Governance of the European Patent System

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Knowledge-based economies

• Modes of
  – generation
  – appropriation
  – access to
  – diffusion
  – distribution

• of knowledge (in science & technology) have become decisive for societal development and important sites of political contestation
Reforms are needed

• Thesis:
  The European patent system is characterized by technocratic decision-making. It lacks democratic legitimacy and accountability and has become increasingly inefficient.

• Outline:
  – I. Diagnosis
  – II. Proposals for reform
I. Diagnosis
European Patent Organization (EPO)
Contracting States - EU member states

Member states largely coextensive, but EPO: 7 non-EU members
**EU and EPO – two worlds apart**

- Two fully independent supranational bodies
- EPO not subjected to the EU and to ECJ decisions

**EU**
- Commission
- Council
- Parliament
- ECJ

**EPO**
- Europ. Patent Convention (treaty)
- Administrative Council (legislation)
- EPOffice (execution)
- Boards of Appeal (quasi-judiciary)
European Patent Office

- Supranational organisation
- High degree of **autonomy**
- Control by Administrative Council very weak
- **Self-governance** mainly by
  - Interaction between applicants and the office
  - Interplay between granting departments and Boards of Appeal (quasi-judiciary bodies)
EPO policy: The black box

Granting + decisions of Boards of Appeal = *interpretation* of the
EPC = *implicit policy-making* masked as mere technical and
legal administrative execution of law
EPO‘s self-regulation

balance ?                       Drift
EPO‘s drift

- self funded by fees of patentees
- interests apart from the applicant‘s not represented

- risk: applicants as customers to be served
- risk: capture by clients

- expansion of patent eligibility
- broad scope of patents granted
- narrow construction of limits to patentability
- low threshold for inventive step

Separation of powers, accountability, democratic legitimacy and control ?!
EU – directives on biotechnology and software

• Legislative regulation of substantive patent law in new technological fields
• Democratization of patent governance
• Responsiveness of European Parliament to concerns:
  – Ethical limits
  – Public domain/ Open science
  – Public Health/ Costs
  – Efficiency
  – Alternative modes of innovation (open source)
• Contentions gave impetus for re-balancing of the patent system
Challenge of hermetically closed patent system

- Janus-headedness of patents between generation – diffusion of knowledge
- Call for a better balance
- Question inherent expansionist drive
- Innovation to be qualified in terms of efficiency, sustainability and social desirability
Interface EU - EPO

EU

EU directive
98/44/EC
(biopatents)
1998

EPO

„implemented“ by
EPO‘s
Administrative
Council as rules 23
d-e in the EPC‘s
Implementation
Regulation in 1999
II. Proposals for reform

Goal: coherent co-evolution of the multiple poles of the patent system (including national level)
Patent policy must be brought back to the *legislative* arena

- transparency
- political decision-making
- accountability
- participation
- efficiency
Challenges for legislative regulation

• **Specific legislation** on patents – may provide guidance to EPO and courts - but may quickly be rendered obsolete

• **General clauses** allow for more flexibility

• Legislation “after the fact“ = ratification of practice

• → **kairos** (the right time)
Reflexivity and responsiveness

- Reflexive *self-regulation* of the EPO must be combined with venues for *legislative* decision-making and feed-back loops with *society*
1. European Parliament: create an ad hoc committee on patents

• to strengthen MEP‘s competence
• patents as cross-cutting issue
• allow for awareness + political will formation
• hearings and expert reports
• platform for dialogue with the Commission and with EPO
2. Strengthening the interface EU – EPO and redesign: regulatory notion of patent law

- Qualitative **reporting** of EPO on its practice: make implicit policy explicit (opening the black box)
- **Self-restriction** of EPO necessary: acknowledge limits of competences as an executive body: must request advisory support by national and EU legislators, and by ECJ
- Systematic use of patent information as **early warning system** for regulatory activities outside of patent law (health, environment, anti-trust): alert legislators
3. Patent assessment and impact analysis

- Scrutinizing empirical impact of patents
- Strengthening of analytical capacities both at EU and EPO
- Independent reviews of samples of patents granted (audits)
- Expertise from economists and social scientists
4. Participatory fora and deliberation

- Patent eligibility and scope in new technological fields are genuine political decisions
- Institutionalization of public deliberations between patent experts (technicians, lawyers), politicians, stakeholders, and civil society at EPO on
  - state of the art, prior art, inventive step threshold
  - public domain
  - ethical and public policy exceptions to patentability
- to be fed back to pre-grant-process
5. patents and geopolitics

- EU is not bound to imitate flawed US patent policy
- Self-confident design of a regulatory concept of IPRs
Conclusion

• EPO to be redefined as regulatory office
  – *Accountability* for public good and the balancing of interests, enhanced communication with the European legislators and the public
  – *Transparency* to be improved: “Practice Notes”
  – *Democratic control*: EPO = element within a broader European governance framework

• Adequate communication and *policy-coordination* between the European multi-level structure, as opposed to dominance or hegemony

• Democratization and re-regulation of patent law

• ➔ *Reflexive and responsive governance* of the patent system in knowledge based societies