

## **Quality in the European Patent System**

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Everyone agrees: quality in the European Patent System matters. Recent evolutions in the patent world have put an increasing pressure on quality. Patents play an increasing role in financial and capitalization markets, hence the importance of IP rights to companies is increasing. The surge in patenting activity, mainly due to a shift in the applicants' motivation to seek protection, raises a critical workload and quality issue for the EPO.

But what is it exactly that we call "quality"? There is probably no such thing as one single helpful definition, and it all depends on the quality of what one is looking at. Products or processes, form or content, the scope is very large. It starts with inventions and innovations and it ends at litigation and courts.

Starting with incoming applications, their quality can be defined in terms of form – they have to be clear and to respect the formal requirements provided by the EPC – and in terms of substance in the sense that they should meet the patentability requirements, i.e. novelty and inventive step. The increase in the average number of claims and pages in incoming applications as well as the increase in the number of citations they make to the prior art puts a serious question mark on the quality of both their form and substance, and much more so for PCT than non-PCT filings. The changing – and not always so honest – motivation of inventors for filing patent applications, the behaviour of patent attorneys strongly influenced by American drafting modes and a wrong perception of the essential role of dependent claims as fall-back positions in the European patent system, may explain to a large extent the evolution in quality of incoming applications. Various ways could be considered to influence the quality of incoming applications: setting financial disincentives to excessively large applications – a very efficient measure in the US –, educating applicants on the role of dependent claims and the benefits to everyone from claims' clarity, focusing more on patentability and less on formal requirements during the examination, etc.

The central element in the patent system is the granting process. Therefore, the quality of this process – its efficiency and timeliness – and the quality of its final products – decisions, reports and grants – is essential to everyone. Obviously, this is conditioned by the abovementioned quality of incoming applications, its raw material. Well drafted applications are definitely easier to examine.

The three main facets of an application that the granting process evaluates are its form, its novelty and its inventive activity. The evaluation of formal requirements is quite straightforward and is to some extent a prerequisite for the examiner to be able to assess the novelty and inventive step of the application. But to some patentees, examiners focus too much on these requirements before looking at novelty and inventive step. The recent implementation by the EPO of the EESR providing the applicant with an opinion on patentability in the examiner's first communication is in this sense a very good thing. But searching for prior art sometimes really looks like finding a needle in a haystack. However, inventors should be aware of existing prior art before filing an application and make it clear to the examiner, and the EPO should make sure that the haystack is complete and that examiners have all the necessary tools and skills – including language skills – to find the needle. But while it is easy in 95% of the cases, finding the needle for the remaining 5% sometimes require spending a lot of time and energy. Article 115 of EPC opening the door to a contribution of the applicant's competitors to the search for the needle could be helpful here.

Whereas the search report is quite an objective element, the examination can be compared to gold mining, in the sense that it should be able to separate pure gold from the rubbish, which requires some subjectivity. Since it can not be perfectly objectivised, is it worse to leave some rubbish in the gold pile or some gold in the rubbish one? If patents are not as good as they could be or get granted while they shouldn't, it is most often a matter of inventive step. Up to now, the legal requirement in this matter is that the invention couldn't – not shouldn't – have been done by the person skilled in the art. Logically, the examiner should be this person "skilled in the art" and the EPO should leave him the necessary time and freedom to evaluate it. But expecting examiners (they are over 3000 at EPO) to take subjective decisions could be the end of the system's predictability. Therefore, decisions on inventive step need to be objectivised through formal procedures such as EPO's "Solution Approach". Nevertheless, the notion of inventive step is no absolute concept, since it may vary among technological fields. So whereas quality standards in the granting process should be defined by Law, the subjective appreciation of these standards when evaluating inventive step within an application are difficult to objectivise and quantify.

Regarding the quality of the process itself, it can be defined in terms of efficiency and timeliness. Timeliness in particular is essential to many users and the system cannot be designed to satisfy the not-in-a-hurry

applicants. But it is a joint responsibility of applicants, attorneys and EPO. Anyway, these concepts are somewhat in opposition with the necessary effort to achieve highest quality products. For instance, the fact that the examining division has to organise a costly and time consuming oral proceeding before any rejection, inevitably leads to some arbitrages, in which a lighter version of an application may be accepted in order to avoid this embarrassment. Therefore, quality in the granting process will always be a matter of finding a balance between the quality of the outcome and the efficiency and timeliness of the process for all users, including SME's.

Yet, the question remains as to how to measure the quality in the granting process and how to set precise standards. While the timeliness of the process can be easily measured, the quality of its outcome is harder to quantify. Statistical measures based on appeals, oppositions or litigation decisions may sound relevant and should be instructive on a case by case basis, but they may be biased and they concern only less than 5% of the granted patents. Therefore, it is the main role of EPO's Quality Management System to define metrics in this matter and to audit the results of the granting process for their conformity with legal provisions.

The next logical building block in the system is made of EPO's Boards of Appeal (BoA). They play an important role on quality by reviewing the decisions under appeal as to their legal and technical soundness. But here again, this represents a tiny proportion of granted patents and can only ensure the uniform application of the law by the EPO. The quality of the Boards of Appeals' activities is nonetheless important as well as the timeliness of their decisions – especially on critical issues –, but their current organisational autonomy makes them difficult to control, at least as long as their current independence and positioning inside the EPO are maintained.

Once patents are granted, their quality turns more into a question of validity, which is often considered as the ability to stand in courts. For this reason, the enforcement and litigation system is the main element we have to ensure the validity hence the quality of granted patents. Of course, some flaws in patent drafting may hamper the ability of a patent to stand in court by itself: claims containing unnecessary details or with a very narrow description of the embodiment and not a functional one, lack of description of the technical function of one important feature, or absence of modified examples of the invention in the patent description.

But from there on, how can we ensure the quality of the litigation system itself, meaning that it should be fair, unbiased, fast, accessible and predictable, all of these elements being equally important? First, this requires a specialist judiciary and therefore judges who know IP matters and lawyers and attorneys highly skilled in the field. And secondly, it necessitates an efficient and objective discovery procedure. On top of this, under the current system, there is no supreme judicial authority to decide patent disputes in the European patent system, and the result is that there are differences in the application of the law between member states, a burden to predictability hence enforceability and validity of patents. Strong quality standards need both a central granting authority and a central patent judiciary authority such as the American CAFC, which Europe has failed to achieve in the last 20 years. The EPLA should bring this central element to the system if adopted. It would also help in preventing forum shopping by the users and counter-productive competition between different European jurisdictions. In the meantime, the high degree of harmonization of patent law among member states leaves plenty of room for national courts to harmonize litigation across Europe by taking notice of and citing other states' courts decisions. In this matter, the consistency of BoA decisions with the national case law and conversely is of equal importance. Various EPO publications on national and BoA case law should help in achieving this objective.

As a conclusion, on the one hand there are (and should be more) quality measures – as good as possible – to monitor the system and its products, but on the other hand corrective mechanisms need to be present to allow for rectification of potential punctual failures (oppositions, appeals, litigation), up to one central authority able to harmonize the standards and their implementations. This is the role of the Enlarged Board of Appeal within the EPO, but it is still lacking on the litigation side. So the only standard is made of the EPC, with some ambiguity due to all national courts playing with the Convention. And if quality standards are not appropriate, the law itself must be changed, as it should be adapted to new legal and technical developments. But defining standards depends on who should be the ultimate beneficiary of the system: users or society?

Quality in the patent system will be achieved if it is ensured at each level – since a chain's resistance depends on the resistance of its weakest link – as well as within the global picture. Therefore, there is a need for a global European Quality Management System, and maybe even beyond. A draft of such a system is currently under development. But it will in any case be a matter of balance and cooperation: balance between conflicting interests or standards, and cooperation and good will among all stakeholders of the patent system.