Are Computer Programs and Business Methods Patentable under European Patent Law? (Part 1)

Although the United States Patent and Trademark Office generally accepts computer programs and business methods as patentable subject under US patent law, its counterpart the European Patent Office (the “EPO”) holds a very different view.

With the rapid development of computer and information technology, many computer programs and business methods have been invented so that the business transactions can be implemented by software programs, reducing human labour, for example, automatic billing system and pension benefit system. The EPO has clarified the situation with respect to inventions in computer programs or business methods in some recent appeal cases.

The General Rule

According to Article 52(1) of the European Patent Convention (the “EPC”), “European patents shall be granted for any inventions which are susceptible of industrial application, which are new and involve an inventive step.” However, Articles 52(2) and 3 EPC explicitly exclude “business method” and “computer program” as patentable invention “only to the extent to which a European patent application relates to such subject matter or activities as such”.

What is “as such”?

According to the Decision of the Technical Board of Appeal of the EPO (Computer program product II, IMB, case no. T 0935/97-3.5.1), the meaning of the words “as such” may be construed as such invention lacking in technical character. Hence, an invention having technical character should be considered patentable.
What is “technical character”? 

An invention which brings about a further effect or solves a technical problem is considered having a technical character. In particular, the invention should use some technical means for carrying out a method. Having said that, it is concluded in the Appeal Decision of the EPO (Pension Benefit Systems Partnership, case no. T931/95-3.5.1) that although a method only involving economic concepts and practices of doing business is not patentable, an apparatus constituting a physical entity for carrying out such method can be patentable.

In other words, if the method is capable of being run on an apparatus, for example, a computer or a machine, the apparatus is considered to have “technical character” and is patentable. As a result of that case, the threshold for patentability has been substantially lowered.

Inventive Step

A patentable invention also needs to fulfil the novelty requirement and involve an inventive step. Although the patentability threshold is now lowered, it is still not easy to fulfil the requirement of inventive step. In the next issue of newsletter, we shall discuss the current view of EPO on inventive step regarding computer programs and business methods.