

National Language as Fundamental Value of State and Law and Proposed Single Patent of the European Union (Czech–Hungarian View)

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1. Introduction

The conference *Az állam és jog alapvető értékei*, i. e. Fundamental Value of State and Law organized by the *Széchenyi István Egyetem* faculty of law was held in Győr on 10th December 2010. Most sections were in Hungarian. This language is unrelated to most European languages and I know few words only. Therefore, I am not capable to learn about the issues ascertained by Hungarian scholars as reflecting the topic of the conference. The only exception was section of European law. Due to the visit of lecturers from Masaryk University in Brno it turned into the mixed Hungarian–Czech section. English was language of our debate because it is the only language known by young university lecturers of both sides.

I mention language regime at the Conference because it is significant for the topic of this paper. Proposed single patent of the European Union divides people similarly as participants at the conference were divided. Some of them are capable and willing to switch to English¹ or other widely known foreign languages and perceive it suitably but many others do not.

2. Multilingualism of the European Union

There are twenty three official languages of the European Union: French, German, Italian, Dutch, English, Danish, Irish, Greek, Spanish, Portuguese, Finnish, Swedish, Polish, Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Slovakian, Slovenian, Bulgarian and Romanian.² Most Member States have brought their languages to the European Union. The number of languages has increased rapidly due to the last enlargements.

This multilingualism is unique in global comparison. There is no state and no international organization having such high number of official languages. There is no legal system expressed in such high number of languages.³

¹ I thank to my doctoral student D. Bacho for language improvement of this paper.

² See Article 56 of the Treaty on the European Union after the entry into force of the Treaty of Lisbon (2009) for language regime of the founding treaties, and the (Council) Regulation 1/58 determining the languages to be used in the European Economic Community for secondary law and political and administrative operations.

³ Most countries of the world have one official language, and several countries are bilingual or trilingual. The only significant multilingualism in public sphere is in India. Nevertheless, federal authorities use two languages. Similarly, most international organizations have several official languages.

Multilingualism of the European Union is expensive. Numerous translators and interpreters – both in-house and freelancers – must be engaged. Expenditures for them exceed billion Euros per year.⁴ It is also burdensome. Translation and interpretation cannot be perfect. Words of different languages have slightly different meanings, although they are displayed as equivalents in vocabularies. Despite all care, errors cannot be fully avoided.

Multilingual regime is necessary for the European Union due to its aspirations on one hand and due to its linguistic situation on the other hand.

The European Communities started to develop their laws towards supranational position early. Every student of European Union law is expected to learn about landmark judgments on direct effect and on primacy.⁵ Currently, this supranational position is generally accepted.

Certainly, there were various languages of wider communication of elites of entire Europe or several European countries in various periods: Latin, French, German, Russian, and finally English. Nevertheless, any language has not become language of general communication of Europeans. Thus, multilingual regime is necessary for legitimacy of the European Union. Democratic structures cannot apply law which is not understood by people.

Certainly, daily operations of institutions of the European Union and unofficial communication with the Member States require reduction of number of languages. Elite officers are employed on both sides. Knowledge of foreign languages can be expected and required. There is, however, little preparedness and willingness to select one or several languages as official working languages of the European Union.⁶ Therefore, English, French and German are working languages solely on informal basis.

3. Grounds for the Single Patent of the European Union

Numerous politicians, journalists, economists, and other experts are convinced that patenting of inventions encourages research and development. Innovations are perceived as precondition of economic growth.

Patents are granted to inventors by states. Certainly, there is global international standard of patenting of inventions established with international conventions.⁷ The World Intellectual Property Organization provides for international cooperation on global level.

Patents are now granted by most countries of the world, including all European countries. Acceptation of worldwide standards of intellectual property is precondition of all contemporary international economic integration.⁸

⁴ Official statement about expenditures can be found on website of the Directorate General Translation http://ec.europa.eu/dgs/translation/faq/index_en.htm#5: „According to certain very rough estimates, the cost of all language services in all EU institutions amounts to less than 1% of the annual general budget of the EU. Divided by the population of the EU, this makes to around 2 euro per person per year“.

⁵ Judgments 26–62 van Gend en Loos and 6–64 Costa v. ENEL.

⁶ See Article 1 of the Regulation 1/58 (above) where official working languages are mentioned.

⁷ Foremost, the Paris Convention for the Protection of Industrial Property of 20th March 1883, as revised by subsequent conventions, harmonizes patent laws of most countries of the World.

⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights which requires strong protection for intellectual property rights established with other international conventions is compulsory for all Member States of the World Trade Organization.

Europe goes further. Joint evaluation of patent applications by the European Patent Office and recognition (validation) of positive results (“European patent”⁹) simplifies patenting in most European countries.¹⁰

Nevertheless, patenting is expensive in Europe compared with the United States of America, Japan and China. This situation is perceived as an obstacle to innovations and thus to economic growth in Europe, which is especially desired in period of economic slowdown.

Separate administration of patents partially explains it. National patent offices of European countries require fees. Expenditures on patent attorneys in all countries where patent protection is sought must be also calculated.

Gains of patenting in European countries differ widely. Hence, many inventors do not seek patent protection of their inventions in all or most European countries. Different patenting, however, causes constraints on internal market of the European Union. Products manufactured in a Member State of the European Union can be prohibited to enter other Member States due to patent protection of related invention there.¹¹

Single patent of the European Union is proposed as solution of these troubles. Expenditures for patenting of inventions for its entire territory will be reduced. Increasing patenting of inventions is expected to support innovative activity in Europe.

Existing structures, i.e. the European Patent Office, are expected to administer the single patent. Therefore, a mixture of secondary legislation of the European Union and international treaties is proposed.¹²

4. Language Regimes of Proposed Single Patent of the European Union

Centralized administration of patents in the European Union by the European Patent Office or another Europe-wide authority would surely decrease costs. Nevertheless, significant expenditures on patenting result from European multilingualism.

National authorities require patent application in their national languages worldwide like as most other actions, petitions, claims, or responses. Patenting inventions in Europe is no exception. It requires translation of documentation of inventions needed for evaluation of patent application and subsequent publication of a patent. Expenditures for communication with patent attorneys also reflect language barriers in Europe.

Crucial issue of proposed single patent of the European Union is language regime. Which languages shall be used for description of patented inventions?

The distinction between entire patent documentation and so-called patent claims is important for the consideration of language aspect of patenting.

⁹ Therefore, proposed single patent of the European Union is not known as the European Patent.

¹⁰ Introduced and established as the principal institution of the European Patent Organization Convention on the Grant of European Patents of 5th October 1973 (the European Patent Convention).

¹¹ See Article 36 of the Treaty on Functioning of the European Union (ex Article 30 / ex-ex Article 36 of the Treaty establishing the European /Economic/ Community).

¹² Other solutions, including the patent tribunal of the European Union, were discussed.

Patent documentation describes in detailed manner the invention. Therefore, it is voluminous. Dozens of pages are necessary in most cases. Patent claims summarize restrictions resulting from patent in favor of inventor for others. Patent claims are significantly shorter, one to several pages are sufficient.

Entire patent documentation in all official languages of the European Union – or most of them¹³ – has never been proposed. It would be perceived surely as unacceptably expensive.

Finally, several European countries have already ceased to require translation of entire patent documentation and confirmed it as their international commitment with the London Agreement.¹⁴ These countries, however, continue to insist on translation of patent claims.

Currently proposed language regime¹⁵ of single patent of the European Union is far-reaching. Patent claims shall be described solely in three languages – English, German, and French – and entire documentation in one of these languages.¹⁶ This regime follows the language regime of the European Patent Office.¹⁷ This regime, however, is intended for Europe-wide evaluation. As I have mentioned, validation of European patents granted by the European Patent Office by national patent authorities requires translated patent claims or even entire patent documentation.

Nevertheless, the European Commission admits multilingual reality of the European Union in proposal of rules for single patent. Alleviating measures are expected for entrepreneurs in countries with other languages. First, translations of patent applications from inventors from the member states using other languages shall be subsidized.¹⁸ Second, automatic machine translation of patent documentation shall be available for free.¹⁹ Third, damages for infringement shall be awarded only for period after delivery of entire patent documentation translated into language of the infringer by patent proprietor.²⁰

5. Proposed Single Patent Repeatedly Failing due to Languages

Several proposals of single patent of the European (Economic) Community failed due to the lack of support for discontinued use of other languages since 1975.

¹³ Ireland and Malta have accepted reduced use of their official languages in the European Union, because English is used widely as official languages and most people know it.

¹⁴ Agreement on the application of Article 65 of the European Patent Convention was adopted in October 2000.

¹⁵ Proposal for a Council Regulation (EU) on the Translation Arrangements for the European Union patent adopted by the European Commission on 30th June 2010 (COM(2010) 350 final, 2010/0198 (CNS)).

¹⁶ The text of proposed council regulation avoids mention the languages directly, while citing provisions of the European Patent Convention.

¹⁷ See Article 14 of the European Patent Convention.

¹⁸ See recital 5 of the proposal of the Regulation on the Translation Arrangements.

¹⁹ See recital 6 of the proposal of the Regulation. Nevertheless, the translations shall not have any legal effect.

²⁰ See recital 4 of the proposal of the Regulation on the Translation Arrangements and Article 44(3) of the Proposal for a Council Regulation on the Community Patent (2000), mentioned below.

Current proposal of the regulation establishing the single patent of the European Community / the European Union dates eleven years ago.²¹

There was no clear competence for legislation on single patent in founding treaties until the Lisbon Treaty. Emergency provision enabling legislation necessary for economic integration was expected as base for it. However, it required unanimity.²² Similarly, additional treaties among the Member States would require consensus, if intended for general application.

The Member States agreed in Lisbon (2007) to establish competence of the European Union for unification of intellectual property.²³ Standard legislative procedure shall be applied, including decision of the European Parliament and majority voting in the Council. Nevertheless, specific provision requires consensus in the Council on related language regime.²⁴ Such arrangement confirms that the Member States are aware of the problem.

The provision on language aspects has already showed its teeth in November 2010. Spain decisively vetoed draft regulation addressing language aspects of the single patent proposed by the European Commission.²⁵ Meanwhile, Italy has several times expressed similar attitude towards the proposal. Furthermore, Poland confirmed preparedness to veto hypothetical five-language regime which would satisfy Italy and Spain.²⁶

6. Mixed and Confusing Positions of the Member States

Proposed language regime of single patent is the first significant reduction of number of languages used for expression of law in the European Union. The last proposal is among the harshest from this point of view.

We shall not ignore that patents on inventions are specific type of legal rules. What else is a patent than a temporary prohibition of manufacturing of some product or use of some technology to all other potential manufacturers?

The Member States using selected languages support the proposal. However, it is hard to ascertain situation and to identify opinions in countries whose languages shall fall out of use with the single patent of the European Union. Internet does not reveal everything.

Attitudes of Italy, Spain and to lesser extent Poland reflect visibly national prestige. These three countries are counted among big Member States of the

²¹ Proposal of the Commission for a Council Regulation on the Community patent of the 1st August 2000 [COM(2000) 412 final, 2000/0177 (CNS)].

²² Former Article 308 of the Treaty establishing the European Community (now Article 352 of the Treaty on Functioning of the European Union).

²³ See Article 118 (1) of the Treaty on Functioning of the European Union.

²⁴ See Article 118 (2) of the Treaty on Functioning of the European Union.

²⁵ See press release, 3057th Council meeting – Competitiveness (Internal Market, Industry, Research and Space), Brussels, 10 December 2010, page 8. Enhanced cooperation is contemplated by many Member States and the Council of the European Union, The European Union Patent: Way forward and possible enhanced cooperation – Exchange of views, Brussels, 29 November 2010, 16946/10 PI 140.

²⁶ For analysis of position of Italy, see Locatelli S., *Balancing Diversity and Efficiency in the EU's Language Regime: E Pluribus Tres for the EU Patent?*, Roma, Istituto Affari Internazionali, August 2010, 9 p. (Documenti IAI, 1015), <http://www.iai.it>, for journalist coverage of attitudes in Poland see Fedorowicz H., *Patent unijny musi byc zrozumialy* (Union Patent must be understandable), 12. 5. 2010, Rzeczpospolita, <http://www.rp.pl>.

European Union. The first two countries are convinced that their languages merit greater respect due to their importance in international culture and trade.

On the other hand, medium-sized and small Member States of the European Union generally confirm their support for proposed single patent of the European Union, albeit use of their languages should be suppressed with it.

Several small Member States with population showing higher level of knowledge of English whose elites and experts generally know English seem to be prepared – both factually and psychologically – to accept information about patents and respect restrictions resulting from them in other languages.

Furthermore, these Member States would prefer monolingual regime. “English only” regime is, however, unacceptable for Germany and France.²⁷ Considering it, their approach does not differ from criticized behavior of Italy and Spain.

In my eyes, several other medium-sized and small Member States support the proposal under considerable political pressure. Their representatives don't want to be criticized for blocking a measure generally presented as necessary for economic growth in Europe. Nevertheless, they don't seem to be keen on it. Besides resulting language disadvantage, they can fear that their industry is not innovative and will be restricted with increased number of the single patents of the European Union. Nevertheless, they need not to show objections because they can rely on repeated failure of the project.

Patent attorneys, attorneys (lawyers) and translators in countries using other languages express objections because their business is endangered. From this point of view, they can be added to several other professions affected adversely due to European integration: customs officers or moneychangers. However, concerns for own business can be hardly expressed. Therefore, other arguments are raised. Doubts about constitutionality and equality can be read and listened. By the way, English patent attorneys show strong support for the proposal and they are glad to underline merits of single patent in weblogs.

Big, medium-sized and small enterprises generally support the single patent of the European Union. Nevertheless, I am not convinced that opinions articulated by representatives of small and medium-sized enterprises follow real assessment of their situation. I assume that most of these enterprises show no ambition to invent. Neutral position would thus fit better to them.

I can describe the situation in my country. The Ministry of Industry and Trade of the Czech Republic supports decisively the project of the single patent of the European Union with absence of Czech language. Increasing innovative activity of Czech enterprises is expected.

Such approach is in full compliance with big Czech industrial enterprises. They support the single patent of the European Union. Position of small and medium sized enterprises including cooperatives is mixed: one association supports it, other one rejects it.

²⁷ Summary of positions of the Member States can be found in Metzler F., Belgian Compromise not Sufficient to Remove Deadlock on EU Patent Language Regime (updated), *Visae Patentis* – www.ipblog.eu, posted 12 October 2010, <http://www.visaepatentes.com/2010/10/belgian-compromise-not-sufficient-to.html>: “France and Germany want to maintain the privileged status reserved for their respective languages in the current system, which is run by the European Patent Office (...)”

On the other hand, objections are expressed by professionals serving patenting on national level. Both chambers of attorneys and of patent attorneys²⁸ clearly reject the project, arguing with multilingual nature of the European Union and with consequences for enterprises.

I have mentioned language barrier between Czechs and Hungarians. I am unable to read texts in Hungarian. Therefore, I must rely on scarce information available in English. Nevertheless, I can assume position of Hungary and Hungarian stakeholders.

First, attitude on national language shall be considered. Certainly, there is no international scale of nationalism. Nevertheless, many observers would claim that Hungarians stress their national identity more intensively than Czechs.

Both countries have tradition of research and development. The innovative activity in Hungary is slightly lower to that in the Czech Republic if we consider current indicators.²⁹ Therefore, I would expect less interest in the single patent in Hungary.

No Hungarian position on the single patent achieved European prominence. Hungary presides the Council of the European Union in the first six months of year 2011. Nevertheless, Hungary seems to remain silent on the issue.³⁰ Anyway, the project of single patent seems to be put temporarily on ice.

Nevertheless, my assumptions are shattered with fact that Hungary has acceded to the London Agreement.³¹ The Czech Republic has not done it till now.

7. Rethinking Language Aspects of Proposed Patent of the European Union

I am not convinced that national languages are sacrosanct and all laws must be forever expressed and applied with them. I admit that the notion of national language is connected with modern state, which is based on linguistically defined nation in most cases. Nevertheless, European elites always internationalized and various languages were used for it.

European integration naturally contributed to the change of language situation in Europe similarly as the European Union redefines notion of nation-

²⁸ According to semi-official statements of representatives of both chambers submitted and presented in process of formulation of the position of the Czech Republic and in framework of clarification of related aspects by the Ministry of Industry and Trade and the Office of Industrial Property.

²⁹ Hungarian A. Ganz and Czech F. Křížík can be mentioned as 19th century inventors and innovative entrepreneurs. For current indicators, see Global Innovation Index Report 2009-10, which reveals 27th and 36th position of the Czech Republic and Hungary respectively, see <http://www.globalinnovationindex.org>.

³⁰ Hungary promised at 3057th Council meeting mentioned above to seek consensus as future presiding Member State, confirmed by Hungarian minister Z. Cséfalvay in the European Parliament on 26 January 2011. However, I perceive it as mere politeness. Any proposal and any long-term statement cannot be found at the presidency website, see <http://www.eu2011.hu>. No position of Hungary is mentioned also in Metzler F., Belgian Compromise not Sufficient to Remove Deadlock on EU Patent Language Regime (see above).

³¹ See "The London Agreement has entered into force with respect to Hungary on 1st January 2011" posted on the website <http://www.sztnh.gov.hu> of Szellemi Tulajdon Nemzeti Hivatala (Intellectual Property Office).

state. There are examples of use of English in various spheres. This situation is to some extent accepted, and mandated: pilots, personnel serving international tourism, top level managers, scientists, and university lecturers are expected to communicate in English.

While observing current debate about the project of the single patent of the European Union, I am surprised by little interest for consequences for those who will be restricted with patents expressed in foreign languages. It can be explained with preparedness to learn about patents in English (not in German and French).

I am convinced that large manufacturers and service providers are really capable to understand information and restrictions in English. First, they have specialists for many tasks. Second, their production must be continuously improved. Therefore, they need to know about innovations. Professional literature is with limitation available in national languages. By the way, patents can be perceived as specific type of professional literature. Engineers – similarly as scientists, physicians and university teachers – are expected to seek and to understand English texts. Third, large manufacturers and service providers serve often international markets. They must comply with foreign regulatory frameworks, while patents are no exception. They must learn about it directly or through communication with costumers. Lack of language skills is no excuse. Fourth, many large manufacturers and service providers at least occasionally try to commercialize their own inventions. The single patent for entire European Union would certainly provide more efficient protection of their inventions.

Situation of small and medium-sized enterprises seems to be less clear. Their capacity to learn information in English varies. Many small and medium-sized enterprises serve national markets. Finally, most of them do not involve in research and development.

It is easy to condemn attorneys, patent attorneys and translators for pursuit their interests. Nevertheless, I want to draw attention to merits of systematic translation of patent documentation in national languages. This contributes to development of national languages.

Furthermore, language arrangements of current proposal of patent of the European Union show that the administration and judiciary on both national and European level are less prepared and willing to switch for English than national industries and research.

I am convinced that both explicit refusal and tacit reluctance to the project haven not melted to extent which allows its quick introduction. I would suggest return to multilingualism as regards patent claims as summary of invention and description of restrictions. The London Agreement shows that many European countries are prepared to accept wider use of English. Certainly, translation of patent claims into twenty languages is not for free. Nevertheless, it is cheaper than current patenting of potentially successful inventions in the Member States.