

Opinion of the Economic and Social Committee on 'Promoting innovation through patents: Green Paper on the Community patent and the patent system in Europe'

(98/C 129/03)

On 25 June 1997 the Commission decided to consult the Economic and Social Committee, under Article 198 of the Treaty establishing the European Community, on 'Promoting innovation through patents: Green Paper on the Community patent and the patent system in Europe'.

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 6 February 1998. The rapporteur was Mr Bernabei.

At its 352nd plenary session (meeting of 25 February 1998), the Economic and Social Committee adopted the following opinion by 128 votes to one with one abstention.

1. The Economic and Social Committee

Whereas:

1.1. patents are an essential instrument for stimulating investment in the research and technology sector. Consistent and efficient European law on patents therefore represents an essential element for ensuring the competitiveness of enterprises in the European Union;

1.2. a fully integrated European innovation market requires a unitary European system for protecting industrial property, with a Community patent accessible particularly for small and medium sized enterprises which are innovative in high-technology terms or 'pre-cursors' as stressed in the Committee opinion (CES 986/97 of 1 and 2 October 1997) on the impact on SMEs of the steady reduction in funds allocated to RTD in the European Union;

1.3. the Community patent system covered by the 1975 Luxembourg Convention and by the 1989 Agreement relating to Community patents which have never come into operation, no longer seems adequate to achieve such unitary protection;

1.4. there is an urgent need to give the Community patent problem maximum priority, because of its economic aspects and implications for competitiveness and technological and industrial development in a global market;

1.5. there is therefore an urgent need to review the patent system and relaunch it on a basis which would enable it to take off effectively before the European Union is further enlarged;

Recommends to the Council, the Commission and the European Parliament that:

1.6. The Community patent be adopted on the basis of a Community regulation, to be adopted under Article 235 of the Treaty.

1.7. The Community patent must have a unitary character and must therefore cover the whole Community, whereas an à la carte or variable geometry Community patent would be unacceptable because it conflicts with the requirements of the single market.

1.8. The Community patent system must co-exist with national patents and the European patent. An applicant for a European patent must — in the stage before the granting of the patent — have the opportunity to convert his Community patent application into a European patent application.

1.9. The Community patent must involve accessible costs which make it comparable to a European patent requested for a limited number of countries. In particular, the initial costs should be reduced.

1.10. With a view to containing costs, the problem of translations should be tackled on the basis of the 'global solution' evaluated by the EPO, as follows:

1.10.1. the patent application can be deposited in any of the EU languages, but with an obligation for it to be translated into one of the working languages (English, French or German);

1.10.2. the EPO prepares and publishes a detailed technical summary of the application in the language of the procedure, at the same time as the application is published. The EPO should arrange translation into the other two official languages and publish the text in the three aforementioned languages via Internet. In addition, the EPO should promptly forward these texts to the Commission departments (DG XIII) responsible for exploiting and disseminating research findings, to be translated into all the other Community languages and published through the CORDIS databank. The cost of translation would be borne by the EU as a cost of exploitation and dissemination of research findings. In any case, the Commission will need in future to make a general assessment of the cost of the language

arrangements adopted in the context of an enlarged European Union.

1.10.3. when the patent is granted, the applicant should ensure translation of patent claims at his own expense;

1.10.4. prior to any legal action, the patent holder should arrange for the translation of the whole patent, again at his own expense.

1.11. The system of jurisdiction should be based on a limited number of national courts of first instance, competent to hear infringement cases and counterclaims for revocation, but with the limited power of declaring the patent non-opposable to the (alleged) infringer as regards that specific type of (alleged) infringement (purely 'inter partes' effect). As an alternative, it could be laid down that national courts — competent to judge in the matter of infringements — can declare a Community patent invalid (when subject to a counterclaim for revocation) subject to the condition that the revocation would be suspended until confirmed by an appeal court.

1.11.1. The power to revoke a patent with 'erga omnes' effect should be reserved even in the first instance to the EPO's cancellation division, or preferably a new court to be set up (subject to the remarks on the previous alternative).

1.11.2. A specialized chamber of the Court of First Instance of the EC should operate as court of second instance.

1.12. In the matter of fees, SMEs, universities and non-profit-making research bodies should enjoy preferential conditions; in addition, an active policy in favour of SMEs should be adopted, by setting up patent consultancy units attached to the representative organizations.

1.13. Consideration should be given to harmonization of the right of prior use.

1.14. Article 52(2)(c) of the European Patent Convention should be amended to make it possible to patent computer programmes.

2. Introduction — summary of the Commission document

2.1. The Green Paper on the Community patent and the patent system in Europe forms part of the action to

promote innovation in Europe on which the ESC has issued opinions on a number of occasions⁽¹⁾.

2.2. The Commission recognizes the role played by patents in protecting innovation, while drawing attention to the complexity and disadvantages of a system such as that currently prevailing in Europe, which involves the coexistence of 'national patents', the 'European patent' (i.e. the unified system for the deposit and granting of patents which then gives rise to a range of national patents) and (but only on paper) the 'Community patent' (i.e. a patent which would not only be deposited and examined centrally, like the European patent, but would give rise to a single protection document covering the whole area of the European Union).

2.3. The green paper is in five parts: the first is an introduction dealing in general terms with the relationship between innovation and patents; the second gives the history of the European patent and the Community patent and explains the reasons why this could be a good time for a new Community initiative on the Community patent, also with a view to future enlargements; the third part analyses the Community patent system in terms of the opportunities which it offers but also in terms of the excessive costs and other disadvantages which it can involve; the fourth part is a discussion of whether it is desirable to harmonize at Community levels certain aspects of substantive law (particularly as regards the patentability of computer programs and software-related inventions), and certain aspects of procedural law; finally, the fifth part discusses certain questions relating to the current system of the European patent and its sensitive aspects, particularly in terms of costs.

2.4. The green paper takes as its starting point a consideration of the advantages and limitations of a European patent system based on the 1973 Munich Convention (EPC).

This system has undoubtedly meant considerable progress for protection of patents in Europe, setting up a centralized procedure (in Munich) for deposit and examination of patent applications, thus enabling users to protect their inventions, through a single application and a single procedure, in one or more of the countries which are party to the EPC.

⁽¹⁾ Opinion CES 700/96 on the Green Paper on Innovation, 1.5 — OJ C 212, 22.7.1996; Opinion CES 987/97, 1.10.1997 on the Commission Working Paper: Towards the fifth framework programme — scientific and technological objectives — OJ C 355, 21.11.1997; Opinion CES 986/97, 2.10.1997 on the Impact on SMEs of the steady, widespread reduction in funds allocated to research and technological development in the EU — OJ C 355, 21.11.1997.

Moreover, under this system the patent issued by the European Patent Office (EPO) corresponds to a range of national patents, each of which requires a translation into the language of the country concerned, logically limiting the scope of its protection to that country; moreover, each of these patents can be the subject of legal action only before the national courts.

2.5. The characteristics of the Community patent would be quite different: this form of patent, created by the Luxembourg Convention (CPC) of 1975, and modified and updated by the Agreement relating to Community patents (ARCP), signed in Luxembourg in 1989, would enable the applicant, through a centralized procedure for deposit of applications, to obtain uniform protection throughout the European Union and to refer — at least to some extent — to central legal bodies responsible for deciding on the interpretation and validity of the patent.

2.6. The green paper acknowledges (at least implicitly) that the main problem preventing the 'take-off' of the Community patent (for which the agreement of 1989 has not yet been ratified) is the very high cost of translation into the national languages which the system would involve.

The green paper suggests a range of possible solutions to this problem.

2.7. The green paper identifies another important obstacle to the attractiveness of the Community patent, in the system of jurisdiction set up for it and in particular in the fact that revocation of the patent (with effect throughout the EU) could be decided not only by a central body (EPO) but also by national courts, when considering a counterclaim for revocation submitted by an alleged infringer called before the national courts.

The green paper also proposes some possible alternative solutions to the problem of the system of jurisdiction.

2.8. The green paper goes on to examine the problem of the level of fees relating to the Community patent and the possibility of providing for/perfecting a system of transition from the Community patent to the European patent (and possibly vice versa).

2.9. On the question of possible further harmonization of patent law at Community level, the green paper raises above all the question of whether it would be desirable to modify a system set up by the EPC [Article 52(2)(c)] on the basis of which computer programs as such cannot be patented.

Other subjects covered are possible harmonization as regards inventions by employees, and formalities and recognition of qualifications for the profession of patent consultant.

2.10. Finally, the green paper considers some possible improvements which (apart from the Community patent) could be made to the existing system for the European patent, particularly as regards fees and cost of translations.

3. Innovation and patents — Europe, USA and Japan

3.1. Comparing the European (EU) system with the systems of its main competitors, the USA and Japan, Europe is clearly at a disadvantage.

3.2. Whereas in the USA and Japan enterprises can take advantage of a system which makes possible the unitary protection of technological innovations, throughout the territory concerned and at limited cost, in Europe protection is still fragmented and the costs are higher.

3.3. Indeed, a European firm which, through the European patent system, wishes to obtain patent protection in eight Member States — i.e. for a market broadly comparable to that of the USA — has to pay about DM 36 000, as against a cost equivalent to DM 3 000 for the USA and DM 2 200 for Japan⁽¹⁾.

3.4. If one compares the cost of obtaining a European patent (covering eight Member States as above) and maintaining it throughout its duration with the cost of a USA patent, Europe comes off even worse⁽²⁾.

3.5. Moreover, SMEs do not enjoy any particular concession in Europe, whereas in the USA SMEs benefit from a 50 % reduction in fees, under Section 41(h)(1) of the US Patent Act⁽¹⁾. The above could explain, at least in part, the fact that about two-thirds of innovative European SMEs (of which there are about 170 000) do not deposit patents⁽³⁾, and as stressed in Opinion CES 986/97⁽⁴⁾ the trend is strongly accentuated by a new

(1) J. Straus 'The present state of the patent system in the European Union', EC, 1997.

(2) In the case of the European patent this cost is calculated at US \$120 000, in the case of the United States at only US\$ 13 000. Cf. J. Straus, *ibidem*.

(3) Estimate in EC, Green Paper on innovation, 1995.

(4) Opinion CES 700/96 on the Green Paper on Innovation, 1.5 — OJ C 212, 22.7.1996; Opinion CES 987/97, 1.10.1997 on the Commission Working Paper: Towards the fifth framework programme — scientific and technological objectives — OJ C 355, 21.11.1997; Opinion CES 986/97, 2.10.1997 on the Impact on SMEs of the steady, widespread reduction in funds allocated to research and technological development in the EU — OJ C 355, 21.11.1997.

approach which would draw a distinction between small technology-intensive enterprises or 'precursors' which have unused applied research capacity on the one hand, and on the other the majority of enterprises which simply make use of the 'final products' of RTD.

4. Basic questions raised by the green paper

The green paper raises a number of questions; the most important of these are listed below. An attempt will be made to answer these and other questions in part 5 and the following parts of this opinion:

- a) Is it really necessary to get the 'Community patent' off the ground?
- b) How can the problem of languages and translations be solved?
- c) Is it possible to envisage a 'variable geometry' or 'à la carte' Community patent?
- d) Is it necessary to provide for the possibility of transfer from the Community patent to the European patent (and vice versa)?
- e) Is it possible and desirable to deprive national judges of the opportunity to revoke a Community patent?
- f) Is it necessary for the operator of the Community patent system to be totally self-financed through patent fees?

5. General comments

In approaching the problems raised by the Commission green paper and the fundamental questions involved, it is thought necessary to adopt the following general criteria:

5.1. Patents and single internal market

The Committee has repeatedly stressed the need to harmonize patent law in the European Union in order to consolidate the single internal market ⁽¹⁾.

However, even harmonization of certain substantive provisions of national law on patents is not sufficient to complete the single market. It appears to be necessary to introduce a single patent protection title, namely the Community patent.

⁽¹⁾ Legal protection for biotechnological inventions (see Conclusions 5) — OJ C 295, 7.10.1996.

5.2. Completeness and consistency of the system

The Community patent would be one of the three Community pillars for protection of industrial property, namely:

- the Community patent;
- the Community mark, already up and running ⁽²⁾;
- the Community design, which is in preparation ⁽³⁾.

A simple harmonization of national laws could add the utility model ⁽⁴⁾ to these three pillars.

5.3. Community patent and competitiveness of Community industry

5.3.1. Launching a European patent system which includes the Community patent is essential if research findings and new technical and scientific knowledge are to be transformed into industrial and commercial successes, thereby putting an end to the 'European innovation paradox' and providing an incentive for private investment in RTD, which is currently much lower in the EU than in the USA and Japan.

5.3.2. The rules for the Community patent should be seen in the light of the fourth indent of the first paragraph of Treaty Art. 130, under which the aim of Community and Member State action to ensure competitiveness of Community industry is 'fostering better exploitation of the industrial potential of policies of innovation, research and technological development' ⁽⁵⁾.

5.4. Community patent and innovation monitoring

It is acknowledged that patenting is an important indicator of R&D capacity ⁽⁶⁾.

Thus, if the Community patent system becomes operational and efficient at low cost, its use by Community

⁽²⁾ Council Regulation No 40/94/EC, 20.12.1993.

⁽³⁾ Proposal for a European Parliament and Council Regulation on Community designs and models (COM(93) 342 final) in OJ C 29, 30.1.1994.

⁽⁴⁾ Green Paper — utility models in the single market — OJ C 174, 17.6.1996.

⁽⁵⁾ Green Paper on innovation, 1.5. — OJ C 212, 22.7.1996.

⁽⁶⁾ Cf. Z. Griliches and others, 'R&D patents and productivity', Chicago, 1984.

firms will also be a yardstick for their productivity in terms of innovation and valid R&D results.

5.5. *Need for competitive costs*

It is clear from the above data that European enterprises, especially SMEs, are at a cost disadvantage in protecting their innovations on their 'domestic' market (the EU), as compared with enterprises of the main competitive countries (USA and Japan) on their respective domestic markets⁽¹⁾.

One of the essential requirements for the Community patent is therefore the containment of costs.

5.6. *Need for early proposals*

Apart from the economic and competition considerations mentioned in 5.1 and 5.3.1 above, the Committee would stress the importance of issuing a draft regulation on the Community patent by spring 1999, in order to provide the EU with a competition instrument before going on to future enlargement.

6. **Specific comments**

In the light of the above criteria, the ESC has the following comments on the basic questions raised by the green paper and set out above:

6.1. *Need for the Community patent*

According to some circles, the present system, based partly on national patents and partly on the centralized system for deposit and patent granting (European patent) has so far worked quite well: however, the needs of the single market appear to make it essential also to have a Community patent.

Comparison with the main competitors (USA and Japan — see point 3 above) also brings out the strangeness of a 'Europe system' which, while preparing to introduce a single currency, does not yet have a unitary system for protecting inventions.

One can also take account of the current success of the Community mark, which goes beyond the most optimistic expectations. This success (while remembering the very different characteristics of mark and patent) suggests that, if a protection right with Community validity existed, enterprises would be prepared to adopt it.

It is thus necessary to have a Community patent, while maintaining the national and European options.

The Community patent could be created (or revived) by adopting a Community Regulation under Article 235 of the EC Treaty.

It is important for SMEs, and especially for those which operate solely on the domestic market, that the national patent offices should continue. In view of the rapid spread of technology these offices make a valuable contribution and are necessary to preserve national patent expertise.

6.2. *Language problem*

In tackling this crucial problem (perhaps the central problem for the Community patent) the following points should be borne in mind:

6.2.1. It is legitimate for the Member States to be reluctant a priori to give up using their national languages, but the dual nature of the patent should be borne in mind: on the one hand, an instrument of information on the state of the art, and on the other, a technical/legal instrument for protecting inventions.

6.2.2. Whereas it may be regarded as essential to have the patent in the national language when it functions as a legal instrument, other solutions are possible for its function as an information instrument on the state of the art.

6.2.3. According to reliable assessments, only a small percentage (1-3 %) of translations of patents issued by the European Patents Office are in fact consulted⁽²⁾.

6.2.4. The problem of translations into the national languages also has political significance which justifies decisions at political level.

6.2.5. Among the solutions presented in the green paper, further attention should be given to the Package Solution presented by the EPO and mentioned by the Commission in the green paper, which in the Committee's view could be adapted as follows:

6.2.5.1. In accordance with the arrangements for the European patent⁽³⁾, applications for Community patents should be deposited in one of the three official languages of the procedure (English, French or German), or there is the option as before of depositing them in the language of the Member State of the EU in which the applicant is established, with an obligation to send the translation in one of the aforementioned three official languages

⁽²⁾ Information provided by the president of the EPO, I. Kober, at the Epidos Annual Conference 1996, and recorded in the proceedings of the conference.

⁽³⁾ EPC, Article 14.

⁽¹⁾ See Section 3 above.

of the procedure, by the deadline laid down in the regulation⁽¹⁾.

6.2.5.2. The European Patent Office should prepare in the language of the procedure, a clear technical summary (enhanced abstract) of the patent application. This summary should be published simultaneously with the publication of the application. The EPO should see to the translation of the abstract into the other two official languages as well and publish it in the three languages via Internet. The EPO should forward these texts promptly to the Commission departments responsible for exploitation and dissemination of research results (DG XIII), for translation into all the other Community languages and publication through the CORDIS databank, so that they will be an effective, rapid instrument for dissemination of technical progress.

6.2.5.3. Given the usefulness for dissemination of technical and scientific knowledge which translation of the abstract into the national languages would have, the translation costs would not be borne by the applicant for the patent, but by the EU, as a cost of exploitation and dissemination of research results.

6.2.5.4. When the patent is granted, a translation should be made into the national languages of the Member States of the patent claims alone. These translations would be arranged and paid for by the applicants.

6.2.5.5. Before any legal action which the patent holder wished to bring to safeguard his rights, the whole patent file should be translated in the country concerned. This translation would also be the responsibility of the patent holder and at his expense.

6.2.6. Entrusting the preparation of the enhanced abstract to the EPO would have the advantage that uniform criteria would be used.

However, it would also be possible for the EPO to entrust translation of this summary into the national languages, under its own responsibility, to the national patent offices — if they were willing and able; in such cases the national patent offices responsible for translation should forward the translations to the Commission departments mentioned in point 6.2.5.2 above for dissemination.

6.2.7. In future, in view of European union enlargement, the Commission could look for other solutions — in the more general context of the Community's language arrangements — especially as regards the impact on relative costs and the competitiveness of European industry.

6.3. *Unacceptability of 'à la carte' Community patent*

6.3.1. The 'à la carte' Community patent solution is favoured by certain business and professional circles, where the need for a 'flexible' system is emphasized.

6.3.2. In reality — while the applicant for a Community patent would retain the option of choosing a European patent at a certain stage of the procedure (see point 6.4 below) — the 'à la carte' Community patent solution appears to contradict fundamental requirements of the single market. It should therefore be firmly rejected.

6.4. *Option of converting a Community patent application into a European patent application*

6.4.1. As noted above, this problem should be distinguished from the 'à la carte' Community patent hypothesis, although in certain ways the practical effects could be similar.

6.4.2. In the context of a Community which is preparing for further enlargement, it seems reasonable to allow the applicant for a Community patent to be able to transform his application — before completion of the granting procedure — into a European patent application which, if successful, would give rise to a set of national patents for the countries concerned.

6.4.3. However, for reasons similar to those given in the preceding points on the 'à la carte' Community patent, it does not appear to be compatible with the requirements of the single market to allow a Community patent once granted to be transformed into a European patent, i.e. into a set of national patents.

6.4.4. Nor does it appear realistic to allow a European patent application to be transformed into a Community patent application, except in the case of a European patent covering all the Member States of the EU.

6.4.5. The ESC can therefore endorse the possibility of transforming a Community patent application into a European patent application if the request for transformation is presented before the patent is granted.

6.5. *Legal questions*

On the delicate question of the respective jurisdictions of national courts and Community bodies, it seems reasonable to take as a starting point the system laid down by the Regulation on the Community mark with regard to forgery and validity of the Community marks⁽²⁾.

⁽¹⁾ Cf. 'Implementing Regulations to the European Patent Convention', Chapter 1.

⁽²⁾ Regulation No 40/954/EC, Article 91 and following.

A similar system could be provided for the Community patent, with certain correctives to take account of the specific nature of the Community patent, and in particular of the high level of legal and technical qualifications required of a body which would be competent to declare such a patent invalid with effect throughout the EU's territory.

In the light of this, the following is a possible solution:

6.5.1. Each Member State designates for its own territory a small number of national courts — with a maximum of five for each state⁽¹⁾ — which are competent to judge in the first instance:

6.5.1.1. all actions relating to infringement of Community patents;

6.5.1.2. actions to determine non-infringement of Community patents;

6.5.1.3. counterclaims for revocation of the validity of a Community patent presented by the (alleged) infringer in the course of an infringement case.

For the type of case mentioned in point 6.5.1.3, two alternative solutions are set out below, both of them based on the need to allow the judge in an infringement case to pronounce also on the question of validity, and at the same time to limit the effect of the decision (so as to avoid irreparable consequences in the event of a faulty decision).

In the first solution, any decision unfavourable to the validity of a Community patent would not have the effect of declaring it null and void with general application ('*erga omnes*'). On the contrary, such an unfavourable decision would simply have the effect of declaring the patent in question non-opposable to the alleged infringer, with limited reference to that judgement and that particular type of (alleged) infringement. (This first solution would have the advantage of clarifying the validity or invalidity of the patent at once, but as it would have only *inter partes* effect, it could cause further disputes on the same patent *vis-à-vis* other parties.)

As an alternative, the national courts selected in accordance with 6.5.1 above could be empowered to revoke a Community patent (subject to a counterclaim for revocation) with '*erga omnes*' effect, but with a stipulation that revocation would be suspended until confirmed in an appeal court. (This second possibility would have the advantage of avoiding a proliferation of

court cases — precisely because the decision would have '*erga omnes*' effect — but would have the disadvantage of not coming into effect immediately, as the result of an appeal would be awaited.)

6.5.2. The aforementioned national courts would therefore have no competence as regards *erga omnes* cancellation of Community patents (unless of course the alternative in point 6.5.1.3 above was chosen). Such competence would lie exclusively with:

6.5.2.1. In the first instance, an appropriate cancellation division of the EPO or preferably a new specialized *ad hoc* court.

6.5.2.2. In the second instance, a specialized chamber of the Court of First Instance of the European Communities (CFI).

6.5.3. The specialized chamber of the CFI would also operate as a court of second instance for cases of infringement brought before the national courts.

6.5.4. Against decisions of the specialized chamber of the CFI a final appeal would be possible — solely for questions of law — to the Court of Justice of the European Communities.

6.5.5. In all cases, the national courts competent under point 6.5.1 above would have the power to take urgent decisions in favour of the patent holder, should it be deemed appropriate, applicable throughout the territory of the EU.

6.6. *The role of the national patent offices*

6.6.1. In the overall system envisaged, the national offices would continue to play their present role with regard to national patents and European patents.

6.6.2. They should also play an active role in disseminating and promoting patents as such and patent knowledge, including Community patents, especially with SMEs, professional associations, consultancies and independent inventors. In the case of SMEs, the action taken should include strengthening general cooperation with the organizations representing SMEs, micro-businesses and craft enterprises in the Member States.

6.6.3. For this function of diffusion and promotion, they should receive appropriate contributions from the Community Patent Office. These could take the form of a share of the maintenance fees for the Community patents.

6.7. *Tax-related questions*

6.7.1. In a Community patents system, based on a Community Regulation⁽²⁾, there would be no sense in dividing up fees among the Member States, although

⁽¹⁾ The suggested number of five is of course to some extent arbitrary. However, it is still preferable to indicate the precise number (however arbitrary) rather than resorting to the generic formulation of Article 91 of the Community Mark Regulation, namely a number as small as possible. The idea of designating in each Member State a single court of first instance appears above all to penalize the SMEs, whose connections with the regional environment are still very strong.

⁽²⁾ See Point 6.1 above.

this is envisaged by the Community patent convention and the Community patent agreement ⁽¹⁾.

6.7.2. On the contrary, in principle the fees paid by users of this system should go to the manager of the system, namely the EPO, saving payment by EPO to the national patents offices of an appropriate contribution for the activities indicated in point 6.6 above.

6.7.3. To make the Community patent system attractive, there is a need to make the fees for its maintenance significantly lower than the fees for maintaining in force European patents covering the whole Community.

6.8. *Favourable conditions for the SMEs*

6.8.1. In line with what is done in the USA, SMEs (to be defined as laid down in Commission Recommendation 96/280 of 3 April 1996), universities and non-profit research bodies should enjoy suitably reduced fees in the Community patent system (e.g. reduced by 50 %).

6.8.2. Specifically as regards SMEs, micro-businesses and craft enterprises, a pro-active policy needs to be launched for the purpose of maintaining and strengthening their innovation capacity. To this end, in addition to reducing fees, it is necessary, within the representative organizations (trade associations, chambers of commerce etc.), to train advisers for the task of briefing enterprises directly and providing them with assistance in the innovation process right up to the patenting and marketing stage. Such a measure could be covered by the Fifth framework programme for research and technological development.

⁽¹⁾ Cf. Article 20 of the Community patent agreement, on financial costs and benefits.

6.9. *Other possible harmonizations at Community level*

6.9.1. The patentability of computer programs

6.9.1.1. The Committee would point out in general terms that protection of computer programs through copyright is provided by Directive 91/250 ⁽²⁾.

6.9.1.2. Moreover, the Committee thinks it desirable to amend Article 52(2)(c) of the European Patent Convention, which excludes computer programs from patentable inventions, but would stress that 'software inventions', to be patentable, should nonetheless constitute a 'solution to a technical problem'.

6.9.2. The right of prior use

The desirability of harmonizing the right of prior use should also be considered.

6.9.2.1. This would mean defining, in appropriate and harmonized terms, to what extent a third party which has begun to use the invention in good faith (or has made serious effective preparations to use it on a commercial scale) could continue such use despite the granting of the Community patent to another party.

6.9.3. Inventions of employees

6.9.3.1. It is not thought that the existing differences in the laws of the Member States with regard to the inventions of employees justify harmonization at Community level.

6.9.3.2. In accordance with the principle of subsidiarity, the matter should continue to be regulated by the various national laws.

6.9.4. The need for harmonization in the field of biotechnology

There is an urgent need to issue the directive on harmonization of patent law in the field of biotechnology, in order to avoid European enterprises being seriously disadvantaged in competition with their non-European rivals (particularly in the USA).

⁽²⁾ Council Directive No 91/250/EEC, 14.5.1991 on legal protection of computer programs.

Brussels, 25 February 1998.

The President
of the Economic and Social Committee
Tom JENKINS