

**POINT OF VIEW FROM
THE EUROPEAN BUSINESS COMMUNITY: INDUSTRY**

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SUMMARY

There is no doubt that quality is an essential issue for both users and society. To define quality in the European patent system, it is important to first define the system. It is created and defined by the European Patent Convention, which contains two major facets: the grant of European patents and the effects of these European patents. The former task, according to the EPC, shall be carried out by the EPO supervised by the Administrative Council. Consequently, it is a single unified process. To the contrary, regarding the latter aspect, Article 2 (2) of the EPC provides that *“the European patent shall, in each of the Contracting States for which it is granted, have the effect of and be subject to the same conditions as a national patent granted by that State, unless otherwise provided in this Convention”*. Therefore, a major consequence is that litigation of European patents is fragmented on the basis of the current jurisdiction of national courts.

Looking at the first aspect of the patent system, namely the grant of European patents, its process is structured into five inseparable steps: checking the admissibility of the application, examining the application against the patentability criteria, deciding to grant a European patent or to reject the application, hearing appeals against rejection decisions and dealing with oppositions against grant decisions. Obviously, the European economy needs robust European patents, hence a high quality patent grant process, which provides a safer environment for doing business, less litigation and easier licensing and other arrangements. In this context, a high quality grant process is above all a process capable of granting patents only on “true” inventions with claims defining the “true” scope of the invention, given the content of the application. Indeed, users want EPO to grant valid patents having claims consistent with the content of the application. Although the EPO is generally considered as doing a better job than many other offices around the world, it is still not sufficient, and the EPO’s application refusal rate is far too low for this to be completely true.

At each step in the process, there are some requirements in order for the system to reach a sufficient level of quality. The examination step, for instance, requires the examiner to have a good knowledge of search techniques and methodology, access to the most advanced search tools and complete documentation, the ability to deal with prior art in various languages and, most of all, an in-depth knowledge of the technical field of the invention, regularly updated through courses and own studies. For the decision step, the person skilled in the art to be used for determining the non-obviousness of an invention is the examiner himself (or the examining division or the joint cluster at large). What is obvious to him *is* obvious. In reaching a decision, the independence of the examiner must be preserved from any interference from budgetary issues, customer satisfaction considerations or biased productivity incentives. Would now not be the right time to place the examiner at the centre of the system, rather than the applicant? The basic goal of the process to bear in mind is to accept true inventions and to reject false ones.

However, a proper balance needs to be found to reconcile this objective and the former aspects with additional critical parameters: cost control, timeliness and predictability. Cost control is a major EPO responsibility, linked to productivity and to refocusing the activity of the EPO on the grant process. Delays are a source of

cost for the users and for the EPO and they are also an embarrassment for Society. As a matter of fact, it takes 5 years at the moment to get a European patent, should even the applicant be in a hurry to get one. But the system cannot be designed to satisfy the not-in-a-hurry applicants and something needs to be done for the other interested parties. Achieving this objective is a joint responsibility of users and the EPO through a tightening of the process, possibly with an option for deferred examination. Finally, predictability, meaning that rules should be simple, stable and publicly available, is a major responsibility of the Boards of Appeal when fixing the interpretation of the EPC by examining divisions.

In addition to achieving quality in the grant process, users and society alike need a strong and efficient litigation process. This means judges who are well versed in European patent matters, producing consistent and efficient litigation proceedings and fully reasoned decisions that can be fed back to the EPO to improve the grant process. The present fragmented situation hinders the competitiveness of the European economy hence a single court system, as defined in the draft EPLA, is the way forward.

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QUALITY IN THE EUROPEAN PATENT SYSTEM



**AN ESSENTIAL ISSUE FOR
BOTH USERS AND SOCIETY**

Jacques COMBEAU
UNICE

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THE EUROPEAN PATENT SYSTEM

CREATED AND DEFINED BY THE EPC

TWO MAJOR ASPECTS

- **THE GRANT OF EUROPEAN PATENTS**
 - **THE EFFECTS OF EUROPEAN PATENTS**
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THE EUROPEAN PATENT SYSTEM

1. THE GRANT OF EUROPEAN PATENTS

ARTICLE 2 (1) EPC

“Patents granted under this Convention are called **European patents**”

ARTICLE 4 (3) EPC

“The task of the (European Patent) Organisation shall be **to grant European patents**. This task shall be carried out **by the European Patent Office** supervised by the Administrative Council.”

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THE EUROPEAN PATENT SYSTEM

2. THE EFFECTS OF EUROPEAN PATENTS

ARTICLE 2 (2) EPC

“The European patent shall, in each of the Contracting States for which it is granted, have the effect of and be subject to the same conditions as a national patent granted by that State, unless otherwise provided in this Convention”

A major consequence is that litigation of European patents is fragmented on the basis of the current jurisdiction of national courts.

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THE PROCESS OF GRANTING EUROPEAN PATENTS

A **single process** comprised of several, inseparable, steps:

- checking the admissibility of the application
- examining the application against the patentability criteria
- deciding to grant a European patent or to reject the application
- hearing appeals against rejection decisions
- dealing with oppositions against grant decisions

QUALITY IN THE GRANT PROCESS

The European economy needs robust European patents, hence a **high quality patent grant process**

- Safer environment for doing business
- Less litigation
- Easier licensing and other arrangements

A high quality grant process is above all a process capable of

- Granting patents only on **“true” inventions**
- With claims defining the **“true” scope** of the invention, given the **content of the application**

WHAT'S REQUIRED?

For the examination step

- Knowledge of search techniques and methodology
- Most advanced search tools and complete documentation
- Ability to deal with prior art in various languages

And, **most important of all,**

- In-depth knowledge of the technical field of the invention
- Regularly updated through courses and own studies

WHAT'S REQUIRED (2) ?

For the decision step

- The examiner is the person skilled in the art*
 - what is obvious to her, within reason, is obvious
- In reaching a decision, the independence of the examiner must be preserved from any interference by
 - budgetary issues
 - « customer satisfaction »
 - biased productivity incentives

* Could also be the examining division or the cluster

MORE ABOUT QUALITY IN THE PROCESS

Beyond the primary objective of granting valid patents with appropriate scope, **further aspects must be taken into account** even though they may run counter to the primary objective

- cost control
- timeliness

delays are a source of cost for the users and for the EPO
they are also an embarrassment for society

- predictability

rules must be simple, stable, publicly available

MORE ABOUT QUALITY IN THE PROCESS

Cost control

Major EPO responsibility, linked to productivity and to refocussing the activity of the EPO on the grant process

Timeliness

Joint responsibility of users and the EPO through a tightening of the process (with an option for deferred examination?)

Predictability

Major responsibility of the Boards of Appeal

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QUALITY IN COURT DECISIONS

Users and Society alike need a strong and efficient court process

- **Judges who are well versed in European patent matters**
- **Consistent and efficient litigation proceedings**
- **Fully reasoned decisions that can be fed back to the EPO to improve the grant process**

The present fragmented situation hinders the competitiveness of the European economy

A single court system as defined in the EPLA is the way forward

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