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"A single patent will make the European Union more competitive"

Interview with Professor Alain Pompidou, former President of the European Patent Office, honorary MEP and member of the Robert Schuman Foundation Scientific Committee

1. Doesn't a European patent already exist? Isn't there a European Patent Office (EPO) over which you have presided?

Yes indeed, the European Patent Office was created in Munich in 1977 when the European Patent Convention (EPC) came into force, after being signed in 1973. Created at the outset by four countries (Germany, France, Italy and the Netherlands), this independent pan-European organisation now includes 37 Member States and 3 associate States. With a budget of almost € 2 billion, it employs over 7,000 international public servants spread between Munich, The Hague, Berlin and Vienna. The EPO is currently directed by Benoit Battistelli. The three official languages of the EPO are German, English and French.

2. What does the European Patent Office do?

The EPO's missions are wide-ranging: its mandate is to support innovation, competitiveness and economic growth in Europe.

Patents are issued after a centralised, harmonised procedure. When a patent application is submitted a search is made for any previous applications in order to check, worldwide, whether patents already exist. In this respect the EPO search motors are extremely powerful and because of this the analysis is very complete. The EPO then looks at the application in depth taking three criteria into consideration: novelty, inventiveness and industrial application. A patent is an industrial property document made up of both a description of the invention and claims demonstrating the inventiveness and industrial application. Six months after the application is submitted the EPO issues an initial written opinion; this enables the applicant to modify his claims over a period of one year. The patent is published after 18 months and will be issued 36 to 48 months after the patent application patent was first submitted..

3. What are the advantages and disadvantages of the European patent issued by the European Patent Office?

The quality of EPO patents is recognised at international level by the major patent offices in the United States, Japan, China and South Korea, with which the EPO cooperates. These countries often take their inspiration from the first publication by the EPO.

The strength of the EPO is to issue patents of excellent quality because they result in only a very low rate of litigation: 3 to 5% compared with 30% of litigation for the American equivalent. The quality of the patents is due to the rigour used in the issuing process. In 2009 the EPO received 134,500 applications but issued only 52,000, i.e. only 38%. The process is therefore highly selective.

However, although the issue of European patents is centralised at EPO level, the applicant then has to have these patents validated by national offices in Member States. The European patent then becomes a bundle of national patents. And, in addition to the issue tax paid to the EPO, the inventor has to pay an annual validation tax to each national Office, in order to maintain the patent. Through the London agreement, ratified in 2005, the EPO did succeed, however, in reducing the issue tax by 30% by demanding for the first application a translation limited to the claims only into one of the three official languages (French, English, German). However, getting a patent validated in all Member States is extremely expensive and applicants very often have to restrict themselves to the most economically interesting countries

4. What would be the advantages of a European Union Patent compared to the existing European patent?

A European Union patent (hereafter "EU patent") would combine two advantages. Firstly, it would benefit from the quality of work of the EPO which would continue to issue patents using the same procedure. However, this patent would be validated right from the beginning in all Member States party to the agreement on a EU patent and the applicant would therefore have to pay only one single validation tax.

The second advantage would be the harmonised processing of litigation. Contrary to appeals that oppose an applicant or competitor to the EPO, litigation generally opposes a competitor to the applicant. For the time being, litigation is dealt with by the courts of Member States which sometimes render contrary judgements between States, or even within the same State (between England and Scotland, for example). It would be more coherent to have a single EU patent, issued by the EPO and then validated from the outset in all Member States as well as a harmonised method for processing litigation.

5. Where are we in terms of the creation of this European Union patent?

Discussions on a EU patent have been going on for about thirty years and are hindered by language aspects in particular. In 2000, the European Commission proposed a regulation regarding the community patent, now the "EU patent", with the Lisbon Treaty.

On 7th December 2009, the European Union Council unanimously adopted a political agreement to create a EU patent as well as a "European and EU Patent Court". This court was the object of a draft international agreement with third party member countries of the EPO, which the Council submitted to the EU Court of Justice for opinion. The latter has just judged, on 8th March, that this agreement does not comply with current Treaties in force.

Further to the Council's conclusions, on 1st July 2010 the Commission proposed a regulation on the language regime for patents. However, Member States did not succeed in adopting this regulation unanimously as required by article 118 of the Treaty on the Functioning of the European Union (TFEU).

In order to make progress on this file, on 7th December 2010, 10 Member States asked the Commission to implement reinforced cooperation. These 10 States were quickly joined by 15 others, making 25 Member States of the 27, with Italy and Spain refusing to join. On 10th March this year, the Council finally authorised this reinforced cooperation between these 25 Member States. Application should now happen very quickly. In this respect, on 13th April the Commission published two proposals for a regulation: the first, relating to the implementation of the reinforced cooperation, should be adopted as a co-decision by the Council and the European Parliament, and the second, relating to the language regime, should be adopted by the Council unanimously, after consultation of the European Parliament.

6. Why wasn't this type of European Union patent created earlier?

Discussion on the Community patent has failed until now, for language reasons. Currently, in case of litigation, the patent has to be translated into the language of the country in which the litigation has arisen. Moreover, if the processing of litigation is centralised at European Union level, technical judges for the whole of the Union will have to be trained, judges who will have to be able to process files in one of the three official languages of the EPO (German, English or French). Indeed, in the project under discussion, the language regime of the EU patent will be aligned on that of the EPO, which is based on these three languages.

These language arguments are mainly invoked by Italy and Spain, the latter country arguing in particular in terms of the size of the Spanish-speaking area of the world. Behind the language argument is also hidden a certain conservative approach on the part of mandate-holders, whereas internationalised firms, at an advantage for the issue of the EU patent, are still only very limited in number in these countries.

My analysis of the situation is that Italy and Spain consider themselves to be discriminated against in terms of their languages; however by playing on na-

tional discriminations they are creating discrimination for Europe in terms of other major patent application countries, the United States, Japan, China and South Korea. A single EU patent would enable the Union to be more competitive, whence the interest of going ahead thanks to reinforced cooperation.

7. In the opinion you mention, does the European Union Court of Justice (EUCJ) consider that the draft agreement on the creation of a European and EU Patent Court is not compatible with European Union law? Does this opinion risk blocking or slowing down the establishment of the Community patent?

In this opinion, the Court of Justice challenged the harmonised processing of appeals, judging it to be incompatible with Community law for reasons of language discrimination.

However, in my opinion, that should not block the establishment of the EU patent. Even though it would lack coherence, it is possible to separate the two aspects of the patent obtaining procedure on the one hand and the processing of litigation on the other. For the second aspect, the EPO would continue to deal with internal appeals and litigation would be dealt with by the national courts.

I believe that the Court has demonstrated an exacerbated degree of legalism. It would have been possible to find a political agreement on the harmonised processing of litigation, in the knowledge that the draft agreement maintains the principle of examination in the language of the country in which the litigation has arisen.

8. What do you think of the project for a European Patent fund, supported by the European Council on 4th March this year, to buy patents in order to make them available to businesses?

I am in favour of a fund such as this. Following an initiative by the French Caisse des dépôts, the European Commission has begun considerations with the European Investment Fund, the European Investment Bank and structural funds. The idea is actually to combine on the one hand a European fund for the development of patents on the model of capital risk with, on the other hand, a fund to put them on line, available to businesses, with a view to later purchase or licence negotiations.

A databank such as this would enable businesses to complete their patent portfolio. This mechanism would accelerate innovation, encourage cooperation between European businesses and reinforce their competitiveness.

9. Would reinforced cooperation on the EU patent pose problems for the functioning of the single market? Could it serve as a model?

Reinforced cooperation means that 25 Member States go ahead, even if 2 retain their national characteristics. Of course this could limit the extent of protection by patent but it does not prevent the free circulation of goods. This is what happened before the euro became established and it did not prevent the single market from operating. Of course reinforced cooperation does not entirely solve the problem of EU discrimination in terms of its competitors. However, even if the mechanism with 25 will not be as efficient as with 27, it will still be a great deal better than the current system.

Member States taking part in the reinforced cooperation will enjoy a competitive advantage. Even Italy and Spain are not seeking for compensations. The Commission has nevertheless suggested that the applicant could ask to translate the claims into his own language using automatic translation software. These types of software are increasingly efficient. However Italy and Spain will have to be convinced of the technical quality of these translations.

Reinforced cooperation does not mean that Europe is going to break up, differentiation does not prevent cohesion. As with the euro, reinforced cooperation on the patent respects national cultural identities whilst going in the direction of cohesion and enabling the European Union to position itself within international competition.

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