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Recusal of Non-Permanent Judges of the Swiss Federal Patent Court compared to Article 7 of the Statute of the Unified Patent Court

Simon Holzer (MLL Meyerlustenberger Lachenal Froriep Ltd.) · Thursday, December 26th, 2013

In a recent decision ([case no. 4A_142/2013](#)), the Swiss Federal Supreme Court had to decide whether one of the non-permanent judges of the Swiss Federal Patent Court, a Swiss patent attorney, was obliged to recuse himself due to activities of one of his colleagues in his patent law firm in connection with a trademark matter of a company affiliated with one of the parties of the pertinent patent dispute. The Swiss Federal Supreme Court took the opportunity and established a high standard to ensure the independence and integrity of the non-permanent judges of the Swiss Federal Patent Court.

The case at hand concerned the conflict between the Swiss retailer Denner and the patentee of the Nespresso capsules, Nestlé. Judge Rigling, a non-permanent judge of the Swiss Federal Patent Court, who was appointed to handle the patent dispute as one of the non-permanent members of the court, disclosed to the parties that one of his colleagues in his patent law firm had represented Migros France in a trademark matter, which had also been coordinated by Migros France's parent company Migros-Genossenschafts-Bund. Nestlé requested that Judge Rigling recuse himself from the case because Denner was also a subsidiary of Migros-Genossenschafts-Bund and Migros-Genossenschafts-Bund sold Nespresso-compatible capsules in Switzerland as well. According to Nestlé it could therefore not be excluded that the non-permanent Judge Rigling had a conflict of interest.

The Federal Patent Court rejected Nestlé's request for recusal of Judge Rigling, holding that the Federal Patent Court Act states in Article 28 that non-permanent judges shall recuse themselves in proceedings where a member of the judge's law firm or patent law firm or employer represents one of the parties. The Court found that this was not the case here because the administration of the trademark did not concern one of the parties but only a foreign company of the same group.

Nestlé appealed the Federal Patent Court's decision and the Swiss Federal Supreme Court rejected the reasoning of the Federal Patent Court. It held that Migros-Genossenschafts-Bund had an obvious interest in the outcome of the patent dispute between Nestlé and Denner and that Judge Rigling's patent law firm was too close to the matter in dispute. Therefore, the Swiss Federal Supreme Court came to the conclusion that Judge Rigling's independence could be affected and he could be biased in the patent dispute. However, it rejected a schematic evaluation in connection with affiliated companies. Rather, the Court advocated a case-by-case analysis.

To sum up, there are two main lessons to be learnt from the Supreme Court decision. The first one is that also activities for or against companies of the same group as one of the parties of the patent dispute must be taken into account when examining the independence of a non-permanent patent judge. The second one is that even rather marginal administrative activities (such as the administration of a trademark) might create the risk that the independence of a non-permanent patent judge is affected.

This decision is not only interesting for the new Swiss Federal Patent Court but also for the development of the judges pool of the new Unified Patent Court. To ensure the independence of the judicial activity of the judges in the pool of judges of the Unified Patent Court Article 7 of the Statute of the Unified Patent Court provides that judges may not take part in the proceedings of a case in which they:

- a) have taken part as adviser;
- b) have been a party or have acted for one of the parties;
- c) have been called upon to pronounce as a member of a court, tribunal, board of appeal, arbitration or mediation panel, a commission of inquiry or in any other capacity;
- d) have a personal or financial interest in the case or in relation to one of the parties; or
- e) are related to one of the parties or the representatives of the parties by family ties.

The new Swiss decision holds in an obiter dictum that judges may also not take part in the proceedings of a case in which they have acted or advised against one of the parties. It is interesting to see that paragraph b) of Article 7 of the Unified Patent Court would therefore not stand the new Swiss standard for examining conflict of interests of non-permanent judges.

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This entry was posted on Thursday, December 26th, 2013 at 6:20 pm and is filed under [Procedure](#), [Switzerland](#), [UPC](#)

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