

Kluwer Patent Blog

European Patent Office dominates list of most read articles in 2018

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What were the most popular articles of the Kluwer Patent Blog in 2018? A look at the list shows that – even more strongly than in previous years – one topic drew more readers than anything else: the functioning of European Patent Office.

Episodes of last year's [series on the EPO](#) by Thorsten Bausch – top author in the chart – ended as numbers 6, 5 and 2. They were all written in the first half of this year, which was also the last half year of the notorious EPO presidency of Benoît Battistelli.

Nr 6 of the list, [The EPO's Vision \(V\) – Trust](#), was a sad display of what this principle meant to Battistelli: *'... if trust is supposed to be the EPO's vision, why does the EPO President apparently believe the EPO needs an "investigative unit" (aka as "Stasi" in examiners' speech)? Because he trusts his employees and just wants to confirm what a great job they all do and how high quality their products are one year after another? If www.jungewelt.de is to be believed, the motivation is a different one. And if all of the EPO's relationships are to prosper through trust, why did the President's investigative unit consider it appropriate to install a [keylogger](#) on the public computers in the EPO's Patent Attorney rooms in the Isar building?'*

The experiences described in nr 5 of the list, [The EPO's Vision \(II\) – "expert, well supported and motivated staff"](#), offered an insight into the atmosphere of fear and intimidation at the EPO under Battistelli. *'Every examiner who wanted to be a little bit more open to me cautioned me not to mention her/his name by any means, as he/she might be subjected to severe sanctions if it came out that he/she was a source of the information just relayed to me. I find this very strange, to say the least, as we are not talking about professional or personal secrets here, but about the way in which the EPO generally works.'*



The nr 2 article in the chart, the third of Bausch' series, [The EPO's Vision \(III\) – Quality](#), discussed whether reforms under Battistelli had led to improvements of patent quality. Bausch pointed out, among others, that in a poll among colleagues *'.... two thirds responded that quality has decreased over the last 2-3 years, one third responded that quality has stayed about the same, and exactly none (zero) responded that there was an improvement in quality.'*

Articles nr 3, 4 and 7 reported about decisions of the ILO Administrative Tribunal (ILOAT)

concerning leaders of the SUEPO union and others who had come into conflict with the former EPO president, and had been fired or demoted by him – with silent support of the Administrative Council. In spite of ILOAT judgments that they should be allowed back in their old jobs, this did not always happen. On the contrary, after a legal battle of three years culminating in an ILO decision that the Irish judge Patrick Corcoran should be reinstated, attempts were made to transfer him from Munich to The Hague to do work he was not qualified for (it seems this decision was reversed by Battistelli's successor António Campinos).

The nr 7 on the list, [Constitutional Law Alert for the EPO](#), reported about a parliamentary motion in the Bavarian State Parliament to do something about the lack of legal protection in cases such as Corcoran's: *'... motions like this should really ring the alarm bells both at the Administrative Council level and in the German Ministry of Justice. We cannot and should not just sit and watch what happens on the Isar riverbanks. The EPO has deserved better and our constitutions demand it.'*

Article nr 3 in our blog's chart, [Landgericht München: Patrick Corcoran is Innocent and Acquitted of all Charges](#), made clear that Corcoran didn't 'win' his case on procedural grounds only: *'decisions of the ILO and the EBA went in favour of Mr. Corcoran for procedural reasons only. This made me curious whether there is anything to the accusations raised against Mr. Corcoran on the merits, or whether – using the EBA's words – "unsubstantiated or groundless, made-up allegations were used as a pretext for getting rid of an irksome judge". (...) To put it succinctly, Mr. Corcoran was acquitted of all charges both by the Local Court (Amtsgericht München) and on appeal by the Regional Court of Munich (Landgericht München).'*

Article nr 4 in the list, [Tribunal ILO reverses dismissals and downgrading of SUEPO leaders](#), concerned ILOAT judgments in other EPO cases: *'Battistelli's decisions to dismiss SUEPO leaders Elizabeth Hardon and Ion Brumme and to downgrade their colleague Malika Weaver were wrong and must be set aside.'* Although it seems that this decision has been respected and carried out by EPO president Campinos, and he has [encouraged employees to share their views](#), social conflicts and problems at the EPO are far from over. Former SUEPO leader Laurent Prunier, for instance, was fired on questionable charges as well and is still waiting for a review of his case.



Unitary Patent

Notably down in popularity in this year's list are the Unitary Patent system and the Unified Patent Court. For years they were at the centre of European patent lawyers' attention, but last year the harsh reality dawned on many observers that the future of this patent system is highly uncertain, due to both the Brexit and the German constitutional challenge.

The most important blogpost on the UP project in the list, nr 9, dates back to April, probably the moment there was most optimism the system would become a reality after all: [UK celebrates World IP Day by announcing UPCA ratification](#).

'(...) of course, there is Germany which remains a real remaining obstacle in the way of the UPC.

But vitally, serious discussions can now start about enabling the UK's continued participation in the UPC system after Brexit (including after the end of the transition period after 31 December 2020), and that is probably the point of greatest significance arising from today's announcement. Can agreement be reached on that? Can it extend to the unitary patent part of the package, which is clearly more difficult given its status as an EU right. Hopefully the answers to these questions will be "yes". There appears to be a will, and as the saying goes: where there is a will, there's a way.'



The mood has changed since April however, not only because of serious doubts about the possibility to maintain the UK as a non EU member within the Unitary Patent system, but also because of the uncertainty about the timing of the decision of the German Federal Constitutional Court in, and the likely outcome of the challenge of the UPCA ratification.

Nr 8, [International Investment Arbitration, the European Patent Office, and the Future Unified Patent Court](#), an article on the relevance of international investment agreements (IIA) for patents, makes a reference to the Unitary Patent system as well. *'Should proceedings before the future UPC not comply with the standards of treatment under an IIA, which was signed by a Contracting Member State to the Agreement on a Unified Patent Court (UPCA), the investor whose rights under the IIA would be infringed by acts of the UPC could initiate arbitral proceedings on the basis of the IIA against the Contracting Member State.'*

Equivalents

Number 10 on the list is the article [Actavis and Equivalents – One Year On](#). It discusses the UK Supreme Court decision of 12 July 2017 on patent infringement, which caused a shockwave across the UK patent community.

'What should the correct approach be? Those practitioners who have studied the development of the law of patent construction in the UK, or who have been in the field for a long time, will recall that pre-Improver (decided in 1989), in Catnic (decided in 1982), and in several House of Lords cases pre-Catnic, the Courts decided that the first question should be to identify what the patentee had described as the essential features of the invention. In relation to those features, variation would not be permitted. However in relation to non-essential features, variation was permitted provided the variant did not have a material effect on the way the invention worked and that this was obvious to the skilled person. The author considers that this approach – essentially putting the third Improver/Actavis question first, might be easier to apply and lead to fairer results.'

Finally, our number one of the list, the most read article of 2018! This concerned, again, the EPO: [Leading German patent law firms criticize European Patent Office](#).

The article describes the initiative of four leading patent law firms in Germany – later joined by another ten patent law firms – to publish an open letter expressing 'great concern' about the developments at the European Patent Office. The firms wrote *'that when "the aim is to terminate proceedings as quickly as possible (...), the quality of the search and examination of applications must suffer". The rather high fees, moreover, "can only be justified by giving the examiners sufficient time for an indepth assessment of each single application". Patents with an erroneous scope of protection distort and hinder economic competition and might unhinge the patent system'*.

The letter was published half June and was directed to outgoing EPO president Benoit Battistelli, the (then) chairman of the Administrative Council Christoph Ernst, principal director user support & quality management Niclas Morey and future EPO president António Campinos. Later last year, the firms were invited for a meeting with Campinos and other EPO officials in Munich, which resulted in the start of a ‘[constructive dialogue on patent quality](#)’.

In 2019, the EPO will of course enjoy the continued attention of this blog. It is the first complete year for António Campinos as EPO president and it will undoubtedly be much clearer next year whether he is willing and capable to change the ‘[persistent atmosphere of intimidation](#)’ at the EPO, as it was recently described. Much sooner however, probably in about a week’s time, another huge issue will be clear and reported on: what happened with the Brexit vote, whether there will be a deal or no deal and whether there are still chances for the Unitary Patent system to survive.

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