

Dutch Supreme Court Upholds Immunity of European Patent Organization in Trade Union Dispute

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In a [judgment](#) delivered on 20 January 2017 (original in Dutch [here](#)), the *Hoge Raad* held that the EPO can invoke its immunity from jurisdiction in proceedings instituted by trade unions for alleged breaches of employees' fundamental rights (right to strike, etc.). It ruled that the staff representatives do have access to alternative remedies to protect the right to collective action and the right of collective negotiation, hence the immunity is not disproportionate in light of the individuals' right of access to a court.

The EPO trade unions VEOB and SUEPO initiated proceedings before the Dutch courts as they considered that new provisions in the EPO Service Regulations excessively limit the right to strike and obstruct the work of the unions, and that EPO has wrongfully excluded them from the collective negotiations – all claims premised on the freedom to form trade unions as referred to in Article 11(1) of the [European Convention on Human Rights](#) (ECHR). EPO relied on its immunity from jurisdiction pursuant to Article 3 of the [1973 Protocol on Privileges and Immunities](#).

The Appealed Judgment

On 17 February 2015, the Court of Appeals in The Hague [rejected](#) EPO's invocation of immunity (original in Dutch [here](#)), based on the individual's right of access to a court enshrined in Article 6 ECHR, and ordered EPO to take a number of specific measures designed to preserve the plaintiffs' rights. As far as the immunity is concerned, the Court of Appeals considered that it entails a disproportionate restriction on the right of access to a court, as VEOB and SUEPO as such do not have for their claims any judicial process available to them.

Admittedly, the Court noted, in [Stichting Mothers of Srebrenica and Others v. the Netherlands](#) in 2013 the European Court of Human Rights held that in the absence of an alternative remedy the recognition of immunity is not *ipso facto* constitutive of a violation of Article 6 ECHR. However, in the Court of Appeals' view, '*additional circumstances*' in the case at hand involve that the immunity must still be ignored: in essence, the nature of the rights at stake (the rights of trade unions to take collective action and to conduct collective bargaining being '*rights belonging to the fundamental principles of an open and democratic constitutional state*') and the nature of the alleged breach (these rights being allegedly '*violated systematically and in a far-reaching way*').

It should be stressed that the enforcement of the Court of Appeals' judgment was immediately blocked by the Dutch Minister of Security and Justice, through an [order](#) ('*aanzegging*') addressed – pursuant to relevant Dutch legislation – to the bailiff and prohibiting the latter from proceeding with the execution of the judgment. This prohibition was based on the assertion that enforcing the

judgment contravenes the international obligations binding on the Netherlands, in particular the inviolability and immunity from execution enjoyed by EPO on the Dutch territory.

The Supreme Court's Decision

In any event, the Supreme Court set aside the appealed judgment. It found that EPO is entitled to immunity from jurisdiction, as reasonable alternative means do exist for the rights of VEOB and SUEPO under Article 11(1) ECHR to be effectively protected, hence the proportionality requirement in the sense of Article 6 ECHR is met.

The Supreme Court relied, in this respect, on the fact that individual members of the trade unions – unlike the trade unions as such – have access to an internal procedure at EPO, followed by a judicial process before the Administrative Tribunal of the International Labour Organization (ILOAT), to challenge measures and decisions they would consider in breach of their right to collective action. By the same token, staff representatives have also access to these remedies, according to the Supreme Court, to protect their right of collective negotiation.

By contrast, the Court of Appeals had explicitly denied that access to the EPO internal procedure and the ILOAT for individual EPO employees may amount to an alternative remedy relevant for the trade unions themselves.