

Unternehmer gegen Softwarepatentierung



Protocol on patentfrei.de's Engagement in the ICT Task Force of the European Commission DG Enterprise & Industry

28.11.2006

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patentfrei.de is an initiative of small and medium-sized German enterprises. It has been founded in 2004 to contradict the highly controversial software patent directive, which has eventually been thrown down by EU Parliament. More than 600 entrepreneurs, founders and CEOs of small and medium-sized businesses have signed patentfrei.de's "Common Statement" those days. In the spirit of this statement, patentfrei.de continues to represent the small and medium-sized enterprises. Their biggest concern is not the protection **through** patents, but the protection **against** patents.

Official supporters of patentfrei.de are Bundesverband mittelständische Wirtschaft (BVMW) and Berufsverband der Selbständigen in der Informatik (BvSI).

I. Introduction

According to our role as a stakeholder for small and medium-sized enterprises (SME) of the software sector, patentfrei.de decided to engage in the ICT Task Force of the European Commission.

patentfrei.de made contributions to working group 2 "IPR and Competitiveness" on Module E "Institutional reform of the EU patent system". We decided to concentrate capacities in this section and therefore did not participate in other modules or working groups.

patentfrei states, that the recommendations presented in the final report do not represent the consensus of the complete group. Further, patentfrei stresses that the participant's contributions were not moderated with due balance, accuracy and fairness.

The final working group report mentions various statements which are referred to as opinions of patentfrei. patentfrei points out, that these statements are not identical with their original wording, but summaries, which do not always reflect the full meaning of the original contributions. In addition patentfrei's statements were taken out of original context. In case of doubt only original contributions and abstracts should be regarded as patentfrei's own positions.

Even though patentfrei's statements were included in chapter "Other Views" it is important to point out that this was achieved against strong opposition after repeated complaints directed to the European Commission.

Nevertheless the chapters I. Introduction, I.1, I.2, II, III of the draft of Module E from 12.9.2006 retained – except to two subordinate clauses and two footnotes of marginal importance - unchanged. Especially the biased recommendations in chapter III. mention the criticism expressed in chapter "Other Views" in no way.

The criticism of EPLA is completely disregarded in the chapter "Intellectual Property" of the Task Force's final report. Instead the final report recommends the establishment of EPLA in the name of the Task Force.

We hope that the following detailed documentation of patentfrei's contributions and change requests will help to clarify patentfrei's criticism of the group's findings and the findings of the Task Force's final report.

II. Time Table

Date	Intervention	Result
13.09.2006	patentfrei.de sends it's contribution on Module E to the WG2 working group	
15.09.2006	Complaint letter to coordination and Commission following rejection of patentfrei's contributions	
28.09.2006	patentfrei's contributions on Module E modified by coordination	
29.09.2006	European consumer organisation BEUC withdraws all of their contributions from the report due to distorted presentation	
02.10.2006	patentfrei criticises coordination for ignoring and modifying their contributions on Module E; criticism includes following requests:	
02.10.2006	1) Section "I. Problem" - phrase "Work Module E did generally reach consensus" (page 19)	Not changed.
02.10.2006	2) Section "I.3. Other Views" - discriminating composition (pp. 22)	Not changed.
02.10.2006	3) Section "I.3. Other Views": irrelevant comments (pp. 22)	Changed after protests of BEUC and ObjectWeb directed to the coordination.
02.10.2006	4) Section "I.3. Other Views": missing references (p. 23)	Only the references were added; the cited phrases were not embedded in the footnotes.
02.10.2006	5) Section "I.3. Other Views": Corruption of original sense (pp. 23)	Changed "reserves" to "objections"; the expression "Group's finding" was not changed to the proposed neutral expression.
02.10.2006	6) Section "II. Proposed Actions" (p. 24)	Not changed.
02.10.2006	7) Section "III. Result / Conclusion" (p. 24)	Not changed.
11.10.2006	patentfrei's critical contributions on EPLA removed from WG2 report draft	
12.10.2006	patentfrei submits complaint letter to coordination and Commission	
12.10.2006	critical contributions on EPLA contributions included in WG2 report draft after intervention of Commission	
13.10.2006	Commission announced consultations with coordination for further consideration of patentfrei's change requests and asks for confirmation or completion	
15.10.2006	patentfrei submits Commission final list of change requests as follows:	
15.10.2006	8) Section "I.3. Other Views": discriminating composition	Changed after intervention of Commission.
15.10.2006	9) What is now footnote 81 (ex-84) be deleted on the grounds that it is irrelevant;	Changed after intervention of Commission.
15.10.2006	10) Also delete footnote 85 and 86. (Footnote 85 referred to the withdrawn contribution of ObjectWeb and was deleted because it was obsolete)	Footnote 86 was not deleted.

Date	Intervention	Result
15.10.2006	11) patentfrei's view on EPLA should be recorded.	Not changed.
15.10.2006	12) Integrate the following comment enhancement:	Included again after protest directed to the Commission.
15.10.2006	13) General and Essential: Make clear, that there is no consensus within the Working Group regarding Module E	
15.10.2006	13.1 Change Section "I. Problem", phrase: "Work Module E did generally reach consensus"	Not changed.
15.10.2006	13.2 Change Section "II. Proposed Actions" in two possible ways:	Not changed.
15.10.2006	13.3 Change Section "III. Result / Conclusion"	Not changed.
17.10.2006	ObjectWeb withdraws all their contributions to Module E, because they didn't want their name seen associated with statements that would reflect their contributions imperfectly	
19.10.2006	patentfrei asks for adopting ObjectWeb's comments in Module E	
19.10.2006	14) Adopting ObjectWeb's withdrawn comments	Not changed.
13.11.2006	patentfrei accidentally receives reports summary draft (should be delivered to Task Force members and their sherpas only)	
17.11.2006	patentfrei protests against suppressing criticism on EPO granting practise and EPLA in the reports summary draft (supported by FSFE)	
24.11.2006	patentfrei protests against withholding the reports summary draft (only delivered to Task Force members);	
24.11.2006	patentfrei protests against plan of coordination to present reports summary first to public, to WG members afterwards;	
24.11.2006	patentfrei submits complaint letter to Commission	
25.11.2006	commission announced that reports summary would be published on ICT Task Force website before presenting to public (Commission denied to send pre-final version)	
27.11.2006	coordination announced that they will send reports summary on 28.11.2006 before official presentation to public	
28.11.2006	patentfrei receives reports summary; official presentation of reports summary by Commission	

III. Contributions and Change Requests

A: STARTING PHASE – SENDING THE ORIGINAL CONTRIBUTION ON MODULE E

How to exile diverging views

13.09.2006 - **patentfrei.de sends it's contribution on Module E to the WG2 working group**

We sent our contribution as a complete document as well as embedded in the WG2 reports version from 12.09.2006 (see attachment page 14 et seq.).

The group coordination **first denied** to integrate the comments into the version which should be discussed on Oct. 2nd. So in the new reports version from 14.09.2006 Module E was not changed.

After protest directed to the Commission the patentfrei comments were predominantly adopted, but **separated from their original position** in the text, summarized and mixed with contributions of other workgroup members with diverging views on the Module E content and **outsourced in a new section "Other views"** in the WG2 reports version 28.09.2006.

As BEUC stated, in this version "all the diverging view comments are accompanied by slightly negative wording". patentfrei's statement „*Courts for European patent suits in general and especially a court of ultimate resort must be implemented under the responsibility of the European Court of Justice, only*“ was completely left out.

The original sections of Module E from 14.09.2006 edited basically by SAP and EPO were not changed.

B: CHANGE REQUEST ON MODULE E

How to defend a non existing consensus on EPLA (and other peculiarities)

Changes requested 02.10.2006 referring to report version dated 28.09.2006.

1) Section "I. Problem" - phrase "Work Module E did generally reach consensus" (page 19)

- Objection: This is obviously not true. The only consensus is that there is no consensus concerning the findings of module E.
- Justification: Module E consists of the whole module text. Since the text consists of conflicting statements, it is illogical to speak about a consensus.
- Change request: Change the text as follows:

"The contributions presented in the following sections of Work Module E did not reach general consensus within the working group. The stakeholders' opinions differ in essential questions".

Not changed.

Changes requested 02.10.2006 referring to report version dated 28.09.2006.

2) Section “I.3. Other Views” - discriminating composition (pp. 22)

- Objection: Comments which were originally embedded in the text are separated in a new section in a discriminating way.
- Justification: The expressions “other views” and “diverging views” give the impression that there exists a “mainstream view” expressed in section I.1. and I.2., and that the views expressed under section I.3 are only a minority view and therefore less relevant.
- Change request:
 - Create new subsections “a.” and “b.” for section I. and assign the findings of (current) sections I.1, I.2. and I.3. to the new subsections. Indicate stakeholders who contributed the statements and stakeholders who support the statements fully or partially:
 - I.a. “Views emphasizing the importance of a central role of EPO and supporting EPLA”**
 1. Facts/Approach (currently section I.1)
 2. Unresolved Issues (currently section I.2)Add indication of stakeholders as done in (currently) section “3. Other Views”
 - I.b. “Views refusing a central role of EPO and rejecting EPLA”**
 1. Facts/Approach (currently section I.3)
 2. Unresolved Issues (currently section I.3)Indication of stakeholders for this section is already done.
 - Delete phrases like “against broad agreement found”, “while the Group agreed” etc. Instead use neutral expressions “against findings of (new) section I.a. and II.a. ”, “while (new) sections I.a and II.a. emphasizes” etc.

Not changed.

Changes requested 02.10.2006 referring to report version dated 28.09.2006.

3) Section “I.3. Other Views”: irrelevant comments (pp. 22)

- Objection: Comments like “views have been expressed very lately” or “who very recently gave comments” are irrelevant.
- Justification: These comments do not contribute to the findings. It does not matter when during the comment phase a specific comment comes in. The schedule of the comments allows no conclusion on their quality.
- Change request: Delete these comments.

Changed after protests of BEUC and ObjectWeb directed to the coordination.

(Note: BEUC withdrew their comments before 29.9. because their diverging view comments were accompanied by slightly negative wordings, and contributions were not integrated as original)

4) Section “I.3. Other Views”: missing references (p. 23)

- Objection: References were not given by patentfrei.de for the following statements

(note: footnotes were inserted by the editors arbitrarily without asking patentfrei if they intended to make references. In the footnote was stated “unfortunately, no references were given at this stage”.)

“Patentfrei and Object Web have reserves against the Group’s finding that the current EPC patent application procedure is perceived to work well, or that the EPO is said to be rigorous in prior art search examination. They mention “other voices who complain”, and “other opinion” consilary diverging in this context [1]. In particular, patentfrei believes, that thousands of software patents have been granted without legal basis [2] (...)”.

- Justification: References were not given due to lack of time.
- Change request: Add the following references:

[1] SUEPO, the staff union of the EPO, states in a paper released Sept. 2004: „The Quality Mission of the EPO“: „After the quality of the EPO’s work has been repeatedly criticized, not only by the staff representation, but also in staff surveys, and by the interested public from various quarters, the EPO’s management has finally tabled a proposal on a quality policy of the EPO shows that - at least in principle - it is concerned by the quality issue. (...) However, the management’s proposal fails to clearly address the real priorities for quality(...)“
<http://www.suepo.org/public/docs/2004/zb0504.pdf>

[2] This is not only patentfrei’s opinion: More than 28.000 persons, among them company decision makers, scientists, jurists, politicians and representatives of economic associations, signed FFII’s “Call for Action”, which states: „We are concerned that the European Patent Office (EPO) has, in contradiction to the letter and spirit of the written law, granted tens of thousands of patents on rules for computing with conventional data processing equipment, below termed "software patents" [...]“.
<http://swpat.ffii.org/papiere/euoparl0309/appell/index.en.html>

Only the references were added:

- 81 The following reference to SUEPO, the staff Union of the EPO, was cited by patentfrei.de in this context:
<http://www.suepo.org/public/docs/2004/zb0504.pdf>
82 The following reference to FFII was cited by patentfrei.de in this context:
<http://swpat.ffii.org/papiere/euoparl0309/appell/index.en.html>

The cited phrases were not embedded in the footnotes.

5) Section “I.3. Other Views”: Corruption of original sense (pp. 23)

- Objection: “Patentfrei and Object Web have *reserves* against the Group’s finding”
- Justification: The expression “reserves” underplays the serious opposition to the findings of (currently) sections I. (introduction part), I.1, I.2, II. and III.
- Change request: Change the text as follows:

“Patentfrei and Object Web have *serious objections* against the findings of (new) sections I.a. and II.a.”

We assume that the “consensus” phrase of section I. - see our request 1) - and the section III. - see our request 7) - will be changed so that it has not to be mentioned in this context.

Changed "reserves" to "objections"; Not added: “serious” (before objections)

The expression "Group's finding" was not changed to the proposed neutral expression.

Changes requested 02.10.2006 referring to report version dated 28.09.2006.

6) Section “II. Proposed Actions” (p. 24)

- Objection: The impression is given that the mentioned actions are generally supported. That is not true.
- Justification: There are contributions with diverging opinions under section “I.3. Other Views”.
- Change request: Create subsections “a.” and “b.” under section “II. Proposed Actions” as follows:

II.a. Proposals emphasizing the importance of a central role of EPO and supporting EPLA

II.b. Proposals refusing a central role of EPO and rejecting EPLA

Indicate stakeholders who contributed the statements and stakeholders who support the statements fully or partially.

Not changed.

Changes requested 02.10.2006 referring to report version dated 28.09.2006.

7) Section “III. Result / Conclusion” (p. 24)

- Objection: The statement “Safeguard and - where necessary and feasible – improve the quality, legal certainty, accessibility (including cost) and speed of the patent system” given under this section is not an adequate result of Module E and must be changed.
- Justification: This phrase was created at the stage of a former report version and does not take the statements under section “I.3. Other Views” into account.
- Change request: Change the text as follows:

“With respect to the diverging opinions no definite result/conclusion can be given.”

Not changed.

Changes Requested 15.10.2006 referring to report version dated 12.10.2006.

8) Section “I.3. Other Views”: discriminating composition

Change requests:

8a) Views be described in a neutral way (e.g., "considers" not "believes") this applies to several other WG members' views, as well as patentfrei's;

Changed after intervention of Commission.

8a) Additional: Also change the following phrase: “While patentfrei opposes the group’s finding that EPO should have a “gate keeper function”

to: “While patentfrei opposes the opinion expressed in section I.2 that EPO should have a “gate keeper function””

Justification: Findings under Section I.3 are also group’s findings and must not be discriminated.

Not changed.

Changes requested 15.10.2006 referring to report version dated 12.10.2006.

9) What is now footnote 81 (ex-84) be deleted on the grounds that it is irrelevant;

(In this footnote was stated that patentfrei's comments were delivered very late. Note: the report version for the group meeting on Monday 02.10. were sent Thursday 28.10. noon, 1 ½ working days before the meeting. patentfrei sent comments early in the morning to all WG members by email and parallely via fax to the meeting location.)

Changed after intervention of Commission.

Changes requested 15.10.2006 referring to report version dated 12.10.2006.

10) Also delete footnote 85 and 86.

Justification: members who made the comments should decide if they want to give references or not. The empty footnotes 85 and 86 were inserted by other persons, not by the Group members who delivered the comments.

Footnote 85 was deleted because it referred to the withdrew comments of ObjectWeb.

Footnote 86 was not deleted.

Changes requested 15.10.2006 referring to report version dated 12.10.2006.

3. Inserting the cited phrases for footnotes 83 and 84

Justification: web links alone, especially to documents addressing several issues, are not sufficiently informative. The quotes deliver essential information for understanding. The respective text presented in our change request dated Oct.2nd should be integrated completely in the footnote.

Not changed.

Changes requested 15.10.2006 referring to report version dated 12.10.2006.

11. patentfrei's view on EPLA should be recorded.

(Note: all patentfrei's EPLA statements were deleted in the Oct.11th version. After protest directed to the coordinator the answer was , that the passage was deleted “upon the Group’s wish” in the final group meeting.

Included again after protest directed to the Commission

Changes requested 15.10.2006 referring to report version dated 12.10.2006.

12: Integrate the following comment enhancement:

(this will make make patenfrei's reasons for opposition against EPLA more clear)

"Patentfrei wants the EPLA rejected, because it implies the potential to legitimize software patents by means of case law. " (4th line counted from end of page 22)

Justification: Unfortunately BEUC's comments which focussed this aspect were withdrawn and are now deleted from the report. Without this phrase it may be not clear for the reader why EPLA is regarded as so dangerous for SME software developers.

Not changed.

Changes requested 15.10.2006 referring to report version dated 12.10.2006.

13. General and Essential: Make clear, that there is no consensus within the Working Group regarding Module E

13.1 Change Section "I. Problem", phrase: "Work Module E did generally reach consensus" to

"The contributions presented in the following sections of Work Module E did not reach general consensus within the working group. The stakeholders' opinions differ in essential questions".

Justification: It does not make sense to speak of a consensus when it is obvious that it does not exist, what is proven by the group member's statements in section I.3 "Other Views"

Note: There is no need to reach a consensus, because it is not the purpose of a consultation to deliver a consensus, but to present a maximum range of opinions of all stakeholders on the discussed matter.

Not changed.

13.2 Change Section "II. Proposed Actions" in two possible ways:

a) Present proposals of all WG members under "II. Proposed Actions", incl. patentfrei's opinions currently presented under section I.3.

(this makes it clear that there are different proposals for actions)

or

b) Move the statements currently presented under Section II. so that they follow Section I.2 (e.g. as new section I.3, and "Other Views" as new section I.4.)

a) + b): Denote current "Proposed Actions" not as "Work Module E recommendations" but as "Recommendations based on findings of Sections I.1 and 1.2"

(this makes clear that these proposals only count for Group Members supporting these sections)

Justification: Without a consensus on the considered matter it is not acceptable to present "Proposed actions" in the name of the Group to the Commission. Therefore the proposed actions must not be denoted as "Work Module E recommendations".

Not changed.

13.3 Change Section “III. Result / Conclusion”

“Safeguard and - where necessary and feasible – improve the quality, legal certainty, accessibility (including cost) and speed of the patent system“
to:

“With respect to the diverging opinions no definite result/conclusion can be given.”

Justification: This is a consequence of the non existing consensus.

Not changed.

Requested 19.10.2006 referring to report version dated 12.10.2006.

14. Adopting ObjectWeb's withdrawn comments

Justification:

ObjectWeb has withdrawn their comments and pointed out that they should be included, when other WG members share their views.

We share

- a) the view that numerous trivial patents were granted from EPO (please use <http://swpat.ffii.org/patente/muster/index.en.html> as reference) and we share
- b) the concern that EPO is no EU institution.

These statements from Object Web can be maintained in the name of patentfrei.

Note: Object Web withdrew their comments on 17.10. ObjectWeb didn't want their name seen associated with statements that would reflect their contributions imperfectly.

Not changed.

C: PRE-FINALE: REPORTS SUMMARY COMPOSITION

How to transfer a non existing consensus on EPLA to the ICT Task Force Reports Summary

In the second Task Force meeting it was determined, that only the 25 selected "Task Force members" should receive the Task Force reports summary draft, not the working group members.

But patentfrei.de received the Task Force reports summary draft on 13.11. accidentally with an email to which this document was attached by mistake. We noticed that the propagation of EPLA was - in a smooth way – adopted in the summary ("carefully considered progress in EPLA") without mentioning any diverging opinions expressed in Module E.

On 17.11. we sent the following email to the the working group coordination which was also supported by the Free Software Foundation one day later:

Preliminary note

patentfrei.de protests against the practice to send the first official information about the reports summary draft (received yesterday 16.19) so late to the WG members which are not sherpas, only about 24 hours before deadline for comments.

Change requests on report summary

1. For us the "compromise" which was arranged by the mentioned sherpas on the IPR issues is not acceptable.

- we strictly oppose EPLA because of the potential of software patent legitimation by means of case law. The expression "carefully considered progress in EPLA" only camouflages the criticised aspects of EPLA and is finally a blank check for EPLA implementation. We demand that the report makes clear that different views exist if EPLA should be implemented or not, and why there are different opinions.

- this includes the critics on EPO's software patent granting practice and the aspect of lacking judicial independence in the current EPLA draft. We strictly oppose an European gatekeeper function of EPO in the realm of patents and share the view that EPO should stop software patent granting. EPO should be controlled by an independent authority. We demand that the critical views on EPO expressed in module E section "Other Views" will be integrated into the summary.

2. We demand that in the report summary and the WG reports (annexes) it's mentioned which WG members withdrew their contributions and why they did it.

Change requests on WG2 Report

1. As stated in our first contribution on Sept. 12th(*) and expressed again in our change requests from Oct. 10th and Oct. 16th, we demand that it has to be made clear that Work Module E did ***not*** generally reach consensus. The stakeholders' opinions differ in essential questions. Also the stakeholders differ in opinion which actions should be taken. We also demand to indicate the stakeholders by name (means company/organisation) who support the views expressed in module E sections I, I.1, I.2, II and III.

2. We uphold our change requests on module E expressed in our contributions on Sept. 12th(*) and expressed again in our change requests from Oct. 10th, Oct. 16th (via Mr. Rogers) and Oct. 19th (via Mr Rogers).

(*): Correction: The contribution were handed in on Sept.13th.

D: FINALE - PRESENTATION OF OFFICIAL ICT Task Force FINDINGS

How to present a non existing consensus on EPLA to the public

The presentation of the Task Force's findings were scheduled on Tuesday 9h during the conference "The EU's legal framework for e-business and innovation"

<http://ec.europa.eu/enterprise/ict/policy/legal/bxl2006/prg.pdf>

Asking the coordination we were informed that the chairpersons of the six working groups would receive the report on Monday after approval at the last meeting. But we were also informed, that WG2 group chairman planned to distribute the final report to all members of the working group „most“ likely on Tuesday – with the consequence, that working group members with diverging views would have no chance to know the official findings of the report before its presentation to the public.

We sent the following protest note to the coordinator and forwarded it to several members of the Commission on 24.11. :

When the Chairpersons of the six Working Groups will receive the report summary on Monday, why is it scheduled to distribute the summary to the WG members on Tuesday ***after*** the Task Force's findings will be presented to the public at Tuesday 9h by Mr Andropoulos on the conference "The EU's legal framework for e-business and innovation". Don't you think that the WG members should be the first to be informed about the official Task Force's findings which are presented to the public in their names? (...) We demand to receive the final reports summary version incl. WG2 annex at the latest until next Monday 27th close of business.

Shortly after sending this email we received an answer from the Commission, that the Commission will publish the reports summary including all annexes on Monday.

IV. Attachment

ICT Task Force Workgroup 2 (IPR) Report

patentfrei.de comments on Work Module E

("To Determine the Need for an Institutional Reform of the European Patent System")

Handed in on Sept. 13th

Introduction: Shortcomings of Work Module E

1. The Module only speaks for EPO and Large Industry

The module reflects the opinions of the EPO and large enterprises, but not that of SMEs. It conceals that there is an extremely controversial debate about the future definition of the patent system. Particularly the most controversial issue, regarding patentibility of software ("computer-implemented inventions", see also the struggle for the software patent directive 2003-2005), is not mentioned at all. Since the effects of software patents form a vital issue of any discussion about the reform of the European patent system, it is not acceptable to leave this topic out.

2. SME needs protection against a borderless patent system

Several times the intention is mentioned to ease participation in the patent system for SMEs. We recommend to allow the SMEs of the IT business to speak for themselves. In our judgement (and that of our supporters), the most pressing concern of small and medium-sized companies is not to participate in the patent system with as little effort as possible, but to be protected against the dangers of a borderless patent system. Instead of discussing how to make access to the patent system easier for SMEs of the IT business, the European legal institutions should take effective action to protect software developers - companies as well as freelancers - against being deprived of the exploitation rights of their own works due to questionable patent claims of third parties.

3. EPO patent application procedure is not generally perceived to work well

The quality of the EPO patent application procedure is not generally regarded as high standard. Massive recent criticism has been intentionally concealed.

4. EPLA is not a generally favoured solution

Calling the EPLA the generally favoured solution is not in accordance with facts. Criticism of the EPLA conception (particularly lack of separation of powers, thus enabling legitimization of the disputed EPO patent application practices for software patents via case law, as well as increased costs in most patent conflicts) is never mentioned.

5. The findings of Work Module E are *not* our recommendation directed to the competent EU instances in particular to the Commission.

They should not be designed as the workgroup's official recommendation in this issue.

(highlighted text = patentfrei.de's comments)

E. Work Module (E) – To Determine the Need for an Institutional Reform of the European Patent System (Reduce Costs, Enhance Access, in Particular for SMEs, etc.)

I. Problem

Work Module (E) sought to verify whether certain safeguards need to be taken, and improvements made in the European Patent System³⁸. It achieved this goal by summarising the most recent findings with regard to safeguards and improvements and by screening for concrete steps (see #1.)

Work Module (E) ~~generally did not~~ reached consensus, ~~because but~~ several essential unresolved issues require additional debate involving all stakeholders (see # 2.)

Especially the subject of software patentability demands a very critical examination. During the controversial discussion, which has taken place over the patentability of software, and which culminated last year in the plain rejection of the "directive on the patentability of computer-implemented inventions", it had been proven that there exist essential differences over the question, whether software (formulated as method or as device) shall be patentable or not. It can be expected, therefore, that changes of the patent regime, which touch the legal enforcement of such patents, will be discussed rather controversial as well.

1. Facts/Approach

---Most Recent Findings: the Focus for Safeguards and Improvements

The principle requirement of any revision to a patent system must lie in maintaining the quality of the system and, where necessary, to improve it with regard to both the granting of patents and the enforcement process³⁹, in particular for SMEs⁴⁰.

Maintaining the Quality implies taking safeguards against “shortcomings” as identified in the patent grant procedures of other law regimes⁴¹. It also further implies safeguards against the misuse of the patent system, e.g., in the context of so-called “patent trolls”⁴².

³⁸ This follows the goal to “(...) develop a comprehensive innovation policy in Europe in order to respond to challenges from the US, Japan and emerging economic powers such as China and India, which all have in recent years invested substantial effort in making innovation a top priority”, see Preliminary Findings of the Commission DG Internal Market Public Hearing on Future Patent Policy in Europe (hereinafter: “Preliminary Findings”), at p. 9.

³⁹ See Preliminary Findings, at p. 9.

⁴⁰ SMEs are major users of the patent system, cp. studies previously ordered by the Commission, e.g. „Erfinder in Europa – Eine empirische Studie des Instituts für Innovationsforschung, Technologie-management und Entrepreneurship“, München, August 2004, at pages 13/14.

⁴¹ See Preliminary Findings at p. 11 mentioning “destructive practices such as „patent trolls“; see Preliminary Findings at p. 17, under “Conclusion”, mentioning “shortcomings of some patent offices such as the USPTO”.

⁴² The term is used for patent owners, frequently small companies, whose business consists in negotiating with, or enforcing patents, which they usually do not practice on their own. Nothing contradicts the use of a patent by a party not practicing it. Otherwise, small companies or universities with lacking own manufacturing resources would not be able to leverage their innovation and resulting patents, e.g., to obtain venture capital or subsidies. The reasons of misuses by “patent trolls”, such as known from the US, are to

Improving the system implies, for the benefit of all, improvements of an institutional, procedural or administrative nature⁴³, including cost (e.g. translation cost⁴⁴). *Improving the system* also implies, in particular, making the system more attractive for SMEs⁴⁵ notably by increasing awareness of the patent system⁴⁶.

---Concrete Steps: Where to Assess Potential Measures

Work Module (E) assessed both possible measures that have already been taken, and measures under discussion, in particular for SMEs. The assessment was performed in the following areas:

- The existing *EPC grant procedures*, including *EPO post grant procedures* like opposition, and post grant procedures with the National Patent Offices (NPOs),
- The *enforcement procedures*, including *litigation* and *invalidity* proceedings,
- Some ancillary improvements may be envisaged to support SMEs through other measures outside the legal framework of the existing procedures.

---Assessment in the Grant and Post Grant Procedures

→ *The EPC Patent Application Procedure*

~~As a general matter, the opinion about the quality of the current EPC patent application procedure differs. It is perceived to work well.~~ In terms of *Quality*, some say, that the EPO is said to be rigorous in prior art search and examination⁴⁷. On the other hand there are voices, who complain about the EPO's patent granting policy for software patents which, they say, are not compatible with EPC Art. 52, and thousands of software patents have been granted without legal base.

Several improvements have already been driven by the EPO. These include: Achievements reached by the “EPC Revision 2000”; accelerated procedures upon request; online filing; “search opinion” since July 2005; “bringing together search and examination”; improved information facilities (EPO and NPOs’ websites, online public register, etc.); transparency and ease of use, in particular for SMEs.

Further improvements are under discussion. These include, as necessary: Increased transparency and legal certainty; increased quality of search and examination procedure; increased speed and ease of use of the procedure – to the extent at all still necessary - as compared to other patent offices worldwide; reduced fees and potential subsidies for SMEs⁴⁸; more efficient and transparent publication of patent documentation⁴⁹; help in prior art and patent portfolio searches⁵⁰, and in establishing respective tools; in general, measures that may help to strengthen the use of patent information.

be found in intrinsic elements of the US legal system, said to unilaterally favour misuses by “patent trolls”. Yet, major European legal systems do not know such elements.

⁴³ See ongoing discussion, mostly re. the proposed “European Patent Litigation Agreement” (EPLA).

⁴⁴ See ongoing discussion re. “London Protocol”.

⁴⁵ See latest findings by, e.g. UNICE, and previous and latest findings by the Commission; see Preliminary Findings, at p. 9, and at p. 15.

⁴⁶ Regarding awareness, reference is made to work module (d) of this Working Group.

⁴⁷ Generally, in terms of limited conclusions that can be drawn from filing and granting statistics, see the comparative figures in the “Trilateral Statistical Report 2004”, under “4. Patenting activity at the Trilateral Offices”.

⁴⁸ See Preliminary Findings, at p. 9.

⁴⁹ See Preliminary Findings, at p. 17 under “Conclusion”.

⁵⁰ See Preliminary Findings, at p. 9.

It must be said, that from the side of SME's there is mostly less interest for patenting their developments. It would be too easy to say that the reason for the less participation of SME's in the patent system lies in their lack of awareness of the advantages of the patent system. In contrary, SME Software developers are often stressing consciously that the copyright is sufficient for protecting their developments. Their biggest concern is not the protection of their developments through own patents, but the protection against patents of third parties. They are at first interested that software patents cannot be legally enforced.

Specifically, the need for a single Community Patent (not to be confused with the Community Patent Proposal according to the so-called "2003 Common Political Approach"⁵¹) shall be further explored, and how to implement it.

→ *The EPC Post Grant Procedure*⁵²

The existing EPC post grant procedure has safeguards in place to protect against patent misuses, e.g., the established opposition proceedings.

Decisive cost savings are urgently needed notably with regard to the language regime in NPO post grant procedures, a reform which ratification of the *London Protocol* would fulfil.⁵³

Further possibilities to save costs were suggested, e.g. with regard to maintenance fees.

---Assessment in Enforcement Procedures, Including Litigation and Invalidation Proceedings

The EPO is of the opinion that in patent experienced countries, the existing EPC enforcement system⁵⁴ already allows for basic safeguards to protect against patent misuses, e.g., through national specialist courts for both infringement and invalidity proceedings, and through "reasonable" procedural rules and sanctions, including the principle of reimbursement of litigation costs by an aggressor in case of loss (helping, beside other factors, to prevent misuses of the system, e.g., by "patent trolls")⁵⁵.

However, urgent institutional reforms are required to the current litigation scheme, due to drawbacks related to the enforcement and invalidation of patents before multiple courts, and due to disparities in case law and procedural rules (e.g. theory of equivalents; estoppel).

To achieve these improvements, for the EPO the "European Patent Litigation Agreement" (EPLA) appears as the generally favoured solution.⁵⁶ A "Community Patent" (not to be confused with the Community Patent Proposal according to the so-called "2003 Common Political

⁵¹ Following the results of Commission Consultation on the Future Patent Policy in Europe, and July 12 Public Hearing, it appears that this proposal is no longer favoured as an alternative to the EPLA.

⁵² By "EPC post grant procedure" are meant EPC post grant procedures within the EPO like opposition, and also EPC post grant procedures like validation, translation, or registration formalities for EP patents with the National Patent Offices, but excluding other purely national post grant procedures with national authorities or courts like, e.g. opposition or other procedures for national patents.

⁵³ To that extent, alternative proposals had originally been made in the frame of the Community Patent "2003 Common Political Approach", and beyond. Since the Commission July 12, 2006 Hearing, it seems to be common understanding that these proposals are no longer favoured.

⁵⁴ "EPC enforcement system" includes the existing, EPC enabled national enforcement systems for EP patents, and future EPLA based or community patent based enforcement systems.

⁵⁵ Most of the national procedural systems provide safeguards in this respect; also, the „Enforcement Directive" 2004/48/EC puts an emphasis on this principle.

⁵⁶ This is all the more true after the most recent Decisions of the European Court of Justice in matters C-4/03 (GAT vs. LuK) and C-539/03 (Roche Nederland BV vs. Primus/Goldberg), making pan-European litigation almost impossible from now on.

Approach”⁵⁷). they say, -can still be implemented later on, once the appropriate institutional framework is in place.

Alternative dispute settlement procedures such as mediation are options which should be further explored, e.g. through national chambers of commerce with a view to making the system available at a reasonable cost.

--Assessment of other Measures to Improve the System to the Benefit of SMEs

Other measures have been envisaged to support SMEs.

These proposals include e.g. instituting an insurance scheme for SMEs, or additional measures based on private initiative to increase awareness, to institute funds (e.g. as an alternative to reduction of fees), etc. Insurance may make sense at least for litigation fees. On the other hand to reduce the cost risk could lead to a higher number of patent litigations. The costs for the insurance must also be seen as an additional charge difficult to bear for SME's.

As to funding, it is to be taken into account that various public patent funds and initiatives do already exist at national and regional level⁵⁸, to grant subsidies and other incentives⁵⁹ in particular to help SMEs, but also independent and individual inventors, founders of new business, and for universities and the research sector. The funds and incentives come for example from the German Ministry of Economy⁶⁰, the German Fraunhofer Institute⁶¹ and the German Trademark and Patent Office⁶².

2. Unresolved Issues

In Work Module (E), the following issues remained unresolved and require continued debate among stakeholders:

- ☐ More clarification and efficiency may be needed, in particular, on the respective roles of the EPO and NPOs, as currently discussed in the Administrative Council of the European Patent Organisation aimed at fostering innovation in Europe⁶³. Although the outcome of these discussions is still pending, a no broad-consensus seems to already have emerged that the

⁵⁷ See footnote 51.

⁵⁸ E.g., „Patent- und Lizenzfonds Mecklenburg-Vorpommern“, see http://db.bmwi.de/ DE_de/WZL_0bd1920d26e177f3b734a77e593e9d94_WZL/app.wiz?WDC=index_documents_open&DOC=7533&LEN=1

⁵⁹ Both in form of subventions and credits.

⁶⁰ So-called “Verbundprojekt zur Innovationsstimulierung der deutschen Wirtschaft durch wissenschaftlich-technische Innovation“ (“INSTI” Patent Initiative for SMEs, including subsidies for protection national and abroad), see http://db.bmwi.de/ DE_de/WZL_0bd1920d26e177f3b734a77e593e9d94_WZL/app.wiz?WDC=index_documents_open&DOC=4111&LEN=1

⁶¹ See http://db.bmwi.de/ DE_de/WZL_0bd1920d26e177f3b734a77e593e9d94_WZL/app.wiz?WDC=index_documents_open&DOC=8711&LEN=1

⁶² See <http://www.dpma.de/formulare/a9540.doc>

⁶³ See the micro web site of the Administrative Council of the European Patent Organisation: http://ac.european-patent-office.org/strategy_debate/index.en.php

EPO should not only remain the gatekeeper, but that “decentralisation/outsourcing” should be avoided to maintain a high level of quality⁶⁴;

- Certain details on the implementation of the EPLA court system are still under discussion⁶⁵. It was considered important to include national, future EPLA, and “community based” enforcement systems into the debate, but the opinions concerning the consequences are very different.
- Cost of the court system was seen as an important factor. For litigation in all member states the costs would be reduced. But the discussion must take into account, that parallel litigation accounts for only a small percentage of all patent suits⁶⁶, while estimates show the average cost of most cases would rise. According to annex 2 to the EPO's impact assessment⁶⁷, even the smallest litigation in front of an European Patent Court will result in court costs of € 97,000 and party fees of € 62,000 each, for the first instance. Especially for SME's this is a very problematic aspect.
- Serious concern has been expressed about the relationship between the EPO boards of appeal and the future EPLA courts. Judicial independence would be compromised in multiple ways, including the fact that the members of the EPO's boards of appeal (who are EPO employees) could simultaneously be European Patent Court judges.
- Fixing the exact details on these questions needs to be left to forthcoming EPLA meetings and could currently not be anticipated by this Group.

II. Proposed Actions

The meanings are too different to express a consensus. We line out two contradictory positions:

a) EPO proposes ~~Work Module (E) has~~ the following recommendations, directed to the competent EU instances, in particular to the Commission:

- The paramount necessity of the reforms must lie in maintaining the quality, legal certainty, accessibility and speed of the EPC patent grant procedures including post grant procedures notably keeping the EPO as “gatekeeper” in this role.

⁶⁴ Also cp. the discussions in the Commission's July 12, 2006 Public Hearing.

⁶⁵ E.g., a Group member raised the question of “retroactive liability” for infringing acts that occurred in the past, i.e. before the establishment of an EPLA court system.

⁶⁶ http://ec.europa.eu/internal_market/indprop/docs/patent/hearing/frain_en.pdf Nokia stated at the DG market hearing as of 12.7: “As to cost, we would point out that is unusual, at least in our experience, to litigate the corresponding patent in more than one European country and even more unusual to litigate the corresponding patent in several European countries simultaneously. It is therefore of some concern if, as the EPO has estimated, the cost of centralised litigation would be more than double the cost of litigating nationally in France or Germany [...]”

⁶⁷ http://www.european-patent-office.org/epo/epla/pdf/impact_assessment_annex2_2006_02.pdf (sections 7 and 8)

- Ensuring the quality and legal certainty of the European patent system will also require a careful monitoring of any proposed EU legislation against the risks of misuse – with direct or indirect effect on the patent system.
- Accelerated adoption of the EPLA and the London Protocol would contribute to improving legal certainty and accessibility (including a reduction in the total cost) of the patent system.
- Work Module (E) would also suggest discussions on additional measures to help SMEs such as ~~patent~~ funds, incentives or, to the extent feasible, insurance.

b) patentfrei.de, a German SME initiative, proposes the following recommendations, directed to the competent EU instances, in particular to the Commission:

- Software and logic patents must be condemned effectively, e.g. by a new EU directive
- This ruling must be enforced against the European Patent Office
- At this time EPO should in no case have a gate keeper function. Instead the EPO should at first be controlled by a democratic institution
- The EPLA should be rejected. Courts for European patent suits in general and especially a court of ultimate resort must be implemented under the responsibility of the European Court of Justice, only.

III. Result/Conclusion

Further discussion necessary.

~~Safeguard and—where necessary and feasible—improve the quality, legal certainty, accessibility and speed of the patent system.~~

END