STOA Dissemination Workshop: "Policy options for the improvement of the European Patent system" in the European Parliament on June 14th 2007

The dissemination workshop was the conclusion of the project "Policy options for the improvement of the European Patent system". The workshop was organized for the working group to present and discuss the policy options put forward in the report "Policy options for the improvement of the European Patent system" with Members of the European Parliament, academics, practitioners, business representatives and other stakeholders.

Chairman of the workshop Mr. Malcolm Harbour, MEP and Vice President of the STOA Panel in the European Parliament, opened the workshop. Bjørn Bedsted, the project manager from the Danish Board of Technology and representing the ETAG GROUP, introduced the purpose of the project, which is to provide a fresh look at the European patent system and assess whether reform is needed to rebalance the system in order to fulfil its purpose of promoting social and economic welfare. Bjørn Bedsted emphasized that the Working Group express their support for the introduction of a Community Patent and a European Patent Court. The policy options put forward from the Working Group are not an alternative for this ultimate goal. They have been developed to improve the system as it is known today and should the Community Patent be introduced, the Working Group considers that many of the policy options put forward would have an even better effect.

The working group members made presentation of 5 of the 6 policy options in the report. The policy option on "Facilitating defensive publications" was not presented as it is considered only a minor option compared to the others.

Presentation of policy options:

Mr. Peter Lotz, Head of Depatment of Industrial Economics and Strategy, Copenhagen Business School in Denmark opened the presentation of policy options. The recommendation on "*Insertion of the economic mission of the patent system in the European Patent Convention*" involves the introduction of a preamble in the legislation that states what the purpose of the legislation is: to promote social and economic welfare. A wording for such a preamble was suggested at the workshop. The preamble should be placed in the European Patent Convention and if the European Union is able to come forward with a community patent that same preamble was proposed to be included in that legislation. The effect of a preamble with regard to for instance emerging technologies would be to guide legislators and to make the legislator consider whether or not the application of the patent system to an emergent technology makes sense from the point of view of the mission of the patent system.

Mr. Francesco Lissoni, Professor of Applied Economics, University of Brescia, Italy spoke about "*Enhancing governance within the European patent system*". To meet the challenges that the governance of the European patent system is facing because of the emergence of patent thickets, the increasing number of patent applications and patenting for defensive and strategic reasons three options were recommended: enhancing the patent awareness within the European Parliament, establish an European Parliament Standing Committee on Patents, which should be linked with an External Advisory Body composed by experts, practitioners and stakeholders and finally enhancing patent awareness within the Commission. The Standing Committee would gather information from the European Patent Office and other sources related to patent claims.

Mr. Wim Van der Eijk, Principal Director International Legal Affairs and Patent Law, EPO, Munich, Germany presented the policy option about "*Improving quality aspects in regard to patentability standards and patent grant procedures*". The evolution of the EPO workloads over the last decades shows a very steep upward string in the number of filings, in the volume of applications and the number of claims per application. In order to strengthen the patent system and create stronger patents two aspects were recommended to look at: the way in which patent offices apply the given standards for patentability and the standard itself. The aspect of the standard itself concerns the question of what is an invention and when is it valuable to be granted a patent for. The working group suggested taking a closer look at the concept of inventive step to see if it is still fulfilling the function it is meant to have and concentrate on the concept of who is a person skilled in the art.

The policy option on "*Dealing with emerging technologies*" was presented by Mr. Jens Schovsbo, Professor, University of Copenhagen, Faculty of Law, Denmark. The patenting of emerging technologies gives rise to special concern about patent quality in regard to both the patent system and in regard to the individual patent. The quality problem at the system level is about setting the standards for patents and deciding on what is going to be considered patentable subject matter and what is not going to be. On the executive level (the EPO) the quality problem relating to emerging technologies deals with applications of patent standards in individual cases. The special problems in emerging technologies in this regard are that prior art can be limited and hard to find for an examiner. In order to avoid these problems the working group suggested to boost the executive level by allocating additional resources to EPO examiners to better assess prior art and to avoid too broad patents and to ensure ongoing deliberations on what is patentable and what is not.

Mrs. Geertrui Van Overwalle, Professor of IP Law, University of Leuven, Belgium spoke about "*Increasing access to patented inventions*". Patents that crowd the market create a patent thicket that makes it difficult for an inventor to enter the market. In order to overcome a patent thicket negotiations will have to be started with each and every patent owner in order to obtain a legitimate access to the patents and to obtain the necessary licences. The working group suggested two different measures, which would facilitate access to patented technology. One is the license of right, which is a legal mechanism by which a patent holder voluntarily chooses to give general access to anyone willing to pay a certain license. Another possibility is to facilitate access to a web of patents by the establishment of collective rights management models such as patent pools and clearinghouses. The working group recommended further investigation of these models especially in view of current competition law.

Key questions raised by the audience and discussed with the working group:

Patentability standards:

- What effect on the European competitiveness and the increasing workload at the EPO is the setting of patentability standards in Europe going to have if changes are not made in agreement between the European patent system and the US and China, Japan?
- What legal bodies should be involved on the "raising of the bar" of the person skilled in the art and the level of the inventive step?

The Working Group agreed that there is an international dimension to patentability standards, strict application and rigid granting procedures. Yet the Working Group argued that we could easily make improvements in these areas on a European level and meanwhile try to persuade our partners in the world to do the same. The Working Group did not agree with the conclusion that we should only make a move when it can be made on a global scale because it would take too long before anything happens. Internationally, Europe already has a spoken reputation for quality and should be in a position to lead the process internationally. In regard to the changing of the standards in the EPO the Working Group emphasized that it is difficult to address a matter of the office versus the Board of Appeal. First in the process should be to establish among ourselves as a patent community the standard we would like to have. Then we need to instruct the examiners to change their behavior in order to comply with this standard. The need to change rules in order to make the Boards of Appeal compliant would be a part of a second phase.

Governance:

- What kind of governance is needed? Is it more important to include the European enterprises, inventors and SME´s than the European parliamentarians since they do not file patents and they do not make innovations?
- Would the integration of the EPO be possible under the umbrella of the European Union? What should be the relation between EPO and the European Parliament?

The Working Group argued that the proposal on enhancing the governance of the European patent system and the suggestion to set up the European Parliament Standing Committee on patents serves to establish transparency within the European patent system mainly for politicians and the public at large, including stakeholders. The form of transparency that the report focuses on is based on the recognition that simply making information available does not enable anyone in civil society to see the global picture. The role of the External Advisory Body that was proposed is to systematically gather information on current trends with regard to patenting in the EPO and report on trends within the patent offices. The governance of private companies and stakeholders is therefore introduced with the suggestion on representation in the Advisory Board to the European Parliament and also by the proposal to open up the Standing Advisory Committee at the EPO to other stakeholders and experts besides those that are already there.

The preamble:

- Is the policy option introducing a new patentability requirement, which goes beyond the utility or industrial applicability, and do you have to prove as a patent applicant that you enhance the social *and* economic welfare? Is it a social *or* economic welfare?

The Working Group responded that the preamble should have an effect on how the patent system, overall, is interpreted. This means that the purpose of the patent system expressed in the preamble should be unfolded in the patent law legislation and lead to a settling of the patentability standard. The preamble is important to all the levels of the patent system that means both at the policy level, the executive level and the legislative level. The preamble is not intended to be used on a daily basis as a patentability requirement on the same level as the requirement of novelty and inventive step. It was imperative for the Working Group to state explicitly that the patent system is there to a specific end, which is not only economic welfare but also social welfare. The distinction between social and economic welfare is made because economic welfare may risk being interpreted in a narrow business related sense.

Emerging technologies:

- How to define what should be patentable

The Working Group replied that it is not the idea of the group that emerging technologies should not be patentable. The Working Group underlined that emerging technologies give rise to special concerns and that these should dealt with in the system to make sure that the technologies are patented in the right way. Again, attention was called to the preamble, as the effect of a preamble would be to guide legislators and to make sure they consider whether the application of the patent system to an emergent technology makes sense from the point of view of the mission of the patent system.

Access to market, patent thickets and competition law:

- What can we do to overcome the issue of competition law in regard to the collective rights management model and patent thickets?
- What can be done to promote the filing of patents by European universities and public research institutions? What access to the patent system could be done for the SME's and universities?
- Should the focus really be on cost and quality?

The Working Group explained that the preamble is there also to open up a dialogue with bodies that are entitled to deal with competition issues or innovation issues at large beyond the patent system. With a statement like the preamble, it is more straightforward to set up a dialogue on how to bring together IP and competition issues. The competition faction would have much more incentive to bother with patents if there is a clear connection between the patent system and overall welfare issues.

In regard to the filing of patents by European universities, public research institutions and the SME's and universities the working group replied that many concerns about the contribution of European universities to patenting in Europe are based on incorrect data. Compared to universities in the US, universities in Europe do not contribute to patented inventions that much less (in proportionate terms) to the overall number of patens taken by nations and industries. The difference is that European universities do not hold these patents themselves. Creating special incentives for universities to patent involves the risk of more litigation over who owns the patent. Also, many patents owned by universities in Europe are co-owned by the universities and businesses. There would be no big advantage to universities in lowering fees over these co-owned patents because the co-owners are in many cases big companies.

On the question of access for SME's, the Working Group argued that it is an issue outside the frame of the patent system. The report has dealt with the patent system as such and the policy options put forward should automatically benefit SME's. Whether there is reason to encourage SME's, universities and others to take out more patents is a separate issue. If we want SME's to take out more patents, it should be achieved by separate policy initiatives and possibly subsidies for SME's. The Working Group does not believe this to be a core issue of the workings of the patent system.

In regard to costs the working group responded that a patent system with easily obtainable patents and low costs is not necessarily a competitive advantage. The Working Group agreed that unnecessary costs should of course be eliminated but making the system cheap or cheaper for users should not be the primary goal. The primary goal of the patent system is to produce good quality patents and if it takes more examiners to decide whether a patent should be granted, it is reasonable to make it more costly. The cost issue is secondary. Furthermore, the Working Group argued that the European Parliament should only be concerned with the overall cost of the system. Making the application much cheaper for a European patent could be counterproductive, because more people possibly would apply for a patent, thus increasing the problems associated with the rising number of patent applications.

Final recommendations from the Working Group to the members of the European Parliament:

The Working Group pointed at four very important issues:

1. The Working Group strongly recommended the European Parliament to put an effort into the insertion of a preamble in the EPC and a future Community Patent. The preamble is very important because it clearly sets the perspective through which the patent system will be looked at when developing policies on patent issues. The adoption of a preamble would also introduce a dialogue about the competition issues in relation to collective rights management models and in specific emerging technologies. With regard to emerging technologies, the preamble would guide the decision on whether the adoption of a specific technology within the European patent system is suitable from the point of view of the purpose of the patent system.

2. The Working Group called for more political leadership and expressed their wish for the European Parliament to recognise the importance of the patent system. The patent system is an essential policy tool in modern society and the European Parliament should pay attention to the need for a fact based and open discussion about the system. The European Parliament should also consider the group's proposal to introduce a Standing Committee on patents issues and an External Advisory Body linked to such a committee.

3. The Working Group encouraged the European Parliament to deal in more detail with issues of access to knowledge. The European Parliament could do so by further exploring the collective rights management models and by making the competition law framework more flexible in order to promote and enhance those models. From both a civil society and users' point of view, this is of great importance.

4. European universities: The European Parliament should be aware that special incentives for universities to patent more may carry the risk of increased litigation over who owns the patents. Many patents are co-owned by the universities and the business community, and thus lowering fees for these co-owned patents would not be an advantage to the universities because the co-owners often in fact are big companies.

Members of the European Parliament present at the workshop:
Mr. Jorgo Chatzimarkakis, member of the Group of the Alliance Liberals and Democrats for Europe (Germany), Mr. Adam Gierek, member of the Socialist Group in the European Parliament (Poland) and the chairman Mr. Malcolm Harbour, member of the Group of the European People's Party (Christian Democrats) and European Democrats.