Patent Reforms at Both Sides of the Atlantic: A Critical Analysis from a "Good Governance" Perspective

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At present, I am carrying out a study of the European patent system from an administrative law/governance and comparative law perspective. Even though in the US, several patent scholars have been doing research on applying administrative law principles to the US patent system (notably Arti K. Rai, John F. Duffy, Craig Allen Nard and Kali N. Murray), in Europe the lack of attention to administrative law principles has remained a striking feature of the patent system. In contrast to commentators and practitioners in other technically complex areas, such as environmental law, the European patent law community has tended to pay little attention to administrative law doctrine and principles. One could claim that the European patent system largely is an uncultivated area in terms of governance. Moreover, the available literature on patent governance consists primarily of contributions by social and political scientists (e.g. Susanna Borrás, 2006; Ingrid Schneider, 2009) and focuses mainly on the European patent system.

In my research I employ the following definition of "governance": the proper functioning of institutions and their acceptance by the public (legitimacy), ensured by the rules of the political system for adopting decisions and solving conflicts between actors (legality), for safeguarding the efficacy of the government and the achievement of consensus by democratic means (participation). The European Commission has developed six main principles underpinning so-called "good governance": legitimacy, transparency, participation, accountability, effectiveness and coherence (European Commission, 2001). These principles are helpful in the light of a comparative legal analysis that goes beyond a simple testing of national administrative law principles. The European and US patent system and the administrative law concepts and principles vary significantly. Good governance principles are, however, shared more widely and may provide a useful guidance in (a) gaining a better understanding of the European patent system and (b) comparing the findings on the European system with the US in order to identify "best practices" to improve the European patent system. In the paper, I start from the *premise* that it is vital (1) that patent systems are subject to good governance principles; (2) that the interaction between heterogeneous actors in the patent system and beyond is clearly articulated, and (3) that safeguards are put in place to ensure that good governance principles are monitored and enforced throughout the patent governance system and intertwining governance systems.

The current patent reforms at both sides of the Atlantic seem to be bridging part of the transatlantic divide in patent law. Once the European proposals for a unitary patent and a unified patent court are adopted by the EU institutions, it will bring about a patent with a unitary effect in all the participating EU Member States and it will significantly

centralize patent dispute resolution. With the America Invents Act, the US is increasing the rule-making authority of the USPTO and is moving towards a first-to-file and a post-grant review system. These reforms constitute major changes with respect to the prior patent governance system in respectively Europe and the US. Yet, one may wonder to what extent these reforms will increase the compliance with good governance principles or whether the existing problems related to for instance transparency and participation by stakeholders in the patent system (e.g. Kali Murray & Esther van Zimmeren, 2011; Susanna Borrás, 2006; Ingrid Schneider, 2009) will only be exacerbated.

In the paper, I identify a number of “best practices” in the US and European patent system and explore to what extent these practices could be extrapolated to other patent jurisdictions in order to increase the compliance with good governance principles.