

AS TO THE ADMISSIBILITY OF

Application No. 39025/97
by LENZING AG
against Germany

The European Commission of Human Rights (First Chamber) sitting in private on 9 September 1998, the following members being present:

MM M.P. PELLONPÄÄ, President

N. BRATZA

E. BUSUTTIL

A. WEITZEL

C.L. ROZAKIS

Mrs J. LIDDY

MM L. LOUCAIDES

B. MARXER

B. CONFORTI

I. BÉKÉS

G. RESS

A. PERENIČ

C. BÎRSAN

K. HERNDL

M. VILA AMIGÓ

Mrs M. HION

Mr R. NICOLINI

Mrs M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 21 May 1997 by LENZING AG against Germany and registered on 18 December 1997 under file No. 39025/97;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant company is an Austrian company, with its seat in Lenzing, Austria. It is represented before the Commission by Dr J. Pagenberg, a lawyer practising in Munich. The facts of the application, as submitted by the applicant company's representative, may be summarised as follows.

A. The particular circumstances of the case

On 7 August 1989, the applicant company applied to the European Patent Office ("EPO") for a patent for its process for making cotton-like fabric from wood. The patent was granted on 16 December 1992 and designated as EP(DE) No. 356,419 in Germany. Opposition proceedings were entered in the EPO by Courtaulds plc and Akzo Faser AG within the 9 month time period provided for by the European Patent Convention ("EPC"). Such opposition proceedings were rejected on 4 July 1994 and the two opponent companies appealed to the Board of Appeal of the EPO, together with another Courtaulds subsidiary which was permitted to intervene in the proceedings. The Board of Appeal appointed a rapporteur who issued his comments on the appeal to the parties on 26 January 1996, asking for submissions for the oral proceedings to be filed with the EPO one month beforehand. The appeal hearing was held on 3 May 1996 in Munich. The Board of Appeal orally allowed the appeal and revoked the patent on that date although the reasons for its decision were not issued to the applicant company until 12 July 1996. The fact of revocation was recorded on the register of European Patents kept by the EPO.

In its written decision, the Board of Appeal revoked the patent because it lacked an inventive step. The applicant company complained that the Board of Appeal's decision had been based on an issue which it had not addressed at the hearing and asked the EPO to re-open the proceedings. However, the EPO declared itself *functus officio*.

The applicant company also filed a complaint with the Constitutional Court in Germany alleging violations of the principles of due process, rule of law and the right to property as guaranteed by the German constitution. On 8 January 1997 the Constitutional Court rejected the complaint as inadmissible because the complaint of a foreign applicant against the procedural rules of the EPO did not concern an act of a German public body and therefore did not fall within the Constitutional Court's jurisdiction. This decision was transmitted to the applicant company's representative on 6 February 1997.

B. Relevant domestic law and procedure of the EPO

Article 21 of the EPC provides:

"(1) The Boards of Appeal shall be responsible for the examination of appeals from the decisions of the ... Opposition Divisions ...

(4) For appeals from a decision of an Opposition Division, a Board of Appeal shall consist of:

(a) two technically qualified members and one legally qualified member, when the decision was taken by an Opposition Division consisting of three members; three technically qualified members and two legally qualified members, when the decision was taken by an Opposition Division consisting of four members or when the Board of Appeal considers that the nature of the appeal so requires."

Article 23 of the EPC provides:

"(1) The members of the Enlarged Board of Appeal and of the Boards of Appeal shall be appointed for a term of five years and may not be removed from office during this term, except if there are serious grounds for such removal and if the Administrative Council, on a proposal from the Enlarged Board of Appeal, takes a decision to this effect.

(2) The members of the Boards may not be members of the Receiving Section, Examining Divisions, Opposition Divisions or of the Legal Division.

(3) In their decisions, the members of the Boards shall not be bound by any instructions and shall comply only with the provisions of this Convention.

(4) The Rules of Procedure of the Boards of Appeal and the Enlarged Board of Appeal shall be adopted in accordance with the provisions of the Implementing Regulations. They shall be subject to the approval of the Administrative Council."

Article 24 provides:

"(1) Members of the Boards of Appeal or of the Enlarged Board of Appeal may not take part in any appeal if they have a personal interest therein, if they have previously been involved as representatives of one of the parties, or if they participated in the decision under appeal.

(2) If, for one of the reasons mentioned in paragraph 1, or for any other reason, a member of a Board of Appeal or of the Enlarged Board of Appeal considers that he should not take part in any appeal, he shall inform the Board accordingly.

(3) Members of a Board of Appeal or of the Enlarged Board of Appeal may be objected to by any party for one of the reasons mentioned in paragraph 1, or if suspected of partiality. An objection shall not be admissible if, while being aware of a reason for objection, the party has taken a procedural step. No objection may be based upon the nationality of members.

(4) The Boards of Appeal and the Enlarged Board of Appeal shall decide as to the action to be taken in the cases specified in paragraphs 2 and 3 without the participation of the member concerned. For the purposes of taking this decision the member objected to shall be replaced by his alternate."

Article 110(2) of the EPC relates to the decision-making parameters of the Board of Appeal:

"In the examination of the appeal, which shall be conducted in accordance with the provisions of the Implementing Regulations, the Board of Appeal shall invite the

parties, as often as necessary, to file observations, within a period to be fixed by the Board of Appeal, on communications from another party or issued by itself."

Article 113(1) of the EPC provides:

"The decisions of the European Patent Office may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments."

After a European patent is granted, any party may, within nine months, oppose such grant. The Opposition is heard by an Opposition Division of the EPO, comprised of three members of that Division. There is an automatic right of appeal from a decision of the Opposition Division to a Board of Appeal. The decision of the Board of Appeal is final. Questions of law may be referred to an Enlarged Board of Appeal of the EPO but only by a Board of Appeal. The Enlarged Board of Appeal has no jurisdiction to reverse a decision of a Board of Appeal, its function is purely to advise other bodies of the EPO on issues of law referred to it.

The EPC was incorporated into German law by way of the International Patent Act ("Gesetz über Internationale Patentübereinkommen") of 21 June 1976 (the "Patent Act 1976").

COMPLAINTS

The applicant company complains that the German Government has deprived it of its patent by failing to review the decision of the Board of Appeal and has thereby denied it an effective remedy for the breach of its Convention rights contrary to Articles 6 and 13 and Article 1 of Protocol No. 1 of the Convention. The applicant company also alleges a violation of Article 14 of the Convention claiming that the Constitutional Court has discriminated against it on grounds of nationality.

THE LAW

The applicant company complains that it has been denied access to court contrary to the provisions of Article 6 para. 1 of the Convention, and that it was deprived of its possessions, namely its patent, in violation of Article 1 of Protocol No. 1 to the Convention. It also alleges violation of Articles 13 and 14 of the Convention.

The applicant company complains that the Patent Act 1976 provides that if a patent is revoked by the EPO, then it is also revoked in Germany. The statute therefore operates to interfere with the applicant company's alleged possessions by giving effect to the EPO revocation in Germany. The applicant company complains that it is thereby deprived of a fair hearing to review the decision of the EPO.

In so far as the applicant company's complaint is about the proceedings before the EPO and the outcome of those proceedings, the Commission notes that this complaint is

against the EPO and not the German Government. The Commission must first consider the question whether it is competent to examine complaints about the decisions of other European institutions, whose membership is in whole or in part composed of High Contracting Parties to the Convention. In this connection, it recalls its case-law according to which it is not competent *ratione personae* to examine proceedings before or decisions of organs of the European Communities (see No. 13258/87, Dec. 9.2.90, D.R. 64, pp. 138, 144) or of the European Patent Office (see No. 21090/92, Dec. 10.1.94, D.R. 76-A p. 125 and No. 27410/95, Dec. 12.4.96, (unpublished)) as they are not parties to the European Convention on Human Rights. The Commission cannot therefore consider a complaint against the EPO.

The Commission must, however, also consider whether the proceedings before the Federal Constitutional Court can give rise to responsibility of Germany under the Convention.

The Commission notes in this respect that in its constitutional complaint to the Federal Constitutional Court, the applicant company made no attempt to explain how the challenged decisions of the EPO could be considered as the acts of a public authority in Germany. The Federal Constitutional Court's decision, too, refers to no matters which could be interpreted as indicating any acceptance of German jurisdiction in the case at all.

It remains, however, the case that the Federal Constitutional Court did not give judgment on the substance of the applicant company's claim, because Germany, as a party to the EPC, has transferred competence in the field to the EPO.

The Commission recalls that "if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty it will be answerable for any resulting breach of its obligations under the earlier treaty" (cf. No. 235/56, Dec. 10.6.58, Yearbook 2, pp. 256, 300). However, the transfer of powers to an international organisation is compatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection (cf. *Waite and Kennedy v. Germany*, No. 26083/94, Comm. Report 2.12.97 and *Beer and Regan v. Germany*, No. 28934/95, Comm. Report 2.12.97).

The Commission notes that the EPC contains detailed provisions on substantive patent law covering patentability, the persons entitled to apply, the term, the rights and equivalence of a European patent and patent applications, the application as an item of property, the procedure for grants, opposition procedures, etc. Article 21 provides for an appeals procedure which includes the Board of Appeal and an Enlarged Board of Appeal. The members of these Boards are independent of the parties and of the decision of the division appealed from, have tenure and there must always be one legally qualified member of the Board. The Boards have powers to obtain sworn evidence and must give written decisions containing reasons. Further, the members of the Boards are not subject to any instructions from the President or anyone else in their work (Article 23). These

procedures set up a form of "equivalent protection" within the meaning of the Convention case-law (see No. 13258/87 and No. 21090/92, both cited above, and No. 38817/97, Dec. 9.9.98).

The Commission considers that, given the procedural guarantees available before the EPO, any transfer of powers to the EPO which led to the German courts' refusal to deal with the matter, cannot be said to be incompatible with the applicant company's rights under the Convention.

Further, there is no indication in the present case that the guarantees available before the EPO were not respected (see the above-mentioned No. 38817/97, Dec. 9.9.98).

It follows that the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

M.P. PELLONPÄÄ
President
of the First Chamber