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A few thoughts on trust and judicial independence

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In these days and times, we are constantly reminded how important and how endangered seemingly simple concepts are such as truth, facts, science and trust. Hannah Arendt, the famous Jewish German-born American political philosopher, wrote about seventy years ago in her first major work "The Origins of Totalitarism"

> The ideal subject of totalitarian rule is not the convinced Nazi or the convinced Communist, but people for whom the distinction between fact and fiction (i.e., the reality of experience) and the distinction between true and false (i.e., the standards of thought) no longer exist.

This is why lies from political leaders matter so much: constant lying tends to blur the boundaries between true and false. This is also why accountability based on the principles of an impersonal and impartial justice is so important.

Timothy Snyder, Professor of history at Yale University, and perhaps one of the most insightful and important political thinkers of our times, has neatly summarized it here:

> Without trust, we can't have the rule of law.

Thus, trust in our institutions and in particular trust in an independent judiciary is so fundamental. If we lose this trust, we are literally sawing off the branch all of us are sitting on.

Readers paying attention to the news around the globe will find it easy to think of manyfold examples confirming this simple truth, but as this blog is a patent blog, let us turn back our attention to a popular subject on this blog, the independence of the EPO's Boards of Appeal, or the lack thereof as some critics claim.

While I have written about this subject a couple of times myself, I would today like to direct our readers' esteemed attention to two papers of my UK colleague Mike Snodin that were recently published in the CIPA journal (I hope that this link works, just scroll down the page and click to see a full-screen version of the latest edition). Mike's first article is titled: "G 3/19: A need to improve the perception of independence of the EPO Boards of Appeal?", and the second "G 3/19:

Do flaws in the EBA's reasoning amplify concerns regarding the perception of independence of the EPO Boards of Appeal?"

So, Mike Snodin has reviewed decision G 3/19 and its background in considerable detail. He is fairly critical about the Enlarged Board's reasoning on the whole, but the main point he makes is this: Fundamentally, G 3/19 was about the new Rule 28 EPC by which the Administrative Council (AC) "interpreted" Art 53b EPC in a particular way that essentially overturned the Enlarged Board's opinion in G 2/12 and G 2/13. The referring Board 3.3.04 in T 1063/18 thought that the terms of Art 53b EPC, as understood by the Enlarged Board in its earlier decisions, prevail over any terms of the Implementing Regulations as amended by the AC. The EPO President and the Administrative Council, however, thought that this result cannot stand, and the EPO President offered a President's referral of the case to the Enlarged Board. As Mike Snodin reports, **"this proposal received broad and overwhelming support from *almost* all Contracting States."** The referral was therefore made, and resulted in the Enlarged Board essentially overturning its earlier decisions.

Before this background, Mike Snodin wonders whether the members of the Enlarged Board of Appeal were really free to come to any different decision than the one they arrived at. Concerns about the perception of independence of the Enlarged Board were raised based on two undeniable facts: (i) the Administrative Council has disciplinary authority over the members of the Enlarged Board to the extent that they are EPO employees, which most of them are. (ii) EBA members are appointed by the Administrative Council, but only for a five year period, and their re-appointment again depends on the AC's consent and goodwill.

All of this is a consequence of the unfortunate construction of the European Patent Organization, which has been modeled as an supranational authority with diplomatic immunity, yet with a strong emphasis on its executive function and very tenuous checks and balances. In particular, the quasi-judicial function of the Boards of Appeal in patent disputes has received only little attention. Mike Snodin makes some suggestions at the end of his first paper how to improve the current situation, such as revisiting key proposals from 2004 (see AUTONOMY_BOA_CA_46_04_EN), which almost made it into the EPC but were then delayed and later shelved in the hope of a Community Patent Court soon to come. It will not surprise readers that I wholeheartedly support these proposals. Trust in our institutions and in particular in the independence of the judiciary, of which the EPO Boards of Appeal strive to be a part, is an essential cornerstone of our patent system.

With that, let us return to the bigger picture. As is well known, trust can be quickly destroyed but needs a long time and much effort to be built up. This is why attacks on the independence of the judiciary driven by an "us versus them" mentality or "enemies of the people" ideology are so misplaced and so dangerous. We should act against such ideologies with a firm and optimistic mind, e.g. by voting for politicians that help to build trust in institutions of civility, or – if you are a politician in power – by taking these elementary principles to heart and implement reforms that ascertain both judicial independence itself and the perception thereof. The European Patent Organisation is not the only institution where this would be highly desirable.

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