

# **GREEN PAPER ON THE COMMUNITY PATENT AND THE PATENT SYSTEM IN EUROPE**

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**Position of the STAFF UNION  
of the European Patent Office**

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**November 1997**

*"... the staunch Europeans gathered here this evening have a clear picture of what they do not want their brainchild to turn into: a hybrid creature, pulled about and torn apart by egoistical and divergent national interests, representing a lifeless Europe devoid of passion and reduced to the single dimension of commercial compromise, a mere legal construction, an empty shell void of all vision. Our future actions must be guided by a distrust of national self-interest, those centrifugal forces born of individual interests alone which pose a constant risk of decentralisation, or even disintegration, at the expense of coherent, high-quality and homogeneous procedures - the Convention's very raison d'être.*

*The European Patent Organisation came into being solely as a result of the zeal of a handful of visionaries who in the democratic systems in which we are privileged to live had nothing but the force of their own conviction with which to impose their vision. The vision was not solely dictated by economic considerations. The geopolitical perspective of a greater Europe was also a key factor.*

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*Speech given on the occasion of the 20th anniversary  
of the signing of the European Patent Convention  
(EPO-Gazette 33/93 - 06.12.1993)*

## ABSTRACT

The patent system is a powerful stimulus for innovation, provided that it does not constitute an excessive obstacle to free competition. Neither should it constitute an impediment to the free movement of goods by way of a geographic fragmentation of the internal market. It should not unnecessarily hinder competitors, which presupposes that only new inventions with a sufficient level of inventive activity should be patentable.

In comparison to its main competitors, the United States and Japan, the European Patent System suffers from a certain number of deficiencies:

- Europe still does not have a single patent which has uniform legal effects within the single market, because the Community Patent Convention (CPC) has still not entered into force. The European Patent Convention (EPC) permits the grant, in a single procedure with the European Patent Office (EPO), of a European patent having the effects of a bundle of identical national patents in each State designated by the applicant. Litigation concerning these patents remains within the competence of the national courts, which results in a multiplication of national procedures, increased costs, lacking unification of case law at a European level, and a risk of segmentation of the market.
- The complexity and the costs of the European patent system are worsened by the dualism of the system (EPO, national patent offices), resulting in redundant procedures and activities. The filing fees of the EPO remain relatively high, while 50% of the renewal fees for European patents are retained by the designated States. Furthermore, the EPO is indirectly financing certain activities of the national offices at the expense of the applicants. The obligation to translate the patents into each of the official languages of the Contracting States contributes to at least one third of the costs of a patent, even though these translations are rarely consulted.
- The EPO has a worldwide reputation for the quality of its work (high level of inventive step and a strong presumption of validity of the granted patents), thanks to the centralisation of the documentation search and the examination of European patent applications. This quality is currently under threat, because of internal and external pressures, which push the EPO to stress productivity while neglecting certain essential tasks, in particular the updating and the improvement of its documentation.

The deficiencies of the system are a result of the following causes, which prevent reform from within and lead to deadlock:

- The European patent system is of a purely intergovernmental nature, as the EPC and the CPC are international treaties. There does not exist any global coordination on community level. Legislative changes require unanimity of the Contracting States and most often result in the lowest common denominator of national interests. Furthermore these treaties are not a part of the so-called “acquis communautaire” and are therefore not automatically applicable to new Member States of the European Union.

- A major conflict of interest exists in the Administrative Council of the EPO, which is composed, to a significant extent, of presidents of national patent offices. For these delegates the interests of their own administration prevail, at the expense of the proper functioning of the EPO and the interest of the European public in general. Certain offices even call for a (re)decentralisation of the granting of patents, which could only harm the uniformity of patentability criteria and the quality of granted patents.

As proposed by the founding fathers of the European patent system, the Staff Union of the EPO proposes the return of the entire European patent system to the framework of Community law, by the adoption of a Council Regulation based on Article 235 of the EC Treaty (transitional measures would allow for the still uncompleted implementation of the Common Market and could be ended by an act of the Community authorities):

- Without waiting for the ratification of the CPC, such a Council Regulation should very quickly create a true Community Patent, which has unitary effects on the entire territory of the European Union. This patent would, in the end, replace the national patents.
- Litigation concerning these patents should be dealt with by a Community Court, starting at first instance level and competent both for validity and infringement. Revocation of a patent could also be obtained from the Revocation Divisions of the EPO. The appeal procedure would be carried out by a special chamber of the Court of First Instance (CFI) of the European Communities, which would also comprise the Boards of Appeal of the EPO. These boards constitute at present the only jurisdiction in the field of patents at the European level, which can rely on a uniform and coherent body of case law, which is the result of 20 years of experience.
- Contrary to what is foreseen in the CPC, the obligation to translate a community patent should be limited to the claims only, while the applicant would still have the option to file his patent in one of the three official languages of the EPO (German, English, French).
- The renewal fees should be collected entirely by the EPO and contribute only to the Patent system and to innovation in Europe (especially in States which have to catch up in this field). This would also allow reduction of the filing fees, which constitute an entry barrier to the system, since they are due at a time when the patent is not yet economically profitable.
- The EPO should be integrated into the Community Institutions, which alone are capable of exercising a political control taking into account public interest at European level.

Because of the quasi-identity between the Member States of the European Union and the Contracting States of the EPO, a unique opportunity is presently available for strong community action in the field of patents. Cooperation with States that are not, yet, Members of the European Union, and more specifically with Eastern and Central European Countries, could be insured by association agreements. The possible

accession of these States to the EPC in the near future may make Community action in this field more difficult if it is not taking place rapidly.

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## INTRODUCTION

1. In every society innovation is essential for economic progress and thus for increasing the standard of living and individual and collective well-being. This is even more true for the developed economies if they wish to maintain their competitiveness and to reduce unemployment when faced with the globalization of the economy. As a result, low qualified jobs are drained towards developing countries where labour is cheap, leaving developed countries their “grey matter” as their main resource. In a European economy in the process of unification, Community authorities are led to play an increasing role in creating an innovation friendly framework. Initiatives in this sense have been proposed by the European Commission in 1995 in their “Green Paper on Innovation”<sup>1</sup>.
2. Among the elements contributing to the promotion of innovation, the Commission, in its Green Paper of 1995, cites the protection of inventions by an efficient patent system. In fact, experts generally agree that the patent system is a powerful stimulus for innovation. Although it cannot substitute the factors needed in the first place to promote creativity and technological progress (the system of education and professional training, incitement towards fundamental and applied research, interaction facilities between researchers, risk capital for investments in leading edge technologies, etc.). But subsequently, it allows protection of the invention by a title which is similar to a real property right. The holder of a patent may appropriate the fruits of his creation in law and not only in fact (which would require keeping the invention a secret - if that is possible), which enables him in particular to permit the exploitation of his invention, entirely or partly, by a third party in return for a fee (patent transfer or licence concession). This is particularly useful when the inventor does not have the means or the desire to exploit his invention himself, as is frequently the case for individual inventors, SME's or university laboratories, to mention but a few examples. A legally solid patent constitutes therefore a patrimonial asset or even a genuine “security” that may be used as collateral. Such a system is suitable to promote investment in research and development activities, just as the creation of joint stock companies, represented by shares and distinct from the individual entrepreneurs involved, favoured the financing of commercial activities.
3. With respect to its main competitors, Japan and the United States, Europe unfortunately suffers from a notable disadvantage which it should make up, not only in the domain of innovation in general, but also in the patent system in particular. It succeeds less well, compared to its competitors, in transforming its proven skills in research in leading edge technologies into marketable products. In correlation, the protection of innovation by patents is less well used. This state of affairs is not least due to the complexity of the patent system characteristic of Europe, as compared to that of its competitors. At present, an inventor who wishes to protect his invention in Europe can either obtain a national patent in

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<sup>1</sup> COM(95) 688 final, 20/12/1995.

each European State where protection is sought, or he can obtain a European patent, granted by a single procedure by the European Patent Office (EPO)<sup>2</sup>, but then providing a purely national protection in each of the designated states. While the European Union (EU) directs itself towards a single market that will soon have a single currency, it is still far from the “single patent”, i.e. a title of protection for inventions producing unitary effects in the entire territory of the European Union. In fact, the Community Patent Convention (CPC)<sup>3</sup>, aiming at the creation of such a title, has not come into effect yet. Even though the quality of the patents granted by the EPO is generally appreciated, their high costs are criticized<sup>4</sup>, especially with respect to the expenses that are not directly linked with the services provided, such as the costs of translation or validation for each designated state. Moreover, in Europe, contrary to the United States, no provisions are made for reduction of these costs for SME’s. The costs and the complexity of the system are further increased by the obligation to enforce the rights of the patentee separately in each national state (annual fees, litigation in the event of infringement and invalidity of the patent), and by the contradictions in case law that may result. The entry into effect of the CPC in its present version will only partially compensate for these drawbacks. Furthermore, the legal instruments that are in force (EPC) or that are proposed (CPC) are international conventions, and are not part of community law, contrary to what has been achieved in trade mark law<sup>5</sup>.

4. Historically, the EPC and the CPC were conceived as instruments of community integration<sup>6</sup>, the second one due to come into effect shortly after the first one. Meanwhile one finds unfortunately that European integration in the field of patents has progressed only marginally, in particular due to the resurgence of certain national interests. Several “founding fathers” of the European patent system have denounced the deadlock in which the system finds itself at present and have called, sometimes very explicitly, for its “return ... to the European Union”<sup>7</sup>. The Court of Justice of the European Communities (ECJ) has explicitly recognized the

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<sup>2</sup> European Patent Convention, Munich, 5 October 1973 (hereafter EPC).

<sup>3</sup> In its last version resulting from the Agreement on Community Patents, done at Luxemburg on 15 December 1989 (hereafter ACP).

<sup>4</sup> See especially U. Schatz, *What is wrong with patenting in Europe?*, Patent World, September 1993, pp. 29-37.

<sup>5</sup> (EC) Council Regulation of 20 December 1993 on the Community trade mark, OJ EC N° L11, 14.1.94, p.1.

<sup>6</sup> K. Haertel, *Die neuere Entwicklung des Patentrechts in Europa unter besonderer Berücksichtigung des Entwurfs über ein europäisches Patentrecht*, GRUR 1965, p.65.

<sup>7</sup> O. Bossung, *Rückführung des europäischen Patentrechts in die Europäische Union*, GRUR Int. 1995, N°12, pp. 923-935; see also J.B. van Benthem, *The European Patent System and European Integration*, IIC Vol. 24, N°4/1993, pp. 435-445; P. Braendli, *The Future of the European Patent System*, IIC Vol. 26, N°6/1995, pp. 813-828; E. Armitage, *EU Industrial Property Policy: Priority for Patents?*, EIPR Vol.18, N°10/1996, pp. 555-558; C. Lees, *Strategic Reflections on the European Patent Office*, Patent World, December 1995/ January 1996, pp. 24-29.

competence of the Community in the field of patents<sup>8</sup>, but the latter has so far exercised only sporadic actions (complementary protection certificate for pharmaceutical products, draft Directive concerning Biotechnological Inventions, Green Paper on Utility Models, etc.). Faced with the problems outlined above, one can only welcome that the Commission at last adopted a “Green Paper on the Community patent and the patent system in Europe”<sup>9</sup>, in order to start a wide-ranging consultation of interested circles on the necessity of Community action in the field of patents.

5. The Staff Union of the European Patent Office believes that it is able to make a useful contribution to this debate, especially because of the knowledge it has of the system “from within”, i.e. from the other side of the barrier with respect to its users. As an institution charged with the judgment of patentability of inventions, the European Patent Office has to ensure for the applicants the most efficient service possible. Above all, however, it must take care of the interests of the public that will be confronted with the patent, i.e. of all participants in economic life (competitors, consumers, etc.). The interests of these circles, some of which will not have an opportunity to give their opinion during the debate on the Green Paper, will duly be taken into account in the subsequent considerations. First of all, a short outline should be given of the requirements of an economically efficient patent system (Part 1) before analysing the deficiencies of the present system (Part 2) and presenting the recommended solutions (Part 3).

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<sup>8</sup> ECJ, 13 July 1995, case C-350/92 (Kingdom of Spain versus Council), Rec. 1995, I, p. 1185; ECJ, opinion 1/94 of 15 November 1994, Rec. 1994, I, p. 5267.

<sup>9</sup> COM(97) 314 final, 24 June 1997.

## Part 1

### THE REQUIREMENTS OF AN ECONOMICALLY EFFICIENT PATENT SYSTEM

6. The patent system aims at promoting innovation by granting inventors for a limited time an exclusive right to their invention, in exchange for its disclosure. Not only does this allow the inventor to secure the property of his invention, which otherwise would have fallen into the public domain (inasmuch as it is not kept secret). In addition, the possibility of obtaining a monopoly creates a strong incentive for creative activity, as well as for the costly investment required for innovation, which is profitable only in the long run. Furthermore, the disclosure of the invention contributes to the increase of public knowledge and may serve as a basis for competitors to improve the invention and thus to accelerate the process of innovation even more. On the other hand, the grant of a monopoly creates a distortion of free competition. Any patent system thus constitutes a compromise between “rewarding the inventor” (stimulating innovation) and safeguarding free competition (necessary as well, in order not to slow down economic and technological progress).
7. One may think of alternatives to the patent system, that reward innovation without granting a monopoly, such as keeping the invention secret (with possibly legal protection of the trade secret), public financing of research, or by the public authorities granting a reward to the inventors. Historically, even the predecessors of the present patent system only granted a monopoly to inventors in a subtle manner, on an ad hoc basis: a variable duration of the monopoly according to the nature of the invention, a monopoly limited to certain types of exploitation, a right of exploitation of the invention by the state, systems of compulsory licences, etc. Economic studies, however, confirm that for want of an ideal solution it is the patent system based on the present principles which constitutes the most satisfactory solution<sup>10</sup>.
8. Economic analysis as well as empirical experience nevertheless show that, in order to play the role of promoting innovation efficiently, the patent system must fulfil a certain number of conditions. If granting a monopoly is necessary in order to allow the patentee to secure the property of his invention, it should not, on the other hand, give rise to unwarranted distortions of competition, or even to abuse of domination, risking slowing down investment and the innovative activity of competitors. On the whole, the economic balance of the system must be favourable to society, and in particular to the consumers.

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<sup>10</sup> For a historical overview and an economical appraisal of the patent system, see E. Kaufer, *The Economics of the Patent System* (Fundamentals of Pure and Applied Economics, Vol. 30), Harwood Academic Publishers, Chur, Switzerland, 1989.

## **I. THE ABSENCE OF AN EXCESSIVE LIMITATION OF FREE COMPETITION**

9. The distortion of free competition created by granting a monopoly to the inventor must remain proportionate to the intended objective (promotion of innovation), which may be realized by a certain number of measures.

### **A. A monopoly of exploitation which is limited in time**

10. In all patent systems the monopoly that is awarded to the inventor has a limited duration. Indeed, if the invention would remain excluded from the public domain too long, economic activity would be excessively affected. The duration of the monopoly, on the other hand, must be sufficient to allow the patentee to derive a sufficiently attractive profit from his invention. The optimal duration of the protection depends on technical and economical factors (technical field, life span of inventions, period of marketing, etc.). In certain fields the legislator sometimes foresees a prolonged protection, especially for pharmaceutical products, for which administrative authorization to put the product on the market often takes long to obtain<sup>11</sup>. In general, the duration of the protection is uniform and in the range of 20 years. A more subtle modulation of the duration of protection may be obtained indirectly through the progressive increase in annual renewal fees (see below, section D.)

### **B. A quality patent**

*1° A sufficient threshold of inventive activity*

11. Only inventions constituting a real technological innovation deserve to be protected by a monopoly. For want of such a threshold the market risks being swamped by a flood of low quality patents (“junk patents”) unduly hampering the activity of competitors and constituting a genuinely unjustified monopoly. Experience shows that in systems which do not carry out an examination (registration systems) or only a light examination, the users of the system will attempt to reinforce their position by the quantity rather than by the quality of the patents. The flood of applications makes it even more difficult for the patent offices to perform a serious examination, thus starting a vicious circle. Such a system is first and foremost detrimental to individual inventors as well as to SME’s, which, contrary to large enterprises, do not have the human and financial means to systematically apply for patents in large numbers<sup>12</sup>.
12. Apart from safeguarding a sufficient level of inventive step one must also insure a correct delimitation of the protection provided by the patent. The claims must be

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<sup>11</sup> (EC) Council Directive of 18 June 1992, N° 1768/92, OJ EC° N L182/1 of 2.7.1992 on the complementary protection certificate for medical drugs; see also the revision of article 63 of the EPC, come into force on 4.7.1997.

<sup>12</sup> See especially: F. Panel, *Qu'attend l'industrie du brevet européen?*, Colloque CEIPI, 24-26 septembre 1969, Journée d'étude de la propriété industrielle et de la mise en valeur de la recherche.

clear and the protection they provide must be limited to the disclosed part of the invention.

2° *Patents with a high presumption of validity*

13. The requirements of patentability should not only be sufficiently strict, but they should also as far as possible be fulfilled as soon as the patent is granted, both in the interest of the patentee and of his competitors. Indeed, though it is still possible to have a patent invalidated in court a posteriori, the cost of litigation and the risk of the total loss of investment may lead to catastrophic economic consequences for the enterprises involved.

3° *A patent office carrying out a high quality examination*

14. For that reason industry is generally in favour of a patent office that carries out high quality examinations. Its objective is not to grant the highest possible number of patents, but to grant patents that meet the patentability requirements. It has in mind not only the interests of the applicants (who certainly have a right to the best treatment possible), but also the interest of the public in general. Unwise savings on the level of search and examination carry the risk of causing subsequent costs that are very much higher for the applicant (litigation) and for society in general (unjustified monopolies).
15. Experience shows that States practising in-depth examination of patentability are the ones that have the most developed patent system and that are at the forefront of technological innovation. One of the reasons urging industry to call for the creation of the European Patent Office was the necessity of having a quality examination at European level, at a time when national offices were less and less able of coping with the flood of patents having a low inventive activity<sup>13</sup>.

**C. Low cost of access to the system**

16. If the access barrier to the patent system should be sufficiently high as far as inventive activity is concerned, the access cost on the financial level, on the other hand, must remain reasonable. The access to the system must only be determined by the technical value of the invention and not by the financial resources of the applicant. Indeed, for many innovating entrepreneurs their “grey matter” is their only capital. Too high procedural expenses prevent them from converting this capital into money by using the patent system. The fees must, however, remain sufficiently high to prevent a flood of lightly filed applications, carrying the risk of flooding the patent office and of preventing it from correctly fulfilling its mission. To that end a distinction can be usefully made between individual inventors and SME’s on the one hand, only filing a patent occasionally, and large groups of enterprises filing massively and having the means to form an

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<sup>13</sup> *ibid.*

opinion on the value of their invention beforehand. The first ones could benefit from reduced procedural fees.

#### **D. Strongly progressive annual renewal fees**

17. If access to the patent system must remain low-priced, this does not mean that the patent in general must be cheap. On the one hand it seems justified that the examination by the patent office is not only financed collectively (i.e. by the tax payers) but also, or indeed even exclusively, by the applicants. On the other hand, the maintenance of the monopoly created by the patent is not socially justified unless it is the object of sufficient economic exploitation. Strongly progressive annual renewal fees, such as they exist in certain countries, enable the patentee to postpone fee payment until a time when his invention becomes economically profitable. Furthermore, such fees will lead to a progressive self-elimination of patents that are no longer economically justified and they thus serve as a policy instrument to regulate the number of patents that are desirable from an economic point of view.
18. Moreover, the higher the renewal fees, the more the procedural fees (entry fees) may be reduced, promoting access to the patent system while avoiding unjustified monopolies.

## **II. THE ABSENCE OF MARKET FRAGMENTATION**

19. Apart from abuse of a dominant position that may result from unjustified monopolies, the patent may serve as an obstacle to the free movement of goods by geographic fragmentation of markets. Historically, one may observe that states have often used the patent system as an instrument of protectionism (thus - to give only one example - Switzerland introduced patent protection only when its mechanical industry became competitive on a worldwide scale, while excluding the protection of chemical processes as long as its chemical industry remained underdeveloped)<sup>14</sup>.
20. In a more liberal perspective certain jurisdictions have introduced the theory of the "exhaustion of rights". Once a product is put on the market with the consent of the patentee, he can no longer prevent its free circulation (he may "squeeze the lemon only once"). The act of exhaustion may consist of exhaustion on a worldwide scale (Germany) or only within a unified market (ECJ).
21. In practice, however, the theory of the exhaustion of rights, even if attenuating the problems of market fragmentation, does not produce entirely satisfactory results<sup>15</sup>. One can only come to the conclusion that the only viable solution is to introduce

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<sup>14</sup> Kaufer (cited above, note 10).

<sup>15</sup> Prof. Dr. J. Straus, *The present state of the patent system in the European Union as compared with the situation in the United States of America and Japan*, EUR 17014, Office for Official Publications of the European Communities, Luxembourg, 1997.

a patent with unitary effects on an economically unified territory (such as the common market).

### **III. THE SETTLEMENT OF LITIGATION**

22. First of all, the granting of high quality patents, i.e. with a strong presumption of validity, will by nature prevent as much as possible that litigation arises. Afterwards, if litigation occurs nonetheless it should be ensured that it may be resolved in a simple and fast manner, without excessive expense, while maintaining a high level of legal security. In fact, the cost of litigation risks preventing the weakest economic actors from enforcing their rights. This is as much the concern of competitors, who have to be able to defend themselves against invalid patents, as it is the concern of patentees, who risk seeing their business compromised by the malevolent attacks of their competitors (in particular the patent of a SME attacked by an enterprise with a dominant position).
23. Within an economically integrated territory the system must ensure unity of the case law concerning validity and infringement of patents. Divergencies in case law between different national jurisdictions could seriously affect the free movement of goods (for example a patent revoked in certain countries and validated in others). But legal security equally demands harmonization of case law concerning the grant with case law applicable to subsequent litigation. If, for example, patents, declared valid by the Boards of Appeal of the European Patent Office, were too often revoked by national jurisdictions, the expectations of the patentees (and their competitors) would be seriously frustrated.
24. The appeal procedure must be simple and swift, while ensuring unity of the case law. The multiplication of instances and appeal procedures must be avoided.

### **IV. FAST AND LOW-COST DISTRIBUTION OF PATENT INFORMATION**

25. The disclosure of the invention is the counterpart of the monopoly awarded to the patentee. For such a disclosure to be effective, a system of fast and low-cost distribution of patent information should be available. It must be an integral part of a general policy of distribution of technical information, susceptible to stimulate inventive activity but also to avoid the duplication of costly research and development.
26. Apart from technical information, patent information also includes a legal aspect (information on the rights of patentees, ensuring the security of third parties), as well as an important amount of commercial information (in combination with certain economic databases patent information allows discovery at an early stage of the orientation of competitors and to react to that, which stimulates economic activity).
27. The distribution of patent information (and of technical information in general) may be facilitated by the improvement and systematic use of appropriate technical

means (the progress of information technology and telecommunications). But the distribution of this information should not lead to distortion of competition. Raw patent information (i.e. the text of patents as well as the basic bibliographic data) must be distributed free of charge by the patent offices (save for the costs related to actual distribution which, however, tend to become marginal) and must not be restricted to certain privileged distributors (public or private) who benefit from a genuine economic rent in this situation<sup>16</sup>. As for information with added value (indexation, classification, etc.): every entrepreneur must be able to create it on the basis of raw data, in a competitive environment.

## V. COORDINATION WITH INDUSTRIAL AND ECONOMIC POLICY

28. The different aspects of the patent system that have just been mentioned are closely related to issues of economic and commercial policy<sup>17</sup>. They must therefore be coordinated and controlled by the political authority that is responsible for the market and the society concerned. The patent system is not only of concern to its users, but to society as a whole. It can, therefore, not be an objective in itself, the management of which is left to certain groups with particular interests.
29. This coordination is all the more important since we witness at present an intensification of the "globalization" of issues on industrial property, especially within the framework of the World Trade Organization and the TRIPs agreements. It is important that Europe defends its interests in a unified manner, with the voice of the European Commission.

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<sup>16</sup> *Pour une politique européenne de l'informations brevets au service du public et de l'innovation*, Contribution of the Staff Union of the European Patent Office at the "Hearing 97" on the patent information policy of the European Patent Office (7 March 1997).

<sup>17</sup> See in particular the Green Paper on Innovation (cited above, note 1).

## Part 2

### THE PRESENT SYSTEM AND ITS DEFICIENCIES

30. The patent system is closely related to economic and industrial policy. Yet, Europe has still not created a global framework for the coordination and management of those policies (I). The preeminence of national interests and more precisely the conflict of interests within the European Patent Organization, which is mainly controlled by the representatives of the national patent offices, has prevented the possibility of overcoming the dualism of the present system (II). This situation needlessly increases the costs of access to the protection of inventions by patents (III) and threatens the quality of the European patent (IV), which not only entails the risk of slowing down innovative activity in Europe but also to distort competition. As a result of their essentially intergovernmental nature, the present structures seem unable to reform themselves from within (V).

#### I. THE LACK OF A COMPREHENSIVE FRAMEWORK FOR A EUROPEAN PATENT POLICY

##### A. Economic and industrial policy, and innovation in particular

31. The legal instruments intended to serve as the legal basis for the patent system on a European level scarcely make any reference to the role of the patent system concerning innovation and industrial policy<sup>18</sup>. The preamble to the EPC succinctly refers to a “single procedure to grant patents”, presenting the patent as an objective in itself, without establishing its link with its economic function. Article 36 of the EC Treaty considers the patent as a “necessary evil” justifying infringements to the free movement of goods (fortunately toned down by the case law of the ECJ). The preamble to the CPC of 1975 evokes the necessity to abolish these obstacles to the free movement of goods, and it is only in 1989 that the ACP makes a vague reference to a “European Community of technology”. This situation contrasts with the one of our economic competitors, such as the United States, who assign to the patent a role of promoting innovation in the very text of their constitution<sup>19</sup>.
32. At the European level competences for industrial policy and innovation are dispersed between different actors. On the level of the Community there is no action or coordination to fully exploit the potential of the patent system, with a view to promote technological progress and to relaunch the economy and employment in Europe.

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<sup>18</sup> Straus (cited above, note 15), p. 13.

<sup>19</sup> Article I, section 8, clause 8 of the American constitution authorizes the Congress to “promote science and useful arts by giving authors and inventors exclusive rights limited in time to their respective writings and discoveries”.

33. This absence of coordination leads in particular to legislation lagging behind the evolution of technology (especially in the fields of software and biotechnological inventions). The case law of the Boards of Appeal of the European Patent Office can only imperfectly overcome this time lag, due to the fact that the existing legislation in these fields is outdated and to the absence of indications in the preamble of the EPC allowing a broader, teleological interpretation.

## **B. Industrial and intellectual property**

34. One also observes a lack of coordination between the different fields of industrial property at Community level. The Community competence in this field has been recognized explicitly by the EC Court of Justice, and the Communities have intervened in the field of trade marks<sup>20</sup> (creation of the Office for Harmonization of the Internal Market - OHIM) and the protection of plant variety rights<sup>21</sup> (Office for the Protection of Plant Variety Rights). However, these fields are regulated by distinct texts and managed by distinct agencies, while with respect to patents the European Patent Office remains entirely outside the Communities. With our main competitors, just as in the national systems in Europe, the entire intellectual property is generally entrusted to a single institution, and the law governing it is sometimes even regrouped into a single code.
35. For the new technologies already mentioned (software, biotechnology) the action of the Community has only been able to develop partially and without real coordination with the law of the EPC. The Community legislation exercises, at most, indirect influence on the case law of the Boards of Appeal of the EPO (which are bound only by the EPC, the revision of which is difficult and uncertain).

## **C. The distribution of technical information**

36. Although the Commission recommends, in its Green Paper on Innovation<sup>22</sup>, the development of technology watch and of technology prospective, the distribution and exploitation of technical information (of which patent information is an important component) is not achieved in an efficient manner on the level of the European Union and is not being coordinated by the Community authorities. Yet, easy and low-cost access to this information and its systematic use would allow research and development costs to be reduced (both as far as public as well as private financing are concerned) and would stimulate innovation.
37. The way in which patent information is presently made available risks distorting competition. The European Patent Office makes its information available free of charge to the national offices and for marginal expenses to commercial operators,

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<sup>20</sup> EC Council Regulation of 20 December 1993 on the Community trade mark, OJ EC N° L11 of 14.1.94, p.1.

<sup>21</sup> EC Council Regulation of 27 July 1994 on the Community plant variety right, OJ EC N° L227 of 1.9.94, p.1.

<sup>22</sup> Cited above (note 1), p. 40.

while nothing has been foreseen for private persons. This could give rise to economic rents, entailing excessive expenses for the users<sup>23</sup>.

## II. THE DUALISM OF THE EUROPEAN PATENT SYSTEM

### A. A factor of complexity and costs

#### 1° *Obtaining a patent*

38. To keep European and national systems in parallel causes redundancies that are one factor increasing the expenses for the applicants. Indeed, the national systems are partly financed by the procedural fees of the applicants of the European Patent Office. These fees help to finance not only complementary activities that are beneficial to innovation, but also competitive activities.
39. Once granted, the European patents must go through a national procedure of "validation" in the designated states. This procedure is complex (as a result of the formalities differing from one state to another) and costly (national validation fees, translation costs, obligation to use the services of a national patent attorney.).

#### 2° *The exploitation of a patent*

40. The split of the European patent in parallel national rights also increases the cost and complexity of exploitation and enforcement of the rights of the patentee. Apart from the administrative and management costs (renewal fees to be paid to each national authority, patent transfer or licence concession to be registered at each national office), one must above all point to the multiplication of litigation, for example with respect to infringement, that must be resolved separately in each state where the patent is in force.
41. The enormous costs of the system for the enterprises makes efficient protection illusory for those who do not have sufficient resources, to have their own patents respected as well as to defend themselves against possible patents of their competitors in the event of alleged infringement. Moreover, there is a considerable risk of divergence between the case law of the various national jurisdictions, concerning the validity of the patent as well as concerning its infringement<sup>24</sup>. Therefore competitors risk finding themselves in opposite legal situations according to the Member State of the European Union concerned, and this may be for the same invention and the same patent granted by the EPO. The least one may say is that such a situation is hardly compatible with the single market!

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<sup>23</sup> See the reference cited in note 16.

<sup>24</sup> See in particular the famous case *Epilady*: Court of Appeal in Düsseldorf, 1993 GRUR Int. 242; Court of The Hague, 1993 GRUR Int. 252; UK Court of Appeal, 21 IIC 561 (1990).

3° *Harmful consequences for SME's*

42. The costs and the complexity of the system make it difficult for SME's to have access to patent protection on the entire European territory. As a result of the cost of litigation, they risk being crushed by their financially stronger competitors, especially if these pursue a policy of mass filing of weak quality patents that have not gone through a serious examination procedure ("junk patents").<sup>25</sup>.
43. An excuse often used to justify the continued existence of national patents is, that only these would be financially within the capability of the SME's. In reality this "present to the SME's" is a poisoned present, because it is precisely those costs due to the dualism of the system that prevent the SME's from having access to uniform protection in Europe. Without such protection the SME's may not extend themselves to a market that is sufficiently large to get a return on investment on their innovations and to expand their activities.

**B. The geographic fragmentation of markets by national patents**

44. The existence of national patents leads to the segmentation of markets and hinders the free movement of goods, especially by blocking parallel imports. Thus it constitutes an obstacle to the creation of the single market. Paradoxically, this obstacle has been explicitly authorized by article 36 of the Treaty of Rome, drawn up, true enough, at a time in which patent protection on a European level did not even exist in an embryonic stage. The case law of the ECJ toned down this obstacle by a restrictive interpretation of the exception of article 36, by introducing the theory of exhaustion of rights<sup>26</sup>. However, this brings only an imperfect solution, since the patented product may only circulate freely in the single market if it has been marketed with the consent of the patentee. In particular, this is a problem with inventions that are not protected in all the Member States of the European Union, or with identical patents with different holders in the various States (for example, as a result of separate transfers of corresponding national rights).
45. Within the framework of the present system no beginning to a solution to these obstacles to the single market is in sight. Indeed, the applicant has a choice between:
  - a series of national patents, that are independent of one another;
  - a European patent, allowing a free choice to designate states (without obligation to patent for the entire territory of the EU); this may therefore have no unitary effect on the territory of the EU;

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<sup>25</sup> see above n°11.

<sup>26</sup> Above n°20.

- possibly the Community patent, if the CPC comes into force; this provides a possibility of switching to the European patent with the designation of certain states “à la carte”, and certain people even propose a “Community” patent for which the applicant could waive the protection in certain states ( “Swiss cheese” model).

46. To justify the continued existence of national patents, people often refer to the interest of the SME’s which would only aim at their “local market”. In reality, any invention is susceptible of being exploited in the entire single market, if necessary by licence concession in the case of an SME unable or unwilling to exploit the patent itself. The true problem is that the present system prevents the SME’s from having access to patent protection in the entire single market, diminishing the commercial value (transfer, licences) of their inventions<sup>27</sup>.

### **III. THE EXCESSIVE ENTRY COSTS OF THE EUROPEAN PATENT SYSTEM**

47. The existence of a dual system contributes to a needless increase of the costs of patent protection in Europe. Especially the entry costs are too high, i.e. those that have to be paid at the period of obtaining the patent, before the invention can be economically exploited. Those costs constitute a barrier to entry for those whose entire capital only consists of their grey matter. Apart from the costs already mentioned<sup>28</sup>, it is above all translations (A) and the structure of the fees (B) that make the bill heavy.

#### **A. The translations**

48. At present all systems that are in force or proposed (national patents, EPC, CPC) demand, from the moment of grant of the patent, the translation of the entire text in all the languages of the European Union (for a protection in the entire territory if desired). This requirement is an aberration!

49. On the one hand it is true that the translation costs constitute at present approximately a third of the cost of a European patent <sup>29</sup>, a proportion likely to increase, especially when new States join the European Union or the European Patent Organisation, while maintaining the translation requirements. On the other hand, these translations are totally superfluous:

- The statistics of the national offices show that these translations are only rarely consulted.

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<sup>27</sup> See also above n°43.

<sup>28</sup> Above n° 38-41.

<sup>29</sup> See in particular Schatz (cited above, note 4).

- The majority of technicians in Europe master at least one of the official languages of the EPO.
  - For an unskilled person even the translation of the patent is of little value, in view of the very specific language used in patent documents (an amalgam of technology and law). A non-specialist must in any case consult a patent attorney.
  - In the case of litigation the original text is deemed authentic, provided that the text of the translation does not confer a less extensive protection<sup>30</sup>. The national court referred to will then, in any case, probably ask for an “official” ad hoc translation.
  - Moreover, it should be noted that in multilingual States (such as Belgium and Switzerland), the patent only has to be published in one of the national languages, and that this has never caused the slightest problem (despite the sometimes exacerbated sensitivities in these States concerning language matters).
50. Even more serious is that the translation requirements risk degenerating into instruments of unfair competition in the hands of the large enterprises. Let us assume, for the sake of illustration, that an SME applies in English for a patent covering the entire territory of the EU, but that it omits to produce a translation of it for one of the states (let us call it fictiously “Ruritania”). A competitor could with impunity infringe the patent of the SME on the “Ruritanian” territory under the pretext that it has not been translated into his “native” tongue, *even though this competitor is a member of a multinational group whose industrial property services have perfect knowledge of the patent in its original language*. In actual fact, the intended concern to protect “the small national entrepreneur who only understands his native language” turns into an instrument of oppression of this small entrepreneur by the large enterprises.
51. The only case in which a translation of a patent is justified is in the event of litigation before a national tribunal, and hence generally long after the grant of the patent, when it has become economically profitable. The other solutions that are mentioned in the Green Paper must be rejected:
- *The system of the CPC in its 1975 version:* The patent cannot be opposed to third parties as long as it has not been translated into their native language. The third party “acting in good faith” who exploits the invention will therefore not be an infringer and may even continue his exploitation if a certain period of time has lapsed during which the translation has not been produced. This system poses the same problem as the one mentioned above with respect to multinational groups who in reality know the patent in its original language.

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<sup>30</sup> Article 70 EPC.

- *The system of translation on demand:* This system risks leading to abusive demands and inflation of costs, especially if these translations are financed by a levy on the fees of the applicants.
- *The package solution of the EPO:* This solution hardly convinces industry and one may wonder if these translations, even if they are restricted to abstracts, are really useful (and used). The only potential advantage is, that it may (possibly) be a politically viable compromise, while not leading to such exorbitant costs as the other proposed solutions.

In any case, the filing of translations must be centralised, without administrative expenses other than those resulting from the translation proper.

52. To conclude: the linguistic requirements, which are legitimate in the cultural domain, are completely inappropriate in the technical domain, when economic interests are at stake. A choice has to be made between an efficient system promoting innovation and economic progress which is favourable to the creation of jobs, and a system where specific (false cultural) interests prevail perpetuating the present deadlock.

## **B. The fee structure**

53. At present, the EPO is financed entirely by the fees paid by the applicants<sup>31</sup>. These fees consist of procedural fees (to be paid before or at the moment of grant) and annual renewal fees, to be paid during the life of the patent, while it produces economic profits.
54. *The procedural fees* seem disproportionate in comparison with the corresponding fees of the national offices. This cannot only be explained by the quality of the search and examination provided by the EPO (entirely financed from the own resources of the EPO), but also by the fact that, as compared to the majority of the national offices, the annual fees are only a small fraction of the EPO budget. This situation is unsatisfactory, for the procedural fees are a barrier to entry, especially for the SME's. It would therefore be advisable to shift the equilibrium of financing towards the renewal fees.
55. Unfortunately, *the annual fees* are partly paid back to the Contracting States designated by the patentee, according to a repartition key at present fixed at 50%. The amount of the annual fees is fixed separately by each State. This system presents the following disadvantages:

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<sup>31</sup> In accordance with article 37 EPC, the expenditure of the Organisation may be covered equally from the special contributions made by the Contracting States, or from the amounts received by the EPO for the accomplishment of special tasks (article 146 EPC). Article 40 EPC, however, calls for the budget of the organization to be balanced. Under no circumstances, may the level of the fees cause the Organization to produce any "profits".

- The renewal fees partially serve to subsidize the activities of the national offices, or indeed go straight back into the general budget of the designated States (without contributing to the patent system, nor to the promotion of innovation), and everything at the expense of the applicants of the EPO.
  - For want of receiving the entire benefit of the renewal fees, the EPO is not in a position to reduce its procedural fees to less crippling proportions, especially for the SME's.
  - The system favours primarily the large States, since they are most often designated by the applicants. The present version of the CPC perpetuates the system, by fixing the repartition key of the fees *between Contracting States* on the basis of the present situation. Thus there is no system of redistribution in favour of States where the patent system is less developed. The designation of these States by the applicants is systematically omitted as a result of the costs of the system and a vicious circle begins to build up...
56. A patent must not necessarily be cheap, to the extent that society awards an exploitation monopoly to the patentee. However, the fees must only increase substantially at the time when a patent is liable to economic profit. They should not constitute a tax "at entry" which can only slow down innovation. The renewal fees must serve to decrease the procedural fees and must not be used for objectives that are alien to innovation.

#### **IV. THE QUALITY OF PATENTS GRANTED BY THE EPO ENDANGERED**

57. Let us keep in mind that only new inventions presenting an inventive activity justify the award of an exploitation monopoly through a patent. If patents are granted without a serious examination, the large enterprises might drown the SME's in a sea of weak quality patents ("junk patents") which these can contest before courts only with great difficulty due to their large number and the amount of the legal expenses<sup>32</sup>.
58. The creation of a centralized body in charge of granting, in a single procedure, patents that are valid in several States, while resulting in a considerable simplification of the patent granting procedures, has above all allowed ensuring a high quality level of the granted patents, with a strong presumption of validity. This is one of the reasons why European industry wanted such a centralization. Indeed, many national offices only had a simple system of registration or "light" examination, while the quality of the examination began to degrade even for the best performing offices, as they were drowned in a flood of applications<sup>33</sup>. With respect to the documentary search, which is essential for the determination of the novelty and the inventive activity, the EPO could draw from the heritage of the

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<sup>32</sup> Above, n°11.

<sup>33</sup> F. Panel (cited above, note 12).

former International Patent Institute (IPI), which it had absorbed and which had previously been envisaged as the single authority in charge of PCT searches<sup>34</sup>.

59. At present, the quality of the work of the EPO is endangered. The Administrative Council of the Organization, which should normally see to it that the Office may fulfil at best its mission of public European service, consists in fact of representatives of the national offices. These claim from the EPO more and more means for their own national searches. On the other hand, they award it only with difficulty the means, especially the staff, necessary to face the increase of European patent applications. This pressure upon the EPO could lead to either an increase in the backlog of applications to be dealt with, or a degradation of the search and the examination of the EPO. The situation this would lead to within the EPO (A), coupled with rising inclinations to (re)decentralise the system (B), could lead to an absolute reduction in the quality of the granted patents.

#### **A. The situation within the EPO**

60. The EPO has been implementing since a number of years an extensive "automation" program, in order to carry out search in online databases, without however taking into account the know-how acquired in 20 years of traditional search (50 years if one includes the experience of the IPI). The online search is certainly indispensable to face the expansion of available technical information, especially in the non-patent literature (in particular technical and scientific magazines). The EPO, however, exercises considerable pressure to *substitute* at any price the online search for the search in paper documentation, rather than to utilize their *complementary nature*, and this occurs in spite of the warnings to the contrary from the side of the examiners.
61. At the same time, the office neglects its documentation, as well as the work of intellectual classification of this documentation without which no accurate search is possible. The classification is at least just as important, if not more so, to the online search, for complex technical situations can hardly be searched by merely combining words drawn from the abstract or even from the entire text ("full text search"). Within the framework of online search, the intellectual instruments which have up to now facilitated paper searches should not be abandoned but, on the contrary, must be improved (classification, index systems etc.). The competitive advantage of the EPO results essentially from the concentration in one centralized organisation of specialists that are highly qualified in their respective technical domain, having daily experience with search and being able to work in close collaboration. These specialists carry out the analysis and classification of the most important new patent and non-patent publications and bring them constantly up to date for the entire range of fields of technology. A degradation of the documentation would only be reversible at the cost of major efforts. If, on the contrary, one turns towards search that is merely done by means of databases put at one's disposal by commercial operators, it would be more economical to leave

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<sup>34</sup> *ibid.*

this to the care of the applicants and their competitors, who may then address themselves directly to the courts without passing through a patent office.

62. Both as far as search as well as examination are concerned the office puts more stress on the quantitative aspect of the work (production) to the detriment of its quality. We may cite the examination of PCT II applications as an example, where the production pressure hardly and only with difficulty allows an examination of a quality that is equivalent to that of the traditional EPO examination. If the functioning of the Office must certainly be guided by the principle of economy, this cannot be to the detriment of quality, if the EPO is not to lose its meaning as an examining office. Certain interested circles have already expressed the opinion that the EPO grants patents too easily<sup>35</sup>. If the present tendency persists, the EPO seriously risks to deteriorate into an office of "light" examination, which was exactly what its "founding fathers" intended to avoid by its creation.
63. At present the office implements the system called "BEST", aiming to have the same examiner perform both search and examination for the same application. Without intending to enter here into details on the advantages and disadvantages of this system nor on the scale on which it could usefully be implemented within the EPO<sup>36</sup>, one must come to the conclusion that such a merger of search and examination tasks would be made to the detriment of the other tasks related to the grant procedure, viz. the maintenance of the documentation and the opposition procedure. Indeed, the examiners do not have the time nor the means to devote themselves *simultaneously* to the entire group of these tasks, the increasing complexity of which demands a certain degree of specialization (this does not prevent the examiner from having preferably the opportunity to familiarize himself with each of these tasks *successively*).
64. To conclude: the efforts of the staff of the EPO have so far been able to preserve the level of quality of granted patents. The question is how long this will still be possible. If one wants to return to a simple system of registration or light examination (of which we are not in favour, because of the economic consequences explained previously<sup>37</sup>), this is a political decision (and not simply a matter of management), affecting the interests of the European economy and of its public, and which therefore has to be taken by the competent political authorities at European level.

## **B. The threat of a (re)decentralization of the European patent system**

65. Certain delegations of the Administrative Council of the EPO have openly declared that they wish a (re)decentralization of the European patent system with respect

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<sup>35</sup> Discussion during the colloquium on *The Green Paper on the Community patent and the system of patents in Europe*, Brussels, 17 October 1997.

<sup>36</sup> See in particular the documents Info 5/AC 62 and Info 6/AC 67 presented to the Administrative Council of the EPO by the Central Staff Committee.

<sup>37</sup> Above n°11.

to search and examination. In fact, some of the tasks of the EPO are contracted out to certain national offices, sometimes more than is authorized by the Protocol on Centralization annexed to the EPC.

66. However, the creation of the EPO and the Protocol on Centralization had as their objective to ensure quality search and examination, by a centralized body. Only such a body may guarantee a homogeneous and high level quality, by bringing together into close contact and in a favourable environment an international and highly qualified staff (in particular the search tools of the DG1 in the Hague and the proximity of the Boards of Appeal in Munich).
67. It is justifiable that, faced with the evolution of the patent system in Europe, the national offices strive to adapt themselves to the new situation. But such an adaptation must consist of activities that are complementary to those of the EPO (in particular technological information and the raising of awareness to the patent system at a local level), and not in competitive activities constituting a return to the former decentralization.
68. At the same time, within the framework of the “trilateral meetings” which gathers together the three main patent offices of the world (EPO, JPO and USPTO), reflections are in progress on a possible mutual recognition of searches carried out, or even patents granted by these offices. The opinion of the SUEPO is that such a solution can only lead to a levelling down of quality. Until now the EPO has had a competitive advantage with respect to its two main competitors. It is important to preserve this advantage, for the benefit of European industry and its public and not to have it diluted by an “upward” decentralization at world level, or a “downward” one at European level.
69. To conclude: a conflict of interests exists within the Administrative Council of the EPO, which is mainly controlled by the heads of the national offices, i.e. by its main competitors. This situation creates for the European patent system a serious risk of *regression*. While such a regression may not yet have taken place, leaving the political control of the system in the hands of a purely intergovernmental authority has at least lead to its deadlock .

## **V. DEADLOCK OF THE PRESENT INTERGOVERNMENTAL SYSTEM**

### **A. At the legislative level**

70. Within the framework of the EPC it is extremely difficult to modify the substantive patent law. Actually, since the EPC is an international treaty, its modification
  - necessitates a diplomatic conference and the ratification of the modifications by the national parliaments of the Contracting States;

- comprises a risk of exclusion of Contracting States from the EPC, if they do not ratify within the requisite periods of time<sup>38</sup>;
- takes a considerable period of time, hardly compatible with the speed of technological evolution and the adjustments of the patent law it requires.

One might imagine transferring substantive patent law to the level of the implementing regulations of the EPC, which may be modified by a (qualified) majority of the Administrative Council. But apart from the divergences with certain national laws (which continue to exist autonomously in the field patents, but are at present largely harmonized) to which this procedure might lead, its democratic legitimization is only very indirect (democratically chosen parliaments controlling their respective governments, which control their delegations to the Administrative Council, controlling the EPO). Rather than having a “multiple degree democracy”, it would be preferable to transfer political control to institutions with direct legitimization at a European level.

71. Moreover, even if the European Community is competent with respect to patent law, Community law is not implemented automatically in the framework of the EPO, which is only bound by the EPC. For want of modification of the EPC (always very slow), this could create divergences the legal resolution of which would be very delicate. With respect to the complementary protection certificate for medicinal products, the modification of the EPC in view of its harmonization with a Community Regulation took several years. With respect to biotechnological inventions, the present law is entirely the result of the case law of the Boards of Appeal of the EPO, which will not necessarily be compatible with the corresponding Community directive if it is adopted. The same problem might occur with respect to the patentability of software.
72. The intergovernmental decision-making which is the only one possible within the present framework, leads systematically to the lowest common denominator of the national interests. In many cases this constitutes the worst solution for the interests of the European public. One only has to think of the sad example of the translation requirement within the framework of the EPC (and of the CPC, if it comes into force!).

## **B. At the institutional level**

### *1° The never ending ratification of the CPC*

73. It was the intention of the founding fathers of the European patent system, who were Europeans in spirit even though they came from national offices, that the coming into force of the CPC should closely follow that of the EPC. Despite the lack of a Community regulation - which at the time was not politically possible - the system thus conceived stood in the forefront of European integration. Twenty

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<sup>38</sup> Article 172, paragraph 4 of the EPC.

years later, Community instruments are in place for other fields of industrial property (trade marks, plant variety rights), but in the field of patents national overcautiousness still has not permitted the ratification of the CPC. Obsolescence is the price for precocity!

74. Even if the CPC is finally ratified by all signatory States, it will only be “ a dead man put on the throne”<sup>39</sup>, as a result of its serious flaws, in particular with respect to translations.
75. Even with the eventual ratification of the CPC by its signatory States matters would not have been brought to an end. Actually, not all the States of the EU are signatory to the CPC, since it is not, as an international treaty, automatically binding as “*acquis Communautaire*” for new Member States of the EU (Austria, Finland, Sweden). The same problem will occur during the accession of the States of Central and Eastern Europe (SCEE) to the EU. While waiting for the ratification by these new Member States, the CPC will always be late by a few accessions or ratifications, postponing the realization of “a single patent in a single market” until the Greek calends.

2° *A false pretext: the presence within the EPO of States that are not Member States of the EU*

76. The EPO comprises a certain number of Contracting States that are not a Member of the European Union. Cooperation with these non-EU States is desirable (and moreover desired by all the parties concerned), because it constitutes a first step towards their future integration into the European Union. Meanwhile, this will enable an extension of the single market (see the European Economic Area). As far as the SCEE are concerned, some of which have the status of observer at the Administrative Council of the EPO, the association agreements with the European Union allow an initial supportive action, which is indispensable for their economic development and their future integration.
77. Otherwise it is observed that the representatives of non-EU States are sometimes more ardent Europeans than their counterparts of the Member States of the European Union. Their technical and legal collaboration within the EPO is often highly appreciated. Unfortunately, the presence of non-EU States might serve as a pretext for certain Member States of the European Union to slow down the necessary integration of the Community. It is therefore urgent to create genuine Community structures, to which States outside the EU that wish to do so may be linked by association agreements.
78. One of the reasons for choosing the intergovernmental structure rather than a Community structure for the EPO was the necessity to allow the participation of States that were not yet members of the European Community at the time. The hardly conclusive results of this choice can now be appreciated. It is necessary not

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<sup>39</sup> J.B. van Benthem (cited above, note 7).

to repeat this error. At present, the composition of the EPO practically coincides with that of the EU (i.e. all the States of the EU, plus Switzerland, Liechtenstein and Monaco). This constellation might not endure, since certain States outside the EU have opened serious negotiations in view of their membership of the EPC. It is a matter of seizing the opportunity presenting itself now and of integrating the European patent system within the legal framework of the European Community.

### **C. The causes of the present deadlock**

79. The present deadlock results generally from the predominance of national interests in the absence of an authority in charge of the general interest at the European level. More in particular, it is a result of the conflict of interests of "decision-makers" within the Administrative Council of the EPO, who are at the same time heads of national offices. This sclerosis can only be overcome when those responsible on the one hand at a European level, and not a national level, and on the other hand at a general policy level, and not limited to the particular field of patents, will take charge of the system, i.e. the European Commission, Council and Parliament.

## Part 3

### PROPOSED SOLUTIONS

80. The deficiencies of the European patent system in its present form call for action in a number of fields (I). Because of the inertia resulting from the intergovernmental system, and in order not to block the revisions that will be necessary in the future, it is important that all the aspects of European patent law be covered by Community regulations (II).

#### I. THE FIELDS WHERE ACTION IS REQUIRED

##### A. The creation of a single patent, due to become the sole patent in the Community

81. The European Union urgently needs a *single patent* for its *single market*. Because of the difficulties of ratification of the CPC, both as far as the present signatory States as well as the future adherents to the EU are concerned<sup>40</sup>, and because of the rigidity of an intergovernmental treaty as an instrument of legislation<sup>41</sup> (modifications by unanimity), it is essential that the future "Community patent" is established by a Community act (regulation according to article 235 EC). Moreover, it is indispensable that the Community title thus created really is a *unitary* title for the whole of the territory of the European Union. The "flexible" designation of states or the possibility to waive protection for certain states ("holes" in the geographic coverage) should be rejected. Such a solution would not permit a really free movement of goods and would, in fact, result in undoing with one hand what has been united with the other.
82. In the long run the unitary patent should replace the national patents and should become the single title of protection of inventions on the territory of the European Union. Every other solution will be incompatible with the common market and would moreover hardly be of any interest. What would the large market of the United States look like if the inventors could obtain protection, not only for the entire territory of the Union at a federal patent office, but also for every federal state in particular, or for a restricted number among them according to the wishes of the applicant? Moreover, not a single American entrepreneur would think of such a solution, and the foreign enterprises exporting to this country would not fail to denounce such a system as a useless complication.
83. In Europe, however, it seems reasonable to abandon the national patents only after a transition period. At present, the enterprises still need national patents, at

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<sup>40</sup> Above n° 73-75.

<sup>41</sup> Above n° 70.

least to a certain extent. Indeed, the single market is still being constituted. Certain sectors of the economy are still in the hands of the national public authorities or closely regulated by them, just as the market conditions are not yet homogeneous (one may think for example of the sector of medicinal products). Under these conditions parallel imports can sometimes constitute a form of unfair competition, against which the enterprises must be able to protect themselves, subject to the control by the competent authorities on competition. With the completion of the single market, these conditions will disappear<sup>42</sup>. It will then be a matter for the Community authorities to definitively establish the Community patent as a single patent within the Community.

84. On the other hand, the cost of the European system cannot be used as a valid pretext to justify the continued existence of national patents. The problem of the costs requires a proper solution<sup>43</sup>. One evil (excessive costs of the present system) can not be cured by an additional evil (continued existence of a system that is an obstacle to the free movement of goods).

## **B. The settlement of litigation**

### *1° The prerequisites of the system of settlement of litigation*

85. Once the patent is granted, it is important that the patentee may enforce his right in an efficient and reliable manner, and that conversely enterprises may defend themselves efficiently against unjustified patent rights. A jurisdictional system which is too complex and too expensive would especially be to the disadvantage of the SME's, which do not have the financial means nor the human resources to sustain long and heavy legal procedures. The system of settlement of litigation must therefore be swift, simple and inexpensive, while ensuring a high level of legal security and a uniform application of the law on the entire territory of the Community. Such a system must in particular meet with the following requirements:

- consist of a single procedure having effect on the entire territory of the EU;
- avoid multiplication of instances of jurisdiction, which would make the procedure lengthy and cumbersome;
- take into account the links existing between the appreciation of the validity of the patent, the extent of the protection conferred by it and its infringement;
- ensure uniform application of the law at Community level and therefore the harmonization of the case law both (i) between the different jurisdictions

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<sup>42</sup> F.K. Beier, *Industrial Property and the Free Movement of Goods in the Internal European Market*, IIC Vol.21, N°2/1990, pp. 131-160.

<sup>43</sup> Above n°43 et 46.

dealing with patent litigation and (ii) between these jurisdictions and those of the EPO.

2° A “Community” jurisdiction before its time within the EPO

86. The Contracting States of the EPC have already created a common jurisdiction competent to give ruling on appeals concerning the grant of patents and of opposition formed against them: the Boards of Appeal of the EPO. The provisions of the EPC concerning conditions of patentability are necessarily very general, in order to be easily adjusted to the diversity of technical fields and to the evolution of technology. During the two decades of their existence, the Boards of Appeal have created a body of consistent and uniform case law at the European level. Even though they give ruling in last resort during the granting procedure of the patent, in the event of litigation at a later stage this ruling may be annulled by a national judge *in the national territory concerned*. The case law of the Boards of Appeal has nevertheless been able to serve as a precious guide for the national jurisdictions, and has thus contributed to the harmonisation of the case law concerning validity of patents, despite the absence of complete harmonisation of the litigation settlement system.
87. The Boards of Appeal have the advantage that they are composed (i) of members coming from different national backgrounds on the one hand, representative of the various sensitivities and legal traditions, and (ii) both of *legally* and of *technically* qualified members trained in patent law on the other hand, making it possible to bring in the necessary enlightenment to deal with the variety and complexity of technical problems inherent to this matter. They constitute the sole jurisdiction of this scale presently existing at a European level.
88. It has sometimes been claimed that the examination and opposition divisions (just as the divisions for revocation, provided for by the CPC) equally constitute jurisdictions (of the first order), or indeed even that the search divisions would constitute a kind of instructional jurisdiction<sup>44</sup>. Without going into an academic debate on the administrative or jurisdictional nature of these bodies, one may nonetheless point out that:
- unlike an administrative authority, the various divisions of the EPO do not have discretionary power, in the sense that they could decide whether it is opportune to grant a patent (according to the necessities of economic policy for example);
  - the examination or opposition divisions are not represented in the procedures before the Boards of Appeal, suggesting that the appeals are not lodged against an action taken by an administration, but against an action of a nature similar to a judgement.

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<sup>44</sup> By using in particular the case law of the European Court of Human Rights (Judgement 46/1994/493/575 confirming the opinion 19589/92 of 19 May 1994 of the Human Rights Commission).

One could certainly object that, contrary to the members of the Boards of Appeal<sup>45</sup>, the examiners of the EPO are submitted to the hierarchical authority (even though, in practice, the examination and opposition divisions decide in complete independence). The fact remains that they must give ruling as impartial servant of the EPC and not according to the (economic) policy of an administration. They constitute therefore at least what is sometimes called an independent administrative authority with quasi-jurisdictional empowerment (like the authorities in charge of competition in certain states). In fact if not in law, the Boards of Appeal (and in future possibly the "Common Court") constitute therefore already a second degree of jurisdiction.

3° *The future Community jurisdiction on patents*

89. For the creation of the future Community jurisdiction on patents it is advisable to take advantage of the technical as well as the legal competence of the authorities of the EPO, and of the experience that they have accumulated during twenty years. Since only the grant procedure has so far been unified at a European level, the activity of the Boards of Appeal could not be extended over its entire natural domain which, apart from the validity of patents, comprises as well matters related to infringement and to the scope of the protection conferred by the patent. It is necessary to submit to one and the same jurisdiction the entire group of these problems, which cannot be separated. It could be useful that members coming from national jurisdictions specialized in the field of patents would join this jurisdiction, contributing their experience in the matter of infringement.
90. The decisions taken by this jurisdiction should have their effects on the entire territory of the Community, in particular as far as the revocation of a patent is concerned. On the one hand, this solution would considerably limit the cumbersomeness and therefore the cost of litigation, by avoiding the obligation to appeal before each national jurisdiction. On the other hand, the possibility envisaged by some people to restrict the invalidity of a Community patent to certain states seems incompatible with the unitary nature of this patent. Moreover, because of what is at stake with this litigation (invalidity of the patent for the *entire* Community), industry is justly reluctant to entrust the competence on this to the national jurisdictions, if only because of the risk of "forum shopping". It is important therefore that the competence for litigation concerning Community patents is attributed to a Community jurisdiction as soon as at the first instance level.
91. To ensure legal security, every party must be able to demand revocation of a Community patent, independent of the existence of an infringement action. To this effect, it is necessary to create revocation divisions at the EPO, which would constitute a jurisdiction of the first degree and which would be competent to revoke or possibly limit the patent (while the limitation may equally be requested by the patentee himself).

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<sup>45</sup> Article 23 of the EPC.

92. In the second degree, a single jurisdiction would be competent for appeals concerning patents. This jurisdiction should be a special chamber of the Court of First Instance (CFI), the only one that can be created in the framework of the EC Treaty. The boards of appeal of the EPO would be integrated into this special chamber of the CFI<sup>46</sup>. This should be an outpost of the CFI located in Munich, in order to maintain the contact at present existing between the Boards of Appeal on the one hand, and the examination and opposition divisions as well as the future revocation divisions on the other.
93. The ECJ would remain competent for the appeals - limited to questions of law - against the decisions of this chamber of the CFI.
94. This solution would have the advantage of entrusting to a single jurisdiction appeals against all the decisions taken concerning patents, from grant, through opposition, to revocation and infringement of the patent. The harmonization and the coherence of the case law between the various stages of the procedure would thus be ensured, avoiding for example that a patent that was declared valid by the Boards of Appeal at the time of grant would be declared invalid by the Community Court of Appeal during litigation at a later stage. One might think about submitting the decisions of the Boards of Appeal to an appeal at the CFI. Such a solution would imply, however, an appeal to three authorities (Board of Appeal, CFI, and then ECJ) during each of the multiple stages of the life of a patent (grant, opposition, infringement, revocation), which would make the procedure disproportionately cumbersome.
95. Finally, the proposed system would have the advantage of clearly structuring the litigation system in two degrees of Community jurisdiction judging the substance, with the ECJ as an instance of last appeal (limited to questions of law). This would avoid delay due to the multiple preliminary rulings provided for by the CPC in its successive versions (national jurisdiction - COPAC, national jurisdiction - ECJ, COPAC - ECJ).

### **C. The fee structure**

96. A patent does not necessarily have to be cheap, for it is advisable to exclude from the system inventions of weak technological or economic value, which would constitute monopolies creating unjustified obstacles to free competition. The fees may therefore serve as an instrument of economic regulation, thus creating an equilibrium between incentive to innovation on the one hand, and free competition on the other. The level of fees therefore amounts to a political decision taken on the basis of economic requirements, in order to obtain a positive overall economic balance.
97. It is necessary, on the other hand, to avoid creating *a priori* barriers to access to the system, by keeping the entry fees as low as possible, and only collecting them

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<sup>46</sup> J. Straus (cited above, note 15), p. 63.

at a moment at which the invention is susceptible to being economically profitable. The best solution therefore consists of a reduction in the procedural fees and of financing the system essentially with the renewal fees, which should increase progressively with the lifetime of the patent (and which should possibly be very high by the end of the life of the patent). The system would have the advantage of progressively eliminating patents without real economic value, while lowering the barriers to entry.

98. These fees should:

- be collected and managed integrally by the EPO, under the supervision of the Community institutions;
- not serve for other purposes than the promotion of innovation, nor *a fortiori* be transferred to the general budget of the Member States, nor serve to subsidize competing activities of the national offices (but indeed serve the complementary activities, particularly in the field of patent information);
- serve to reduce the procedural fees;
- serve to promote innovation in Member States lagging behind in this field (in particular patent information in the Member States where the patent system is less developed); a system of redistribution between Member States should therefore replace a system where the more developed Member States continue to collect the lion's share of the fees.

Coordination with the other Community policies on economic and innovation matters is necessary, implying political control by the European Community.

99. For the SME's the fees could be fixed at a reduced level (at least for those that are not part of a large enterprise), as practised in the United States. These fees could eventually be increased to their normal level by the end of the life of the patent, or starting from a certain number of patents, in order to avoid a flood of patents concerning inventions of weak technological or economic value.

#### **D. The transformation of the EPO into a Community institution**

100. The EPO has been created in order to have a centralized public service granting quality patents (i.e. with a high presumption of validity). The quality level of the EPO has made its success and it is highly appreciated by industry. It is necessary to preserve this level, the control of which must be based on the economic objectives of the patent system at Community level. This control is therefore a matter for an authority in charge of the general European interest as opposed to the individual national interests. Therefore, the EPO must become a Community institution whose regulatory authority is exercised by the Commission. It was this

model which the founding fathers of the EPO already had in mind already early on<sup>47</sup>.

101. In this context the national patent offices will continue to play an important role, for they, or their regional agencies, are in the best position to provide a service at the local level for the users of the patent system. This role must, however, be adapted to the evolution of the economic environment, in particular to be able to stand up to our competitors at world level (United States, Japan). It would be disastrous, in this context, if Europe would scatter its efforts, with national offices whose activities double the work of the EPO (but less efficiently). These activities must, on the contrary, be complementary. The national offices are ideally placed to provide certain patent information services, or to make the enterprises, not yet operating at a European or world level, aware of the patent system.

#### **E. Substantive patent law**

102. *Software*: Patent law is an immaterial law but one which is, until now, focussed exclusively on material objects. The evolution of technology must be taken into account and it must be widened to immaterial objects, from the moment that these are susceptible being used for a technical application.
103. *Biotechnology*: Biological inventions contribute to a significant extent to the improvement of the standard of living (medicine, agriculture) and thus to the economy. Europe should not lag behind in comparison to its competitors in including these inventions into the scope of patentable inventions. These inventions, however, raise a certain number of questions concerning ethics and the environment. Supervision by a democratically legitimized European institution (the European parliament) is therefore indispensable.

#### **F. The distribution of technical information**

104. The Community has taken as its objective a better distribution of information in general, and of technical information in particular<sup>48</sup>. It has taken initiatives for the distribution of patent information on the Internet<sup>49</sup>. The potential of the information of the EPO must be fully exploited and integrated into the policies of the Community in this field, especially as a means to promote innovation. Moreover, Community supervision on the public patent information services is indispensable to avoid unfair competition in the "marketing" of patent information, to which the access is still too expensive for its users<sup>50</sup>.

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<sup>47</sup> K. Haertel (cited above, note 6).

<sup>48</sup> Green Paper on the society of information (cited above, note 1).

<sup>49</sup> Document CA/159/97 of the EPO.

<sup>50</sup> Above n° 37.

## **G. Translations**

105. Because of the considerable costs it generates<sup>51</sup>, the requirement to translate patents into all the official languages of the European Union (or of the designated states) must clearly be abolished. The translation at the grant stage should be limited to the claims. The translation of the entire patent should only be required in the event of litigation. For lack of a political compromise in this (good) sense, the package solution of the EPO would at least permit the limitation of crippling costs caused by the translation requirements.
106. Certain circles have proposed to retain English as the only official language of the EPO, with the argument that English would have become the lingua franca of technology. The SUEPO is of the opinion that the present three languages of procedure must absolutely be retained:
- A not inconsiderable part of the European applicants chooses a language other than English as language of procedure<sup>52</sup>. On the other hand, it is true that throughout Europe (the SCEE included), the majority of persons that are active in technology master at least one of the official languages of the EPO.
  - If English dominates in certain technical fields, the other languages have a certain importance in other fields (for example mechanical).
  - Beyond the technical aspects, the official languages of the EPO represent the great legal traditions in Europe (the German-roman tradition and the common law) and their combined use promotes the mutual interpenetration and fertilization of these great traditions in the field of patent law. The different legal concepts and categories possess in each of these languages their own nuances, that might be masked if one single language was used.

## **H. Miscellaneous**

107. The other problems raised by the Commission in its Green Paper (especially employee's inventions, patent attorneys, litigation insurance) do not seem to have the same urgency as those treated above. For all these questions it is advisable above all to ensure free enterprise, the freedom of establishment and of the provision of services within the EU. In this context, it is advisable to keep a watchful eye on the qualification of service providers, but to avoid artificial barriers generating additional costs.

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<sup>51</sup> Above n° 48-52.

<sup>52</sup> According to a study realized by Dr. H. Suchy, European representative in Konstanz (Germany), focussing on European patents published between April 1<sup>st</sup> and 30 June 1997, the applicants based in Europe choose procedural languages before the EPO in the following proportions: German: 45%, English: 38%, French: 16%. In spite of the relatively restricted sample on which the study focussed (approximately 7.000 patent applications with their origin in Europe), the general tendency that may be derived from it is nevertheless revealing.

108. As far as the European patent attorneys are concerned (i.e. those registered before the EPO): they should also be authorized to act before the national and European jurisdictions with respect to patents. Indeed, their technical competence, combined with their legal qualification, enables them to understand better than a purebred lawyer the scope of the problems arising in this field<sup>53</sup>.

## **II. THE NECESSITY OF A COMMUNITY REGULATION COVERING THE ENTIRE PATENT SYSTEM**

### **A. A Community regulation ...**

109. A Community regulation with respect to patents would permit a far greater flexibility to legislate in this field than the present intergovernmental system. The latter requires modification of the corresponding international treaty by unanimity, and its ratification by all the national parliaments, a process generally taking several years. A Community regulation would fall within the competence of institutions having higher democratic legitimacy, such as the European Parliament. It would allow a real political control in the field of patents and on the institutions in charge of this field, taking into account the general interest of industry and of the European public. Moreover, it would allow adequate coordination with the other Community policies related to patents, especially with respect to innovation, to the distribution of technical information and to competition.

### **B. ... for all patent matters ...**

110. If certain competences in patent matters remained at an intergovernmental level, the problems of deadlock and unsuitability of the present system might be perpetuated in those fields that have not been brought under Community control. This would thus result in a "two-speed" system and it would later on make necessary a new attempt to restart the long and difficult process of transferring these competences to the Community.
111. Moreover, new Member States of the EU would not be automatically bound by the intergovernmental instruments left to survive, since these would not be part of the "acquis Communautaire". The unity of the system would thus have to be remade over again.

### **C. ... in the near future ...**

112. The present situation is favourable to a transfer of the system to the Community, for a quasi-identity exists between the Member States of the EU and those of the EPO. This situation might not endure, because of the impending accession of certain SCEE to the EPC, that might precede their membership of the European Union.

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<sup>53</sup> See also above n°87.

**D. ... while maintaining transitional measures ...**

113. Certain modifications of the present system, if they were immediately adopted, would cause a shock that would be too difficult to absorb by the parties involved in the patent system, especially because the single market itself is still in the process of constitution (progressive harmonization of national provisions by the EU)<sup>54</sup>. Thus, it will undoubtedly be necessary to let national patents continue to exist for some time to come.
114. These modifications could, however, become appropriate, or indeed even indispensable, as the realization of the single market advances further. The EU must then be able to implement them rapidly. A certain number of transitional provisions could be left in force, which could however be progressively removed by a (possibly qualified) majority vote of the Council of ministers.

**E. ... as well as association agreements with countries that are not (yet) EU-members**

115. Cooperation on patent matters exists already with certain States that are not a Member State of the EU, whether they are already parties to the EPC (Switzerland, Liechtenstein, Monaco), or whether they cooperate with the EPO, sometimes with the support of the EU (extension agreements, technological cooperation). The mechanism of association agreements would permit maintenance of the cooperation with these States and supporting their legal and economic development if necessary (SCEE) in view of their future integration into the EU.

**F. Conclusion**

116. The legislative instruments proposed would permit placing instantly the European patent system in all its aspects under Community responsibility, while providing a progressive plan for the introduction of necessary changes, as the evolution of the single market and its needs advances further.

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<sup>54</sup> See above, note 83.

## GENERAL CONCLUSIONS

117. At present a movement has started which has as its objective that the Community institutions take charge of the European patent system. Especially industry demands a simpler system, that is more coherent, less cumbersome and less costly, in order to facilitate access to patent protection and the implementation of this protection. Moreover, at present quasi-identity exists between the Member States of the EPC and those of the EU, which was not the case when the European patent system in its present state was set up. It is advisable to take advantage from this constellation, that might not endure, in order to set up a genuine Community public service in the field of patents, to promote innovation in Europe.
118. To that effect, it is advisable to create by Community regulation a unitary patent (and later undoubtedly a single one) at the level of the European Union, in which both the grant as well as possible litigation is within the competence of a single Community jurisdiction, the decisions of which would have their effect on the entire Community territory. The existing institutions of the EPO, in their administrative as well as their jurisdictional functions, should be integrated into corresponding Community institutions. The European patent system should be placed under the political control of the Community (Commission, Parliament, Council, Court of Justice), and its coordination with the other Community policies should be ensured.
119. In particular, it is advisable to keep a watchful eye on the simplification of the system and on the reduction of its costs. The structure of the fees must be controlled by the Community. It must permit an easy access to the system (reduction of procedural fees) and postpone payment of fees to a time period in which the patent is economically profitable (with renewal fees increasing progressively). The amount of the fees must ensure the financing of the system and take into account the economic policy objectives (avoid a flood of patents with weak technical or economic value); under no circumstances, should these fees serve to finance activities that are alien to innovation. With respect to languages, the requirement of translation of the patent should be abolished, except for the claims and possibly the abstract. The applicant must have the choice between the three current languages of procedure of the EPO (German, English, French).
120. The modifications envisaged here are supported by certain interested circles, but might nevertheless meet with resistance from other circles (in particular from national offices and patent attorneys), who fear seeing their activities affected by those improvements, which are nevertheless indispensable for the present system. Their concerns should be taken seriously, but not by remaining fixed in standstill and waiting-games, but on the contrary by giving the circles concerned the means to adapt their role to the evolution of the needs of European economy. The national offices have an important role to play by their proximity, as intermediary

and for providing information to local enterprises, that are not yet established on a European scale and are not very familiar with the potential of the patent system. The patent attorneys, rather than carrying out mountains of translations nobody ever reads, have a role as counsellor to play, facilitating access to the patent system, its propagation and its optimal utilisation. The realization of these proposed modifications, far from making these actors in the system redundant, will enhance their role (albeit in a modified form) because of the reinforced attraction of protection by patents that will be its result.

121. Within a context of globalization of the economy, Europe can no longer allow itself to lag behind because of divisions due to what certain people think to be their national interest. Confronted with its competitors, Europe must take charge of its economic, industrial and employment policies on a Community scale. This is true in particular of the policy on innovation and of its essential component: the patent system. Patents and industrial property have always been in the forefront of international cooperation and of reconciliation between nations (to begin with the Union Convention of Paris in 1883). It was the same objective the founding fathers of the European patent system had in mind, when, as genuine forerunners from the sixties onwards, they have wanted to make it into an instrument of Community integration. At the time when The World Trade Organisation itself has started addressing questions of industrial property, will the work of these pioneers of Europe remain indefinitely on the loom?

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