

Lost property: The European patent system and why it doesn't work

BY BRUNO VAN POTTELSBERGHE



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EUROPE SHOULD STOP TAXING INNOVATION

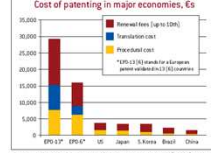
by Bruno van Pottelsberghe
Senior Fellow at Bruegel
Professor at the Université Libre de
Bruxelles
brp@bruegel.org

SUMMARY The European Union failed to achieve its Lisbon agenda target of spending three percent of GDP on research and development, and so, in the EU2020 strategy, has given itself another decade to meet this goal. Meanwhile, the EU has been leapfrogged by China in terms of business R&D spend. One key element to stimulate innovation and ultimately drive European growth would be to create the long-awaited single EU patent. Today's fragmented European patent system is poor value for money and overly complex, not least because national patent systems still have the last word over all European patents on their territory. After nearly 50 years of failure to create the EU patent, language issues and the design of a centralised patent litigation court remain unresolved. The recent EU Council deal on an 'enhanced' European patent system is potentially a step forward, though many problems remain unresolved.

POLICY CHALLENGE

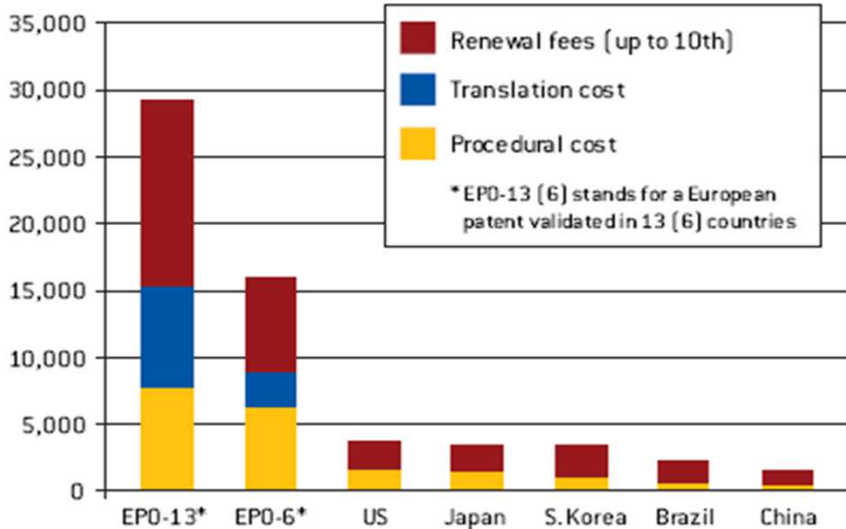
The risk for Europe is that current moves result in a patent agreement that does not cure the system of its major ills, and thus does not bring about any significant improvement for those who need it most: entrepreneurs and innovative companies starting out on the innovation process. The creation of an effective single

European patent requires i) English-only post-grant translation, ii) the end of nationally granted patents, iii) phasing-out of the current 'European patent', iv) lower fees for young innovative companies, and v) a radical shake-up of the governance of the European Patent Office.



Source: Bruegel based on van Pottelsberghe and Mejer (2008) and van Pottelsberghe and François (2009). Figures refer to 2008.

Cost of patenting in major economies, €s



Source: Bruegel based on van Pottelsberghe and Mejer (2008) and van Pottelsberghe and François (2009). Figures refer to 2008.



Prohibitively expensive, for wrong reasons



Incongruous



Uncertainty, Parallel processes

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THE SEVEN DEADLY SINS OF EUROPE'S FRAGMENTED PATENT SYSTEM

- **Affordability (high absolute and relative costs)**
- **Low quality:** NPOs grant patents independently of the EPO, inducing heterogeneous quality standards
- **Complexity**
- **Uncertainty:** parallel litigations with divergent outcomes
- **Lack of coherence:** *'parallel imports' and 'time paradoxes'*,
- **No coordination at EU level**
- **Weakness in global negotiations:** PPHs

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Institutional heterogeneity

	Germany	France	The Netherlands	United Kingdom
Institutional design				
Judicial system	Dual	Single	Single	Single
Specialized court	Court	Chambers	Chambers	Court
Quality of proceedings				
No of judges legally qualified ...	62	40	6	6
...out of those technically qualified	46	0	0	5
Composition of the court	3 or 5	3	3	1
Damage Assessment				
i. Lost profits	YES	YES	YES	YES
ii. Licencing fee	YES	YES	YES	YES
iii. Infringer's profits	YES	NO	YES	Yes, rarely requested
Choice for plaintiff	YES	YES	YES	YES

DIFFERENT DEFINITIONS !!!

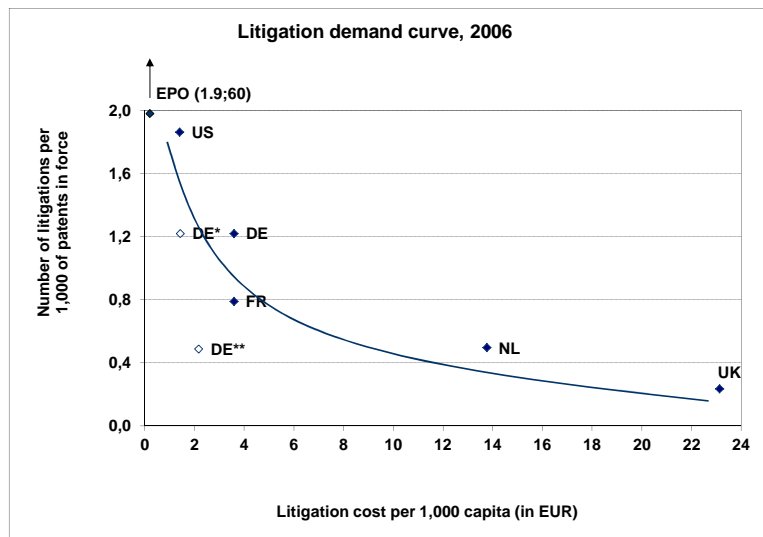
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Cost heterogeneity and litigation activity

	Germany	France	The Netherlands	United Kingdom	Cumulative 4 EPC
First Instance ('000s)	50 to 250	50 to 200	60 to 200	150 to 1,500	310 to 2,150
Second Instance ('000s)	90 to 190	40 to 150	40 to 150	150 to 1,000	320 to 1,490
Total ('000s)	140 to 450	90 to 350	100 to 350	300 to 2,500	630 to 3,640
Litigation activity (in 2004)					
# of patents in force	410,000	380,000	141,000	360,000	-
# of EP "nationalized"	307,488	252,798	121,337	257,600	-
# of patents litigated	200 (nullity) 500 (infr.)	300	70	85	-

Note: Estimations apply to a patent with an amount in dispute equivalent to about €1 million.

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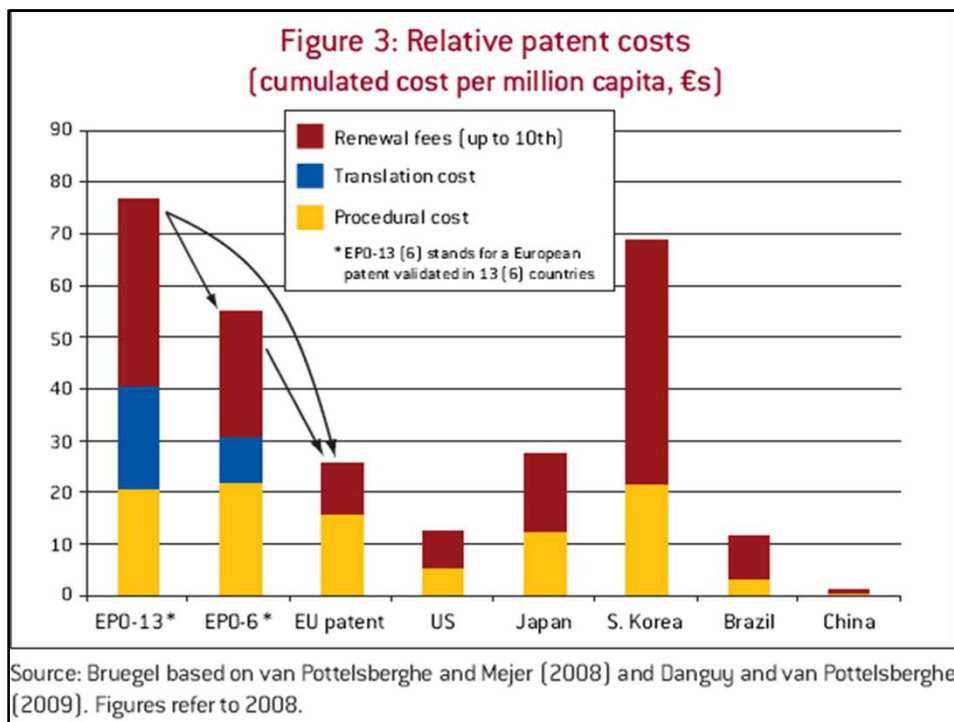
Two official fig-leaves...

- **Language regime**
- **Centralized patent litigation system**
 - 50 years to ask advice to ECJ...

... And additional factors

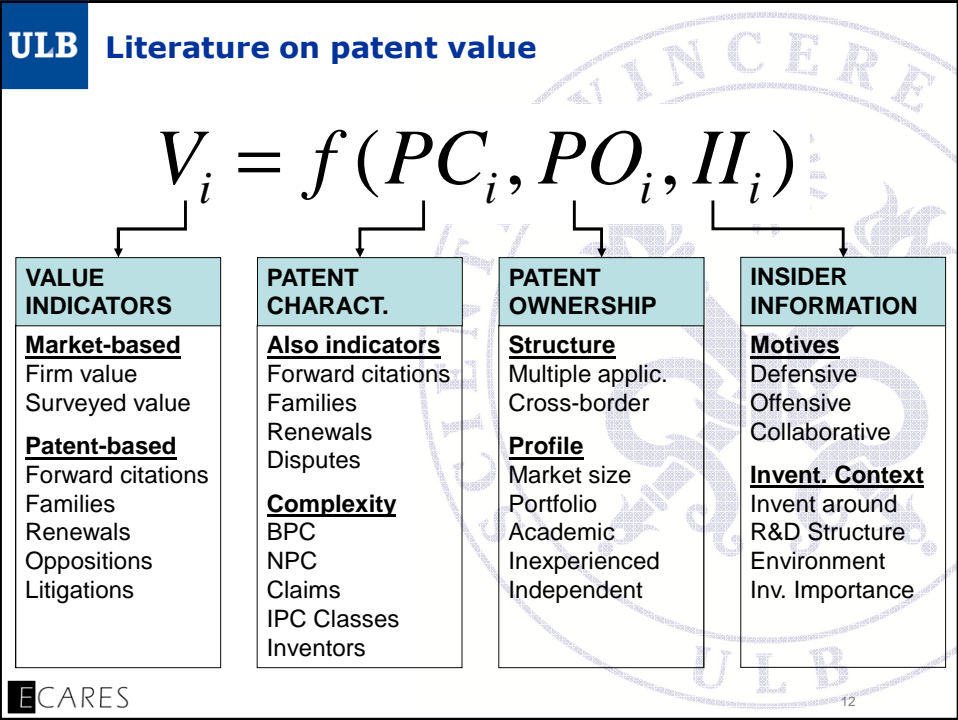
- **Control loss (POs)**
- **Financial losses (or fear of...)**

	EPO	NPOs	Business sector	Attorn. & transl.	Lawyers
Designation fees EPO ^{α,β}	-25		+40	-15	
Validation fees NPOs ^γ		-10	+10		
Translation costs ^{δ,ε}	-20		+129	-129	
Filing patent translation ^α			+60	-60	
Taking over representation ^α			+46	-46	
Renewal fees ^ε	+88	+88	-176		
Intermediary cost for maintenance ^α			+20	-20	
Drop in parallel litigation (Harhoff, 2009) ^φ			+121		-121
Total	+43	+78	+250	-270	-121

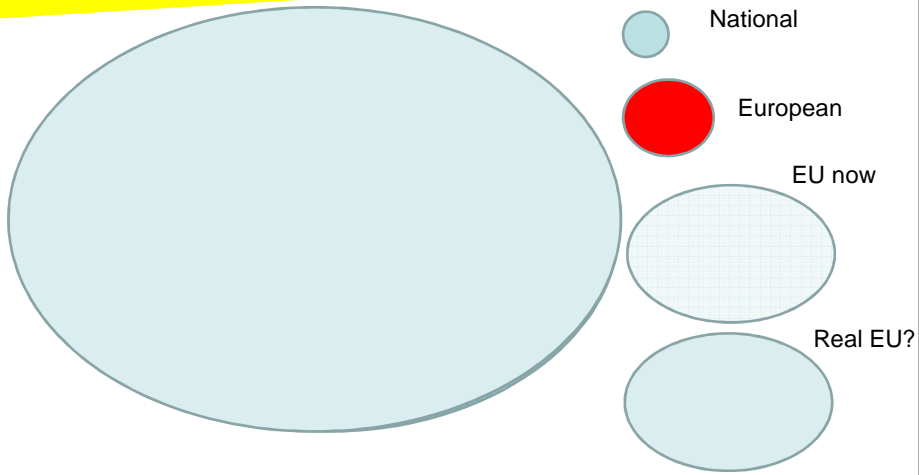


Do not expect much from the new 'deal'
(Beside the nice Newspapers headings)
(a key first step, but only 'first')

**... and three issues with the paper:
 three layers? Which Fees? Which
 Governance? (in addition to value
 measurement)**

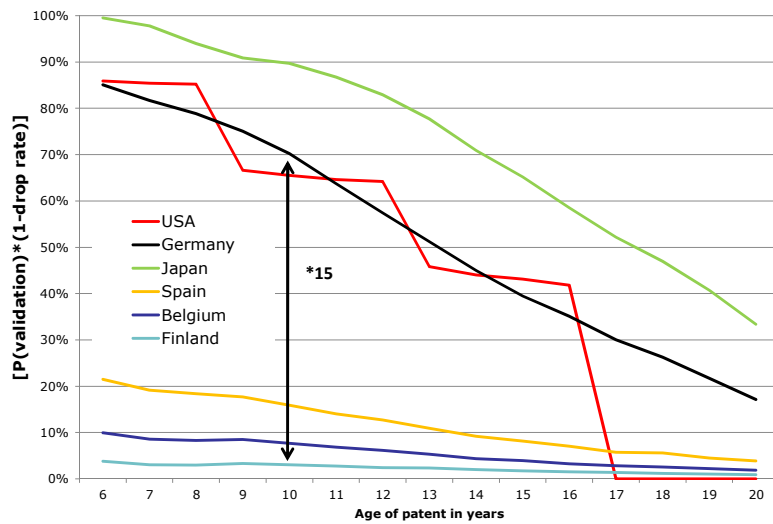


The New Deal: adding a third layer...



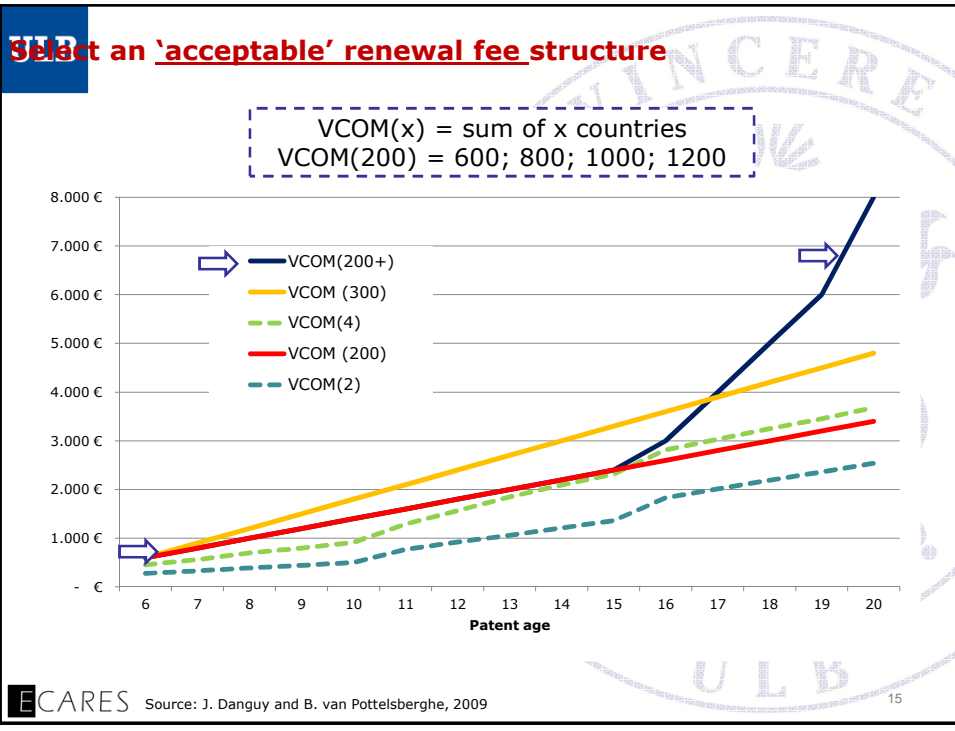
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ULB S2. Understand the factors that influence the maintenance rate of patents in national jurisdictions



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**Estimated parameters of the « maintenance rate » model
 15 EU countries + Japan and USA**

Variable	(3)
Intercept	-0.256 (0.207)
GDP ('000 billion €)	0.064 *** ← Market attractiveness (0.007)
Fees ('000 €)	-0.119 *** (0.026)
Age of membership	0.008 *** (0.001)
Age of the patent	-0.029 *** ← Life cycle of technology (0.002)
Intellectual Property Index	0.172 *** (0.044)
Adjusted R-Square (%)	75.6
Number of observations	243

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The new deal will not bring further innovation...

- **Suppress two of the three layers (National patents and European patents)**
- **Radically change the governance of the system**
- **Need SME-based fees, and much lower aggregate renewal fees**
- **NPOs should change their business plan: e.g.,**
 - **Search services before priority filings?**
 - **Search reports during the first year (Paris Convention)?**
 - **Advices for filing strategies?**
 - **Advices for litigations?**
 - **FTO services?**
 - **PCT searches coordinated by EPO?**
 - **Support to the EPO 'small' 'backlog'?**

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