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The discussion on the functioning of the patent law is necessary. It rises some fundamental questions.

First, what is the influence of the patent system to the economy?

Second, who is the user of the patent system?

Third, what is the place of industrial property in the system of the European Law?

Four, what should the features of the property, including industrial property, be?

1. Patent system and the economy

The usefulness of the patent system is impossible to prove. Anyway it has limited influence on the development of the economy, including foreign investments. The reason is that patent protection is but one of many factors affecting the business decisions. To take a historical example (from the 19th century), in Switzerland even a total non-existence of patent protection was not an obstacle for development; to look at modern times - China has been a case in point. So we can still rely on the well-known opinion, expressed by Professor Fritz Machlup half a century ago in his report to the US Congress, that if the patent system had not been introduced, there would be no sufficient grounds to demand it; but if it is already working, similarly there are no grounds to abolish it. The point is that discussing the basic problems of the patent system we should be very pragmatic.

2. Users of the patent system

The use of the patent system suffers from an uneven distribution. For example, in 2005 nearly 70% of the PCT applications originated in only three countries (the USA, Japan and Germany).

Besides, studies show that the practical significance of patent protection for individual sectors is not consistent: it is huge in the pharmaceutical and chemical industries, smaller in the engineering and metallurgical industries, and quite tiny in many other branches.

3. The place of industrial property in the system of the European Law

Let's begin with the statement that the patent rules are *de facto* harmonized. In particular, the patentability criteria are the same across the EU countries. This means that the same technical solution should be either patented or not patented by the European Patent Office and by the patent offices of the Member States alike.

In accordance with articles 28 and 29 of the Treaty establishing European Community, *quantitative restrictions on imports and exports and all measures having equivalent effect, shall be prohibited between Member States.*

Article 30 allows *restrictions justified on grounds of the protection of industrial property.*

So, the basic rule of the European Community is the free movement of goods and the exclusivity deriving from industrial property rights is an exception. In other words, legal exclusivity which is not justified, violates the competition rules. The problem is that the quality of patents granted is not a Member State's domestic problem. If they are weak in a sense that in fact they do not fulfil the legal requirements, they are outside the scope of exception allowed by article 30, and the exclusivity violates the rule of free movement of goods.

In my opinion the following conclusions follow from these objectives:

First, it is contrary to the European Law if a patent for the same invention is granted in Member State "A" and refused in state "B".

Second, it is contrary to the European Law if a patent for the same invention has been found invalid in Member State "A" and is still in force in state "B".

Nevertheless these objectives cannot be achieved unless there is a European invalidation procedure. So, the establishment of a European Patent Litigation System is necessary. The ways of reaching this aim may be different. One of them may follow the draft prepared by the Commission. The good basis could also be provided by the Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, where a similar problem dealing with the competition law has been settled. I am convinced that such a system should control all patents, including those granted by the national patent offices. Being more realistic, we should start with the European Patents.

The number of patent systems is also relevant here. The question arises if one system, namely a community system, would not be a better option than two (or even three). One can say that each system of national monopoly is contrary to the common market, leading to its division. By introducing the community patent the risk of infringing a national patent due to the movement of goods from one EU Member State to another would be practically eliminated. The quality of the community patents would certainly be higher and the costs difference would mainly result from the claims translations. Of course I realize that today a single European patent system cannot be a reality, but I am convinced that this is our future. One of the solutions could also be the mutual recognition of patents issued by national patent offices, but this issue would need a through-study which should balance advantages and disadvantages of such a system.

If patents are “strong” (that is they cover technical solutions which would be unknown without inventors disclosing them), the exclusivity may be effective and credible within society. Not only the time-limited exclusivity would be fully justified but, moreover, the scope of restrictions could be smaller than that defined by the Technology Transfer Block Exemption of 2004 and the Guidelines. The rules contained in the American Guidelines dealing with licensing of intellectual property of 1995 could be considered in full. So, restricting the patent issuance regime could be combined with broadening the scope of exclusivity use in full. In such a way, patent law would not be eroded by competition authorities.

4. The features of property (including industrial property)

The owner of a real property can build a fence – what is inside, belongs to him, what is outside – doesn't. It is easy for the third person to draw a border line based on an official register. In my opinion one of the basic disadvantages of the patent system is that because of many historical reasons, the scope of patents is not clear. On the one hand, in accordance with article 69 of the European Patent Convention, *the extent of the protection conferred by a European Patent or a European Patent Application shall be determined by the term of the claims. Nevertheless, the description and drawings shall be used to interpret the claims. So, it seems to be easy to know a scope of a patent, but on the other hand the Protocol on the Interpretation of art. 69* says that the provision *should not be interpreted in the sense that the extend of the protection is to be understood as that defined by the strict, literal meaning of the wording used in the claims, the description and drawings being employed only for the purpose of resolving an ambiguity found in the claims. Neither should it be interpreted in the sense that the claims serve only as a guideline and that actual protection conferred may extend to what, from consideration of the description and drawings by a person skilled in the art, the patentee has contemplated. On the contrary, it is to be interpreted as defining a position between these extremes which combines a fair protection for the patentee with a reasonable degree of certainty for third parties.*

This view of protection is theoretically justified as it balances the interests of the patentees and the general public. As a matter of fact, however, the scope of protection is quite unclear. The problem is that during the infringement investigation, the “balancing of interests” is impossible because of binary system of settlement of disputes. Namely a court may alternatively decide that infringement has or has not been committed. Thus, there is no room for “balancing of interests” in the case of a specific judgement.

The problem is aggravated by the different interpretation of the claims in various EU countries. This results in contradictory decisions with respect to the same patent. The EPILADY case is a classic example.

In the current situation there is no legal certainty because even a scrupulous patent examination does not ensure that an entrepreneur's action not covered by the patent claims will not infringe the patent.

So, the scope of the European patent should be reconsidered. Maybe the solution is to take the description into account only in cases where the content of the claims is ambiguous. It would be in line with the basic rule, which already existed in the Roman law: *clara non sunt interpretanda*; that is: what is clear cannot be interpreted. I am of the opinion that such a way of interpretation would be fair also for the patentees. We should have in mind that most of patentees are not inventors, but professionals, being also represented by professionals, i.e. patent attorneys. So, they try to obtain as much protection as possible. If after a long patent procedure and discussion with the patent office the patent claims are drafted in a certain way, there is no reason to give more protection than a third person could expect reading these claims.

Changing the way of interpretation of patent claims would make the whole patent system cheaper. Firstly, the basic issue of most of the infringement cases, i.e. what is a scope of exclusive rights, and the need of experts practically disappear. Courts could concentrate on problems which they are familiar with, such as damages. Secondly, it would be enough to translate only patent claims into all official languages.

In such a way patent infringements cases should be predictable, fast and cheap.

3. FINAL REMARKS

In my presentation I have focused on a few issues regarding the patent fundamentals. Crucial to the proper performance of the patent system are, in my opinion, the following things: first - European Patent Litigation System should be established; second - the scope of the European patent should be reconsidered.