

# Beyond Lisbon

Reviewing EU policies on IP,  
Competition and Innovation

~~Failing~~



# Introduction

This review provides a concise overview of some of the key issues associated with the EU activities in fields of innovation, competition and intellectual property.

It is a convincing argument that the EU tends to lag behind the other major blocs – the United States and Japan – in its ability to incentivise, support and utilise its knowledge-based sectors. Consequently, and especially since the year 2000, a significant amount of data (working papers, reports, quantitative and qualitative research findings, public consultations, etc.) has been generated with the purpose of investigating EU's policies and practices concerning its knowledge-based economies.

This review seeks to build on some of the existing high quality data to provide a broad, yet concise, overview of EU policies and practices in the fields of innovation, intellectual property and competition. It also aims to highlight some of the key challenges that the EU currently faces in these fields. It is hoped that by doing so one will be able to obtain a more comprehensive and simple (though not simplistic) snapshot of EU objectives concerning its knowledge-based activities as well as the extent to which the EU was able to secure these objectives.

The review also goes one step further, as it seeks to provide some concrete policy recommendations for improvement. Such recommendations are not limited to the subject matter of EU policies and practices but also occasionally provide some political insights as to how one may promote such policies.

Structurally, the review is divided into five main elements. For each of the main issues (innovation, competition and intellectual property), the review identifies the EU's strategic goals, its key relevant objectives, the degree of the EU's success in terms of its ability to secure these objectives, analysis of EU policies and practices and some policy recommendations for the future.

We hope you find this review of use.

Dr. Meir P. Pugatch, Director of Research, Stockholm Network



# I. The Lisbon Agenda

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## Strategic goals

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In March 2000, at the European Council Meeting in Lisbon, European Heads of State launched one of the most ambitious agendas for the EU over the next decade: to become the most competitive and dynamic knowledge-based economy in the world by 2010.

This agenda is commonly referred to as the Lisbon Strategy or the Lisbon Agenda.

## Key relevant objectives

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1. An information society for all – “businesses and citizens must have access to an inexpensive, world-class communications infrastructure and a wide range of services.”
2. Establishing a European area of research and innovation – “Research activities at national and Union level must be better integrated and coordinated to make them as efficient and innovative as possible, and to ensure that Europe offers attractive prospects to its best brains... At the same time, innovation and ideas must be adequately rewarded within the new knowledge-based economy, particularly through patent protection.”
3. Creating a friendly environment for starting up and developing innovative businesses, especially SMEs – “Further efforts are required to lower the costs of doing business and remove unnecessary red tape, both of which are particularly burdensome for SMEs.”

## Degree of success

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It would seem that, so far, the Lisbon Agenda objectives have not been secured.

In March 2004, the European Council invited the Commission to establish a High Level Group to carry out an independent review of the Lisbon Agenda.

The High Level Group, chaired by Mr Wim Kok, issued its report *Facing the Challenge* in November 2004. The report concludes: “External events since 2000 have not helped achieving the objectives but the European Union and its Members States have clearly themselves contributed to slow progress by failing to act on much of the Lisbon strategy with sufficient urgency. This disappointing delivery is due to an overloaded agenda, poor coordination and conflicting priorities. Still, a key issue has been the lack of determined political action.”

## Analysis

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Evidence on the state of innovation in the EU, compared with the other major economies (the US and Japan), is not encouraging.

The European Innovation Scoreboard (EIS) of 2005 concludes that “based on a set of comparable data for 16 indicators the US and Japan are still far ahead of the EU25”.

The Report suggests that the innovation gap between the EU25 and the US is close to stable. About 70% of the innovation gap is, in statistical terms, explained by lagging EU performance in three indicators: patenting activities, population with tertiary education and ICT expenditures.

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The innovation gap between the EU and the other blocs has increased specifically in the area of public R&D expenditures and exports of high-tech products.

The EU is also lagging behind the US in term of scientific output especially with regards to citations of academic research.

### **Policy recommendations**

**Introduce the Lisbon Agenda 2007 Directive** – “Act focused, act together, and act now” – this wise conclusion of the High Level Group’s report seems to sum it all up.

In order to translate the report’s sound conclusions and suggestions into practice, it is necessary to introduce a new Directive that would expedite major changes essential for the implementation of the Lisbon Agenda.

However, the Lisbon Agenda Directive should be quite different than the original text of the Lisbon Agenda itself.

**First the Directive should seek to redefine the strategic objective of the Lisbon Strategy** – instead of aspiring to become the most competitive and dynamic knowledge-based economy in the world by 2010, the EU should be more modest in its objective. The EU should make it a strategic goal to be better prepared to compete in the global knowledge economy by fundamentally strengthening key areas that currently impinge on its innovative output.

**Secondly, the Directive should narrow the scope of the Lisbon Agenda, focusing on areas of strategic importance with a feasible chance of being accepted by the Member states** –

At this point it would be virtually impossible to secure all the objectives that were identified by the Lisbon Agenda. Rather, it is now important to narrow the scope of the Agenda and to identify priority areas of strategic importance, such as intellectual property, public-private cooperation, utilisation of publicly- funded research and supporting SMEs.

Also for each element it is important that the Directive should define more clearly its deliverables, both in terms of the process-driven change and expected outcomes.

**Thirdly, the Lisbon Directive should provide concrete timelines for completion**

that are based on short and medium term deliverables (that do not exceed three years) – although the Lisbon Agenda was designed to improve the EU’s innovation performance over a decade, there is a dire need to more accurately define the timeline for completion of each deliverable. This way the textual statements can be translated into practical commitments.

## **Relevant electronic links**

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### **1. Lisbon Strategy Statement**

[http://consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/00100-r1.en0.htm](http://consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm)

### **2. European Commission Growth and Jobs**

[http://ec.europa.eu/growthandjobs/index\\_en.htm](http://ec.europa.eu/growthandjobs/index_en.htm)

### **3. High Level Group Report of the Lisbon Strategy**

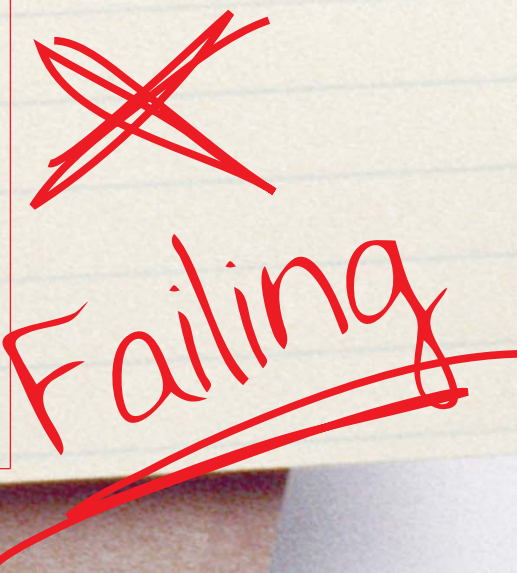
[http://ec.europa.eu/growthandjobs/pdf/kok\\_report\\_en.pdf](http://ec.europa.eu/growthandjobs/pdf/kok_report_en.pdf)

### **4. The European Innovation Scoreboard**

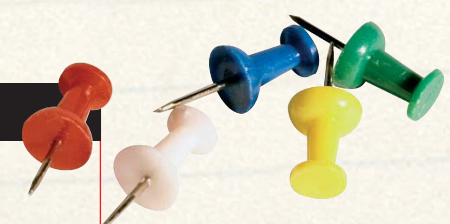
<http://www.trendchart.org/scoreboards/scoreboard2005/pdf/EIS%202005.pdf>

## LISBON AGENDA

Strategic goals	Become the most competitive and dynamic knowledge-based economy in the world by 2010.
Key relevant objectives	An information society for all Establishing a European area of research and innovation Creating a friendly environment for starting up and developing innovative businesses, especially SMEs
Degree of success	Lisbon Agenda objectives have not been secured.
Analysis	The state of innovation in the EU, compared with the other major economies (the US and Japan), is not encouraging. About 70% of the innovation gap is, in statistical terms, explained by lagging EU performance in three indicators: patenting activities, population with tertiary education and ICT expenditures. The EU is also lagging behind the US in term of scientific output especially with regards to citations of academic research.
Policy recommendations	Introduce the Lisbon Agenda 2007 Directive The Directive should seek to redefine the strategic objective of the Lisbon Strategy – instead of aspiring to become the most competitive and dynamic knowledge-based economy in the world by 2010, the EU should be more modest in its objective. The EU should make it a strategic goal to be better prepared to compete in the global knowledge economy by fundamentally strengthening key areas that currently impinge on its innovative output. Directive should narrow the scope of the Lisbon Agenda, focusing on areas of strategic importance with a feasible chance to be accepted politically by the Member states The Directive should provide concrete timelines for completion.



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## II. European Research Area

### Strategic goals

Building a European Research Area (ERA) that will overcome outdated geographical, institutional, disciplinary and sectoral boundaries.

The ERA will extend the single European market to the world of research and technological development, ensuring open and transparent trade in scientific and technical skills, ideas and know-how.

The EU will invest more in research, as well as exploit its technological outputs more effectively than in the past.

### Key relevant objectives

In its report, Building Europe's Future (2005), the European Commission DG Research outlines its policy objectives:

1. The United States and Japan currently spend far more on research than Europe – the EU now plans to increase its own spending to 3% of its GDP by 2010.
2. European research is often exploited elsewhere – renewed emphasis has been placed on the conversion of Europe's scientific expertise into marketable products and services.
3. The fragmentation of European research policies and activities diminishes their effectiveness – the ERA is creating a single market for scientific and technological ideas, skills and know-how.

### Degree of success

The EU is still far from securing its Lisbon Agenda objectives.

Both the EU's research inputs and outputs are still lagging behind the US and Japan and are subject to a relatively high degree of inefficiencies and non-utilisation.

There is, however, some room for optimism as the new 7th Framework Programme may be able to provide a more suitable and effective platform for the EU's research objective.

### Analysis

Not only did the EU fail to secure its Lisbon Agenda Objective of 3% of GDP for research, but the EU level of spending on R&D remains substantially lower compared to the US and Japan. At present, less than 2% of Europe's GDP is allocated to research, which compares poorly with 2.5% in the US and more than 3% in Japan. In fact, the growth rate of R&D intensity (R&D expenditure as % of GDP) in the EU has been declining since 2000 and is now close to zero.

The business sector continues to be the major source of financing of domestic R&D in OECD countries. In 2003 it

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accounted for almost 62% of funding in OECD countries. However, the level of business R&D in Europe is considerably lower than the US and Japan. According to the OECD Science and Technology Indicators, the business enterprise sector R&D expenditure as a percentage of value added in industry stood at 1.7% in the EU 25, compared with 2.6% and 3.2% in the US and Japan respectively. The EU continues to be less attractive to business R&D, which accounts for about 55% of total expenditure on R&D in the EU25, compared with 63% and close to 75% in the US and Japan.

The sub-optimal translation of EU-research activities into viable outputs – commercial and academic – remains a cause for concern. An expert report prepared by Giovanni Dosi, Patrick Llerena and Mauro Sylos Labini for the Trend Chart Policy Workshop 2005 suggests that overall perception of EU leadership in scientific publication is a myth. The report suggests that with regard to the most important element of scientific publication – citation – the US is well ahead of the EU (40 citations per population in the US compared with 23 citations per population in the EU 15). OECD data also suggests that the EU is lagging behind the US and Japan in patenting activities. The share of patents per million population in EU 15 stood on 43.3 patents compared with 57.7 patents in the US and 92.3 in Japan.

The EU also suffers from a relatively low level of public private partnerships. The European Commission Report on European Technology Platforms and Joint Technology Initiatives (June 2005) states that “there is clear evidence

that existing instruments and structures (and notably those of the Framework Programme) would not achieve the desired outcome, since they would not allow sufficient co-ordination and synergies nor guarantee the prior commitment of other funding bodies or partners (particularly industry and Member States) to long-term continuity.

However, progress has been made in the EU research framework. On 18 December 2006, the Council adopted decisions establishing the Seventh Framework Programme (FP7) of the European Community (EC) for research. In its Staff Working Document of April 2005 the European Commission argues that “participation in FP6 remains complex for non-administrators, and in particular for smaller actors. Further simplification and rationalisation is a *conditio sine qua non*: a critical success factor for the high-quality and efficient implementation of future Community RTD actions”.

If properly executed, the FP7 could become simpler to operate as well as more results-oriented. FP7 places greater emphasis on research that is relevant to the needs of European industry. Focus will also be given on excellence throughout the programme. Another priority will be to make participation in the programme simpler and easier.

### **Policy recommendations**

**make investment in the European Research Area a**

**political objective** – There is a general consensus about the importance of raising the level of investment in R&D in the EU. Yet when push comes to shove resources are still

disproportionably allocated to other areas that arguably are less valuable to EU citizens in terms of the contribution to the economy and to society. Thus, the only way that the 3% of GDP objective may be secured is to put the issue of R&D side by side with other political issues such as the Common Agriculture Policy. It is important to make EU policy makers and politicians accountable for their current choice to under-invest in the ERA.

**Make the utilisation and exploitation of EU research outputs a strategic objective via new pan-European legislation**

– Although the FP7 does place strong emphasis on the exploitation of R&D outputs, EU performance in this area is still disappointing. The main problem is structural. While today there is a great emphasis on the exploitation of research outputs at the micro level (specifically the exploitation of IPRs and technology transfer) not enough attention has been given to fundamentals at the macro level. There are considerable differences between EU-members concerning the exploitation and commercialisation of research outputs including in the different legal tools, structural mechanisms and cultural perceptions. The EU should seriously consider promoting new pan-European legislation that seeks to level the playing field among EU-members as well as creating a more supportive environment for knowledge exploitation and technology transfer activities. The 1980s Bayh-Dole legislation in the US can provide a powerful example of the manner in which such a legislative framework can be framed (of course, with the necessary changes and adjustment to the EU context.)

**Continue to place greater emphasis on public-private collaboration in the ERA** – the changing nature and rising complexity of the R&D undertaken in the 21<sup>st</sup> Century makes collaboration between public bodies and private enterprises more important than ever. In this context the European Commission initiatives concerning the establishment of European Technology Platforms are crucially important. In particular policy-makers should strive to establish the necessary mechanism under Article 171 of the EC Treaty in order to create a more efficient and flexible coordination mechanism as well as to increase the opportunities for public-private collaborations.

## **Relevant electronic links**

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### **1. European Commission, DG Research. Building Europe's Future (2004)**

[http://ec.europa.eu/dgs/research/pdf/corporate-brochure\\_en.pdf#pagemode=none](http://ec.europa.eu/dgs/research/pdf/corporate-brochure_en.pdf#pagemode=none)

### **2. European Research Area**

[http://ec.europa.eu/research/era/index\\_en.html](http://ec.europa.eu/research/era/index_en.html)

### **3. EU 7th Framework Programme**

[http://ec.europa.eu/research/fp7/home\\_en.html](http://ec.europa.eu/research/fp7/home_en.html)

### **4. Future European Union Research Policy**

[http://ec.europa.eu/research/future/index\\_en.cfm](http://ec.europa.eu/research/future/index_en.cfm) (2006)

### **5. European Commission Staff Working Paper. Report on European Technology Platforms and Joint Technology Initiatives: Fostering Public-Private R&D Partnerships to Boost Europe's Industrial Competitiveness (June 2005)**

<http://register.consilium.eu.int/pdf/en/05/st10/st10102.en05.pdf>

### **6. Science and Technology Indicators for the European Research Area (2006)**

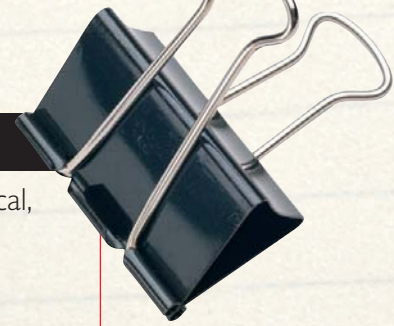
<http://cordis.europa.eu/indicators/publications.htm>

### **7. OECD Science Technology and Industry Scoreboard (2005)**

<http://www.sourceoecd.org/scoreboard>

### **8. Giovanni Dosi, Patrick Llerena and Mauro Sylos Labini. Evaluating and Comparing the Innovation Performance of the United States and the European Union (June 2005)**

<http://www.trendchart.org/scoreboards/scoreboard2005/pdf/EIS%202005%20EU%20versus%20US.pdf>



<b>European Research Area</b>	
<b>Strategic goals</b>	<p>Build a European Research Area (ERA) that will overcome outdated geographical, institutional, disciplinary and sectoral boundaries.</p> <p>Invest more in research, as well as exploit EU's technological outputs more effectively than in the past.</p>
<b>Key relevant objectives</b>	<p>Increase the EU's level of spending on R&amp;D to 3% of its GDP by 2010.</p> <p>Convert Europe's scientific expertise into marketable products and services</p> <p>Create a single market for scientific and technological ideas, skills and know-how.</p>
<b>Degree of success</b>	<p>Both the EU's research inputs and outputs are still lagging behind the US and Japan and are subject to a relatively high degree of inefficiencies and non-utilisation.</p> <p>There is, however, some room for optimism as the new 7th Framework Programme may be able to provide a more suitable and effective platform for the EU's research objectives</p>
<b>Analysis</b>	<p>At present, less than 2% of Europe's GDP is allocated to research, which compares poorly with 2.5% in the US and more than 3% in Japan</p> <p>With regard to the most important element of scientific publication – citations – the US is well ahead of the EU (40 citations per population in the US compared with 23 citations per population in the EU 15).</p> <p>The sub-optimal translation of EU-research activities into viable outputs – commercial and academic – remains a cause for concern</p> <p>The EU also suffers from a relatively low level of public private partnerships.</p>
<b>Policy recommendations</b>	<p>Make the investment in the European Research Area a political objective</p> <p>Seriously consider promoting new pan-European legislation that seeks to level the playing field among EU-members as well as creating a more supportive environment for knowledge exploitation and technology transfer activities</p> <p>Continue to place greater emphasis on public-private collaboration in the ERA, especially under Article 171 of the EC Treaty</p>

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# III. Competition and Anti-Trust Policy Under Article 82 of the EC Treaty

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## Strategic goals

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Ensure effective competition in the EU, as a means of promoting innovation, greater consumer choice and competitive prices.

Prevent companies from abusing their dominant position within the common market.

## Key relevant objectives

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The DG Competition discussion paper (December 2005) on the Application of Article 82 of the Treaty to Exclusionary Abuses – stipulates the following objectives:

1. Determine the relationship between Competition rules (as provided by Article 82), and other articles of the EC Treaty (especially Article 10).
2. Provide more accurate definitions – based on economic analysis – of key concepts such as “the market”, “economic strength”, “dominant position” “competitive constraints”
3. Establish the general framework for the analysis of exclusionary abuses of dominance undertakings in the EU.

## Degree of success

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Currently there seems to be a considerable gap between the declarative level and the de facto practices of the EU's approach (as expressed by DG COMP) towards the interpretation and application of Article 82.

Moreover, although pro-active in the field of competition and anti-trust, the actions of DG COMP seem to be detached from and to some extent to contradict the Lisbon Agenda goals, not least concerning the issue of “competitiveness”.

## Analysis

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It is likely that DG COMP actions are aimed at establishing the supremacy of competition anti-trust policies over other areas that are not less fundamental to the EU's economy. In its discussion paper DG COMP argues that “Article 10 of the Treaty obliges Member States to take all appropriate measures to ensure fulfillment of the obligations arising out of the Treaty”. DG COMP argues that “this article, which imposes on the Member States a duty to cooperate, read in conjunction with Articles 81 EC and 82 EC, requires the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings.”

What DG COMP seems to ignore is that this statement may be read in reverse – i.e. that Article 82 should not be interpreted or used in a manner that is inconsistent with other fundamental issues under the EC Treaty.

Heading towards failure

A notable example of the manner in which DG COMP is trying to secure the supremacy of competition rules over other key areas is intellectual property rights (IPRs). Article 3 of the EC Treaty, *inter alia*, emphasises the need to strengthen the competitiveness of the Community industry as well as to promote research and technological development. Article 157 of the EC Treaty calls for fostering better exploitation of the industrial potential of policies of innovation, research and technological development. IPRs are key for securing the above and their value to the EU's economy is well-known (as explained later in the review). Yet in recent years, DG COMP, perhaps because of the various contemporary legal disputes in which it is currently involved, seems to promote (including in its discussion paper) an agenda that seeks to subordinate the protection of IPRs to competition rules. A recent study by the Stockholm Network (December 2006) finds that, when comparing the relationship between IPRs and Competition rules, EU member countries as well as the US recognise the importance of the former and do not treat the issue of the refusal to license IPRs as an abusive act as such. On the other hand, the European Commission's approach towards this issue seemed to have shifted towards a much more predatory mode. The European Commission seems to no longer adhere to the McGill principle established by the European Court of Justice in 1995 – according to which a compulsory licence will be invoked in *exceptional circumstances* and when the refusal to license prevents the launch of a *new product* for which there was proven consumer demand.

One also cannot escape the feeling that DG COMP is

currently trying to define policies that would fit its own actions rather than doing it the other way around – i.e. to let EU policies dictate DG COMP's action. On the one hand DG COMP argues in its discussion paper that "The essential objective of Article 82 when analysing exclusionary conduct is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources." It further notes that it is "competition, and not competitors as such, that is to be protected." However in the same discussion paper DG COMP also argues that "it may sometimes be necessary in the consumers' interest to protect competitors that are not (yet) as efficient as the dominant company." In other words DG COMP seems to suggest that, from a policy perspective, competition authorities in Europe (including DG COMP itself) are allowed to act on a discretionary basis in order to promote competition generally, even if such actions may be in contradiction to the logic of competition rules themselves. In his recent paper (December 2006) Brian Hindley refers to this issue and argues: "this nod in the direction of industrial policy is dangerous. A company that is not yet as efficient as the dominant company may never be: and DG Competition has no obvious competence to assess this risk. Getting it wrong, however, is likely to be expensive for Europeans."

Finally, although promoting the use of economic analysis in the formation of competition policies, DG COMP still has a long way to go. A notable example for this is the manner in which DG COMP chooses to define key concepts, such as "market dominance" or "exclusionary

practices". On the one hand DG COMP positively emphasises the role of competition as a means of enhancing consumer welfare and of ensuring efficient allocation of resources. On the other hand, DG COMP ignores recent economic theories and empirical evidence on the changing nature of competition in knowledge-intensive and dynamic sectors, which are becoming more and more important to the EU economy as a whole. As Federico Etro explains in his recent paper (2007): "the general impression is that the current version of the Discussion Paper, which suggests a reform of the approach to Art. 82, still places excessive stress on the importance of market shares to evaluate dominance, and that this can be highly misleading, especially for dynamic markets".

### **Policy recommendations**

**Ensure that EU competition policies – particularly with regard to the application of Article 82 – are**

**synchronised with the other objectives of the Lisbon Agenda** – competition policy should be considered a

means to an end and not an end in itself. And since competition policy is aimed at promoting innovation, consumer choice, competitive prices and more efficient allocations of resources in general, there is a great need to ensure that the execution of this policy does not come at the expense of other policies that seek to maintain the same objective. As such, the Stockholm Network recommends that in cases in which there is a tension between competition policy and other areas (such as IPRs) a special Inter-Directorate Consultation Committee be established by the European Commission to review and execute the EU's policies in these areas.

Such a Committee, consisting of relevant representatives of the different Directorates, is likely to form a more comprehensive and informed perspective on the positive and negative implications of competition policies on the EU's economy and social welfare.

**Reverse the shift of DG comp towards active interventionism and "self-participation" in the market –**

The role of competition authorities, as DG COMP itself notes, is to protect competition and not competitors, as well to make sure that competition policies result in greater consumer welfare and efficiencies. However, an important regulatory authority, such as DG COMP, should make a clear distinction between protecting competition in the market, and assuming the role of the "market" itself by intervening in favour of less efficient players in order to promote market competition as the DG COMP envisages it. DG COMP is neither a fortune teller nor has it the practical tools to analyse and determine the extent to which the outcomes of its interventionist actions are more beneficial to Europeans. DG COMP should therefore return to its original role of a market regulator and gate-keeper.

**Continue to strengthen the use of economic tools as part of the process of reviewing competition cases in the EU** –

In recent years there has been increased openness by EU regulatory authorities, including DG COMP, to combine economic analysis in its working process. This trend is certainly a positive one. Yet in order to secure an effective and complementary use of economic analysis, more attention should be devoted to

recent developments in the field, not least studies that focus on the role of market leaders and recent analysis concerning the competition in knowledge-intensive and dynamic sectors.

### **Relevant electronic links**

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#### **Article 82 of the EC Treaty**

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E082:EN:NOT>

#### **DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (December 2005)**

<http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>

#### **Treaty establishing the European Community**

[http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/htm/C\\_2002325EN.003301.html](http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/htm/C_2002325EN.003301.html)

#### **Brian Hindley. An Economic Analysis of DG Competition's – Discussion Paper on the Application of Article 82 (December 2006)**

<http://www.stockholm-network.org/downloads/publications/d41d8cd9-Hindley%20-%20covered.pdf>

#### **Federico Etro. The Economics of Competition Policy and Dominant Market Position (2007)**

[http://www.stockholm-network.org/downloads/publications/d41d8cd9-ETRO\\_2\\_\\_proofed1.pdf](http://www.stockholm-network.org/downloads/publications/d41d8cd9-ETRO_2__proofed1.pdf)

## COMPETITION AND ANTI-TRUST POLICY UNDER ARTICLE 82 OF THE EC TREATY

<b>Strategic goals</b>	<p>Ensure effective competition in the EU, as a means of promoting innovation, greater consumer choice and competitive prices.</p> <p>Prevent companies from abusing their dominant position within the common market.</p>
<b>Key relevant objectives</b>	<p>Determine the relationship between Competition rules (as provided by Article 82), and other articles of the EC Treaty (especially Article 10).</p> <p>Establish the general framework for the analysis of exclusionary abuses of dominance undertakings in the EU</p>
<b>Degree of success</b>	<p>There seems to be a considerable gap between the declarative level and the de facto practices of the EU's approach (as expressed by DG COMP) towards the interpretation and application of Article 82.</p>
<b>Analysis</b>	<p>It is likely that DG COMP actions are aimed at establishing the supremacy of competition anti-trust policies over other areas that are not less fundamental to the EU's economy. One notable example is the manner in which DG COMP is trying to secure the supremacy of competition rules over intellectual property rights (IPRs)</p> <p>DG COMP seems to suggest that, from a policy perspective, competition authorities in Europe (including DG COMP itself) are allowed to act on a discretionary basis in order to promote competition generally, even if such actions may be in contradiction to the logic of competition rules themselves.</p> <p>Although promoting the use of economic analysis in the formation of competition policies, DG COMP still has a long way to go. A notable example of this is the manner in which DG COMP chooses to define key concepts, such as "market dominance" or "exclusionary practices".</p>
<b>Policy recommendations</b>	<p>Ensure that EU competition policies – particularly with regard to the application of Article 82 – are synchronised with the other objectives of the Lisbon Agenda</p> <p>Reverse the shift of DG COMP towards active interventionism and "self-participation" in the market</p> <p>Continue to strengthen the use of economic tools as part of the process of reviewing competition cases in the EU.</p>

Heading towards failure

# IV. Intellectual and Industrial Property

## Strategic goals

Create and maintain an intellectual property (IP) environment that will incentivise EU innovators to develop new knowledge-based products and technologies to the benefit of consumers.

Secure the IP interests of EU innovators, both within the EU and globally.

## Key relevant objectives

1. Provide state-of-the-art level of IP protection across the EU, not least in emerging fields of technology, in order to sustain and enhance intra EU activities in the fields of knowledge creation and exploitation.
2. Harmonise and simplify the IP system in the EU, especially the patent systems in Europe in order to make the use of the system easier and more accessible to innovators, not least small and medium-sized enterprises (SMEs).
3. Become an active player in the formation of international IP environments, *inter alia* by negotiating trade agreements with third countries that seek to establish and enforce a level of IP protection of the highest international standards.

## Degree of success

The IP framework in the EU is ill-equipped to meet the rising technological challenges that knowledge-based economies currently face.

The EU is unable to harmonise and simplify its overall IP

framework, thereby making the IP system complex and cumbersome, particularly for SMEs. Also there is a considerable gap between the level of IP protection provided at the EU level and the level of protection provided by the member countries.

Internationally, EU-led regional and bilateral agreements in the area of IPRs have been less effective than anticipated. The EU's attempts to raise the level of IP protection provided by its trading partners has, vis-à-vis bilateral trade agreements, had a mixed success.

## Analysis

Although the modern IP system has its roots in Europe, the EU's IP system today suffers from some serious structural and procedural inefficiencies.

High Level Group accurately commented on the state of the EU's IP system: companies will only invest in innovation and R&D if they are sure that they will be able to reap the rewards of that investment. An essential prerequisite for this is a legal framework for the protection of intellectual property rights that is accessible at low cost to Europe's SMEs and academic institutions – something which is manifestly not the case at present.

One of the EU's most acute chronic problems in this field is the lack of patent harmonisation. The underlining logic of Community-wide patents is to make patent protection simple and inexpensive to obtain. Currently this is not the case. Patent protection in just eight European countries is estimated to cost about €50,000, around five times as much as in the US or Japan. Another survey

*Failing*

commissioned by the European Patent Office in 2004 found that the total cost of having a Euro-direct patent granted is on average €24,100 for a European company. By comparison, it costs €10,250 for a US company to obtain a patent from the US Patent Office (USPTO) and a Japanese company will pay €5,460 to receive a patent in Japan. One of the reasons for this is that, currently, each Member State requires that a patent application be translated into its official language for it to be legally valid within their territory. Of course SMEs are those who suffer the most from such high costs.

The European Commission proposal for a Regulation on the Community Patent dates back to the year 2000. The proposal envisaged a Community patent, which would be granted by the European Patent Office in Munich, but applicable in every Member State. The Commission estimates that a Community Patent could cut these costs by half to about €25,000 for the 25 Member States. Yet, almost 8 years have passed and the signs for a convergence on this issue are not encouraging, especially after the European Council failed to agree on the proposed regulation on a Community Patent in March 2004, dealing a painful blow to the entire process. In January 2006 the European Commission launched a Public Consultation on Patent Policy in Europe. The preliminary results were published in July 2006. The report finds that "industry (big and small), as well as other interest groups, generally support the Community Patent as a way of addressing problems of the patent system. It is seen as the initiative which will deliver value-

added for European industry under the Lisbon agenda."

Another example of the EU's failure to harmonise its patent system concerns the Computer Implemented Inventions Directive (CIID). In its original form, the proposed CIID was aimed at harmonising the manner in which patent offices treat patent claims concerning computer-based inventions. The initiative to harmonise the EU's approach to the patentability of computer-implemented inventions, can be dated to 2000, when the European Commission published the results of its first major (commissioned) study – The Economic Impact of Patentability of Computer Programs. In this study the authors found that "the patentability of computer program- related inventions has helped the growth of computer program- related industries in the (United) States in particular the growth of SMEs and independent software developers into sizeable, indeed major, companies". Following a series of consultations, the European Commission issued in July 2002 its proposed Directive on the patentability of computer implemented inventions – later (notoriously) known as the CIID. However despite years of discussions, modifications and negotiations the CIID was finally rejected by the European Parliament on July 6 2005.

IP Legislation at EU level also seems to be unequipped to protect innovative sectors, such as the IT sector. Indeed, a new Index of IP regimes in the high-tech sector, created by the Stockholm Network, ranks the EU as a whole at the bottom of the scale, below nation states of the EU and other countries, including the US, Japan and

Singapore. The index positions countries' IP environments relevant to the IT industry on a mathematical scale of 0 to 4. The IP-IT Index factors in 14 components that are relevant to the IT sector, covering the term of exclusivity, scope and coverage of essential components, strength of exclusivity and enforcement. The US was found to have the strongest level of IP protection (3.92), followed by Singapore (3.73). The EU on the other hand scored only 2.47, which is 37% lower than the US, and 15% lower than Japan. The Index finds that a similar level of IP protection is provided to IT companies by the leading EU countries. Among European countries, Germany leads the list (with a score of 3.59), followed by the UK (3.50), Sweden (3.37), Norway (3.37) and France (3.11).

Finally, EU trade policy strategy towards the international regulation of IPRs (including the area of enforcement) seems to be less effective than anticipated. The EU certainly seeks to secure effective IP agreements with its negotiating partners. However, compared to the US, the EU's approach towards the international regulation of IPRs is less effective and does not fully meet the EU's objectives in this field. This can be seen in the cases of Israel, Ukraine, Russia and Chile. The European Commission, perhaps being mindful of the EU's weakness in this field, seems to become more proactive in the international regulation and enforcement of IPRs. This can be seen in the EU's Strategy for the Enforcement of IPRs in Third Countries, which was officially launched in November 2004. Moreover, on 4th of October 2006, DG Trade announced the launch of its Global Europe

initiative – linking this initiative to the Lisbon Agenda goals. *Inter alia*, DG Trade emphasises its intentions to step up its “work to protect intellectual property rights, setting out priority countries for enforcement and co-operation”.

### Policy recommendations

**Take immediate steps to harmonise the EU patent system by adopting and (unilaterally) implementing the London Agreement and the European Patent Litigation Agreement** – to date the attempt to harmonise the EU patent system via the standard EU political track has failed. In the interim, member countries should strive to immediately implement two important legal instruments, that were negotiated voluntarily by the member countries, and that could significantly improve patent harmonisation in the EU. The first is the Agreement on the application of Article 65 of the Convention on the Grant of European Patents, of 17 October 2000 (so-called London Agreement). Signatories to the London Agreement agreed to waive, entirely or largely, the requirement for translations of European patents to be filed in their national language. According to the Agreement, countries would have to choose one of the official languages of the European Patent Office (English, French or German) as a “prescribed language”, in which European patents would have to be translated in order to enter into force in their country. The second agreement is the European Patent Litigation Agreement (EPLA), or formally the Draft Agreement on the establishment of a European patent litigation system of

November 2003. The Agreement seeks to establish a European patent litigation system and a draft Statute of the European Patent Court. Both agreements require ratification by the signatories in order to enter into effect. However if some of the signatories, such as France, would continue to delay their decision to ratify the agreement other signatories should seriously consider voluntarily implementing the London Agreement and the EPL among themselves.

**Make the use of IPRs by European SMEs a strategic objective** – (SMEs) play a key role in the European economies accounting for two-thirds of the continent's employment, almost 60% of economic output, and more than 99% of all enterprises. Although most SMEs recognise the importance of IPRs, many are still struggling to fully exploit the advantages of the system. Indeed, the links between innovation, intellectual property rights and funding are especially significant for knowledge-based small and medium-sized enterprises, for whom IPRs could be a make-or-break issue. The Stockholm Network appreciates that a variety of agencies have been established with the specific aim of supporting SMEs in their efforts to exploit IPRs. There is however, a need for these agencies to coordinate their efforts and make sure that the SMEs actually know that they exist. We also believe that the EU countries could go even further in supporting SMEs, by cutting red tape, establishing a fast track for SME patent applications and giving special treatment with regards to costs. EU countries should also develop further the idea of a 'patent insurance', as means of improving SMEs' ability to enforce their rights.

**Strengthen the EU level of IP protection** – the EU needs to step up its efforts to provide a first class level of IP protection to innovators.

With regard to the IT sector – the EU should revive discussion on the Computer Implemented Inventions Directive in order to support and encourage technological innovation in Europe. As mentioned above, many of the leading EU countries already allow for the patenting of such inventions and therefore it is crucial to harmonise this issue at the EU level. The High Level Group has also addressed this issue arguing that "most urgently, the EU should adopt the pending proposal on the patenting of computer-implemented inventions, and of course, the Community patent"

With regard to the pharmaceutical and biotechnological sector, the EU should consider expanding regulation EC 1768/92 – extending the life of a pharmaceutical patent via a Supplementary Protection Certificate (SPC). SPCs are of crucial importance to the ongoing development of innovative medicines, as they allow innovators to recoup some of the exclusivity lost due to the extensive development periods of innovative products. In this context, EC 1768/92 should be also expanded to cover the grant of an SPC to medicines that combine two or more active ingredients covered by patents or pharmaceutical products resulting from the combination of an off-patent active ingredient, and a substance that has no therapeutic effect on its own (excipient).

**Continue and even strengthen the strategy underlined by the Global Europe initiative with regard to the negotiation and implementation of international IP agreements as well as the enforcement of IPRs** – as

noted above the EU's rather 'generalist' trade-policy approach with regard to IPRs – seeking to incorporate international conventions and treaties into its regional and bilateral agreements – is not particularly effective. In order to secure more effective results in its present and future negotiation, the EU should both broaden the use of its new IP Enforcement Strategy in Third Countries of 2004, as well as to consider shifting to agreements that are more specific in terms of their IP demands.

In this context the 2006 Global Europe initiative is a step in the right direction. The EU should increase the level and collaboration and coordination with the US. Coordination and collaboration are important with regard to countries that have not yet concluded their IP negotiations neither with the United States nor the EU, especially dominant countries such as India and China. The EU should also strengthen the mandate of the monitoring and enforcement committees established under EU-led free-trade agreements in order to ensure that such agreements are better implemented and enforced.

Finally the EU should step up its enforcement efforts both internationally and inside the EU, particularly against counterfeiting. Given the global threat of piracy on the economic performance of knowledge-driven economies, the EU should be one of the most active participants in

the fight to stop counterfeiting. In addition to the Global Europe initiative, the EU should consider establishing more specific programmes, including the adoption of the US-based STOP Initiative (Strategy Targeting Organised Piracy (STOP!)) in the EU.

## **Relevant electronic links**

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**European Commission. Promoting Innovation Through Patents – The follow-up to the Green Paper on the Community Patent and the Patent System in Europe (1999)**

[http://ec.europa.eu/internal\\_market/indprop/docs/patent/docs/8682\\_en.pdf](http://ec.europa.eu/internal_market/indprop/docs/patent/docs/8682_en.pdf)

**Roland Berger Market Research (RB). The Cost of a Sample European Patent – New Estimates (2004)**

[http://www.european-patent-office.org/epo/new/cost\\_analysis\\_2005\\_en.pdf](http://www.european-patent-office.org/epo/new/cost_analysis_2005_en.pdf)

**European Commission, DG Internal Market, The Economic Impact of Patentability of Computer Programs” (2000)**

[http://ec.europa.eu/internal\\_market/indprop/docs/comp/study\\_en.pdf](http://ec.europa.eu/internal_market/indprop/docs/comp/study_en.pdf)

**Legislative History of the Directive on the Patentability of Computer Implemented Inventions (2002/0047/COD)**

[http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=en&DosId=172020](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=172020)

**The Stockholm Network Intellectual Property Index for the Information Technology Sector (IP-IT Index) (2006)**

[http://www.stockholm-network.org/downloads/publications/d41d8cd9-IP\\_A4\\_AW.pdf](http://www.stockholm-network.org/downloads/publications/d41d8cd9-IP_A4_AW.pdf)

**EPLA – European Patent Litigation Agreement**

<http://patlaw-reform.european-patent-office.org/epla/>

**London Agreement on the application of Article 65 EPC**

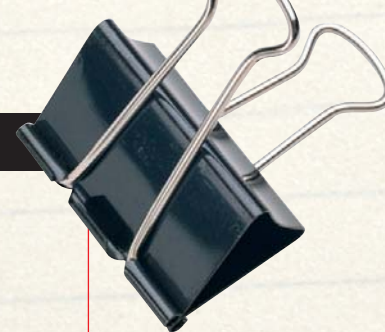
[http://patlaw-reform.european-patent-office.org/london\\_agreement/index.en.php](http://patlaw-reform.european-patent-office.org/london_agreement/index.en.php)

**European Commission – External Trade. Global Europe – Competing in the World (October 2006)**

[http://ec.europa.eu/trade/issues/sectoral/competitiveness/global\\_europe\\_en.htm?](http://ec.europa.eu/trade/issues/sectoral/competitiveness/global_europe_en.htm?)

## INTELLECTUAL AND INDUSTRIAL PROPERTY

<b>Strategic goals</b>	<p>Create and maintain an intellectual property (IP) environment that will incentivise EU innovators to develop new knowledge-based products and technologies to the benefit of consumers.</p> <p>Secure the IP interests of EU innovators, both within the EU and globally.</p>
<b>Key relevant objectives</b>	<p>Provide state-of-the-art level of IP protection across the EU, not least in emerging fields of technology.</p> <p>Harmonise and simplify the IP system in the EU.</p> <p>Become an active player in the formation of international IP environments, <i>inter alia</i> by negotiating trade agreements with third countries.</p>
<b>Degree of success</b>	<p>The IP framework in the EU is ill-equipped to meet the rising technological challenges that knowledge-based economies currently face.</p> <p>The EU is unable to harmonise and simplify its overall IP framework, thereby making the IP system complex and cumbersome, particularly for SMEs.</p>
<b>Analysis</b>	<p>One of the EU's most acute chronic problems in this field is the lack of patent harmonisation. The future of the pending European Commission proposal for a Regulation on the Community Patent, which dates back to the year 2000, is bleak. Another example of the EU's failure to harmonise its patent system concerns the Computer Implemented Inventions Directive (2005).</p> <p>IP Legislation at EU level also seems to be ill-equipped to protect innovative sectors, such as the IT sector. A new Index of IP regimes in the high-tech sector, created by the Stockholm Network, ranks the EU as a whole at the bottom of the scale, below nation states of the EU and other countries, including the US, Japan and Singapore</p> <p>EU trade policy strategy towards the international regulation of IPRs (including the area of enforcement) seems to be less effective than anticipated.</p>
<b>Policy recommendations</b>	<p>Take immediate steps to harmonise the EU patent system by adopting and (unilaterally) implementing the London Agreement and the European Patent Litigation Agreement</p> <p>Make the use of IPRs by SMEs a strategic objective</p> <p>Strengthen the EU level of IP protection. Continue and even strengthen the strategy underlined by the Global Europe initiative with regard to the negotiation and implementation of international IP agreements as well as the enforcement of IPRs.</p>



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