

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**

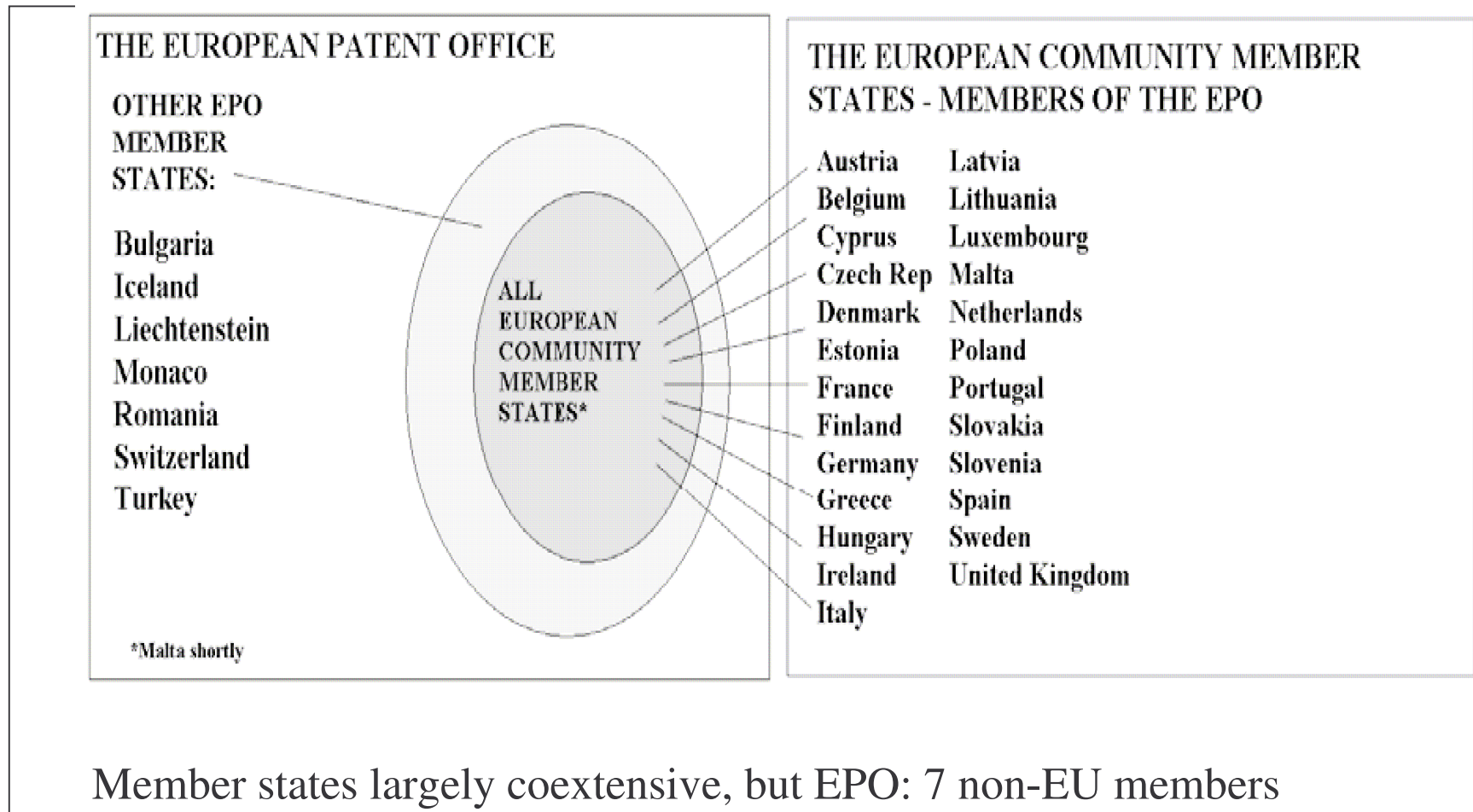
Reforms are needed

- **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



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

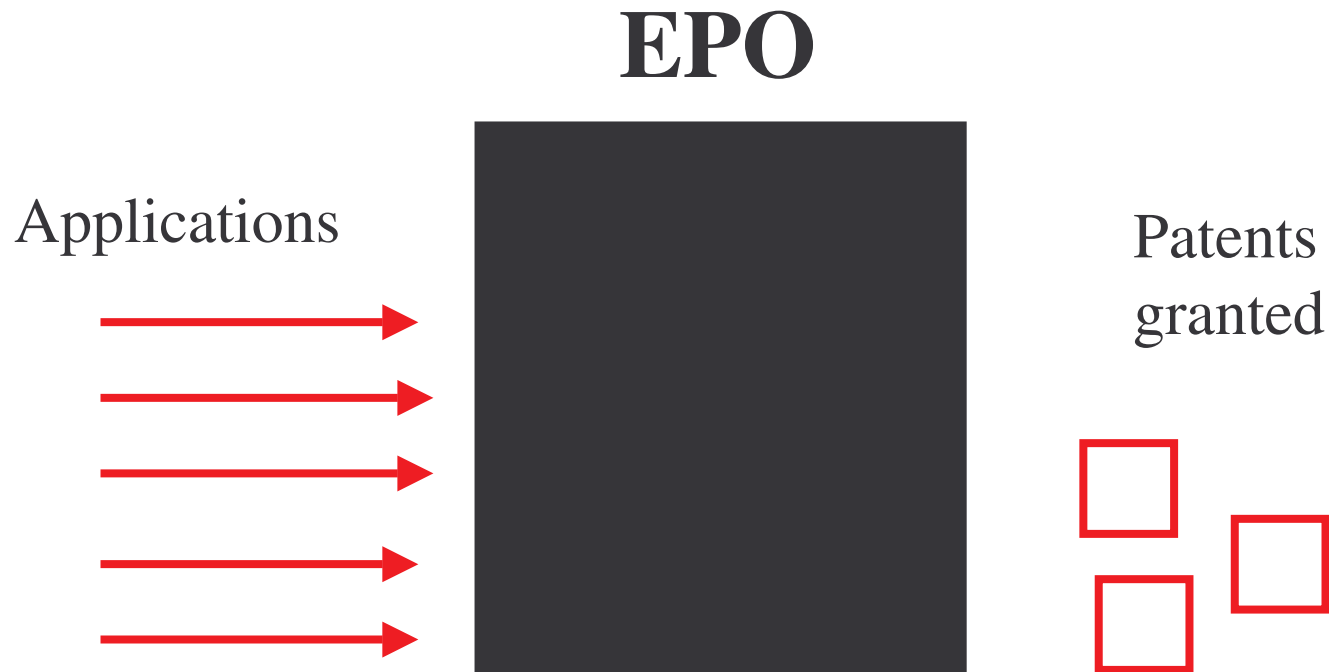
EPO

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

European Patent Office

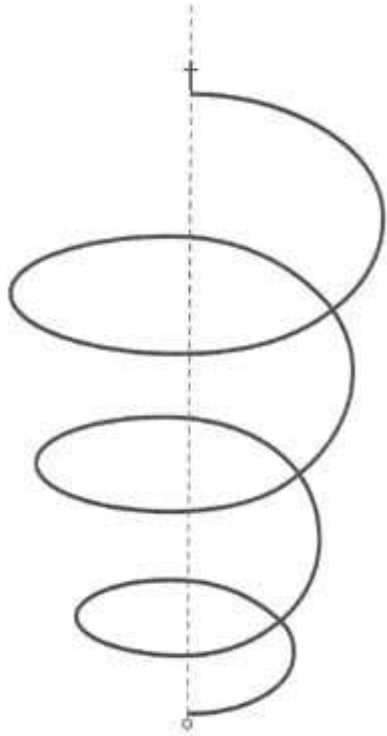
- Supranational organisation
- High degree of **autonomy**
- Control by Administrative Council very weak
- **Self-governance** mainly by
 - ↔ **Interaction** between **applicants** and the office
 - ↔ **Interplay** between **granting** departments and Boards of **Appeal** (quasi-judiciary bodies)

EPO policy: The black box

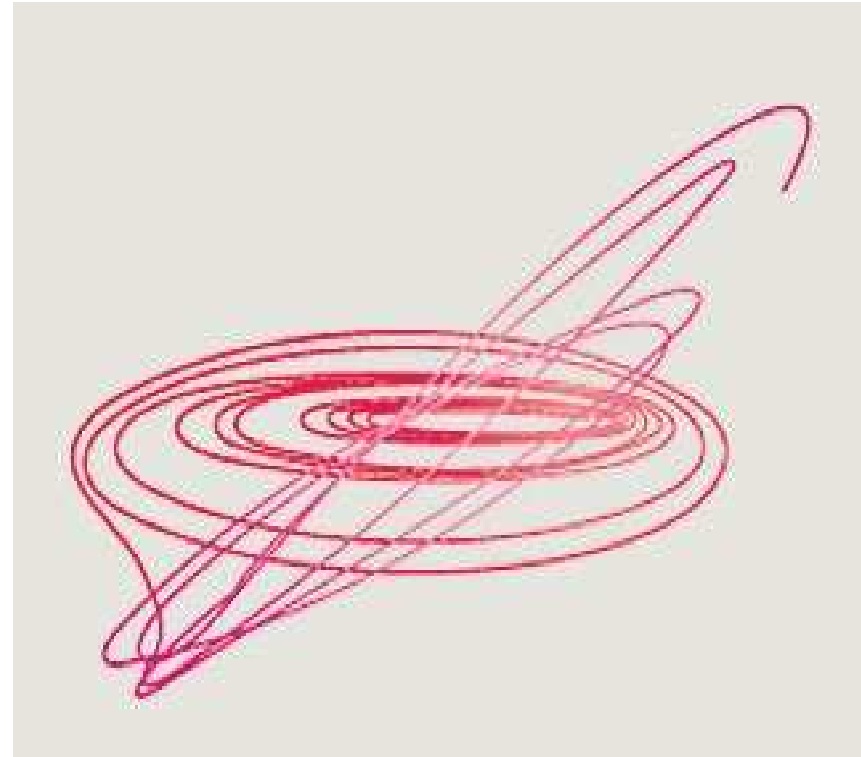


Granting + decisions of Boards of Appeal = *interpretation* of the EPC = **implicit policy-making** masked as mere technical and legal administrative execution of law

EPO's self-regulation



balance ?



Drift

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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 ?!

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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

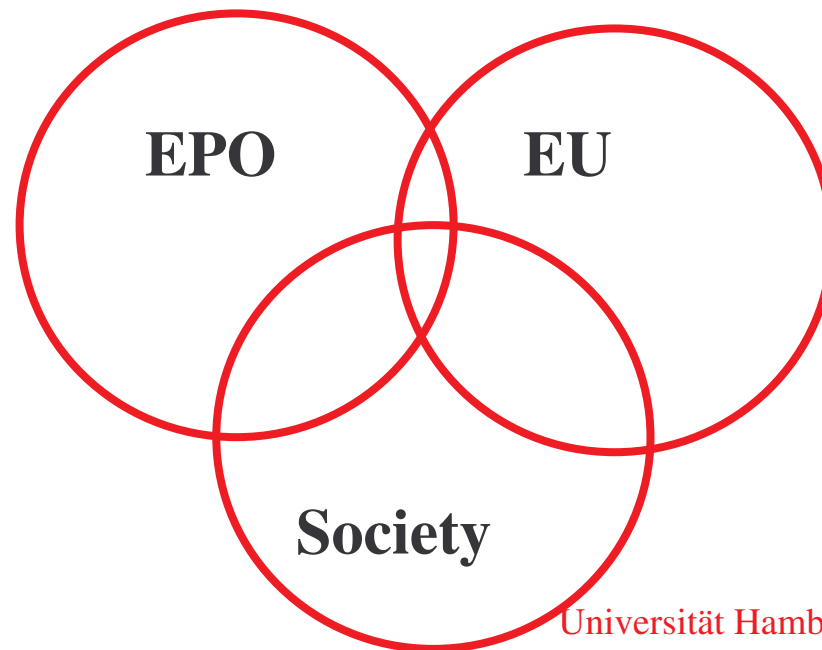
- transparency
- political decision-making
- accountability
- participation
- efficiency

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

