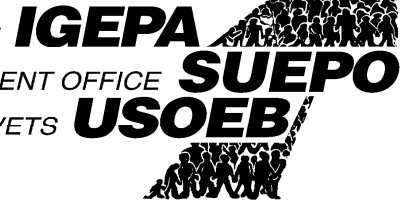


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## ***Interview with Bruno van Pottelsberghe***

**Senior Research Fellow at Bruegel and Professor at the Université Libre de Bruxelles, Solvay Brussels School of Economics and Management**

*Mr van Pottelsberghe, in the first part of your latest study „Lost property: The European patent system and why it doesn't work“ you summarise the weakness of the European patent system. You talk about a fragmentation of the European patent system induced by the failure of a community patent. What main weaknesses did you find?*

**Bruno van Pottelsberghe:** The first one is prohibitive cost. It is the weakness we have always been aware of: cumulative translation costs and national renewals fees, which surely make the European patent at least four times more expensive than the US, Chinese, Japanese or South Korean systems. I have no problem with those examination costs which correlate with quality - but the largest share of the costs in Europe has nothing to do with the quality of examination process, it is purely a tax on innovation. Even with the 14 or 15 countries that have signed the London Agreement on Translation Requirements, patents are still at least three times as expensive as in the US or Japan.

Other disadvantages of the European patent system are rarely mentioned or tackled and I think they are as important as the prohibitive costs. I summarise them as very high uncertainty. A high uncertainty because you must manage your patent in each national member state – which has the ultimate power either to grant a patent or to invalidate a patent. Which means you have very prohibitive costs in case of parallel litigation, for a *de facto* uncertain outcome: in some countries your patent may be validated and in others it maybe revoked. Since you have different legal systems, it induces very high litigation costs and complex managerial aspects.

It reduces the attractiveness for the true inventors, which are universities, SMEs (small- and medium-sized enterprises) and even some large companies. They are so far not particularly attracted to the European patent system.

An example of incongruity is that some national systems litigate on a patent which

is still being processed by the EPO opposition process and sometimes take a decision before the EPO does. The infringer must pay for royalties or compensation to the patent holder and a few months later the EPO cancels the patent. This is an example of “time paradox” that is currently working in Europe.

As a cherry on the cake the most striking issue, rarely mentioned so far, must be underlined:

it is possible to file parallel applications simultaneously – one at the EPO and several in various National Patent Offices (NPOs). Of course you do that when your patent is in the grey area, if you don't really know if it will be granted or not by the EPO. If it is not granted by the EPO, then you have another chance to have it granted by an NPO. This is a *de facto* quality drop to the level of the lowest common denominator. Even if the EPO refuses to grant a patent, you still have a chance in one of the NPOs. In my study I show that, on average, 25% of the patents granted by the NPOs are granted to foreign companies: these patents most probably include parallel EPO applications. If a company desperately wants an invention to be granted in Europe it can play on various channels and this is highly inefficient.

Another incongruity of the European Patent system is its complexity. The European patent system makes parallel imports of imitations easier to do. If you are an imitator, you can enter Europe through a country which hasn't been protected (e.g. because it is too

expensive), and then you pack your bags and you can easily move into another European country. Of course it is forbidden, but it is very difficult to identify.

*Should the areas of work in the NPOs be changed?*

**Bruno van Pottelsberghe:** Yes, NPOs have a very important role to play in helping national inventors. The NPOs should strengthen their services to domestic innovators,

including training, search and coaching services to young, innovative companies. They could also be information providers to local business on counterfeiting issues and they could eventually offer search services for PCT applications. But they should definitely not grant patents.

*What are your additional policy recommendations concerning the European patent system?*

**Bruno van Pottelsberghe:** The first recommendation is to create the community patent and centralise the litigation system. We should see the present crisis as a catalyst to stimulate change. I compare the current crisis with the patent crisis in Germany in the 1870s. Each of the German States had its own patent system, when the German Parliament in July 1877 enacted the German Patent Act and founded a centralised Imperial Patent Office. Today there is a similar situation in Europe. It is the same process now. The community patent would be so successful that it would generate enough revenues to secure the funding of NPOs *and* the EPO.

**„The National Patent Offices (NPOs) ... should definitely not grant patents.“**

*Why is it so difficult to institute a European Community patent? European business and industry are asking strongly for it. And they have a powerful lobby.*

**Bruno van Pottelsberghe:** But you have other, more powerful lobbies. And who are these lobbies?

First the NPOs. They logically don't want to lose power or control, they are afraid they would lose resources, budgets, so they prefer to resist change, they still want to have a major say. They should agree that their role must change. The second who resist are lawyers and patent attorneys. Because it threatens a lucrative business – parallel litigations, translations, complexity. The community patent means less business for them. These are a very powerful lobby. So, what I argue for is political leadership. We shouldn't be asking NPOs to elect the President of the EPO. We need real political leadership for the European patent system.

Consequently, another recommendation is to reform the governance of the EPO, as a catalyst for change. Nowadays, the Administrative Council of the EPO is essentially composed of the representatives of NPOs. The 35 member countries frequently have divergent – and sometimes conflicting – interests to those of the EPO. But it is these same members that elect the President of the EPO and the five Vice-Presidents.

The new EPO Administrative Council should include ten representatives of NPOs, not 35, but also representatives of

consumer associations, business associations, academia, technology transfer offices, patent attorneys, the centralised patent litigation institution, one independent member and representatives of the European commissioners for research, internal market, enterprise and competition. Obviously, the staff of the EPO should also be represented. In addition there could perhaps be one observer from the European Parliament.

*How many members will the new Administrative Council have?*

**Bruno van Pottelsberghe:** About 21. So it will be smaller and more efficient. Besides these recommendations it is urgent to create a small company status at EU level which would allow for reduced fees, for instance, about half the fee applicable to other, larger companies.

*The second part of your study is related to the global patent warming and backlogs in the world wide patent systems. What are the main results?*

**Bruno van Pottelsberghe:** Actually the trilateral patent offices, US, Europe, Japan, and even China and South Korea, are entering convergence agreements, as witnessed by the creation of Patent Prosecution Highways (PPH) and the IP5 discussion group. They justify these agreements with the backlog issue, which supposedly call for more effective collaboration.

So, do we have a patent bubble and what are its consequences? True, there has been a sharp increase in patent

applications. The number of applications is huge for several reasons. But, the key issue is strategic patenting. There is evidence that companies have tended to change their management practice from a 'single-patent' approach to a 'portfolio' approach, they 'reserve' markets for their technology. So you do have a sharp increase in patenting everywhere, which does not correlate with any economic indicator that we have looked at – in other words there is something wrong. The propensity to patent has constantly increased and that faster than the number of examiners. The workload – if you count the number of claims instead of the number of patents – has also increased dramatically.

You have two worrying consequences of the bubble: backlogs and quality of applications (or grants). How do we measure backlog? I put forward three indicators. The total number of patents which are currently under examination in 2007, the total number of claims which are in examination and the total number of examining months needed to process the whole backlog. According to these three measures the backlog of the EPO is systematically much smaller than the backlog of the US Patent and Trademark Office (USPTO). With the three measures the European backlog is at the level of the US backlog of 1996 – thirteen years ago. And the total prosecution time in the EPO is on the level of the USPTO in 2000. The backlog is much less worrying in Europe

than in the US. The situation is actually dramatic in the US. It is simply huge. And Europe should not be used to solve the American problem.

*Who is responsible for the backlog?*

**Bruno van Pottelsberghe:** If someone is to blame, it is policymakers at large: they designed a system that naturally leads to a backlog. If they have a backlog it is because they wanted a backlog: cheap patents and easy to get.

*What about the quality of patents?*

**Bruno van Pottelsberghe:** Backlog is mainly a US issue. Falling quality is everywhere, but it is difficult to compare internationally. We have several indicators which converge, indicating that there is a drop in quality in applications and in patents granted. And I investigate systematically four or five aspects, which all support the hypothesis that the quality of the examination process in the US is much smaller than in Europe.

In the US you have much fewer restrictions on patentable subject matter, and the search for prior art is definitely softer than in Europe. For example they don't write a search report in the US, and it is still possible to hide applications, hence playing the submarine strategy.

Fees are also significantly smaller in the USA, jointly with a lower rigour of the examination process. You have many more patent applications per examiner,

***„Europe should not be used to solve the American problem. [In the US] policymakers ... designed a system that naturally leads to a backlog. If they have a backlog it is because they wanted a backlog.“***

and you have many more patents granted per examiner – the pendency is much smaller, which means they spend less time on it, and the grant rate is much higher in the US than in the EPO. The average American examiner has four times more claims to tackle than a European examiner – i.e. the workload is much higher. So they work faster and they do a lower quality job.

Bottom line: In the US it is easy to get a patent granted, it is cheap, you have no restriction. So it is natural that you have much more applications and it is therefore typical that they tackle a whole lot of applications. These are of course only a bunch of indicators. Each of them taken alone is not convincing, but all of them converge towards the idea that the US has a much lower quality in examination process compared to Europe.

I also present the idea that human resource practices must be accounted for. The average experiences and incentives of examiners in the US has nothing to do with these of the examiners at the EPO. The US examiner has much smaller wages, much smaller incentives: on average they stay three years at the patent office. In Europe the job training is about three years and the examiners stay for life. It is a completely different system for a human resource practices. I wouldn't want to change much the way EPO examiners work, except that we must assure that the process of quality evaluation proceeds.

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*What are your recommendations about the global patent system in the coming years?*

**Bruno van Pottelsberghe:** We should not first find an agreement about mutual recognition or PPH, we should first agree on a global patent standard – I call it GPS. One key aspect of the GPS is a free access to key information, which is at the moment not at all the case—it is a myth today. Many players (especially SMEs, universities, independent inventors) do not have ready access to information about granted or pending patents. It is not easy to find out if a patent is granted and enforced for example in the Czech Republic. Improved transparency, which would restore confidence in the system, could be achieved if the key information sources were freely and readily available to all online.

Other recommendations for Global Patent Standard are structural convergences – we should agree on a 'first to file' or 'first to invent' approach, we should agree on the level of fees, we should agree on an opposition process, and then we need a GPS for examiners. And here the way we treat examiners is important. What incentives do we put in place, what experience and educational level should examiners have and how do we train them? It is only with a strong convergence on GPS that mutual recognition practices could logically put in place.