III

(Preparatory acts)

EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

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Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee — An Industrial Property Rights Strategy for Europe

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(2009/C 306/02)

On 16 July 2008 the Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

'*Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee — An Industrial Property Rights Strategy for Europe*'

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 19 May 2009. The rapporteur was Mr RETUREAU.

At its 454th plenary session, held on 10-11 June 2009 (meeting of 10 June), the European Economic and Social Committee adopted the following opinion by 98 votes to three with one abstention.

1. **Summary of the EESC's conclusions**

1.1 The EESC supports the Community industrial property rights strategy proposed by the Commission. It reiterates a number of points already made in previous opinions.

1.2 It calls first and foremost on Member States to support the strategy, both as regards the future Community patent and the current international talks, particularly in the WIPO. The discussions on distribution of patent fees, which continue to hold up the adoption of the Community patent, are not appreciated by civil society, which is concerned with long-term progress and wants to see effective, practical conclusions which significantly reduce the cost of obtaining and maintaining patents.

1.3 The EESC stresses in particular the need to facilitate access to industrial property titles, for effective protection thereof and to combat — very often mafia-type — counterfeiting which is a burden on the economy and businesses and can expose consumers to serious risk (medicinal products, toys, household appliances etc.).

1.4 This requires a more effective dispute resolution system, circulation of final judgments handed down in a Member State (abolition of exequaturs), and better-organised, closer cooperation on police and customs matters.

1.5 More active involvement of organised civil society in international talks should help to strengthen European negotiators' positions and encourage technology transfer to the least-developed countries with a view to development of sustainable technology.

2. **The Commission's proposals**

2.1 The Communication concerns the European strategy for industrial property rights, given their growing importance in value creation and innovation and their role in industrial development, in particular for SMEs.

2.2 While the majority of intangible industrial assets are covered by harmonised Community protection, the same does not apply to one key asset: patents. Although there is an EU-wide system based on the Munich Convention, under this system there is neither a unified judicial authority nor uniform case law among the national courts, which have jurisdiction in the area of patents. The cost of EU-wide patents is deemed to be too high, owing, in particular, to the cost of translation into national languages.

2.3 The London Agreement, which reduces translation costs, came into force on 1 May 2008, but language issues and the amounts to be paid to national industrial property offices continue to make it difficult to find a definitive solution.

2.4 The Commission feels that major progress has recently been made towards a Community patent paving the way for a coherent system protecting intangible industrial assets, as can be seen from the Recommendation from the Commission to the Council to authorise the Commission to open negotiations for the adoption of an Agreement creating a Unified Patent Litigation System ([1]).

2.5 In the Commission's view, 'the intellectual property system should continue to act as a catalyst for innovation and contribute to the overall Lisbon strategy'. Lastly, the Communication sets forth measures which could be taken to achieve a European industrial property system of this kind, which would also make it possible to combat counterfeiting more effectively.

3. **The EESC's comments**

3.1 The Communication is one of a series of proposals, reflections and analyses which have been developed over the years since the failure of the Luxembourg Convention on a Community patent system in the early 1970s. The EESC, which has always supported the creation of the Community patent, welcomes the news that substantial progress has been made recently.

3.2 The language-related points cited by certain Member States in opposition to the Commission's proposals have never convinced the EESC. Indeed, it firmly believes that industrial property issues should be governed by private law. The question of official languages should be governed by the constitutional law of each country, which should not in principle be concerned with private agreements or disputes or hinder the application of property law on intangible industrial assets at Community level.

([1]) SEC(2009) 330 final of 20.3.2009.

3.3 Over and above the legal and political debates, it is the interests of the European economy, businesses, inventors and holders of an indisputable property right which should prevail, so as to encourage the creation of value and jobs, especially in SMEs, which are in practice left quite defenceless against piracy and counterfeiting of their industrial property. The successive EESC opinions on patents, combating counterfeiting ([2]) and the Community patent ([3]) continue to apply and to reflect a considerable social demand for jobs and industrial development.

3.4 This Communication should be seen as supplementing Communication COM(2007) 165 final on Enhancing the patent system in Europe.

3.5 *The changing innovation environment*

3.5.1 The EESC endorses the Commission's views on the growing importance of innovation as a driver of competitive advantage in the knowledge-based economy; knowledge transfer between public research, businesses and private R&D is essential for Europe's competitiveness. The Committee is very interested in the call to set up a European framework for knowledge transfer and supports in particular the proposal for harmonised definition and application of the research exemption to patent infringement.

3.5.2 This Community framework should make it easier to bring together fundamental research, R&D and the development of innovative applications, and to enforce the rights of each stakeholder more effectively with due regard for the autonomy of fundamental research, as it is often impossible to predict the practical applications of research programmes, which cannot, therefore, be guided solely by demand for industrial applications; moreover, research is a key pillar of the knowledge-based economy and the Lisbon Strategy.

3.5.3 Under this approach, Member States should continue to take the Better regulation programme as a basis and other stakeholders (inventors, universities, businesses and end-users) must be put in a position to make informed choices about the management of their industrial property rights

3.6 *Quality of industrial property rights*

3.6.1 The EESC shares the view that the European industrial property system must encourage research, innovation and dissemination of knowledge and technology, which paves the way for new research and applications.

([2]) OJ C 116 of 28.4.1999, p. 35 (rapporteur: H. Malosse) and OJ C 221 of 7.8.2001, p. 20 (rapporteur: H. Malosse).

([3]) OJ C 155 of 29.5.2001, p. 80 (rapporteur: J. Simpson) and OJ C 112 of 30.4.2004, p. 76 and p. 81 (rapporteur: D. Retureau).

3.7 *Patents*

3.7.1 At the same time, access to industrial property must be facilitated with the Community patent, preventing patents from being used to hijack the protection system through 'patent trolls', who use poor quality patents (cross-references, overlaps, excessively complex — not to say incomprehensible — drafting of claims) in order to appropriate others' inventions; they thus obstruct the lodging of new patents or cause confusion which ultimately leads to breaches of competition rules, clogs up the courts and makes it difficult to find clear information and case law.

3.7.2 The Community patent should only be granted for genuine inventions which represent a real technological advance and are likely to be used in real industrial applications. Applications without a genuine, tangible inventive step must not be accepted, and the creation of genuine pools of patents which are complementary and can be used in a number of different applications should be encouraged. Claims should be strictly confined to the technical innovation made by the invention: their interpretation should be restricted in respect of use of the patent and disputes between patent owners.

3.7.3 The use of expertise and codes of good conduct to enhance the quality of patents lodged is essential, as it should be borne in mind that holders have exclusive rights for a relatively long period of time. This is the trade-off for publication, which, to encourage demand for licences from industry, allows knowledge to be disseminated but also exposes inventions to reproduction.

3.7.4 The EESC also feels that the quality of the patent is an essential guarantee for licence applicants and encouraging innovative applications. It therefore endorses the Commission's proposals in this area, such as the importance of the quality of the scientific and technical mechanism for examining patents and cooperation between national and European examiners, and the importance of recruiting qualified examiners, as they are the pillar of Community expertise in technology and applications. Examiners and other highly-competent experts make up the pool of human resources which is essential for the quality of the Community patent, and the Commission should give more consideration to this question so as to be able to give the best professionals the ethical and material conditions which are essential for high-quality examinations, to the benefit of applicants and industry.

3.7.5 Member States which grant patents without an examination, and therefore without a guarantee, should, as the Commission proposes, reflect on the quality of the patents they issue. The EESC believes in this connection that, in certain complex cases which are not clear-cut, these countries should call on the expertise of examiners or other national or even foreign experts to improve the quality of the national patents they issue.

3.7.6 Patent offices should also ensure strict respect for fields which are not patentable under the Munich Convention such as software and methods, algorithms and parts of the human body such as genes [4], which are unpatentable scientific discoveries.

3.7.7 Although the lifespan of the Community patent is 20 years in theory (TRIPS agreements), the actual average varies between five to six years for ICTs and 20 or 25 for medicinal products, giving an overall average of 10 to 12 years. Utility models have even shorter actual lifespans.

3.8 *Trade marks*

3.8.1 The EESC endorses the Commission's proposal to carry out an in-depth evaluation of the Community trade mark system, and also calls for cooperation to be developed between the European and national trade mark offices.

3.9 *Other rights*

3.9.1 The EESC also endorses the proposed evaluation on obtaining plant varieties, not to be confused with GMOs. It welcomes the public consultation planned on the possibility of introducing protected geographical indications for typical non-agricultural products.

3.9.2 The EESC will carefully monitor arrangements for PDOs and PGIs and protected designations for agricultural products and spirits. It believes that protected designations could also be extended to typical products other than foodstuffs — craft products for example — and would also like other information increasing a product's value such as the fact that it is organic or sustainable to be displayed on designation labels as well, where appropriate, even if the qualities described are not necessarily a requirement for the designation to be granted.

3.9.3 As regards the aftermarket in spare car parts, which the Commission wants to liberalise, the EESC notes that there is some conflict between this liberalisation policy and protection of designs. Despite this, the EESC has adopted an opinion supporting this approach [5]. However, it should be pointed out that the principle of exclusive rights is being breached and that car manufacturers are required to supply original spare parts for a mandatory length of time, while other manufacturers are not. Logically, the principle of a mandatory licence should apply, and it should be mandatory to use the same materials where parts contribute to the vehicle's structural solidity.

[4] As discussed in Directive 98/44/EC with regard to certain isolated genes.

[5] OJ C 286, of 17.11.2005, p. 8 (rapporteur: V. Ranocchiari).

4. **Industrial property rights and competition**

4.1 Like the Court of First Instance, the EESC feels that in more and more situations, owing to inflation of low-quality titles from certain countries, the best way to resolve certain conflicts between applicable rights is usually to apply the theory of abuse of rights. This should result in a genuine principle of mandatory licensing, which could lead to a rebuttable presumption of a requirement to issue a licence at a reasonable price under fair, non-discriminatory conditions. In all cases, foreign patents relating to fields excluded by Community law or which are very poor quality should not be recognised as valid, enforceable titles.

4.2 The Commission believes that standard-setting helps achieve a better industrial environment. For the EESC, standard-setting, which benefits consumers and SMEs, must be carried out in an open and transparent manner. The EESC endorses the view that the owner of an essential proprietary technology, which is then taken as a standard, extracts an over-inflated value for his title if they conceal their patent during the standard-setting process. A penalty system should apply in the event of this behaviour.

4.3 The future Community patent should require a higher level of quality, in line with the criteria set out by the Commission in respect of the European strategy, and also a specialised jurisdiction system, in particular to avoid 'patent ambushing' and other distortions of competition, which are very often based on poor-quality titles. Good patents are ousted by bad ones.

4.4 The EESC welcomes with interest the proposal for a study to analyse the interplay between industrial property rights and standards in the promotion of innovation; it will also take part in the planned consultation on standard-setting in ICTs, which will touch on this interplay.

4.5 In the current period of development of new, complex technology where manufacturing a product involves numerous discoveries and a large number of inventions and patents, a cooperation strategy is needed, maybe involving cross-licensing systems or patent pools. A balance should be ensured between stakeholders, to avoid potential distortion of competition and the rights of 'small inventors' being breached, in view of the huge patent portfolios of large businesses, some of which lodge thousands of new patents each year in the field of ICTs.

5. **SMEs**

5.1 In a globalised market SMEs and VSEs [6] have great difficulty in protecting their trade marks and patents (where they have them) as many of them are involved in subcontracting. However, a large number of businesses are reluctant to lodge patents, often because of a lack of information or fear of a system which is known to be complex and costly. Sometimes the exclusive rights granted in certain countries are circumvented by counterfeiting in other countries where patent owners' rights are not protected.

5.2 Thus, manufacturers often rely on trade secrets, but these secrets are not always safe, thanks to chemical analysis of products and the development of industrial espionage. For example, in perfume manufacturing, there used to be no patents as that would have meant publishing the chemical formula of components. Today, current analysis techniques mean that trade secrets no longer provide protection, and proper legal protection should be established for complex products, perhaps a form of copyright.

5.3 Reluctance to lodge patents, even if only because of the lodging and renewal fees associated with the current European patent, has had the effect of holding back technology transfer as the investors concerned have been unable to obtain licences; this is a loss for the European economy. SMEs and VSEs should therefore be supported and encouraged to obtain industrial property rights and to use them in business strategies involving several businesses which own titles and operate in the same sphere of activity, with a view to implementing inventions combining several different discoveries. In any case, industrial property title owners are in a better position to interest investors or obtain credit for developing their activities.

5.4 As the EESC has often stressed, European industry needs affordable, high-quality patents which are valid throughout the Community and stimulate the internal market.

5.5 An inexpensive, rapid dispute-resolution system is also needed; mediation should be encouraged to resolve certain disputes. Arbitration is also an alternative. The judicial system for patents should, for its part, be specialised, easy to access and expeditious so as not to hold back economic progress.

5.6 These are questions of public interest, and it is hard to understand why they have remained on hold for so long; it is true that very large businesses are able to lodge patents under the current system, thereby generating large amounts of income for the European Patent Office and national member offices. The purpose of the system is not that, however: it is to encourage industrial innovation and development, benefiting businesses and generating new skilled jobs, although expenditure will be needed to ensure effectiveness and extension of titles issued to innovative businesses and individuals.

[6] Very Small Enterprises (VSEs) and micro-businesses.

5.7 The EESC firmly believes that individuals working in a business who contribute directly to innovation and lodging of patents should be entitled to part of the income generated by their inventions (the issue of the employee inventor, or 'work for hire'); this happens in some countries but the practice should be extended to give innovation a greater boost.

6. **Enforcement of IPRs**

6.1 The EESC has already commented in detail in a number of opinions on enforcement of IPRs and combating piracy and counterfeiting, notably in one Opinion ([7]) to which the reader is referred in particular.

6.2 It is up to Member States which have issued intellectual property titles to enforce the exclusive rights they have granted, notwithstanding the general principle of exclusion of abuses of rights. Counterfeiting is a serious offence against the economic interests of innovative businesses, as well as the image of Community industry, and exposes consumers to serious risks. Moreover, it is difficult for SMEs to defend themselves on their own and they need tangible help.

6.3 High-quality legislation, jurisdiction systems and customs controls at the EU's borders are essential to combat counterfeiting.

6.4 The EESC therefore advocates strict compliance with the Brussels I Regulation and developing judicial and customs co-operation to this end. Final judgments handed down in a Member State should be accepted without an exequatur in all the other Member States.

6.5 Under Community law, the zero-tolerance approach advocated by the Commission to infringement of industrial property rights and copyright should target offenders who produce imitations or copies commercially, as the EESC has already stated in previous opinions. Industrial property rights cannot be protected by clamping down indiscriminately. Mafia-type counterfeiting rings and large producers should be targeted to put an end to an industry which is a burden on growth and jobs in the Member States.

6.6 Education and information also have a key role to play as regards consumers, who must be aware of what is involved in the production of imitations, including child labour or forms of forced labour. They must be warned of the risks entailed in buying certain items such as medicinal products on websites selling for the most part highly-dangerous imitations.

7. **International dimension**

7.1 At international level, it is essential to implement a strategy to ensure respect for European IPRs both within and outside Europe in order to tackle counterfeiting and piracy. At the same time, Europe should endeavour to encourage sustainable-technology transfer to developing countries.

7.2 International agreements on trade marks, patents and copyright follow old rules on treaty law (Vienna Convention). The EESC condemns the regrettable lack of transparency. It is not just a question of involving the best experts in national delegations, but also of adopting a European approach, especially when it comes to the quality requirement for protected titles. Civil society and its organisations should be more involved in these talks so that the European Union's economic partners know that 'European delegations' have wide support based on prior consultation and involvement in following talks — which could drag on for years.

7.3 The requirements of sustainable development and international cooperation to achieve this should take precedence in the global economic area. All talks must aim to find solutions which meet the public's expectations and serve the interests of the organisations concerned.

8. **Final comments**

8.1 The EESC supports the Commission's strategy, subject to some reservations and the suggestions made above.

8.2 It is fully aware of the obstacles and difficulties in the way of reforms, which will be problematic and costly, but it firmly believes that the sustainable growth generated by a European protection system will result in tax revenue.

8.3 The Community patent will boost investment in innovative technology.

([7]) OJ C 116, of 28.4.1999, p. 35 (rapporteur: H. Malosse).

8.4 In this area the EESC will continue to support all tangible Community initiatives seeking to improve applicable law, dispute resolution and protection of IP title owners in the fight against mafia-type organisations responsible for counterfeiting. It stresses once again the urgent need for solutions, which have been too long awaited by businesses and the public.

Brussels, 10 June 2009.

The President
of the European Economic and Social Committee
Mario SEPI