

Kluwer Patent Blog

The tarnished legacy of an EPO president

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Three weeks before the end of the presidency of Benoit Battistelli, the European Patent Office published the report '[Modernising the EPO for excellence and sustainability](#)', a 'summary of achievements resulting from the extensive modernisation reforms put in place' during Battistelli's term in office from 2010 to 2018. Concerns about quality, the independence of the Boards of Appeal, pending cases at the German Federal Constitutional Court and the endless social conflicts that have tarnished his term in office are downplayed or ignored in the report.

'Unsubstantiated claims', was the reaction of an EPO spokesperson to the [open letter](#) in which four leading German patent law firms expressed 'great concern' last week about the 'overreaching desire for high productivity'. According to the firms, it will lead to a deterioration of the quality of the search and examination procedures and of patents granted by the EPO.

As World IP Review reported, the spokesperson said the EPO 'takes feedback from all its users seriously', but 'surveys carried out by the EPO and independently, as well as an annual quality report, show that the high-quality levels for which the office is known continue to increase further.' Moreover, 'the "most important" German IP user associations (...) are "in general very positive about the projects and results of the office', the spokesperson added.

The reaction is typical for the EPO and its president, who have never given any sign they were impressed with criticism of the organization, let alone entered into a dialogue about it. On the contrary, the message above seems clear: the 'most important' German IP user associations (which ones, by the way?) are 'very positive', so the four law firms are simply wrong! Another characteristic element of the reaction: parts of the open letter, questioning the huge financial reserves of the EPO and referring to a recent petition of 900 examiners (who stated they were prevented by the internal directives from a thorough, complete search and examination) are simply ignored.



Everything is excellent, is the central message Battistelli has conveyed during his term in office, and the report '[Modernising the EPO for excellence and sustainability](#)' is no exception. As the president writes in the foreword: 'The EPO of today is a vastly different organisation to that which

existed in 2010. We are more competitive, more efficient, more financially secure and ready to face the challenges of tomorrow.’ However, there are several ‘challenges of today’ that the president has overlooked.

Social dialogue

Against the backdrop of the social conflicts that have plagued the EPO, it is sometimes alienating to read Chapter 4 ‘Modernising working conditions’ of the EPO report: ‘As an employer, the EPO is fully aware that its staff constitutes one of its most valuable assets for delivering high performance over the long-term. The Office is therefore fully committed to ensuring best-in-class working conditions for all EPO employees, to attracting and developing the best talent in Europe and to promoting a constructive and transparent social dialogue.’ Really?

Over the last years not only EPO staff members and trade unions have protested and organized strikes dozens of times to protest against the deteriorating working conditions. There were governments and parliamentarians in the Netherlands, Germany and France as well, who warned that ‘the internal unrest has been going on for too long and (...) the situation now needs to improve quickly’, and that the ‘deterioration [of the social climate] is damaging the image of the organization’ (March 2017).



The ILO Administrative Tribunal (ILOAT) said it couldn’t cope with all the complaints concerning EPO labour conflicts (March 2017). In 2015, a Dutch judge found that the immunity of the EPO couldn’t stretch as far as to include the violation of human rights of EPO employees – which was the case according to the judge, although this decision was later overturned by the Dutch Supreme Court (January 2017). Even the EPO’s Administrative Council (AC), which showed its teeth for once, expressed its ‘deep concerns about the social unrest’ in a Resolution (March 2016). The SUEPO, the biggest trade union at the EPO, filed a complaint against The Netherlands before the

European Court of Human Rights (ECHR), arguing it should have acted to end the breach of fundamental rights at the organisation (May 2017).

Nothing about all this is to be found in the EPO report. True, on page 63 there is a photo of a small group of demonstrating staff members. And the paragraphs on ‘Change management and social dialogue’ start with: ‘Improving social dialogue at the EPO has been one of the most challenging tasks for the management of the Office.’

But what follows is extremely vague and incomplete: ‘The general framework governing social dialogue had proved insufficient for developing effective social dialogue: the Central Staff Committee (CSC) was not directly elected by the staff; the right to strike was not recognised in the Service Regulations whereas multiple forms of work stoppage of indefinite duration were de facto common practice; and trade unions were not formally recognised, even though the main trade union SUEPO plays an active role in practice and accounts for the vast majority of staff representatives positions.’

These few phrases alone lead to a lot of questions: Who is responsible for not recognizing SUEPO?

For the fact that no CSC election was held? Wasn't that a task of the AC and the EPO president? Where is a text on the various SUEPO leaders who were sacked or demoted, in two cases contrary to recommendations of the EPO's own disciplinary committee? And what is meant with the 'active role' of the SUEPO, whose 'active' members can only be contacted anonymously because of fear of reprisals?

Another example: 'The external perception of the EPO was also being affected by defamation campaigns, public attacks against the core business of the EPO, repetitive attempts to block the proper functioning of internal statutory bodies of the Office, and even threats against moderate staff representatives.' What does this refer to, who were responsible? In what way was 'the external perception' of the EPO affected and does this imply that, though the outside world may think negative things are happening, the contrary is true?



Remarkable is the way the independent 2016 Social Study by PricewaterhouseCoopers (PwC) is being quoted in the EPO report. This study was carried out in the aftermath of the AC's critical Resolution of March 2016 and led to a 'social conference' later that year. Only two remarks from PwC's Social Study (which was never published by the EPO, contrary to its own [Social Reports](#)) are included in the EPO report, both positive. Do they reflect the findings of PwC? It is highly doubtful. In 2016, the Techrights blog reported it got hold of the PwC Study and [published a table from it](#), showing broad discontent among EPO employees.

One of the gravest omissions in the social paragraphs is the case of the Irish judge Patrick Corcoran, who was suspended late 2014 pending investigation of various allegations, including dissemination of defamatory material against Battistelli. After three long years, including a fruitless attempt of the EPO president to have Corcoran fired illegally (described in detail [here](#)), the ILOAT decided in December 2017 that the judge should be reinstated in his post and paid damages. As [reported yesterday on this blog](#), by that time he had already been acquitted of all charges by German courts. However, Corcoran's term of office in Munich was almost over in December 2017 and it was not renewed. Instead, he was offered an unrelated post in The Netherlands, where he has never lived. Sadly, it seems Mr. Corcoran's health has suffered severely from the situation and he has recently been admitted to a psychiatric hospital.

Reports about psychological pressure and an atmosphere of fear at the EPO have been rife. In the PwC table as published by Techrights, the text: 'Consideration is given to my opinions about decisions affecting me at the EPO' scores worst of all. During Battistelli's term in office, five people committed suicide (transcript of a German documentary about one of them, Wolfgang Schiessl, [here](#)). The SUEPO called for an independent investigation but the president refused. He told [website Politico](#) the union used the issue to exert pressure to reverse his efficiency measures and get him removed. It "is not a trade union, it's a mafia-type entity. (...) They used to control the office and they want to continue to control the office". After a suicide at the The Hague Branch, he also [blocked an investigation](#) by the Dutch labor inspectorate, invoking the EPO's immunity.

Structural problems

The EPO under the leadership of Battistelli shows why the diplomatic immunity of an international organization can be very problematic. The German current affairs magazine *Cicero* recently wrote: ‘places come into being which are essentially almost outside the law, where only the rules apply which the particular organization has created for itself. If all goes well, the conditions of the job are something to dream about. But what happens if a system of despotic government comes into being within these authorities, under which nobody can protect themselves against pressure, bullying, or even contraventions of human rights?’ ([German original](#), [English translation](#)).

In *Cicero*’s article (describing the case of Corcoran extensively, among others) the example is given of the EPO’s controversial sickness leave Regulation, according to which persons off sick must be at home daily from 10 to 12 am and from 14 to 16 pm ‘in case the Office doctor comes knocking. Anyone who is not at home is threatened with sanctions, including patients suffering from depression or burnout. Munich attorney Alexander Holtz counts up how many basic rights this ruling is infringing: “First, the general right of personality, second the right of integrity of the place of residence, and third also the needs and rights of family members, are all affected”.’

Employees who are in conflict with the EPO can invoke the ILOAT, but as Thorsten Bausch of Hoffmann Eitle explained [earlier on this blog](#): ‘this Administrative Tribunal is (a) no fact finding court and (b) only admits an appeal if all internal means of redress have been exhausted. The former is completely unsatisfactory, because it is very often the proper establishment and assessment of the relevant facts that is decisive for a lawsuit. The latter is equally strange because it may result in a complete denial of an employee’s rights (...)’.

Apart from the labour conflicts, there is also a problem with the lack of independence of the Boards of Appeal, despite the positive remarks in the EPO report about reforms aimed at improving ‘perceptions of the Boards’ independence’ and increasing ‘managerial autonomy and organisational independence’. ‘A separate building in Haar, Munich, now accommodates the Boards of Appeal Unit, reinforcing an understanding that parties of appeal proceedings are appearing before an independent body.’

Financially however the BoAs are far from independent from the EPO president; the president of the BoAs can only be appointed by the Administrative Council, if the EPO president agrees to propose him/her; the BoAs cannot normally overrule Administrative Council decisions, even if these are in violation of the letter or spirit of the European Patent Convention or human rights in general, and the president of the BoA is subject to the hierarchical and disciplinary authority of the Administrative Council.

The functioning of the Administrative Council is a problem in itself. It is supposed to be the governing body of the EPO and to supervise the president, but in reality it seems just one man governs everything and everybody: president Benoit Battistelli.



The deficiencies in the organisational structure (or, more correctly, the fact that so many EPO employees have now been confronted with these deficiencies), have provided the basis of four constitutional complaints against the EPO before the German Federal Constitutional Court (FCC). In an earlier blogpost, Professor Siegfried Broß, a retired FCC judge and patent expert who rendered a long and scathing opinion on the EPO in one of the cases, said:

‘When the Member States of the EPC [European Patent Convention, on which the EPO is based] entered into an association, they completely disregarded the obligations imposed on them for many years by national constitutional law, by the European Convention on Human Rights (ECHR) – for all member states – as well as, for all EU member states, by the EU Charter of Fundamental Rights.’ There could also be consequences for the future Unitary Patent system, in which the EPO has an important role to play.

Quantity, quality

‘Production has increased by 36% since 2010 and the stock of outstanding work has been reduced by 27% during the last three years. The number of patents granted is also up by +82%’. ‘New initiatives have been developed to ensure that they can depend on legally robust patents that are continually reaching new levels in quality. Yet, those same patents are now also being delivered faster.’ ‘extensive user surveys (...) have confirmed increasing levels of satisfaction with the EPO’s products and services, year after year.’ Nothing but good news as to efficiency and quality in the EPO report. And the [Quality Report 2017](#), which was published just two days ago: ‘The most recent survey results show that between 2015 and 2017, levels of user satisfaction with patent administration services increased from 80% to 89%.’

Again, this is not the whole story. We have already commented on the letter of the four German patent firms. Unsubstantiated claims? The four file more than 9500 patent applications every year, so they should know what they are talking about. Further firms have joined their initiative or are expected to still do so. The same applies to the petition of over 900 examiners. More questions about quality were raised in this [blogpost](#). The EPO has not given signs it takes this kind of user feedback serious.

Transparency

Every decent modern international organization will claim it works transparently. The words transparent and transparency are used in the EPO report 28 times. Nice! After years of social conflicts and after all the criticism of the office, it would be very interesting to hear from the Administrative Council, or from its delegates from the 38 member states, why they think the president did a good job and why his achievements are more important than what went wrong – and if they agree that some things went wrong at all. In all transparency, they could discuss the future and whether Thorsten Bausch’s [New Year wishes for the EPO](#) deserve to be taken seriously.

But accountability is a rare thing at the EPO. The three-monthly meetings of the president and the

Administrative Council, where many important decisions are made, are behind closed doors, and no one is allowed to know more about what happened than what is described in remarkably uninformative communiqués. Was it decided that president Battistelli should receive a bonus of 600.000 euro apart from his yearly salary, during or in the verges of the AC meeting of March 2018?, Kluwer IP Law inquired. ‘As for the outcome of the AC I can refer you to the statement published by the Administrative Council on our website’, was the answer of the press office. In labour conflicts the obligation not to speak about them or face dire consequences, seems to be common practice.

Challenges

‘In 2010 the EPO faced a number of challenges’, but since it has been successful in ‘mastering its own destiny’, according to EPO president Battistelli in the report on his legacy. It sounds impressive, but his successor Antonio Campinos, who starts in office on 1 July 2018, is hopefully aware that very impressive challenges are waiting. Restoration of trust, normalization of the social relations are the first of many important tasks lying ahead of him.

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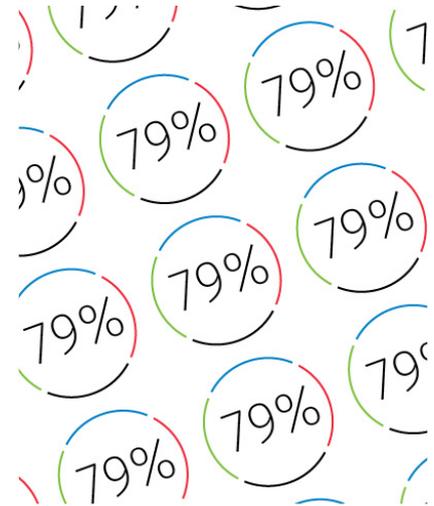
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