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The dilemma of (in)validity of European software patents in Poland

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Can a valid European patent be declared invalid in Poland? In other words, can a computer-implemented invention for which a European patent has already been granted be refused a patent by the Polish Patent Office? While this may sound contradictory, it is in fact common practice - not only in the Polish Patent Office but also in the administrative courts in Poland. However, the latter seems to recognize the issue.

Some of the recent judgments of the Polish Supreme Administrative Court on the technical character of computer-implemented inventions in the light of the long-term practice of the Polish Patent Office in the subject, have added a new dimension to the controversial debate on software-related patents in Poland. Poland ratified the European Patent Convention in 2004 but the issue remains divisive since the EPO system of patent law permits the patenting of computer-implemented inventions while the policies of the Polish Patent Office prohibit the patenting of such inventions.

The EPC excludes only computer programs “as such” from the category of patentable subject matter. The EPO has interpreted computer programs as such to mean the source of code. Currently in Europe a computer program or computer-implemented inventions must have a technical character, solve a technical problem, and make a technical contribution to the state of the art. Technical character is defined as a solution to a technical problem where technical is interpreted as having an effect beyond the normal physical interaction between a program and a computer.

The difference in approach between the EPO and the Polish Patent Office is illustrated by the fact that the latter has - for years - been refusing to issue patents to applicants approved by the EPO. Furthermore, to date, the Polish administrative courts have upheld such decisions. But it seems that there is light at the end of the tunnel. In some of its recent cases, the Polish Supreme Administrative Court has focused attention on the issue of whether granting a European patent should have any effect on the decisions made by the Polish Patent Office. Furthermore, the court raised the question of whether such practice -i.e. the Polish Patent Office ignoring EPO decisions - is legal.

According to Polish patent law, in order to be patentable, an invention must meet the

patentable criteria, namely be new, involve an inventive step and possess potential for industrial application. The requirement of a technical character of an invention is not statutorily regulated. However, the Polish legal doctrine together with the practice of the Polish Patent Office has created a concept of a technical character of an invention. Thus, an invention must be a technical solution to a problem, otherwise it will not be defined as an invention and therefore will be rejected by the Patent Office. According to the decisions of the Polish Patent Office, an invention has a technical character if it changes physical matter; it has to have a technical effect on the matter. Moreover, the Polish Patent Office decided that only inventions are patentable, not the resulting effects of those inventions.

Therefore, it may be said in general that the EPO adopts a liberal approach with regards to the technical character of an invention, whereas the Polish Patent Office tends to be of a much more conservative bent, favoring an approach that may seem at times unjustifiable within the parameters of European patent law. Furthermore, in terms of the technological progress of mankind, the practice of the Polish Patent Office seems to be, at the very least, rather old-fashioned.

Currently the Polish Patent Office is considering some cases which involve the technical character of an invention which may be of a precedential nature in terms of future practice. Since the subject matter of these cases is related to “old” patents which are already widespread in different technologies, there is no doubt that the economic effect of the decisions will be significant. One can envisage two possible scenarios for the future. The Polish Patent Office may change its very conservative approach with regards to the technical character of inventions. However, this scenario may be considered as unrealistic. Therefore, the alternative is waiting for the judgments of administrative courts finding that the Polish Patent Office should decide on the patentability of computer-implemented patents in the light of the current approach of the EPO in relation to software-related patents.

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This entry was posted on Friday, December 2nd, 2011 at 4:28 pm and is filed under [Exceptions to patentability](#), [Poland](#), [Validity](#)

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