

The governance of the patent system in Europe: intersections between the EPO's supranational autonomy and the European Union's strive for technology specific patent legislation

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Please note: the paper for this section was sent to the discussants and will be available in Lund.

Some of the arguments brought forward can be read online at:

[http://documents.epo.org/projects/babylon/eponet.nsf/0/F172DE5BB2B9B15BC12572DC0031A3CB/\\$File/Interview_Schneider.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/F172DE5BB2B9B15BC12572DC0031A3CB/$File/Interview_Schneider.pdf)

and a very short version of the main points at:

www.tekno.dk/pdf/projekter/patent-system-STOA/background_document.pdf, pp.47-49

Abstract for EPIP 2007, Section 4A “Governance, Patents & Innovation Systems”

My paper derives from governance studies in the political sciences, focussing particularly on the links between horizontal and vertical governance processes and questions of input/output legitimacy¹.

First, I will analyze the dominant mode of governance of international patent systems after WW II, which can be described by two intersecting interactions:

- the interaction between applicants and the patent office;
- the interaction between patent offices' granting practices (executive) and court decisions (jurisdiction).

Patent systems so far have been hardly governed by legislative ruling. For many decades, patent systems remained largely self-regulated by administrative granting practices, by technicians and lawyers as an epistemic community, and by courts.

The Patent system in Europe exhibits some particular features and is characterized by a “unique, multipolar constellation” (Artelsmair 2005)². Due to the “birth failure” of the EU Community Patent, a double structure between the European Patent Organization (EPO) and the European Union has come into existence at the supranational level. Patents were regulated by the 1973 European Patent Convention (EPC) as an intergovernmental treaty, governed by the European Patent Organization (EPO) and executed by the European Patent Office (EPO).

¹ Mayntz, R. 1998: New Challenges to Governance Theory. Jean Monet Chair Papers No 50, European University Institute; Borrás, S. (2006): "The Governance of the European Patent System: Effective and Legitimate? In *Economy and Society*, Vol. 35, no. 4, pp. 594-610

² Artelsmair, G. 2005: A Comprehensive Patent System Needed for Europe, in: A. Kur et al. E. (Ed.): „...und sie bewegt sich doch!“ Patent Law on the Move. Cologne, pp. 5-30: 19

Unless the EPLA will be ratified, the lack of a European Patent Court means that the enforcement and validation of European bundle patents is still left to the national courts.

The EPO system oscillates between intergovernmentalism and supranationalism. As a supranational organization at the public/private divide, the European Patent Office enjoys a high degree of autonomy and is self-funded by the applicant's fees. I will analyse, in which respect control by the EPO's Administrative Council is exercised and how the tension between national patent offices and the EPO is played out. I will also regard, how substantive patent law for new technological fields has evolved in the interplay between the granting departments and the EPO's opposition chambers and its boards of appeal which are quasi-judiciary bodies. The EPO's „technocratic self-determination“³ will be critically interrogated.

Despite the lack of direct legislative powers on patents⁴, the European Commission aimed at IPR legislation in the context of the single market objectives, and later in the context of international economic competition and knowledge-based societies (Lisbon Agenda). It was exactly the “incompleteness” of the European patent system – particularly the lack of a European Patent Court – which prompted the European Commission (EUC) to propose legislative directives for patents in biotechnology and later software to provide for legal clarity in these new technological areas. Both the biotech directive (98/44/EG) and the software directive (2002/0047/COD) strived for pre-emptive harmonization of the national patent law of the EU member states to prevent diverging national court judgements in new technological areas which would possibly have fragmented the European patent system.

Despite of incongruity in the contracting states and full institutional independence, some institutional co-evolution between the EU and the EPO system has emerged. This can be made explicit by parallel member state extension, but also by the EU's legislative actions which aimed at securing the EPO's granting practice by clear statutory norms at the EU level. This indirect (co-)regulation of the EPO system is also related to institutional problems within the EPO itself, whose constitutional treaty EPC has been considered as structurally “non-revisable”⁵ for contentious issues.

³ Ullrich, H. 2004: Harmony and unity of European intellectual property protection, in: D. Vaver, L. Bently (Ed.), *Intellectual Property in the New Millennium*. Cambridge, pp. 20-46: 77

⁴ Borrás, Susana 2003: *The Innovation Policy of the European Union. From Government to Governance*. Cheltenham, UK and Northampton, USA

⁵ Bossung, O. 2003: A Union Patent Instead of the Community Patent – Developing the European Patent Into a EU Patent, in: *International Review of Intellectual Property and Competition Law (IIC)*, Vol. 34, No.1, pp. 1-30.

As I will argue, these attempts for legislative regulation of substantive patent law must be evaluated as steps towards the politicisation and democratisation of patent governance in Europe. They have brought patentability standards to the arena of policy-making and allowed for the involvement of “unusual actors“ in the deliberation processes.

As a case study, I will refer to the contentious EU biopatent directive (98/44/EG) which led to protracted negotiation processes at the EU (1988-1998) and the national level concerning directive’s implementation (1999-2006).

I will discuss some effects of the EU biopatent directive on the patent system in Europe.

- Has legislative governance by the EU cast the “shadow of hierarchy” upon the self-regulatory structure of the EPO patent system? Did agenda setting at the EU level just ratify the rules developed at the EPO level or did the legislative outcome make a difference? How was EU legislation “transposed” to and implemented by the EPO?
- How were questions about separation of powers, transparency, and accountability of the EPO system addressed by the European Parliament?
- Caused by endogenous and exogenous factors, the EPO patent system currently seems to be in crisis, articulated inter alia in claims about inefficiency, decreased patent quality, capture by the clients, “anti-commons” effects, and political contestation of the legitimacy of certain patent granting practices (concerning subject matter and scope). What has been the EPO’s response, did external challenges result in internal reflexivization and proceduralization?
- Did politicization and vocal contestation of patents in the public sphere impact on the self-regulatory structure of the EPO patent system? How did the emergence of new actors - apart from economic competitors - in EPO’s opposition proceedings influence the decision-making processes?
- Can the biopatent directive be regarded as a step towards a new, reflexive governance structure which establishes feedback loops between the EPO and the EU system? Or is legislative patent governance – after the failure of the software directive – but an episode in the European patent system?

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