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“Thales” and “Bull” decisions: the French Supreme Court and the patentability of computer-implemented inventions

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In two decisions rendered on January 11, 2023, the French Supreme Court (“Cour de cassation”) ruled for the third time in almost 50 years on the patentability of computer-implemented inventions.

As we will see, in doing so the Supreme Court seems to follow the “Hitachi” approach used at the European Patent Office in this field.

In the first case, the appeal concerned a decision rendered by the Paris Court of Appeal on May 21, 2019. A French patent application had been filed by Thales for a time-based display of an aircraft’s mission and had been rejected by the French patent office. The *Cour de cassation* disapproved the Court of Appeal, which had considered the subject-matter of the application patent eligible, on the basis of articles L. 611-10, 2°, d) and L. 612-12, paragraph 1, 5° of the French IP Code (equivalent to art. 52(2) EPC). According to the Supreme Court, by simply reproducing the terms of claim 1, without establishing the existence of a technical contribution or explaining in what way the means were technical, the Court of Appeal did not provide a legal basis for its decision.

In the second case, the appeal concerned a decision rendered by the Paris Court of Appeal on November 22, 2019. A French patent application had been filed by Bull for a terminal establishing communications by broadcasting within a group. The Court of Appeal ruled that the invention was in the field of communication devices and that the claimed device responded more specifically to the technical problem residing in the global visualization of a situation for a unit comprising several fighters and not that of memorization in a stressful situation, which constituted a cognitive problem, *i.e.* not a technical problem. Indeed, this device involved several technical means (microprocessor, storage means such as a hard disk or a memory card, a communication interface and a screen), which justified that the invention be considered as technical in its entirety. The *Cour de cassation* approved this decision, which was based on the same articles as the Thales case.

The two decisions of the Paris Court of Appeal adopted reasonings similar to the so-called “Hitachi” approach, and the *Cour de cassation* does not seem to contradict the said approach. As such, the Thales decision was overturned by the Supreme Court, but this was due to a lack of characterization of technicality. Such an absence could be justified since, while retaining the “Hitachi” approach, the Court of Appeal had nevertheless dismissed the patentability of the first feature of claim 1, which concerned the display of the timeline, in order to focus on its second feature (relating to the length of the timeline), without qualifying the technical character of the

latter. In other words, one can imagine that the decision would have been different if the Court of Appeal had assessed this claim in its entirety, specifying that the display device to which it related constituted a technical means. In the “Bull” case, on the contrary, the Court of Appeal duly qualified the technicality, stating that the technical means (microprocessor, storage means, a communication interface and a screen) justified the technicality of the invention. In both cases, the *Cour de Cassation* does not criticize the method of assessment of the technical character, but the way it is applied. Thus, it appears that the French Supreme Court recognizes the relevance of the “Hitachi” approach, but only implicitly, without mentioning it.

However, the basis of the two decisions is a source of confusion: it is the notion of invention as deduced from L. 611-10, 2° of the French IP Code (equivalent to article 52(2) EPC). While the assessment of the technical contribution, as understood in the “Vicom” case, is carried out within the frame of this text, the “Hitachi” approach results from the examination of the inventive step (article 56 of the EPC and article L. 611-14 of the French IP Code). Therefore, the reference to the notion of technical contribution implies that one must look for the contribution of the invention to the state of the art (“its contribution”). In doing so, we must necessarily look for what is inventive in what is claimed. Yet, article L. 611-10, 2° of the French IP Code, from which the notion of invention is deduced, merely delimits the field of technology with a series of exclusions. However, at the preliminary stage of examination during which eligibility is assessed, which precedes the establishment of the search report, there should be no question of looking at the inventive step, which is examined later during the examination of the application under article L. 611-14 of the French IP Code. This partly explains why, at the level of the European Office, the technical contribution part of the examination of the inventive step (art. 56 EPC) since 2004.

Did the *Cour de Cassation* erred by using the technical contribution under article L. 611-10, 2° and not under article L. 611-14 of the French IP Code? I don’t think so. If the basis is inadequate, one must keep in mind that it constitutes the origin of the appeal to which the Supreme Court is bound. Besides, we must remember the nature of the appeals in question: they were both filed by the Director General of the INPI in response to the decisions of the Courts of Appeal. However, the texts in question are no longer in force since the “PACTE” Law. The INPI is now competent for the examination of inventive step. Therefore, if one ignores the inappropriate basis, it does not seem particularly daring to imagine that the solutions adopted by the *Cour de Cassation* could be transposed to the examination of the inventive step by the INPI. This understanding would then have the advantage of being closer to that of the EPO, so that it would be possible to use before the INPI methods that have proven to be sound before the EPO.

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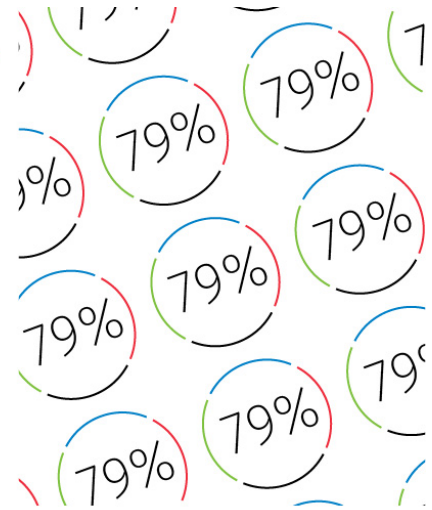
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