

EPO unrest - again - and Unitary Patent dominate list of most popular posts in 2017

Kluwer Patent Blog

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Artists, writers, singers would undoubtedly be thrilled to see a list of most popular works being dominated for years by their books or songs or other creations. In the case of this blog, however, the top ten of most popular items is a sad display of the longstanding social unrest and problems at the European Patent Organisation. In 2017, the German constitutional complaint against the Unified Patent Court Agreement found its way into the list as well.

For the third consecutive time, and even more emphatically than in past years, blogposts about the EPO and its impassive president Benoit Battistelli, the 'dictator' or 'Napoleon of the tenth floor', as one of our commenters has often written, dominate the top ten of best read articles of the Kluwer Patent Blog.

Number 10 is the article [The EPO and the Problem of the Right Speed \(II\) - Examination Proceedings](#), the second in a series of four blogposts (see also [I](#), [III](#), [IV](#)) about Battistelli's aim of speeding up all EPO proceedings. This second post focuses on the program "Early Certainty from Search", which was introduced in 2014 and is aimed at providing a search report with a preliminary opinion within six months of filing. European patent attorney Thorsten Bausch of Hoffmann Eitle concludes: *'I am afraid that the "early certainty" program in examination proceedings, at least if implemented as described above, i.e. if it results in a significant increase in the number of oral proceedings at an early stage of the*

examination proceedings, will - needlessly - have quite significant negative consequences for most applicants.'

Number 9, President Battistelli under pressure to improve 'unacceptable' social situation at EPO, dates back to March 2017 and shows how little progress there has been since. *'Just one single phrase in the press release was dedicated to the ongoing social unrest at the EPO, after the 151th meeting of the EPO Administrative Council, 15 and 16 March 2017 in Munich. It hardly reflects the mounting pressure that EPO president Benoit Battistelli has had to face over a wide range of issues that have led to a disastrous social climate at the EPO (...).'*

Number 8: a small intermezzo in the EPO dominated list, a big issue for the Unitary Patent system: the first post about the constitutional claim that was filed in Germany against ratification of the UPCA, completely unexpected to many people, among others the UPC Preparatory Committee. Breaking News: Germany's Federal Constitutional Court pulls Emergency Break on UPC Agreement. *'Another significant delay - or even more substantial - trouble seems to be ahead of the Unitary Patent system, due to today's decision of the German Constitutional Court (Bundesverfassungsgericht) in Karlsruhe. The Bundesverfassungsgericht has requested the German President not to sign the bills already approved by Bundestag and Bundesrat on the ratification of the Unitary Patent system.'*



Number 7 is an interview with the German Professor Broß, former patent judge and former judge of the Federal Constitutional Court, and covers both EPO and UPCA. 'EPC, EPO and UPCA lack guarantees for democracy, rule of law and human rights', Broß argues: *'The constitutional complaint (...) and the entire problem behind it have only been able to develop because EPC Member States have largely failed to act in the Administrative Council and since - with the approval of the "mainstream" - a parallel world has developed in international law; despite all the criticism in the past, numerous publications and, since several years, serious clashes between the EPO's presidency and staff members. The rule of law, democracy and human rights have been put at risk.'*

The **number 6** post was based for a great deal on an interview of the German legal website JUVE with the new president of the EPO's Administrative Council.

Christoph Ernst: 'rigid regime' cloud over achievements EPO president Battistelli.
'The verdict on the success of reforms he achieved will certainly be clouded by the fact that President Battistelli has overseen a very rigid regime with a heavy-handed approach. I would have occasionally liked to see more compromise and more understanding for differing interests', Ernst said.

Since the interview in JUVÉ, the AC, including its chairman, has come under fire itself, most recently in the Corcoran case, which is the topic of **number 5: Quo usque tandem, Battistelle**. This is a post from 11 December 2017, criticizing the failure of the EPO to act upon the verdict of the ILO Administrative Tribunal. The ILO AT had ruled a week earlier that Patrick Corcoran - an Irish judge who had been suspended for almost three years - should be reinstated in his post at the EPO and be paid 40.000 euros in compensation for moral injury and costs, among others. *'Maybe Mr. Battistelli is really a case for „Krampus“. If he does not change course now and if he continues refusing to do what the ILO ordered the EPO to do, he should be sacked. Otherwise, the Administrative Council risks a serious loss in reputation of the European Patent Office (...).'*

But the EPO leadership was not impressed. It only issued a 'press release' after the AC meeting on 13 and 14 December, which said: '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.'

It isn't clear what the 'peace-restoring' decision entailed, but neither Battistelli nor the AC have publicly recognized they were wrong in ordering or allowing for the suspension of Corcoran and other measures against the judge. According to JUVÉ, he was reinstored just for the 10 remaining days of his regular tenure as Board of Appeal member and has now returned to his former activity as a patent examiner. 'This will mean that for disciplinary matters he will no longer be subject to the Administrative Council but directly to the EPO President.' It was a 'Pyrrhic victory', JUVÉ wrote. (English translation JUVÉ article)

Deficiencies in the basic framework of the European Patent Convention and the EPO can lead to problems for the Unitary Patent system as well, according to the article The Rule of Law, the EPO and the Ugly Writing on the Wall, based on a

lecture of the earlier mentioned professor Broß, and the **number 4** of the list. *'If the UPCA were to be ratified in, say, September and if two months later the European Patent Convention were to be declared unconstitutional, this might also pull the rug out from under the UPCA.'*

Some names kept coming back this year. The **number 3**, [EPO - All Problems Solved?](#), discusses the serious understaffing of the EPO Technical Boards of Appeal and statements of AC chairman Christoph Ernst there is no such problem. *'Did somebody falsely inform the Chairman of the EPO's Administrative Council? If so, who was it and will that have any consequences? Or did the Chairman not bother to inform himself properly? He may be forgiven for not reading this blog, but is there nobody around him telling him what is going on?'*

Back to the decision of the ILO AT of 6 December. It was described in **number 2**: [The ILO is alive](#). *'Not a good day for the EPO management and its AC, when you are being found to have violated due process rights in one case and being accused of partiality - and, indirectly, violation of the principle of separation of powers.'*

What to expect for 2018 from the EPO? The topics are far from over, that is a sure thing. Not in the least because more decisions of the ILO AT are expected later this month and year. And, on the other hand, change might be coming. Some observers hope that Battistelli's successor Antonio Campinos, the current EUIPO president who will start in office in July, will be able and willing to tackle the deep problems at the EPO. In the meantime commenters, who are finding their way more and more to our blog, are not overly optimistic. And as Thorsten Bausch [wrote on the last day of 2017](#): *'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.'*

Was it all EPO on the blog? Not at all! It definitely is a much debated topic, but over 200 articles were posted last year from all over the world, covering a wide range of topics and cases. The **most-read article of 2017** concerned the Unitary Patent system, more specifically the German constitutional complaint.

The complaint had silently been filed at the end of March, which was discovered in June, without anyone being able to tell what was behind the complaint and on which alleged violations of the German Basic Law it was based. In the blogpost [UPC](#)

- Finally some News from the German Federal Constitutional Court, the four alleged violations were explained based on information obtained from the FCC.

As most readers will know, the FCC asked a range of organisations and the German government to submit their comments on the complaint by 31 December 2017, and we'll probably know within months whether it has been admitted by the Court, the first step in a procedure which could severely delay or block the entry into force of the



Unitary Patent system. In a German-language GRUR article and in [this post](#), professor Tilman sets out why he thinks the constitutional complaint should be reject as inadmissible. It would be interesting if other organisations that have been asked for comment by the FCC publish their findings as well. And of course if the constitutional claim itself was published. This blog would be more than happy to report about it in 2018.

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