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The EPO and the Problem of the Right Speed (I) – Introduction

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How long should proceedings before the EPO ideally take? Admittedly, this is a tricky question because various stakeholders will usually have different interests and thoughts as to what the "right" or "ideal" speed is. Let us tackle this question by beginning with a simple distinction. I posit that the answer depends considerably on whether the proceedings are *ex parte* or *inter partes*.

In ex parte examination proceedings, the main stakeholders are the applicant and the patent office. Most, but not all, patent applications do not bother the public much. I therefore tend to take the view that the "ideal speed" of such cases is the one that conforms to the applicant's interests and wishes, i.e. it should match the speed desired by the applicant as closely as possible. In my experience and given the diversity of applicants, this "ideal" speed is not a constant and largely depends on the technical field of the application. When the application is in a rapidly changing technical field with short product cycles, the applicant will normally have a strong interest in the fast grant of its application. Conversely, in the field of pharmaceuticals and biologicals where product development and approval times are on the order of 12-14 years, applicants will generally be happier with a much slower speed. This is because it does not make much sense to begin the costly national validation process at a time when it is still unclear whether the subject-matter of the patent application is approvable from a regulatory standpoint.

Therefore, "one size fits all" does not apply when it comes to an ideal speed of EPO examination proceedings, and the EPO would be well advised to keep the speed of examinations flexible and in accordance with the applicant's wishes. In my personal view, the EPO's past practice with the so-called PACE requests came very close to this ideal, and the EPO should be commended for having introduced it. The EPO rightly considered PACE as "its popular free programme". However, it has been my experience that PACE requests are still filed for only 5-10% of all applications. Thus, it seems that the remaining 90-95% of applicants are generally happy with the EPO's normal speed in examination proceedings.

A caveat should be made here. There is, of course, a fraction of EP applications that do concern competitors or the public (e.g. certain NGOs who do not like patents for certain things, such as live matter, or even more ordinary goods such as beer). Those

competitors can and usually do make their voices heard by filing third-party observations under Art. 115 EPC. The EPO's practice of dealing with such observations has much improved over the last couple of years. Generally, such observations are now taken seriously and considered thoroughly, which obviously does not mean that they are always followed by the examiners (nor should they be). Moreover, they generally result in an acceleration of the examination proceedings, as they should (exceptions confirm the rule). This is obviously desirable, since if there is a commercial or legal dispute between two parties, the EPO should decide such a dispute as soon as possible. Justice delayed is justice denied, as the English say – or as the Germans say: Nur schnelles Recht ist gutes Recht.

Therefore, is everything now in order with the EPO's speed of handling cases? I am afraid not. The latest initiatives by EPO management seem to be focused on working on a problem ("early certainty" in examination) that most applicants do not really have, while not doing much, if anything, about the EPO's real problem: the extremely slow speed of appeal proceedings.

I will therefore deal with the impact on the EPO's policy on the various type of proceedings separately and in more detail in three blogs to follow.

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