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Scary Figures Call for Action by the EPO

Thorsten Bausch (Hoffmann Eitle) · Sunday, June 19th, 2016

No, this is not another blog about the Brexit, even though the current figures of the EU referendum polls in the UK make this author wonder how it comes that cooperation and European harmonization is so uncontroversial and successful in the field of intellectual property, yet apparently so controversial and difficult in other fields. Perhaps part of the explanation is that patent law appeals more to the rational part of us. Reason may render it obvious that cooperation and harmonization – as difficult and thorny it may sometimes be between democracies with their own pride, history, culture and language – will make both a union as a whole and its individual parts weightier and more relevant on a global scale than its individual countries could ever be. For example, have you ever heard of Hunan? It is number 7 of 23 provinces of the People's Republic of China, yet it has about the same, if not a higher population than the UK (including Scotland!). And Rajahstan, the number 7 of India, is reported to have had a population of 68,621,012 in 2011, not to speak of India's no. 1 province, Uttar Pradesh, with 199,281,477 inhabitants in the 2011 census.

India with its 29 states and 7 union territories, with 122 major languages and 1599 other languages, 4 major religions and an overall population of over 1.2 billion manages to stay together since 1947, probably not least thanks to its long history under British government. The United States – nomen est omen – is another example of a successful union that owes a lot to English culture and heritage. Before this background, would it not be attractive for the Brits to stay part of and continue to shape the third great union of states on this planet, the European Union, which has – despite all of its faults and imperfections – doubtlessly helped to secure peace and prosperity for so many decades by now?

We will know the answer soon, yet whatever it will be, this is not what scares this author, since it will definitely not be the end of the European Union and the United Kingdom. The UK will remain a member of the EPO, life will go on and we will make the best out of it. In the end, it is a democratic decision and that alone means a lot. And it will be primarily the Brits who will be affected by their decision, for good or for bad.

The figures that do presently scare me, from a professional perspective, are coming from a different source where you would perhaps not expect them, namely the latest statistics from the Boards of Appeal of the EPO, published in the Annual report of the Boards of Appeal of the European Patent Office 2015. It is not the outcome of the inter partes appeals that concerns me (although a ratio of 1:6 between maintained and revoked patents on appeal, if successful, is worrisome for patentees, cf. pg. 12 of the report). In this regard I would mainly wish for more

meaningful statistics. The pie chart on page 13 groups the inter partes appeal decisions into the categories "appeal rejected" on the one hand and "patent revoked/maintained unamended/maintained amended" on the other hand, but this does not make much sense if one gets no clue about the outcome of the first instance decisions against which the appeal was rejected. Why not present the results in two different statistics, i.e. (1) "appeal allowed/appeal rejected" and (2) final outcome, i.e. "patent revoked/maintained amended/maintained unamended/other (remittals)"? The latter statistics would be important because stakeholders and in particular national courts would then get a much clearer picture about the overall chances of a European patent to survive EPO opposition appeal proceedings. Even more interesting would be a further breakdown, e.g. into various technical fields or even IPC classes.

Yet the really scary figure in the Annual report 2015 is the number of vacant positions of Board of Appeal members. Page 17 of the report shows that the number of BoA chairpersons went down from 27 to 22 and the number of technical and legal BoA members from 132 to 120. At the same time, the number of appeal cases remained more or less the same. What does this mean? It means that the duration of EPO appeal proceedings, which even now is excessively long (in the order of three years on the average, and in the chemical and biotech fields even more, according to this author's experience) will continue to rise in the not too distant future. This author has already been put on notice by one board of appeal that in view of its current backlog of cases, a decision can only be expected in about six years.

This is a dramatic development against which swift action must be taken. Stakeholders in the patent field need nothing more urgently than legal certainty, which includes quick decisions within 1-2 years at most. This is not the time and place to play the blame game and to investigate why we are where we are. Yet it is the time and place to really call the EPO President and the Administrative Council to their duty to fill up the gaps in the Boards of Appeal as soon as possible. If the objective to have a BoA decision within 1-2 years is to be achieved in a few years' time and if the quality of the decisions is not to suffer, then it is in my view inevitable to set up significantly more Boards of Appeal and to appoint additional capable members standing up to this challenge. Whether or not Brexit will come and whether or not the UPCA will eventually be ratified, the Boards of Appeal will continue to be one of the most important cornerstones of a functioning patent system in Europe. This should not be put at risk.

So let us all hope for a change to the better in the next Administrative Council's meeting end of June.

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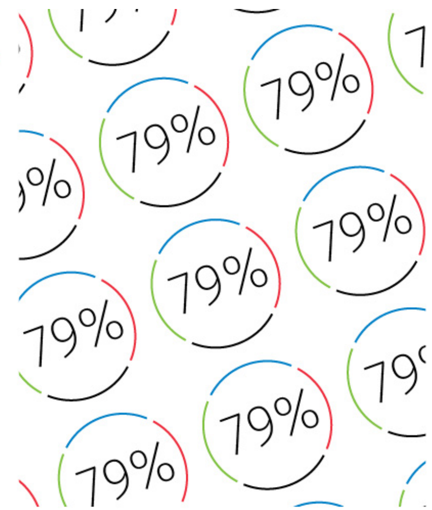

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This entry was posted on Sunday, June 19th, 2016 at 2:16 pm and is filed under Brexit, EPC
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