THE EUROPEAN PATENT

A EUROPEAN SUCCESS STORY FOR INNOVATION

PASCAL GRISET
Reproduction of the signatures affixed to the Final Act by the plenipotentiaries of the 21 States represented at the Diplomatic Conference for the setting up of a European System for the Grant of Patents, which met in Munich from 10 September to 5 October 1973.
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Methodology

This work is a history of the Munich Convention signed in 1973, known as the European Patent Convention (EPC). While the European Patent Office has played the leading role in that history, I have tried to take a broader, long-term perspective in my analysis. My methodology has been classical, a historian’s approach. I put together a university team, with which I analysed the institution’s own archives and combined these sources with “grey” literature such as Administrative Council minutes, magazines, internal memos and interviews.
General introduction

— 6 October 1973. Coming a few months after the suspension of dollar-gold convertibility, the Yom Kippur War would bring on the first oil price shock. Earlier, the Non-Aligned Conference in the name of the developing countries had proclaimed a New Economic World Order. The world was stumbling into a new era, and the post-war boom would soon be no more than a memory. On the day before, the European Patent Convention (EPC) was signed in Munich. In that turbulent political climate, the event was scarcely noted by the press at the time; yet it too marked a major turning point in history. After much hesitation, Europe was signing up to a document that allowed it to build a unified policy on industrial property, a field that was key to its future. Both economic and technological in nature, the Convention was also, and perhaps primarily, a political gesture. It was about “expanding national consciousness into a European consciousness”.

In an abruptly changing world, the Convention gave shape to the aspirations of a generation marked by the tragedy of the Second World War. More than ever, in the tumults of the time, the idea of constructing a unified Europe, at peace and able to co-ordinate its own development and prosperity, was a sign of hope. The nascent European patent system had its roots in ideas that germinated in the 19th century. First among these was the conviction that technological progress had to look beyond national borders and flourish within international organisations capable of co-ordinating and harmonising the efforts of many countries. With major technological networks offering international perspectives, Europe gave shape to that vision very early on in the field of telegraphy. Post, rail, road and later aviation would give rise to comparable initiatives. Standardisation was at the heart of these endeavours, giving birth to
raries sought prosperity and the building of a unified Europe through economic integration. The idea of a European patent system merged these three dimensions of a Europe at peace, a Europe in prosperity and a Europe constructing itself through technological progress, and was itself the condition for progress to flourish. The Munich Convention, rooted in fertile intellectual and philosophical soil, grew out of this historical dynamism. Yet it was not the culmination of a single, coherent process by which national systems were gradually united. Its drafting and signing were the fruit of lengthy cross-fertilisation among national systems, a cross between idealism and pragmatism that gave birth to a complex and demanding instrument designed to bring Europe’s national patent procedures together in a single efficient system, a system tolerated by the national offices, its existence bound to activities within their national borders. The Convention, with the Protocol on Centralisation at its heart, would prove capable of facing up to the challenges of setting up an organisation that would quickly be operational and compatible with varying visions of a European patent system. So in 1971, as Intel was marketing the first microprocessor, a new era was dawning. From 1973 on, the Convention was put into practice, thanks to the work of the Interim Committee. It was a long process, aimed at setting up an international organisation which, on the basis of the Convention, had to define its rules and its ways of working. After the lengthy gestation period, it was now time to build up the European Patent Office itself, which started work on 2 November 1977. It met with rapid success, surprising both its supporters and the less enthusiastic. It quickly achieved financial autonomy, and business grew at a sustained pace. The Office experienced its Golden Age, the age of the pioneers.
The convulsions of 1973 had accompanied the birth of the Convention, and in 1989 it again came face to face with history. Around the end of the decade, several events radically changed the context in which it was applied. The fall of the Berlin Wall in 1989 and German reunification the following year reshuffled the geopolitical pack. With neoliberal ideas in the ascendant, the European Council in 1989 decided to open value-added services and data transmission up to competition. In 1990 Tim Berners-Lee produced the tools underlying the world wide web. In successive stages, what became known as the *information society* grew into a reality. The European Patent Office and Organisation had to adapt. The first amendments were made to the EPC in 1991. Practices were evolving; that year saw the patenting of the first transgenic mouse. There were changing constraints and opportunities, and tension within the Organisation likewise generated a need for reform. The 2000 revision would show that the 1973 Convention remained a modern document, the bearer of a true vision.

Three major eras, then, marked out by technological progress and the march of history. Forty years have now left us with a treaty that has moved with the times and embraced a growing number of states. Both ambitious and realistic, it is embodied in the success of a constantly evolving institution: the European Patent Office.

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The city of Venice, which in 1474 enacted the first-ever patent law, giving rights to makers of inventions and discoveries and prohibiting counterfeiting (infringement).
Designing a system to protect inventors first entailed defining the status of work and its value to society. Such perceptions quietly emerged during antiquity, but the beliefs, philosophies and political institutions of the time imposed visions very different from today’s notions. Until the late Middle Ages, practices and vocabulary, developed without any real continuity. Even within Europe, attitudes to innovation varied considerably according to place and culture. Patents in the modern sense originated in Venice. Adapted in Britain, they had a key role in the early dramas of the history of innovation when the mechanisation of textile production in the 18th century laid the foundations for the first industrial revolution. The fates of Richard Arkwright, whose patents were invalidated by Parliament under pressure from rich merchants, and Samuel Crompton, whose unpatented spinning mule was copied thousands of times without his profiting in the slightest, would become emblematic. Are patents really useful? Do they protect innovators or merely hold back progress? Although a vehicle for innovation, patents may also be a source of conservatism. This duality made the principle of patentability one of the most disputed issues of the 19th century. Thus industrial property belongs both to the world of ideas and to the world of money. It is also a matter for sovereign jurisdiction at the national level. During the 19th century, all the industrial nations progressively passed intellectual property legislation, though some dispensed with it for a considerable time. Without patents, and thus legal constraints, foreign inventions could be used without paying fees. The decision not to legislate seemed appropriate where local businesses still had very little technology to protect. The development of European practices was therefore characterised by national strategies. States adopted one of two basic systems: examination or registration. Beyond the differences, the legitimacy of patents, though still debated, established itself as a universal model. Despite their diversity, national systems felt the need to forge links, and with the signing of the Paris Convention in 1883 intellectual property became one of a series of international systems set up in the field of technology. The Convention was born out of worries that the fear of copying in foreign countries not recognising patents might significantly hamper international trade. However, it did lay the foundations for international patent administration. In 1893, the United International Bureaux for the Protection of Intellectual Property (BIRPI) provided an institutional basis that was both better organised and broader, as it also covered trade marks. A new context emerged after the Second World War, countries gave more value to technology as an aspect of their power. The GATT agreements established the basis for unchecked growth in international trade. In 1960, BIRPI moved to Geneva to come closer to the UN, and was succeeded by WIPO in 1970, the year in which the Patent Cooperation Treaty was concluded (see page 64). The creation and development of the IIB were part of this post-war dynamism. This allowed France, for example, to extricate itself from the predicament that it might eventually find itself in due to its registration-only system. Its success reveals the strength and relevance of a relationship between an international system and delegating national systems. Superimposed on national attitudes was the process of European integration, which followed many different avenues. The Treaty of Rome, signed in the late 1950s, was just one part of a broader set of agreements outlining a Europe shaped by different overlapping areas and institutions. It was the joint efforts of the Council of Europe and the European Communities that gave birth to the European patent system. This project, would follow different paths, but driven by men marked by the Second World War and in love with peace, would ultimately prove an essential factor in the realisation of a truly European
ideal. Thus in 1973 these different roads at last all led to the Munich Convention, and to the coming together of the people who became known as the *founding fathers*.

**Chapter 1**

**Patents: from national to universal**
The origins of patents

“Historically, patents appeared before copyrights, but the concept of intellectual property (a kind of intangible property) emerged prior to either form of limited monopoly.” The notion of industrial intellectual property emerged primarily from the recognition of the value of manual labour and more generally of the making of utilitarian objects. “Although their intrinsic value may seem obvious, some aristocratic traditions in the ancient world encouraged contempt for handwork and practice.” However, this image of crafts being devalued seems to have been overemphasised by historians and too easily generalised in any case. The idea that progress was due to human action and genius rather than divine influence was already in evidence in ancient times, as confirmed, for example, in the thinking of the Greek poet and philosopher Xenophanes of Magna Graecia (Sicily): “Not all things, by any means, did the gods show to mortals: rather, as time went on, men found improvement by constant searching.” He was not alone in this perception: Periclean Athens was a society in which crafts were considered to have considerable value for the city. Anaxagoras of Athens similarly distinguished humans from other species on the basis of their ability to make objects. This idea of a form of accumulated knowledge went on to be developed far more widely in ancient philosophy, with Hellenistic civilisation reflecting the significance attributed to technical knowledge. Philo of Byzantium, who lived in Alexandria, is regarded as one of the first engineers in history. This tradition, arising in the Greek world, was adopted and transformed by the Romans. From the 1st century B.C., ancient works and respect for their creators began to play a significant role in attitudes towards knowledge. Vitruvius’ work is evidence of this new approach. As an architect (in the broader sense of the term as employed at the time), Vitruvius studied techniques and their developments. Thus in occasionally disjointed stages the notion of technology established itself in the course of antiquity in an approach encouraging contemporaries to credit those who created these new things with having benefited society as a whole. This knowledge mostly seems to have been passed on orally throughout ancient times. Written documents were rare and not easily circulated. Although there is a lack of sources confirming this, the concept of craft secrecy also seems to have been associated with methods used in small groups of craftsmen being passed down within families. “Yet concrete evidence for craft secrecy in antiquity is exceedingly sparse.”

Similarly, guilds existing in ancient Rome seem to have played a predominantly social and religious role, and cannot be equated to the corporations that arose later in Western Europe. Regardless of debate over the notion of the Dark Ages, the end of the Roman Empire and the Early Middle Ages saw an undeniable decline in these domains. “The writings of three authors – Vegetius...

Thus the guilds in the late Middle Ages seem to have been the first organisations associating the notion of property with recognition of the importance of knowledge. “The significance of the medieval craft guilds includes their role in the development of proprietary attitudes toward craft knowledge.” This is illustrated by the well-known example of the Murano glassmakers in the 13th century. However, it was the specific approach taken by the rulers of Venice which marked a fundamental change. The municipal authorities considered the glassmakers’ craft knowledge to be collective property. Whilst the glassmakers were encouraged to export their products, they were prohibited from disclosing their methods outside the Republic of Venice. Thus the glassmaker Petrus Caldera was banned from his guild in 1313 after working outside the city. He was allowed back only on payment of a heavy fine. Therefore, for the first time in history, secrecy was considered to be crucial and was protected by the public authorities. This acceptance of craft methods as a form of intangible property with a high commercial value was a major turning point in intellectual history, leading to the emergence of patents. An Act passed in 1297 authorised Venetian manufacturers of remedies to keep their recipes secret once they had undertaken, within their guilds, to use only the best ingredients. As from the Middle Ages, knowledge came to be considered a precious commodity. It allowed those who possessed it to establish themselves in a market and make their fortunes. The contrast that developed between towns and the countryside, in its affirmation of the urban reality, emphasised the preservation of specific techniques that were to be promoted and controlled. As a political and economic entity, the town directly or indirectly regulated technical knowledge and practices, thus distinguishing it from the countryside. Whether in the republics, municipalities or free towns, the nascent middle classes increasingly moved into positions of power, with the aim of...
Glass manufacture in England, around 1870: windows, flasks and optical items.
freeing themselves from aristocratic rule and with the support of their economic success, which was initially independent of land ownership. Thus the accumulation of capital went hand in hand with the accumulation of knowledge, both requiring protection and preservation and, where this basis was established, offering great scope for exploitation. With the slow but real accumulation of capital that commerce entailed, the corporations that were formed allowed craftsmen to operate in groups through which their voices could be heard. Regulated professions were based on the sharing of technology governed by near-immutable rules and controlled by the group, thus securing the members’ income by protecting them from competition. Between the extreme, long-term commercial uncertainties and regular income from the land, the urban middle classes found a way of regulating activity by controlling knowledge, allowing them to view the future in a socially sustainable perspective. Close links between municipal power and the structuring of urban functions were established for the first time in the Venice of the Doges, which was more of a city-state than a municipality. Technology was embraced as part of a collective approach, without any real desire to stimulate innovation. Patents were part of this move towards recognising the value of technology, but the approach was very different, as it was based on the specific recognition of the inventor’s merit and therefore favoured individual strategies for innovation.

Patents, viewed as a temporary monopoly granted within a defined area for possessing knowledge or for inventing a new process, emerged in certain areas of 13th-century medieval Europe, although they were rare in this period, becoming more important and widespread in 15th-century Venice. In 1416, Franciscus Petri of Rhodes was granted a patent in Venice for a superior fulling mill, on account of its exceptional quality. Brunelleschi, the architect of Florence Cathedral, followed the same procedure in his town to protect a new type of boat that he had invented. In the intense competitive environment among architects in the Italian city at that time, Brunelleschi did not intend to allow his ideas to be pillaged.

Legislation

These practices became more widespread, giving rise to the first general patent law, passed by the Venetian Senate on 19 March 1474. The arguments related essentially to the protection of inventions. Once protected from copying, inventors would then be encouraged to continue their work and invent new things. Once declared to the Provveditori di Comun, the law guaranteed them protection for ten years. Any work infringing the patent was destroyed and its creator was fined 100 ducats. This law also laid down the principles of justification for the patent as subsequently developed by the supporters of the system. Patents served to encourage inventive activity by compensating the inventor for his investment, giving him rights over his own creation and promoting the social utility of inventions.

The idea then spread throughout Europe, starting with England. Glass-blowing, which reached far beyond Venice and was sometimes protected by patents granted by other cities, notably contributed to the process in Antwerp, Holland, England, France, the German states and Austria. It was not only the associated legal system that spread, but also the Italian notion that patents were a means of promoting growth and development. Obviously this did not eliminate the advantage of secrecy, which many technicians and scientists still considered the best way to protect their discoveries. Leonardo da Vinci is thought to have made occasional
use of *mirror* writing as a means of keeping his ideas safe from prying eyes. Patents only partially resolved the issues of ownership, and prior-art conflicts have raged between inventors since the 16th century. The development of printing and of commercial and industrial companies, which increased the number of common-interest associations, led to ever more conflicts. These were “at the center of the development of early-modern scientific and technological thought and practice.”

Thus patent legislation had its roots in intersecting traditions and in contrasting philosophical approaches as to what constitutes an invention and what constitutes the rights of citizens, of the state and of the community in general. These concepts came face to face with the reality of economic activity. Translating these concepts into consistent legal systems was a crucial and complex challenge. It had to take into account the various perspectives of the different players, and had to do so at an operational level. As with other fields, such as land ownership or, more specifically, ownership of the subsoil, the tension between collective interest and ownership is perceived differently according to time and place.

The term *patent* derives from the expression *litterae patentiores*, letters patent, meaning public letters, which are documents issued by the king, putting the patent proprietor outside the scope of common law by conferring on him a dignity, a job, an exemption or a monopoly. Thus, in people’s minds, patents may be associated with arbitrariness, with privileges granted by the authorities on the basis of friendship, money or power. Patents are therefore rooted in the notion of privilege attached to centralised authoritarian political systems. Their acceptance might have been undermined by the movements progressively establishing democracy in Europe, even though the industrial revolution made patents’ continued existence or abolition an absolutely crucial issue for the future of industry. However, of the many privileges that could be granted, the right to exploit an invention deserves historic distinction. The British case is the most enlightening. England was the first country to create a system permanently limiting the power of the king. In response to abuse, the English Parliament prohibited the Crown from granting privileges. Remarkably, however, patents for new inventions granting privileges to first inventors were excluded from this prohibition under the Statute of Monopolies of 1623. The great revolutions of the late 18th century adopted the same view.

In 1787, the American constitution gave Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and inventors the exclusive Right to their respective Writings and Discoveries.” In France, the Constituent Assembly declared in the Law of 7 January 1791 that: “Any discovery or new invention, in all kinds of industry, shall be the property of its author; consequently, the law shall guarantee to him the full and complete enjoyment thereof, in accordance with the conditions and for the time to be determined hereafter.” These provisions are based on the recognition of a right to property. In the context of a fierce clash between various visions of the Revolution’s future, the chevalier de Boufflers, reporting on the law, clearly placed patents in an ethical framework as an element of justice in property rights: “If anything is truly owned by a man, it is his thoughts; these at least seem to be out of reach – they are personal, independent and are prior to any transaction. A tree growing in a field is not as undeniably the property of the field’s owner as an idea in a man’s mind is that man’s property. Invention, which is the source of the arts, is also the source of property; it is primary property – all other forms of property derive from conventions.” This vision would later be challenged. It was the major countries involved in the geopolitics of the time that enacted laws, in keeping with their history and the main differences in their social relationships. Thus, at the turn of the century, there were “four laws, four different ways of seeing the right to property for inventions:

1) American law: promoting industry and the arts by rewarding the inventor with a temporary monopoly.
2) French law: acknowledging a property right of limited duration.
3) English law: denying the State the right to grant monopoly privileges, except in the case of inventions.
4) Austrian law: restricting the right to copy inventors for reasons of social utility.”

From the origins to 1973.
A common basis, differing applications, challenged legitimacy

These common origins, however, gave rise to very different laws. The conditions to be met by the invention, the inventor and the patent application itself varied considerably from one country to another, making it extremely complex for inventors to exploit and protect their inventions in many countries at the same time. The specific notion of inventions and their protection was generally, and often explicitly, based on the desire to protect the interests of the country’s manufacturers. In an extension of mercantilism, countries needed to protect business on their national territory, without concerning themselves with equity or the recognition of individuals’ rights, and even less with the interests of foreign nationals. Discrimination against the latter was evident in the initial US and Prussian laws. At first, the United States only accepted applications filed by US citizens. Applications filed by foreigners were accepted from 1800, but only on condition that they had been living in the country for two years. Prussian legislation in 1815 stipulated that a foreign applicant had to acquire Prussian citizenship or else assign his invention to a Prussian citizen. In the case of France, although the idea of industrial property falling under natural law meant that the state made no distinction between French citizens and foreigners, it did seek to favour national industry by speeding up the transfer of inventions created abroad. Thus the French patent law of 1791 authorised inventions protected but not yet published abroad to be imported and subsequently protected in France. Conversely, taking out a patent abroad was a ground for forfeiture of the French patent for the invention concerned. The intellectual property approach was therefore the successor to the mercantilist vision of accumulating the greatest possible number of goods likely to endow the nation with influence and power.

Otto von Bismarck (1815–1898), Imperial Chancellor who initially opposed a patent law for the North German Confederation but lived to see the Imperial Patent Office set up in Berlin in 1871 in the wake of German unification.

Meiji-Tennō Mutsuhito (1852–1912), 122nd emperor of Japan. During his reign, Japan opened up to the West, industrialised, and transformed its socio-economic system.

Napoléon Bonaparte (1769–1821) as first consul, painted by Antoine-Jean Gros in 1802.

The North German Confederation in 1866.

It was against this background that, from 1830, the legitimacy of patents was to be challenged, as liberal ideas formed in a Europe marked by political changes that were a cross between democracy and nationalism. In countries having adopted legislation early, such as Great Britain and France, commissions examined its merits. Three commissions in Britain (1851–1852; 1862–1865; 1869–1872) brought about a reduction in the duration of the monopoly and made the conditions for protection stricter. In France, work began in 1818 and, in 1832, the commission chaired by the Comte d’Argout, the Minister of Trade, opened a wide-ranging debate leading to a new Law that was passed in 1844. These reappraisals increased as a result of free-trade ideas that considered national patent systems to be an obstacle to the economic dynamism of the countries concerned and, more generally, a barrier to international trade. This idea prevailed after the turn of the century. In Prussia, Bismarck was opposed to the patent system for the North German Confederation. Switzerland, the only country without patent legislation, saw its attitude strengthened by the decision of the Netherlands, in 1869, to abolish the patent system it had set up in 1819. This trend was later halted and reversed by groups in favour of protecting inventions. Their actions benefited from the economic difficulties of the 1870s, when protectionist ideas once again became influential. In many countries, new laws were enacted, defining and reinforcing protection for inventors. This was the case in Britain in 1875, in Germany in 1877 and even in Switzerland which, having rejected patent legislation until that point, passed a law in 1887. The Netherlands followed suit, changing course in 1910. In the spirit of the Meiji era, Japan also enacted patent legislation in 1887, but it was mis-understood and remained unimplemented, and was replaced by new legislation in 1885.

Thus there were significant differences between the principles underlying the various patents systems, which made it difficult to devise interfaces between them. Three main movements structured national legislation during the 19th century. The first, based on the rejection of all legislation, had disappeared by the time the First World War broke out. Two main models remained: countries with patent systems based on registration only, and countries requiring prior examination.

France had adopted a registration-only system to break with Ancien Régime practice by exempting inventors from the state’s censorship powers. “What are censors in such matters? They are a court ruling on things that do not yet exist and choosing to allow or prohibit their creation; ... a court that fears being responsible if it authorises and risks nothing if it prohibits; a court that hears only itself, that proceeds without contradiction and rules without fear of appeal on unknown grounds, where experience would be the only appropriate procedure and the public the only competent judge.” The consequence of this choice, justified by serious arguments, was a limited commitment on the part of the public authorities. French patents were then granted “without government guarantee”, a decision made by Napoléon Bonaparte on 5 Vendémiaire Year 9 (27 September 1800), which was confirmed without qualification by the Law of 1844: “Patents shall be granted without prior examination, at the applicant’s own risk, and without guarantee, either as to reality, or as to the novelty or the merits...”
During the second half of the 19th century, a worldwide telegraph network was developed.
of the invention, or as to the truth or accuracy of the description.” Combining this with the fact that innovators could protect an improvement to existing patented inventions with a certificate of addition, described by Balzac in Les illusions perdues as the “curse” of inventors, it is clear how the French system required so little effort on the part of the authorities and offered inventors only minimal protection in return.

Other countries adopted prior examination, which was most successfully implemented by the German Patent Office (Patentamt). In the process of unification, the legislative framework applicable to the entire empire was laid down in the Law of 1 July 1877. Germany had drawn conclusions both from the experience of other countries and from its own initial industrial success. Whilst Prussia had proved very tolerant of its enterprises’ behaviour towards foreign innovation when it had hardly any technology to protect, Germany established a far more rigorous system when the alliance between university laboratories and highly innovative new enterprises began developing products and processes likely to open up major markets for the country. This was particularly the case in the field of organic chemistry, where enterprises had been able to file as well as exploit patents collectively. German law imposed an obligation on applicants to allow other important manufacturers to use their inventions for a fee. This compulsory licence gave more flexibility to a system that was increasingly strict about the granting of patents. It was based on the notion of inventive level and used increasingly extensive documentation, making German patents a genuine international reference as from the early 20th century.

On the eve of the First World War, the Patentamt had more than 2,000 employees, including 500 examiners, and it was making a profit from the fees paid by applicants. Other countries, such as Britain, Japan and the United States, had also adopted the principle of prior examination, albeit with significant differences. The United States stood out radically by adopting the first-to-file principle, ultimately came round to the first-to-file principle.

Thus the existence of patent legislation, and the protection it offered to inventors, was by no means evidence that a natural right was uniformly recognised; it was merely a socially constructed reality. The form that this reality took depended on the economic situation, on the rate of technological innovation and on the prevailing doctrine or ideology. However, beyond this diversity, the central role of the state was upheld everywhere. The various political systems converged in recognising, in varying degrees, the need to create a public protective framework for innovation. On this basis, the foundations for international arrangements were subsequently laid. Economic growth and expanding trade meant that changes would have to be made if the different systems were at least to co-exist, if not converge, and open up to one another.

A state-controlled international system

In the second half of the 19th century, the heterogeneity and limited compatibility of industrial property systems, which had been acceptable in a world where international trade was still rare, began to prove harmful. Policies lowering customs tariffs were introduced between the late 1840s and the late 1870s, promoting a more liberal development of international trade. Britain was a driving force: the bilateral treaties it signed created new opportunities for the country’s industry, whilst the free trade agreement signed in 1860 with the France of Napoleon III was a crucial turning point.

A new era seemed to be dawning, but it would not be immune from setbacks. Nevertheless, until 1914 intra-European trade enjoyed a degree of freedom and expansion not to be seen again until the creation of the Common Market. Having been torn apart by wars, from the 1870s Europe tried to establish a delicate equilibrium that would allow trade to develop: “The development of trade brought about increased interpenetration and interdependence among countries... There was globalisation, increasing market integration, within Europe and throughout the world.”

New means of transport and communication catalysed this trend, driving it and fueling its development, bringing with it many other additional types of flow – information, capital, goods, people, etc. The development of the railway and merchant shipping due to the advent of steam and steel only made sense with telegraph networks to help manage them and allow merchants to place orders at prices quickly and easily negotiated remotely. The colonial expansion of Britain and the other European powers in the age of new imperialism added to the extent of globalisation: interaction between distant countries became increasingly pronounced, extending to ever more areas of social life. As a new development, this process was subject to international governance. Sector by sector, international organisations based on common values were established to regulate globalisation: the International Telegraph Union (1865), the Universal Postal Union (1874) and the International Bureau of Weights and Measures (1875). It is important to point out that, in these various cases, in contrast to the liberal ideology limiting the role of the state to specific sovereign domains, the areas concerned were clearly linked to national interest. The liberal approach of conflating national domains, based on the free and unrestricted use of known technology, was not adopted. The role of the state there fore proved to be crucial in bringing areas of innovation together, or at least providing for coexistence and communication. Thus the movement was overseen by the political authorities where efficiency required cross-border
rules and procedures to be established. The years around 1870 were a crucial period for patents. Granting patents, like minting money, was a matter of sovereignty, and international negotiations in this area, beyond unavoidable issues of doctrine and of practices specific to each field, would involve national policy at the highest level.

Scientific journals developed a very international readership, and large firms set up establishments in a growing number of different countries. Industrial property had to be able to meet the new requirements of this first globalisation. The disparities, the bullying and the injustices had become "absolutely intolerable since the customs barriers were lowered to such an extent and the distance between the various production sites was so greatly reduced," a German observer exclaimed indignantly. For entrepreneurs launching their patented products on the international market, protecting their inventions simultaneously in several countries was essential. They refused to allow their innovations to be copied or even challenged by local products infringing their rights. More generally, whatever the economic situation, patents are crucial in developing a real commercial strategy. During periods of growth, they provide the right conditions for exports and for creating foreign subsidiaries. In more difficult times (in the last quarter of the 19th century, the economy contracted with customs tariffs increasing), they are assets that allow their proprietors to negotiate and position themselves within a cartel. But this internationalisation of patent law seems nonetheless to have been extremely difficult, despite having been acknowledged to be vital by many of those concerned.

The end of discrimination between nationals and foreigners was an essential condition. In the United States, the Law of 1836 removed any such distinction, other than in the level of the payable fees, which were ten times higher for foreigners, and even higher for the British. This difference in treatment was abolished in 1866, subject to reciprocal arrangements. Under the German Law of 1877 the national system also applied to foreigners, except that those not residing within the Empire had to appoint a representative there. "At the time of the preparatory conferences for the Paris Convention, the principle of national treatment for foreigners was already practically the norm." The patent of importation evolved to cover only inventions not patented abroad. A so-called "patent of extension" also appeared, notably under the French Law of 1844, which specifically provided for the grant of a patent to any inventor whose invention was patented abroad in another country was granted a period in which to file a patent application in France. This resolved the problem of the invalidity of patents granted for inventions already described or published at the filing date, due to having been patented abroad. In Belgium (1854), Italy (1864) and later Spain (1878), a special system of novelty was established, applying to inventions already patented abroad. The United States had long been the most advanced country in this respect, having introduced a six-month right of priority in 1836. Finally, the French Law of 1844 and the Belgian Law of 1854 abolished the ban on filing abroad after filing at home, not out of liberalism, but because otherwise applicants tended to file first in countries without such a ban.

By favouring the comparison of procedures and fruitful dialogue, whilst also increasing the fear of copying, universal exhibitions began, in 1851, to stimulate reflection on the idea of harmonising rules. Inventions were poorly protected and were quickly copied, due to the difficulty of filing abroad, which was impossible once an invention had been made public, thus destroying novelty. Complaints from exhibitors
The negotiations leading to the 1860 Cobden-Ch Felman Anglo-French Free trade agreement.

The “Buch von der Weltpost” (book of world post), a richly illustrated work published in 1884, Cover illustration by Ludwig Burger (1825-1884).

The General Postal Union, created in Berne in 1874, aimed to harmonise and standardise international postal relations, its members forming, in the words of Article 1 of its founding treaty, “a single postal territory.”

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mine their own patent legislation. The most important development was Union priority right, according to which, having filed a patent application in one of the Union member countries, an inventor had a period of, initially, six months to file an application in one or more of the other member countries for the same invention. An international bureau of the Union would be established in Berne, Switzerland, with French as the official language, and all members would undertake to set up an industrial property service. A diplomatic conference was held in Paris in March 1883 to create this Union. Belgium, Brazil, France, Guatemala, Italy, Romania, El Salvador, Serbia and Switzerland, all of which fully approved the draft, agreed to attend. An expert committee was charged with resolving the problems that remained with various other countries such as the Netherlands and Portugal. The text discussed was essentially based on the 1880 draft. The process was a success and, on 20 March 1883 at the Quai d’Orsay, eleven countries signed the Convention, soon to become known as the Paris Convention, founding the International Union for the Protection of Industrial Property. The Union was open to any country wishing to join.

However, achieving this longstanding ambition did provoke a reaction in some quarters. In France, the fact that countries without a patent system were signatories caused a controversy: the Union itself would be protecting infringements by these countries’ manufacturers. For the Swiss in particular (the leading applicants for patents abroad), the international bureau in Berne seemed a veritable hotbed of infringement. In France, the fact that countries without a patent system were signatories caused a controversy: the Union itself would be protecting infringements by these countries’ manufacturers. For the Swiss in particular (the leading applicants for patents abroad), the international bureau in Berne seemed a veritable hotbed of infringement. Against the background of sluggish economic activity, the fear of seeing national work disappear, battered by foreign competition, was considerable and, in some way, rekindled by the possible consequences of the Convention. However, the positive aspects prevailed. The Convention was quickly ratified and entered into force in 1884, with the US joining in 1883, Japan in 1895, Germany in 1903 (after the treaty revised in Brussels in 1900 had extended the priority period to twelve months) and Austria in 1909. In 1924, the Union comprised a total of 21 countries, with 17 more joining after the war.

The Paris Convention therefore seems to be the result of a series of initiatives over the course of what has been dubbed the décennie uniériste (Union decade). Those in favour of patents considered the Convention to be a victory for their ideas, which had been recognised and enshrined in an international treaty. It was also a victory for exporters of technology, the main beneficiaries of an international agreement facilitating the extension of their monopolies to new territories.

In 1885, the International Association for the Protection of Intellectual Property (AIPPI) was born, with the aim of unifying existing legislation. Its first congress was held in October 1897 in Vienna and Budapest. Its creation highlights just how quickly those directly involved in the intellectual property world were thinking beyond the framework laid down by the Paris Union. Many lawyers shared the view that the logic of the law required patent applications to be processed uniformly, because “due to their technical and intangible nature, inventions have an international dimension and cannot be tied to a specific territory or culture.” In this form of discourse, harmonisation and unification seemed to be the natural direction—an end in itself. For patent attorneys and the companies they served, the problem was of a more pragmatic nature, arising from the difficulty of initiating as many procedures, paying as many fees and being subject to as many different jurisdictions as there were countries in which the applicant wished to protect his invention. This was the consequence of the territoriality principle, under which patents only had any value in the territory of the state in which they were granted. Similarly, it was impossible to bring infringement proceedings in a country in which the invention had not been patented.

The International Association for the Protection of Intellectual Property (AIPPI) has the aim of unifying existing legislation. Its first congress was held in October 1897 in Vienna and Budapest. Its creation highlights just how quickly those directly involved in the
Economic sphere had taken charge of debate on the internationalisation of patents. The Paris Convention had encouraged an increase in the filing of patent applications abroad. This only further exacerbated the ongoing problems, both for the offices and for the main applicants. Carrying out prior examinations simultaneously in various countries seemed a waste of both time and money. Keeping up with all this literature became increasingly complicated. In 1909, du Bois-Reymond, a patent agent from Berlin, recommended establishing a world patent office to grant a Weltpatent protecting its proprietor in all industrialised countries. However, being aware of the extremely ambitious nature of such a goal, he put forward more modest and realistic proposals, such as mutual patent recognition among countries with similar legislation, such as Germany and Austria-Hungary. As an indication of how much thought was being given to the matter, another international patent project proposed by the Frenchman Claude Couhin was approved by the Congress of the International Associations of Inventors and Industrial Artists.

During the First World War, and then in the process of international reconstruction following the peace treaties, governments gave serious thought to the issue of industrial property. The Central Powers worked on joint projects at conferences arranged in Berlin, Vienna and Budapest by Maximilian Mintz and Albert Osterrieth. Similar initiatives had been taken by the other side. Whilst the project of the Central Powers perished with their defeat, France went on to organise an inter-allied conference among the victors. Germany was not invited and for good reason: one of the objectives was to compete outright with the quality of German patents, which was expressly viewed as an asset in terms of power. The realignment of international relations around the League of Nations provided a new framework for this project. It was under the League’s authority that, on 15 November 1920, 19 states signed the agreement establishing a central office in Brussels responsible for the international registration of applications and for partial examination of novelty. Whilst optional for countries with a registration-only system, the latter was required for those countries with an examination-based system. The criteria for patentability and the decision on the validity of international patents were to remain within the jurisdiction of each member country. However, the agreement never entered into force, particularly due to the non-participation of the United Kingdom, although eight countries did ratify it. Britain preferred to try to create a patent office for the Empire, but this was abandoned.

These setbacks killed off reform for the next decade. But the 1920s saw a marked revival of international dialogue and, by the end of the decade, Franco-German relations had returned to normal. Europeanist thinking enjoyed fresh impetus. Thus in September 1929 Aristide Briand, the French Minister of Foreign Affairs and President of the Council, suggested from the platform of the League of Nations that Europeans should be united by “a sort of federal tie.” A number of projects of various origins, bringing together people from the private sector, the diplomatic service and government authorities, were developed on a technical level to achieve this goal—from European stamps and motorways to agreements on agriculture. And industrial property was not forgotten. Jan Alingh Prins, the Director of the Netherlands Patent Office, and the Italian engineer Franco Bandini each proposed similar plans in 1931 and 1932 respectively. The former’s proposal involved centralising only those elements that were wholly common to all procedures, i.e. the prior art search comparing the invention to the state of the art. The latter proposed establishing an international bureau in Berne, to examine the novelty of a patent according to the standards in force in the various countries in which the applicant wished to patent his invention. But these plans, like all the others, came up against the world economic crisis, which began in 1929 in the United States, spreading increasingly to Europe. Countries were tempted to turn inwards. The rise of totalitarian regimes, the great depression of the 1930s and the Second World War temporarily put an end to this renewed world vision for patents.
Chapter 2

Patents and European integration

The Hague, where the agreement setting up the International Patent Institute (IPI) was signed in 1945.
Between 1940 and 1944, Germany had tried to lay the foundations of a German-dominated confederation by focusing projects freely discussed around the end of the 1920s, such as the creation of a European Postal Union (which was indeed established in Vienna in 1942) with von Knieriem, Redies, Wiegand and Lindenmaier posing the creation of a European patent office and a European patent court and the unification of substantive law.

So in 1945 the Allies were primarily intent on preventing a return of German belligerence. The debate on intellectual property (IP) was affected by these tensions, and was also linked to the desire to build a united Europe that would guarantee peace. A conciliatory spirit would prevail, and international co-operation on intellectual property would again converge with the European project, though even in a peaceful context national concerns would certainly not disappear. Like all processes related to European integration, patenting has been part of a cyclical process, driven by a dialectical relationship between European aspirations and national strategies.

The creation of the International Patent Institute

The end of the war was not a time for reconciliation, with the discovery of extermination camps making the Nazi era even more abject in the eyes of the world. The United States were the most determined to destroy any capacity the Germans might have had to one day resume combat. The Secretary of State, Henry Morgenthau, came up with the policy of deindustrialising Germany, planning to dismantle all heavy German industry and turn Germany back into a primarily pastoral and agricultural region. This plan was presented by Roosevelt and was initially accepted by Churchill at the Quebec Conference in September 1944, despite Britain’s great reluctance. It was then abandoned as tensions with the Soviet Union altered priorities, encouraging the Allies to strengthen Germany once under their control, rather than trying to keep it in sterile submission.

Britain was anxious not to repeat the errors made at the time of the Treaty of Versailles and thus was in favour of a conciliatory policy towards Germany from very early on. France was more moderate than in 1918, but was careful to ensure that long-term advantages were secured to counterbalance Germany’s power.

In the patents field, France, whilst refusing to be part of the German initiative in 1942, had begun work on reforming its national legislation. Given the advantage that Germany in particular derived from this system, the project involving reforming the law in force since 1849 to introduce a prior examination in 1947 was, in Henri Longchambon’s later words, that a patent granted after examination “is immediately considered as valid by whoever acquires a licence to use it”, whereas, without an extensive examination of novelty, “the owner must undertake this examination himself or have it done for him by specialists, if he does not wish to run the risk of a possible lawsuit. Matter to be patented thus tends to gravitate towards countries giving the guarantee of a serious examination and by-passing others, bringing to the former an advance in technical progress.”

In a continuation of this philosophy, which had fallen by the wayside during the war, in the immediate post-war period the co-operation between France, the Belgium-Luxembourg customs union and the Netherlands led to the creation of an International Patent Institute (IPI). The tripartite Council for Economic Co-operation set up by these countries created several technical committees, including a patent and trade mark committee which prepared the agreement signed in The Hague in late spring of 1947. This agreement, which drew heavily on the Alingh Prins plan proposed about fifteen years earlier, provided for an International Patents Bureau to be set up in the Dutch regional capital. This town was chosen due to the fact that the Netherlands was the only one of the four partners to have a national examining service. The expertise and documentation possessed by the Netherlands Patent Office, the Octrooinond, were invaluable. The system provided France, Belgium and Luxembourg with expertise in examination which would otherwise have been expensive and difficult to acquire. The advantage of this for the Netherlands was that it was able to share the rising costs, as well as giving The Hague international status in the field. The special feature of this limited union was that “it did not involve for the adhering countries any actual economies, but simply avoided future expenses which appear
IIB staff in front of the management building, 97 Nieuwe Parklaan, The Hague, in October 1959.
as inevitable consequences of present trends of evolution. Thus an opportunity for a new beginning presented itself, at a moment when Germany, having been defeated and now occupied, was no longer completely in control of its own destiny.

The Bureau officially began operations two years later in July 1949 upon receipt of the last instrument of ratification of the High Contracting Parties. Each member state appointed a representative to the Administrative Council, which voted on a majority basis. The Council, which was chaired by the Belgian Joseph Hamels, decided to rename the organisation to avoid any confusion with the International Bureau for the Protection of Industrial Property in Berne. It finally decided on “Institute”. Its main task was to give reasoned opinions on the novelty of inventions, regardless of whether they formed the subject of a patent application, to governments and, in exceptional cases, to private persons (whether individuals or legal entities) seeking clarification.

This opinion would be based in particular on publications likely to constitute a total or partial obstacle to the patentability of the invention concerned. One article made it possible to subsequently extend fields of competence, which could be seen as a sign of optimism, or alternatively as an implicit indication of a lack of ambition, the IIB being restricted to prior art searches. Under another article, the agreement was open to accession by all member states of the Paris Union. During this period, France did not share the desire of the United States and Great Britain to re-establish the German Patent Office, as it wished to give the IIB a sufficient period in which to develop without any great competition from the Germans.

The agreement did not set out the practical arrangements for the Institute’s organisation. It was the Administrative Council’s responsibility to structure the IIB and lay down the rules governing its operation, particularly concerning co-operation with the Netherlands Patent Office. The IIB could not take over the latter, since the Institute was limited to prior art searches. As to the rest of the procedure and the Octrooiraad’s jurisdictional role at national level, plans for a partial transfer of search staff came up against the problem of pay inequality: employees transferred to the Institute would suddenly have received better pay, which seemed unacceptable. A year later, in May 1950, the IIB and the Netherlands government signed an agreement providing for transitional arrangements. The Octrooiraad, continuing as a national office, was to process applications received by the Institute whilst training the latter’s technical staff for a period of six months. The IIB was reluctant to compile its own documentation.

It was to have the right to use that of the Octrooiraad, which would remain independent. The Netherlands government seemed willing to change the situation in this respect, on the express condition that the IIB remained in the Netherlands. It supported the enlargement of the Octrooiraad so as to adequately accommodate the Institute. Complex financial arrangements ensured remuneration for reciprocal services. With regard to the agreement, a note at the time concluded: “It need hardly be pointed out that it realises in no degree the final intentions of the promoters of the agreement and is concerned above all with the rapid establishment of the working of the Office.”

Relatively few applications were received initially, as not all the signatory states had passed the necessary national legislation. It was not until 1951 that France and Belgium authorised the collection of a fee charged to applicants to cover transmission and processing costs. Opinions given to countries without prior examination were for information only, as otherwise they risked encroaching on judicial prerogatives. In January 1955, the Institute employed 28 technical staff (managed by Mr Mathon), almost half of them (12) being French, plus seven from Luxembourg, five from Belgium, two
from the Netherlands and two from Italy. At the time, this was a third of the number of Dutch examiners. The staff regulations were the same as those for similar international organisations, laying down obligations, immunities and privileges, and providing for the confidentiality of administrative and technical operations. Such were the modest beginnings of the IIB. The experience highlights the difficulty in developing staffing and documentation capacity. It also reveals the importance of financial issues and premises. But “despite the difficulties and slow progress, it has at least shown, for the first time, that such hopes were not unrealistic.”

Thus, at the time of its creation, the IIB was a somewhat ambiguous institution, being both a vehicle for influence, or even confrontation, and a potential source of European convergence or even union. It was designed in part to counterbalance German power, but without the initiating states being provided with the necessary resources. Hopes of one day achieving this goal were still a long way off. But it was also a sort of prototype for a future European office – part of a new Europe of peace – and talks logically tended to emphasise this positive, peacefull aspect.

International prospects and European plans

In the 1950s, the IIB grew from four member states to five (Turkey, 1955) and then to six (Monaco, 1956), followed by just three further accessions over the next twenty years – but these were significant: Switzerland had its searches in the field of clocks and watches and textile fibres carried out as from 1960, with the United Kingdom and Italy joining in 1965 and 1974 respectively.

In 1960, the Institute had 80 examiners and its results were satisfactory. It was still small-scale, but team spirit grew stronger every year. “I joined the IIB in May 1965,” an examiner recollected many years later. “I remember my first day very clearly. After the initial formalities, I was shown to my office on the fourth floor of the Willem Witsenplein building. There were two of us, both examiners, in the same little room, sitting opposite one another, each behind small wooden desks pushed up against each other, [with] … difficult cases to be identified using long coloured strips of paper … It was a time of meticulous, detailed work … In today’s terms, the IIB then was like a family business. At that time, we also had a free rein … Do you remember when you used to have to phone a family system operator to find out the members of a patent family? He would dictate them to us over the phone! Or, going back even further, the time when our searches were conducted mechanically using punched cards? The card sorters in our little room made such a noise that we had to cover the walls and ceiling with egg boxes to absorb the noise.”

However, the IIB’s political status was more important than its operational reality. For the German patent lawyer Kurt Haertel, who at that time was considering the founding of a European Office for the six members of the recently established European Economic Community (EEC), it was easy to consider conferring upon the IIB all the functions of a European patent service, thus including examination for patentability. However, there were serious practical and legal objections. Only four IIB members were also members of the EEC. Would the others agree to this change in their Institute’s role? And, of the six EEC members, would those not in the IIB (the Federal Republic of Germany and Italy) agree to transfer certain sovereign rights to an organisation comprising countries other than their fellow EEC members? That seemed doubtful to Haertel, who was well placed to answer his own question. From a practical point of view, if the same examiner and the same authority performed two different tasks (one for all the signatories of the IIB and the other for the six EEC members), how would the contributions of the various states be fixed? In any case, this would be a paradigm shift for the IIB, requiring a huge recruitment campaign to deal with its new functions.

Thus Haertel came to propose the solution that would prevail ten years later, i.e. to have prior art searches for European patent applications carried out in full or in part by the IIB, provided that prior art searching and novelty examination were performed separately. A treaty would set out the nature of relations between the IIB and the other European communities, the two organisations remaining independent of one another.

An agreement was signed in The Hague on 16 February 1961 to extend the Institute’s competence, probably in connection with the discussions under way at Community level. From then on, subject to the Administrative Council’s prior consent, it could give its opinion on matters other than the state of the art. Later, during international negotiations on the Patent Cooperation Treaty (PCT), France and the Netherlands would seek to make the IIB the sole international authority for prior art searches. This claim would subsequently be set out in Article 16 PCT. But that Treaty would also recognise the competence of some major national offices to act as international authorities. From then on, the IIB could no longer hope to have a monopoly in this respect. It was unlikely that industries in the major patenting countries would voluntarily go through the Institute.

This setback made the idea of integrating the IIB into a limited European system both possible and attractive. From then...
The IBV Rijswijk building, an austere and masterful concrete complex, reflects the aesthetics and principles of the architectural style known as Brutalism.
on, the IIB no longer had to remain open to accession by any country, which was essential if it was going to have a monopoly. There was a risk of fragmentation of Europe’s industrial property scene if it did not join the European system—a paradoxical outcome to the efforts in this part of the world to create a centralised international system. The likely consequence was that the Institute would become permanently marginalised. Caught between its international aspirations and the risk of diminishing significance, in the early 1970s the IIB was forced to reposition itself. These tensions could be seen where the IIB’s operations began to benefit from wider developments in the patent world. Its business increased spectacularly in the boom years between 1970 and 1974, due particularly to the French reform of 1968. Its staff doubled from 300 to 700 to enable it to handle the growing number of applications, which increased from 15 000 to 41 500 over the same period, evidence of a significant improvement in search productivity. The structure was modernised, and moving into the Rijswijk building considerably improved the working conditions and relations among staff as the IIB increased in size. Its employees, having been spread out until that point, were brought together at a single dedicated site. Without doubt, this period created a strong culture based on expatriation, diplomatic status and a certain rebellious spirit, ready if need be to take matters into their own hands. This combination of self-management and team spirit was fashionable at the time. On a small scale, the canteen was an arena that bore witness to this perception, in which very real issues and a symbolic dimension were combined. When the IIB moved into the Rijswijk building, catering had been entrusted to a specialist multinational. “At the beginning, the majority were very happy with the food but, as is often the case, wonderful fairy tales must come to an end and, after several years, staff found that the quality had deteriorated considerably and prices had increased unjustifiably, triggering a revolt!” A boycott was organised. “Staff brought in their sandwiches and their lunch boxes – some even brought full meals.” After a while, the Amicale Committee took over, and in October 1976 opened the PUMA (Petite unité monétaire de l’Amicale) Steakhouse – an alternative restaurant operated by volunteers on the 25th floor. This period, later described as heroic, would come to an end on 31 March 1978 when the PUMA House closed. “A glorious, unforgettable and colourful period came to an end just as we were about to get our Michelin star,” as one of the managers said several years later. This anecdote reveals just one aspect of the site’s complex culture, which would persist, anchored in the accumulation and adaptation of expertise in Europe. By the mid-seventies, the IIB was a mature institution that had established itself on the European patent scene and was staffed by competent and highly dedicated personnel committed to the institution they served. The prospect of its playing a role in the future of a Europe whose priorities increasingly included patents was therefore not unrealistic. In just a quarter of a century of existence in a field where the national offices had had a far longer history, the IIB had become a player to be reckoned with. One of the solutions for moving forward involved the accession of new member states, especially examining countries. This was expected to stimulate business, thus in turn creating new needs and opening the way to a major extension of the IIB’s competence.

After many years in ill-suited offices dotted about the city, the IIB had decided to bring its employees together under one roof. Construction on a project by the architect R. D. Bleeker began in June 1969. On 20 January 1972, the Mayor of Rijswijk raised the flag on the tower’s pinnacle at over 86 metres. Staff very quickly settled into their new working environment.

From the Longchambon report to the Council of Europe’s Committee of Experts

“It was on 6 September 1949 that the French senator Longchambon put before the Consultative Assembly of the Council of Europe a plan for a European Patent Office. This is how Kurt Haertel emphasised how the French senator’s initiative had given crucial impetus to the European patent project: it triggered a series of reflections, discussions and negotiations which would lead by tortuous paths to the signing of the Munich Convention nearly a quarter of a century later. Longchambon, as he himself claimed, was obviously building on previous work, as is clear from the speed with which the Council of Europe put European patents on the agenda—barely three days after the opening of the Consultative Assembly’s first session. With 700 members...
from the parliaments of the ten member states, these early meetings were packed and enthusiastic. Longchambon, a member of the Committee on Economic Questions entrusted with the matter, was responsible for presenting a primarily realistic draft. It was prepared quickly, comprising a draft proposal for a convention based on the principle of harmonising rather than unifying national legislation. It had two main aims: “to give to every citizen of one of the Member States of the Council of Europe, who has a patent application, the means of obtaining through a single procedure a patent valid in all Member States as regards its form and its newness; see to it that this means should give to the inventor and possible user the greatest possible degree of certainty as to the newness of the invention.” It thus aimed to centralise an optional but “highly technical examination service”, the benchmark here being the US system, and to do so without encroaching upon national sovereignty and legislation.

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The legislation. His report did not mention the IIB and barely mentioned Germany, which, to be fair, did not become a member of the Council of Europe until 1950. Finally, Longchambon thought the European Office, attached to the Council of Europe, might become a consultative council working to slowly unify national legislations in which examination was practised. Entitlement to appeal would be it would suffice if the assessment criteria were stricter than in the strictest national legislations in which examination was practised. Entitlement to appeal would be available to the member states’ offices in order to defend the interests of their nationals. Finally, Longchambon thought the European Office, attached to the Council of Europe, might become a consultative council working to slowly unify national legislation. His report did not mention the IIB and barely mentioned Germany, which, to be fair, did not become a member of the Council of Europe until 1950. But, as for the IIB, why was it not mentioned? Compared with the Institute, Longchambon’s plan certainly extended and strengthened co-operation. It extended the potential group of member states, in particular to include the United Kingdom and the Scandinavian countries. It strengthened co-operation, by advocating an examination of novelty that went well beyond a mere prior art search and by conferring on the organisation a power of coercion. Was the French senator disregarding the IIB, or was he hoping to make it the focus of his project?

Having been discussed and approved by the Committee on Economic Questions and submitted to the Committee of Ministers in early September 1949, the text was given a rather cool reception by the national offices, which thought it was too soon to create a European Patent Office and objected to certain provisions. France objected to the opposition procedure, which drew on the British, Dutch and Scandinavian systems, considering it to be detrimental to the interests of small inventors, who would have to contend with multiple oppositions brought by economic powers. The British were decidedly opposed to the project on the grounds that “It would appear that unless and until there is a Federation of European States with a central legislature having power to adopt a patents law operative throughout the whole of the Federation, a European Patent Office in the full sense of that term is out of the question.” Instead they were in favour of extending the IIB. The Belgians and the Norwegians held similar views. However, the idea of harmonising legislation was retained, and the most important outcome of Longchambon’s initiative was that it got patents firmly onto the agenda of the Committee of Ministers, which decided to entrust the matter to a committee of experts.

This committee, made up of the heads of the national patent offices, met for the first time on 15 January 1951. Its membership shows how significant the committee’s establishment was for the European patent system, even though there was no real indication of this at the time. Reimer and Haertel were the representatives for Germany, De Haan and Van Benthem for the Netherlands, Finniss for France, Hermes for Belgium, Neergaard-Petersen and Holm for Denmark, Brunier for the Saar, Nicolaides-Bourbaki for Greece, Cleary for Ireland, Pennetta and Roscioni for Italy, Hoffmann for Luxembourg, Bourgrevink and Helgeland for Norway, Girling and Gilham for the United Kingdom, von Zweigbergk and Reiland for Sweden, Utkan for Turkey. Several options emerged during the early debates. The Belgian, Dutch, Luxembourg, Scandinavian and German experts, like the British, were in favour of extending the competence of the IIB. Having been seeking to standardise their legislation since 1948, France and Italy jointly proposed creating an international registry and mailing office. The committee, having invited Switzerland to join, decided to structure itself for future work into three sub-groups, on simplifying formalities, standardising novelty criteria and establishing a European Patent Office, “particularly within the framework of the International Patents Institute.” Guillaume Finniss, the head of the
French office, elected as Rapporteur-General, set as the “ultimate objective … the creation of a single European organism granting a single patent,” and was pleased to see how the committee was functioning as “a living organism with a team spirit and a method of working adapted to a common end”.

It was within this committee that, in 1951, a group of European countries, at the initiative of the French, Germans and Dutch, set themselves the desired objective of creating a single patent and office. Their work brought tangible progress so as to “accomplish European integration in a gradual progressive way by means of successive agreements with limited objectives.” The committee and the bureau set up to co-ordinate all the proceedings had a technical secretariat comprising several experts provided by their governments. In summer 1951, “it was unani-

mously decided that the principle of prior (even though optional) technical examination should be extended to all participating states.” Significant results were quickly achieved through questionsnaires, memoranda and numerous comparative law studies. Two conventions were signed in Paris in one year. As technical measures, they did not involve any transfer of sovereignty. The first convention, of 11 December 1953, concerned harmonisation of the formalities required for patent applications. The second, of 19 December 1954, provided for establishing an international patent classification, a key to all documentary research.

As the issues relating to the actual organisation of the European system became clear, the discussions lengthened and reaching a consensus became increasingly difficult. The idea of mutual recognition of national patents was suggested. Eduard Reimer, on behalf of Germany, suggested going even further and creating a common Court of Justice to decide on revocation and infringement disputes, supplementing the principle of extending national patents. Thus no European authority other than this optional court would be created. However, this required the precondition that substantive law be at least partially unified. Amended three times between 1953 and 1955, this plan was a serious option, although it was countered by another system proposed by Cornelis Johannes de Haan on behalf of the Netherlands. The latter, being in favour of a development based on the IIB, as the “seed around which crystallisation of the future European office is foreseen”—recommended that all member states of the Council of Europe give their support, so that the IIB could be converted into a European office in every sense. He felt the German proposal was too sensitive with respect to sovereignty, as it raised the issue of jurisdiction. He also thought that the proposed system would encourage applicants to turn to the more liberal offices. He felt priority should be given to the pre-grant phase, rather than the post-grant phase, so that a common Office could grant European patents according to uniform criteria stricter than the strictest national criteria. The European patent would have the force of a national patent in all countries, but would have to be interpreted and revoked according to national rules. According to De Haan, this system would also have the advantage of dealing with the backlog and recruitment problems faced by national preliminary examination services.

But these arguments failed to win the support of Germany, which considered it, despite the lack of ambition, to be an expensive project that would encourage applicants to approach national offices for fear that the European office would be too rigorous. There were two contending proposals, the Dutch one defending the IIB versus the German one favouring convergence through a single jurisdiction, and in the circumstances it was difficult to achieve consensus among the Committee members. Both were unacceptable for Gilham, the British representative, and unachieve-

able for von Zweigbergk. They had reached a deadlock. “In a field where all the problems are tangled together, where the factors for consideration, alternately causes and effects, mutually influence one another”, noted Finniss, clearly but somewhat glumly, “no programme could escape the criticisms of insufficiency or even of contra-

dictoriness.” In this climate, the Committee decided towards the end of 1955 to review its working methods. Five rapporteurs were appointed to deal with each of the problem points. Their reports were to be submitted to the Rapporteur-General, who would present a summary to the enlarged bureau (including Swiss and Spanish observers, Mr Bolla and Mr Juristo Valverde). But over time, the intensity of the work decreased. The conventions devised within the Committee of Experts nonetheless laid the legal foundations for the European patent, and the unfinished projects allowed deliberations to make progress and ideas to mature.
Signing of the Treaties of Rome by Belgium, France, Germany, Italy, Luxembourg and the Netherlands in a ceremony on the Capitol on 25 March 1957. The first treaty established a European Economic Community (EEC), the second a European Atomic Energy Community (EURATOM). They both entered into force on 1 January 1958.
At the same time, a united Europe was taking on a new form. The Schuman plan and the creation of the European Coal and Steel Community (ECSC) in 1951 had laid the foundations of a Little Europe anxious to finally achieve European ambitions. This process, which had been mismanaged, particularly with the failure of the European Defence Community, was given fresh impetus in 1955, resulting in the signature of the Treaties of Rome of March 1957. The six members of the ECSC formed the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). The sectoral approach continued, as did this new way of organising ongoing debate between member states and independent authorities invested with power (Commissions, Court of Justice, Parliament).

It was in this new Community context that the European patent project found new avenues. The treaty establishing the EEC aimed to create a common market in which people, capital and goods could move freely. The diversity of national industrial property laws was perceived from this perspective as a possible technical, non-tariff barrier to trade. It is true to say that countries had used patents, from their very inception, as a weapon of economic warfare. From the Commission’s point of view, the territoriality of industrial property law constituted a barrier to the free movement of goods. Different individuals could enjoy the same property rights in different countries, which could result in imports being prohibited. Furthermore, certain inventions were the subject of property rights in some countries but not in others, with competition being restricted in one country, but free in another. This could also discourage new products from being launched, thus hindering the optimum distribution of economic activities. The German Commissioner for Competition, Hans von der Groeben, took the initiative of defusing the weapon, or rather reconfiguring it, for the European integration project. On 19 November 1959, the Secretaries of State entrusted the matter to three working groups – one on patents, another on trade marks and the third on designs and models – co-ordinated by a committee led by Guillaume Finniss. The patents group, chaired by Kurt Haertel, decided to increase its impact by increasing the number of expert delegates per member state from two to three and to bring in an ECSC representative to join the representatives from the EEC and Euratom Commissions. Within the group, Kurt Haertel mobilised virtually all the experts co-operating in these matters since the early 1950s. Two-week meetings were organised every quarter. The Studie über die grundsätzlichen Probleme der Schaffung eines europäischen Patents, das neben die nationalen Patente tritt has no fewer than 150 pages. This text, clearly marked by Kurt Haertel’s inspiration, was to form the cornerstone of debate, continuing until the present decade, on the two principal options for the European patent: a system comprising a bundle of national patents (as previously outlined by De Haan) and a system involving integration, with the creation of a single patent. However, these issues went well beyond the scope of the Community Treaties in force. Changes to patent grant procedures affected national sovereignty and would therefore be subject to a special agreement that would have to be signed by governments. Hence, in December 1960, the governments of the EEC Six commissioned a draft convention on European patent law. The road map was clear: find a way to create, within the Common Market, a wholly European patent law under which a European Patent Office could grant Community patents that were autonomous, i.e. in principle independent of national law, and unitary, i.e. territorially indivisible.
Chapter 2

The Strasbourg Convention was signed on 27 November 1963 as a result of mutual concessions. It dealt with the unification of extent of protection was to be determined by the terms of the definitively prohibited the grant of patents of importation. The which had previously been a matter for jurisprudence. It also these points the convention goes as far as codifying elements skilled in the art (Article 56 EPC), and industrial applicability. On to be patentable: absolute (general and unlimited) novelty, inven-
tion of 1962, setting out three common conditions for an invention essentially adopts the provisions of the draft Community conven-
tion into the definition of patentability and the extent of protection. It approximations of European laws in certain fundamental points –
the creation of a supranational authority granting a unitary and autonomous patents to be valid throughout the member states. It also allowed other countries to join. Its drafters alerted their governments. It was the basis for a new private international law requiring a thorough reading by the numerous public (Foreign Affairs, Justice, Finance) and private parties involved. Several articles of the draft included variants or reservations entered by one or more delegations. Encouraged by the progress made by the EEC’s working group, in the early sixties the Council of Europe’s Committee of Experts resumed its work on unifying substantive law. At the heart of the Committee, the experts of the six EEC members formed a central driving force. Based on a major synthesis prepared in particular by Ake von Zweigbergk on novelty and Herbert Kohne’s,” on technical progress and inventive step, the Strasbourg Convention was signed on 27 November 1963 as a result of mutual concessions. It dealt with the unification of certain points of substantive patent law and is the most significant of the three Council of Europe conventions. Whilst the first two are primarily concerned with procedures and classification, the Strasbourg Convention resulted, for the first time, in the approximation of European laws in certain fundamental points – the definition of patentability and the extent of protection. It essentially adopts the provisions of the draft Community convention of 1962, setting out three common conditions for an invention to be patentable: absolute (general and unlimited) novelty, inventive step, meaning that the solution is not obvious to a person skilled in the art (Article 56 EPC), and industrial applicability. On these points the convention goes as far as codifying elements which had previously been a matter for jurisprudence. It also definitively prohibited the grant of patents of importation. The extent of protection was to be determined by the terms of the unitary patent has been an avowed aim ever since the Longhams report of 1949. It is a single patent valid for all the countries of Europe, as opposed to a patent granted in a single procedure. The Community patent would be a unitary patent valid only in the countries of the European Community.

The House of Europe in Strasbourg, the initial seat of the Council of Europe from 1950 to 1979


The convention did not enter into force until 17 years later, once it had been ratified by eight countries.

At the same time, the EEC continued its work, with some of the same experts. A new version of the draft Community convention of 1962 was submitted in January 1965. This was significant progress, but was still marred by a sort of contradiction or at least duality in its aims. Should the new system focus on integrating the six EEC members, or should it open up to other states? In the former case, the Common Market would benefit immediately, but with so few states involved its development would be extremely fragile. Switzerland and the United Kingdom would be excluded from a process close to their hearts in which they had been involved from the outset. Opening up to other countries would resolve this issue of critical mass, but would weaken the project’s integrational momentum due to differences between countries. Caught in the middle, the working group showed great imagination, proposing not one solution, but two. The first solution consisted in giving associate status to non-members, which would recognise European patents but make them subject to national legislation. This system tended to make the associate states lower-ranking partners, unable to participate in subsequent revisions to the law, which remained the prerogative of the EEC Six. By turning the problem around, a second solution proving to be more acceptable to non-members emerged. It involved dividing the convention into two linked conventions. One, a broad convention, would provide for a European patent consisting of a bundle of national patents with different effects in each of the contracting states. This was in line with De Haan’s proposal ten years earlier. The other, restricted to EEC members, would confer a special, unitary and autonomous status on the European patent once granted. Combining the two, previously juxtaposed approaches was an elegant solution, but might prove tricky to implement in practice. On many levels, the issue of the United Kingdom was a key piece of the puzzle. The deteriorating relations between France and its partners on the matter of the UK’s candidature for the EEC made this all the more evident. France opposed British membership. This had a direct impact on the question of patents, with France’s partners preferring to suspend negotiations on this front until the issue of Britain’s candidacy was more fully resolved. “In

claims, interpreted in the light of the description. Denmark, Norway, Sweden, Finland and France quickly brought their new legislation into line with these provisions. The convention did not enter into force until 17 years later, once it had been ratified by eight countries.

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July 1965, however, the rapid progress made suddenly ground to a halt, partly owing to lack of agreement on whether the United Kingdom should be admitted. The Empty Chair Crisis brought progress to a halt in this and many other areas.

“World patent system in chaos”

So the situation in 1965 was paradoxical. Never before had the idea of a European patent system been taken so far, and never had it had so much chance of success. Its supporters had been working towards this for nearly 20 years, and now they had stable drafts likely to encourage a broad group of countries to join. The combined efforts of the Council of Europe and the EEC in this process had created a somewhat hectic pace, but nonetheless had ensured the extensive involvement of the countries of Europe through a pragmatic approach. The 1963 convention and the EEC draft of 1965, although not perfect, were tangible progress that could readily be drawn on to finally achieve success. Yet, in 1965, everything seemed frozen in deadlock, held hostage to far wider tensions.

This deadlock gradually gave way, between 1966 and 1970, to allow this potential to finally be realised. In truth, given the history of European integration, it is not surprising that external constraints played a decisive role in prompting Europeans to speed up their integration work. Within this process, the United States acted as a spur as usual, threatening a global solution imposed from outside on Europeans in a hostage to far wider tensions. The increasingly certain prospect of a comprehensive agreement being finalised was to remove the remaining prejudices concerning the need to make substantial progress towards a European agreement. Faced with a growing volume of applications, including an increasing proportion from abroad, the national offices at this time were under overwhelming pressure. The European offices and the USPTO were at the forefront, since international patent applications reflected an economy centred on the Euro-Atlantic area. Kurt Haertel described the national offices at this time were under overwhelming pressure. The European offices and the USPTO were at the forefront, since international patent applications reflected an economy centred on the Euro-Atlantic area. Kurt Haertel described the situation as an “international patent crisis”.

Clearly, the current rules of the Paris Union were completely inappropriate given the swamped offices. The one-year priority period was insufficient, and legal uncertainty on external markets was increasing. Furthermore, old problems persisted and despite revisions to the Paris Convention were becoming increasingly costly for applicants: diversity among filing formalities, requiring applications not only to be translated but also to be presented differently, and redundancy in search and examination procedures. “Industry wants lower fees, less time between filing and grant, more time for deciding whether to extend protection to other countries, and unified forms and formalities”, as a memo from the Federation of Belgian Industries summed up the situation.

During their work leading up to the Strasbourg Convention of 1965, the Council of Europe’s experts had devoted themselves to developing procedures for sharing searches. Under the chairmanship of Austria’s Richard Piensnicka, this process led to a draft “European Convention for Facilitating the Filing of Applications for Patents in respect of the same Invention in several States and the Examination thereof” (1961), known as the Vienna Plan. However, it was decided “to wait until the work begun at Brussels had produced a sufficiently developed text. It would then be possible to judge to what extent the two drafts could be reconciled.”

With the deadlocked negotiations in Brussels and American observers having been allowed to participate in Council of Europe debates since the early 1960s, it was the United States that relaunched the Vienna Plan, moving it into a broader framework. In June 1965, the National Association of Manufacturers organised a conference attended by representatives of the USPTO and the Department of State. The year after, the USPTO submitted a revision proposal to the United International Bureaux for the Protection of Intellectual Property (BIRPI). The Director of BIRPI was charged with urgently conducting a study on ways of limiting the duplication of work for applicants and offices, and returned to the idea of separating the examination phase from the grant procedure, the latter remaining a matter for national offices. The negotiations progressed rapidly. Contrary to what is generally written on the subject, the Americans were not the only ones pushing for an agreement. Following the meeting of representatives from the six main patenting countries (the Federal Republic
Chapter 3

From the technical to the political: the Intergovernmental Conference and the Diplomatic Conference

The World Intellectual Property Organization (WIPO) took over from BIRPI in 1970, and in 1974 became a specialized agency of the United Nations, charged with dealing with intellectual property issues recognised by UN member states.

The Patent Cooperation Treaty (PCT) was signed in June 1970, and entered into force in 1978. Its aim is to enable the same invention to be protected in multiple countries and to provide worldwide access to technological information. From the outset, WIPO and the EPO have played an essential part in implementing the PCT.

After a long period highly productive in initiatives and quality texts, development of the European patent system had stalled, just as an international system was emerging. The latter could not be achieved without the European states being involved in its development and governance; but the United States had established itself as the most influential power, taking the lead in an area in which Europe had been seeking to make progress for decades.

Thus three avenues – the world, Europe as a whole and the European Community – corresponding to three approaches that had been shaping the patent internationalisation process since the 1950s were open to the Europeans. None of them could be neglected, and in fact all of them were followed.
Snapshot of Europe's car industry in 1957: an aerial conveyor carries bodywork to the assembly lines.
Regaining impetus for a European patent system called for efforts at the highest level. The challenge was to reconcile the contrasting visions and experiences, and to bring together the different models that had emerged over decades of discussions and shifting alliances. Since the nineteenth century, the national intellectual property (IP) systems had built up administrations which inherently saw their future as being one of development – or at least survival – and not of extinction. Yet the prevailing sense of urgency and the energy of the visionaries, who saw a window of opportunity to implement at last the plans they had been devising since the aftermath of the war, were to mobilise those concerned to take effective action.

Movement needed in Europe

The headway made in the negotiations culminating in the Washington Convention had prompted the “Six” to review their positions. France in particular took note of the change in the international climate with regard to patents, and decided to relaunch the process that had been interrupted, largely through its own doing, since 1965. The country which for reasons not directly related to the war, were to mobilise those concerned to take effective action. French industry had made a considerable effort since the end of the 1950s to adapt to the new order created by the Treaty of Rome. At the behest of Georges Pompidou, Prime Minister and subsequently President, French companies had invested in research and had reconfigured with a view to becoming truly international players. German industry was held in particular awe, and the French patent system was increasingly perceived as a handicap. The system established by the Washington Convention was seen to be holding back industrial companies in the face of the direct competition. Which authority would examine their applications? How could they steel themselves to cope with the likely influx of foreign patents into their own market, knowing how difficult and costly it was to contest them? All of the French participants were conscious that this could damage their country’s standing, which ran counter to the ambitions of the time. It seemed too late and too expensive for France to consider setting up a national examination system. It could maintain its influence by building up the European infrastructure, and do this around the IIB as far as possible. Belgian industry was thinking along the same lines: “Only European co-operation will arm our industry to fend off our most fearsome competitors and allow us to put up a fair fight instead of playing a dubious game in which, no matter how good our products are, we – along with our European partners – stand to emerge as the losers.”

This explains the eagerness with which the French authorities proposed to the EEC members at the end of 1968 that the European patent question should be put back on the agenda. Meanwhile, a British expert remembers, they also kept a very close eye on the diplomatic conference scheduled to take place in Washington in spring 1970. At the Council of Ministers of the European Communities in January 1969, Michel Debré, the French Foreign Minister, proposed that two conventions should be negotiated: one open to as many states as possible that would set up a European patent grant procedure and a European Patent Office to grant a bundle of patents, and the other bringing Community partners together to work towards a unitary patent. As we have already seen, this was the solution Kurt Haertel’s team had come up with some years previously. It had also featured in another forum, the European Free Trade Association (EFTA), with the EFTA Council setting up a working party on the Europeanisation of industrial property law in May 1965, which had continued to explore the possibility of two linked levels of co-operation. With the Six and the

**Image:** In 1962, the PB1 station established the first satellite link between Europe and the US. Now listed as a 20th-century historic monument, its antenna and radome are preserved at the telecoms museum in Pleumeur-Bodou (France).

**Image:** Since its creation in 1960, the European Free Trade Association (EFTA) has operated in competition with the EEC. Initiated by the United Kingdom, it initially also involved Austria, Denmark, Norway, Portugal, Sweden and Switzerland. In the mid-1960s, with Community patent discussions stalling largely because of the empty chair crisis, EFTA tackled the issue and played a major part in giving it an outcome that was less integrated but involved more states.

**Image:** The EFTA members in 1965 were: Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom. Finland was an associate member.
The first meeting was held in May 1969. It was no longer a matter of experts working together on a small committee for and on behalf of an international organisation, but of carrying out an assignment set by governments. That assignment came with clear aims: the drafting of a European convention open to non-EEC member states yet not precluding the drafting, in the context of other processes, of a Community instrument that would create a more integrated European patent system for a Europe defined by the EEC borders. In response to those who advocated limiting the number of invitees, the Frenchman Boegner argued: “Inventors in industry in the Community have an interest in ensuring that inventions are protected in as many western European countries as possible.” The principle of extending as many invitations as possible was therefore adopted, while at the same time taking specific account of the past involvement of states in the different phases of the project. The choice of countries to invite and the status to grant to each did, however, raise questions which made this “technically straightforward” principle fairly difficult to apply politically. Each of the Six decided to participate on its own behalf, and it fell to the Committee of Permanent Representatives (COREPER) of the member states to decide which other countries to invite to join the debate. After discussion, it was agreed to invite the seven countries that had shown an interest in the prospects opened up by the Community texts published in 1962 (Austria, Denmark, Ireland, Norway, Sweden, Switzerland and the United Kingdom). Seven others would be informed and allowed to participate if they so wished. These were countries that had been involved in the work of the Council of Europe but not that of the EEC (Cyprus, Greece, Iceland, Monaco, Portugal, Spain and Turkey). That would bring together all of the countries that had participated as members or observers in the drafting of the Council of Europe’s 1963 convention. Notwithstanding the range of experience and “legitимacies”, it was decided that all countries would have the same status, being entitled to participate fully in the negotiations. Working in such a large group would inevitably be complicated, but was regarded as a risk worth taking.

The conference began on 21 May 1969. With Cyprus and Iceland not taking up their invitation, but Finland, Liechtenstein and Yugoslavia – the only country from the socialist bloc – having been added to the list originally adopted, there were 21 states around the negotiating table. The conference did, however, turn down Israel’s request to participate. The national delegations, now greater in number, were also larger than ever, having been expanded to include experts from the private sector, lawyers and other industry representatives.

Although this was the political pinnacle of European patent history, there was also a lot of legal input. Expertise in this area assured legitimacy and gave meaningful direction to the discussions. None of the highest-ranking government experts made any secret in retrospect of the political motivation behind their actions. Remaining guarded on the defence of the national interests they were supposed to be protecting, they took pride in the European spirit that prevailed. Of the dozens of experts involved, each made a contribution, but the collective effort is associated with three men in particular. Their special and unanimously recognised role would earn them the title of founding fathers of the EPO.

François Savignon, (1910–1999), (right), head of the French Patent Office (INPI) in 1968, when the national patent system was reformed. He was involved in drafting the Patent Cooperation Treaty in 1969, and along with Kurt Haefel (left), is regarded as one of the founding fathers of the European patent system.
Kurt Haertel and François Savignon, a German and a Frenchman, took centre stage. Born in the same year, 1910, it is not known when they first met. What is clear is that from then on, they kept in contact with each other until they died, within a few months of each other, in the year 2000. Theirs was a shared destiny.

Berlin-born Haertel was a member of the German delegation to the Council of Europe’s Committee of Experts from 1951, his commitment and his skills bringing him to the head of the group mandated by Hans von der Groeben and the ministers of the Six to come up with a Community patent by the start of the next decade. Nearly twenty years of negotiating in one of the most influential delegations made him the central figure among the senior civil servants in the European Community dealing with industrial property. And as a new decade dawned, he was elected conference chairman. Savignon’s involvement in European patent history began later. In his youth, he could conceivably have come face to face with Haertel, but armed with a gun. Both were nearly thirty when the Second World War broke out, the First having coloured their youth. In September 1939, they had just finished their respective law studies and were embarking on professional life. Both were incarcerated, with Haertel being taken prisoner by the British, the wounded Savignon being captured by the Germans. Post-war, they seem to have made Europe their life’s work, as did a considerable proportion of the intellectual elite, placing great hopes in the European project to build democracy and ensure peace for their countries and the entire continent. Their respective responsibilities would give them a chance to contribute directly to this ideal.

Haertel was appointed head of the IP protection office set up in Frankfurt under the umbrella of the legal services of the joint British-US occupation zone. In 1949 he became head of this office at the newly established Federal Ministry of Justice. Its task was an important one because it involved rebuilding the industrial property system in a physically divided and morally devastated country. From 1963 to 1975, he was President of the German Patent Office in Munich, where he set up a working party on the European project. Georges Vianès (see page 120), who visited him in 1975, “had expected to meet a figure of commanding presence, but found instead a warm, open, welcoming, tolerant man and a shrewd diplomat.” Vianès said of François Savignon, whom he succeeded as head of the French National Institute of Intellectual Property (INPI), that he “complemented Kurt Haertel splendidly. His natural modesty could not conceal his absolute belief in Europe and his relentless will to serve that cause. ... A painter, draughtsman, poet and fossil collector, he was a man who loved life.” After liberation, Savignon stayed on in Germany to help feed the thousands of displaced persons. He took up his role as the director of INPI at a time of less activity in terms of European co-operation yet marked by the 1968 reform of the Patent Convention.
French patent law, which had gone virtually unchanged since 1844. He also worked on the PCT, being elected deputy chairman of the drafting conference in 1969.

A third man who played a particularly key role was Johannes Bob (known as “Bob”) van Benthem (1921 – 2006), a Dutch contemporary and friend of Haertel who knew Bob van Benthem stress the role played by his life philosophy, marked by anthroposophy, in his commitment to Europe. He lived and breathed what he himself called a belief in “the need for an integrated Europe". For him, the actual construction of European unity was a real need, and the transcendence of national interests an obligation. Graduating in law at the University of Amsterdam in 1946, he joined the Octrooiraad and took part in all the European work from the early 1950s, working on the Longchambon and Reimer plans among others. Vice-President of the Octrooiraad from 1965 to 1968, it was as its President (1968 – 1977) that he took part in the Intergovernmental Conference and headed its Drafting Committee.

Working methods, organisation and contributors

Four working parties and one co-ordination committee were set up, each usually comprising six delegations. The first to meet was Working Party I, looking at the rules governing patentability, the grant procedure and the Protocol on Centralisation – the key issues. It was chaired by Kurt Haertel. This was followed, in 1970, by meetings of Working Parties II, III and IV on the responsibilities of the Administrative Council, the Protocol on Privileges and Immunities, questions concerning the Service Regulations and, lastly, the Convention’s financial provisions and the financing of the Office.

They proceeded paragraph by paragraph, article by article, creating overarching links between distant articles – the challenge in drafting a convention of this type. The work was co-ordinated by a committee and submitted at regular intervals to the intergovernmental conference, which met six times. On two key occasions – in 1970 and in April 1971 – the level of consensus reached and substantive questions remaining both permitted and demanded the submission of a preliminary draft to the conference. Each time a preliminary draft of a Community convention was submitted in parallel.

The preliminary drafts were the subject of intense discussion, the debate extending to the non-governmental international organisations representing the interested circles. It should be noted that the drafts were substantially amended as a result, taking the suggestions into account.

Finally, two years after it began and after a cumulative total of 43 weeks of meetings, the conference finalised a text which it submitted as a final draft to the governments in June 1972, together with a related collection of draft protocols and regulations, and three recommendations. The Community Patent Working Party followed suit in March 1973.

One of the protocols related to the IIB. In the context of work on the PCT, the Institute, in stark contrast with its initial reserve, had made every effort to turn itself into a global organisation. The nature of its relationship with the future European Patent Office was discussed at a meeting in October 1971. The conclusion reached was that “establishing the future relationships between the two Organisations falls within the overall ambit of patent policy which the European States intend pursuing at the international level. The fundamental question is to know whether the IIB must remain an instrument with not only a vocation but also a universal structure or if, on the contrary, it must constitute a component of the European patent system, this last solution not excluding a certain extension out towards the countries outside Europe". In other words, the IIB would now have to choose whether to make its own way in future or to become part of the EPO structure.

It chose the second option, although agreement was not reached until the final meeting of the Intergovernmental Conference. Under the Protocol on Centralisation, an adjunct to the Convention, the IIB employed about 400 examiners in 1973 and produced 37,000 searches for national agencies of member states and 3,000 special reports for private clients became a branch of the Office at The Hague. The plan was to have it conduct prior art searches for the EPO, in particular for PCT applications, which France and the Netherlands had arranged to have handled systematically by the European Office. This meant that the European procedure was not a replica of the German model, which made no comparable distinction between prior art search and substantive examination. The Interim Committee, responsible for implementing the Convention, was entrusted with the task of organising the IIB’s integration.

Crucially, the future users of the European patent system were involved in the planning process from the outset. Since the existence of the national systems had not been called into question, preparing for the future only made sense if the new arrangements provided users with a concrete, more favourable and therefore attractive solution. No one was better placed than they were to see if that was the case. They had previously been associated only on the fringes with the work of the Council of Europe and the EEC and only, it appears, after asking to be heard. CNIPA (the Committee of National Institutes of Patent Agents) had written to the Council of Europe back in 1961 to suggest “that it be consulted on all matters of industrial property on which the advice of official patent agents may be of value. We feel it would be highly desirable that we should have the opportunity to tender our advice … as occasion offers.” Things were different for the Intergovernmental Conference, when close contact was maintained with the non-governmental international organisations in connection with the Intergovernmental Conference; on behalf of international non-governmental organisations. Ulrich Schatz (born 1938), was appointed head of legal services and external relations at the IIB in June 1970. A brilliant lawyer, he was a key player in the genesis of the EPO, becoming its principal director for legal affairs and patent law in 1973. In 2000-2001 he served as interim Vice-President. The Committee of National Institutes of Patent Agents attended the hearings arranged in connection with the Intergovernmental Conference; on behalf of international non-governmental organisations.
In one sense, this stood to reason, because these organisations for the most part represented large, export-oriented companies, the ones most often confronted with the challenges of filing patent applications abroad. Would the Convention be tailored to meet their needs in the first instance? Henri Longchambon, in 1949, was hoping to support those filing on a small scale by simplifying European patent law. To his mind, the complexity of the system benefited the established powers.
The Office’s working language and seat

Filing a patent in a foreign country entailed translating the application into the language of the country in question, and translation costs were high. Being able to file an application in just one language that was valid in several countries would save applicants money. For the same to apply in the centralising office, there had to be a limit on the number of languages accepted. The Council of Europe’s Committee of Experts had already considered this question in 1951. It had suggested accepting only applications and descriptions drafted in one of the two official languages of the Council of Europe, English and French. The matter went on to be discussed in the various European institutions, and the problem took on greater dimensions. In the Community bodies, there were as many official languages as working languages.

And there were as many official languages as each member proposed. Take for example the EEC’s language arrangements, adopted in 1958. It had four official and working languages: French, German, Italian and Dutch. Yet everywhere else English was becoming dominant. This became an issue in the creation of the European system and the establishment of bilateral relations.

The Elysée Treaty signed in 1963 between France and the Federal Republic of Germany encouraged the learning of the respective partner’s language.

What should the system be at the future Office? In view of the volume of Germany’s documentation, France’s political role, and the place of the European Office in the larger system established with the USA, three languages – English, French and German – seemed essential. The debate centred around whether others should be added, but the three-language principle was upheld. Later Kurt Haertel was to reminisce that “the solution found for probably the most delicate problem after the question of location of the EPO, i.e. the languages to be used,” was one of the main successes of the Conference and the system put in place by the Convention.

The seat choice overlapped with the language question and was certainly the most directly political issue at the conference. Various options were discussed, the case for each of The Hague, Munich, Nice and London being made more or less forcibly and convincingly. Back in July 1960 Kurt Haertel had taken a stance on the matter. In theory, any city of a given size in the “Europe of Six” could host the Office. But in practice, since examination as to novelty had to be performed, there would be a need for the support of an existing office conducting examination with a possible view to using its library and examining material,” reducing the choice to two cities: The Hague or Munich.

The Hague made a bid for the seat of the Organisation at the outset of the Conference. This was seconded by London which, given the strong link between the European and Community patents, saw a city in an EEC member country as the only option. That, in 1969, ruled out the British capital.

Munich’s ambitions were based on its expertise and the documentation held by the German Office. In France, the question gave rise to tumultuous debates in the Senate, the upper chamber of Parliament. Senator André Armengaud (1901 – 1974) expressed concern at “a Germanisation of the patent-grant procedures in Europe.” Well versed in industrial and European affairs, the senator was an engineer, and came from a long line of engineers specialising in IP. He began his career before the war in the firm set up by his great grandfather and took part, after Liberation, in the efforts to rebuild French industry by managing an industrial mission in the USA. Despite being elected to the European Parliament at the end of the 1950s and being chairman of the Franco-German Friendship Group, he saw the European Office’s possible siting in Munich as “seriously undermining the need for Europeanisation of the office’s technical staff, without which only the German philosophy on industrial property will prevail in the signatories to the draft European Patent Convention.” He was concerned that French industry would be “tied to the PCT patent network and, at European level, to German practices and influences as regards European patents.”
The secretariat and three delegates taking a break during the Munich Diplomatic Conference in 1973.
The choice proved more difficult to make highly detailed preparations for the Munich bid, which had been in the air since 1963 – 1964 and the decisions of the municipal authorities and the Land of Bavaria to make a site available next to the Patentamt 136. The choice proved more difficult than anticipated, other cities submitting bids, each hoping to prevail in the event of stalemate. If the two natural challengers cancelled each other out, a third might carry off the spoils.

Luxembourg made some moves in this direction, without going so far as to make an official bid. The first to take that step was Nice, in September 1970. The situation remained unchanged until the seat question was put on the agenda of the June 1972 meeting of the Intergovernmental Conference. The Mayor of Nice then lost no time in inviting Kurt Haertel to visit the city at his earliest convenience. Years had passed and the United Kingdom, now in the process of becoming a member of the EEC, had set its sights higher and put forward a bid for London. It presented three arguments. One was the flight connections to London, which were unparalleled in Europe, making the capital a central, easily accessible location for all users. The second related to language: most applications were likely to be drafted in English, and the British felt that the examiners handling them would need a perfect command of their language. It was about the confidence with which the users of the international patent system, and more especially their professional advisers view the new arrangements. The latter will almost certainly view them with some caution and will probably be very ready to find good reason for such caution. In particular they will wish to be satisfied of the qualifications of the Examiners for dealing with patent claims written in English – bearing in mind that the precise wording of these is of enormous importance in determining the scope of the patentee's rights.137. “The majority of the teams recruiting would therefore have to be English speakers, and recruiting them away from London would be risky and costly. At the same time, the United Kingdom delegation made it known that it believed there was “no certainty that all the complications of a tri-lingual Office [could] be overcome”, giving rise to the proposal to set up a branch office in London to examine applications in English. This was not adopted, the majority preferring the idea of a central Office, so London then switched to supporting an Office of three languages provided that it held the seat. Having the seat in the UK would make it possible to recruit British staff in sufficient numbers and without having to pay them patration allowance, thereby resulting in a more affordable European patent. The government proposed to locate the Office close to the National Reference Library for Science and Invention, presented as being one of the most comprehensive in the world. London had made a strong case for itself, thereby eliminating Nice, and was left facing the two strongest contenders, Munich and The Hague. Germany and the Netherlands, most certainly owing to direct discussions between Van Benthem and Haertel, reached an agreement. Haertel ended up getting his deputy to take over chairmanship of the conference, leaving him to take over provisionally as head of the German delegation so that he could personally make the case for Munich. The Intergovernmental Conference looked at the issue on 28 June 1972. Barring the abstention of Britain, it unanimously accepted this “peace of the brave”, which put the official seat of the Organisation in Munich and saw the establishment in The Hague of a large-scale operation based on the IIB.

The aim of the Intergovernmental Conference was to come up with a text which each state would take the time to study before meeting at a diplomatic conference to discuss it once more collectively and then to sign it. Compromise had not been reached on all points. The parties had for example gone their ways without reaching agreement on the making of reservations, but the plan was to find solutions in the time between the end of the Intergovernmental Conference and the beginning of the Diplomatic Conference. The parties also left it to the later Conference to decide on the detail of the amounts stipulated in the implementing regulations, and various other provisions; and in the interval Working Party I – now including the Italian and Belgian delegations – was mandated to look at the urgent matter of training staff to perform tasks under the Convention, and to co-ordinate all the other topics.

The Diplomatic Conference and the signature of the Convention

The European Patent Convention, or Munich Convention as it is also known, was signed at the Maximiliansum, seat of the Diet and Senate of Bavaria, on 5 October 1973. “For people of my generation, in particular, the words signed at the Maximilianum, seat of the Diet and Senate of Bavaria, on 5 October 1973. “For people of my generation, in particular, the words

137. “These words of thanks, spoken on 10 September 1973, would therefore have to be English speakers, and recruiting them away from London would be risky and costly. At the same time, the United Kingdom delegation made it known that it believed there was “no certainty that all the complications of a tri-lingual Office [could] be overcome”, giving rise to the proposal to set up a branch office in London to examine applications in English. This was not adopted, the majority preferring the idea of a central Office, so London then switched to supporting an Office of three languages provided that it held the seat. Having the seat in the UK would make it possible to recruit British staff in sufficient numbers and without having to pay them patration allowance, thereby resulting in a more affordable European patent. The government proposed to locate the Office close to the National Reference Library for Science and Invention, presented as being one of the most comprehensive in the world. London had made a strong case for itself, thereby eliminating Nice, and was left facing the two strongest contenders, Munich and The Hague. Germany and

136. From the origins to 1973
by François Savignon to Gerhard Jahn, Minister of Justice of the FRG and German President of the Conference, highlighted the political significance of a conference on the future of European patents. The German press also acknowledged the event. A headline in the Frankfurter Allgemeine Zeitung referred to a “major patent conference in Munich,” while the Handelsblatt proclaimed: “European patent law now taking shape. Aim: one application for protection in 23 states”.

Aim: one application for protection in 23 states.

Kurt Haertel went on record later as saying that the EPC “marked the decisive step from the national to regional European patent, [and was] the most important event of this century in the field of patent law.”

After the Intergovernmental Conference in Luxembourg, and its very studious atmosphere and massive workload, the Munich Diplomatic Conference seemed to be a much more showy affair. Some participants felt that it reflected the spirit of the near-mythical Congress of Vienna. The specially devised cultural programme may have created the impression that the 200 or so participants were just going through the motions, since all the decisions of any real significance had been taken long in advance.

The conference secretariat was headed by J. Van Grevenstein, director of the General Secretariat of the Council of the European Communities. The 21 states that had taken part in the Intergovernmental Conference were joined by representatives of four intergovernmental organisations (the Council of Europe, the Commission of the European Communities, the IIB and WIPO) and 14 international organisations.

While the key decisions had indeed been taken, the Conference was not a purely formal exercise. More than a hundred amendments were submitted and discussed by the governmental delegations. The founding fathers held the key posts. Kurt Haertel chaired the Coordination Committee and the Working Party on Patent Law. François Savignon chaired the Committee for Institutional Arrangements, while Bob van Benthem was elected General Rapporteur of the Conference and Chairman of the Drafting Committee. Others like Paul Braendli, Ulrich Schatz, Edward Armitage and Pierre Fressonnet also made their mark as committee rapporteurs.

The guiding principles of the Convention were set out in the preamble and first nine articles. This multilateral treaty put in place a single set of substantive conditions for obtaining patents. The legal and procedural rules, now both unified and stand-alone, would henceforth be based on a legal system common to all contracting parties. In essence the Strasbourg Convention of 1965 was the basis for defining the substantive conditions an invention had to meet to qualify for a European patent and withstand revocation. Paradoxically, however, that convention had still not entered into force at that time, prompting Antoine Scheuchzer to quip: “rarely has such respect been paid to a convention not in force.”

A new feature of the procedure was that the decision to grant was taken by a division of three examiners, and not just by one examiner as was customary.

By contrast with the centralised decision to grant, the conditions for exploiting the granted titles retained their national character, the effects and the handling of the European patent being the same as that of national patents. This brings us to the concept of the “bundle”, the European patent being first and foremost “a device enabling Contracting States to pool their prior examination activities while at the same time retaining their sovereignty as to the regime for patents so granted with effect for their territory.”

In a few respects though these patents were subject to a common regime potentially differing from those governing patents granted by the national offices, there being nothing in the text to demand their abolition (or retention). And that was a key point: patents granted by the EPO co-existed with national patents, the lifetime of European patents had been made a

Edward Armitage (left), head of the UK delegation and Comptroller General of the UK Patent Office, and Bob van Benthem of the Netherlands signing the Munich Convention for their countries.
The Munich Diplomatic Conference ran from 10 September to 5 October 1973, with 21 countries participating.
standard 20 years; the grounds for revocation had also been standardised, in a list set out in Article 138. In the nine months after grant, a centralised opposition procedure could be initiated at the Office. This was an advantageous alternative for opponents compared with instituting legal proceedings before national courts. All this meant that the European patent was not just a bundle of national applications or patents, but a bundle of European patents. It was within the context of these relatively strict provisions that states were given the clearly demarcated possibility of making reservations under Article 167.

Operation of the system would be entrusted to the International Patent Institute and a common institution that would be set up to examine and grant patents, the European Patent Office. In accordance with Article 4, the Office would be supervised by an Administrative Council made up of representatives of the contracting states. Together, the Office and the Council would form the new European Patent Organisation. The Convention conferred extended powers on the Administrative Council: appointing the President and vice-presidents of the Office along with the members of the boards of appeal, approving the yearly budget, amending the Implementing Regulations to the Convention, and adopting and amending the Financial Regulations, the Rules relating to Fees and the Service Regulations. There had been lengthy negotiations on the extent of these powers. The President was the head of an independent organisation that would be required to become ever more autonomous if it proved to be a success. The fees the EPO received were expected to cover its costs in the long run, with direct income for handling applications and indirect revenue in the form of renewal fees partly remitted by the national offices.

And, lastly, the patent was referred to as European because only European countries could accede to the Convention, in spite of requests for broader membership from some organisations like UNEPA (see page 76) at the Intergovernmental Conference. This meant the Convention was no less compatible with wider international agreements such as the Paris Convention, under which the EPC is a “special agreement”, or the PCT, under which it is a “regional treaty”.

**Conclusion**

— The Convention was a twentieth century landmark, and together with the PCT it constituted a “second revolution in the history of the patent system.” For Árpád Bogsch, one of the main architects of the PCT in his capacity as Director-General of the World Intellectual Property Organization (WIPO), the PCT and the EPC were “twins.” Under the PCT, an international filing could have the same status as a national application in all the countries it designated. The EPC went further in simplifying and streamlining matters: it provided for a single filing, resulting in a single patent. Via the PCT, the applicant could get a European patent and not just national patents. The EPO could conduct international searches and preliminary examinations under the PCT. This close interaction should not obscure the dialectical relationship between the origins of the two treaties. The EPC emerged from the new context brought about by the PCT. To face up to industry outside Europe in general, and in particular in the USA, Europe put a new guard at its doors. The EPC was intended to contribute to “protecting European countries not possessing a system involving complete examination of applications against the risk of having their economy swamped by patents of dubious and unreliable value.” In these countries the business of proving patent nullity had always been long and arduous. This cemented the dominance of the largest – principally US – firms, which had the time and resources to file countless patents. European industry on the whole had not resolved to plead for the abolition of patents. It too needed protection if it was to be a match for innovative industrialists, and not just follow their lead. A political reading of the inception of the Convention would therefore probably see it as a European response to...
the challenge of global – and particularly transatlantic – competition and trade, while at the same time respecting member states’ national sovereignty in a field affecting industrial policy.

After over twenty years of debate, a European patent organisation was about to see the light of day. So why had it taken so long? Leaving aside the huge differences in IP culture between countries, the complexity of the issues and concerns about the IIB’s future, the main hold-up was the sensitivity surrounding national sovereignty in an area directly linked to major economic interests. After all, a national patent policy provided the flexibility to counterbalance the advantages and disadvantages to patent holders and society and, increasingly, to boost innovation. It was also a fact of being able to define where the boundary lay between what was patentable and what was not. More broadly, industrial property provided a discreet way of equipping a national economy to stand its ground or to take appropriate action in the face of international competition.

Bob van Benthem clearly identified the difficulties: “That this detailed preparation took so long is due precisely to the overcoming of national attitudes: the latest views and developments had to be taken into account on a practical level, while at the same time refashioning traditional national attitudes into supranational, European attitudes and expanding national consciousness into a European consciousness.” The signing did not allay all fears, however. The Times ran the headline: “More reasons for alarm over patents switch” and warned that “The crux of the future distress for industry is that the mooted European patent system is looking every day more German in character.” But the “European enthusiasm displayed” carried the day in the end. The Tagesspiegel’s caption was “Unified patent law for Europe,” and it went on to say that the co-ordination of patents “would have considerable political and economic weight for Western Europe and its 400 million inhabitants.” And the Süddeutsche Zeitung announced: “European patents from 1980,” quoting the German Minister for Justice, Gerhard Jahn: “For the first time, a single law will be established in a crucial domain which will allow for practical co-operation between European countries.” The Handelsblatt, which published an interview with Kurt Haertel, underscored the idea of history in the making with the title: “European patent law – a step towards the next millennium.” To some extent, Europeans were now placing their destiny in a new domain in common hands. A new layer of power was being created above the national offices, and the biggest applicants stood to gain the most from it. As for political involvement, it was not all about interfering in the discussions between experts. Political support had been absolutely essential to vest powers in the experts and to validate their work. And over the course of the lengthy process, no-one could confidently say where the boundaries lay between the political and the technical, between the skills of the diplomats and the knowledge of the experts.
Part 2

Success on an unimaginined scale
1973 to the late 1980s
In December 1973, the EPO's future headquarters building in Munich was still just a plan on the architect's drawing board.
The Convention had laid down the legal framework and had minutely defined the rules and implementing procedures. It only remained to flesh out this structure, to turn the doctrine into practical details for the Organisation, and that was the task assigned to the Interim Committee. Meanwhile the signatory states were ratifying the Convention. It entered into force officially on 7 October 1977, upon ratification by the minimum number of states. The European Patent Office then opened in Munich on 2 November 1977. A short time later, the IIB was integrated into the Office. The new institution had a dual structure, serving a functional need – the search documentation being in The Hague – and a political one.

Once the pioneering era was over, the Office grew in strength. An EPO model emerged, based on the quality of its product and communication with its applicants. The work of the Standing Advisory Committee (SACEPO), set up in the first months, is exemplary of this, although the same spirit prevailed throughout the Office. From the move to the building on the banks of the Isar to the founding father’s passing of the baton to the Office’s second President, Paul Braendli, the institution was maturing, but not without problems and internal tensions. The increase in activity was proof of success but was also difficult to manage. Examiners’ work, at the very core of operations, was assessed in terms of productivity. Large numbers of staff needed to be recruited to handle the volume of filings. The number of contracting states was growing, so EPO staff were coming from a greater diversity of cultural backgrounds, making the Office a meeting ground for exchange. From this European melting pot were to emerge teams that became cohesive units. A strong identity was also created around a set of fiercely guarded service regulations and a clear identification with the institution and its mission. The development of an organisation across several sites was accompanied by efforts to create a corporate culture.

The national offices expected to have to finance the EPO’s development for some time. But within two years, they in fact no longer had to contribute to the budget, and were even being refunded the sums they had advanced. They wished they had not been so generous initially, and the apportionment ratio for fees collected by the Office was adjusted in their favour. The failure of negotiations on the Community patent gave the Office a unique and central role in a Europe that was still trying to find its way. This role also came to bear at international level. The EPO gave training to other Offices and developing countries. It entered into trilateral co-operation with the USA and Japan, and started cultivating a special relationship with the Chinese Patent Office. In a world where the geopolitics of IP were starting to become apparent, the EPO was to play an increasingly significant role.
On 7 July 1976, Hans-Jochen Vogel, Federal German Justice Minister, laid the first stone of the building destined to be EPO headquarters on the banks of the Isar in Munich.
Chapter 4

"I was quite sceptical about this method of organising the Interim Committee's work in Working Parties made up of delegations from the signatory States. I regarded this form of organisation as too cumbersome and doubted whether it would produce worthwhile results in good time.¹" Kurt Haertel's reservations were understandable, given the scale of operations between 1974 and 1977 and the number of delegates from different patent traditions whose approaches were likely to be at variance with one another. However, the Diplomatic Conference’s recommendation to set up an interim committee had to be followed. That committee’s role would be "to take all preparatory measures to enable the European Patent Office to begin its activities as soon as possible."² Having no decision-making power, its mandate was to draw up all the organisational plans, which would then be put to an official vote at the first meeting of the Organisation’s Administrative Council. The task proved to be colossal. It meant having to establish, down to every last detail, an Office capable of putting the Convention into practice. Everything, in all areas, had to be set up from scratch, from producing an organigram and drafting post descriptions to choosing office furniture.

From doctrine to detail

In view of the scale of the undertaking, seven working parties reporting to an executive committee were set up at a first meeting in January 1974. Their remits were: organisation; search; examination, opposition and appeals; staff; finance; legal matters; and the EPO building, the European School and housing. Each working party, comprising at most six delegations, had to meet several times a year and progressed on the basis of discussions and proposals made in sub-committees that met more regularly again. The progress of each depended to a large extent on that of the others. A planning group, based in Munich, supported the working parties. Kurt Haertel highlighted its role in his closing address, referring to it as "the only European body and the nucleus of the European Patent Office."³

Following the signing of the EPC, an Interim Committee chaired by Kurt Haertel was charged with getting the Office ready to open and mandated to give practical shape to political intentions, dealing both with the institution’s internal equilibrium and with material aspects of the choice of sites. While not all its recommendations were followed, the IC was where the EPO was truly hatched, its structure and culture fashioned by the actions of the founding fathers.

In the IIB era, patent applications arrived once a week in crates coming from all over Europe and America.

Back in 1973, computerising the procedure already seemed like a good idea.

One of the group’s main responsibilities was to optimise the internal procedure for handling applications. To become established, the future Office would have to offer applicants a clear, precise and accessible procedure delivering sound patents regarded across the globe as providing the highest legal guarantees. This put quality at the heart of the procedure. The German delegation agreed to pilot the project. Numerous proposals, frequently presented in the form of flowcharts, detailed how the dossiers would move through the system and what work would be performed in or with them. These flowcharts, discussed at great length, were generally over eight pages long, indicative of the complexity of the processes to be defined. Along with these procedures, the structure of the Office itself had to be established. The organigram as envisaged in the 1960s had three directorates-general: examination; boards of appeal and revocation; and administration. By the time of the Diplomatic Conference, searching, as performed by the IIB, constituted a fourth. Then, in view of the importance of relations with WIPO, the European Communities and the world’s other major offices, coupled with the need to have the President on the ground in Munich as much as possible during the establishment phase, the idea was put
forward in the Interim Committee of creating a fifth directorate-general to deal with legal questions and international relations. This would ease the burden on the President while at the same time ensuring representation at the highest level. The idea was received with reluctance by some members of the working party, who saw it as an unnecessary expense. Nevertheless a majority on the working party supported it, and in the end it appeared in the draft put to the vote before the Administrative Council. This directorate-general, to which the Office’s Press and Public Relations unit would later belong, was to go on to develop a strong and dynamic identity, as unplanned children tend to do.

The members of the Interim Committee were particularly conscious that the Office would be judged “on the search and examination before grant, more than anything else, ... and especially on how examiners in the new Office deal with such difficult questions as inventive step.” Working Parties II and III therefore concentrated on drafting very precise guidelines on search, examination (formalities and substantive) and opposition under the EPC. These guidelines were to function as internal administrative instructions and as a reliable reference work for the outside world. To begin with, the overall objective had to be restated and the Office’s search philosophy and examination philosophy put in writing. For search, agreement was reached that the objective was “to discover the prior art which is relevant for the purpose of determining whether, and if so to what extent, the invention to which the application relates is new and involves an inventive step.” This called for “a thorough, high quality, all-embracing search”, while at the same time keeping the cost within reasonable bounds. From a general point of view, the separations of a geographical (The Hague and Munich), institutional (DG1 and DG2) and procedural (search and examination) nature meant that the examination as to patentability was performed by a different examiner to the one who had previously done the search. Thus to be totally reliable, this system meant that searches had to be as exhaustive as possible and that search examiners had to be familiar with the requirements of substantive examination. It also meant there had to be provision for additional searches at the examination stage. The interface between these two phases was therefore a critical juncture that had to be carefully configured by the Interim Committee.

The search examiner was supposed to “determine the subject of the claimed invention” by conducting “a critical analysis of the claims in the light of the description and drawings.” At this point in the procedure, consideration was to be given to elements excluded from patentability (defining what an invention was by stating what it was not in Article 52 EPC) and to lack of unity. The Interim Committee covered all the possible scenarios, such as exceptions to patentability in cases where inventions were contrary to “ordre public” and to morality, i.e. where “the public in general would regard the invention as so abhorrent that the grant of patent rights would be inconceivable.” While it was ultimately the examining division’s task to decide on novelty and inventive step, the search report issued was also expected to draw clear conclusions. Another issue for the working party on searching was that a decision had to be taken on the division of tasks among the different DG sites. It was agreed that the nationality of the applicant for a European patent should not determine where the search was conducted. Two other types of search also had to be performed: international (PCT) searches and national ones that some member states had previously en-
There were banks of filing cabinets like these on each of the 25 floors of the Tower. Every examiner had the task of going to every floor to consult what he needed among the reams of paper.
This estimate took the basic unit as being the examiner and the number of hours he spent on each task, on the grounds that you could calculate the number of other staff needed in the Office based on the number of examiners required. That gave a figure of 745 people, including 300 examiners, to make the system work. This early estimate seems to have been taken later by the Interim Committee, at least implicitly or unconsciously, or maybe by force of habit, as a credible estimate.

Regarding future recruitment, the Interim Committee also looked beyond the need to meet the Office’s operational capacity requirements. Even then, finding a balance of nationalities in the staff complement was given serious consideration. A table of national quotas for posts to be filled was drawn up, the number of staff for each member state reflecting its financial contribution. There was much debate on whether to include IIIB staff in the calculation. A selection board was given the task of choosing the President and the vice-presidents from among the candidates put forward by the delegations. The Interim Committee decided on a list of proposals. The first posts were to be filled as of 1 November 1971. Withdrawals of applications midway through the procedure and candidates with an unsuitable profile sometimes complicated the process. The post of Vice-President DG 5 was not filled for several months. Generally speaking, the quality of staff, particularly for examiner posts, was regarded as critical by the Office’s founders. Many examiners were needed, and they were a rare breed in Europe. A report from the French delegation in 1972 said that there was “a very real danger that it will not be possible to find enough good examiners in the national offices, with the exception of the German office, who will be willing to go to Munich.” And the authors advocated giving “very serious consideration to the consequences for the growth and success of the EPO of all decisions relating to the working conditions of examiners: remuneration, housing, pension scheme, European School.”

Kurt Haertel, aware of the risks, sought to guarantee remuneration and conditions likely to attract the best examiners in sufficient numbers from the member states. Bearing this in mind, and with a view to securing the status of the Organisation as an essential component in the workings of an integrated Europe, he recommended – as had the Intergovernmental Conference – adopting the service regulations of the European Communities. However, some delegations were against this recommendation. The German delegation proposed a model that was considerably less favourable to future staff by suggesting that their salaries should be in line with those of the national office in Europe that offered the most, i.e. the Swiss Office, possibly plus a supplement. This proposal aimed to limit public expenditure and banish the spectre of “excessive” fees while at the same time avoiding what was viewed as a “disproportionately high” and “unwarranted” differential between national and international salaries. The German Office may have been trying to avoid having too much competition for good examiners on its own soil, given that the differential between what it could offer and what the European Office was offering could potentially impact negatively on its own recruitment. These viewpoints gave rise to concern. How could you attract the best people without offering them an attractive package? “If you apply this element of the British proposal to the branches, it could further compromise the smooth operation of the future Office, which has to bring together employees of 17 nationalities and get them to adopt a common practice. Fixed-term contracts would endanger this process.”

A group of delegations argued for the adoption of the service regulations of the Co-ordinated Organisations (Council of Europe, NATO, OECD, WEU, ELDO/ESRO), and in the end this middle ground between the initial proposal and the German approach was chosen. The Interim Committee opted for the service regulations of the Co-ordinated Organisations, which were regarded as more flexible for the future management of the Office, with an eye to the longer-term aim of joining this grouping.

The Western European Union was a European organisation set up in 1948 by the Treaties of Brussels (1948) and Paris (1954) to provide for co-operation on security and defence. Reactivated in 1954, the WEU helped to strengthen the alliance with the USA in Europe while allowing the European Union to progressively acquire defence capability. The WEU was accordingly dissolved in 2011.

The European Launcher Development Organisation (1962–1975) and the European Space Research Organisation (1964–1975) were two complementary research bodies devoted to the space industry which merged to form the European Space Agency (ESA). The pooling of strategic research, and of the associated patents, marked a new stage in European integration.

"Co-ordination no thankou!" – as late as the 1980s, as this 1984 banner shows, union representatives were still opposed to the EPO joining the Co-ordinated Organisations.

This choice was to cause numerous subsequent conflicts, and present problems in the way it was applied. The representative of the Joint Study Section of the Co-ordinated Organisations pointed out what was feasible and what not if the Office were to adopt these regulations. He regarded as unacceptable the proposal supported by a majority of delegations on the Working Party on Staff to grant all Office staff an education allowance, irrespective of grade. He maintained that “no exceptions could be permitted,” and that C-grade staff should not qualify for this allowance. Bob van Benthem thought it regrettable that the service regulations should create an “unsatisfactory social situation,” in that signing up for the Co-ordinated Organisations’ system would deprive C-grade staff of the right to home leave. In the end, the Interim Committee concluded “that a sufficient number of candidates for examiners’ posts was available so that the top posts could be easily filled” and concerned itself no further with this question. But it was far from having been resolved. The integration of the IIB into the EPO had not been called into question at any stage during the Munich Conference. On the contrary: it had been regarded as “a sine qua non of the establishment of the European patent system.” To secure what it regarded as this crucial point, France succeeded in ensuring that no mention of the IIB appeared in the Convention, such references being replaced by provisions stipulating that with immediate effect the European Patent Office should have “a branch at The Hague, comprising not only search divisions but also a Receiving Section responsible for examining each European patent application up to the time when a request for examination was made.”
The issue of transferring personnel required the constitution of an ad hoc committee. Chaired by Jean-Louis Comte (Switzerland), this committee was boycotted by the IIB staff union, which had itself faced a particularly long period of uncertainty. “For six years, life at the IIB was rather like that of a family awaiting the birth of a baby. We prepared a birthplace (the Patentlaan building); we fiercely debated Service Regulations, rights and duties. We experienced a crisis point when fear of the unknown was mingled with expectations of all kinds.” This feeling did not impede activity however, even though things calmed down from 1975 to 1977. In fact this interlude gave scope for “streamlining administrative procedures” and thereby dealing more effectively with the very rapid growth of the preceding period. The advent of computerisation was to boost the institution’s efficiency: “the computer played a huge part in simplifying administrative procedures.”

Debate centred on the question of salary and pensions, and these were to give rise to difficult exchanges between the Administrative Councils of the IIB and the EPO. The Conference had only adopted the Protocol on Privileges and Immunities. Far more restrictive than the provisions of the royal decree enjoyed by non-Dutch employees, it brought no tangible privileges as regards indirect taxation. Instead it provided that all EPO staff, regardless of their nationality, would be subject to an internal tax on salaries and emoluments and thereby exempt from national income tax. In the case of The Hague, that put the Office’s Dutch and foreign staff on an equal footing. Kurt Haertel thanked the Comte Committee in particular for having found “a means of transition for a group of nearly 1000 persons from a higher to a lower salaries system while at the same time maintaining acquired rights,” which, once the “initial … over-reaction” had died down, would succeed, it was hoped, in winning over the IIB staff. This perception too was to prove somewhat optimistic.

Symbolic value or operational efficiency: the question of buildings in Munich

From the first day of the IIB’s integration, the Office had the use of a prestige building in The Hague. But Munich, seat of the Organisation, was not to be outdone. In keeping with its standing, and to ensure the Organisation’s visibility and symbolic role, the future Office would have to be housed in a landmark building. It should at the same time tie in with the culture of patenting and technology in Germany. The ideal location was on the banks of the Isar, next to the Deutsches Museum and the German Patent Office. The Deutsche Museum von Meisterwerken der Naturwissenschaft und Technik had been established by Oskar von Miller in June 1903 at a meeting of the Association of German Engineers (VDI). It reflected the link – then troubled, as the two world wars would show – between love of technology and German national pride. For the first few years it was housed in the former premises of the national museum, then moving to new buildings, the first stone of which had been laid by Emperor Wilhelm II in 1906. The City of Munich had made available a section of the Kohleninsel, an ideal – newly flood-protected – location on an island in the Isar. It went on to become known as the Museumsinsel. Designed by Munich architect Gabriel von Seidl, the building was constructed using the latest architectural techniques. At the time of its construction, it was the biggest reinforced concrete building in Germany. The tower, borne by 123 columns, was built using compressed concrete, making it a masterpiece of engineering. Yet its highly controversial appearance meant that it was not completed until 1925. These delays, and then the First World War, meant that the new museum did not open until 1932.

The Kaiserliches Patentamt (Imperial Patent Office) opened in Berlin on 1 July 1877. It became the Reichspatentamt in 1919, and moved to the building in Gitschiner Straße. During World War 2, the documents it held were moved for safekeeping to a salt
mine in Heringen (in the Hersfeld-Rotenburg district). Which was just as well: the Berlin building was badly damaged in the fighting, but the treasure trove of files and patents and the library of 300,000 volumes were preserved. The documents, which were taken to the USA, were subsequently returned. After the armistice, temporary services were resumed in Berlin and Darmstadt in October 1948. In August 1949, after the establishment of the Federal Republic of Germany, which formally divided Germany into two political entities, the Patent Office moved to Munich. It re-opened on 1 October 1949 in the library wing of the Deutsches Museum, which had escaped the bombings. Then, between 1954 and 1959, the German Office moved into the atrium building in Zweibrückenstraße 31. Finally in 1959, it took occupancy of the sister building in Morassistraße, a brick structure designed by Munich architect Franz Hart. The German Office now had its home on the banks of the Isar, opposite the Deutsches Museum. The little "valley" this created in the centre of Munich was becoming the heartland of technology in a Germany that had committed itself to the project of European construction.

Locating the EPO as near as possible to these two landmark institutions seemed to the German authorities to be the natural choice. There was a competition and a selection procedure along with a public information campaign run by the municipal authorities. The plan chosen was for a four-wing, eleven-storey steel-and-glass building. However, there was strong local opposition to the building’s location, as there had been at the turn of the century to the then new Deutsches Museum. Public opinion was divided, with some fighting for a traditional district and opposing the destruction of the housing and the displacement of the occupants. At the end of January 1973, the Liberals (FDP) proposed an alternative location in the north of the city to the Town Council. On 31 January 1973, the Town Hall looked like a fortress surrounded by protestors. The Town Council voted under police protection. The mayor of Munich, Georg Kronawitter (SPD, the Social Democrats), succeeded in pushing through the Isarufer (Isar banks) project, adopted by a majority of 44 to 34. That settled the question – or so it seemed. The local press proclaimed: "European Patent Office by the Isar after all." The protests did not end, but the conflict led by an active minority was starting to lose momentum. On 7 February 1973, 700 people attended a Bürgerversammlung (citizens’ meeting) in the Hofbräuhaus: "Citizens seek protection against impact of EPO." Katharina Schunk of the CSU (Christian Democrats), attacked the Town Council’s decision as being “a dagger in the heart of Munich.” A significant number of CSU members regarded the expropriation carried out to make way for the EPO building as illegal. Even in the SPD, then in power on the Town Council, many members spoke out against the Isar banks project. When, in April 1974, the Munich Administrative Court called for substantial changes if the building was to be allowed, the whole business became quite fraught. The project was getting bogged down and tempers were starting to flare. The press was now criticising the handling of the project more than the project itself. The lack of public information, the approximate nature of the plans, the choice of a controversial location, the flouting of the Court ruling – now that confusion reigned, everything was subject to criticism. A Süddeutsche Zeitung headline read: "EPO building delayed by red tape." As this tug of war continued, the protest movement gradually weakened and the building project gained acceptance. The plan was eventually approved in January 1975. The Süddeutsche Zeitung ran the headline: “EPO due to open in 1977.”
The Interim Committee’s Working Party on Buildings, chaired by Paul Braendli, worked away undeterred during this troubled period. To tailor plans to the Office’s exact needs, the Hamburg-based architects Gerkan, Marg and associates needed answers to many questions. One of particular importance was the space to be devoted to information and communication technologies, and here there was an overlap with Working Party I. A huge area was set aside for the computer. The mainframe was still the prevailing model and there were no plans yet to provide each examiner with a computer terminal. As regards telecommunications, there was even the question of whether there should be a telegram service for visitors. On a broader level, the new economic situation brought about by the oil crisis led some cost-conscious delegations to question ambitions regarded as somewhat excessive. The United Kingdom, Swiss and Netherlands delegations were especially concerned about the low ratio (around 66%) between total floor space and total useful area. The plan seemed to them to “allocate space too lavishly.” In particular, the large scale of the octagonal conference room was called into question. In the end, the plans for it were adjusted to make more efficient use of the space and to accommodate more participants. There were also questions about the wisdom of installing escalators to deal with the bulk of movement in the building. They were kept as a distinctive feature, and as conducive to mixing and promoting good social relations in the building. Two other projects gave rise to lengthy discussions: the provision of a kindergarten and of a shopping precinct on the ground floor. The municipal authorities did not want the building to be a place from which local people felt
excluded. In the end, though, they gave up on the idea of shops, and it was decided to set up a newspaper kiosk and a bank branch. A majority of delegations on the Committee told the German delegation that they were against the provision of a kindergarten as a way of "reducing the costs," and asked it to inform the Munich authorities accordingly. The building was still incomplete when the Interim Committee was disbanded. A Building Committee took over Working Party VII's work, an experience which the German delegation – taking the greatest interest in this matter – regarded as "a worthwhile venture." Handover was scheduled for mid-July 1979, so temporary accommodation had to be found for the first employees. The idea of locating these people at the IIB in The Hague was dropped for lack of space and because they would then have to move again. The choice fell on the offices occupied by the Planning Group, five minutes' walk away from the EPO site. The Motorama building was to be the Office's first home.

An overwhelming success

One final doubt crossed the delegations' minds when they were presented with the EPO emblem proposed by Kilkenny Design Workshops: did it perhaps infringe a trade mark? Many thought the stylised digital fingerprint was not unlike certain existing commercial trade marks. The Working Party had received "a series of marks which presented certain similarities with the EPO emblem." The potential consequences of using a pirated emblem did not bear thinking about. The German delegation mandated to investigate the issue was able to reassure everyone: "a legal examination of the possibility of a conflict... has led to the conclusion that the emblem could be used by the European Patent Organisation for official purposes regardless of whether the symbol itself or any similar symbol has been registered as a trade mark in a Member State. ... An international organisation cannot infringe the validity of a registered trade mark in its choice of an emblem..." The emblem has been registered as a trade mark in a Member State. The fingerprint is the universally recognised hallmark of individuality and identification, its adoption here in stylised form achieves the qualities necessary to the role of the European Patent Organisation.

The European Patent Organisation (and the colours of its flag) at its inaugural meeting from 19 to 21 October 1977. From then on it was up to the President to decide how the emblem could be used.

The Administrative Council adopted the emblem of the European Patent Organisation (and the colours of its flag) at its inaugural meeting on 19 to 21 October 1977.

The fingerprint is the universally recognised hallmark of individuality and identification; its adoption here in stylised form achieves the qualities necessary to the role of the European Patent Organisation. Kilkenny Design Workshops, Ireland.
Chapter 5

The EPO turns into a reality
On 7 July 1977, Luxembourg ratified the EPC, joining Belgium, the Federal Republic of Germany, the Netherlands, the UK, Switzerland and France. The Convention had now been ratified by the minimum number of states required and so was ready to be put into practice. On 7 October 1977 it officially entered into force.

**Institution building**

The European Patent Organisation is made up of two entities: the European Patent Office (EPO), which runs the European patent system on the basis of the EPC, and the Administrative Council, which comprises delegations from the contracting states and supervises the Office’s operations.

The inaugural meeting of the Administrative Council was held in Munich from 19 to 21 October 1977. It was an opportunity to pay tribute to Kurt Haertel, but also to establish the Office’s legal foundations. The adoption of thirteen regulations and twelve international agreements was the essential condition for starting up operations. The most tangible vote was on the adoption of a DEM 104m budget allowing for the initial recruitment of 110 international civil servants as from 2 November 1977, with 700 more due to be added following IIB integration, on 1 January 1978. At the same time, 1 June 1978 was announced as the date for receiving the first European patent application. The first Council meeting was the occasion for a solemn affirmation that the Organisation’s mission was “to enable inventors and business circles, by means of a single European patent application, to obtain patent protection for an economic area embracing a major part of Europe.”

On 7 October 1977 it officially entered into force.

The EPC was to be no mere forum for recording the EPO President’s proposals: “On its efficiency will depend the smooth operation of the whole machine. Its powers, apart from approving the President’s actions, include amending the EPC implementing Regulations and the Rules relating to Fees. A true legislative assembly, the Council is both a place for delegates from different countries to meet and build the European patent system and a space in which tensions and divergences among the national offices can be expressed. In practice, the delegates are mostly heads of national offices. Acting as a parliamentary forum, the Council is driven by multiple debates. It is also subject to pressures external to the delegates, be it from Office staff, from users or from member-state authorities. Interest groups would play a significant part in the Council’s development, as outside bodies such as WIPO and the European Commission progressively found their own place within its meetings. While the Council is a legislative organ, the executive body is the Office, directed by a President elected by the Council. The first vice-presidents in charge of the five Directorates-General were appointed on the basis of equilibrium among the member states: Jacques Delorme, the last Director-General of the IIB, was the logical choice to head DG 1 (Search) in The Hague, Norman Wallace took charge of DG 2 (Examination), Hans-Peter Dornow headed DG 3 (General Administration, including Personnel, Finance, EDP (computers) and the Language Service), while Jenö Staehelin managed DG 4 (legal affairs and international relations). DG 5 (Appeals) was due to be allocated to Giuseppe Trotta of Italy, but as his country had not yet ratified the EPC, the post remained vacant and promised to him until 1 October 1978. The Office officially opened its doors in the Bavarian capital on 2 November 1977. Work began in the rented Motorama premises until the new building was completed. The local press did not show much excitement at the event. “European Patent Office starts work,” the *Süddeutsche Zeitung* baldly announced.

**Chapter 5**

The inaugural meeting of the Organisation’s Administrative Council was held in Munich in October 1977, in the very place that had witnessed the institution’s birth four years earlier.

"The President and his men", on the cover of the first issue of the EPO’s in-house magazine No. 1, in March 1978: Hans-Peter Dornow, Jacques Delorme, Bob van Benthem; Norman Wallace and Jenö Staehelin.

Chapter 5

For the Office’s collective memory, the Motorama offices are one of the true founding myths – strange days in which a team of 98 people, many of whom had helped to draft the Convention, came together from a variety of signatory states. A selection committee had agreed on the list of initial recruits. Chaired by Romuald Singer, it had comprised representatives of the smallest signatory states (Denmark, Austria, Ireland), and applications had been received from the delegations that had concluded the Interim Committee phase. The careers that had led these men and women to work for the Office were diverse, but many of them were associated with the very history of the Convention – translators, secretaries or managers who had often been directly involved in the long meetings in Munich. Thus they were linked to the history of the project, having helped to shape it and experienced the exceptional atmosphere of meetings that had frequently gone on beyond midnight. This intensity, the key role of the various secretariats and the translators, the urgency of the tasks to be performed, these all formed bonds between all the participants who went beyond hierarchical constraints. From typists to heads of delegation, the abiding memory was of a group elbow to elbow, mostly made up of young people, feeling they were working towards the realisation of a vision. On that first day of November, a first team arrived at 8 am, a second at 11, the first welcoming the second. They moved in as best they could, setting up highly pragmatic payment procedures. Improvisation was the watchword. Not everything was easy; but a European spirit was in the air, and around Bob van Benthem it seemed to infiltrate the anonymous spaces of the characterless building.

Bob van Benthem was particularly close to his team. On that first evening he invited them all to a reception in a nearby hotel, the Penta. His speech went to the heart. Everyone felt they had lived through a historic day, made up of those little things that memory would later magnify. A kind of multicultural island began to form, grouped around affinities and linguistic convergence in an ambiance where interchange seemed easy. Ten years after 1968, it was a young and cosmopolitan community, enjoying opportunities to swap recipes and traditions. The fact that the Motorama was in essence a set of apartments rented for the occasion helped to create an institutional life based on spontaneous conviviality. “It was a very exciting, pioneering time. We all had a room with a bath. This is the only thing I regret in my career, that I never took a bath in my office!”, said Curt Edfjäll, some years later. A British examiner had similar memories: “I joined the EPO expecting a great adventure,” he said, “and I was not disappointed. I also expected to get rich, but that was a different role.”

Yet it wasn’t all roses, and the ideal picture needs a few more brushstrokes. For the non-Germans, expatriation was not easy to accept. Regardless of the host country, adapting to a different life in a Europe where mobility was still very weak was no simple matter. Staff had difficulty finding their bearings, and links with home were relatively rare at a time when international phone calls were something of a luxury and television broadcasting was a strictly national affair. Food and leisure, learning the language - there was a whole range of typical problems facing the first employees and those that soon joined them. Finding somewhere to live was not easy in a city where there was not enough accommodation to absorb the influx of several hundred people looking for comfortable flats or houses. Similarly, cohesion was not to be taken for granted within the teams. There were language problems, and the managers had not picked their own staff, so they had to assess potential and get to know personalities. Yet everything had to be done at top speed, including organising a language service and drafting the first directives. The Council was an executive organ issuing decisions (directives). Its composition varied according to the subject of each meeting.

A meeting of EEC heads of state, the Council was an executive organ issuing decisions (directives). Its composition varied according to the subject of each meeting.
The Interim Committee had defined the successive stages for getting the various sections of the EPO up and running. Given the need to recruit substantive examiners and for EPO and national office staff and users to learn the procedure, it had not been conceivable to have a complete organisation in place from the outset. The chosen path was to progressively open the technical fields at a rate of 20% per year over five years. This first phase was designed as a time for recruiting examiners and letting everyone involved get to know the new procedure.

That was no doubt a prudent policy on the Office’s part, but it was also likely to strengthen national office doubts about future operations. As Bob van Benthem explained in a speech in Paris in 1978, there were two main reasons for prudence. One was that the various countries feared the impact of over-rapid growth of the European patent system on their national patent offices; the other was that opening up the system too quickly would cause insurmountable problems for the EPO itself, given that it was starting substantive examination from the beginning and was unable to recruit and train a full complement of examiners overnight.

The Office shared doubts over the achievable steady-state workload. Already in 1977, against an Interim Committee target of 40,000 applications per year, Van Benthem reduced the forecast by 25% to 30,000. That decision was interpreted in various ways: one was that there were legitimate doubts about the success of the procedure that had been put in place; another was that reducing the target made it easier to achieve and above all helped to speed up the process of getting the EPO established. The date of 1 June 1978 that the Interim Committee had set for receiving the first patent applications remained unchanged, although the possibility of bringing it forward had been examined.

The Office set to work in a systematic manner, taking one stage of the procedure at a time. The grant procedure for a European patent had to go through several phases calling for separate administrative services. The seven departments charged with the procedure were set out in Article 15 EPC: the Receiving Section; search divisions; examining divisions; opposition divisions; the Legal Division; boards of appeal; and the Enlarged Board of Appeal. The first thing to do was organise the receipt of filings. The most significant achievement of those early months was undoubtedly the computerisation of the application filing process. This provided the Office with a modern operational capability and allowed it to meet the deadlines it had been set for receiving the first applications.

Comments on the Office’s activities at that time still reflected a degree of scepticism based on rather hazy knowledge of the timetable. As early as February, the Süddeutsche Zeitung was surprised that there were “still no patents in the European Patent Office.” On 1 February, the application pre-classification service was started up to enable European applicants to ascertain whether their applications fell within one of the technical fields open for examination.

The Office opened its doors for the filing of applications on schedule on 1 June 1978. The first applications had been accepted during May, but were given a filing date of 1 June. The Süddeutsche Zeitung announced the first filings very briefly. “Act One: a heart attack drug,” observing that the first applicants were BASF, Opel and Renault. As witnessed by Curt Edfjäll, one of the Office’s very first managers, things seemed slow to get of the ground: “The first few months were very nerve-racking and even pessimistic, because we received very few applications, and everyone was a little bit shaky and saying, ‘Hmm, is this going to take off or not?’” Applicants adopted a cautious strategy, in some way testing the Office by filing only a few applications to see how it all worked in practice. “Of course, after the first six or seven months the Organisation started to grow very nicely.” The Süddeutsche Zeitung soon seemed rather surprised that there had already been 2,000 filings with the EPO. “We began with three people in November 1977. It certainly wasn’t easy to start with, as everything was brand new and three different procedures had to be set up. Don’t forget that apart from European applications the Receiving Section also acts as receiving Office for Euro-PCT applications, where the procedure
is different again. Luckily we had the benefit of the lengthy experience of Mr Hosemann, who had worked for the German Patent Office for 26 years, leaving there as assistant to the executive director Patent Divisions; he had been involved in the handling of granted patents, the transfer of applications, patents and licences, and formalities examination. He made that wealth of experience available to the Office, which was extremely useful for us 67.

By the end of 1978, 3,559 European patent applications had been filed. Together with the applications filed under the PCT, that meant that the Office with 4,041 applications was very close to the Interim Committee’s estimate of 4,041 filings, for an area covering the 16 signatory states.

Filed in Munich, in the national offices or directly in The Hague, applications were focused on The Hague for the search stage. Thus it was the potential of the IIB that enabled the EPO to work properly in its first phase of development. DG’s work was directly linked to the first stages of the grant procedure. Its three major functions in 1977 were: receiving and administering patent applications and checking them for formal requirements; searching for prior art; and managing the documentation and databases on which prior art searches were based. On arrival in The Hague, each application file was taken in hand by the Receiving Section, which assigned it a date of filing and a number. The date of filing was highly significant in terms of prior art at the post-grant opposition stage. If the application was admissible, it was passed to the pre-classification service, which assigned it to a directorate appropriate to the technical field concerned. Incoming applications also had to be checked for compliance with formal requirements and for the payment of fees. The patent application dossier, filed either with a national office or directly with the EPO, was made up of the official request form (mentioning among other things the countries covered by the application), the description of the invention, drawings, claims and an abstract. On arrival, too, applications were sorted according to their nature, in particular for standard searches which did not go on to enter the grant procedure. Some applications might be open to divergent interpretations as to their compliance with the EPC, so a procedural support team was set up to help staff dealing with incoming files. The language of filing was one of the Office’s three official languages: English, French or German. After registration and formalities examination, the first stage of the search procedure consisted in comparing the invention with the state of the art so as to justify the patentability of the proposed invention. That entailed in-depth technical expertise, as it involved studying the patent application, having a mastery of the field concerned and understanding the solution proposed by the applicant. On the basis of this analysis, the search report was sent to the applicant, who then had six months to decide whether or not to continue with the procedure by submitting a request for examination. If so, the patent application was published, theoretically 18 months after the date of filing, together with the search report.

IIB integration, a key concern

The Hague provided the EPO with a ready-made foundation of experienced staff that was immediately operational, housed in a suitable building with all the necessary equipment. The search stage being by definition the first that had to be ready to meet applicants’ needs, the configuration seemed particularly well suited.
Integration of the IIB proved a major concern for the EPO team. Georges Via- 
nès, the first Council chairman, identified it as the “first principal task” dealt with by the 
Office in its first year of existence. A delicate task, too, because the Service Regulations 
of the Co-ordinated Organisations that had ultimately been adopted were received very 
badly by staff in The Hague, who felt dispossessed. They thought they were not only 
losing a part of their identity by being integrated into the EPO, but also being penalised 
by forfeiting acquired benefits that they held to be legitimate. That feeling was no 
doubt exacerbated by the perception that Europe’s first international organisation 
dedicated to patents, with several decades of experience behind it, was being absorbed 
by a new institution, with no history and no structures. Some doubtless thought it 
would have been more reasonable, and more just in view of the work it had done since 
1947, to convert the IIB into a European Office with its headquarters in The Hague. 

“Two problems arose: one was how to deal with the increased workload with 
which the search departments have been faced. The other problem concerned the 
arrangements for applying the Integration Agreement to the staff of the former IIB. As in 
all matters affecting staff rights, many delicate questions were involved. Today, however, 
we may say that they are on the way to being definitively solved, thanks in particular to 
the close co-operation between the EPO management and the Administrative Council”.

That was an optimistic diagnosis which would not be fundamen-
tally belied by the facts, if the phrase “on the way to being solved” is 
viewed from a long-term perspective. When Jacques Delorme left 
his post of Vice-President DG1 at the end of 1986, a EUREKA editor 
asked him an “innocent” question: “Staff in The Hague were reput-
et to be awkward. Resolving conflicts giving rise to demonstrations, 
strikes, sit-ins – did you find that a particularly complex and tricky 
task?” To which Delorme gave a diplomatic reply: “Staff in The 
Hague are not particularly awkward, not in my view anyway. Be-
sides, the existence of conflict in an organisation is entirely normal; it 
merely shows that not everyone is of the same opinion. Consulta-
tion should allow many conflicts to be resolved without pointless 
strikes.” Yet the crucial issue of the Service Regulations would give 
rise to recurrent confrontation in the Office’s early years. The Hague 
staff fought to preserve their culture and special position, negotiat-
ing to gain compensation for the loss of their diplomatic status. 

Typically, the issue of catering, whose importance to the culture of 
the site had been demonstrated by PUMA, illustrates the desire to 
control the most fundamental aspects of the institution’s opera-
tions. Thus the communal restaurant would be run directly by staff 
as from April 1978. The Restaurant de la Tour foundation (abbreviat-
ed to RESTOUR) was managed by an administrative committee fea-
turing eight EPO staff members, nominated by the Staff Committee 
for two-year terms. The foundation, a non-profit organisation, was 
an independent enterprise subject to Dutch law which recruited 
and paid its staff itself.

Following the Interim Committee’s recommendations, the 
EPO’s first Administrative Council asked President Van Benthem to 
start negotiations for the Office to join the Co-ordinated Organisa-
tions (CO). The CO response was not favourable, one member voting 
against the EPO’s integration on the steering committee. Ultimately, 
the EPO chose to align itself with the CO remuneration system, but 
without formally embracing the CO Service Regulations. Regular 
links were established, with an annual meeting, but this alignment
gave rise to internal tensions, notably because the CO remuneration scheme for B and C-grade staff was less beneficial than the EPO’s, which had largely been inherited from the IIB. Bob van Benthem took charge of the matter in person and entered into discussions, notably with the Hague staff representatives, with a view to arranging for compensation.

Decisions taken over the years reduced the level of conflict. As Georges Vianès would stress, “a merger whereby a completely new Organisation acquired one which was 25 years old constituted an exceptionally difficult operation. The integration is now complete, enabling the EPO to progress to a point which it could not otherwise have reached until many years on.” It is fair to think that this period was not an ideal platform for establishing calm social relations within the Office.

Staff Committee and Staff Union

The founding texts made detailed provision for staff representation. The representative body was the Staff Committee, which was soon admitted to the Administrative Council as an observer. However, social relations within the Office called for a body more directly in sync with staff and independent of the institution, in other words a union, and one set itself up rapidly, chiefly at the initiative of the union that had existed at the IIB. The foundations laid down at that time still essentially form the framework for the way things work in 2013. Each site has “a local section of the Staff Union which is wholly autonomous in its functioning, the use of its financial resources and the definition of its policy.” The union claims to be independent in both political and material terms, achieving this through “payment of relatively high union dues. The members thereby ensure the financial and material independence of their representatives.” This basis provides the organisation with resources for travel and communication. As its secretary-general Gérard Giroud stated in 1982, “we are able at all times, even in a conflict situation, to take care of the production and dissemination of information ourselves.”

The local bodies are co-ordinated at Office level. “The central bureau with members elected for one year … constitutes the structure for co-ordination, deliberation and joint action. It represents the Staff Union of the EPO as a whole and is responsible to the SUEPO Congress, which meets once a year.”

The defence of EPO staff interests takes place in a legal context specific to international organisations. The Office’s operations are governed by its own documents and procedures, and they are what count in the event of conflict between a member of staff and the employer. Where there is disagreement, the only authority qualified to examine a complaint is the International Labour Organization in Geneva. Article 13 EPC stipulates: “Employees and former employees of the European Patent Office or their successors in title may apply to the Administrative Tribunal of the International Labour Organization in the case of disputes with the European Patent Organisation … An appeal shall only be admissible if the person concerned has exhausted such other means of appeal as are available to him under the Service Regulations, the Pension Scheme Regulations or the conditions of employment of other employees.” On paper, there is a strict division between the statutory bodies and the union. In reality, though, the union’s de facto existence is recognised by management, even if its secretary-general said in 1982: “the Staff Union regrets that its existence is not formally acknowledged in the legal texts or in terms of the facilities granted for the exercise of its activities.” In practice, the members of the statutory bodies and the Union representatives are the same people. “The Union candidates are elected very simply to the statutory bodies (the staff committees, for example); hence the positions defended by these official formal representative bodies do not differ from the union’s positions,” said Giroud, going on to point out that the union had to assemble in one representative body all staff categories of whatever nationality or origin, and refused to get involved
in any political commitment. As for its strategy, and despite the frequency of conflict from the Office’s earliest days, the Union resolutely refuses to “systematically seek confrontation with management.” It maintains relations with other organisations: “We have contacts with other equivalent European unions, which provide us with essential information concerning other international organisations, thereby enabling us to organise joint actions,” recalled Giroud in 1982.

Thus there are manifold differences between the Office’s Staff Union and the unions active in Europe. While no other organisation was in a position to compete with it, that did not make it easy-going. From the early years it has been characterised by a combative nature bolstered by significant resources from union dues and by the symbiosis between Staff Union and Staff Committee.

Launching substantive examination

Phase two, substantive examination, was to be handled by DG2, in Munich. It involved establishing whether the invention was patentable in the light of the EPC.

Three patentability criteria had to be checked: novelty, inventive step and industrial applicability. The decision to grant the patent was not left to a single examiner, but was to be taken by a three-member examining division. The examiner’s work is technical as regards management and analysis of the documentation that is the basis for justifying the invention’s patentability, and it is legal as regards substantive examination, grant and opposition. The most delicate of the three patentability criteria proved to be inventive step, where there had been divergent practices among countries, some setting the bar very high, perhaps too high, as in the Netherlands, other setting it very low, as in the UK. A conference in Munich dedicated to the definition of this criterion was organised by the Union of European Patent Agents and by representatives of patent and industry communities in the first weeks after the creation of the EPO. One result of this consultation was the request from the interested communities to follow German practice. As the French delegation stressed, the German procedure referred to “inventive level,” but the term “inventive step” used in the EPC had to be the foundation for the European procedure, without reference to a national model. The Swiss delegation specified that the model for the desired European quality was not so much the German terminology as the German Patent Office’s reasonable practice. Unsurprisingly, the UK delegation argued that the level should not be set so high as to discourage inventors. The debate was anything but trivial. As the German delegate emphasised, if industry’s expectations were not met by the chosen criterion it might rapidly gain confidence in the European patent.

Conversely, if applicants were not happy with the level required at the EPO, because it was either too low or too high, they would be sure to adopt avoidance strategies, especially as the system of national patents had not disappeared with the creation of the EPO.

However, this was all purely theoretical when the EPO first opened its doors, as the first substantive examinations were not on the agenda for many months. The significance of The Hague was especially apparent, as the presence of the IIB teams meant search could be operational fairly quickly. Otherwise it was a question of recruiting and progressively setting up teams.

Examiner recruitment had been identified as the critical point in the development of the Office and had been the subject of lengthy debate, both on the Interim Committee and at the first Administrative Council meetings. In practice, it was a tightrope walk between two tendencies: the competence criterion (and in particular the crediting of professional experience gained in a national
The agreement reached by the Interim Committee over credit for past activity was not questioned, but as the professional experience required for recruitment had not been fully defined, things were left fairly vague. The constraints linked to the balance between countries also made the recruitment process tricky to set up. The first 86 DG2 examiners had to be recruited with allowance for geographical origin, for example with 21 posts for the UK, 18 for Germany, 13 for France and just one each for Luxembourg, Norway and Greece. Most of them were civil servants from national offices, with different cultures, who were given training with a view to harmonising practice. This quota among states applied to every level of the Office’s hierarchy, which led the UK delegate to regret “that political considerations had taken precedence over the abilities and past experience of the candidates.”

To ensure that there was a real choice, the Council wanted every state to propose twice as many candidates as its allocated posts. However, without imposing a quota, it also wanted recruitment to allow for some variety in ages, so as to avoid a generational effect.

Substantive examination could not properly start until staff had been recruited and trained in Munich – a tricky process, as they needed intensive training. A course was set up quickly, “with the accent on practical examination work and discussion amongst examiners. The aim of the course is to achieve a uniform and European standard of examination and to avoid examiners bringing to the examination of European applications different national attitudes and approaches.”

The training tools were put together in the course of 1978 as the entrants were being lined up. They had been selected, but they had to be trained before they could take up their duties. This process meant that the first batch of substantive examiners did not begin to be recruited until April 1979. This first wave would then train later recruits. One thing that was to be avoided was the two host countries accounting for the majority of candidates. A good distribution of candidates amongst nationalities was an early success story, made possible by the dissemination of vacancy notices and adverts in the various countries concerned and by the fact that the national offices were able to encourage members of their staff to apply for posts in Munich. The Office being short of space in the Motorama, the first examiners invaded the Isar building while it was still a construction site. Principal Directorate (PD) Chemistry moved into the third floor of the south wing, while the Electricity/Physics and Mechanics PDs occupied the fourth floor of a building without lifts or escalators and with just six phones between them. “It was estimated that on average staff climbed 400 stairs a day, with some poor individuals having to negotiate 800 per day.”

When the other teams left the Motorama, DG2 staff were forced to move into new offices: “One soon learnt to look into the cupboards to check that a pillar was not occupying most of the cupboard space. Binoculars were soon found useful for admiring the bird life on the balconies of the flats in Baaderstraße while mentally assessing inventive step.”

Drawings from the first European patent, granted in January 1980.
Chapter 6

The Office grows and comes to an initial equilibrium
Headquarters on the banks of the Isar in Munich, inaugurated on 18 September 1980.
“Colossus of the Isar”

“The Deutsches Museum’s proximity was a factor in the choice of a location for the EPO: together with the museum and the German Patent Office, the European Patent Office today forms a technology triangle on the Isar.” The opening of the Isar building was an early turning point in the history of the institution. It gave the Office its own stage as a major international organisation with all the resources it needed, but it also to some extent put an end to the family atmosphere of the pioneering era. Now housed in a stylish steel-and-glass building, the various teams would rub shoulders, but without ever getting back to the nearness and bonding of the early days.

The arguments over the siting of the headquarters seemed long past when the Isar building finally opened; but they had not disappeared without trace. The institution’s multicultural dimension was an issue for the Süddeutsche Zeitung, which referred to a “Babel of languages”.

The building itself was not universally welcomed, the Stuttgarter Zeitung calling it “a monument to failed planning”,” while Die Welt and Der Tagesspiegel spoke of “a black colossus.” The more optimistic Hans-Jochen Vogel, the ex-mayor of Munich, explained that “everything Munich people end up loving starts out by being resisted,” adding that “the EPO does not constitute an expansion of European bureaucracy, but in fact an institution close to the population.” The EPO’s settlement on the banks of the Isar was increasingly regarded as a positive event for the international dimension of the city of Munich. “Europe settles on the bank of the Isar,” said the Süddeutsche Zeitung, while the Neue Presse Augsburg saw the EPO’s arrival in Munich as “a piece of reality everyday Europe”.

For the administrative units, the move took place in March 1980, on St Patrick’s Day as one witness remarked. Inaugurated with great pomp on 18 September 1980, the EPO’s new place in March 1980, on St Patrick’s Day as one witness remarked. The building itself was not universally welcomed, the Stuttgarter Zeitung calling it “a monument to failed planning”,” while Die Welt and Der Tagesspiegel spoke of “a black colossus.” The more optimistic Hans-Jochen Vogel, the ex-mayor of Munich, explained that “everything Munich people end up loving starts out by being resisted,” adding that “the EPO does not constitute an expansion of European bureaucracy, but in fact an institution close to the population.” The EPO’s settlement on the banks of the Isar was increasingly regarded as a positive event for the international dimension of the city of Munich. “Europe settles on the bank of the Isar,” said the Süddeutsche Zeitung, while the Neue Presse Augsburg saw the EPO’s arrival in Munich as “a piece of reality everyday Europe”.

The future seemed assured. The Office had at last found its physical incarnation. The building’s gross floor area was 81,000 m², and its interior space amounted to 330,000 m³. It could accommodate a staff of 1,200 and had 27 meeting rooms of various sizes seating from 15 to 450 people. Due allowance was made for the Office’s specific needs, since 23 of the meeting rooms were equipped with simultaneous interpreting facilities for three to six languages. The library had 350,000 volumes and seating for 80 readers. A system for transporting documents on tracks gave a modern touch to the functioning of a building which would have to handle vast amounts of paper. The air-conditioning was equipped with an energy recovery system. The building sought to be “an exemplary piece of architecture fully suited to the role of the EPO as an institution in close and constant contact with inventors and their representatives,” said Federal Justice Minister Hans-Jochen Vogel on presenting a large key to President Bob van Benthem. Representatives of the EPC signatory states were present, of course, but the circle was much wider, since the ceremony was also attended by representatives of ideally located at the heart of Munich, with easy access to the railway station and the airport. Transport and communication facilities were essential for an organisation having three sites and receiving delegates and attorneys from all over Europe.

To the sound of trumpets in Tomaso Albinoni’s D minor concerto, interpreted by a local chamber orchestra (the Staatsorchester am Gärtnerplatz), the EPO officially took possession of the premises that were to house its development. The building had been erected by the Bavarian Finance and Building Administration on behalf of the Federal Republic of Germany, on plans drawn up by the architects Gerkan, Marg and partners. Bob van Benthem was quick to recall this support from the German authorities: “The Federal Republic of Germany undertook the construction of the building on behalf of the European Patent Organisation on a site generously provided by the Free State of Bavaria and the City of Munich. I would like to join the President of the Administrative Council in thanking you, Herr Vogel, as representative of the Federal Government, for this comfortable and efficient building. We are well aware, and appreciate, that the building has been pre-financed by your Government and also that politicians, not least yourself as Mayor of Munich, as Federal Minister of Housing and later as Federal Minister of Justice, have supported and at times fought for the building.”
The EPO’s Berlin sub-office, which opened on 1 June 1978 in the historic building that had housed the German Patent Office. It was an extension of the branch in The Hague, where European patent applications were filed, searched and published.
other countries that had been involved in the Munich Diplomatic Conference (Spain, Finland, Portugal) and of countries whose patent offices were PCT authorities (Australia, Japan, USSR, USA), along with representatives of the Council of Europe, the African Intellectual Property Organization, the European Free Trade Association, the Community Patent Interim Committee, the Institute of Professional Representatives before the EPO and INPADOC. "Let me congratulate you... on the location you have selected for the European Patent Office. Munich is one of the intellectual and cultural centres not only of Germany but also of Europe. I am sure you will be happy here. I should also like to remind you – and I do so with the utmost satisfaction – that the European Patent Organisation has set up a sub-office in Berlin, thus meeting the wishes of the Federal Republic of Germany in a matter of great importance for the latter." 

This satisfaction expressed by Federal President Karl Carstens in 1981 was the culmination of a process that Germany had embarked on back in the early 1960s. It was at last hosting an international organisation and affirming its place as a leader in European technology. The spectre of deindustrialisation that had been conjured up by Senator Morgenthau was now just a distant nightmare.

A human resources policy for the EPO

Beyond the differences in mission and culture between Munich and The Hague, to achieve its objectives the Office needed a management policy for all its staff. Its activities had at first focused on search work in The Hague. With the passing of time, rebalancing between the Dutch branch and Bavarian headquarters became a critical factor in the Office's development. Staff management based on a clear policy progressively had to turn into a reality.

The Council "has had to resolve a good many staff-related questions, some of them inherent to any international organisation, such as national quotas, changes to the Service Regulations, Pension Scheme Regulations, sickness insurance, etc." These occasionally tricky adjustments had been only one aspect of HR issues at the EPO. The main one, linked to growing success, was surely the recruitment and training of newcomers with different origins and profiles and their integration in a multi-cultural organisation.

The characteristics of that community were settled from the early years, which was a special period in two respects. The Office was still little known, and it needed to communicate in order to attract job applications. Growth in staff numbers was achieved by the successive assimilation of employees from varying backgrounds around a historic core formed of the very first recruits. The core saw its numerical significance automatically reduced, but its role remained important, as the recruits of the early months would remain heavily involved in collective life. They were infused with a European spirit. They were greatly attached to the personality of Bob van Benthem and felt themselves to be the bearers of the institution's true values. Forged in the Motorama, that spirit persisted in the new building, even if the pioneering element seemed to become dissipated in the vast corridors of the brown steel colossus. Though heterogeneous, the staff as a whole was marked by a strong awareness of duty towards the institution, a duty which in return implied rights. Collectively, EPO personnel over that founding period developed the feeling that they had to contribute to the Office's governance and that they had supervisory rights going well beyond the defence of their interests. A fairly comparable state of mind existed in The Hague, even if the context in which that aspiration was expressed was noticeably different.

This situation was a trump in the Office's hand, in that it united institutional voluntarism and the involvement of staff to provide the best welcome for new recruits. Bob van Benthem had mentioned his attachment to Munich. The city certainly offered real attractions. A short guide published by the EPO's Personnel Department introduced new staff to Munich's many cultural attractions and festivities and included sections dealing with accommodation and education. Stressing the human side of a great European city,
it was clearly intended to reassure EPO employees and their families. It did not refer to professional matters, apart from pointing out to recruits that immunity from jurisdiction applied only to acts performed in the exercise of their official functions. Thus the Office, in Munich, Berlin and The Hague, was able to rely on devoted administrative staff capable of accentuating the positive when integrating new recruits.

**Business growth, examiner recruitment and training**

Business expanded rapidly from 1979 on, and the recruitment and training of new examiners became one of management’s major concerns. From 1980 to 1981, the number of European patent applications rose by 33%, reaching over 22,000 filings and greatly exceeding the estimates. “Since 1978,” recalled Jacques Delorme in 1986, “the Office has been wrong every year in its estimate of incoming applications, and has always erred on the low side.”

As a result, the opening of fields of technology to the European procedure was greatly accelerated. Instead of the five years envisaged, it took just a year and a half to open up all fields. By 1 June 1979, 80% were open, and by 1 December 1979 the Office was able to offer all technical fields. In parallel, substantive examination officially began on 1 June 1979 in Munich, and the first appeals were filed in 1981.

The root cause of this acceleration lay in the user community. While the Office’s managers, and especially its President, had constantly stressed the risk of a surplus of substantive examiners, the users had been in favour of opening up all fields as quickly as possible so as to avoid distortion between sectors of industry. There was no denying that the chemistry sector had been heavily privileged, to the detriment, for example, of electricity. The chemical industry was thought likely to have the highest demand for European patents.

The Office managed to attract filings very quickly, and some were surprised by its success. Statistics reflected very vigorous growth overall, but also a rebalancing of activities. “One notable change … was a decrease in the percentage of applications filed in the chemical field, with corresponding increases in the other main technical fields.” The recruitment forecasts had to be rapidly reconsidered. In May 1981, the Receiving Section had 64 employees of eight different nationalities. After three years of practical experience, it was fair to say that the broad outlines of formalities examination and the Section’s other tasks had taken shape and stabilised. Of course there were still regular changes on specific points of detail, notably due to amendments to the regulations in force or to decisions of the Legal Board of Appeal. From January to the end of July 1981, over 12,600 European applications were received and around 1,550 Euro-PCT filings, which was likely to result in some 23,000 or 24,000 filings by the end of the year. The number of PCT applications filed with the EPO as receiving Office for international applications was of the order of 150 per year. Not all the system managed to keep up with filings growth, though. A stock of applications awaiting search began to accumulate, and already the aim was “reducing the backlog to reasonable proportions as early as possible.” That was not easy to do, as the number of filings rose considerably every year, but the trend did improve somewhat. In 1982, the outstanding stock (58,572 cases completed, 57,645 new cases received) shrank for the first time.

Growth in business ought automatically to have entailed faster recruitment to cope with demand, but prudence remained the order of the day. “The Office was wary of the obvious solution of massive recruitment with its possible adverse future consequences.” The imbalance between The Hague and Munich was one of the first points to point out. While DG 1, which could call on many experienced staff, had to build up its teams from scratch, 62 examiners were recruited in 1981, and in the same period 17 search examiners were transferred from The Hague to DG 2 in Munich to strengthen substantive examination. That brought the search examiner complement in The Hague and Berlin to 533 and the substantive examiner complement in Munich to 204.

The relative strengths of The Hague and Munich had to be adjusted to achieve a smooth workflow in which the two stages of the grant procedure were harmonised. One stage could not be allowed to form a bottleneck for the other, and the respective
In the 1980s in The Hague, the EPO library inherited from the Netherlands Patent Office included a rich collection of old patents with a double classification (by technical groups, and numerically by country). Examiners consulted a reference list and then determined whether they needed documents copied in order to deal with their files.
identities of the Office’s two major components had to be respected. So the priorities were to increase the Office’s handling capacity while improving the integration of different cultures, to merge experience and to homogenise expertise. 1982 saw the launch of the “internal note,” in which the search examiner expressed a preliminary opinion for the substantive examiner on issues such as novelty and inventive step 98. Thus exchanges between The Hague and Munich were organised. More significantly, in 1981 it was decided that search examiners and substantive examiners would be recruited as part of a common plan. Substantive examiners would spend the early part of their career in The Hague before being transferred to Munich. In 1982, 128 new posts were filled, the great majority by experienced examiners from national patent offices; but that reservoir was running dry because, after the first wave of volunteers, the national offices “now have few examiners willing to transfer to the EPO.” From 1982, the recruitment net was extended to “candidates from industry and, for the first time, from amongst patent attorneys.” Prudence was still the watchword, due to uncertainty over business: would growth be sustained, or would success simply prove to be a flash in the pan? In general, the Office remained cautious in taking on additional staff who might not be needed in the long term; but that caution was called into question by immediate needs and by the risk of a growing backlog that might compromise the Office’s budding reputation. The evolving procedures were placing increasing pressure on Munich, where “considerable recruitment is still necessary.” Whereas the growth of Directorate-General 1 is largely complete and, in the long term, its staff numbers will even fall somewhat as examiners are transferred to Directorate-General 2, the latter will continue to expand for some time to come. In 1982, 60 additional examiners were recruited to DG 2. These were experienced people coming from DG 1 or national offices. “The fact that, throughout the EPO’s formative years, the national patent offices have released so many of their experienced examiners for transfer to Directorate-General 2 is very much appreciated.” Without them, serious problems would surely have arisen. To some extent, caution was strengthened by the size of the available pool. “In spite of … unemployment, the EPO is experiencing some difficulty in attracting staff meeting both the technical and linguistic requirements that the EPO has to set in order to maintain the quality of its work and to ensure that its staff is drawn from all the Contracting States.”

The individual careers that led young engineers and scientists to opt for the profession of examiner were diverse, but seem to have had some points in common. “Having graduated in patents in 1981,” recalled an examiner in 1983, “I was not keen on setting up office in that difficult period. Having thought about retraining in development matters, I was ultimately seduced by the sirens of the EPO in Munich … . Like everyone, it was with curiosity mingled with a degree of distrust that I observed the establishment of the imposing institution that the EPO promised to become. From my initial contacts with the pioneering European examiners, I discovered, much to my surprise, a new-style organisation committed to efficiency and service, rigorous yet without excessive formalism.”

The difficulties strengthened the Office’s policy on salaries: “There is no concealing the fact that salary levels well over those for comparable duties in the Contracting States are absolutely essential if an international organisation like the EPO is to function properly.” This statement is a response to “efforts within the Co-ordinating Committee of Government Budget Experts directed against the principles governing remuneration in international organisations.” This proposal had “given cause for deep concern, … although the Office and its staff are well aware that the difficult economic situation in many Contracting States must be reflected in salaries of international civil servants, in the same way as in national salaries.” So the equation was fairly complicated for Office management, which was subject to a scarcely manageable set of tensions. It had both to recruit in a market where suitable talent was in short supply and to show discretion over the benefits granted—the latter in any case being disputed by examiners working for the Office. A German examiner, Karl Goettgens, one of the first to be recruited in 1979, drew comparisons that he claimed were accurate because they took account of the real status of other civil servants: “I think national civil servants need to realise that their status is far higher than they think. As you can see from the budget, 40.7% of the A staff in the German national office have at least the status of group supervisor or Richter [Judge]. In the EPO a similar status applies to only 9.1%. Even if you include the A4 posts at the EPO in this figure you will still only find that 33.6% of the A posts have this status. My own feeling is that all my colleagues...”
at the EPO have been willing to sacrifice in order to create an office which functions. Much of the criticism we have had, due to our supposed high salaries, is undeserved, more especially as we have brought highly experienced people into examining posts, who otherwise in national offices would have been hearing officers, or Richter or other higher animals.” Be that as it may, Goettgens conceded that he had gained: “But the gain,” he specified, “is more spiritual than financial.”

A British examiner for his part had noted among staff from national offices a truer desire to join the European Office, linked to a very direct interest. “In the German Office there was great competition to join the EPO. Many German examiners gave up almost certain promotion to join (so did several UK examiners) and many German examiners even took a reduction in grade. I found myself with some German staff of such experience and ability that I marvelled at the circumstances that put them under me, rather than the other way about.”

So it is hard to draw a generalisable profile. Behind the uniformity of the procedures, it was frequently exceptional people who found different attractions in the job. Receiving his jubilee gold pen from the hands of President Van Benthem himself, Daniel Vandooren – “a Belgian to boot,” in his own words – reflected the caustic spirit that sometimes seemed to pervade the community. “I can assure you, Mr President, that your words have touched our very hearts, especially as we are quite unused to being complimented, day after day here in this building! It’s an open secret that examiners and those around them are fated to live, for almost their entire career, in the deepest anonymity, and that the days when they are overwhelmed with praise by their superiors are even less numerous than tropical days in Holland! The situation is not yet dramatic, but it deserves to be examined with a magnifying glass by an ad hoc working party!”

The examiner has to try to cast doubt on the novelty and inventive step of the application facing him. So the core of his work is negative. He is a kind of demolition worker, an intellectual demolition worker of course, and if demolition workers ever get buried, it’s rarely under heaps of praise! A second reason why examiners are rarely dragged from one ceremony to another in their honour is the circumstances in which they do their job. Every morning they enter their cell, surround themselves with vast volumes of documentation and search, in silence and for hours on end, for a detail that would never have occurred to a normal person. In short, they lead the life of a monk. Now, Mr President, have you ever seen a monk loaded down with honours?”

Friendly to applicants, strict on quality

From its earliest years, the Office was present at major European events relating to innovation. In 1979 it took a stand at the International Inventors Fair in Geneva, alongside the Swiss and French Offices and WIPO. It launched a growing number of initiatives to raise general awareness of the European patent. “Newspaper, television and magazine interviews have been arranged to draw the attention of the public to the existence of the European patent system ... Thousands of copies of the information brochure How to get a European patent have been distributed.” This publicity was directed not only at potential applicants in Europe but also at those in major non-European countries such as Japan and the USA.
registration-only system. Bob van Benthem’s doctrine meant acting towards applicants as partners, not as judges.

As for formalities examination by the Receiving Section, we try wherever possible to avoid the loss of applications for formal reasons, and we conduct the examination with a degree of flexibility. Of course, it is still essential to follow the rules and supply documents in due form and time. By the end of 1980, only eight European applications and three Euro-PCT applications had been killed (i.e. refused) for formal reasons, out of a total of 3,883 filings in 1978, 12,700 in 1979 and 20,051 (so far) in 1980 194.

“Mr President, when you were head of the Octrooiraad (Netherlands Patent Office), your reference point was always a skilled person who was easy to classify – a universal mind, a mega genius, a virtuoso for impossible combinations, in short, a sort of E.T., an extraterrestrial with a human face. Now you have taken charge of the European Patent Office, which is far more easy-going towards inventors, its reference person being a craftsman who, while he has a right hand, certainly doesn’t have two of them 195. This principle, clearly positive, raised the question of impartiality. How could an office, and hence its staff, be close to applicants yet guarantee a strictly independent procedure? The Office would progressively build up this practice, but enshrining it from the outset in structures and partnerships that provided the policy with precise criteria and efficient tools.

Relations with patent attorneys were one of central planks of this policy. Since the opening of the Office, there had been a transitional period in which those already authorised by the central industrial property office of the contracting state where they practised were entitled to act in patent matters before the EPO. Nearly 4,750 representatives had been listed under that provision. As from 7 October 1981, the European qualifying examination (EQE) was the only way to obtain the status of authorised professional representative; but special arrangements would apply to statutory states that acceded to the Convention later. The Office from its first weeks endeavoured to establish good relations with the Institute of Professional Representatives that was set up at the very first Council meeting. All those entered on the list of professional representatives were automatically members of the Institute. The Institute’s co-operation with the Office was “both friendly and fruitful” 113 and that was confirmed when new procedures were put in place. Members of the Office and of the Institute sat together on the EQE Examination Board and its three committees. The EQE was anything but a formality. In the May 1981 exam, 12 of the 18 candidates passed. The Office and the Institute also sat together on the three disciplinary bodies ruling on issues relating to professional representatives.

The other strong point in the construction of an office open to users’ concerns was the creation of the Standing Advisory Committee before the EPO (SACEPO), specifically desired by Bob van Benthem. Its held its first meeting on 12 January 1979 112. According to its founding principles, SACEPO is a broad assembly of corporate representatives. Each member speaks in one of the Office’s three official languages, with no provision for interpreting. The inaugural meeting chaired by Bob van Benthem set out the issues that would be addressed at the four two-day meetings planned for 1979. Diverse as they were, what these topics had in common was that they dealt with applicants’ real and immediate concerns. Methodology was flexible. Everyone was free to speak, and “no minutes of the discussions will be taken, but a brief report of the conclusions reached will be issued after each meeting” 114. SACEPO was not totally open to the outside world. While the discussions could be broadly reported, matters arising from Office internal procedures could be classified as confidential. The issues
addressed ranged from simple details of the Guidelines for Examination, patent information/documentation and fee refunds to the correction of formal errors in a European patent application. The SACEPO secretariat had worked throughout 1978 to make all the arrangements. At the first meeting Bob van Benthem decided to appoint five new members, including Kurt Haertel.

A working party on quality harmonisation sought to harmonise search to adapt it to DG 2’s needs. The mechanics and electricity/physics sectors were the first to achieve this harmonisation over assessment of the level of inventive step, in 1981, and chemistry followed in 1982. To ensure the success of this conversion of industry to the new procedure, the EPO had mounted a considerable communication campaign, preparing 18,000 copies of the Guide for Applicants and circulating them among industrial communities, professional representatives and chambers of commerce, “so that the Office might receive a sufficient number of applications to ensure future financial stability.”

Attracting applicants meant simplifying processes for them and taking their concerns into account. On the other hand, any weakness in the procedure likely to attract a certain class of applicants would ultimately have been disastrous for the Office’s reputation and thus for its attractiveness. The underlying fear was also that combining IIB-style searches with German-style substantive examination could not work, in other words that the creation of the EPO, based on that new practice, was a failure. So the quality requirement, one of the Office’s founding principles, was endlessly re-examined and re-evaluated and deemed to be the crucial factor in its development. In general terms it was defined as the “set of characteristics of an entity that give that entity the ability to satisfy expressed and implicit needs.” Thus the quality of service provided by the EPO was not to be construed here solely as a positive judgment but as incorporating the systematic monitoring of each of the stages in the granting of a patent, along the same lines as the production of goods or services.

Already then, relations between examiners and applicants were key to the notion of quality, which also motivated Office staff in a very specific way. The fact of having to work in three languages was particularly rewarding: “The entire discussion with the applicant or his representative, be it in writing or in speech, takes place in one of the three official languages. For my part, I work over 60% in English, 20% in German and the rest in French. It should be noted that contacts both by telephone and face to face are encouraged, which helps to make the profession and the procedure very lively; there is also very close dialogue with our colleagues in The Hague. Since decisions to refuse or grant a European patent are likely to have major commercial implications in an economic zone covering up to eleven countries, these decisions are taken jointly and in the examining divisions.”
The European School Munich

The European School, a major factor in attracting volunteers, proved complicated to set up because of delays in its construction. The staff representatives stressed how much it was needed for international civil servants living in Munich. In the first phase of the Office’s history, marked by the recruitment of many examiners, its absence might explain the difficulties encountered in attracting non-German-speaking examiners. The site in Neuperlach, to the south-east of the city, had been made available to the Office by the German Government at a discount of 30% off its real value. The school opened on 1 November 1977, temporarily housed in the premises of the French school in Berlepschstraße, with a handful of children and two teachers. It did not move into its current site until November 1981. Teaching was offered in English, French and German. Under an agreement between the Office and the Board of Governors of the European Schools, the school was financed by the EPO and not, as for other European schools, from public funds. This costly arrangement had been the subject of lengthy debate on the Interim Committee, and only the Netherlands and France sought to downscale it in the early years. The first pupils passed their European baccalaureate and left the school in 1984. The aim of the founders of the European Schools for this new type of educational institution had not been to assemble several national systems under one roof, but to create an establishment which allowed pupils in the different language sections to take part in joint activities so as to get to know, appreciate and help each other better.
Chapter 7

New President, new era?

Bob van Benthem congratulating his Swiss successor Paul Braendli, who took over at the helm on 1 May 1985.
“Today,” declared the Council chairman in 1981, in the presence of the visiting President of the Federal Republic of Germany, “we can already pass judgement on the value of this European achievement: It is considerable and the European patent is a success. And, since we must ‘render unto Caesar the things which are Caesar’s,’ I should like in your presence to thank warmly the President of the Office and all his staff for the competence they have shown and the high quality of their work.” The European patent was now a reality acknowledged by the press, well beyond the bounds of Germany. “Success of the new European patent,” wrote the Ferramenta e cavaliaggi, while Il Fiarino in Rome said: “European patent applications on the rise.” Following these years of construction and initial international recognition, the Office was about to undergo its first major change, with the departure of founding father Bob van Benthem.

**Fragile equilibrium**

At the start of the 1980s, the Office’s undeniable success, welcomed by all concerned, was still too unstable to predict a peaceful future. As Bob van Benthem perceptively stated in 1981, “the Office is still in a build-phase.” Not all departments were in place (still no Enlarged Board of Appeal) and some issues broached in October 1977 remained unsettled (e.g. accession to the Co-ordinated Organisations). So despite the highly encouraging first few years, a feeling of uncertainty still prevailed. “The future of our Organisation is not clear,” explained Jean-François Mézières to the Council: “The major problems facing the Council that I have just sketched out are proof of that. The Office’s current situation, which at least in appearance is wonderful, is the result of our member states’ desire and ability to operate a truly European policy. The dangers that it may face are commensurate with its success, which may have come too quickly. The Mephistophelian principle is that everything that comes into being deserves to perish. Against this principle of evil stands the creative principle or, in our case, the European spirit. As Bob van Benthem perceptively stated in 1981, “the Office is still in a build-phase.” Not all departments were in place (still no Enlarged Board of Appeal) and some issues broached in October 1977 remained unsettled (e.g. accession to the Co-ordinated Organisations). So despite the highly encouraging first few years, a feeling of uncertainty still prevailed. “The future of our Organisation is not clear,” explained Jean-François Mézières to the Council: “The major problems facing the Council that I have just sketched out are proof of that. The Office’s current situation, which at least in appearance is wonderful, is the result of our member states’ desire and ability to operate a truly European policy. The dangers that it may face are commensurate with its success, which may have come too quickly. The Mephistophelian principle is that everything that comes into being deserves to perish. Against this principle of evil stands the creative principle or, in our case, the European spirit.”

In a lengthy article, Mézières went on to express a feeling which, while not generalisable, is indicative of recurrent concerns: “There is no demographic data on the longevity of international institutions, so it is impossible to say if the European Patent Organisation has just left the cradle to enter early infancy, or if it is already experiencing its questioning adolescence; but after five years of apparent success it is doubtless moving into a region of turbulence: as for any social body, rapid growth gives rise to friction, which entails adaptation.” He then listed various staff issues – remuneration, pensions, etc. In the medium term there could clearly be no certainty over the Office’s financial equilibrium. Because clients paid for expected services in advance, there were still unresolved accounting problems, which cast doubt on the way fragility continued into the late 1980s.

**Jean-François Mézières** (born 1947) was appointed first Secretary of the Administrative Council of the European Patent Organisation in 1978, having been a member of the Interim Committee with particular responsibility for financial arrangements.

Bob van Benthem passing assembled staff on his way to the Council chamber in 1984.

In which expenses or charges, income or products, were taken into account. The Financial Regulations had established a cash principle according to the usual rules of public finance. Some delegations defended the idea that only accrual accounting would provide a realistic picture of the Organisation’s position. Still more broadly, the standards adopted seemed to give a poor reflection of the Office’s real activities.

“On the Interim Committee’s Working Party V, there were various opposing approaches, above all to the presentation of the budget, some favouring a breakdown of income and expenditure by nature (e.g. costs for staff, hardware, etc.), others preferring a breakdown by programme (e.g. search or publication, all income and expenditure arising from the same function or administrative unit being grouped). As a compromise it was decided that the EPO’s budget would be presented in both forms, by nature and by programme. The programme-based structure was initially set up such that management could investigate its usefulness.”

These debates, combined with staff-management conflict over pay and service conditions, prevented the social body from finding the equilibrium that was desirable after some years of existence. The Office in the mid-1980s was far from being a settled institution where all problems were resolved by consensus. There were many tensions, and relations between staff and Office management were strained despite Bob van Benthem’s charisma. The President, who had no doubt hoped more trust would be placed in him, seems to have suffered from this climate of tension. The campaigns conducted by staff often took spectacular, indeed shocking forms. In The Hague, documents were thrown out of windows, a transgression clearly with no real operational implications, but highly symbolic, consistent with union policy of not damaging working tools. In January 1985, conflict over pay took on proportions that suggested the Office’s very stability “had been put into question by the staff actions, particularly by causing applicants to feel uneasy about using the European system. The damage done to the Office would ultimately have a bearing on the staff, and it was naive of the staff to imagine that applicants would have faith in an organisation where the personnel had no sense of responsibility.” The delegations too seemed extremely worried at the depth of the crisis and the spectacular forms it took,
one pointing out that, “having created the Office in good faith, the Contracting States were now not prepared to allow irresponsible behaviour to ruin their work over the years in constructing the system.” Debate on the Council on this issue was recounted by the author of a EUREKA article: “To give the reader an impression of the dramatic nature of the warnings given, I jotted down a series of epithets used frequently in the first hour of discussions: Childish, Maladroit, Scandalous, Irresponsible, Illegal, Threatening, Inadequate, Naïve, Disloyal, Babyish, Imprudent.” Only consequential financial concessions would put an end to the conflict, but its gravity led the Council chairman to command that such events should not be repeated, making the concrete suggestion that, “to avoid possible breakdown in communications between the elected staff representatives/the President/the Council, there should be time set aside for informal discussions during Council meetings with staff representatives and the Office management, in order to air any personnel matters which were hindering, in the staff’s opinion, the proper functioning of the Office. However, there was no wish to awaken false hope in the personnel, and create expectations which could not reasonably be fulfilled. An unhappy chapter in the EPO’s recent history was closed with a clear warning that the existing machinery of staff consultation and co-ordination was the framework in which legal staff representation should take place. Illegal staff action would in future be treated as such in the interests of the Office and the staff.\[129]\[130] (see p. 127) A dangerous transition?\[131]\[132]

Thus it was in the wake of a particularly tough conflict that could only raise fears for the future of an institution he had helped to set up and had led from the outset that on 28 March 1985 Bob van Benthem bade farewell at an extraordinary Council meeting in Munich. The ambience was cordial, with musical interludes provided by the EPO choir and pieces for harp and violin, and with an array of gifts (including a telescope). There were six speeches in praise of the founding father, the Office’s first President, paying tribute to his role in “one of the most important developments in the patent field, above all of course in Europe but also from a worldwide point of view”[133] and recalling his involvement in the preparatory discussions, when he had chaired Interim Committee Working Party 1, dealing with the opening of the EPO. Describing Van Benthem as a conductor whose baton allowed different and indeed divergent voices to speak out within the Office, a co-ordinator of contacts with industrial communities, and a seasoned campaigner in dealings with WIPO, the presidential portrait also mentioned his profound humanity and his sense of humour. His own words on the occasion reflected the understanding he had established with Georges Vianès. Beyond the conventional homage, his words were friendly in their evocation of common memories reflected the understanding he had established with Georges Vianès. Beyond the conventional homage, his words were friendly in their evocation of common memories reflected the understanding he had established with Georges Vianès. Beyond the conventional homage, his words were friendly in their evocation of common memories reflected the understanding he had established with Georges Vianès. Beyond the conventional homage, his words were friendly in their evocation of common memories reflected the understanding he had established with Georges Vianès.

Turning to the future, Van Benthem said solemnly: “Your destiny is to work with my successor Paul Braendli[134]. Destiny was a strong term, and seemed better suited to Braendli himself, as the incoming President had the impossible mission of following someone whom the passing years would turn into a veritable myth.

Yet there appears to have been no real break between the presidencies of Van Benthem and Braendli. The head of the Swiss Patent Office had been present in much of the process of setting up the Office. As a Council member he had been heavily involved in decision-making. However, the transition between a historic figure and a younger high-level manager could not be entirely problem-free, and Braendli was aware of that. He decided to observe for a year, to listen and consult. It was only then that he committed himself to action, always with the aim of strengthening the Office’s position, within the framework of the Protocol on Centralisation, while encouraging it to evolve towards greater efficiency in its methods and structures.

The departure of Bob van Benthem nevertheless marked the end of a major phase in the history of the Organisation and the Office. The founding father had held the presidency since the very first day. Under his aegis, the linkage between the President and the Council had never really been an issue. The Munich Convention had given the European patent system a constitution founded on a number of strong principles, designed to guarantee both efficient functioning and the long-term preservation of the founding principles. The arrangements are based on the Organisation and its Administrative Council. Each member state has a seat and a vote. The Council takes two decisions by a three-quarters majority: it elects the President of the Office and adopts its budget each year. The President therefore has very broad powers. He does not have to have his decisions validated by the Council. While any comparison with the political sphere is tricky, the system is arguably comparable with a presidential regime. Although it guarantees strategic supervision and requires the Council to agree on the choice of a President capable of carrying most of the delegations, the system has no checks and balances. In the event of a major divergence between the sitting President and the Council, there is by true personal proximity, had laid the foundations for an image fuelled by many anecdotes. When problems arose, it was recalled, he offered a cigar as a sign of friendship, of respect. The abiding memory was of a man who knew how to forge consensus on the Council, his personality growing legendary by the year - founding father, loved, respected, generous and impartial, creator of the Organisation, organiser of the Office, the man who set it on the road to success. This depiction is especially impressive because it can be considered to a very large extent to reflect a reality perceived and expressed by his contemporaries.

no provision for an emergency exit, apart from the protagonists’ willingness to seek a compromise.

Paul Braendli had been elected in June 1984, which had allowed him to spend the last half of the year alongside Bob van Benthem, who had involved him in meetings and in decision-taking. Preferred to Jacques Delorme, the Vice-President DG110, Braendli took up his duties on 1 May 1985 for an initial seven-year term. One consequence of a Swiss national replacing a Dutchman at the head of the Office was that Switzerland’s Jenö Staehelin, the Vice-President DG5, gave up his post to the Netherlands delegate Peter Zwartkruis.

Paul Braendli had to keep the pioneers’ flame burning and at the same time make the EPO’s functioning appropriate to a rapidly changing economic, social and political environment (the emergence of neoliberalism, the prospect of a single European market, the growing strength of social democratic parties, etc.).

It was perhaps in awareness of this challenge that Braendli asked a number of questions in his speech on 10 June 1985 at the first Council meeting during his term of office. “The EPO,” he affirmed, “is an efficient and well-organised office which performs admirably all the tasks assigned to it under the European Patent Convention. Bob van Benthem, who presided over its evolution, the 2,000 or so employees now working in it, and its Administrative Council, can be proud of their accomplishment. Could this state of affairs strike a new President as rather frustrating? Must he ask himself dejectedly: Everything’s going so well, there seems little point in doing anything more? Might he be tempted, as he takes delight in his sumptuous inheritance like the prince in the fable, to fold his arms and enjoy the fruits produced by those who went before him113?”

Mastering rapid growth

The Office’s unforeseen success was marked by rapid but uneven growth in its activities. The workload focused initially on search, before subsequently shifting towards substantive examination and then the downstream procedures. The rhythm and quality of the examiners’ work were the keys to the institution’s reputation, as well as its financial health. If the size of the EPO in the early 1980s was still comparable with that of the larger national offices, by the end of the decade this was no longer the case. Recruitment and higher productivity became the two priorities in order to win the never-ending race against the accumulating backlog, which lengthened waiting times for applicants114. The way in which performance requirements were taken into account varied considerably among the various components of DG1 and DG2. The directors in the various fields had contrasting styles, leaving their staff differing degrees of freedom and initiative. “Gradually, however, more and more problems have their laid-down solutions, and work is more routine-like. This was inevitable, and indeed essential, but I hope the EPO examination will always leave more scope to individual initiative by examiners and directors than did the old national Offices115.” Examiners seemed to have grown accustomed to the concepts forming the basis for their work for the Office. For example: “The problem and solution approach to deciding obviousness is extremely illuminating in the majority of cases. It is not however the only approach: references in the Rules to problem and solution are not directed to determining inventive step. There are ... occasional cases – not all that rare – where a problem and solution approach is at best irrelevant and at worst misleading. Experienced examiners recognise such cases, but inexperienced examiners can be misled into complicated formulations of a problem when the inventor is really only trying to make a better mousetrap116.” Innovative solutions were tried in an endeavour to even things out and resolve certain disparities: “One of the methods used to reduce the major search backlog in DG1 has been the DG3 fire brigade. 18 examiners (out of 96 candidates) participated in the scheme in 1986; 73 examiners (out of 126 candidates) have been selected for the 1987 operation117.”

Regular quality studies were conducted. These involved reconsidering hundreds of applications and verifying that the best results had been arrived at in the grant procedure, in both search and substantive examination. Rapid growth in staff numbers had given rise to a general fear, both in the interested circles and among older examiners, that not all examiners were up to the task of examination. In a 1991 study in DG2 on substantive examination, the conclusion was that growth in examiner numbers had not had a negative effect on quality, which had remained within the same bounds. In parallel with this internal investigation, a study was commissioned from a former Council chairman, the Austrian professor Otto Leberl, to find out how the interested circles assessed the quality of examination. One of its results was a call for greater harmonisation of search and examination, perhaps in the form of closer co-operation between directorates in DG1 and DG2. The principle of separation was not attacked by name, but that was clearly the way the reactions were leaning.
Adaptation to what was becoming a true market was both a challenge and an opportunity for the Office. While its chief task was to administer a European patent grant procedure, the wealth of available information, both patents themselves and technical documentation, made the EPO a centre of valuable resources that allowed it to diversify its activities. Thus outside the grant procedure the EPO performed standard searches, these being patentability searches. In reality this was a commercial service. Comparable in real terms to a European search, it was not intended to result in the grant of a patent, but gave the requester information on the patentability of a particular item of technology.

Priced at DEM 2,300, significantly more than the true cost of the search performed, this service – the most expensive for applicants – was an innovative and substantial source of income for the Office. 2,000 such searches were performed in 1983, and 2,400 in 1984. In 1984, the terms of this search were reviewed, primarily in order to adapt it to the market. Most such requests came from SMEs wishing to assess the potential benefits of filing a European application rather than a national one. But the cost was likely to deter SMEs, especially as it was DEM 630 (DEM 510 following the January 1985 review) higher than that of a European search as part of a patent application. In other words, the EPO was missing out on patent applications filed by SMEs, the very users it was hoping to attract. The other factor which limited these standard searches was the complete lack of harmonisation from country to country, which was an IIB legacy. While in Austria, Belgium, Italy, Luxembourg and the UK the only available option was a standard search at the full rate, the cost was 15 to 40% lower in France, the Netherlands and Switzerland.

The negotiations on reforming standard searches were symptomatic of relations between the EPO and the national offices in the mid-1980s. The EPO’s success had already been encroaching upon the activities and revenues of the national offices. So when the EPO proposed a partial refund for standard search clients, the delegates of many member states were against it because the refund would be perceived as a financial incentive to transfer national office search work to the EPO. Ultimately, the fee was harmonised at a high level (DEM 2,095) that the EPO was able to view as a charge for advance performance of search with a view to a future grant, to the extent that most standard searches eventually turned into a grant procedure.

Computerisation or automation?

The computerisation of procedures was still an uncertain prospect in the early 1970s, though it had been envisaged back in Interim Committee days in an EDP Subcommittee chaired by the German delegate Zimmer. For this new field the future Office was able to rely on the significant experience of the IIB. In The Hague, an IBM 370/135 boasting 256 K of main memory was dedicated to file administration, salary calculations and the early stages of automated documentation. It was also cautiously beginning to get involved in search documentation.

To the tasks already computerised at the IIB, the Interim Committee decided to add the publication system, the patent register, general application/patent administration (monitoring of time limits, about 40 of them before publication and about the same during examination and opposition proceedings, plus renewal fee reminders and the recording of stages reached in the procedure) and accounting. Despite the additional cost, agreement was reached on installing a second computer in Munich, rather than setting up night-shift working on the IIB computer and transferring the information to Bavaria or remotely displaying it there. This was a high-pressure and highly urgent project. Any failings in this field would have delayed the opening for filings. The team in charge had fearlessly dispensed with a safety net – “perhaps a little mad”, in the words of one of those in charge, but ultimately it worked. What made it all the more daring was that it was all managed in-house. For accurate programming it was essential to know the Convention and take it all apart so that the computer could correctly assess all the possible scenarios. No off-the-shelf software could have satisfied those conditions.
Computer room at the EPO in The Hague in the late 1980s. The computerisation of patent applications as soon as they were filed was key to the Office’s success.
Dedicated proprietary software known as EPASYS was designed, embracing a set of sub-systems capable of handling all the critical variables in the application process, such as fee payments, time limits, etc. As part of a broader approach to electronic data processing, this highly complex suite was the high-tech priority of the first years of activity, and would remain in service for decades. "The first phase of this system ... is now as good as completed," it was reported in the early eighties. "However, this does not mean that all the work is finished. Far from it!" Aside from the constant adaptation that was needed to cope with regulatory changes, the system also had to progress in line with the capabilities offered by a permanently evolving computer world. Operational from the first day, leaving no memory of the bugs that traditionally affect computer system launches, EPASYS was perfectly suited to requirements, yet still a little rigid and consequently difficult to develop subsequently by either extending or transforming it. In a constantly evolving technical field, in the service of a rapidly growing institution, successes could only be momentary. By the summer of 1981 the Office’s computer system was saturated: "During the day simultaneous accesses are made from various terminal-users" (about 65 terminals were installed). A new IBM computer was chosen to replace the 370/138 as from October. This constant evolution of computing capacity caused the EPO problems encountered by all users of this technology at that time, such as dependence on IBM or management’s inability to understand the relevance of the ever-costly demands of in-house computer specialists.

In June 1983 it again proved necessary to increase the available capacity. The only solution that IBM then proposed was “to install a considerably larger computer, and plans were made and all documents prepared to present a proposal to the office management for approval. However, immediately prior to submission in September, IBM in their wisdom announced a new computer [the IBM 4381] which would bridge the gap between the computer which was already installed at the EPO and the proposed new computer. … A decision was made to install the IBM 4381. This necessitated a complete re-planning exercise which commenced in October 1983.” Installing the new software subsequently proved tricky, “as all testing had to be performed outside of normal working hours. Therefore, to meet the installation deadline it was necessary for this group to work extremely unsocial hours (evenings and most weekends) for a 3 month period." The following year, a computer got lost somewhere between Valence and Munich. On 4 June Jim McNulty got a call from IBM telling him that the computer due to be installed in the Office the next day at 2 pm had disappeared. “You are not going to believe me,” said the man from Big Blue. To which the man from the Office replied: “After three years at the EPO I’ll believe anything! How can you lose a computer?” The machine would ultimately be found, but “J. McNulty had a sleepless night cursing a lorry driver who was having a good time in Paris!” So there had been a few delays with this capacity upgrade that the Office had decided on in June 1983.

Some Interim Committee decisions took even longer to implement because they were so complex. “Once upon a time, as all fairy-tales start, the Interim Committee decided that the EPO should publish its so called A-documents, the publication of the patent application, using a printing technique which was producing copies of the application as it was filed. For the so called B-document, the publication of the granted patent, typ-set techniques were to be used.” The DATIMTEX project sought to rationalise this process and make it less of a burden for the Office.
"The basic idea for the solution of the problem was to bring the digitalisation of the application from the very end of the granting procedure to the beginning, i.e. immediately after the patent application has been filed. A first document exploring this proposal was submitted to the President, who gave his approval and the DATIMTEX project was born." Digitisation caused major problems. Should the Office retype all the applications? That idea was dropped. 120 people would have had to be assigned to the task. "One possibility would be to use OCR equipment, another possibility would be the use of floppy disks produced by applicants and representatives using word-processors when typing their application." The working hypothesis was to divide up the effort as appropriate: "30% of the applications would be filed with floppy disk, 40% in OCR and the remaining 30% would have to be keyboarded... The results of the tests were quite encouraging. As expected, the best results were achieved with the diskettes... After a thorough preparation in the DATIMTEX Working Party, the Council approved the continuation of the project aiming at introducing the new system from the 1st of January 1985." The process was subsequently unified and rationalised. This involvement of Office teams in the implementation of computer programs was both fruitful and hard to streamline. Its most positive results were undeniable expertise and intuitive solutions, no doubt at the price of occasionally disproportionate effort and rather hesitant progress.

Global change in information and communication technology entailed constantly redefined objectives and adjustments to people and procedures. It also offered new opportunities. The microcomputer was a case in point. Its introduction into the Office's information processing arrangements was largely due to individual initiative. Direct knowledge of the problems of examination, combined with home use of a microcomputer, led examiners to propose innovative solutions, based on the use of a PC. Thus in 1987 an examiner came up with software for printing search reports: "I've long been excited by personal computers," he explained, "and in January 1985 I bought an IBM/PC portable for a price I won't admit here. I may have been the first examiner to own such a machine. Writing a search report is an unappealing skill in which I do not excel. I am incapable of remembering the countless rules for a good report, and I have discovered that I'm not the only one... I've been writing search reports for 15 years. That's why I managed to write a program that meets examiners' needs. I was even only thinking of them when writing it. ... Of course, there will always be exceptions... and cases where manual drafting will be easier for someone unaccustomed to a keyboard. ... My product needs to be industrialised... and that goes beyond the bounds of a hobby. It needs to be accomplished by the competent department. But I do hope to be involved..." The Office in the end did take this innovation on board. Flexible and easily accessible, the new facility seemed to find favour: "The combination of a PC and a program specially designed to draft search reports is the best response to the problem of automating search administration," stressed Michel Bertin in EUREKA in 1987. "Verification of the data in reports and annexes, translation assistance, the use of personal databases... these were all features that would make life easier for examiners..." There was a rising demand among examiners for access to PCs once they began to spread throughout society. EPO staff were then eager to get hold of them, through individual initiative, often linked to their own daily life. So then it was a question of weighing up the choices and freeing up funds. Back in 1987 the option was certainly envisaged: "So perhaps it might be possible for each examiner to have one or more optical disks with all the patent documents in his field recorded on it. That would enable him to do word searches in patents preselected by class and thus already accordingly reduced in number. I don't think such a system will make it possible to..."
dispense entirely with the good old manual search, but it would be very useful in certain cases. The necessary hardware is available at a very affordable price. I hope we will conduct some experiments along those lines. The 1980s were thus marked by multiple initiatives in the IT field. While not all of them were successful, the Office undeniably benefited from effective and reliable IT procedures. Automation was then a much-used term. The schemes pursued by Office management saw it as one of the keys to overcoming the backlogs. However, the way in which it was applied to procedures had more to do with computerisation than with real automation.

Faster access to information first took the form of a computerised approach to classification. That is why computerisation was particularly well suited to bringing about evolution in working methods that had not changed since the late 19th century. A new system known as ECLA (European Classification) was started up on an experimental basis in 1982: “To keep track of the many modifications, to enable an efficient administration and to simplify the printing and distribution problems, the text of the internal classification system has been recorded in the computer and is now handled via online text processing methods. Since a few months ago, the text is even available online. There was so much information to be taken into account that the new system was at first applied only in “a limited number of technical fields such as the laminates, lubricants, A-D converters, telephony.” Information searching was also based on external resources, through online access to third-party databases. Thus already in the early 1980s: “DG 1 search examiners make intensive use of these systems in a number of technical fields, mainly chemical. At this moment five terminals for searching external databases are installed in The Hague and one in Berlin: the most frequently searched files are those offered by Chemical Abstracts and Derwent on the ESA, SDC and Télésystèmes host computers which are respectively located in Frascati (Italy), London (GB), Santa Monica (USA) and Sofia – Antipolis (France).”

The 1983 testimony of an examiner familiar with the IIB and then the EPO reflects the initial advances in computerisation and their limitation. “I study the description and the claims, where necessary looking at the drawings, to gain knowledge of the substance of the invention and discover the inventive concept behind the application. I verify the references to documents that the inventor cites in the description. Then I define a search strategy. Maybe I consult colleagues handling fields related to the application (e.g. fields of application for a compound, general groups of processes). I identify the groups of documentation in which I need to search, referring to our in-house classification scheme, which is more detailed than the International Patent Classification. I may also start with an online search in some particular fields. If I use sufficiently selective combinations of keywords, the computer supplies citations limited to about ten documents.” Paper and coloured card are still used to structure the work: “First, there’s the red folder containing reports on searches performed by other examiners, or perhaps my own searches, on the same subject, which in our jargon we call white cards. These documents may already provide some guidance for search purposes. As we read, we sort the relevant documents which oppose novelty and inventive step or illustrate the technological

A drawing that appeared in EUREKA in 1985, expressing the examiner’s confusion about the services he could expect from a computer system.

A classification system is a living organism: it is constantly being modified and updated. A Sample ECLA classification from 1983, covering the field of control devices or systems characterised by mechanical features.

A 1984 hardware.
background. We choose the most significant of all the documents thus selected and decide which category to cite them in."

Thus there were many projects, but it was not easy to put them into practice. Progress was limited and was essentially linked to action taken in the context of trilateral co-operation (see page 191). It was not until the end of the 1980s that document scanning together with new tools and, in the 1990s, new networks became a factor that made a real contribution to changes in practice and performance at the Office.

**Office objectives and culture**

Rapid growth in staff numbers and the diversification of tasks in a context of high business growth were a contrasting mixture in terms of cohesion among teams. The staff were increasingly young, and knew little or nothing about the Office’s roots. The image of a fragile institution uniting a handful of men and women marching towards European integration had been replaced by that of a powerful, prosperous and financially independent organisation. The generations ever more steadily joining the Office during the 1980s were no longer marked, like the first arrivals, by memories of the war. They were baby boomers faced with declining growth and fears of unemployment. This relative detachment did not mean a lack of interest. EPO men and women were aware that they were part of an extraordinary adventure, contributing to the development of an institution that was truly, consistently and effectively European.

Cultural diversity and the three working languages were perceived as a rich communal experience. Criticism of Europe, often excessive and without regard for actual achievements, perhaps paradoxically gave rise to the idea that, at the EPO at least, Europe actually existed and functioned without much need for directives from Brussels, a real Europe arising in the face of the Brussels technostructure. That conditioned how staff felt towards the Office. They identified with its mission, they felt they were collectively carrying it and were to some extent its best guarantors, even its legitimate trustees. DG1 in The Hague was undergoing significant change. With the combination of large-scale recruitment and transfers to Munich or Berlin, the traditional IIB mindset gradually ebbed away, to be replaced by a very specific DG1 culture: a liking for the job well done (verging on perfectionism), rejection of bureaucracy, and freedom of speech (occasionally bordering on insolence).

What were the characteristics of these new values, and how could they be mobilised in support of the Office’s mission? That was the context in which President Braendli in 1989 decided to tackle the underlying issues and start the Office thinking about what its corporate culture should be. The term in the air of the time, though it was likely to be seen in a bad light in an organisation where the notion of public service seemed to match aspirations better. The President meant the term to refer to the link between staff performance and motivation, but also to a corporate identity, stressing that “there is no reason why these principles of modern management and personnel policy should not also be applied to the EPO.” "Corporate culture in the EPO” was a seven-page document in which the President set out changes in management style in the form of collective objectives. These five objectives were geared to the cohesion of the EPO and gave rise to various recommendations such as improved verbal communication, more delegation, a review of the Service Regulations and re-examination of the reporting system – amounting to an in-depth reform of the Office. The President proposed three key words – “efficiency, open-mindedness and co-operation” – to sum up the “guiding principles which should direct the conduct of the EPO.”

From the outset the Office has had some form of in-house magazine, published by its press and PR department and going by a variety of names over the years – EPO House Magazine, EUREKA, Internal News Letter, Gazette. Thanks to a wealth of staff contributions, these publications have provided a fair reflection of life at the EPO, on both the professional and the cultural front.
Chapter 7

Chapter 7

The EPO’s five objectives in 1990:

- promoting management behavior that is fair, just and staff-supportive
- enhancing a sense of responsibility and professional pride by means of information, communication, participation, delegation
- recognizing individual qualities, real and potential, and providing opportunities for professional and personal development
- encouraging commitment to common goals and mutual assistance towards their attainment
- responding to the needs and interests of the outside world as well as to those of our clients.

President Braendli sought to create a “concept for a corporate culture tailored to the EPO.” While he was pleased with productivity and progress on automation, his chief focus was on responsibility towards clients. Even that term was not neutral, as until then the EPO had referred to users or interested circles. The relationship with clients was both financial and one in which satisfaction had to be the aim, and that was one possible interpretation of the Office’s business. By jettisoning any form of bureaucratic behaviour, Braendli was trying to lay the foundations for a new Office culture. Whereas Van Benthem had sought to avoid bureaucratic drift by closely involving the interested circles in the procedure, Braendli hoped to establish an explicitly contractual relationship. Hence client satisfaction justified shorter time limits, maintained quality levels, and advice rather than sanctions during the examination procedure.

The document was a mixture of objectives, self-fulfilling prophecies and fairly standard ideas about communication. It reflected the contradictions and uncertainties of an initiative which hoped to “develop a corporate culture tailored to the character and function of our organisation,” while stating that “it was never the intention to create a corporate culture for the EPO but, rather, to improve the culture we already have” and acknowledging that the meaning of the term “may still be somewhat unclear.” Such ambiguities were in any case very common within enterprises or institutions seeking at that time to make the concept the basis for change management. The President’s arguments were a set of formulations that seemed to foreshadow the real welcome with which his initiative would be met by staff, and he was unable to avoid mentioning a degree of “skepticism.” At the very least, this first venture did make it possible to identify the problems, beginning with inadequate internal communication, and to prepare Office staff for more strategic reflections on the future of the institution.

Some months later these culminated in a far more substantial document, EPO Horizon 2000. Signed by Paul Braendli, it was preceded by a short sentence pointing out that the content did not necessarily reflect the opinion of the Administrative Council and in no way pre-empted its future decisions. Here Braendli was clearly operating at the very limits of his mandate. While he was clearly entitled to launch strategic reflections on the functioning of the Office, the Council was still the supreme body, especially when it came to regulating co-operation among the contracting states, the first issue highlighted in the text, or to altering the apportionment ratio for renewal fees. Braendli’s document also looked back to the voluntarist notions of the EPO’s founding fathers, with their ultimate objective of the economic integration of Europe.

Three levels of analysis may be distinguished. First, at the EPO level, the identification of guiding principles was a way of unifying an organisation that had undergone abrupt and rapid growth. Apart from the EPO being spread over four sites, the new accessions meant an ever-rising number of nationalities at all levels of the hierarchy. The EPO’s growth entailed not so much a danger of implosion as a risk of sclerosis and of the formation of semi-autonomous internal entities (or fiefdoms). So proselytising for a common culture was not about incantatory words, but about identifying the chief risk that threatened the EPO as an organisation. Besides, these general reflections made it possible to involve the entire staff and not just top management. Braendli had had red-tape suggestion boxes set up to enable staff to fight against what he called Buro Crazy. The function of these boxes was perhaps not so much to gather real ideas as to act as a visible marker, placed in corridors and halls, at the bottom of escalators or by exits from the lifts, for a corporate culture that was encouraged to emerge. A second level of analysis was the European context. As the European Community tended towards a neoliberal model, the EPO’s principles of liberal regulation were perhaps no longer entirely suitable. Without ever talking of privatising the EPO, Braendli nevertheless had to be prepared to face up to such an eventuality. In traditional sectors of public ownership and control (telecommunications, energy, banks), the transformation of public authorities into private enterprises and their opening to competition were moving inexorably forward, despite reluctance in some countries. From there to envisaging government withdrawal from major services was perhaps not such a big step, stock markets being a good example of public property privatised in the 1980s. And then, with or without privatisation, corporate thinking was essential for public services and institutions that had a client base, and that was exactly the case for the EPO. A third level of analysis was the character of Paul Braendli himself. By holding discussions on corporate culture for several years, he was responding to questioning within the EPO, but he was also affirming his leadership. His initiative may also be interpreted as a way of strengthening his position as President of the Office by defining the terms of the debate, providing strategic impetus and repositioning the Office in a moving context.
Chapter 8

The EPO at the heart of an uncertain international system
Between a Community patent decided on in 1975 but never put into force and national offices starting to think about their own survival, the Office found its niche in a pragmatic way.

“Waiting for Godot”: the unitary patent up to 1989

The Munich Convention unifies the formal and substantive conditions for granting European patents, but it does not provide for unitary protection of inventions throughout the territory of the contracting states. Once granted, a European patent is transformed into a “bundle” of European patents, and “each of these titles, even if governed by unified substantive law, has an independent fate.”

Thus only the signing of a second convention unifying the post-grant effects of a European patent could give rise to a unitary patent that would be applicable throughout Europe. This was the subject of EEC negotiations that culminated on 15 December 1975 in the signing of the Luxembourg Convention, which effectively established a Community patent having a unitary autonomous character, producing the same effects on the whole of the territory of the EEC and being entirely independent of the internal law of the member states.

The problem with this convention was that it was not ratified by all the EEC member states and therefore could not enter into force. Thus relations between the EPO and the European Communities were troubled from the outset. “Copenhagen and Dublin are not ready to allow such progress,” wrote La Tribune de l’Economie in 1985, adding that, “to date, no Danish government has managed to put together the requisite 5/6 majority in the Folketing. As for the Irish constitution, it quite simply prohibits any transfer of sovereignty not specifically demanded by the EEC accession treaty.” The journalist concluded: “the Community patent is an idea that is making headway too slowly.”

Thus in the eyes of the public, back in 1977, a new European organisation existed in Munich, but its links with the European Communities were unclear.

Yet the EEC did try to forge links with the EPO. In autumn 1984, for example, the European Commission in Brussels drew up plans to set up a press and information office in Munich, within the EPO. This did not make it easier for the populace to distinguish between the European organisations. For its part, the EPO made every effort to get the Community patent up and running. In early 1984, for example, President Van Benthem went to Brussels to talk to European Commission President Gaston Thorn about the problems caused by the lack of a Community patent and the chances of arriving at a common position for the nine member states. Faced with deadlock, the German government took the initiative on 7 October 1985, proposing an intergovernmental conference to facilitate implementation of the Luxembourg Community Patent Convention. This initiative formed part of the Nine’s discussions on the completion of the single European market, for which progress on patent law harmonisation proved necessary. The second Luxembourg Conference, running from 4 to 8 December 1985, was also supposed to discuss the signing of the Luxembourg Convention by the new member states that had not been involved in its drafting, i.e. Spain, Greece and Portugal. Implementation of the Community patent was important for the economic players. A European patent is not automatically valid in all the signatory states, and the applicant has to designate the countries in which he wishes to obtain protection and pay the same number of national fees. In the light of criticism against the EPO for its excessive fees, the Community patent also seemed to be an option likely to reduce filing costs.

But the second Luxembourg Conference failed. The idea of first making the Convention work with seven members and allowing the two problem countries (Denmark and Ireland) to join later came up against the refusal of the new member states (Spain, Greece and Portugal) to agree to an “Agreement relating to Community patents,” incorporating amendments to the Luxembourg Convention and an additional protocol, the COPAC Protocol on litigation relating to the violation of patent rights. However, the actual adoption of the Luxembourg Convention thus amended was put off until later. The European press was disappointed: “A half-baked patents conference,” commented the Financial Times.

A half-baked patents conference

By A. H. HERMANN, Legal Correspondent

Swissフト M. Michaud, the president of the European Community Patents Committee, was not too disappointed with the outcome of the Luxembourg Conference. ‘For the first time since 1975’, he declared, ‘we have had constructive discussions which can help to resolve our problems.’

One large problem facing the Community patent system is the cost. The European Patent Office has been accused of charging excessive fees which are putting many small companies off applying for patents. ‘There is a need for a radical review of the fees charged by the EPO’, says Mr Michaud. ‘We must ensure that the system is affordable for small businesses.’

Another problem is the lack of harmonisation of national patent laws. ‘We need to work towards a single European patent law’, says Mr Michaud. ‘This would make it easier for businesses to operate across the continent.’

Despite these difficulties, Mr Michaud believes that the Community patent is on the way. ‘We are making progress’, he says. ‘The Luxembourg Conference was a first step towards resolving our problems.’

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But the second Luxembourg Conference failed. The idea of first making the Convention work with seven members and allowing the two problem countries (Denmark and Ireland) to join later came up against the refusal of the new member states (Spain, Greece and Portugal). Nonetheless, the member states did agree to draft an “Agreement relating to Community patents,” incorporating amendments to the Luxembourg Convention and an additional protocol, the COPAC Protocol on litigation relating to the violation of patent rights. However, the actual adoption of the Luxembourg Convention thus amended was put off until later. The European press was disappointed: “A half-baked patents conference,” commented the Financial Times.

The European Commission representation in Munich opened in 1985 at EPO headquarters.

Gaston Thorn (1928–2007), President of the European Commission in 1985 when the EPO launched a renewed attempt to introduce the Community patent.

Article from the Financial Times of 5 December 1985.

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Chapter 8
It was not until 21 December 1989 that the EEC member states signed the amended Convention, in Brussels, following an intergovernmental conference again held in Luxembourg, from 11 to 15 December. “The last obstacle to implementation of a Community patent has been removed,” thought Le Monde, adding: “an industrial property right specifically for the EEC, the Community patent will enable its proprietor to claim ownership of an invention and the resultant exclusive right to its exploitation in all the countries of the Community.” It was envisaged that the patent would be granted by the EPO, which would centralise the Community patents that it granted, without their owners being required to translate them and submit them to the national offices of the EEC countries. This agreement among the Twelve was greatly anticipated by the EPO. “The Community patent is an essential pillar of the single market,” declared President Braendli. The European press was also happy about the agreement. “Borderless patent protection,” announced the Handelsblatt. “New Community patent offers inventors better protection,” wrote Die Welt, and “Progress on Community patent protection under the single market,” said the Neue Zürcher Zeitung. The Dutch magazine Inno Visie wrote: “The Community patent is on its way,” and in Sweden, Upplands Nyheter announced: “Better patent protection in sight: Community patent system about to be launched.” “The Community patent: a guarantee for business,” thought Edith Cresson, French European Affairs minister, in an interview with Le Nouvel Économiste.

“Je t’aime, moi non plus”: the European Office and the national offices

For all that, the Office was far from widely accepted towards the end of the decade. In a sign of real concern, several delegations at an extraordinary Administrative Council meeting in 1980 thought it necessary to observe that the European patent grant system and the national systems were not in competition, but complemented each other to the greater benefit of applicants. The review sent to EUREKA by Jean-Claude Combaldieu after his appointment as deputy head of the French Patent Office underlines the extent to which nothing actually seems settled: “Sorrowful and fearful spirits are still grumbling about the threat to the national offices from the European patent. No doubt the liberal industrial property professions have suffered a good deal in some countries, not from the European patent itself but rather from the EPO’s siting in a country other than their own. Likewise, some national offices whose financial equilibrium is based solely on the traditional activities of patent examination and registration have experienced difficulties and are continuing to do so.” But he still maintained that: “The wager with the European patent is practically won. That’s something to be pleased about, as the success of this institution is good for industrial property as a whole and for its users. The people and organisations worried by the setting up of the EPO need to reconsider, adapt and reframe their position. Co-operation with the EPO is clearly essential – primarily out of realism and out of solidarity with the European institutions, but also out of community of interest.” He illustrated that by reference to France, where the number of national applications and European applications designating the country had constantly risen since 1978, reaching 43,250 applications in 1980. He backed that up with further figures, but also had to resort to fighting words, to the extent of calling anyone who disputed his conclusions a defeatist. So the facts do not yet seem to have been strong enough to really “turn the page,” as he demanded. His fiery words four years after the opening of the Office were a veritable call to arms: “Few things can resist willpower and effort. The choice is ours. The European patent and the national patent will live in harmony together as long as there are responsible people armed with political awareness and a spirit of international solidarity.”

The EPO was built as an international organisation, borne by an undeniable European fervour for harmonisation of grant procedures. While the European patent did not make national legislations disappear, it was informed by a supranational dynamism. Perhaps the main trump in the EPO’s hand in its early days had been the personality of Bob van Benthem. Though admitting to being driven by the European ideal, he did not simply conform to the standard views of the inevitable integration of Europe. On the contrary, he made the complex and ambiguous relations with the national offices a foundation for the establishment of the EPO. This clear thinking was expressed, probably in the best possible terms, in his Office leaving speech on 28 March 1985: “I believe that this work on behalf of Europe has been characterised by the making of sacrifices; our States have sacrificed their sovereignty in patent matters, their national legal concepts, their political positions and, in some instances, their languages. … As I have often said, I should like to pay very sincere and respectful tribute to the Heads of Delegation, who represent national Offices obliged to make sacrifices for the good of the European Patent Office but who nevertheless got our Office off the ground.”

An international organisation’s relations with its founders are necessarily ambiguous when its aim is to take some of their powers away. The European grant system did not make national systems disappear; not just because, once granted, a patent entered a national phase in each of the countries designated by the applicant, but also because an applicant had the option of filing his application in one or more national offices without following the European route. Likewise, national industrial property laws had not been abolished, so there was still room for multiple legal interpretations. The Protocol on Centralisation had provided for all the tasks involved in the granting of a European patent to be performed within the EPO; but to prevent too sudden a change at national offices that were worried about rapidly losing most of their work, it was arranged that some search work could be done at the national offices. Hence the Interim Committee had recommended allowing agreements to be signed between the EPO and the national offices for the subcontracting of such work, stressing in particular that this should enable the national offices to come to a better knowledge and understanding of the European procedure. The UK took up this option in 1977, followed some time later by Sweden and Austria.

Yet it remained true that the EPO, through its work, was in competition with the national offices that made up its Administrative Council. This competition led to a
reduction in filings by the national route and hence in fees collected at the national level. Far from disregarding this competition, Bob van Benthem completely accepted it, feeling that it would serve to demonstrate the relevance of a European procedure: “It is inevitable that the European Patent Office should to some extent compete with these national offices, given that we are seeking to attract applicants who used to apply for patents in several European countries via the national routes. EPO staff are fully aware of this situation, ... we are doing our utmost to build the European patent system to applicants’ satisfaction and benefit. We firmly believe that the European route truly offers many advantages to applicants seeking the protection provided by a patent in many European countries, but that the national route is more advantageous for those who want patents in just one country, or maybe two. So we see an effective division of labour between the EPO and the national offices, but ultimately it is you, our future clients, who will determine the success of the EPO.”

This initial situation changed in the early 1980s, with the remarkable success of the EPO. In 1981 the Office became financially autonomous, thanks to the over 25,000 patent applications filed that year. The average number of designations per patent was between six and seven countries, a sign of the extent to which the territory concerned was coherent and relevant for users. Besides, IIB integration had allowed some national particularities to endure: in 1980, DG I carried out 19,000 searches under the European procedure, but also 35,000 relating to Dutch and French national applications. It had been agreed that the proportion of national searches would diminish with the growth in European work, but a significant volume was nevertheless granted to France. The restraint announced and affirmed until 1981 could no longer be the watchword beyond that date. In 1980 the UK and German delegates were still evoking the coexistence between the national route and the European route. Only the Netherlands delegation mentioned that, while it was not concerned by competition from the EPO, it was the country that had been most affected: the number of applications had been halved, the Netherlands Office now occupied part of the EPO building in The Hague, and many examiners had gone to the EPO.

Regular filings growth (from 10,000 in 1980, 28,958 in 1982, 37,707 in 1984, 44,097 in 1986, 62,189 in 1989) forced the EPO to review how it used its income, which was growing with the increase in business and regular adjustments to fee levels in a still-inflationary period. Once financial equilibrium had been achieved with 25,000 applications, the Office’s revenue began attracting envious glances. The EPO’s resources could be used in three ways: more could be paid back to the national offices, others could be used to reduce fees (which would entail a reduction in income if the number of applications did not rise), or they could be hoarded by the EPO in order to develop other activities or finance large-scale acquisitions, particularly real estate. In practice, all three uses were applied in the 1980s. Under Article 37 EPC, the organisation’s expenditure had to be covered by various forms of income, including payment by the contracting states of a percentage of patent renewal fees (60% in 1977, 50% in 1986), but the general principle was above all that “fees have to be adjusted according to financial requirements.” In 1984, a study was made of financial requirements for 1985 to 1987, taking account of cost-of-living increases and pension commitments. To allow for inflation, a proposal to increase fees by 3% was announced for 1985, though an estimate of 10% had initially seemed more appropriate.

This prosperity, which took only some factors into account (the pensions issue in particular being disregarded) on the basis of accounting methods that would need to be adjusted (among other matters, the delay between receipt of income and effective grant), whetted the appetite of some national authorities, wondering if they had been overhasty with concessions made at a time when the Office’s prospects had been modest, and whether the powerful national offices had not been too generous. Attention and then demands soon focused on the renewal fee apportionment ratio (also known as the distribution key). Starting in 1977, the EPO had received 60% of the renewal fee, the national offices receiving 40%. Several delegations asked for this ratio to be modified to establish parity between the EPO and the national offices. All the delegations, with the notable exceptions of Germany and Luxembourg, were in favour of what was essentially a transfer of revenue from the EPO to the member states. Belgium proposed a compromise of 55/45, but that was not accepted, consensus settling on the request for equal shares. The ratio was changed to 50/50 in January 1985.

Utilisation of this fee varied widely from country to country. Some allocated it to their national offices, others to the funding of innovation policy, still others paying it purely and simply into the general budget. The Office accepted this revision, but stressed that it served “to fix once and for all the percentage apportionment of renewal fees.” In debate on the issue, the staff representatives challenged the relevance of this change to the apportionment ratio to the benefit of the national offices and proposed that the EPO’s profits should be allocated to its pension fund.

This tendency to question relations established at the outset between the EPO and the national offices went well beyond purely financial matters. In particular, some countries took a less favourable view of the Protocol on Centralisation, which had been accepted at a time when there seemed little chance of high growth in the Office’s activities and a corresponding decline in work for the national offices. The Protocol had already had the knife taken to it by countries wishing to free themselves of certain Chapter 8
constraints. That was the case with Denmark, owing to difficulties with having the Convention ratified by parliament. The bill was presented five times in six years, between 1978 and 1984, but failed to achieve the qualified majority of five-sixths of the members of parliament. On 2 June 1983, 143 MPs voted in favour of ratification, but 150 votes were needed for adoption. The parliamentary route ending in an impasse, the Danish Patent Office sought to develop close co-operation with the EPO without persevering with official ratification. Of the envisaged measures, the most noteworthy was the introduction of an optional procedure under which the Danish Patent Office would base its examination of applications on the novelty search and patentability examination performed by the EPO, which would thereby become a subcontractor of the national office. As such a procedure could be the subject of a Danish law (by simple majority and no longer 5/6), it would be easy for it to be adopted.

That was the context for the setting up, at the initiative of the Austrian delegation, of a working party to study co-operation between the EPO and the national offices, both in terms of work (mutual transfer of search or examination work) and in terms of tools (documentation, automation, digitisation), as well as harmonisation of national renewal fees. These negotiations were deemed “highly political” by the Council, which therefore wanted them to be pursued at heads-of-delegation level from March 1985. The background was the success of the European procedure, which had taken some work away from the national offices, faster than envisaged. However, as the Austrian delegate acknowledged, this decline in the workload was partly offset by tasks relating to the publication of granted European patents.

These discussions culminated in decisions relating in particular to the role of the Austrian Office in relation to patent documentation. Sweden too was able to negotiate an exception to the Protocol on Centralisation. The “Agreement between the EPO and the Swedish Patent Office on work in respect of international search under the PCT” was signed in 1988 for a three-year period. It provided that “the European Patent Office will from 1 July 1988 onwards entrust the Swedish Patent Office with search work in connection with international applications for which the European Patent Office is the competent International Searching Authority.” The number of applications was capped at 1,000 per year. The Munich Diplomatic Conference had empowered the EPO “to conclude working agreements with national patent offices when this appears necessary and appropriate in the interests of the proper functioning of the European Patent Office. This applies in the present case. The sharp rise in the number of European and international applications has resulted in the build-up of a search backlog.” Contrary to Article 93(2) EPC, in half the cases European search reports were not being published simultaneously with the European patent application. The agreement was also in line with the EPO’s undertakings to WIPO as a PCT authority. In concrete terms, the EPO reimbursed the national office for costs incurred in carrying out the entrusted tasks, subject to an agreed ceiling.

**The Trilateral**

“European house has its doors wide open for broader co-operation, such as is envisaged in the Treaty of Washington or as we intend to pursue with developing countries.” The initiative for rapprochement between the world’s three big offices was taken by “an admirably energetic and inventive U.S. Commissioner of Patents,” Gerald Mossinghoff, in a letter dated 24 November 1981 and addressed to President Van Benthem, “proposing cooperation in pursuit of the common long-term objectives of automation, reducing costs by avoiding duplication of effort in information processing and facilitating the exchange of information in electronic form.” A meeting between the two teams in Washington from 15 to 18 June concluded with a Memorandum of Understanding. A similar document was signed in January 1983 between the US and Japanese offices. “These two agreements were designed to make possible the international exchange of computerized data.”

The two separate agreements came together in October 1983 with the first Trilateral Conference in Washington. Thus the origins of this project were directly linked to the development of automation, which the Americans wished to harmonise so that the choices made could be compatible and culminate in a documentation system accessible to all three partners. “Enthusiastic about the idea,” Bob van Benthem nevertheless carefully scrutinised the American proposal. He initially saw it as a “learning process” for the three offices, while being specifically interested in “the sharing of patent search results.” The three institutions were facing very high growth, and any reciprocal solution would be welcome in order to save on resources. Hence to begin with, co-operation related to a “program involving the exchange of computer files.” Over the years, though, this ambition ran up against technical difficulties in a rapidly changing field. However, the foundations for convergence were laid thanks to multiplying exchanges which allowed a degree of harmonisation for classification.
and the sharing of information for search purposes. The BACON (BAtchfile CONversion) database “is one of the most tangible, cost-effective achievements of our trilateral cooperation to date.” It made it possible to assemble a huge volume of information, reproduce it on electronic media and make it available to the examiners of the three offices. The USPTO calculated that the project, which had cost it USD 1.2 million within the Trilateral, would have cost it USD 31 million if it had acted alone. According to Jacques Michel, this programme was the cornerstone of trilateral co-operation.

Bob van Benthem took a more critical view of the first ten years of the Trilateral, feeling that they were also disappointing in terms of the exchange of search results. Seeking to assume the role of wise father, in 1993 he maintained that no results had been achieved in that respect. Citing the 1983 projects he remarked, somewhat sarcastically: “Apparently they have been brooding for nine years on the first exchange of search results with the effect that now they have decided to repeat the exercise.” He found that when the subject was mentioned it elicited “a mysterious smile, like that on the face of a secret service man when you ask him about his activities... It is clear that you touch at a mysterious hidden area of Trilateral Cooperation.” Van Benthem interpreted this mystery as the result of a lack of motivation among the three partners. Each office thought it did the best work and made no real effort to overcome the real technical problems; so in 1992 the offices of the Trilateral had duplicated or triplicated 60 000 searches.

Hence in the 1980s the Trilateral was a true success story in terms of international co-operation. Even if the results were still unsatisfactory in the light of certain initial ambitions, for the first time three major institutions were truly working together to improve their performance in the field of patents. The EPO’s place in this group was remarkable. It needs to be stressed that the Office had been in existence for only a few years when it was contacted by the mighty USPTO. This was a kind of accolade. Year by year, the less experienced European institution was becoming more and more of an integral component, a full partner in an alliance among equals.

China

China’s entry onto the intellectual property stage became official with the promulgation of a patent law on 12 March 1984 by the supreme legislative body of the People’s Republic of China. The Chinese Patent Office due to administer the law had been set up for that purpose in 1980. Its Director-General, Huang Kunyi, happily entered into communication with Bob van Benthem, a first sign of success for his institution. From then on, foreigners would be able to obtain patents in China, provided they were nationals of countries with which China had signed a treaty or established reciprocal relations on patents. Foreign applicants would have to be represented by one of the Chinese agencies set up for the purpose.

China’s patent law set out the usual provisions and regulated the claiming of priority for applications filed outside of China. Applications were published after 18 months. The applicant had to submit a request for substantive examination within three years from the date of filing. If the Chinese Office held the invention to be patentable, it published it in order to give third parties the possibility of filing opposition, and it either granted a patent or refused the application, as appropriate. To be patentable, an invention had to have universal novelty. Patents had a term of fifteen years from the date of filing. Various legal remedies were available to parties not satisfied with the patent office’s decisions, and there were detailed provisions designed to prevent and punish infringement; in serious cases, there could be penal sanctions.

The EPO responded to this change by co-operating with China very early in its history. Back in April 1979 a Chinese delegation had been received in Munich. The outcome of this dialogue was a joint programme of work. The visit was returned in February 1980 by Bob van Benthem, accompanied by Jacques Delorme, Jenö Staehelin and Jean-François Mézières. In Beijing, the EPO delegation met Vice-Minister Wu Heng and representatives of the State Science and Technology Commission. Talks continued in Shanghai with the director of
The EPO delegation, led by President Van Benthem, visiting the Great Wall of China on an early mission in February 1980.
the Institute of Scientific and Technical Information. In the same period, the first Chinese interns came to Munich for examiner training. “In Munich, three of our Chinese guests had a very comprehensive training in substantive examination. Their daily study books were: the European Patent Convention and its implementing rules, the Guidelines for Examination in the EPO and the Patent Cooperation Treaty. They became familiar with the patent terminology: priority, novelty, state of the art, inventive step, oral proceedings, taking of evidence, decisions and appeals. They were also given an insight into the European procedure for granting patents and the effects of a European patent (rights conferred, extent of protection...). The relationship between the work of Directorate General 1 and 2 was explained, too. They had more than 20 instructors (Dutch, British, French and German) from DG 2 and DG 3.”

These relations then turned into regular co-operation, the EPO helping extensively with the training of Chinese Office staff. This was done from a strategic perspective, with a view to establishing a close relationship with an emerging office that would ultimately have a crucial part to play in the international system. Nor was the EPO alone in seeking links with the Chinese Office. In October 1981, at the Chinese Office’s request, WIPO organised “a Seminar on Patent Documentation in Beijing. The purpose of the seminar, which took place from 6 to 10 October 1981, was to contribute to the professional training of the staff of the Chinese Patent Office.” The big offices (USA, Europe and Japan) were present, and the German Office, which had been very early in co-operating with the Chinese, had its own representation. Four commercial firms (Derwent, INPADOC, JAPATIC and PERGamon) were there too. There was clearly some form of competition to establish the most active relations with China; but co-operation was the priority. It was decided that China should be supplied with electronic Trilateral documents on very favourable terms.

Developing countries

The World Intellectual Property Organization (WIPO) was a privileged partner for the Office from its first months of operation. The EPO quickly moved into technical co-operation, especially with African countries. Advice and assistance to developing countries grew in strength from the early 1980s. Close relations were established with the African regional patent organisations, OAPI (African Intellectual Property Organization) and ESARIPO (Industrial Property Organization for English-Speaking Africa), and with many developing countries. “The North-South dialogue no doubt remains an essential issue. The Paris Conference and the Cancun Summit were a reminder; the non-failure of the Nairobi Conference on revising the Paris Convention is an unhoped-for conclusion. The Office’s technical assistance programme for developing countries falls within this context and forms our contribution, modest but real, to the North-South dialogue.” A seminar organised by the EPO for 22 participants (out of 70 applications) in 1981 bore witness to these initiatives, which would multiply. Through progressive training, including practical cases, it tackled the issue of patent documents and their use as a source of technological information, as well as the role of patents in development. Discussions with these players from developing countries reflected the inequalities in the world. Effective supervision and production of patents really concerned only a minority of countries. “The world patent system favours the industrial nations which possess the technological expertise; free exchange is suffered, it is unfavourable to us and leads to unfair competition because the partners are unequal. Patents reflect the difference in industrial development and even reinforce it: they allow our national markets to be
invaded by foreign companies, particularly the multinationals, and yet our basic needs are still not met / Patents confer overwhelming monopolies on foreigners who rarely exploit their processes, while nationals capable of exploiting them have to negotiate licences on unfavourable terms. The result is frustration of the spirit of local innovation; this frustration is the same when their monopoly is granted to a national of another developing country / According to the patentability criteria of modern laws, patents are accessible only to foreigners; according to these criteria, the nationals of developing countries have nothing to protect. There were also arguments about the inadequacy of national structures: “The staff of national industrial property structures is non-existent or poorly trained / The use or potential utility of patents is not perceived by those who hold economic and political power.” And there were also arguments constituting fundamental criticism of the system: “The public benefits in our countries have nothing in common with the agreed advantages / The system is too global and makes no distinction as to priority fields on the technical front in our countries and as to the nature, appropriate or not, of the protected technologies.” These findings led to proposals for change: “Conduct cost-benefit analyses of the protection conferred; develop national operational structures, notably by stimulating innovation; have simple and accessible documentation centres; use proper documentation schemes; give the national patent office an effective strategic position in the institutional mechanisms.” The conviction that the system needed to be adapted for less advanced countries gave rise to hypotheses such as: “make more use of utility models, set lower or more flexible patentability criteria; limit the duration of conferred monopolies according to the social utility of the application.” In any case the participants expressed their hope that support from the EPO might help things to change. They called for real technical assistance within the framework of more intensive international co-operation. In that way it would be possible to “create free access to worldwide databases; set up a universal system in which the interests of developing countries were truly respected; strengthen regional co-operation and develop the regional offices; unify the system for classifying and disseminating technical information; set up international services to guide businessmen in choosing technology; and greatly increase assistance so as to strengthen the industrial property infrastructure in developing countries.”

Training was a strong point in this process. Internships allowed the Office to provide training in documentation, search and substantive examination for staff from an ever-growing number of countries. Office specialists took part in seminars and extended training courses organised by WIPO, OAPI or ESARIPO, involving highly diverse countries. Events were hosted by Algeria, Botswana, Brazil, India, Pakistan, Zambia and Zimbabwe. A possible downside to this wealth of shared experience and forged links was the risk of dispersal. So from 1983 the Office decided to streamline its efforts by focusing on regional co-operation projects and avoiding overlap with initiatives taken by the contracting states.
Conclusion

In less than fifteen years, the European Patent Office had found its place and established its reputation, and now it was ready to prepare for long-term development. This success was largely explained by the way in which the institution had evolved: the work of the Interim Committee’s participants, the energy of the first teams and the charisma of Bob van Benthem had turned the Convention into a reality, without hitches or legal or political difficulties. That is testimony to the commitment of the men and women of this pioneering era, to their belief in the project, to the robust and precise nature of the founding text and to the quality of the meticulous work done by the Interim Committee in putting it into practice. Thus aside from the comprehensible but unproductive delays over the status of IIB staff, the initial impetus was particularly well directed and driven by the necessary energy. The strong points that would structure the Office throughout its history and form the basis for its success emerged in the 1980s, at an unusually early stage for an institution of its size and significance. Relations with applicants and more generally with all those affected by the procedure constituted one key point. While it clearly made sense to prioritise them, it was far more difficult to give shape to that objective rapidly and effectively. The same applies to the quality of granted patents. That was linked to the rigour of the procedures and to the resources applied, to the principle of the problem-solution approach and to the work of the growing body of examiners.

The Office’s rapid acceptance on the global industrial property scene was equally remarkable. By the end of the 1980s it had already become a full partner in international patent governance. It had managed to establish healthy relations with WIPO, but crucially for its future influence it had also become a partner for the USPTO and the JPO. Working with these two institutions within the framework of trilateral co-operation, the EPO had established a real and visible presence in the restricted circle of global players in the patent system. The less favourable factors that would be a burden on the Office’s activities were present as well. While the contracting states’ involvement in the project was unquestionable and generally without reluctance, the same could not be said of their patent offices. Though they had played an active part in setting up the EPO, some of them – no doubt surprised by the rapid growth of the European organisation – realised that its success might quickly become synonymous with a decline or disappearance of their own activities. Given that the heads of the Council delegations were leading lights in the national offices, there was clear potential for conflict. The problem of establishing peaceful social dialogue was another issue for the young institution. Starting with The Hague staff’s struggle to defend a status that had been downgraded due to IIB integration, this tension regularly resurfaced. Initiatives designed to establish less antagonistic relations through communication were numerous and effective, and staff often actively participated in them without that ever preventing the re-emergence of conflict. Yet conflict never had a fundamental impact on the Office’s work, as if everyone realised just how far they could go. Thus it had taken just a few years to set up a triangular system whose sides were intimately linked to the success
of the institution and derived from it a situation that some might regard as enviable: national offices that were dispossessed, but which, whatever happened and without their having to contribute to the work done, received 50% of the fees levied by the EPO; staff who were expatriated and heavily involved in demanding work, but who enjoyed highly favourable salaries and conditions in a Europe whose economic dynamism had appreciably declined since the signing of the Convention; and a President subject to extremely high pressure, performing a function that was both technical and political, but doing so on the basis of extremely broad powers and a prestigious position within the European institutions. Equilibrium between the sides of this triangle was the condition for the Office’s lasting success. Thus the tensions within it may be interpreted as a waste of energy, of resources, occasionally of time. They might also be the condition that enables the institution to be reactive and allows the rigid and highly standardised underlying system that it serves to be adaptable and respond to the demands of a changing environment.
1990

Part 3

Adaptation, tension, a new century: the price of success
From 1990 to 2010
June 1990: the Reichstag building in Berlin, where the Administrative Council held its 37th meeting.
In the years around 1990, the Office was confronted with a number of changes which would heavily influence its development and alter the course set when the EPC was signed. During the 1980s, both actively and to some extent in a passive learning process, it had pinpointed the keys to its success. The pace of recruitment had slowed, while labour relations, albeit still a thorny issue, at least posed no structural threat to its operation. It had successfully completed the transition between the Van Benthem and Braendli presidencies. The outcome of debate about its corporate culture had been disappointing, but it knew its purpose, was aware of its success and could be optimistic about the future. The mood was no doubt boosted by the part it had come to play in the international patent system alongside much older institutions, as a respected partner of WIPO and a full member of the Trilateral. It also seemed to have found its place within the European scheme. The Luxembourg Convention had not entered into force, and the Community institutions’ inability to put their own IP policy into practice had ultimately given the EPC system the time it needed to demonstrate its pragmatic efficiency. As in so many other areas requiring specific solutions, it seemed that multilateralism was the only way Europe could work together effectively to find them. Against this backdrop, the Office was able to continue its work without any serious difficulties. Beyond gradual improvements in the quality and duration of its procedures and in the accommodation of applicants’ wishes, there was no call for major reform. It was almost as if, having established its practice, earned respect and gained confidence, the Office had reached the end of history. But all that was about to change.

Berlin, June 1990: the Administrative Council met in the plenary chamber of the Reichstag, yet to be restored to its function as seat of the German parliament, where each of the delegates was presented with a multi-coloured piece of the Berlin Wall, wrapped in cellophane, as a memento of the special occasion. During the lunch break, some delegates took the opportunity to pass by the GDR border sentry posts at the nearby Brandenburg Gate and take a stroll on East German territory. The Wall had fallen some months earlier and the card-playing guards paid them no heed. A new chapter had begun for Europe and the EPO.

Even if the cracks which had already begun to show in the Soviet empire in the eighties had been a sign of things to come in the East, no-one could have predicted the radical transformation which culminated in German reunification on 3 October 1990. Another sweeping change came in the form of advances in technology which very soon acquired a socio-economic dimension. From the 1970s onwards, IT networks had become increasingly commonplace in business and administration, but by the 1990s, the digital revolution was changing society as a whole. In 1989, the European Council decided to liberalise value-added services and data transmission in the telecommunications sector – the beginning of deregulation. In 1990, Tim Berners-Lee laid the foundations for the world wide web. The first transgenic mouse was patented the same year. Fast-changing pressures and opportunities, together with emerging tensions within the Organisation itself, demanded a new course. In just two years, the landscape of the Office’s development had altered dramatically. It would have to adapt if it was to make its way safely through the inevitable turbulence ahead.
The computer bridge on the fourth floor of the Tower in The Hague, from which the Office's mainframe was controlled in the nineties.
Chapter 9

The Office and information technology

Inside a StorageTek robotic tape library.
“Is the EPO going to join the Information industry in the 1980’s?”

The answer seems to be: YES! The idea of information industry covers the commercial generation, operation and use of data-bases [...] the challenge of the so called Information age is there!”

This question, asked by an examiner in 1980, marked a milestone in the Office’s development. From very early on, it had all the resources it needed to join the digital revolution: “The EPO has the necessary computer facilities [...] a highly qualified staff of patent information specialists [...] the telecommunication network. All necessary elements are present.”

But although it had the means, it was less clear that it also had the will to confront such change: “are the EPO and its search examiners willing to accept that challenge? Or do we prefer to remain aside and observe how others manage with modern patent information services? Thereby being well aware of the fact that no other patent database producer can do a better job than we do, in the field of optimal retrieval of technical information from patent documents by classification and indexing methods.”

These were questions that would only be settled after a series of projects, complicated by the rapid pace of technological development.

Automated search: long-standing challenge or unrealistic ambition?

Information had been the Office’s main raw material from the very outset, and its physical form and location had largely determined the new institution’s geographical setup. DG’s search had to be located in The Hague, where the staff could access the information collected by the IIB and the Netherlands Patent Office, a vast resource consisting of tonnes of paper meticulously archived in the Tower Building in Rijswijk. The Tower’s layout mirrored the IP sector’s reliance on information: spread over 24 floors, the examiners’ offices were arranged around a central spine of archives with shelves housing millions of documents. The files, accumulated over decades, were essential for pre-examination search and contained patents from all over the world in the form of full specifications or, in the case of non-European patents, English abstracts. In addition to Dutch patents, the collection included German ones dating back to 1877, French from 1900 and British from 1909. The decision to locate important functions of the new Office in the existing Hague site was no doubt politically motivated, but the physical reality must have made it all the easier to take. It would have been a Herculean task to relocate the millions of documents in this collection stretching back to the mid-19th century. Administrative and procedural steps had been computerised early on (see page 169), but computerisation (generally, but not entirely accurately, known as automation) proved much more difficult to introduce for search. The first step had been to make the original paper documents easier to find by computerising references to them so that searchers could locate them by a keyword search, just as in a library. The DOC-DB application, which the IIB had begun developing in 1972, was already based on such a bibliographic approach to document classification. By 1980, the Office’s successor database contained more than 10 million references and was growing by 1.5 million documents a year, with the addition of the 250,000 new documents published each year and of older, previously unreferenced documents. Classification was a crucial element of this approach, and a lot of work and negotiation had gone on to ensure that the principles applied by the various offices around the world were harmonised as far as possible. The sophisticated system resulting from these efforts comprised more than 90,000 sub-divisions. “If one considers that over 550 highly qualified technical staff are continuously searching for information in documentation comprising more than 15,000,000 documents, then I suppose nobody will argue against this being really a giant information handling problem.”

The late 1970s and early 1980s were therefore a period of transition for the Office’s working procedures. Paper documentation remained the mainstay, and the entire nomenclature used for internal classification was still available only in printed form, but computerised databases were making it increasingly easy to access this information.

Computerising search was an exceptionally big task. Apart from the difficulties involved in devising a suitable system and providing suitable tools, there was also the sheer volume of documentation to be managed. So, on several occasions, the Office sought the advice of specialists, above all firms capable of coping with a project of this scale, but given its very specific requirements, virtually unmatched elsewhere in the
world, the results of such consultation were disappointing. As one member of staff wrote in 1982: “It is perhaps amusing to tell that several representatives of computer firms, after a quick look at the problem, have thought to be able to solve it in a much more efficient way (of course at the expense of acquiring important computer resources from them). But the automation of search activities as required for the patent procedure has proven to be far from that easy.” Since solving the problem was as much about streamlining the actual procedures as about computerising them, the action taken in the mid-1980s for the most part confined to in-house efforts, and the Office refrained from commissioning external service providers, whose expertise it considered ill-suited to its highly specialised needs. This unhurried approach gave it a chance to pinpoint the critical points in the process. It was going to be very expensive, but: “To be successful automation projects require more than sufficient money: they need to be part of an overall strategy of the Office.” So, some years after the Office had been founded, the eventual benefits of automation remained a distant prospect and were still being described as science fiction or a magic tool. The Office approached the task fully aware of the potential problems and not without some scepticism.

Digitising information

Developments at international level gave the Office its initial incentive to consolidate its various projects, which until then had been somewhat over-diversified. Faced with agreements concluded at trilateral level in the 1980s, the Administrative Council approved a budget for digitising patent documentation. The process began with the conversion of documents to image files. The BACON system (see page 192) largely solved the problems of document storage, transmission and reproduction, but remote access remained tricky owing to the limited capacity of the disks on which the data was stored.

In 1987, Jacques Michel suggested a brainstorming exercise among DG 1 staff on two closely linked questions: how to automate search, and how to solve the backlog problem. Based on the results of this exercise, a broad framework for an initial automation plan was drawn up, priority being given to accommodating user needs. This approach clearly highlighted the importance of dialogue between the various stakeholders, which had until then been fairly limited. With a view to implementing the plan, at least one member of staff reporting directly to the relevant vice-president was assigned to each DG to manage the automation projects, known as ISDS (Information Systems Design Services). In addition, an Automation Steering Committee was soon set up to identify needs, co-ordinate projects and make recommendations on the action required and the associated budget to the President, and thence to the Administrative Council. A team composed of a user and an IT technician was put in charge of each project. The projects were implemented step-by-step, rather like putting together a mosaic, by first devising a general framework and then gradually introducing the various individual components, all the time monitoring developments in the technology and assessing its availability and cost. Three key areas would be identified: data production, use of text data, and administering and accessing documents and drawings through the BACON system that had emerged from the Trilateral. At that time, there was still no standard for large-diameter disks, and their capacity was being improved all the time. The disks on the market at the time could store around 10 000 A4 pages on each side. So to find the right reference, a search query had to go through several disks, which was not particularly practical. Jukeboxes were an early solution. Introduced by the USPTO, they were a major step forward when they were introduced in The Hague. Examiners could “view the documents cited in the search report instead of using, as they do now, the paper copies made for them and placed on the file sent to Munich.” This resulted in the EPOQUE system, which became operational in 1989 thanks to the work done by the DG 1 teams and by Bertelsmann and Questel, the two companies called into help with development. EPOQUE was connected to an expandable number of databases which could be fed with more content. In 1990, some of the staff cast doubt on the benefits of the system, and this gave rise to “a lot of internal debate about the con-
At the EPO in The Hague there were eight robots in a securely locked room with a rotary arm for extracting the requested tape storage cartridges and finding the right document in jukebox style with response times ranging between five and ten minutes.
sequences for staff of the [...] implementation of our automation projects. The staff representation has even officially questioned the usefulness of automation systems for staff. This criticism [...] should not be taken lightly. Who is better equipped to judge if and how automation has changed working methods and efficiency for better or for worse than the individual staff member using the systems in his or her daily work? 13

Driven to a large extent by trilateral co-operation, the work done in the 1980s resulted in considerable progress, but the systems proved disappointing in practice. What was available to examiners was paper on screen, which was ultimately less convenient to use and, all things considered, did not improve search efficiency. 14 In building up its expertise as it installed new systems, the Office had spread itself too thinly. In a special issue of the in-house magazine devoted to the subject in 1991, revealingly entitled "The labyrinth of automation," 15 it was explained: "By definition, a labyrinth is something easier to get into than out of again. The entrance to the labyrinth of automation is marked cost, the exit is headed benefit. On your way from one to the other you will encounter the [alleys] of illusion, the cul-de-sacs of ambition, and the twists and turns of justification." 16 Despite this rather convoluted formulation, it can be inferred that staff were somewhat suspicious of the automation process.

Network operations

Remote data access required suitable storage media (such as jukeboxes) and the development of reliable, high-speed networks. The Office had from the very beginning used the most powerful telecommunications facilities, giving priority to the link between Munich and The Hague. The development of local networks at the Office’s various sites, coupled with the installation and regular upgrading of special high-speed links, meant the Office had access to a powerful information system since the 1980s. But it also used these new networks as a means of increasing the amount of information it could access. From 1978, it had been able to consult documents available from the information retrieval services of the European Space Agency in Frascati (Italy), Télésysèmes in France or System Development Corporation in California. Thanks to advances in satellite technology, telecommunications networks developed rapidly throughout the 1980s. The Office profited from these new opportunities: "On Thursday, 5 June 1986, from 16.00 to 18.00 hrs, oral proceedings in an EPO examination procedure were for the first time conducted via satellite between an examining division in Munich and a professional representative at a French company in Grenoble." 17 Given that they were not provided for in the EPC, remote proceedings raised several legal problems, for instance with regard to authenticating documents and signatures, establishing identity, hearing witnesses and, less importantly, charging for communication costs. 18 The move to digital switching in telephony at the beginning of the 1990s was another important, albeit unspectacular, development of this kind. To regulate use of the new installations and any associated problems, Paul Braendli asked for guidelines to be drawn up to ensure that "recording, storage and evaluation of telephone data remains limited to the minimum necessary; data stored is used only for the purpose specified; data processing in connection with operation of the telephone installations remains transparent for each staff member; [and] risk of abuse in operating each line to be drawn up to ensure that "recording, storage and evaluation of telephone data remains limited to the minimum necessary; data stored is used only for the purpose specified; data processing in connection with operation of the telephone installations remains transparent for each staff member; [and] risk of abuse in operating each line is reduced." 19 These guidelines did justice to the staff’s interest in privacy and data protection, but the introduction of new information and communication technology (ICT) gave rise to legal problems and placed question marks over methods of organising and evaluating work.

Paradigm shift in the 1990s: online search at the cutting edge

"It is relatively simple to design new projects [...] it can be a struggle to complete the project on time with the expected benefits [...] the project never gets finished [...] or the project does not result in anything." 20 It was time to move on from exploring new avenues to consolidating the work already done and adjusting it to achieve genuine automation. Development of the world wide web made digital technology a part of society, and the Office could not afford to be left behind. "Millionen Akten beim Europäischen Patentamt. Elektronische Erfassung der Patentanmeldungen" 21 (Millions of files at the EPO. Electronic storage of patent applications) predicted the specialist press in 1990. For this to become a reality, fresh impetus was needed and the Office had to focus on a more ambitious programme which would provide it with the digital technology to perform full-text searches of the documents themselves. But it first
had to make a sacrifice: stopping its BACON conversion projects in 1993, it abandoned the concept underlying its existing system and embarked on a radically different project. This strategic decision was a turning point and was as risky as it was essential.

The Office’s new plan took shape as EPOQUE II and was based on optical character recognition (OCR), which was still not entirely reliable. It was even less reliable when applied to documents which were difficult to decipher, as many old patents were. The files already created would have to be abandoned and the documents rescanned, but this time using OCR software. Scanning 18 million pages of patents published in English, French and German at a maximum error rate of 2% per page was a gigantic task. Following an invitation to tender, the contract was awarded to Jouve. Those involved remember the project as stressful and dependent on the reliability of the original paper documents. As the OCR system was incapable of producing accurate results wherever the printed text to be digitised was indecipherable to the naked eye, Jouve had to find a manual solution for millions of unmanageable pages. As a result, it became more difficult to contain the costs. The initial trials did not produce the results expected, and the contractually agreed accuracy rate was not achieved. However, Jacques Michel’s confidence in his team remained undiminished, and he continued with the project despite the growing delays, intensifying his commitment to the complex process of their development, which had been largely determined by more general IT trends but had had to be adapted to cater for the complicated history of the international patent system. At the turn of the century, EPOQUE I/II–BNS could be used to consult 52 bibliographic databases, 14 full-text patent databases, covering the minimum PCT documentation (three languages), and 29.5 million facsimiles from the Full BACON Numerical Service. The Office’s examiners could now easily access and use all this information online.

**Patent information: accessible everywhere and available to all?**

Once established, the initially laborious, insecure and expensive information and communication technology became invisible, free and convenient to use. But the more online searching became everyday practice, the more interest there was in making the information available to a wider public.

The Office had been set up at a time of growing awareness of the economic value of information. Now seen as a mass market product, and no longer judged purely on the basis of its quality, information had become a vital raw material and many new firms, and indeed an entirely new sector, were founded with a view to exploiting it. In an article on this “information explosion” published on 30 December 1977, The Times wrote: “This new international industry is concerned with acquiring, indexing and storing information; and providing users with immediate access to that information at the switching-on of a computer terminal and the dialling of a telephone.” Given that when the article was written, minitel had not yet been introduced in France and data networks were still closed and difficult to use, the vision it presented of a future where anyone could readily access information via telephones and computers was extremely prescient.

The issue of making patent information more widely available to the public arose in the context of what would come to be known as the information society. Digitisation had opened up a world of new opportunities for patent information, and innovation resources in general, which went far beyond automated search: “the Office’s goals must be more ambitious in view of the develop-
ments on the information market and the activities of some private companies and patent offices (for instance the US office) in this field.\footnote{22} Given its vast resources, the Office was best placed in the 1980s to centralise and then disseminate information. But could it compete with private industry? Was it right for it to invade territory already staked out by the national offices in a sector offering them a chance to revitalise their activity and in which they saw themselves as best placed to identify business needs and provide the most suitable services? In the early 80s, the Swedish Office, the German Office and TNO-NIDER in collaboration with the Netherlands Office had all begun to offer search services, while the French Office had made its INPI Brevets database available online via Télésystèmes. So could the Office offer alternative services by opening up its own databases directly to industry? The question was of particular interest to large companies with the staff needed to carry out such online searches. For each patent application filed, the firms themselves would have to conduct two informal searches.

The EPO was not alone in recognising the value of information. Back in 1972, the Austrian government had set up the International Patent Documentation Center (INPADOC) under an agreement with WIPO. INPADOC provided those in need with patent documentation from its collection, which mostly originated from the national offices. Private companies were also set up to provide services catering for more specific needs, but they purchased much of their information from INPADOC. So by the time the Office was considering whether to get directly involved, another provider had already become established, with the support of an EPO member state, Austria, which would not take kindly to dangerous competition for a Vienna-based institution.

Although finding a place for the Office in this global marketplace would be tough and require more than a little diplomatic skill, there was no question of its not becoming involved. The green light for starting [these] new EPO information services has to be switched on by the EPO Administrative Council, which by doing so, would help to fulfil the patent information needs of the European industrial community, the most important applicant for European Patents.\footnote{23}
became Office employees. Gérard Giroud, who together with Ulrich Schatz had managed the EPO’s own activities in the field and devised this elegant solution, was put in charge of the new sub-office, which moved to new premises, recruited more staff and, within a few years, had set the standard for patent information dissemination. Information access was free, and users only had to pay any marginal costs, e.g. for data storage media. The sub-office’s tasks were diversified to include marketing and organisation of the annual patent information conference EPODIS. The national offices were closely involved in developing patent information services, administering most of the 300 patent information centres opened as part of the PATLIB network and dealing directly with the interested public in their own language. During a patent information event held in Lyon in 1993, Le Progrès paid tribute to this innovative move: “Patents: European strategy honed in Lyon […] All patent applications filled with the EPO can now be consulted in 120 libraries, 20 of them in France.”

Distributing patent information: from physical to virtual form

The PATLIB network used CD-ROM, a new storage medium already tested by INPI and a good alternative to the heavy and bulky media used in the preceding decade. The Office directly supported the PATLIB centres by providing them with the documentation they needed on CDs. Given that, by the late 1980s, CDs had become the preferred means of distributing data and were even commonplace in private homes, they seemed the most modern way to store and, more importantly, easily disseminate data among a wider public. Paul Braendli enthusiastically endorsed them, explaining in an article in the Handelsblatt, titled “Wissen auf Compact Disc gegen Fehlinvestitionen” (Knowledge on Compact Disc against false investments) that the Office was becoming increasingly reliant on the medium. In September 1989, the Office issued its first ESPACE CD. ESPACE does have a meaning: it stands for Electronic Storage of Patent Applications on CD-ROM by the EPO. Somewhat inauspiciously, the first patent application on the first ESPACE EP CD (EP 0 297 091) had no image of the document included in the disc. The EPO really was a pioneer in the CD-ROM field, not only among patent offices. With two ESPACE users had the computer hardware that could actually cope with the product.”

The requirements were very different from those for automating search. Not only was the Office now dealing with an ever wider, albeit professional, public, it also had to publish accurate digital data on a regular basis: “This led to problems, particularly in ensuring that ESPACE users had the computer hardware that could actually cope with the product.” Distributing the product also proved to be complicated, and there were some mishaps in the first few months, including one amusing incident in which a user, on opening his ESPACE EP-B delivery, discovered a Frank Zappa CD inside “due to a mix-up at the production plant”. Procedures were improved as a result, “minimising the chances of this happening again!” Besides helping to make patent information more readily accessible Europe-wide and being acclaimed as “Best patent information product” at the fifth annual CD-ROM conference, the ESPACE CDIs greatly enhanced the Office’s reputation on the patent information market and enabled it to cut costs by 20%.

The defining features of the 1990s include the development of the world wide web - initially little noticed but soon inescapable – and the use of optical fibres in major telecommunications networks. The Office’s response to these breakthroughs was gradual. Its staff, who were anyway up to date with technical innovation through their work, either used or were familiar with these new technologies, and some began to wonder how they could profit from them at work. “Go Internet, EPO! Don’t hesitate, it’s time!”, urged one examiner in December 1995, greatly encouraged by his experience with BEST (see page 236): “Almost all providers of external databases now offer access via the Internet. The BEST team got a 3-month evaluation account for APL Online, which enabled us to search selected parts of the online version of Applied Physics Letters by means of Netscape via the Internet. The fully graphical user interface with hyperlinks outperforms anything you might know from previous text-based databases. And it painfully reveals how much skill has been wasted in the past for just mastering the plain use of a database. However, like many of their counterparts working at other institutions or in industry, the Office’s IT staff were less enthusiastic. Their reflex was to regard the open network available on the internet as an insecure tool providing unreliable information. Their view was not entirely invalid, but they appeared to take too little account of the fact that users and service providers could set their own security and quality standards and criteria. Use of the internet at the Office was reviewed for the first time in 1996. “For a few years now, some of the staff in IT services and Documentation have been using the internet daily to send files and electronic messages (e-mails) or retrieve technical information. Meanwhile, a project is under way in DG 2 to look at the possibility of using e-mail for communications between substantive examiners and clients”. With regard to document searches, however, it was felt that testing to date had been inconclusive, so that “to gain more experience and prepare for the future, the management decided in July to launch a pilot project to investigate the possibility of using the internet to search for documentation. Nine examiners in The Hague, Berlin and Munich will take part.” However, thanks to their expertise, the Office’s IT staff gradually managed to dispel most misgivings. Using web browser tools, the Office significantly extended access to its information. Steps were taken to adapt EPOQUE for internal use by examiners, but the project did not proceed beyond the testing stage. For this type of application, the Office preferred to develop its own solutions based on programming languages like Java. This decision was chiefly motivated by security considerations, but it would mean less flexibility and higher costs. Nevertheless, examiners could now search for information on the internet and lawfully cite what they found in their search reports.

To make information available to a much wider public via the web, in 1998 the Office set up its Espacenet service, which was considered a “step forward in patent information on the
internet” and proved to be “the ideal way to give the public access to a mine of patent information.” It allowed “researchers and industry representatives in any country to consult all patent applications filed in 18 European nations.” A Hannoversche Allgemeine Zeitung headline read: “Patente künftig im Internet” (Patents on the internet in future), while the Weser-Kurier explained how things would change for inventors and, to avoid re-inventing the wheel, advised them simply to look on the internet, where all German patents could now be found. “Zugang soll schneller und billiger werden” (Access to get faster and cheaper) and “A new era in European patent information” were just two European press headlines reflecting the feeling that the Office’s initiative had added a whole new dimension to patent information.

The press were also impressed by the sheer volume of information and its availability from one central source: “European Patents On-Line. A searchable database of 25 million European patent documents will be made available via the Internet later this year. Linking together 20 servers to provide 20 terabytes of data, it will eclipse all other patent information sites in sheer size.” As Ingo Kober pointed out, online accessibility was more than a question of convenience; it also had a political dimension, in that anyone could now readily view information that had been hard for the general public to access, despite its theoretical right to see it. “The Office’s new website is part of a democratic process and offers access to a unique source of information,” all the more so since the services were offered at no cost: “Patentinformationen gratis im Internet” (Free patent information on the Internet).

Access was made even easier by using networks, in a move closely linked to trilateral initiatives. As Reuters reported in 1999, “Europe, Japan and US co-operate on moving to electronic patents.” In 2001, the Office introduced epoline, an electronic filing system for European patent applications very much appreciated by applicants, as it allowed them to file their applications in a “one-click” process on their own PC. It also meant that applications “published” after the prescribed 18-month period, which in the past could only be inspected in Munich, could now be consulted remotely over the internet. To begin with, users rarely took up this option, but it became increasingly common to do so, and there have been tens of thousands of such file inspections since.

In conclusion, the various uses of digital technology radically changed the Office’s working methods, while also making its procedures more efficient, accessible and transparent.
In the late 20th century, the Office experienced some significant changes. Its workload was growing, while digital technology had enabled it to implement a project called BEST (Bringing Search and Examination Together). These developments made clear that the EPC was an umbrella under which many different entities, communities and nations had come together to achieve a common aim. However, as their joint vision did not prevent them from focusing on their own priorities, the challenge facing the Office was to keep them all on board now that the momentum of the early years was slowing and a whole series of new issues had arisen from the steadily growing workload.

Near-constant growth in workload

At the beginning of the 1990s, for the first time in its history, the Office was faced with a drop in filings. The downturn, following a decision to increase fees in 1991, was much more dramatic than predicted. In the first half of 1991, 34,590 applications were filed, compared with 34,930 in the first half of 1990. The figure for the whole year was 67,538, 4.8% down on the previous year’s total of 70,924. It was not just SMEs which had become more reluctant to file applications. On the contrary, the top 100 applicants, accounting for a third of all applications, had likewise reduced their filings by 23%. The Office, however, was not unduly worried. According to the German Council delegation, the decline could be attributed to the fee increase alone, and was not a consequence of the general economic crisis (Gulf War, economic slowdown and even recession in some economies). Indeed, in its view, filing activity tended to increase in a recession as a means of surviving intensified competition. In 1992, 70,305 applications were filed, almost back to the 1990 level, and by 1993 filings were again rising strongly. Nevertheless, the two years of decline had seriously weakened the Office’s financial position. The fall in revenue forced Paul Braendli and his team to take drastic action, in particular to ensure that automation and strategic reform (BEST) could continue. Building investment and recruitment were frozen. This swift, and perhaps excessive, response to a merely temporary dent in the Office’s appeal could be interpreted as a sign of a genuine crisis of confidence. While short-lived, it betrayed the feeling that the still-young Office was vulnerable. However, its workload soon began to increase sharply again. More than 100,000 applications were filed in 1997, and the growth rate between 1995 and 2000 was 80%. EPO anxiety in the face of a possible downturn was thus merely a brief interlude, and the backlog problem soon returned to the fore. One approach to reducing the backlog and, above all, to coping better with the high level of incoming work in fields of intensive patenting activity was to delete the sub-classes in the least “active” fields and transfer the examiners working in them to other areas. In 1997, a quarter of the sub-classes dealt with in Berlin were deemed “inactive”. But faced with the fast pace of growth in filings and aware that it could not process these applications within a reasonable timeframe, the Office’s main priority was to increase its productivity (a 5% increase over 1998 being planned). Productivity was estimated to have increased by 10.1% between 1997 and 1999.

Thanks to electronic tools, productivity gains were particularly high in the search sector. Business growth in the second half of the 1990s and reform of the search and examination procedure gave rise to renewed debate about profits. Following lengthy discussions in 1997 and 1998, it was decided to reduce fees once again. But the Office remained in a dilemma: lower fees would encourage SMEs to file patent applications via the European route, but the Office would find it difficult to meet the cost of processing them (recruitment, office space, administrative overheads). On the other hand, increasing fees might likewise have a seriously adverse impact on the Office (labour relations, stagnation rather than consolidation). Fears of
declining quality led the Office to conduct user satisfaction surveys. After large-scale surveys in 1992, 1994 and 1998, user consultation became an annual exercise and showed that users were satisfied overall but highly critical of the time taken to process their applications, which in their view was excessive.

In May 2000, the Office published the millionth European patent application, which had been filed by a Dutch company for an “apparatus for manufacturing green bricks for the brick manufacturing industry.” As the Munich press in 2002 reported under the headline “Erfinder stellen neuen Rekord auf: Patentamt acht unter der Last” (Inventors set new record: Patent Office creaking under the strain) and in an earlier article on plans to eliminate the backlog by 2005 (“Patentamt will Überhang bis 2005 ab-bauen”),46 grant delays had once again become the Office’s one genuine concern. In 2002, some 30,000 applications were still waiting to be examined and, according to the German press, some inventors were having to wait up to 51 months for a grant (“Erfinder warten bis zu 51 Monate”).47

More staff, more diversity

The Office’s very first social report contained statistics on the work environment in 1991. One of the most revealing aspects was the gender breakdown. Except in Vienna, men far outnumbered women, making up 59% of staff in Munich and more than 80% in The Hague, and so 75% Office-wide.48 The average age was 39, and more than 54% were between 25 and 39, reflecting the high level of recruitment in the 1980s. The nationality breakdown was equally unsurprising.

The figures on movement between sites reflected re-deployment between 1978 and 1991. Of the total of 450 transfers, 310 had been from The Hague to Munich but only 40 the other way. In addition, there had been 39 transfers from Berlin to Munich. That the Office’s staff were attracted to headquarters in Munich was no surprise, given the level of responsibility attaching to many of the posts located there. Nevertheless, the rate of such transfers was relatively stable.49

Workload growth and additional contracting states had a significant impact on staffing. The workforce expanded and became more diverse. In 1993, the Council, without wishing to limit the President’s powers under Article 10 EPC, recommended involving the staff more directly in the management of the Office. This resulted in an increase in staff representatives and a plan to introduce a consultation procedure outside the statutory bodies. A committee was set up to examine appeals lodged against Council decisions relating to the Service Regulations. Its first chairman was Belgium’s Lambert Verjus; his successor was Josef Fichte from Austria. Throughout the 1990s, there were several lengthy conflicts over salaries, including one over salary adjustments for 1992 to 1995 after a change in the method of calculating the specific indicator. In 1996, after four years of staff protests, a settlement was reached. Complaints lodged with the Interna-
tional Labour Organization’s Administrative Tribunal against the date from which the amended indicator had been applied were dismissed as time-barred (judgment 1664).

Relations between Office management and staff were generally strained in the 1990s. There was no lack of contentious issues: remuneration reviews, changes in working procedures (Office-wide introduction of BEST) and problems relating to B and C-grade careers. Favouring a different style from his predecessor, President Kober entered into a broad consultation process with the staff representatives. This initially seemed to calm the atmosphere, but it ultimately failed to stop tension heightening. Multiple meetings and talks ended in deadlock marked by a lack of mutual understanding. Faced with hostile reaction to a phone card specially issued to staff and also presented to visitors to mark the Office’s 20th anniversary in 1997, the President was forced to explain in a communiqué that this object of no real value had been intended to be a simple memento, and not an “ironic” token of gratitude for work done.43 The dispute became so heated and the protests so frequent that the Council was regularly confronted with the problem both during and outside meetings. By 1998 and 1999, the situation had become so bad that the Council unanimously adopted a declaration on 6 June 2000, expressing its concern at the “actions”, which it considered harmful to ap-
plicants, and recalling “that personnel management and measures taken in this re-
spect are the competence of the President of the Office.”40 Its declaration was endorsed by UNICE (Union of Industrial and Employers’ Confederations of Europe) in a letter de-
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Indeed, the growth in workload was matched by developments on the property front. The Rijswijk branch was expanded in December 1997 when the Office purchased a building formerly belonging to Shell, while extension of the PschorrHöfe complex in Munich continued.

BEST (Bringing Examination and Search Together) – from experiment to policy

The separation of search and examination was one of the foundations on which the Office was built. Many logical arguments had been put forward to justify this unusual approach, but in truth it was the prerequisite for speedy integration of the IIB. It also made things easier for the Office when it opened, its top priority then being to meet demand for searches (see page 114). In the long term, however, it proved to be a hindrance in coping with the ever-growing demand for patents. Managing two sites with different, albeit complementary, functions in a balanced and yet responsive manner was a tough challenge. Measures to introduce some flexibility had already been taken during the 1980s, while the fire brigade action (see page 167) had incidentally shown that combining search and examination could make sense in certain circumstances. Fresh impetus was provided by the introduction of digital technology offering staff at other sites remote access to The Hague’s hoard of search documentation, and a radical overhaul of the Office’s working practices was now conceivable. But there were misgivings over the scale of change. The French and Swiss Council delegations advised against haste and asking for more studies of the BEST trials. Examiners were invited to express their views and make proposals on how their performance should be assessed, as a result of which quality was allocated a greater weighting.

Other arguments in favour were an improvement in quality owing to the examiners’ greater technical expertise, faster application processing and more flexibility in dealing with exceptional cases. President Braendli had to be very cautious. Besides the need for staff to learn new skills, the project would also entail developing new, harmonised criteria for calculating individual performance, a sensitive area of labour relations, as how examiners’ productivity developed would depend on their technical field, training and experience and on whether or not they used the new IT tools for their searches. Examiners were invited to express their views and make proposals on how their performance should be assessed, as a result of which quality was allocated a greater weighting.

By 1990, there were 16 BEST examiners. The initial feedback was encouraging. Braendli’s argument, based on the example of the USPTO where the procedure took only half as long, threw a rather unfavourable light on Office practice, but he convinced the Council delegates. BEST was the key to a thorough modernisation of the Office’s working methods, bringing about shorter processing times, improved quality and higher productivity.

During the first half of the 1990s, continuous discussions accompanied a progressive extension of the BEST trials. Opinion was gradually shifting in favour of the new procedure, but resistance weakened only slowly. Levels of optimism varied depending on point of view: while Braendli claimed efficiency gains of 20%, the staff representatives were more inclined to put them at 5%. They were not entirely hostile to the project and indeed were keen to promote job diversification; but they were also reluctant to rush their evaluation of the results and wanted to take their time to prepare their arguments in case they had to negotiate with the management on adapting the performance appraisal system. The Council delegations were equally cautious, likewise warning against haste and asking for more studies of the BEST trials. Besides their fear of hidden costs, they were also worried about upsetting the balance of the European patent system. The Italian delegation was in favour of step-by-step implementation, while the Swiss wanted more detailed figures on the expected savings. The President offered them reassurances (“It will take at least 10 to 15 years”), but continued to push on undeterred. It became clear that the delegations were slowly coming round to the idea when, in June 1992, the Italian delegation raised the possibility of speeding up the BEST process, not just by stepping it up within DG 1, but also by extending it to DG 2.
When Ingo Kober succeeded Paul Braendli as President (in January 1996), BEST was still being tested. Like his predecessor, he took a cautious approach, stating that: “The BEST project is a major strategic move for the Office and its smooth implementation is vital.” Initial results based on trials of a meaningful scope and duration were available. By this point, 150 DG2 examiners across the 80 technical fields in which online search was possible were taking part. In 1996, these Munich-based examiners had performed 4,900 searches, compared with the 86,300 done by DG1 examiners in The Hague, while the DG1 examiners had performed around 8,000 substantive examinations, compared with 60,850 by their DG2 counterparts. Another key piece of evidence was that a study of 400 cases processed between 1992 and 1994 had shown that the files dealt with in DG1 under the BEST procedure were comparable in quality to those processed by DG2. Now that enough experience had been gathered and many examiners had already become used to the idea of performing search and examination together, President Kober proposed that BEST be introduced Office-wide, and the Council gave its approval in June 1997.

A long time coming, this decision nevertheless met with a vehement response. When the Council was asked for its approval, the staff representatives at the meeting registered their protest and distributed among the delegates a circular entitled “BEST NOW – WORST TO COME” in which they objected to the reform for a variety of reasons, including fears of a possible decline in quality, concerns as to EPC revision by a full diplomatic conference and its ratification by the national parliaments, and the impact on interests of the host states (Germany and the Netherlands). They contended that they were “informing” the Council, whose “blind enthusiasm” was based on unfounded management assertions. Their approach took the delegations by surprise. Switzerland strongly condemned what it saw as “threats”, noting that: “My delegation, Mr Chairman, will sometimes take a harder line than the President of the Office, whose patience in trying to accommodate the staff I admire but cannot wholly endorse. The Swiss delegation will also take every opportunity to make the EPO Service Regulations more flexible.”

The Office management decided it was wiser to back down for the time being and let the dust settle. In late July 1997, President Kober published a communiqué explaining that the Council had not decided to introduce BEST Office-wide straight away. Given the implications, and above all the need to ascertain whether the EPC had to be revised because BEST would put an end to the geographical separation of search and examination, it had first been necessary to consult the Committee on Patent Law, which on 8 July 1997 had recommended revising the EPC “for the sake of maximum legal certainty”.

This held up the reform process. Ingo Kober advocated a swift revision of the EPC catering for BEST only, taking the view that any other points could be dealt with at a future diplomatic conference; but the Council wanted a single conference which would, in particular, also address the European Commission’s conclusions in its Green paper on the Patent System. The 2000 Munich Diplomatic Conference established a legal basis for BEST by amending Articles 16 and 17 EPC. In practical terms, the Office-wide introduction of BEST meant re-organising the Office’s various DGs. In The Hague, for example, there were now four principal directorates responsible for search and substantive examination, each comprising twelve to fifteen directorates organised by technical field. Obviously, the principal directorate responsible for documentation and databases remained in place. The most difficult challenge in practice was to change examiners’ habits and develop their skills. A five-year training programme gave examiners in The Hague and Berlin an opportunity to learn substantive examination, while their colleagues in Munich were trained in search.

Eleven years after trials had started, BEST entered into force at the dawn of the 21st century, and from now on was standard Office practice. A quarter of a century after the Office had been set up, practices had converged and the German model had prevailed.

A new and bigger Europe: a revised Convention, a larger Organisation

Between 1977 and 2010, the number of contracting states increased by an average of one a year. But this regularity is purely statistical. The radical change following the geopolitical upheavals of the late 1980s offered a whole group of previously excluded countries the chance to take part in the European patent system and join the European Union. Indeed, the two were linked, as EU accession was conditional on joining the European Patent Organisation. Paul Braendli strongly advocated the accession of new member states, calling it a “status symbol” and making it “the Office’s top priority”. However, as the former Warsaw Pact states had to implement significant reforms before they could join, what happened in the 1990s was more the completion of the process begun back in 1973 than a genuinely new wave of accession. The existing EPO group was joined by Denmark (1990), Monaco (1991), Ireland (1992), Portugal (1992) and Finland (1996). Norway was now the only signatory state to the EPC 1973 to remain outside the Organisation, just as it remained outside the EU. Turkey, which had initially declined to sign, became a member in 2000. Among the states acceding in the 1990s, the only one which had not attended the
The second revision of the EPC was on a very different scale to the 1991 reform. This time, it was not simply about harmonising the EPC and the European legal system, but about overhauling the Convention to make it fit for a changed world. Although the idea of holding another diplomatic conference had already been raised in the mid-nineties, serious preparations did not begin until 1998, once the aim of the revision had been set, i.e., “to render the system still more efficient and cost-effective, and fully tailored to applicants’ needs.” It was not for nothing that reference was made to applicants. Obviously, they had been stakeholders from the very outset, but changes in the overall context had pushed them to the fore. References to the market, competition and deregulation were based on the argument that any reform of an organisation above all had to benefit its clients. To that extent, the planned revision had to be seen in the context of the European Commission’s Green Paper of June 1997. In 1998, the Administrative Council began preparations, and a timetable for talks was drawn up. This foreshadowed the 2001 statement of strategic direction, in which the Office’s mission was summarised as being “for the benefit of the citizens of Europe.” This simple yet ambitious statement reflected the attitude of a stable and confident organisation capable of uniting users, its staff and the national offices. In 1998, France issued the invitations to an initial intergovernmental conference, held in Paris on 24 and 25 June 1999. Here, agreement was reached on the revision aims: a 50% reduction in translation costs, a shorter grant procedure (target: three years), and greater harmonisation of national litigation procedures (preferably to be heard by local courts). The preparatory work continued at a second intergovernmental conference in London the following year (16 and 17 October), leading in particular to an agreement considerably relaxing translation requirements (Article 65 EPC). Under the London Agreement, states which had an official language in common with one of the EPO’s official languages would dispense with a translation, while those which did not would do so if the patent had been granted in the EPO official language that they had chosen as their “prescribed language” or if it had already been translated into that language. The agreement was to enter into force once it had been ratified by eight states, including the three top applicant countries in 1999 (France, Germany and the UK). The other step forward at the London conference was the optional agreement on the settlement of litigation on European patents.

The Munich Diplomatic Conference began on 20 November 2000. It was attended by the 20 member states and 12 observer states, the European Commission and 12 intergovernmental organisations (including WIPO) and non-governmental organisations, including the epi (Institute of Professional Representatives) and UNICE (representing the users). When it closed on 29 November, it was explained at a press conference that, in addition to the EPC revision, recommendations had been issued, including one on improving the legal position of patent applicants and proprietors by introducing a central limitation procedure before the Office which enabled them to request limitation or revalidation of their patents at any time. The conference also hoped it would be possible for appeal proceedings to be re-opened in the event of a substantial procedural violation.

The revision was intended to make the EPC fit for the 21st century and allow the Office to continue operating effectively in a legal, institutional and economic environment which had changed greatly since 1973. To ensure that the Office could adapt as required, without thereby paralysing the Council, it was agreed that the relevant national ministers would meet at an intergovernmental conference at least every five years. The EPC 2000 did not enter into force until 13 December 2007, but some of its provisions, in particular those on search and examination (BEST), applied transitionally.

From June 2001, applicants could ask for their applications to be extended to Albania, Latvia, Lithuania, the former Yugoslav Republic of Macedonia, Romania, Slovenia and the Federal Republic of Yugoslavia. Throughout the 2000s, one accession was quickly followed by another, the new states harmonising their na-
tional legislation as required to become part of a system described by one author as “ingenious and ... sophisticated”. In some countries, e. g. Hungary and the Czech Republic, the national offices had already been relatively active and so were able to adapt quickly to the EPO standards. The process was disconcerting for some, who regarded it as needless mimicry or legal imperialism.

Advocates of European integration, on the other hand, generally welcomed this spillover effect. UNICE representative Karl Josef Heimbach was pleased to see that the EPC had “led to harmonisation of national laws, a process no doubt intended by the EPC legislators but which they could not have expected to be completed to such an extent. This goes not only for the introduction of protection for chemical and pharmaceutical substances [...] and the extension and standardisation of the term of patent protection.”

From one century to the next, the Convention had demonstrated its enduring appeal and its power to bring countries together. The principles enshrined in it allowed the Office to grow and extend the scope of its activities, while the accession of new countries gave it an even greater political weight.

These were all positive developments, but they also brought new challenges. The Office had to brace itself and adapt its procedures. The accession of new countries had the potential to upset the established balance of political power among the founder states. Many of the new members accounted for only a small share of overall patent activity, but whatever their size, each of them had a vote on the Administrative Council. The Office’s success inevitably went hand in hand with tension and challenges to the existing order.

In a historic move in 1999, the Administrative Council decides to enlarge the EPO and invites the Czech Republic, Estonia, Hungary, Poland, Romania, Slovakia and Slovenia to join.
“Even the greenest laurels will fade. Each day, we must look to our laurels anew.” In addressing these cautionary words to staff at a time when the Office’s success had in many ways surpassed the expectations of the early 1990s, President Kober clearly hoped to steel them for a crisis which was emerging behind the scenes but would be no less real for that. By 2000, the EPO’s workload had reached levels unimagined at the time it was founded. In view of its structure and powers, as set out in the revised EPC, it ought to have been able to move confidently into the 21st century. But that was not the case.

A thriving Office, an institution in crisis?

The tension potentially inherent in the upheavals at the end of the 1980s eventually emerged, coinciding with older problems, some of which the Office had put off addressing, but which now resurfaced owing to the changed circumstances. These problems were very intricate and involved a range of stakeholders at various levels, so it was clear that technical solutions, however essential, would not be enough to ensure a brighter future. A complete rethink of development strategy seemed necessary. To that end, the Management Committee set up a working group in 1997 to analyse the difficulties facing the Office, as frankly described in the note setting out its remit. This note identified seven objectives and the changes which would be needed to achieve each one. They related to cornerstones of the Office’s work such as quality, access to the patent system for SMEs and improved synergies with the international system to maintain and enhance the position of the EPO as the main PCT Authority worldwide.

There were, however, three points of more fundamental importance for the Office’s future. First of all, there was the issue of its general efficiency in dealing with filings growth, which was very closely linked to the centralisation issue, and the aims in this connection were to “cope with workload of whatever amount; reduce backlog; maintain centralisation”. To achieve those aims, the Office had to “increase productivity; broadly anticipate further growth in budget, plan[ning] and recruitment; refuse out-sourcing of search and examination work”. So the operational response to the growing workload and the maintenance of centralisation were two sides of the same coin. The second sensitive issue was how to reduce costs for users. The options considered included not only relaxing translation requirements, but also reducing the share of renewal fees retained by the national offices. If that share were to be set at below 50% again, the search fee could be reduced. Finally, the group contemplated reform of the international patent system, possibly under a supplementary protocol to the EPC 1973 providing for “centralised administration of European patents by the EPO; central limitation and revocation procedures; European patent appeal court”. The ambitious proposals thoroughly and frankly addressed a series of delicate matters, all boiling down to centralisation, which had been the essential theme ever since the Office’s creation. The existence of conflicting interests within the Organisation was clearly identified. The authors, who were keenly aware of the sensitivity of the issues, broadly outlined how the Office might develop, treating efficiency as a factor integral to the question of centralisation versus decentralisation. To that end, they analysed the various groups of stakeholders.

First of all, the management: “The question arises whether the EPO can efficiently deal with such numbers of applications under both quantitative and qualitative aspects. If not, the objective of preserving centralisation would be inconsistent with all other objectives.” Then the staff: “EPO staff holds a quasi-monopoly and has consistently been organising itself so as fully to reap the benefits of this position. While hundred of millions of DM have been invested in providing the best possible working conditions and tools, per capita output has hardly been improved and productivity in terms of unit costs (search, examination, etc.) has been constantly deteriorating.” The contracting states, which, it was noted, were not just stake holders but the owners both of the Office and their respective national offices, were considered to be a more mixed group: “They are also responsi- ble for general national interests such as national industry, language culture, etc. [...] Regarding the European patent system and its further development, contracting states are therefore acting in a situation of possibly or actually conflicting interest.” Their situation differed depending on which of the following four categories they came under: registration-only, ex-IIB, small examining or large examining countries. This country categorisation, largely consistent with the groups defined by Bob van Benthem in the Office’s early days, helped to illustrate that it was the small examining countries which were most affected by centralisation: “These countries may support the further development of the central system, provided that workloads are shared with their national offices.” The authors did not omit to mention the Office’s European and international partners and observed that industry in Europe, which advocated a broad range of options allowing it to choose between the national and the European route, would not oppose work-sharing between the national offices and the EPO, “provided that both quality and efficiency are not jeopardized.”
The paper ended with a series of highly detailed scenarios providing a frank analysis of the various alternatives designed to facilitate a compromise among stakeholders. It clearly explained how a possible delegation of tasks to the national offices might work. Searches would be carried out by “a special corps of examiners selected and trained by the EPO (technical and languages abilities). In addition to their national salaries they participate in an award-system granted by the EPO.”

The award-system is at the discretion of the President of the EPO and is used for the purpose of controlling quantitative and qualitative performance. It made clear that there was a complex interplay of political interests (centralisation versus decentralisation), operational issues (coping with the backlog) and matters relating to labour relations (the recurring issue of productivity versus quality). This complexity made it “extremely difficult to find appropriate and coherent answers to all questions.” Despite the variety of scenarios presented in an attempt to ensure that no avenue was left unexplored, the paper showed that the Office could not deviate from the basic principles which had guided its development from the outset: the quality of granted European patents, maintenance of the Protocol on Centralisation even at the cost of some adjustments, and the President’s function, as enshrined in the EPC, as a leader safeguarding the values established by the founding fathers.

A new role for the Administrative Council?

After the accession of Cyprus (1 April 1998) and Turkey (1 November 2000), there were 20 states involved at all stages of debate about the European patent system, and another ten or so were preparing to join them. The inevitable potential for tension arose not so much from any particular desire among the founder states to retain a predominant position as from the risk that more states on the Council might paralyse the institution.

Thus, before the new wave of accessions the Council decided to set up a group composed of member-state representatives to prepare its decisions. Discussed at its 89th meeting, the proposal was the subject of heated debate. Some states felt such a group would infringe democratic principles as was reflected by the four abstentions when the vote was taken (Finland, Greece, Italy and Portugal). Conversely, other delegations (Switzerland, Ireland) were very much in favour of a mechanism which would streamline the Council’s meetings without diminishing its powers, in particular as compared with the President’s. The Council chairman, Switzerland’s Roland Grossenbacher, had been the first to raise the issue when he said he “was somewhat puzzled by the fact that the agenda for heads of delegation meetings was becoming ever more crowded and the discussions were growing longer, whereas the Council agendas and the meetings themselves were getting shorter and shorter” and “was not sure that such a shift was entirely compatible with the requirements of transparency.” In an attempt to overcome reservations, he made clear that the group of representatives would not be a permanent fixture and would only act for as long as set out in its mandate.

Meeting for the first time in Geneva on 27 September 2001, and then in Munich on 16 October, the group called itself the Council Consultation Circle (CCC) and set itself the task of “looking into those issues on the Council’s agenda that are apparently difficult and controversial and [trying] to focus on these points in a way to facilitate discussions.” The possibility of work-sharing (both EPC and PCT work) be- tween the EPO and the national offices was one the main topics identified as a sensitive issue, but the focus at early meetings on 10 December 2001 and 12 March 2002 was on staff issues. Review- ing its work midway through its mandate in June 2002, the CCC proposed that a Council “board” be set up under Article 28 EPC. Whilst this proposal might have met with resistance in the past, it now seemed less contentious, the CCC having to some extent done the groundwork in that it already acted as a board with a purely advisory function in practice. Above all, the CCC’s practice had shown that there was no need for the Council to fear a decision-making body, even if this was not entirely inconceivable in the light of Article 28’s vague wording. The decision to set up a board with effect from June 2003 was therefore adopted quietly at the Council meeting in The Hague in October 2002. It made clear that, like the CCC, whose mandate was to come to an end on 4 March 2003, “The Board’s exclusive function would be to help the chair- man prepare and co-ordinate the work of the Council. If the basic proposal to be put to the December meeting were approved by the Council, the delegations would have to start thinking about the composition of the Board to allow members to be appointed at the June 2003 Council meeting and enable the Board to become operational.”

Thanks to his efficient conduct of the Council’s business, which the delegations praised unanimously, Roland Grossenbacher was re-elected for a second term as chairman. Undeniably, his style had been a crucial factor when it came to deciding whether or not to set up the Council Board. Nevertheless, the sensible and meas- ured approach to this reform and the accompanying official state- ments could not disguise the fact that it had sown the seeds of a possible weakening of the President’s position. Nothing had been put in writing and there had been no specific measure to that effect, but the door had been opened at a time when the arrival of new member states had the potential to change the delegations’ perceptions and behaviour. As Ingo Kober’s term of office drew to a close, the underlying tension began to make itself felt.

The President’s powers in question?

When it came to electing a new president, at a time when the centralisation issue had re-emerged, some delegations were keen to take the opportunity to review the presidential powers and introduce more sharing of responsibility with the Council. Paul Braendli, who attended Council meetings in his capacity as for- mer President, clearly expressed his concern at seeing a question mark placed over the authority which came with this office: “What I in fact find disturbing, indeed deeply worrying, is that the preparations for this election are to be used as a pretext for fundamental institutional debate in the Council on issues such as, ...
in particular, the distribution of roles between the Administrative Council and the Office management. [...] That is why I am dismayed at formulations in CA/51/02 such as corporate governance and strategic control of the Organisation by the Council, together with a reduction of the President’s role to purely operational leadership. [...] It is no secret that even within your Council there is no convergence of interests with regard to the strategic objectives of the Office and the Organisation; there are in fact striking conflicts of interest. [...] Presidents come and go; the institution remains. If the majority considers an institution no longer suited to the present circumstances, there is only one solution: revision of the law, or in the present case constitutional reform of the institutional provisions of the European Patent Convention.”

Paul Braendli’s statement impressively revealed what was being discussed among the delegations behind closed doors but left unsaid in public. Highlighting the inherent tension between the national offices’ interests and the Office’s logical development, he pointed out that the very purpose of the office of president was to reconcile the two. His words were direct to say the least, but as a former president, he could afford to speak his mind in this way, without being accused of any ulterior motive, other than a wish to ensure the Office’s continuity. 2002 was largely devoted to finding a successor for the president. There was no lack of friction, not only as to who the next president should be but also as to how that person should be appointed. Whether it was simply a sign of the times or a tactical manoeuvre, the UK even suggested hiring a specialist recruitment agency to prepare the election externally. In line with ideas fashionable at the time, this approach with its heavy managerial slant could only trivialise the office of president by focusing on qualities as an efficient administrator, while the neutrality of the outside experts might serve as a pretext for exerting an underhand influence on the Council vote. Greece and Spain rejected the idea, stressing “the highly political nature of the President’s post”, which they considered incompatible with the consultation of paid external experts. The proposal was nevertheless adopted and consultant firm Mercuri Urval GmbH was appointed to help the Council with its selection. To allay any fears among the delegations, it was stressed that the consultants would merely draw up an unranked shortlist, so as not to influence the vote. However, such procedural issues were only the first bone of contention; nationality was another. Whilst all the delegations agreed that such procedural issues were only the first bone of contention; nationality was another. Whilst all the delegations agreed that the future president’s nationality would mean for other Office posts. The idea of rotation by nationality was quickly ruled out, but the problem of multiple posts for one member state still had to be addressed.

Once the actual voting started, it became clear that it would be impossible to reach a compromise. No candidate obtained the requisite majority in either of the two votes in March and June 2003. The deadlock was such that the Council decided to extend Ingo Kober’s mandate by one year to June 2004. A new procedure was launched, but it failed to generate any new impetus or consensus. As is so often the case when it comes to choosing a new leader for an international institution, national strategy took priority over a rational decision in the interests of the institution. In this interplay of alliances, false leads and multiple intrigues, France and the UK found themselves in a face-off. Ultimately, neither country could say what exactly was at stake if not a matter of principle or a certain national pride. The Office’s inability to elect a president was gradually turning into a crisis harmful to its image. What is more, this was happening at a time of controversy over the patentability of life and software when some circles anyway had an interest in tarnishing its reputation (see pages 264 and 267). A compromise was eventually found at the highest level of international politics, the truce being signed by the French President Jacques Chirac and the UK Prime Minister Tony Blair. “End to wrangling over patent office boss. Job sharing for top EPO post”, wrote the German press. The compromise was sealed at a meeting in October 2003: France’s Alain Pompidou was elected for three years (1 July 2004 to 30 June 2007), after which he was to be succeeded by the UK’s Alison Brimelow, likewise for a three-year term (1 July 2007 to 30 June 2010). In an article under the headline “Presidents-zoon naar Europees Octrooibureau” (President’s son to take on European Patent Office), the Nederlandse Staatscourant analysed the political nature of the showdown and the part played by Blair and Chirac.
Enduring unrest

So, from 2004 to 2010, the Office had two presidents, each elected for a three-year term. As a result of this “partnership deal”, Lionel Baranes, a Frenchman, agreed to resign as Vice-President DG1, to prevent his country’s over-representation at senior management level. He was succeeded by Germany’s Thomas Hammer from 1 January 2005. Moreover, at the UK’s request (endorsed by France and Italy, but opposed by several delegations), Alison Brimelow was elected deputy chairwoman of the Council for Alain Pompidou’s three-year term of office. The idea was not that she should act as an opposition leader or counter-president, but rather that it would enable her to keep up to date with Office developments, by attending all meetings of the Council and its Board (B28).

The solution’s main advantage was that it allowed France and the UK to save face; but it was not seen as a reassuring signal for the coherence of the Office’s future governance, and it inevitably left its mark both on the people and on the institution.

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On taking up office, Alain Pompidou made clear that he was determined to tackle the many challenges facing the Office: “We must examine patents more quickly”. On a more political note he remarked: “There can only be one captain on board.” He was, after all, required to manage the Office under the watchful eye of someone who already knew she would succeed him three years later. No matter how much goodwill and loyalty the two displayed, this was scarcely a comfortable position for him. Or for that matter for his successor: having been involved in governing the Office for three years, she could not embark on a truly new course when Alain Pompidou handed her the reins. Nevertheless, despite this handicap, both strove to do the job to the best of their ability, and although their presidencies were overshadowed by the decentralisation debate (see Chapter 12), the Office did continue to make progress.

The first decade of the new century was dominated by long-term issues. Many were by no means new and had already been discussed before, but they had become more acute as Europe was now undergoing an enduring crisis and was compelled to adapt to globalisation and the economy’s increasing dependency on financial markets. Views on the now crucial matter of the Office’s financial independence varied. Was its prosperity merely an illusion created by outmoded accounting standards and a short-sighted approach to its long-term liabilities? The debate centred on two issues: pensions and the Office’s true financial position, which was difficult to ascertain as a result of the specific way its fees-based system worked. The adoption of new accounting standards and difficult negotiations on pension reform went some way towards clarifying the situation, but a number of sensitive issues remained.

Endeavours to establish a more open-minded approach to internal dialogue resulted in some progress, but this process was often complicated and there were disappointments too. Some of these, in particular the difficulty in resolving staff-management conflict, were down to the Office’s special legal status. The large number of complaints before the ILO’s Administrative Tribunal, the only body with jurisdiction to settle disputes that cannot be resolved in the Office’s internal procedures, was clear evidence of the Office’s problems in dealing with conflict, which is a much more trivial matter for Europe’s national authorities and private sector because such cases can be taken to the national courts. Social dialogue thus remained beset by the same problems as had made it so difficult in the previous decade (see page 150). Although the processes had been modernised, the suggestions box of the 1980s being replaced by electronic channels, the results remained mixed, as shown by Alison Brimelow’s experience with her “President’s blog”. However, the Office’s overall performance increasingly depended on consensus on the objectives to be achieved and on the crucial balance to be struck between productivity and quality. Alain Pompidou had been quite explicit about his view that the two were linked, and his approach, which tied in with that advocated by the Staff Union, was intended above all to respond to concerns among users. As one analyst observed: “Patents must fuel growth” and “the number of patents means nothing. The only important patents are those that result in licensing rights: they represent financial value based on knowledge. […] Alain Pompidou is keen to apply a social and entrepreneurial aspect to patent issues.”

The Financial Times was pleased to announce that: “The head of the European Patent Office is confident he can tackle the problems that have long frustrated users.” The problem of the time needed to grant a patent which had faced Ingo Kober – “Patent stau hat größte Priorität” (Patent backlog has top priority) – thus remained a recurring theme under Alain Pompidou. But it was becoming increasingly clear that the problem could not be solved simply by processing more applications, and this view was vindicated as filings continued to grow incessantly at the end of the decade, a trend described in the Rheinischer Merkur as a “patent boom.” Alison Brimelow likewise took the line that quality had to take precedence over quantity, observing that, as a result of this quality policy, the Office’s grant rate had fallen below 50% in 2008. And it was as a means of ensuring quality that she launched her Raising the bar initiative.
Chapter 12

The Protocol on Centralisation as a bone of contention
The decentralisation issue is inseparable from the Office’s history and arose as soon as the Protocol on Centralisation had been adopted. Depending on viewpoint, decentralisation can serve either to ensure equilibrium in the European patent system or to weaken it by depriving it of its coherence. The new order arising after the upheavals of the 1990s encouraged the advocates of work-sharing to launch a new offensive.

**National office anxieties**

It was implicit in the thinking behind adoption of the EPC 1973 that there would be a decline in the activities of the national offices. Indeed, as committed Europeans the founding fathers almost certainly contemplated the possibility that they might even eventually disappear entirely. However, as things stood at the end of the 1970s, when the Office still had to prove itself, this was an unlikely prospect. For the various member states, it seemed inconceivable that the existence of their national offices might one day be in danger.

As Bob van Benthem bluntly observed in 1984, the EPC had deprived a number of national offices of much of their work. The impact varied: the Netherlands Office had suffered a 70% decline, the German Office only 20%. As he explained: “This loss of work for national offices was of course fully expected and for some of them very much to be welcomed in view of the difficulties they were facing in coping with their backlogs. Perhaps in some offices the loss of work has been more than they originally estimated, but nevertheless it was plain from the beginning that national offices would have to adapt to the new system by shrinking in size. This is indeed what national offices have – to a greater or lesser extent – loyally done, achieved partly by natural wastage (e.g. retirement) and partly by transferring examiners to the European Patent Office.” But the offices’ ability to adapt was not unlimited. In order to remain viable, they had to retain a certain size. “I wish to emphasise that the European Patent Office is very aware of – and sympathetic towards – the problems of national offices which have arisen from the creation of the European patent system.”

The problems facing the national offices could only grow the more the European Office prospered. In 1991, a headline in the New Scientist entitled: “The decline and fall of national heritage”137 in Munich, the journalist explained, “is the patents centre of Europe. Its rise has been as swift and spectacular as the decline of the national patent offices of the states that signed the European Patent Convention.” The following year, the Münchner Merkur138 announced: “Europe-Patent in Sicht. Nationale Patentämter schrumpfen” (European patent in sight. National offices shrinking), while the Deutsche Handwerkszeitung139 reported: “Euro-Patent schlägt nationale Konkurrenz” (European patent beats national competition).

Anticipating this development, some countries had obtained a special status through derogations from the Protocol on Centralisation. In 1981, the Austrian Office, pursuant to an agreement signed in 1979 under Section IV of the Protocol, performed more than 2,000 searches for the EPO. A supplementary agreement signed in 1982 subsequently allowed it to act as International Searching Authority for international applications filed with the Hungarian Office. Sweden similarly wanted to play a special role and, in 1978, signed a co-operation agreement under Section III of the Protocol. Supplemented in 1982, it allowed the Swedish Office to act as International Searching Authority for the Nordic countries and provided for full or partial reimbursement of the European search fee payable in the European grant procedure if the Swedish Office had carried out an international-type search under Article 15(5) of the PCT. Austria thus took on responsibility for matters relating to Hungary, while Sweden became the dominant power among the Nordic countries. These arrangements, reminiscent of the imperial and royal orders of old, highlighted the extent to which interests in sovereignty and sphere of influence could be pursued in the field of intellectual property.

The British too had insisted early on that their national office keep some of the work, but just a few years later abandoned this position, which they no longer considered an advantage and which had perhaps even become a burden in an increasingly difficult financial climate. In view of these incoherent ad hoc solutions, which were too heavily focused on the specific needs of individual states, Bob van Benthem in 1984 contemplated a more general approach: “One way of overcoming some of the disadvantages of transferred work would be to transfer European examiners as well – in fact to create some kind of European Patent Office agency in the national office. For example, if the minimum number of examiners needed by a national office was 50, but the national office had sufficient work for only 35 of them, then the number of national examiners would be reduced to 35 and 15 examiners, of mixed nationality, would be transferred from the European Patent Office, together with an equivalent amount of European work. Naturally there would be many practical difficulties to be solved, but it might be an idea worth pursuing.”140 This remained no more than an idea which, while not disappearing entirely, faded into the background during the 1990s.

**Decentralisation makes a comeback**

The centralisation debate re-emerged in the run-up to the initial talks on establishing the Council Consultation Circle (CCC) (see page 246). In early 1998, the President of the Danish Office, Mogens Kring, wrote to Ingo Kober, expressing the misgivings some delegations had as to the Office’s centralist policy. He said the Danish delegation had “on several occasions submitted the proposal that, in future, part of the work related to European patents should on the basis of contracts be entrusted to national patent offices which are capable and willing to take part in this work” and had made this proposal both orally and in writing, in particular in connection with the EPC revision debate. He expressed his regret that the point was “still not included in your non-exhaustive list of items, which might be considered upon a revision of the EPC. [...] I do realize that some parties may consider the proposal rather controversial. But this would not be the only controversial item on the list.” Diplomatically, he supposed that “the non-inclusion of the proposal is due to a mistake, and I look forward to seeing the Danish proposal included in the list of items to be considered for revision of the EPC.”141
Entitled “Revision of the EPC: How to create synergy between the EPO and the National Patent Offices”, the Danish paper recalled that the EPC had come into force “more than 20 years ago” and presented the proposals in the context of the conclusions reached by the European Commission in its Green Paper on the patent system. The need to promote innovation, especially among SMEs, to make Europe more competitive made reform essential. The paper then set out how the patent system could play a key role in achieving the objectives identified by the Commission: “A system which exploits the resources and combines a strong central administration with a flexible and close contact with the users [...] which rests on quality as well as efficiency and at the same time offers maximum service to industry.” Such a system would entail an important role to be played by the EPO as well as the NPOs. Two linked questions now had to be addressed: “How to develop the EPO in an appropriate direction? And how do we enable the member states, through their NPOs to maintain a qualified patent service to their national industry?”

The Danish paper offered answers to these questions in the form of a five-page list of measures based on subsidiarity, whereby the national offices would be entrusted with a share of the search and examination work done at the Office.

The Danish position was based on the new challenges faced by the European patent system but also on changes in the environment in which it operated, especially as a result of technological progress: “experts are no longer bound by geographic constraints set up by the need for access to paper based collections of patents documents and other literature. Untroubled electronic communication as such is not only possible, it is taken as granted [...] this will reduce the necessity of maintaining geographic centralisation even more.”

The Danish delegation made clear that the Office was important and that it had no intention to weaken its position, but nevertheless stressed that the national offices were better placed to meet the needs of SMEs. More generally, the various sectors involved in the patent system could only develop properly if their country had a strong national office. To strike the necessary balance, two requirements had to be reconciled: “On one hand the European patent system needs a strong centralized element. On the other hand the system needs a significant element of subsidiarity [...] the strategic challenge lies in developing synergy in the co-existence of, and co-operation between the EPO and the NPOs.”

So action was needed to counter the downturn in work for the national offices and ensure that the second pillar did not eventually crumble. First, their workload had to be maintained at a level which guaranteed their continued viability. Denmark estimated that it would need 1,500 files a year, covering a sufficiently wide variety of technical fields. No growth beyond that level would be allowed. The resources needed would be defined in a contract between the national office and the EPO. Aware that its proposals would mean revision of the EPC, the Danish delegation for the present requested the adoption of “any possible intermediary solutions in order to ensure that the smaller offices can continue to exist.”

New context, old rifts

The Danish paper was based on traditional arguments already dealt with by Bob van Benthem almost 20 years before. But three things had given them new relevance. First of all, the Office was struggling to cope with filings growth, which was an argument in favour of work sharing. Second, as the Danish paper had made clear, developments in technology meant that the need for examination to be carried out where the documentation was physically located – one of the main reasons for setting up a central Office – no longer applied. Third, even if the European Commission could not be seen as an ally in the strict sense of the word, its initiatives calling for various changes to promote innovation had at least provided the new decentralisers with ammunition to support their arguments. All this meant that the proponents of centralisation as the keystone of the European idea behind the Office could no longer dodge the debate. A strategic review, “Harmonisation of the European patent system”, was launched in October 2002 as a Joint Agenda Building project whereby the national offices and the EPO would work together “to derive maximum benefit from the potential synergies.”

The length of the grant procedure, it was suggested, could be reduced to three years, in line with the target set at the intergovernmental conference in Paris in June 1999, by taking a three-tier approach to patenting: national systems, the European system and the Community system. The EPO took the view that:
“Every effort should be made not to pass on the national offices’ problems to the European Patent Office, and to find a solution where national offices would be called on to help the European Patent Office solve its own problems. In most cases, the national offices did not have the capacity to act as a substitute for the EPO, which saw the national offices as providing information and a pre-filing filtering service.”[4] But not all the member states shared this view. Among others, the UK and Germany considered it essential for users to continue having a choice of systems. The UK delegation argued that: “Whatever one’s views, the co-existence in Europe of national systems, the European patent system and, sooner or later, the Community patent system meant that a patent ‘market’ of sorts existed, which users chose from according to their needs.” According to the German delegation, “Europe needed not only complementary patent systems but also ones that, to a certain degree, competed in the interest of users, who should be at liberty to choose between several service ‘providers’. Contrary to what the Office seemed to think, maintaining exclusively national property rights was valid because it met certain users’ needs.” The Danish delegation added that a centralised system had “certainly been the right strategy in the past, when a powerful and strong European Patent Office had been needed,” but “the situation was very different now because the Office had become very strong and powerful; new means of communication seemed to obviate the need for such a high degree of centralisation. What was more, the member states had an increasing need for expertise in industrial property protection at local level to promote technological innovation.” Belgium, France and Spain, on the other hand, were in favour of maintaining a highly centralised system. The more liberal take on the patent system is encapsulated in the term co-operation, to be understood as a situation “where the different players in a given system were simultaneously both co-operating and competing with each other”. A mixture of co-operation and competition between the EPO and the national offices, the co-operation approach heralded a somewhat uncertain future for the European patent system.

The first real challenge to the status quo came in 2003, when Finland applied to WIPO to become a PCT International Searching Authority, without consulting the other Nordic countries (Denmark, Norway and Sweden) or the EPO. As this was tantamount to renationalisation of procedures then part of the Office’s remit, and the majority of delegations and the Office itself had reservations. A solution was found in October 2003 in the form of PCT co-operation between the Nordic countries. This gave rise to questions as to the searches performed under the PCT by some other national offices, in particular the ones the Austrian Office did for South Korea. Since the latter’s office had become a PCT authority, its agreement with the Austrian Office could be considered a hidden subsidy. In this connec-
tion, the PCT 2000 brought considerable relief to the EPO, allowing it to restrict its handling of PCT filings from countries with their own PCT authority by setting quantity limits or excluding certain fields of technology.[5] In the case of Finland, an understanding was reached on procedural matters, but not on fees, for which Finland had sought a reduction under Article 157(3) EPC. The deadlock was broken by conclusion of an interim agreement subject to a “sunset clause” stipulating its exact duration.[3]

The great strategy debate

These piecemeal concessions failed to resolve the issue. During Alain Pompidou’s presidency, under pressure from the decentralisers, the great strategy debate began. 2004 saw a twofold re-examination of the EPO’s whole relationship with national offices. First, in March, the Protocol on Centralisation was called into question: “Like the UK delegation, the German delegation felt it was too early to deem the Protocol on Centralisation to be obsolete, even though it was no longer appropriate.”[6] The intense debate that ensued meant that seven other items on the Council’s agenda had to be postponed. Then, in October, a special brainstorming exercise[7] was organised. Its basis was a report drawn up by the UK. The delegations agreed to discuss nine points:

1) Continuing or ending the partnership agreement between the EPO and the Swedish and Spanish offices
2) Whether or not each member state should be free to request PCT-authority status under existing treaties
3) Whether or not regional bodies should be free to request PCT-authority status under existing treaties
4) Applicants’ freedom of choice
5) Observance of time limits
6) Application of Article 157(3) EPC
7) EPO and national offices functioning as network
8) Quality management and control
9) Efficiency/effectiveness of the system

The discussions reflected very disparate positions. Some countries (Spain, Finland) wanted national offices to maintain high levels of expertise, by keeping and developing PCT search work. Germany was not against some decentralisation, despite its concern about the quality of decentralised proceedings. France was more overtly centralist; it raised the spectre of the EPO’s implosion, and warned the other delegations that the strategy debate could undermine thirty years of work on building up a European patent system. The upshot was a proposal for a network of national offices dealing only with PCT applications in their own language.

The implicit subtext was financial, of course. The issue was how to share out the renewal fees, which now generated more EPO income than filing fees.
The delegations were actually deeply divided. A "group of 13" (AT, DK, EE, FI, HU, IS, LV, NO, PL, PT, SK, ES, SE) wanted more decentralisation, whereas a "group of 16" (BE, BG, FR, DE, IE, IT, LI, LU, MC, NL, RO, CZ, CH, TR, GB, SI) wanted to keep PCT searching centralised whilst allowing searches in national offices. No agreement could be reached, so tensions continued in 2005. After the March 2005 Council meeting, a working party was set up. With the centrifugal forces intensifying, ten delegations met informally in Madrid on 26 May 2005 and produced a joint statement setting their differences aside and proposing the kind of network agreement advocated by the "group of 13". Some issues were unproblematic: applicants’ freedom of choice, no automatic outsourcing from the EPO to national offices. But the Office was strongly opposed to the criteria for ensuring neutral and effective sourcing from the EPO to national offices. The Office played for time, backing the principles defended by the "group of 16", in the hope of securing their acceptance. 

Once again, the centralisation debate and the balance of power between presidency and the Council were on the table, in a context likely to call into question the very principles of the 1973 Convention. But the advocates of decentralisation, whilst united in criticism, found it difficult to formulate joint proposals. Some suggested solutions reflected only the administrations’ point of view, ignoring that of the applicants. Belgium commented that an applicant who filed for a patent with the EPO had every right to be concerned that his application might instead be handled by a national administration to which he had deliberately not applied.

The Swiss delegation summed up the position of the many countries which had fully committed themselves to building the EPO: “Taking up the point made earlier by the Belgian delegation, Switzerland too, in ratifying the EPC, had transferred certain sovereign powers to the EPO, not to other patent offices. Moreover, to outsource large parts of the European granting procedure would infringe the EPC and the Protocol on Centralisation. Any steps towards outsourcing must therefore be preceded by a detailed legal analysis. Subject to that reservation, the Swiss delegation could endorse all the ideas put forward in CA/94/05.”

France’s position was similar, if less forthright; it accepted the principles of the Madrid statement, provided the Office and the Council decided what work was outsourced.

For the next few months, the debate rumbled on. It was supposed to be over by June 2006, but all kinds of proposals were being put forward. Some seemed to involve turning the Office into an IT services company providing national offices with software on request; others wanted the Office to refocus on its core work (which for some delegations – but not all – meant getting out of patent information). Financial issues arose, in fragmentary fashion. The Office played for time, backing the principles defended by some member states and at the same time warning against the return of national interests: “The European patent system undeniably had the potential to benefit all users and the whole European economy. The debate had to be guided by concern for the interests of the economy and citizens of Europe, not for those of the EPO or the national offices.”

Outsourcing would mean drawing up procedural and (above all) quality standards to be met by both national offices and the EPO. Search software could indeed be accessed from anywhere in Europe, but training qualified examiners was not so easy. During 2006, several working parties met regularly to flesh out this recasting of the relationship between the EPO and national offices. Alison Brimelow chaired the one on quality. Twelve national offices had expressed interest in outsourced classification work; eleven in terminology work for machine translation, and fifteen in doing special work (i.e. searches not followed by examination) that the EPO agreed to give up.

The dust settles

The impetus generated by the Madrid statement gradually dissipated, due to the would-be decentralisers’ inability to find an overall solution to their liking. Multiple disparate positions could not offer a viable alternative. EPO management did try to use parts of the statement and give satisfaction of sorts to the demands being made. No-one was fooled – Denmark protested against any “cherry-picking” – but it was high time to resolve the impasse. Utilisation by the EPO of search reports drawn up by national offices, support for users, and co-operation – these were the suggestions for giving national offices more work and a higher profile without jeopardising the dynamics of the EPC. This was a far cry from the strategy package originally wanted by June 2006, but did serve as the basis for future discussions. Some parts were tested. A utilisation pilot project (UPP) run by DG 1 with four national offices (Austria, Denmark, Germany and the UK) was launched, to assess the likely usefulness of national office searches for the European grant procedure. A few months later, just 44 applications had been received, rather than the hundreds expected. In the end, after more than a year, 1350 applications were searched, only 200 at the applicant’s request (the rest were passed on to the national offices by the EPO). At the Administrative Council’s December 2008 meeting, this test was found to have produced interesting results, and to have increased consistency within the European patent system without promoting decentralisation. After five years of conflict, the EPO’s foundations remained intact. The Protocol on Centralisation had survived essentially unscathed, and the President kept his role and powers vis-à-vis the Council. The debate had often been confused, with unspoken, indirect and disparate objectives. Even so, it had shown what increased complementarity between the EPO and national offices...
might look like. The national offices, being nearer to innovators and their workaday problems, were given more specific roles – backed up by EPO resources, tools and expertise – in disseminating patent information, training, and generally spreading a culture of innovation. These activities were important to the early signatories of the 1973 Convention, but even more so to the countries joining after 2000.

Chapter 13

The EPO as a benchmark in key patentability issues
EPO President Paul Braendli chose the film Blue Planet for the celebrations marking the 1973 Convention’s 20th anniversary. It was shown on an IMAX screen at the Deutsches Museum, as an invitation “to contemplate the consequences of human actions: the blue planet is threatened in many ways [...] Developments in new key technologies in particular have produced appeals to mankind’s sense of responsibility in his dealings with nature. Biotechnology is one example.”

His words highlight the new challenges facing the Office. It has to take a position on some controversial issues. Over the years, the boards of appeal have taken centre stage; their decisions are analysed and criticised or endorsed, depending on the strategic interests of a wide range of stakeholders.

### Patents on life

This question first arose for plants, between the wars. In 1922, France agreed to reward the creators of plant varieties by granting rights to firms working on seed selection and the improvement of agricultural plants. In 1961, this principle was enshrined at world level in the UPOV Convention (Union for the Protection of Plant Varieties), which paved the way for intellectual property on living things by drawing a first distinction between natural and artificial life. The first could not be owned; the second could. In 1971, Ananda Chakrabarty, an Indian microbiologist working for General Electric, applied to the USPTO for a patent on a micro-organism genetically modified to break down oil. After a legal battle lasting nearly ten years, the US Supreme Court ruled in his favour, establishing that whether or not a patent’s subject-matter was alive had no legal significance; what counted was that it was a man-made invention. In 1987, the USPTO acknowledged that any living organism genetically modified in such a way as to acquire “invention” status was patentable. This made all levels of life, from animals to genes, and all forms of life, i.e. whether genetically modified or not, patentable under US law. Only human beings (but not their genes) still seemed non-patentable. During the 1990s, the TRIPS Agreement (on trade-related aspects of intellectual property) helped to spread this approach internationally.

This fast and systematic advance of patents on living things was highly controversial. Besides the ethical issue of “owning” life, a series of problems emerged (prevention of free circulation of scientific information, legally sanctioned sterilisation of seeds, biopiracy), and there was strong opposition to the commercialisation of living things. More and more patents were challenged, most famously those claiming genetic sequences linked to breast cancer or plants sacred to Amazonian tribes.

The EPO was directly affected by these debates and the decisions they required. In the late 1980s, in building the single market, the European Community had begun to prepare directives allowing patents in biotechnology. The EPO had to take concrete decisions in line with its own founding texts. The onco-mouse – specially developed by Harvard University for cancer research and patented in the US in 1988 – was the first high-profile case to reach it. “Kein Patent für die Krebsmaus” (No patent for the onco-mouse) was the Frankfurter Rundschau headline when the EPO refused the application in spring 1989. This decision seemed somewhat at odds with developments in Brussels, which in October 1988 had published a directive aimed at laying down modern standards to protect biological inventions across a very wide field, including pharmaceutical and chemical products, agriculture, animal breeding and veterinary care.

This was the first of a series of statements of intent, decisions and votes by various European bodies, with scant indication of any real policy. The directive was rejected by the European Parliament. Whilst political bodies could bob and weave, the Office had to decide on the basis of its texts, procedures and rulings. In October 1991, in opposition proceedings, it set aside its earlier refusal and granted Harvard a patent for the onco-mouse, which it issued on 13 May 1992. It then confirmed this independence of judgment by granting a patent for a genetically modified tomato developed in the US. As the de facto European benchmark in this area, it duly became the venue of choice for demonstrators opposed to patents on life. Greenpeace began to target it, holding more and more protests on EPO premises.

It took several years, before any real policy began to take shape at EU level. On 16 July 1997, the European Parliament approved, with amendments, a directive allowing patents in biotechnology, thus replacing the various national laws with a single set of rules. Patents could now be granted for any biotechnological product or process (especially involving plants and animals) except human beings and embryos. Human cloning was still prohibited under the new Community provisions finally adopted in May 1998. This Europeanisation was welcomed by industry and researchers in Europe because it helped them to compete with their counterparts in the US and Japan. It also established that the European institutions, through negotiations between the Parliament, the Commission and the EPO, were the best way to agree what line to take on this difficult question. For the NGOs, however, the directive was not acceptable. The Office was again the focus of their discontent when the directive entered into force, it was on the façade of EPO headquarters that Greenpeace blocked the entrance to EPO headquarters in April 2004.
peace unfurled its banner proclaiming that “Leben ist keine Erfindung der Gentechnologie” (Life is not an invention of genetic engineers), also blocking access to the building.145 These views were widely shared in numerous member states, and also taken up by the Parliamentary Assembly of the Council of Europe.146 By 2002, only five EU member states (Finland, Ireland, Denmark, Greece and the UK) had implemented the directive in their national law, despite a target date of July 2000.147 The directive had been adopted at European level, but there was still no clear consensus amongst the various countries. This gave the EPO some leeway. It said it would be applying the European directive with effect from 1 Sep-

Chapter 13

Gene Technology – The New Challenge: EPOSIUM discussion forum at the EPO, 1992

A spectacular protest action at EPO headquarters in Munich, February 2002

Finger weg von meinen Genen

Stopp, Patents auf Leben

HAPPYBRAIN

Gene Technology – The New Challenge: EPOSIUM discussion forum at the EPO, 1992

Regularly updated brochure, available on the Office’s website.

tember, but took restrictive decisions on stem cells and embryos. Die Zeit accused it of defining the patentability criteria for animals and plants on the sly,148 but its decision on human stem cells was warmly received in the press despite its general concern about such matters.149 “Patents on genes – the EPO gets tough”150 read the headline in Les Echos, which also attributed to the Office powers of harmonisation which it did not actually possess. The appointment of the medical doctor and researcher Alain Pompidou to the presidency gave added emphasis to the EPO’s positions. “His career as a scientist and bioethicist befits the Office’s great task”, explained the FAZ, a German newspaper, in September 2004. “He has more than the general passing acquaintance with the issues; from his own mindset and experience, he knows how biotechnological research, nanotechnology and IT are transforming science and, with it, our increasingly technical world.”151 The new President stressed the importance of ethical issues: “Pompidou is asking more ethical questions about patent granting”, commented the FAZ, citing the new President’s pithy comment that “a patent for a sheep with no legs is unacceptable”.152 On these issues, which were highly sensitive and in constant flux during the first few years of the new millennium, the Office sought to tie its course closely to its core task: “The EPO holds no political views of its own on biotechnology patents. As the executive organ of the European Patent Organisation, it examines patent applications on the basis of the relevant law, in other words the EPC.”153

Patents on software

The dawn of the IT age, and the start of widespread public use of computers, took place in a legal vacuum which fostered non-interventionism: software programs and lines of code circulated across national borders, spreading informally all over Europe.154 They travelled on Hertz waves, in fanzines or various niches of the “computer bazaar”, irrigating a fledgling IT community still inward-looking and fascinated by programming. It was a world of “early adopters”, technically adept and wanting to penetrate into the code and technical hearts of their machines.155 In the 1970s, software was a state of mind. It bore the imprint of its creator’s personality and, like artistic works, was a matter for copyright. In 1985, the US agreed that it was patentable, prompting a flood of filings in all IT areas. That same year, Japan (followed by Asia more generally) also moved to allow software patents. Business support and practice differed significantly in the US, which moved abruptly to the new rules.156 Seeing these changes, Europe should have adopted its own policy without delay. But it didn’t. Advocates and opponents of software patents split along classic lines, depending on whether they regarded patents as good things or bad. For business, patent protection for IT innovation was the only way to recoup long-term the investment needed to develop increasingly expensive products. For opponents, software patents were an assault on economic freedom and a threat not just to small firms but also to inventive creativity.157 An article in Le Soir even argued that they led to “judicial terrorism”.158 The antis’ arguments are those advanced against patents generally, but transposed to a digital sphere highly sensitive to anything that might curtail freedom. A recurring one is the asymmetric resources of the different players: “the groups of programmers who develop such projects can never afford to defend themselves if threatened by big software houses.”159 The development of the web
and the cybersphere has given the debate on software patents a new, more cultural dimension. Exclusive rights and fee payments are at odds with the no-charge culture which many of those who developed the web regard as its cornerstone. Since the early 2000s, anti-patent militants, bringing together groups with sometimes very different objectives and motives, and supported by transatlantic associations like Richard Stallman’s163 Free Software Foundation, have been vocal in their opposition to successive draft directives on software patents.

The debate in Europe raised the same issues as in the US, but with a different timescale. The Commission found it hard to define a strategy to protect European firms without offending the public. At the end of 1999 it produced a paper164 and launched a web-based consultation exercise. Opponents read it as too “pro-patent”, while industry thought it was unduly cautious, given that Europe was already lagging behind the US and patents were the only way to build up the local software industry by making investment worthwhile.165

The difficulties encountered by draft directive 2002/0047 on the “patentability of computer-implemented inventions” showed just how hard it was for Europe to respond with clear legislation to the decisions taken by the US and Japan in the mid-1980s. The arguments exchanged by the pro- and anti-software patent camps166 were not only economic (patents as a business asset, as opposed to a threat to innovation and free software and a monopolistic source of unjustified economic and social costs),167 political and legal (proponents of software patents in Europe stressing that economic globalisation means more homogeneous international trade practices); they also raise deontological, social and ethical issues pertaining, for some, to the commons.168 In response to criticism, the text was postponed.169 In March 2005, the EU Council of Ministers gave the software directive the green light,170 but the European Parliament was against and a new dispute started.171

The parliament called for a revised directive,172 but then, in July 2005, voted against it.173 The European press was not surprised; the Neue Zürcher Zeitung quipped that “the EU software patent directive has crashed”.174 Following this failure, European Commissioner Charlie McCreevy tried to solve the problem in co-operation with the EPO. But his reform project, like his proposals for the Community patent and EU accession to the EPO, came to nothing.175 So, software patents were lost in a maze of European political institutions, seemingly incapable of taking a decision. But faced with more and more incoming filings in this field, the EPO had to take the bull by the horns. Once again, it was on the front line, taking the 1975 Convention as its reference point. Software patents are governed by its Article 52, which excludes patents for mathematical methods and computer programs “as such”. This wording is open to interpretation, and in 1984 was re-examined as software became increasingly widespread and tool-like: “A working group was set up by the President of the EPO to study the basic problem of what is patentable and what is not in the area of software-related inventions [...]”. The legal study concluded that inventions involving computer programs should not be subject to special rules but should be subject to exactly the same rules for patentability as inventions in all other fields.”176 The Office, whilst taking a line compliant with its founding texts, could not tie its hands completely by refusing to examine software-related applications. It adopted a pragmatic, case-by-case approach: “Guidelines are guidelines and not precise rules; indeed if it were possible to determine patentability by precise and detailed rules, then thinking would not be necessary and we would no longer need examiners. Another reason for not being too detailed is that we consider that we must be free to develop our practice in the light of experience and in the light of decisions of our boards of appeal. I believe that the EPO has arrived at a general approach which, while respecting the terms of the EPC, is better adapted to present technological developments and will thus better serve the needs of industry.”177 And so EPO case law came to govern the relationship between industrial property and software in Europe – not always unambiguously, in industry’s view, but punctuated by a few landmark rulings such as the IBM decision in 1998. The EPO drew a distinction between programs “as such”, i.e. source code and/or the concept bearing the mark of its creator’s personality, which remained a matter for copyright, and programs “having technical effects”, which in a very subtle formulation became “not excluded from patentability”. This affected how applicants framed their applications; they were encouraged to identify a “technical problem”, or stress that their claimed solution took account of “technical considerations” upstream of the actual programming. Thus PME magazine wrote in 2004 that “software cannot be patented in Europe. Not in theory, anyway: but 30 000 patents have already been granted [...]. According to critics of software patents (Linux, open source), Europe has not followed the US line and is refusing patent protection. Hence the paradox of 30 000 granted European patents [...] and an anti-patent lobby celebrating victory.”178

Richard Stallman (born 1953), free software militant.

European Commissioner Charlie McCreevy signing the EPO’s Golden Book in Munich on 6 July 2006. With him, from left to right: Manuel Desantes (Vice-President Legal/International Affairs), Peter Messerli (Vice-President Appeals) and EPO President Alan Pompidou.

President Alain Pompidou.
On this issue, then, the Office’s special situation made it crucial for Europe. Its decisions, seen by some as contra legem, drew criticism from those opposed to software patents. They also put it in the firing line for political attacks. Michel Rocard, the European Parliament’s rapporteur on the draft directive rejected in July 2005, was keenly aware of the money at stake – “$40bn a year, including royalties” – just as he recognised the tension and mutual incomprehension surrounding the issue. “For the pro-patent camp,” he said later, “we were just a bunch of amateurs with no idea what we were talking about. Whilst the anti-patent lobby thinks engineers and financial elites are profiteering outlaws. It’s as bad as that.”

He managed to convince the European Parliament’s socialist group to vote against the directive. His opposition was not just economic: “Our principles were all about free circulation of ideas, freedom of access to knowledge, civilisation.” Looking to the future, he thought rejecting the text would make it possible to keep a closer eye on examiners and the courts: “They’ll be more careful because they know we were just a fraction of an inch away from enacting much stricter rules, but were thwarted by the balance of powers […] Adopting the directive would have legitimised the EPO’s current case law, which would then have known no boundaries […] The directive’s rejection puts the EPO under a lot of pressure: it can continue granting software patents, but at the same time knows that it is under close and critical scrutiny. The EPO realises this will annoy the legislators – which should hold it back, but we don’t know because the pressures are enormous.”

But however things panned out, it was now the EPO that was laying down the law on software patents in Europe, on the basis of the EPC and the proceedings conducted under it.
Parallel enlargement of the EU and the EPO created a wealth of opportunities. But in the patent world, according to a 1997 report, enlargement was also seen as posing a serious risk of sluggishness, or even paralysis, at a time when Europe needs to be able to react and adopt effective policies.

Did the European patent system have to change? This debate was conducted alongside efforts to standardise legal systems and train European law specialists in the countries concerned. It confirmed the 1973 Convention’s crucial role, which however was also linked to developments in a key issue for the EPO’s future: the proposed unitary patent. As in the 1960s, there were several interwoven strands of negotiations, involving many different players and processes. Although connected, institutionally they were also distinct. Thus there were two bodies with a legitimate stake in the further development of the European patent system. One was the EPO, based on its expertise and its involvement with stakeholders well beyond EU boundaries. The other, in Brussels, was backed by the political and global power of the EU but had no track record of actually implementing industrial property policy.

The quest for the Community patent – a never-ending story?

A quarter of a century after signature, the Community Patent Convention had still not been ratified by enough countries to take effect. But the goal of a Community patent was still alive. The process was relaunched by the 1985 Luxembourg agreement, but then lost momentum again until it was revived at the start of the new century.

At the Lisbon summit in March 2000, the EU heads of state and government called for implementation of the Community patent by the end of 2001, to consolidate the single market and facilitate the development of new technologies within the Union. On 5 July 2000, the European Commissioner for the Internal Market, Frits Bolkestein, presented a first draft regulation, published on 1 August 2000, to create a Community patent and set up a special tribunal at the European Court of Justice in Luxembourg. The Commission’s draft took account of developments at the EPO and assigned it the task of granting future Community patents. It also proposed language arrangements identical to those under the London Agreement, so the EPO would grant Community patents in one of its three working languages (English, French and German). However, creating a new court would mean amending the Munich Convention. Also, this new EU court would deal only with litigation on patent infringement and validity; disputes about ownership would stay with national courts. To ensure synergy between the EPO and the EU, the Commission intended that the EU itself should join the European Patent Organisation. It also wanted to take part in the revision work in progress in London at the time: it was “important to ensure harmonious interaction between the Convention and the future Community regulation.” But the national governments did not agree to the Commission’s requests, and the London negotiations continued without its involvement.

There were still two big obstacles to the future Community patent. The first was the language regime, which excluded countries might consider discriminatory; the second was the proposed new Luxembourg court, whose powers worried some member states. In 2001, the Commission proposal was still under discussion in the Council of Ministers and European Parliament, even though industry supported it – as François Lagrange, chairman of the Administrative Council of the French Patent Office, pointed out: “European firms have long been calling for a genuine Community patent covering the whole territory of the Union […]. The Community patent is a logical extension of the single market. It is bound to improve our economic competitiveness because it will drastically reduce patenting costs.”

But the language issue was still a stumbling block. At the EU summit in Stockholm on 23 and 24 March 2001, the misgivings of countries such as Spain and Portugal were very apparent. Frits Bolkestein was critical of member states’ exaggerated national pride, which he thought jeopardised the single market and, above all, the EU’s external competitiveness. In autumn 2001, the Belgian EU Council presidency and the Commission decided to call a halt to the negotiations and withdraw the draft regulation for the time being, to the great disappointment of the continental press. The London Financial Times, feigning concern, wondered “How many boffins does it take?”, adding that “In the EU, the conflict between sovereignty and efficiency is an old story – as old as the Tower of Babel.”

Subsequently, several EU Council presidencies tried to reactivate the process, briefing the EPO Administrative Council on their initiatives. In spring 2002, for example, Spain suggested a compromise: Community patent applications would be filed in English, French or German, whereas the claims, which define a patent’s legal scope, would be translated into all the EU official languages. To reassure governments about the European patent court, Frits Bolkestein planned to set up regional tribunals in different member states. But positions were still too far apart. Some countries wanted translation into all EU languages, others a trilingual regime. And some wanted a centralised court in Luxembourg, whilst others preferred to stick with their national courts.
In February 2003, the Greek EU presidency tried anew to find common ground. To win over the Germans, who were keen to keep their national patent courts, it suggested that the EU Council of Ministers should appoint patent judges to a central chamber in the Luxembourg court, with the president of the chamber then delegating judges to regional courts in the EU member states. But the language issue was still not settled. Spain, Portugal and Italy wanted patent applications to be translated into the inventor’s language at least. The idea that just the abstracts be translated into the EU official languages foundered on the question of the deadlines for supplying them. And in 2003 a new problem arose, when Denmark announced that it would have to hold a referendum on any agreement to set up a supranational patent court – not a great prospect for the Community patent’s advocates, given the chastening experience of the Danish referendum on the Maastricht Treaty in 1992. There was no real progress: “Gemeinschaftspatent eine Totgeburt” (Community patent still-born).

In 2004, the Irish presidency took a different tack, resurrecting the idea of a European patent system ensuring translation into all the EU official languages. But Germany was against, fearing that the system would be too expensive for industry. In 2006, the Commission tried “one last time” to clear the logjam, with Charlie McCreevy, the new Commissioner for the Internal Market, coming up with an original idea: to solve the problems of how the language arrangements and patent court should be organised, the EU should sign up to the European Patent Litigation Agreement (EPLA) and join the EPO. This joint accession would link the EU direct to the EPO, which would also play a role in litigation, alongside the Community court. The language regime would then be the EPO’s trilingual one (English, French and German) as endorsed by the London Agreement of 2000. McCreevy sought backing from the Council of Ministers and European Parliament, but by the end of 2006 had to accept that his idea was doomed: “I thought what we were proposing here would not be that difficult for member states to accept. [But] anything of significance is becoming difficult to make progress on.”

The EPO and the Community patent

By the turn of the century, the Office’s size and stature had made it indispensable to the Community patent project. It had shown skill and tact in dealing with EU bodies, preferring persuasion to grandstanding. In 1993, Paul Braendli had set up an EPO liaison bureau in Brussels, modestly resourced but run with conviction and pragmatism. Politically, it was EPO member states who dealt with the Community; the Office could not take their place. Braendli also had to assure the EPO’s non-EU member states that the Office was bearing their interests in mind. So the liaison bureau operated discreetly but effectively, facilitating contacts, organising internships in Brussels for EPO staff, raising the profile of this little-known agency in the corridors of the Commission. This relatively small investment certainly paid dividends in the early 2000s, when with greater resources and more traditional communication channels the Office needed to get a few messages across to Brussels.

The EPO could not intervene direct in the EU-run process. But it could not ignore it either, because its future was clearly bound up with the choices the EU made. To position itself for future developments, it was best to focus on reforms that put its own house in order. The EPC revision in the year 2000 had not resolved all the open issues. Nor had the Committee on Patent Law been disbanded after the 2000 diplomatic conference; it held a follow-up meeting from 2 to 4 May 2001, above all to discuss amendments to the Implementing Regulations (e.g. to Rule 108 EPC to facilitate PCT work). It also had a more political role, meeting in September 2001 to prepare a “second basket” of changes to the EPC. Similarly, the London intergovernmental conference had set up a Working Party on Litigation to devise a uniform court system. All the EPO member states were represented on this working party, which met regularly. But all these points (second revision basket, legal harmonisation) were linked to a relaunch of the Community patent, which was still being worked on intensively.

These two interconnected issues prompted the idea of holding a single diplomatic conference with twin goals: further reform of the EPC, and adoption of the Community patent. 10 June 2002 was the date set, but not everyone wanted a conference. Sweden, then holding the EU presidency, described progress on the Community patent. Most countries found it encouraging, but said there was still a huge amount...
of work to be done. Switzerland had already expressed its serious misgivings; the Office should not be turned into “a mere EU instrument”. The ideas for the Community patent at the time were not compatible with the EPC, from which Switzerland would have to withdraw as no longer applicable. The UNICE representative too was worried about the Commission’s draft. It would be a backward step to renationalise the EPO’s work to national offices: “decentralisation […] could not be compared to […] sub-contracting in industry. […] UNICE feels that there is a substantial risk that the ongoing discussions will lead to a political compromise at the expense of the users, rather than the desired improvement for innovation. […] UNICE is of the strong opinion that if a number of individual national patent offices are entrusted with search and/or examination tasks by the EPO Administrative Council, it will be an impossible task to implement and enforce adequate systems for quality control and unitary character of the granted patents. […] It will be better to have no Community patent rather than a bad one.” So at this stage the three stumbling blocks (language regime, decentralisation, lack of a unitary court) were still insurmountable. In December 2001, the plan for a diplomatic conference in 2002 was dropped when the EU Internal Market Council failed to reach an agreement.

Relations between the European Patent Organisation and the European Community became more difficult. Tensions rose; there seemed no way out of the impasse over the Community patent. This was confirmed in December 2002, when the Working Party on Litigation reported on setting up a system of unitary jurisdiction designed to simplify procedures considerably. The European Commission representative expressed strong reservations about the draft, and argued in particular that legal issues in creating the Community patent were solely a matter for the Commission, not the EPO. He drew fire from the delegations, Roland Grosenbacher and Ingo Kober: “The President said the Commission’s view that it alone had the power not just to sign agreements but simply to negotiate them was not only not shared by everybody, as the chairman had just indicated; in truth, it was not shared by anybody. Invoking the ‘acquis communautaire’ was a neat sidestep, of course, but it scarcely furthered the debate. The 25-year-old European patent system was very much an acquis; yet after 25 years the only solution in the event of a dispute was to refer it to the national courts. Such a system was clearly not in the users’ interests, and something else was needed.”

In March 2003, Greece was holding the rotating EU presidency and, in the light of the “common approach” just adopted by the Competitiveness Council, relaunched the idea of a diplomatic conference, to be held in spring 2004, with the aim of having the Community patent in place by 2010. Ingo Kober was quick to dampen this ardour: true, the EU countries had agreed on a common approach, but the end result – the Community patent – was still a long way off. And the European Commission was still ignoring the users’ views, which was hard to reconcile with the EPC. By December 2003, the diplomatic conference had been put back to autumn 2004. And by June 2004, with still no agreement at European level, no date at all was envisaged; the diplomats could clear their diaries.

Another recurring issue – connected with the Community patent and likewise requiring a diplomatic conference – was the institutional autonomy of the boards of appeal. The boards had always been independent, but institutionally part of DG 3. That ambiguity meant their independence could be questioned. In 2001, the President “felt that DG 3 should be detached from the Office’s own administrative structure”, but that politically the time was perhaps not yet ripe for such a change. The issue resurfaced in June 2003, the aim being to make the boards the EPO’s third pillar. To guarantee their members’ independence and impartiality, it was proposed to appoint them for life. This idea encountered fierce opposition, although supported by the Netherlands and some other countries. Sweden and the UK were in favour of autonomy for the boards, along German lines. But the German delegation did not think that from an organisational viewpoint its own system was necessarily one to follow. The various options were not taken any further.

So the Convention – adopted in 1973 and twice revised – was not perfect, perhaps, but it did ensure the smooth functioning of the European Patent Organisation. Whereas the competing approaches of the Commission and the Office seemed unlikely to resolve an impasse which ultimately was detrimental to all concerned.

The Office – in the shape of its President, Alain Pompidou – helped to disentangle the language issue and thus relaunch the process. In 2000, the London Agreement had created a basis for simplifying patent translation issues. It had been signed by France, but also much criticised there; business was in favour, but a wide range of institutions and political figures felt that it threatened the status of the national language. One of three countries whose ratification was a condition for entry into force (the others being Germany and the UK), France prevaricated, thus preventing the agreement from taking effect. In spring 2006, more than sixty députés had initiated proceedings to have the text declared unconstitutional. This did not happen, but it made French endorsement look a distant prospect. In July 2007, the debate was relaunched, but no real consensus emerged. Alain Pompidou followed the issue very attentively, noting in 2004, in something of an understatement, that the Community patent he was hoping to see still had a little way to go. He regretted this, whilst on his guard to ensure that the Community patent, once it
came about, should not call the EPO’s existence into question in any way. In March 2005, he said “there is no reason to believe that the EU will take over the EPO one day. After all, some EPO member states are not in the EU. It is important for patent granting and the related procedures to remain centralised at the EPO, to ensure uniform quality standards which provide legal certainty for users.” Aware that stasis would be bad for the Office, he worked energetically to make sure that France signed up to the text its government had approved in 2000. As a result, the law authorising the French government to ratify the London Agreement was passed by the National Assembly and Senate in September and October 2007, and published in the Official Journal of 18 October 2007. With all the ratification conditions now met, the agreement was able to enter into force on 1 May 2008.

But the road to the Community patent remained long. One obstacle had been reduced, not eliminated. In July 2010, the European Commissioner for the Internal Market, Michel Barnier, submitted a new proposal for a Community patent system with a trilingual language regime (English, French and German). As in the past, a number of EU member states and the European Parliament refused to agree to this compromise. This time, however, the Belgian EU presidency presented a non-paper to the EU Council to resolve the impasse by using “enhanced co-operation”, a Treaty of Lisbon arrangement enabling groups of EU member states to work together on certain issues. On 10 December 2010, eleven EU member states agreed to this. Indirectly, in all kinds of ways, the EPO had helped this solution to emerge.

It had thus played its own substantial part in creating new European arrangements which did not replace the procedures under the Munich Convention and ensured that it remained the central player in the European patent world.
Chapter 15

Better co-operation, better communication – the EPO’s global innovation role
Besides its core task of granting patents, the EPO has also raised its profile in the European innovation ecosystem by becoming a key player in a network of information and co-operation work of all kinds. It has thus forged closer links with national offices and other stakeholders in Europe. By increasing and diversifying its international co-operation work, the EPO has taken on a leading role in discussions of the major technological issues of the new millennium.

The EPO has built up its training activities and its drive to promote a patent culture. Its tireless efforts to fulfill stakeholders’ practical needs have made it a major player in the international patent system. Since its inception, it has been helping to train national examiners, at the request of their offices, and this remains a key element of a policy aimed at promoting the exchange of best practice between national offices. Since the 1990s, board of appeal members, patent attorneys from the Institute of Professional Representatives (epi) and representatives of UNICE have been holding “get-togethers” at which they bring all their considerable expertise to bear on technical issues raised by appeals. This role features even more prominently in the system of exchanges, internships and seminars which has given the EPO a major role in harmonisation of patent practice, a role it has further developed, for an even wider range of audiences and issues, in the EUROTAB forum. The “European Round-Table on Patent Practice” was set up in 1992 to foster discussions about the grant procedure within the European Patent Organisation. The EPC contracting states take turns to host these meetings, normally held in May, at which representatives of the EPO, national offices and user communities exchange views on topical issues. EUROTAB quickly established itself and has addressed crucial matters such as the patentability of biotechnological inventions, discussed at its Paris meeting in 1997. This work dovetails with that of SACEPO, still the cornerstone of the “user-interface” system created by the EPO.

The Office’s training services acquired enhanced visibility in 1997, when the International Academy was set up. The idea behind it was to bring together, in a single structure, all EPO training and professional development work for third parties. So the epi always played a major role. The Academy also built up close co-operation with member states, international authorities such as WIPO, universities and other research bodies, assuming growing importance as business boomed and more and more countries acceded to the EPC. In 2004, it was amalgamated with the new European Patent Academy created by the EPO member states to promote patent-related IP and harmonise practice in Europe. The new set-up, managed by the EPO in Munich, built on the existing work but also, in the context of the strategy debate, enabled national offices to play a more direct and visible role in the proceedings, which officially started in January 2005. The Organisation created the Academy in response to the new challenges facing industrial property. This did not fundamentally change the well-established and much admired teaching system, but it did promote adjustment to the “knowledge economy” and thus an enhanced response to the European Union’s aspirations in this area.

The new Academy’s main objectives remain those identified in the 1990s. It thus concentrates on training programmes aimed at specific target groups: courses to prepare candidates for the European qualifying examination, alongside training for practising patent professionals. It also focuses on harmonisation of procedures for infringement or for ensuring compliance with patent rights, and on patents in the context of universities and other establishments of higher education. Another priority is training for IP managers in industry or for representatives of the national governments or patent offices of the EPO member states. The Academy works with numerous national and international bodies, including the Office for Harmonization in the Internal Market (OHIM). Much of its programme is specially tailored to the training and professional development needs of national office staff. The Academy also helps to train staff of government departments and other public-sector bodies. Its programme places particular emphasis on nationals of new or prospective EPO member states, providing the training best suited to their varying needs. The Academy also encourages joint initiatives amongst institutions, identifying best national practices in training and professional development, passing them on to other partners, and thereby facilitating the exchange of information and expertise between offices. It also provides services such as customised training to patent offices of non-EPO countries. The European Patent Academy offers an annual programme of training seminars, backed up by a wide range of e-learning modules.
Chapter 15

The international dimension of the EPO’s work, i.e. its dealings beyond the geographical boundaries of its member states, has become increasingly diverse. Aid for emerging countries has always been a priority, and those EPO programmes have continued, especially for Africa. The EPO has also strengthened its bilateral co-operation with non-member countries, focusing on long-term strategic partnerships aimed at making the world patent system more effective and better suited to users’ needs. Central to this work are the quality and legal certainty of granted IP rights, but cost issues also remain crucial. With its sophisticated and powerful information systems, the EPO can help provide access to prior art for national offices which lack the necessary documentation. Major components here include the European Publication Server and the machine-translation service available from Espacenet. The EPO’s direct relationships are also directed to improving the quality of utilisation schemes, including search and classification resources. Its ability to forge and sustain such relationships with non-EPO offices gives it more leeway with member states which, in view of their specific relationships with individual non-European offices, could claim exceptions under the Protocol on Centralisation.

The EPO has proved highly responsive to geopolitical developments. For example, it has been providing developmental support to the Eurasian Patent Organization since its creation in September 1994. And during the 2000s it has cemented its close relationship with China, with particular emphasis on improving access to Chinese prior art, harmonising procedures, managing quality, planning, and tools for patent searching. Together with various national offices, it has organised seminars and workshops, in both Europe and China, to learn more about each other’s systems. It has also joined the US and Australian offices in providing technical support to ASEAN countries. Establishing direct relations with the offices of countries which have close historical links to individual EPO member states has sometimes been a slightly sensitive matter, and the EPO has tried to minimize the potential for any misunderstanding by involving those member states very closely in its efforts to respond to outside countries or regions seeking closer ties with Europe. In 2003,
for example, a seminar for judges and public prosecutors organised in Madrid by the Spanish office, WIPO and the EPO drew twenty experts from all over Latin America. This led to an agreement, signed by all three bodies, to launch the Espacenet-Latipat project, in order to improve web-based publication of patent data from all the national offices of Latin America. This project is a tangible result of the EPO’s desire to assume its rightful place in the world patent system, whilst respecting historical spheres of influence and thus optimising the use made of specific member states’ existing links.

Trilateral co-operation has always underpinned the EPO’s international policy. It started in the 1980s, achieving great progress both on automation issues and on access to patent information. In April 1995, European, US and Japanese patents relating to AIDS research were made available in a common database, accessible via the internet free of charge with the support of the National Science Foundation. The web’s rapid development made it an ideal framework for more and more joint initiatives from the three offices, and by the 2000s it had become a key element in trilateral information policy. In 1999, the three partners met in Berlin and drew up a work programme to install the necessary technical infrastructure at each office and create a consistent legal framework, based on a common standard, for introducing online patent filing. They also agreed on mutual recognition of electronic signatures. From 2002 onwards, their strategic course was more precisely defined and, perhaps, more collectively endorsed. The three big offices wanted to boost business whilst maintaining high-quality examination procedures. They then pursued mutual exchange of work products, with the aim of reducing costs whilst improving quality. They also wanted to cut processing times, but this goal remained elusive due to constant filings growth. As in the past, their co-operation involved examiner exchanges and harmonisation of patent law and search results, and it continued to focus on devising automation systems and pooling the substantial investment needed. Shared and compatible databases were milestones along the way to a global information system that cut costs considerably.

The three offices have also set up working parties on specific topics such as worksharing, new issues raised by nanotechnologies, and machine translation systems. In 2007, the IP5 was created, formally adding the Chinese and Korean offices to a trilateral process in which they had become increasingly involved. Its objectives were still largely the same as those fixed by the trilateral pioneers in 1983.

Since the 1990s, the EPO has been firmly established as a fully-fledged international organisation. It is the go-to authority of choice for governmental or non-governmental institutions which may not have direct links to the patent system but play a major role in promoting an environment which fosters innovation. Here it works to support innovation and competitiveness for the benefit of Europe, drawing on its technological expertise to explore public issues and help to formulate policy. For example, the EPO has forged close relations with the OECD to find out more about the economic role of patents, and how the patent system can contribute to knowledge creation. The emphasis here is on the issues considered vital for innovation in Europe: green energy and the environment, with the United Nations Environmental Programme (UNEP) and the International Centre for Trade and Sustainable Development (ICTSD), or telecommunications, with the International Telecommunications Union (ITU), the IEEE Standards Association, the European Telecommunications Institute (ETSI) and the International Electrotechnical Commission (IEC). The link between standards and patent filings is a significant issue.

As the EPO has grown and thrived, its work has attracted closer scrutiny. Wholesale opposition to patents, which had faded in the aftermath of the Second World War, has now reappeared in connection with software and genetic engineering. For example, a seminar for judges and public prosecutors organised in Madrid by the Spanish office, WIPO and the EPO drew twenty experts from all over Latin America. This led to an agreement, signed by all three bodies, to launch the Espacenet-Latipat project, in order to improve web-based publication of patent data from all the national offices of Latin America. This project is a tangible result of the EPO’s desire to assume its rightful place in the world patent system, whilst respecting historical spheres of influence and thus optimising the use made of specific member states’ existing links.

The leaders of the world’s five largest patent offices at an initial meeting in Honolulu in 2007 to exchange views and explore approaches to enhancing co-operation. From left: Tian Lipu (SIPO), Sang-Woo Jun (KIPO), Alain Pompidou (EPO), John Dudas (USPTO) and Makoto Nakajima (JPO).
In response, the EPO has boosted its communication work in a number of fundamental ways. The basic aim is still to defend the patent system, but the message increasingly stresses that patents, and thus the EPO, are key to an ecosystem conducive to innovation. Traditional arguments about protecting innovators remain as valid as ever, but the EPO has succeeded in developing a more original communication policy that promotes both the system itself and the EPO’s work within it. It has run special campaigns to stress its role in promoting innovation in Europe. For example, it has held an exhibition entitled “The Wheel of Invention – from ideas to patents”, to encourage young people’s interest in physical and natural science and the engineering professions. This very popular exhibition ended with a conference at which top scientists and schoolchildren presented their ideas of “tomorrow’s world”.

The EPO’s main initiative here is the European Inventor of the Year award, first presented in 2006. Each year since then, this event has showcased the Office’s role in promoting innovation in Europe. So the question is no longer simply what the EPO can do; it is now also about its place within the innovation ecosystem that Europe needs to develop. It has become an identity issue. The slogans in its annual reports underline this shift in perspective. In 2001, one year after the EPC’s revision, “EPO – the patent granting authority for Europe” was used. This idea of service, expertise and fairness was retained in Ingo Kober’s foreword the following year: “Mastering the workload’ may be a seemingly self-explanatory phrase, yet it encapsulates the pioneering process that the European Patent Office launched in 2002 to enhance the efficiency of the European patent system.” In 2003, in contrast, the cover page talked of “Supporting the knowledge economy in Europe”. So the focus was still on results, but clearly the Office wanted to emphasise a role beyond patents which might resonate more with the public. Confirming this ambition the following year, Alain Pompidou wrote: “As [...] a champion of effective innovation protection, the European Patent Office is aware that it has a major part to play in implementing the Lisbon Strategy.” The 2005 report began with a formal “mission statement” giving an official imprimatur to this wider vision and adding that the EPO aimed to “stand out as a model international public-service organisation”. The evolving phraseology was underpinned by state-of-the-art graphic design and very topical issues, with the EPO’s initiatives on the environment and sustainable development featuring prominently. The examples illustrating patents’ importance for the knowledge economy also tended to reflect the latest priorities in Brussels. There were further developments in 2007, when the EPO published a text entitled “Our vision – what we want to be.” The “mission – what we do” was still there, but trimmed to just three lines. There was much more on the EPO’s vision and the identity to which it aspired: “With expert, well-supported staff, motivated to set worldwide standards in quality and efficiency, we will continue to contribute to innovation across Europe, and play a leading role in developing an effective global patent system. All our relationships – within our Office and with partners around the world – will prosper through trust, transparency, fairness and mutual respect. Our processes will empower our people to use their knowledge and skills to the full.” By deploying its communication tools to this effect, the EPO was also giving voice to its aspirations to become a global player with a role transcending what was still its primary mission – the grant of patents.
Conclusion

— “But even though we cannot foresee exactly what the Convention, the Organisation or the Office will look like in twenty years’ time, 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 egotistical 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. […] Like all parents we hope our child has a highly successful future. But to ensure that this wish comes true, all of us present are called upon to devote our energies to shaping that future on the basis of the principles enshrined in our Convention. […] for a happy childhood should be followed by a fulfilled, responsible and generous adult life. Let us therefore cast aside this evening any fear of the future, for I am sure we shall overcome any dangers we encounter. It is therefore with pride and pleasure that I wish our Convention as splendid an adult life as its remarkable childhood.”

These words emphasised not only the long road already travelled by 1993 but also the ever-present danger that the Convention might fall prey to conflict, rivalry and self-interest. These pitfalls were avoided, but the ten years before and after 2000 were full of paradox. The European Patent Office developed in a way that would have been the envy of any business. It took on an increasingly wide range of tasks, and organisationally it succeeded in adapting to growing constraints and demands. By 2010 it had become an acknowledged global player in the international patent system. But this role – increasingly apparent in Europe as the 21st century began – was challenged whenever EPO decisions touched on matters extraneous to patents alone. The attacks of its critics were tacit recognition of its prominent role in the body politic, but they also required it to find new ways of conducting its dialogue with society. Ethics, environmental concerns, the need for innovation combined with sustainable development – all this profoundly changed the nature of intellectual property issues. To face these challenges, the EPO needed to be able to mobilise and channel all its strengths and energies. Since the end of the 1990s, it had been under serious strain. The “centrifugal forces” warned of by Jean-Claude Combaldieu had caused rifts, affecting social relations within the EPO and upsetting the balance between the Administrative Council and the presidency, against the backdrop of conflict over the Protocol on Centralisation. Appointing Alain Pompidou and Alison Brimelow for two “half-terms” was evidence of these difficulties, and could only prolong the uncertainty. For six years, this compromise prevented any real long-term perspective. But that is not to say that nothing happened in that time. Openly addressing the centralisation issue forced the European Patent Organisation to deal with a crisis it could not avoid. It had to conduct this debate before it could look forward to a more sanguine future. The initiatives undertaken to increase the national offices’ involvement by taking account of some offices’ needs and aspirations actually confirmed the EPO’s dominant position in the international patent system. Its credibility, weight and accu-
mulated expertise meant there could be no going back. This realisation was necessary to enable the EPO to continue to develop. With Alison Brimelow not standing for re-election, her would-be successors gave voice to this feeling of ‘emergence from crisis’. On 2 October 2009, Managing Intellectual Property published interviews with the four candidates: Benoît Battistelli, head of the French office, Roland Grossenbacher, head of the Swiss office, Susanne Ås Sivborg and Jesper Kongstad, heads of the Swedish and Danish offices respectively. The election was difficult – but easier than the one before. “Frenchman to head the EPO. Difficult election to a difficult job” was Le Figaro’s headline on 1 March 2010, the day Benoît Battistelli was elected President of the EPO. The following day, the Münchner Merkur opined that “The search by Europe’s second-biggest institution for a new boss has narrowly avoided a debacle. The breakthrough came yesterday, after three failed rounds of voting – Benoît Battistelli is the EPO’s new President.” Both newspapers seemed to ignore the fact that election required a 75% majority. Les Echos welcomed the new president starting at the EPO on 1 July: “Benoît Battistelli assumes a befitting new role, with the exhilaration of a man fulfilling his European destiny”. For an institution which had never before been so powerful, but seemed almost hesitant as it braced itself to meet the challenges of a still-young century, a new era was dawning…

Member states of the European Patent Organisation: *

AL Albania  •  AT Austria  •  BE Belgium  •  BG Bulgaria  •  CH Switzerland  •  CY Cyprus  •  CZ Czech Republic  •  DE Germany  •  DK Denmark  •  EE Estonia  •  ES Spain  •  FI Finland  •  FR France  •  GB United Kingdom  •  GR Greece  •  HR Croatia  •  HU Hungary  •  IE Ireland  •  IS Iceland  •  IT Italy  •  LI Liechtenstein  •  LT Lithuania  •  LU Luxembourg  •  LV Latvia  •  MC Monaco  •  MK Former Yugoslav Republic of Macedonia  •  MT Malta  •  NL Netherlands  •  NO Norway  •  PL Poland  •  PT Portugal  •  RO Romania  •  RS Serbia  •  SE Sweden  •  SI Slovenia  •  SK Slovakia  •  SM San Marino  •  TR Turkey

States recognising European patents upon request (Extension states): BA Bosnia-Herzegovina  •  ME Montenegro

* Source: EPO CA/53/13, June 2013
Overall conclusion

— The European Patent Convention has been a key factor in establishing a stable and widely accepted international intellectual property system compatible with the liberalisation of global trade. It is central to the history of the building of Europe, and its own path intersects with the major stages of that difficult process. Its success is evidence that multilateralism has in many ways been a driving force giving shape to European integration. Forty years after its signing in Munich, its principles and vision, upheld by the European Patent Organisation, seem firmly entrenched in the international system. Yet its undeniable present strength should not blind us to the problems it has surmounted. Its long-awaited signing drew together many different strands woven by various contributors with often contradictory aims. The threads were spun in the 1950s and 1960s, but the fabric often came close to unravelling. The parallel history of the Community patent has been equally complex. Failure to apply the treaties signed in Luxembourg in 1975 and 1989 highlighted the problems of timing in the European intellectual property system. Repeatedly, over several decades, things seemed to have been agreed, only to be postponed, and that left the stage clear for the Munich Convention system. Unlike other treaties whose impact ultimately proved negligible, the EPC was signed unobtrusively, thanks to the lack of media exposure for patent-related matters in the early seventies and to the modest significance that politicians themselves attached to them.

Set up in 1977 to apply the EPC, the European Patent Office has always preferred actions to words. Combining internationalisation with an instinct for strategic opportunities, it has progressively taken on dimensions that no-one had anticipated. The essential work the Office does year after year has been the primary factor in this success, in a field where results can be immediately assessed and quantified. The most visible sign of this is financial autonomy: achieved very rapidly, paradoxically it began to cause problems when the Office changed from a potential burden to a source of income for the contracting states, whetting appetites in some quarters. The constant demand for quality in its procedures, intimately linked to the quality of the founding text, allowed the institution to grow fast without losing its equilibrium. Although there have been problems, they have not negated this dynamism. Social tension, conflict between member states, adjustment to new intellectual property issues—none of these have thrown the Office off course for long. Rapid internationalisation has been the second pillar for lasting success. Within the Trilateral, the Office has established itself as one of the keystone of the international patent system. At the same time it has developed bilateral relations with many national offices, especially China’s. What makes this success so remarkable is that, unlike the US and Japanese offices, the EPO has never been able to rely on the clear and direct support of any one country. This ability to conduct its own diplomacy was again highlighted when the enlargement process gave the EPO a discreet but significant role in bringing new countries into the European Union.

A third strength has been an ability to identify and embrace structural trends in intellectual property. In many ways the most fundamental of these was the emergence and spread of digital technology. Conceived in a print era, the Office has evolved with digital technology and moved out into the cybersphere, and not just by chance. This has been a logical
progression, based on a clear vision that is also reflected at the political level. Devised in the postwar period to strengthen Europe now that it was at peace, in European integration the Convention found an environment particularly conducive to its rise. The collapse of the Soviet bloc supplied fresh and unexpected impetus, providing the Organisation with new opportunities for expansion. On the economic front, the Office has benefited from globalisation, while confirming its position as an agent in the development of innovation in Europe when Brussels made that a priority concern.

While these three key elements have given shape to the founding fathers’ vision, there is no reason to think that a convergence of favourable factors has in some way inevitably brought about the EPO’s success. Each of these elements might equally have been a factor in its failure. The risks have been on a par with the opportunities, and the issues raised in the Epilogue are proof that the present decade will be no different in that respect. The twofold challenge facing the Office is to remain a benchmark while improving its productivity, and to maintain its leading role in the geostrategy of intellectual property, at the same time dovetailing its development with the priorities of the European Union. It may have to tread a narrow path. The key to the Convention’s success has been its ability to satisfy the patent system’s stakeholders, beginning with the applicants, and that will continue to be the primary concern, a litmus test for the relevance of the Office’s strategy, past and future.

In 1977, with the Office about to open its doors, Kurt Haertel referred to “flags blackened by gunpowder and shot through” as an image of the struggle to create the European Patent Organisation, adding that “the battle for the new European patent system is not yet finished.” He went on to hope that Bob van Benthem would be able to place those flags “in the hall of fame of the European Patent Office when European patent law and the European Patent Office have won their places in the world.” Neither he nor his successors have been able to do so. While that day may seem closer than ever as this work reaches its end, a few more battles may well have to be fought before those banners finally come to rest in the place envisaged for them by the founding fathers.

Epilogue: past and future

The 19th century and much of the 20th saw the emergence of mechanical and physical industry in local and then regional economic contexts.

In less than 15 years, in the unitary context of the global economy, today’s technologies have become essentially digital and virtual.

I think these two trends have shaped the present and future challenges facing both Europe and our Organisation. Our principles and rules can and must adapt to this new environment.

In the patent system in Europe, balancing the inventor’s interests with those of society and the economy is of paramount importance, and it is the Office which ensures that this equilibrium is maintained.

Patent law has infiltrated all areas of industry, and is increasingly coming face to face with other interests, and with ethical and social concerns. While its fundamental principles, the famed patentability criteria, have proved their worth after decades in operation, the conditions for applying them need to be extremely rigorous in order to underwrite the quality of the granted patent.

The public expects maximum transparency about institutions and their workings, and this requires patent offices to improve their communication skills. Our modern knowledge-based societies are reliant on the rapid spread of information, which has to be as comprehensive as possible and easily accessible, and the Office has a special responsibility for the broad dissemination of technological information.

The EPO has stable foundations, and its efficiency is a key asset in coping with the challenges that it faces. In particular, given the rich diversity of the 38 member states, it will have to strike the right balance between the local, national and European levels. The energetic and ambitious co-operation policy that has evolved in recent years in close partnership with local players, especially the national patent offices, is helping an enhanced patent culture to spread throughout Europe among a whole range of stakeholders, including businesses, research centres, universities and judges.

The EPO is also proof that Europe is stronger and more comprehensible at international level when it is united and combines its powers. Thus in a patent office’s core business, from prior art searching to the dissemination of technological information, the EPO has mastered the technical challenges and has developed tools and services now regarded as world standards. Typical examples are the CPC patent classification scheme, the Espacenet database, the EPOQUE search engine and the Patent Translate multilingual machine translation system.

As magnificently demonstrated by the author of this work, the historian Professor Griset, our Organisation is a legal and political creation at the service of innovation in Europe.

In the coming years the EPO will have to devote itself to maintaining a political model of equilibrium, built on a set of values common to the citizens of Europe, while remaining open to the world and alert to the major technological and social developments.

Benoît Battistelli, President
October, 2013
Appendix

- Contemporary art at the EPO
- Statistics
- Notes
- Bibliography
- Photo credits
The European Patent Office’s status as a professional player on the art scene stems from a conscious decision to make funds available for regular investment in contemporary art. It was the founding fathers’ conviction that war and barbarism could not win as long as there was a commitment to humanitarian and cultural values based on international consensus. The development of a collection as an integral part of a European institution’s corporate culture serves to demonstrate the sense of historical responsibility that drives the EPO as a patron of the arts.

Built around works from local artists nominated by the member states. Nowadays, acquisitions are made on the basis of the content, themes and forms that the artists engage with, wherever they’re located: Berlin, Istanbul, Shanghai or São Paulo – it makes no difference. This trend continues to be reflected in the development of the collection, in which conceptual and non-figurative tendencies play a substantial role, regardless of the artist’s origin, religion, skin colour or gender.

The EPO’s first public art competition was held between 1978 and 1980 during the presidency of Bob van Benthem (1977 to 1985) to mark the construction of the Organisation’s headquarters on Munich’s Erhardtstraße. To lay the groundwork for the collection we admire today, President van Benthem convened an arts advisory council of such art-world luminaries as Wieland Schmied (then Rector of Munich’s Academy of Fine Arts), Erich Steingräber (then General Director of the Bavarian State Art Collection) and Armin Zweite (now Director of Munich’s Brandhorst Collection). In response to their recommendations, the collection grew through the acquisition of a number of exceptionally significant pieces, including Blauer Ritter [Blue knight] (1976) by Swiss sculptor Bernhard Luginbühl and Flying Carpet by Belgian artist Panamarenko. Works were also donated by member states, such as Pastorale (1973) by British op artist Bridget Riley. Endowments like this underscore the eminently political significance of the nascent art collection. President Paul Braendli (1985 to 1995) continued the tradition established by his predecessor during the Bayerstraße building project by calling on an arts advisory council to judge competition entries and select new public art acquisitions. Pieces added to the collection during this period include Rhythmus im Raum [Rhythm in space] by Switzerland’s concrete artist Max Bill, two works by his compatriot Urs Lüthi built around works from local artists nominated by the member states. Nowadays, acquisitions are made on the basis of the content, themes and forms that the artists engage with, wherever they’re located: Berlin, Istanbul, Shanghai or São Paulo – it makes no difference. This trend continues to be reflected in the development of the collection, in which conceptual and non-figurative tendencies play a substantial role, regardless of the artist’s origin, religion, skin colour or gender.

To this day, the EPO remains true to the collection’s concept of art and technology. Originally understood as referring to kinetic light installations or engineering art, this concept was soon broadened to embrace the burgeoning number of artists who either engage with science, the environment and technology (Thomas Ruff, Tue Greenfort, Sylvie Fleury, Thomas Feuerstein) or adopt methods from scientific practice (Olafur Eliasson, Carsten Höller, Jorinde Voigt) or are themselves inventors (Panamarenko, Tomás Saraceno, Jeppe Hein). The colossal scope of patented technology offers endless opportunities for raising the collection’s profile at the point where art meets science, be it in an associative, ironic, playful, consumerist, pop-cultural or purely aesthetic way. Given the political Europe that has developed over the decades, the EPO wishes its collection to reflect the broadest possible range of works of art. In the beginning, the collection was

Thomas Feuerstein
Thesaurus, 2007
180 x 240 cm
C-Print

Thomas Ruff
Durla 25:56:4065, 2009
206 x 176 cm
C-Print

Bridget Riley
Pastorale, 1973
183 x 178 cm
Acrylic on canvas

An international cultural profile
Contemporary art at the EPO – origins, concept, continuity

The European Patent Office’s status as a professional player on the art scene stems from a conscious decision to make funds available for regular investment in contemporary art. It was the founding fathers’ conviction that war and barbarism could not win as long as there was a commitment to humanitarian and cultural values based on international consensus. The development of a collection as an integral part of a European institution’s corporate culture serves to demonstrate the sense of historical responsibility that drives the EPO as a patron of the arts.

To this day, the EPO remains true to the collection’s concept of art and technology. Originally understood as referring to kinetic light installations or engineering art, this concept was soon broadened to embrace the burgeoning number of artists who either engage with science, the environment and technology (Thomas Ruff, Tue Greenfort, Sylvie Fleury, Thomas Feuerstein) or adopt methods from scientific practice (Olafur Eliasson, Carsten Höller, Jorinde Voigt) or are themselves inventors (Panamarenko, Tomás Saraceno, Jeppe Hein). The colossal scope of patented technology offers endless opportunities for raising the collection’s profile at the point where art meets science, be it in an associative, ironic, playful, consumerist, pop-cultural or purely aesthetic way. Given the political Europe that has developed over the decades, the EPO wishes its collection to reflect the broadest possible range of works of art. In the beginning, the collection was
Contemporary art at the EPO

Ingo Kober’s term as President (1996 to 2004) saw a number of large construction projects in both Munich and Rijswijk, with guest curators invited to submit proposals for new acquisitions. The promotion of local artists was high on the agenda in this period too, resulting in the purchase of installations by Munich artist Susanne Pitroff and a light installation by the Swiss Beat Zoderer, works by Munich-based Andreas Horlitz and a relief by Briton Liam Gillick, the hanging gardens by The Hague-based artists Liet Heringa and Maarten van Kalsbeek as well as the Rijswijk interactive fountain by Denmark’s rising star Jeppe Hein. Another high point in the history of the collection came during the presidency of Alain Pompidou (2004 to 2007), when promoting art became a top-level issue with the launch of yet another public art competition for what would come to be known as PschorrHöfe VIII on Munich’s Grasserstraße. The world’s leading museum experts, including Alfred Pacquement (Centre Pompidou, Paris), Adam Szymczyk (Kunsthalle Basel), Ludger

from the series Universelle Ordnung [Universal order], the IDEA installation by Italian light artist Maurizio Nannucci, and Zwischen Sonnentor und Mondplatz [Between sun gate and moon court] by German landscape artist Hannsjörg Voth for the area dubbed the Kurt-Haertel-Passage. President Braendli’s term of office also witnessed the decision to establish a permanent curator post dedicated to art and culture.
The Office is financially autonomous. Its operating and capital expenditure is financed entirely from the fees that users pay for its services. Its budget for 2013 amounts to EUR 1.9 billion.

In 2012, 35 years after it opened, the EPO received 258 000 patent applications. It accepts two types of applications: direct European applications under Article 75 EPC and international applications under the PCT.

Posts in various fields are administratively divided into three categories (A, B, C): examiners; lawyers, administrators and translators (A); administrative employees and supervisors (B); and technicians and service employees (C).

To grant a patent and the associated monopoly, the EPO has to perform a prior art search followed by substantive examination, in accordance with the requirements of the EPC. Applications not complying with those requirements are withdrawn by the applicant or refused by the EPO.

Note: the figures in DEM, for 1978 to 1999 inclusive, have been converted to EUR at an exchange rate of EUR 1 = DEM 1.956.
Footnotes, Part 1


4 Idem, p. 872.

5 Lisbeth Whitney Parisoud redefined the Mechanical Arts from Antiquity through the Thirteenth Century. Philadelphia. 1990


8 Pierre Caye, Empreintes de la vie inutilisée et question classique, with 6 drawings by Dolora Lurano, Paris, Librairie Philosophique J. Vrin, 1999


12 Idem, p. 873.

13 Idem, p. 874.

14 To which he added (idem, pp. 875–876) that the six EEC members should compose a single part set a patent documentation for the EBI and the German and Netherlands Patent Offices, which he saw as a significant and decisive issue for the future of automated documentation, which involved considerable expense, particularly for the large amount of machine-readable data.


17 Henri Longchambon mentions various projects included in the same way they were to give their present legitimacy and distinction. Although he did not refer at all to wartime experiences and the prototype of European patent that “Germans would have applied to the concept of the patent, he does not mention the creation of the BIB Henri Longchambon, Tassull, Querol Brukmeier “Appeal to the Report on the creation of a European Patent Office. Introduction to the Study of the Problem of the Creation of a European Patent Office 6 September 1994 Consolidated Assembly of the Council of Europe. Nos. 75, Appendix 1.


19 Article 2 of the 1945 Agreement stipulated that the government of each state party to the agreement was to provide an original or a certified copy of the technical documentation of its document to enable the Bureau to accomplish its mission.


22 These countries acceded following the recommendation of the Council of Europe’s Committee of Experts, made to the organisation’s Committee of Ministers in July 1992; Monaco and Tunisia appeared as members in certain texts at the turn of the sixties.


24 Idem, p. 94.

25 Idem, p. 96.

26 To which he added (idem, pp. 95–96) that the six EEC members should compose a single part set a patent documentation for the EBI and the German and Netherlands Patent Offices, which he saw as a significant and decisive issue for the future of automated documentation, which involved considerable expense, particularly for the large amount of machine-readable data.
The European Community Patent.

Since the last full meeting, presented by Mr G. Finniss, Rapporteur-Patents Council, presented by Mr De Haan, 6
Experts, 30
The same purpose.”


But the extent to which search and examination should be com-

bined was unclear. The British had criticised the Vienna Plan in this respect, suggesting that the work should be centralised within the EPC. They officially joined the EPC in 1956. Council of Europe, Committee of Experts on Patents, Note by the United Kingdom, Representatives, June 1956 (EXP/Brev (51) 2).

A company receiving an opinion following a preliminary examina-
tion would know whether it was worth filing a patent application abroad. If it was not worthy, it could save itself paying unnecessary fees.


The decision not to replace the national patent with a European patent, to have been taken well be-


When the Office was celebrating its tenth anniversary in 1987, Jan
van Empel, “Speeches delivered at the ceremony to commem-

In particular, be adjusted to the advantage of one or the other. BR/


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In particular, be adjusted to the advantage of one or the other. BR/

Footnotes, Part 2

3. For example the EDP-Sub-Committee of Working Party I.
6. Cf.17/5/75, Draft Guidelines for the searches to be carried out under the European Patent Convention, 8 July 1975, p. 6.
9. Cf.44 e/75, p. 80.
10. Idem, p. 5.
13. Only the first Administrative Council was entitled to appoint them officially, but the proposals made by the Interim Committee were accepted without exception.
15. Cf.17/5/75, Staff recruitment during the period of progressive expansion, 28 July 1975, p. 4.
22. Speech by the Director-General of the IIB, 19 October 1973, p. 2.
Bertrand Gellie, "La carrière de directeur de brevet à l’EPO", EURÉKA 3/83, p. 5.


The creation of the European Schools dates back to 1953. The most recent, in Cullum (UK), was set up in 1980. It are governed by an agreement on the status of the European Schools, signed in 1953 by the Belgian, French, German, Luxembourg, Italian and Dutch governments.

Speech by the Chairman of the Administrative Council, EURÉKA No. 3, July 1988, p. 7.

The future of the brevet européen", EURÉKA 7/80, p. 6.

...en aumento le ricette per il brevetto europeo", 21 February 1980.


Jean-François Mözzières, "Conseil d’administration : l’avenir de l’EPO... et notre devenir", EURÉKA 1/93, p. 6 (translated).

This method was revised in 1984. Jean-François Mözzières, Conseil d’administration : l’avenir de l’EPO... et notre devenir, EURÉKA 8/93, p. 3 (translated).


I am... p. 2.


EURÉKA 2/83, p. 17. Bob van Benthem had delivered his speech in three parts, each in one of the Office’s three official languages, this passage being in English.

CA/PV 8/84, 8-14 June 1984, p. 82 – 83.

I am, p. 2.

Jean-Claude Camboulives, voie nationale... vue européenne, EURÉKA 5/85, p. 16.


Four memorable days in the history of the EPO, EURÉKA 3/83, p. 69.


For this hardware range see: Pugh, Johnson and Palmer, (IBM) 670 and early 370 systems, MIT Press, Cambridge, 1981.


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1 Patrick Vermesch, “EPO joins information industry”, EUREKA No.5, November 1988, p. 27.
2 Idem, p. 31.
5 Idem.
7 Yielding costs of storage, CPUs and PCs; improved screen resolution and network capacity.
9 Idem, p. 18. Translated.
11 The document content was not directly searchable.
12 The report, which was inserted into CA/PV 90/2, 26 October 2001.
13 Idem.
14 Paul Brandli, “Foreword by the President”, Gazette 1999/1, p. 9.
16 EPO & INFORMATIONSTECHNIK, 1 February 1990.
18 CA/PV 95/88, study by Arthur O. Little, submitted to the Council’s 7th meeting on 16 and 17 June 1998.
23 Handelsblatt, 13 December 1990.
25 Idem.
26 Münchner Merkur, 19 April 1990.
31 Idem.
33 Idem, p. 12.
34 Idem.
35 Idem, p. 4.
36 Paul Brandli, “Foreword by the President”, Gazette 1999/1, p. 9.
38 Anna & Informationstechnik, 1 February 1990.
40 CA/PV 95/88, study by Arthur O. Little, submitted to the Council’s 7th meeting on 16 and 17 June 1998.
44 19 March 1993. Translated.
45 Handelsblatt, 13 December 1990.
47 Idem.
48 Münchner Merkur, 19 April 1990.
53 Idem.
55 Idem, p. 12.
56 Idem.
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69 Idem.
70 Münchner Merkur, 19 April 1990.
Zeitung annualisation of CA/147/02.
The status quo should be maintained”.

Idem, p. 2.

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Idem, p. 2.

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“EU-Parlament europäische gemäß Artikel 189,  p. 10.

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Interview in Ausland, “La brevettabilità dei logici”, master’s dissertation, CEPI, Università di Strasburgo, 26 June, p. 56.

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