and speed of the procedures before the various patent organisations throughout Europe could be improved. In particular, the cost of obtaining patents remains a real issue, especially for small and medium-sized enterprises (SMEs). Surprisingly, no widespread system of reduced fees exists for small entities, as does in Canada or the United States. Access to patent protection should be encouraged and facilitated. As a large enterprise, Microsoft is willing to accommodate certain patent fee increases to enable lower patent fees for SMEs and believes other large enterprises would support this initiative. We also encourage continued efforts to improve latency in both patent prosecution and opposition processes, as this increases efficiency and reduces market uncertainty. This would also lead to improvements in the quality of patents being granted.

A patent grant balances the voluntary disclosure by an inventor of his or her invention in return for a limited exclusivity to that invention. That balance works extremely well and is in the public interest assuming that quality standards are met – which is generally the case in Europe. However, quality improvements should be assessed, including better search tools and collaboration among patent offices. Promoting better accessibility to the patent system and improving the litigation system would also help to optimize this balance. There is due regard built into maintaining other public policy interests and we do not advocate substantive European patent law changes to effect additional aspects in this important area.

Section 2. A Well-Designed Community Patent

Question

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

The common political approach adopted in 2003 is not a satisfactory compromise and fails to offer a workable Community Patent system that would benefit industry and users. The Community Patent, if done properly, should address both the costs of obtaining patents and litigation consistency issues. The common political approach fails to offer a cost-effective system regarding translations and needs improvement as to the proposed judiciary system.

On the issue of translations, the common political approach would require the original patent application (average 25 pages) to be filed in one of the three official EPO languages. Once granted, the patent would be valid in all EU member states, but the applicant would need to translate the claims (average 3 pages) into all member states' national languages. Currently there are twenty languages, but expansion of the EU would bring additional burdens in this regards. If this solution is adopted, a Community patent would remain significantly more expensive than a United States or Japanese patent. The original Commission proposal of 2000

is preferred. It allowed patent applicants to opt for one of the three languages of the EPO (English, French and German) and translate the claims only into the other two languages.

The cost of the system could be further reduced if translations were not required to perfect the grant of the patent, but rather only if a patent became subject to litigation in a particular country. However, machine translation could be used to disseminate the patent disclosure into the official languages of each of the member states to enable others to view and build upon the body of information contained in the patent in other languages. In the event of litigation, a patent could be translated fully into the language of the potential defendant and a system of proper notice given before proceedings would start.

The issue of controlling language also merits attention. The scope of a patent can often hinge on a small set of words in the patent grant. Given the level of precision required, we advocate that the language used in the granting procedure be the controlling language for purposes of infringement and invalidity proceedings. Requiring proceedings to be conducted in the official language of the defendant's country of domicile sounds promising from a due process standpoint, but lacks precision in highly complex litigation. It also represents a substantial cost burden, as patent proceedings typically require the production of substantial technical documents and other evidence.

Section 3. Need for a Patent Litigation System

Questions

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?

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?

Given the complex nature of patent litigation, we are in favour of specialized courts for hearing patent disputes, both at the first instance and appellate levels. The resolution of patent disputes should be rapid and cost effective, which is not necessarily the case today in many members states. The EPLA system is advantageous in that it would address many of these issues. We are not concerned about the coexistence of three patent systems, at least in the short to mid-term timeframe. The EPLA is consistent with existing Community legislation and questions on EU law will be referred to the European Court of Justice (EJC). As such, the EPLA represents a workable solution.

Section 4. Absence of Major Divergences in Patent Laws

Questions

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?

None, but improvements would make the system better and more accessible for everyone. The areas which cause problems for industry and the competitiveness of Europe are (1) excessive costs, mainly due to multiple translation requirements, and (2) litigation predictability, due to a lack of a common court of appeal and uniform case law, as described above, and (3) patent quality, which can occur with inadequate expertise and funding for examinations or inadequate internal procedures at some patent offices.

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

The high cost of patenting inventions in multiple member states reduces the number of applications we file in the EU and also the number of member countries in which we seek patent protection. However, small and medium-sized enterprises (SMEs) are most severely affected by these costs – to secure patents with reasonable coverage of the European Union territory, the cost is twice that of the average Japanese patent, and three times that of the average US patent. For the system to work properly, it should be accessible to SMEs.

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

None of the three options outlined in the Commission's consultation document are needed. We are not in favour of any of the options mentioned.

Option 1 – Harmonising patent law. We are not in favour of this option. We view this option as unnecessary and probably unachievable. The substantive patent provisions contained in the European Patent and Strasbourg Conventions are straightforward, including clear requirements for patentability. Challenges to patents in EPO procedures and cases brought on the validity and infringement of patents in the member state courts have produced reasonably workable and consistent results. The EPLA would add additional benefits. We don't see a compelling reason to re-visit or re-invent law that already works well. Additionally, as this area is politically charged, achieving new harmonising legislation that would be beneficial for the competitiveness of Europe is uncertain at best and not in furtherance of the Lisbon agenda.

Option 2 – Harmonising particular areas of patent law. We are not in favour of this option. This option is unnecessary for the reasons described above. Substantive patent laws are harmonized across Europe and generally working well. There is no compelling reason to single out a particular area to review.

Option 3 – Mutual recognition. We are not in favour of this option. We view patent quality to be paramount. Our concern is that this option would reduce patent quality and potentially increase needless litigation. Rule 36 of the Patent Cooperation Treaty is a minimum threshold for recognizing the substantive work of other offices. Many of the EU national patent offices fail to meet this threshold. It would be a mistake to have results from offices that fail this threshold apply to such a broad market as the EU.

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

We do not have further suggestions in this regard.

Section 5. Importance of the Patent System

A. General

Questions

- 5.1 *How important is the patent system in Europe compared to other areas of legislation affecting your business?*
- 5.2 *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?*
- 5.3 *How important to you is the patent system in Europe compared to the patent system worldwide?*

The importance of the patent system in comparison to other areas often depends on the context of the situation being addressed. Patents, along with other intellectual property rights including copyrights, trademarks, and trade secrets, are indispensable for promoting European competitiveness. A robust intellectual property system encourages continued investment in research, skills and employment and should be maintained.

B. A Remaining Issue : SME Access

Questions

- 5.4. *(Only for a response by a trade association including SMEs:) If you are responding as an SME, how do you make use of patents now and how do you expect to use them in future? What problems have you encountered using the existing patent system?*

Not applicable.

- 5.5. *Are there other issues than those in this paper you feel the Commission should address in relation to the patent system?*

Microsoft would like to see all interested parties – the EU Community, the EPO, national patent offices, large industry and SMEs – evaluate how patents can be made more affordable for SMEs. The simplest would be a patent fee structure tailored for SMEs, whereby enterprises with a turnover or capitalisation below a certain level would enjoy discounted application and maintenance fees. There are also many other ideas that should be considered to reduce the cost and increase the accessibility of the patent system for SMEs. We view this aspect as something that the Community should consider seriously in its implementation of a Community Patent.

(1) If you would like the Commission to be able to contact you to clarify your comments, please enter your contact details.

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(2) Please help us understand the range of stakeholders by providing the following information:

Microsoft is the worldwide leader in software, services and solutions that help people and businesses realize their full potential. Microsoft has over 65,000 employees worldwide. We have research & development and/or sales activities in all EU member states. We just recently received our 5,000th patent in the United States. Microsoft routinely licenses out its patents and technology, and has an IP licensing policy indicating we are generally willing to license our intellectual property to anyone on reasonable terms and conditions. See <http://www.microsoft.com/mscorp/ip> for additional details. We also frequently license technology and patents from others, including SME's. While Microsoft settles the vast majority of its patent disputes pre-litigation, Microsoft is a defendant in a number of patent lawsuits in the United States.