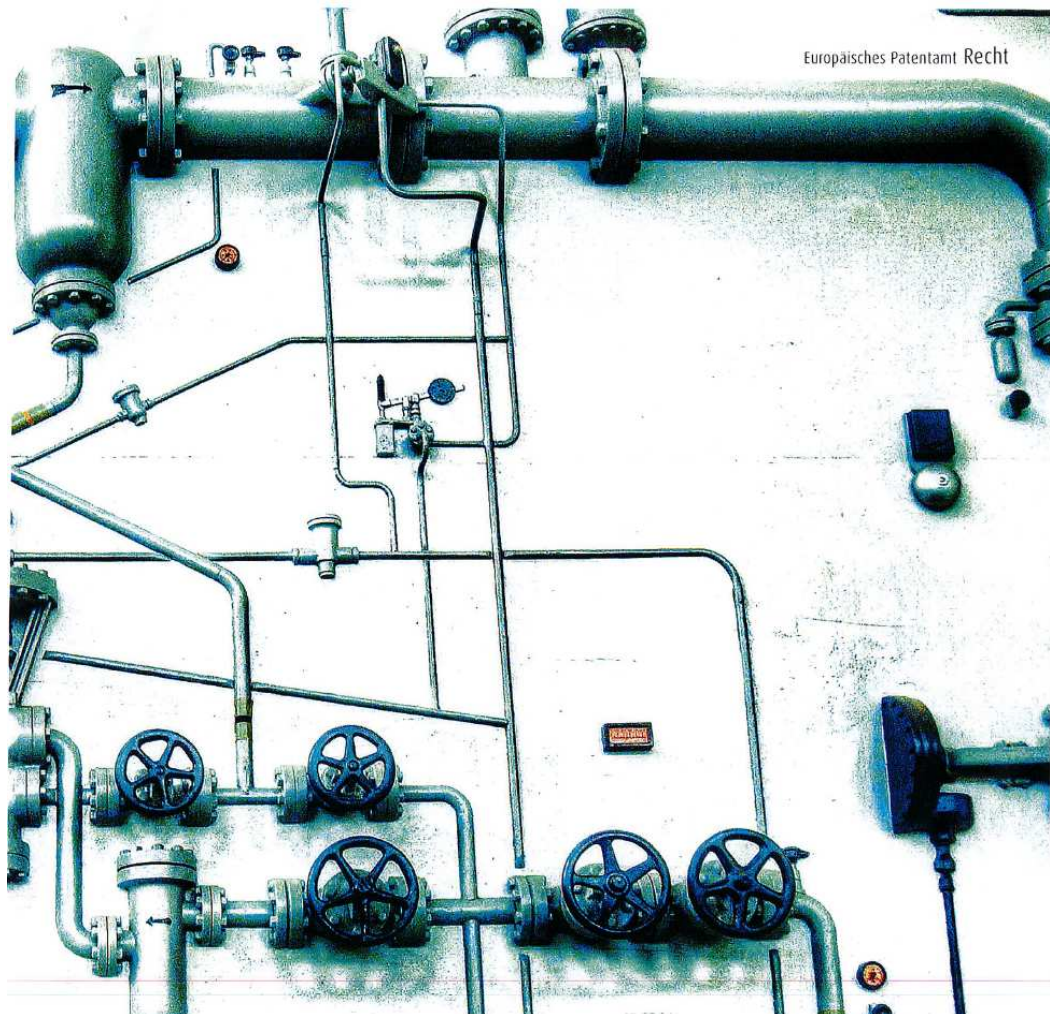


Under Steam

Businesses and attorneys are increasing the pressure on the European Patent Office, complaining about significant deficiencies. In a recent decision, the Office itself decries the missing separation between patent prosecution and legal checks and balances, in terms of personnel. Structural reforms of the European Patent behemoth appear to be unavoidable.

BY CATRIN BEHLAU AND MATHIEU KLOS



It was June 22, 2010, with Football World Cup Fever raging all around the world. On that day, world championship group games between France and South Africa and Greece and Argentina were scheduled. At the same time, Oral Proceedings were taking place before an Opposition Division

of the European Patent Office (EPO) in Munich. This combination of soccer and patent law may very well prove consequential for the European patent system. But let us tell the story from the beginning. Everything has started with business as usual. Automotive supplier *Ixetic*, as represented by the Munich IP firm *Wallinger Ricker Schlotter Tostmann*, has a European patent directed at a vacuum pump (EP 1 117 933). *Ixetic's* competitor *Robert Bosch* had successfully challenged the grant before the European Patent Office at first, using

its law firm of record, *Dreiss*. On June 22, 2010, *Ixetic* challenged this decision before the Opposition Division, which revoked the Patent again. In turn, *Wallinger* filed an appeal before the Technical Board of Appeal and later on before the Enlarged Board of Appeal. So far, so good.

Serious Accusations

However, the case that *Wallinger* made in a publicly available brief before the Enlarged Board of Appeal (► *Combative*, page 65) was significant: As claimed, the Opposition Division of the European Patent Office revoked the Patent in Oral Proceedings because both judges preferred to watch football games at the World Championship in South Africa instead of discussing legal matters.

WRST WORKING TRANSLATION
JUVE Rechtsmarkt 07/14, pages 62 et seq.: "Dampf im Kessel"

Factually correct, one presiding judge was French, another was Greek. Furthermore, the Chairman of the Opposition Division has abruptly ended the Oral Presentation by the Wallinger attorneys at half past three with the remark that the Patent will be revoked. Wallinger's brief succinctly states: "*The Group Stage Game between France and South Africa has started at 4 p.m. MESZ*". Furthermore, the overall conduct of the proceedings, in the perception of the law firm and its client, made it clear that the main purpose of the judges was to close the proceedings quickly. Whether this has influenced the negative decision for *Ixetic* cannot be conclusively determined, as stated by the attorneys in their brief. In any event, in its appeal, *Ixetic* raised serious procedural violations, also based on the fact that the Opposition Division had declined to even listen to new arguments and auxiliary requests.

In the end, the Technical Board of Appeal has ultimately declared the *Ixetic* Patent valid in 2012, however has declined to address the procedural violations as objected to by *Ixetic*, only providing the remark that one purpose of EPO jurisdiction is to limit the number of appeal proceedings. In response to this, the automotive supplier and its attorney,

Michael Wallinger, took the case before the Enlarged Board of Appeal.

Already the allegation of serious procedural violations is significant. However, that is not the end of the story for *Ixetic*. For it is even more explosive that the automotive supplier, in its grounds supporting the appeal before the Enlarged Board of Appeal, also requests to recuse the Chairman of the Enlarged Board of Appeal, Wim van der Eijk, based on the fact that he is biased. While *Ixetic* has no doubts in regard to the legal qualifications of the Chairman, a fundamental problem remains: The Opposition Proceedings against a European Patent is an administrative act. Therefore, the Enlarged Board of Appeal being the highest instance deciding on procedural violations, also renders judgment on administrative mistakes or violations. In this respect, however, the Chairman is biased, since he himself is a leading employee of the EPO, who is responsible for implementing the fundamental principles of exactly these procedures. Furthermore, in his role as the Vice President of the Directorate General 3 (GD 3) he was also integrated in the overall administration of the EPO.

Attorney Wallinger therefore is adding salt to the wound: the administration of the EPO is not separated from the Boards of Appeal, neither in terms of personnel nor in terms of organization.

However, the Boards of Appeal are exactly the venues for checking the decisions made by the officers granting the patents. Therefore, three appellants have filed complaints before the German Federal Constitutional Court. The accusation: lack of checks and balances. Similar requests for recusing the Chairman have been filed in the past, however without any of them being successful.

The Bombshell

However, at the end of April, the Enlarged Board of Appeal rendered an unlikely decision: For the first time, the Enlarged Board of Appeal has declared that the Presiding Judge and Chairman of the Enlarged Board of Appeal is biased and must be recused. This Interlocutory Decision in the case *Ixetic* (R 19/12) is expected to have far reaching consequences for the structure of the Office.

In the decision, the Enlarged Board of Appeal states that there is no legal basis for the intermingling of administration and judiciary in regard to its personnel, irrespective of the fact that this has been established practice in the past. As a consequence, van der Eijk was replaced by his Deputy, Brigitte Günzel, in the *Ixetic* process. However, the Board still needs to decide on the question whether the right to be heard has been denied to *Ixetic* in these proceedings. The judges have held that the integration of the Boards of Appeal into the Office is a structural weakness. However, based on the Treaties underlying the European Patent Convention (EPC), this deficiency must be accepted, at the moment. Any changes can only be implemented by the Member States.

This decision – which was rendered by the Office itself – is seen as a clear sign of an internal opposition against the “strategy of efficiency” as espoused by the Head of the Office, Benoît Battistelli. The President of the Office is controversial, internally, as well as externally. In the opinion of many German patent attorneys, the manner how the EPO conducts opposition and appeal proceedings at the moment is “an imposition on the parties”.

A patent attorney from Düsseldorf states “*In the past, the jurisdiction was a model of service orientation. However, nowadays many important patents are revoked simply for pro forma reasons. Sometimes an error of translation suffices.*” Many critics hold EPO President Benoît Battistelli responsible for the situation. His primary objective is an expedient processing of the pending cases. However, expedient processes and formalized reasons for the decision are only one aspect. In a more fundamental objection, patentees and attorneys object to the lack of right to be heard and too close a connection between the division granting the patents and the judiciary supposed to check these decisions. A union of employees of the EPO, the SUEOU (Staff Union of the European Patent Office) has pointed to the Interlocutory Decision to also criticize the fundamental structural



Successfully against the EPO: Michael Wallinger is regarded as highly experienced in litigation processes and has successfully fought for his client *Ixetic* in regard to the verdict to recuse the Chairman of the Enlarged Board of Appeal.

problems arising from a lack of separation between the Office and jurisdiction. At least part of the blame has to be assigned to the residing President, as noted by SUEPO in a press release. SUEPO is an outspoken critic of Battistelli.

According to insiders of the Office, the Interlocutory Decision is also an expression of internal divisions within the judiciary. Munich-based patent insiders even speak of a power struggle within the Office. One attorney notes: “*Among the EPO judges, two camps appear to exist. One group provides decisions strictly in line with formal aspects, while the other group wants to duly focus on the merits of a case and technical arguments.*”

Support for Karlsruhe.

The Office also faces strong headwinds coming from Karlsruhe and Luxembourg. Three constitutional complaints are pending before the German Federal Constitutional Court, in particular in regard to the patent granting practice of the European Patent Office. *Mundipharma* (AR 2435/13), *Barokes* (2 BvR 421/13) and a company acting via a proxy (2 BvR 2480/10) have filed a complaint against the violation of separation between the Boards of Appeal of the EPO. They raise the complaint that the decisions in opposition proceedings are not subject to control by an independent judicial body.

In the above-referenced decision, the Enlarged Board of Appeal of the EPO also refers to an opinion filed in these constitutional complaints, for example an article by the Stuttgart based constitutional expert Prof. Dr. Rüdiger Zuck,

Combative

As always not hesitant to take up a fight, Munich based IP law firm Wallinger fights for *Ixetic* up to the highest instance in order to ensure fair proceedings before the EPO.

In principle, the battle was already won. The Board of Appeal of the EPO has upheld the *Ixetic* patent against the attack by Robert Bosch. However, *Ixetic* nevertheless has appealed to the Enlarged Board of Appeal in order to have the Enlarged Board of Appeal examine procedural flaws in the lower instances.

In doing so, *Ixetic* again has relied on Wallinger Ricker Schlotter Tostmann. The Munich based law firm of both patent attorneys and attorneys at laws is highly experienced in litigation processes. For example for Shimano many a successful patent battle regarding bicycle components was won. Also, the name partner and patent attorney Dr. Michael Wallinger is seen as being well-connected within the automotive industry. Wallinger has already represented Magna subsidiary and automotive supplier *Ixetic* during prosecution of the patent in dispute regarding vacuum pump technology.

Bosch also relied on well-established contact for this dispute with *Ixetic*, namely the Stuttgart based patent attorney law firm Dreiss, which has represented Bosch in opposition proceedings. Bosch was no longer part of the proceedings before the Enlarged Board of Appeal of the EPO.



Heavy Hand: Frenchman Benoît Battistelli is in the focus of criticism, not only based on the strategy of efficiency that he has dictated as the President of the EPO.

Multinational Project

DATA AND FACTS REGARDING THE EPO	
founded	1973
Member States	38 (16 upon constitution)
Employees	around 7,000 (incl. about 4,100 patent examiners)
President	Benoît Battistelli (since June of 2010, previously, among others, Directeur Général of the French Patent Office)
Patent applications per day / year	725 / approximately 266,000
Number of patents as granted in 2013	66,000, wherein about 2/3 are assigned to applicants outside of Europe
Role in the new European patent system	It is established that the EPO will also administer prosecution of the new "unitary" EU Patent
PATH LEADING TO A GRANTED PATENT	
Patent application	Administrative act before the EPO
Opposition (can be launched by any member of the public)	possible results: 1. Grant of a Patent is confirmed 2. Patent is upheld in an amended form, a new patent is published 3. Patent is revoked
Appeal	Appeal against the decision in opposition proceedings can be filed within two months. 28 technical and 1 legal Boards of Appeal decide in proceedings that are judicial proceedings all but in name. Parties may file a petition for review regarding fundamental violations of procedural rules, before the Enlarged Board of Appeal

who is the spearhead in two of the three constitutional complaints and another opinion by Prof. Dr. Dr. Siegfried Broß, a former constitutional judge, who has prepared the opinion for *Mundipharma*.

Among patent experts, it has been questioned for a long time, whether the constitutional complaints in Karlsruhe have any chance of success. It cannot be denied that the EPO is a complex supranational administrative body based on contracts between 38 Member States (► *multinational Project*). According to a well-known patent expert, "It cannot be ruled out that the Federal Constitutional Court comes to the conclusion that the EPO, at the moment, guarantees at least a minimum right to be heard". However, since the Interlocutory Decision by the Enlarged Board of Appeal has gone public, experts report that the judges of the Federal Supreme Court, which has jurisdiction over patent cases, show increased interest for this topic. It is said that these judges have good connections to the Federal Constitutional Court.

In the meantime, not only German patent experts are interested in this topic. A Greek member of the European Parliament has launched a request to the EU Commission regarding the state of affairs at the EPO. A similar request is now before the Italian Parliament. According to JUVE information, constitutional complaints against the practice to render decisions of the EPO are also pending before the constitutional courts of the UK and the Netherlands. According to information obtained from patent experts, a second request to recuse the Deputy of van Eijk was filed shortly after R19/12 has been published.

The Interlocutory Decision of the EPO is also explosive in view of Spain's complaint presently pending before the European Court of Justice against the new unitary EU Patent (case C-146/13). Among others, Spain bases this complaint on the lack of judicial control of legal acts performed by

the EPO. Oral Proceedings are set to occur on July 1, 2014 in Luxembourg.

Up to this point, based on significant political pressure behind the introduction of the unitary EU Patent, experts have seen little chance of success for this complaint. However, in the meantime, some experts are of the opinion that the judges in Karlsruhe and in Luxembourg now have good cause to provide an opinion on this topic. Some experts even are of the opinion that based on these fundamental concerns about the state of affairs in the EPO, further delay in the ratification process of the European Unitary Patent Court (UPC) is possible. This is because the EPO will be responsible for prosecution of the EU Patents in the future. The UPC will be introduced together with this EU Patent. Up to this point, only three of the 25 participating Member States of the EU have ratified these contracts.

Anticipatory Obedience

Irrespective of the question whether or not a national constitutional court or a national government or the European Court of Justice have the power to force the EPO Member States to change the current status in the European Office, the Interlocutory Decision has already forced the Office itself to take action, on short notice. Experts agree that the practice of the past that the Chairman of the Enlarged Board of Appeal

also participates in decisions of the Boards of Appeal will be impossible if double duty in administration and jurisdiction remains in place.

According to rumors, Wim van der Eijk has been removed from all administrative responsibilities. At least, since the beginning of June, he is no longer listed as a Member of the Directorate on the internal presentation of the Office. The EPO has not provided any official statement vis-à-vis JUVE up to the editorial deadline regarding the present article.

On the other hand, the separation of jurisdiction into a completely independent administrative body (as was the case for the German Federal Patent Court in the 1950ies) is not on the horizon. In order to implement this, the Treaties underlying the European Patent Convention would need to be amended. Patent experts report that corresponding plans are available, in principle. This topic was already discussed internally in 2004. At that time, the topic was referred to a conference of the Member States, which, however, has never materialized. It is also questionable whether this attempt would even be successful. This is because all 38 Member States would have to agree to a separation of the judiciary from the Office. However, on the backdrop of all the difficulties encountered in the implementation of a unitary EU Patent and the UPC, this would seem to be extremely difficult and time consuming. The overall issue will therefore unlikely be off the agenda soon. ◀