

My New Year's Wishes for the EPO (in Russian)

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In 2017 Russia has been in the news quite a lot, even though mostly not for good, due to its despicable efforts to influence the elections in the US and the Brexit referendum via social media. We will yet have to see and hopefully learn more about who supported these efforts in the US and UK and whether their impact may even have been decisive for the outcome of these democratic votes. But since we just had Christmas and it is time for New Year's wishes, let us for now happily remember better past times and, specifically, three (or four) important Russian words we learnt from this great country with a lot of admiration. It just so happens that each of them is a perfect New Year's wish for the EPO that has likewise been in the news a lot in 2017, and mostly not for good, unfortunately (unless you are satisfied with the official EPO news releases). So, without further ado, here are my good wishes for the EPO in 2018: *Mir, Glasnost* and *Perestroika!*

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1. Mir (Peace)

I strongly hope and wish that the EPO will find back to internal peace, which has been so seriously disturbed over the past years, mostly due to the EPO management's "very rigid regime with a heavy-handed approach" (C. Ernst, Chairman of the EPO's Administrative Council) and a new and very controversial policy that seems to put speed and output before quality - except where it would have been necessary the most, i.e. in the much neglected Boards of Appeal.

I also hope that legal peace will be restored in regard to the much reported case of Mr. Corcoran, of which there is an excellent and up to date summary on wikipedia.

This topic immediately brings me on to my second wish:

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2. Glasnost (Openness, Transparency)

I wish the EPO and particularly its Administrative Council (AC) Glasnost. At least in my opinion, the Administrative Council is the “window” of the public into the EPO and vice versa. According to the European Patent Convention, the Administrative Council is the one and only control instance of the European Patent Office (if one leaves matters of constitutional law on a side for the moment). This means, however, that the AC should take its role as a control instance seriously, and certainly much more seriously than in the past, and visibly interfere where things go wrong rather than cover them up. Due to its unique position, the Administrative Council also is accountable (and should be held accountable) for the EPO’s policy and the EPO’s management to the public.

However, all of this requires that the AC communicates with the public directly, not through an EPO management filter, and openly. In particular, the AC should have its own website, independent from the EPO, where it publishes and explains its decisions so that the public is able to understand and discuss them. The AC should also be directly approachable by the public and by EPO staff members who feel unfairly treated by their management. Perhaps an Ombudsman would do the EPO good.

Having said that and reverting now to the case of Mr. Corcoran, I cannot but be critical in regard to the current situation. This is what the AC officially stated on the EPO website:

In a closed session, the Council took a final decision in a disciplinary case against an employee appointed by the Council – a case which had attracted significant public attention. This decision was taken with due regard to all relevant elements. The Council expressed its satisfaction at having closed the case. In particular, it underlined its expectation that now – after a long period of intense debate – legal peace would be restored.

So do you, dear readers, understand from this communiqué what the AC’s “final decision” in regard to Mr. Corcoran was? I don’t. And this is my point on Glasnost. I

wish the EPO, its AC and all of us more transparency and openness, and definitely a much-improved communication with the public.

It is easy to chime in the AC's hope that "legal peace would be restored" following its "final decision" and I certainly would love to do. But the question that tortures me is whether these are just pious words for the consumption of the public, or whether they actually reflect a generous decision reinstating Mr. Corcoran into his rights as a Board of Appeal member at least for the time he was unable to fill out this role due to his unlawful (ILO AT) suspension from the office. Unfortunately, this seems to be still unclear.

Mathieu Klos from JuVe reported that Mr. Corcoran has been reinstated but not reappointed. Assuming this is true, the question still remains what exactly "reinstated" means. If it were to mean that he was reinstated just for the 10 remaining days of his regular tenure as Board of Appeal member (which ends on 31/12/2017, i.e. today), but not for the time period that he lost due to its illegal removal from the office - according to the ILO AT decisions -, then I doubt very much that such a decision would restore legal peace. I sincerely hope that the AC found a better and fairer solution than this one. We will see.

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3. Perestroika (Restructuring)

If Mr. Battistelli's tenure as President of the EPO was/is good for anything, then it is to demonstrate to the public that the European Patent Organisation has no effective system of 'checks and balances' and is too susceptible to abuse of power. The Boards of Appeal are still far from being a truly independent court instance; and it is at least possible, if not even predictable, that this may or will result in constitutional problems in Germany, which may also have an impact on the planned UPCA.

Therefore, it is maybe a good time now to remember decision R 19/12, which in my view is one of the most important internal review papers about the EPO ever written. (Unfortunately, it seems to be only available in German.) As this decision shows, we already had a fairly far-advanced discussion in the years before 2004 about this issue, which led to a "completely worked-out draft of a basic proposal for a revision of the EPC in order to achieve organisational and managerial autonomy of the Boards of Appeal within the framework of the European Patent

Organization" (CA/46/04).

21. Im Jahr 2004 wurde dem Verwaltungsrat ein vollständig ausgearbeiteter Entwurf eines Basisvorschlags für eine Revision des EPÜ zur Umsetzung der organisatorischen Verselbständigung der Beschwerdekammern des Europäischen Patentamts im Rahmen der Europäischen Patentorganisation vorgelegt (CA/46/04). Sie würde den Beschwerdekammern unter Leitung eines Gerichtspräsidenten die Stellung eines dritten Organs der Europäischen Patentorganisation neben dem Europäischen Patentamt und dem Verwaltungsrat verleihen und damit dem Gerichtspräsidenten, der auch Vorsitzender der Großen Beschwerdekammer sein sollte, eine vom Amt und dessen Präsidenten unabhängige Stellung einräumen. Der Verwaltungsrat war in seiner Sitzung im Juni 2004 der Meinung, dass das Projekt reif für eine Diplomatische Konferenz sei und auf die Tagesordnung einer solchen Konferenz gestellt werden sollte (CA/85/04, Nr. 68). Auch dazu ist es bis heute nicht gekommen.

According to R 19/12, the AC in 2004 was of the opinion that this project is ripe for a diplomatic conference and should be put on its agenda. "But this also has not happened until today", noted the Board laconically about 10 years later. There is a rumour that Germany then blocked this project, as the German representatives in the AC were afraid that this might result in a complete uncoupling of the BoA and their subsequent move to a different country. If this was true, I – being a German – could only shake my head about such an undignified *Kirchturmpolitik* (parish pump politics). Of course, it makes eminent sense to leave the Boards of Appeal in Munich – and in a proper building with the requisite space for offices and hearing rooms –, but the issue of a court's or board's venue should never determine the discussion about its proper construction and judicial function.

In my opinion at least, it would be very advisable to enter into a fresh discussion in 2018 on whether the EPO really has the right structure to satisfy the needs of its stakeholders, who (among other things) want and need an independent, efficient, competent, but above all fair judicial body to decide on European Patents and applications. The concept of fairness includes that the parties are given an effective right to be heard, including the possibility to file appropriate requests also in the appeal instance, depending on and in response to the procedural situation. Fairness to the parties should never be sacrificed to procedural efficiency;

otherwise we would need no boards of appeal at all.

In addition, it also seems to me that we should have a discussion about Art. 13 EPC and whether the ILO Administrative Tribunal really is the best forum to safeguard elementary staff rights. At least in my opinion there are substantiated doubts in this regard, which may justify a discussion whether a judicial reform of the EPO should also include this aspect.

With this, I wish the EPO and all of our readers a genuinely happy New Year, and may *Mir, Glasnost and Perestroika* come to the EPO...

...bistrot

That is: fast.