

Kluwer Patent Blog

‘Behavior Benoît Battistelli is bad for the EPO’s reputation’

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The behavior of EPO president Benoît Battistelli is bad for the reputation of the European Patent Office and may in the longer term force him to resign. Wouter Pors, IP practitioner of Bird & Bird, said this in an interview with Kluwer IP Law, on the occasion of a recent decision of the Dutch appeal Court in The Hague.

The so-called Gerechtshof found that the EPO is violating the European Treaty on Human Rights by blocking mails from the labor unions and by limiting the workers’ right to strike. The Court said that regardless of the question whether the EPO is an autonomous international organization with its own legal order and staff policy, and which in principle enjoys immunity from the jurisdiction of Dutch courts, this autonomy cannot encompass/include the right to violate fundamental European rights (...) without offering parties such as the unions any legal remedy.



Impression of the future EPO building in Rijswijk

Battistelli reacted with fury. He was quick to announce that the judgment was ‘neither legally admissible nor practically enforceable’ and nothing would change at the EPO. Apart from that, he thought it ‘unfortunate that such a dangerous development was initiated and encouraged by an union whose first impression should be to preserve the fundamental interests of the staff and the Organisation’. Battistelli must have felt reassured by the Dutch minister Opstelten, who announced that as the EPO was ‘immune from execution’, there would be no action from the authorities in the Netherlands.

The way Battistelli talked about the Court was very inappropriate, according to Wouter Pors. ‘You cannot say this. It amounts to saying “the judge is crazy”! That is disrespectful and contrary to fundamental principles as laid down in Art 4 of the Treaty on the creation of the European Union, that members of the EU should respect each other’s institutions. 28 out of the 38 EPC members are also members of the European Union. They cannot accept such disrespect towards one of their courts.’

According to Pors, the EPO is an organization which delivers high quality, but Battistelli's behavior is undermining its reputation: 'Whoever is right in the many social conflicts at the EPO, as president of that organization you have to find a way to tackle these issues, instead of turning your back to the unions, ignoring court decisions, prohibiting strikes and threatening with disciplinary measures against people who complain. You have to be able to go into a dialogue.'



Wouter Pors

The same holds for the debate that is going on about the independence of the EPO Boards of Appeal (BoA), says Pors. The discussion intensified last December, when Battistelli personally ordered a BoA member to be suspended from office and escorted from the building because of perceived misconduct. In the opinion of everyone familiar with the Rules of the EPO, the Administrative Council has the power to decide on such a measure and not the President.

Battistelli had been limiting the freedom of the BoA-judges in several ways, and his interference was seen as the clearest example yet that he didn't think high of nor respected the principle of independence of the Board of Appeal members.

Letters from the European Patent Lawyers Association, the Chartered Institute of Patent Attorneys, the Advocate-General of the Dutch High Court, and also of a great majority of the internal and external members of the Boards of Appeal ensued. The response from Battistelli came [on his blog](#): 'I would also urge all commentators, especially those having a legal background, to be mindful in their public expression on a case which is still under investigation, in order to protect the rights of the defence and to guarantee the impartiality of the investigation under the supervision of the Administrative Council which is the decision making body.' Many BoA members perceived this as a threat.

According to Wouter Pors, there may have been good reasons to take immediate action against the BoA member, 'but Battistelli shouldn't have done it himself'. Although Pors doesn't think the EPO president will be forced to resign because of this incident – an investigation into the incident will be discussed in the meeting of the Administrative Council on 25 and 26 March, Battistelli 'is definitely making life difficult for himself with his authoritarian behavior and that may be the reason why, sooner or later, he will have to step down'.

The EPO unions, SUEPO and VEOB, as well as many other critics have complained that the Administrative Council, the supervisory body composed of representatives of the EPO member states, is failing in its task to control the president's actions and is no more than a lame duck. 'Instead of exercising oversight, that body is largely responsible for the banana republic that the EPO has become,' Florian Müller of Foss Patents [wrote on his blog](#), for instance.

Pors doesn't agree: 'The Administrative Council will act. But these things take time. One should realize that the AC is a body of civil servants from 38 member states. Some of these states are very familiar with the patent sector, but many are not. The AC members were not immediately prepared to react when this BoA-member was ousted from the EPO building last December. They had to get more information about what was going on, and to consult with their governments, for instance. But I do expect them to be critical during the meeting later this month.'

The conflict between Battistelli and the BoAs is not just an internal issue. Some people think it could undermine the creation of the Unitary Patent and the Unified Patent Court, as the lack of independence of the Boards is one of the arguments Spain has put forward in its challenge to the UPC (Cases C-146/13 and C-147/13). The Advocate-General of the CJEU, in its opinion on the case of 18 November 2014 refuted the argument (see [here](#) and [here](#)), but the CJEU could decide differently now that the struggle at the EPO has made clear there is a big problem indeed.

Pors: ‘I think this is highly unlikely. More so, because the EPO has recently come with adequate measures to enhance the independence of the Boards of Appeal. But if I am wrong and the Court thinks another legal check outside the EPO is necessary, this will be a huge and possibly fatal blow to the Unitary Patent Package.’



Minister Ivo Opstelten resigned

Finally, back to the surprising decision of the Dutch minister Opstelten to back EPO president Battistelli’s view that Dutch judges cannot force him to do anything. ‘I don’t understand it and I can only think of one reason’, says Wouter Pors: ‘the Dutch authorities didn’t take their time to make up their mind on this. The decision of the Court had already been served on the EPO which already concluded its enforcement, when Opstelten announced it was in violation of the EPO’s immunity, disregarding the very thorough argumentation of the Court on this issue. The minister might just as well have said nothing. The Court’s decision didn’t contain any sanctions the government could have implemented anyway.’

It was ‘clumsy’, according to Pors. And it turned out to be one of the last actions of Opstelten as a minister as well. On 9 March, in an unrelated development, he was forced to resign. These things happen more easily at the national level than in international organizations like the EPO, it seems.

The EPO was asked for comment by Kluwer IP Law, and came with a **reaction from its press office** shortly after the publication:

“The EPO management was grateful for the rapid reaction of the Dutch Government in recognising that the ruling of the Gerechtshof is not executable in view of the immunity provision laid down in the EPC. It is therefore inappropriate to say that pointing to legal problems related to a court decision means to be disrespectful of the court and the judge who handled the case. The conclusion reached by the Dutch government clearly supports the views expressed by the EPO that the ruling did not sufficiently take into account the principles of immunity applicable to the EPO. A parallel ruling issued by a German court on the same matter further supports this view.

Relations of the EPO with the authorities and institutions of our member states in which we have an office have always been fruitful, marked by mutual respect and recognition of our individual obligations and responsibilities. They are the cornerstone for the successful development of the EPO, and have never been contested by the Office.

It is misleading to say that the President of the EPO suspended a member of the Boards of Appeal of the EPO. As was publicly stated by the EPO’s Administrative Council, the house ban expressed

by the President was accepted as a necessary measure under specific and urgent circumstances. The suspension of the member of the Boards of Appeal was decided by the Council and not by the President of the EPO. The Council will also independently decide on the appropriate steps to be taken in this case, which is a unique case in the history of the EPO. This is a purely individual case as it happens sometimes in any institution and the Organisation is just implemented the due process. Independence goes often together with higher standards in terms of duties, behaviours and code of conducts.

Contrary to what is stated here, the independence of the Boards of Appeal never was an issue in this discussion, nor will it ever be. There never have been any intervention from any EPO President in the decision making process of the Boards. The decision R19/12 from the Enlarged Board of Appeals referred to a simple appearance of partiality of the Vice-President in charge of the Boards. Thanks notably to the immediate internal measures taken by the EPO President last summer, two recent decisions from the Boards have already dismissed the claims of partiality against the Vice-President and other Boards' members. The proposal of reform under discussion with the member states next week aims at strengthening this aspect by giving greater organizational independence to the Boards of Appeal and also at improving their efficiency as it is foreseen for any good judicial system in Europe nowadays. The scenario depicted here, that a conflict between the EPO President and the Boards of Appeal could undermine the UP and UPC, is totally unfounded."

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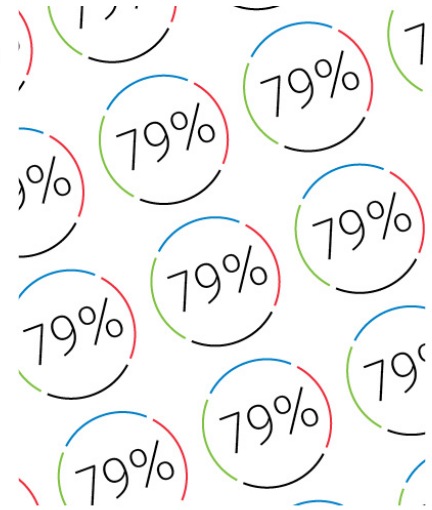
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