

# AN EU PATENTS VESSEL WITHOUT CABINS (AND NOW EVEN SEATS) FOR ITALY AND SPAIN?

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By Miquel Montañá

In year 2021, Italy will celebrate the 600th anniversary of the patent granted by the Republic of Florence to Filippo Brunelleschi for his ship "Il Badalone", the first patent ever granted. Quite ironically, the fathers of the first patent, and of the first Patent Act, approved by the Republic of Venice in 1474 and then copied throughout Europe, have been left out of the project to create a European Union Patents Court. Spain has also been left out, whose Francisco de Vitoria and his fellows crafted the foundations of international law on which the new EU Patents Court is sought to be founded.

In a seminar organized by the Commission in Brussels on 3 November 2010 to debate the project, Judge Robin Jacob stated in a rather harsh and provocative way that the crafters of the project probably have not seen a patent in their life. Although such a statement does not appear to give a fair account of the efforts applied by the Commission into pressing the project forward, he had a point. There must be leeway for improvement in a project where the country that gave birth to the first patent in history does not feel at home. Also, maintaining stubbornly in 2011 a linguistic regime crafted in 1973, to the point of leaving Spain, which proposed a reasonable alternative better suited to today's times, in a politically impossible situation, expresses an exclusive philosophy that should rather be inclusive. This, coupled with the recent increase of the minimum number of cases required by a member state to be able to establish a local division, has pushed Italy and, in particular, Spain further away from the project. Again, it is ironic that the Polish presidency is asking Italy and Spain to be on board while, at the same time, those who are drawing the plans of the vessel, after having left Italy and Spain without a cabin, are now taking their seats away from the vessel.

All in all, a vast amount of time and effort have been applied to the roof (technicalities) of the project, without sufficiently taking into account the high level of legal and political foundations of a building that should make the entire patent community throughout the EU feel at home. The ECJ, in its Opinion 1/2009 of 8 March 2011, already alerted about the legal flaws of the project from the perspective of EU law. The ECJ is now due to hand down a judgment in response to the nullity action filed by Italy and Spain. Whether or not the ECJ will raise objections to the re-defined proposals crafted by the Commission remains to be seen. Although some member states may be tempted to try to put pressure on Judges of their nationality in the ECJ so that the ECJ will remedy politicians' inability to reach a consensus, the ECJ's independence and the independence of its members deserve the highest respect. There is, therefore, no reason to believe that the ECJ's conclusions will not be exclusively based on legal considerations.

In conclusion, it is clear that a single EU patent is needed. It is clear that a more rational litigation system is needed as well. But as the president of the EPO highlighted in the seminar organized by the Commission mentioned above, a more balanced and realistic solution is also needed. In particular, a solution that is perceived to be inclusive, rather than exclusive.