

Kluwer Patent Blog

EPO – All Problems Solved?

Thorsten Bausch (Hoffmann Eitle) · Monday, October 16th, 2017

The European Patent Organisation consists of two organs: the European Patent Office and the Administrative Council. Pursuant to Art. 4 EPC, the task of the Organisation is to grant European patents. This shall be carried out by the European Patent Office supervised by the Administrative Council. Thus, the Administrative Council is supposed to supervise the European Patent Office.

With this background in mind, I went with great interest to a speech given by Dr. Christoph Ernst, the recently elected chairman of the EPO's Administrative Council, at the Max Planck Institute in Munich. I was curious what he would have to say about the Unified Patent Court (UPC), the German constitutional complaints and the two most pressing problems that the EPO currently has, at least in my humble opinion, namely the quality of its products and the serious understaffing of the Technical Boards of Appeal, as regards which I started writing (and complaining) [over a year ago](#).

With regard to the UPC, I learnt that this is a good idea from a European perspective, even though it may occasionally lead to some disruption of the existing business models of some. All well and good. Will it come and when? On that I did not learn anything. I cannot remember Dr. Ernst using the word 'Brexit' even once. He did mention the German constitutional complaint against the UPCA ratification, but his only two comments were "I am afraid I must disappoint you – I cannot comment on it here since I am a member of the Ministry of Justice", and "I hope that it will end well and that it will soon be decided". Amen.

Turning now to the two problems mentioned above, i.e. quality and the understaffing of the Boards of Appeal, I was flabbergasted to learn that the first was not actually a problem at all – at least not for Dr. Ernst – and the second has meanwhile been solved since the vacant positions have now been filled up, as Dr. Ernst explained.

Hmm. "Die Botschaft hör ich wohl, allein es fehlt der Glaube". (I hear your message loud and clear, but still I don't believe it – Goethe, Faust)

I may devote a separate post to quality, which I admit is a difficult subject and with regard to which I think care should be taken not to overemphasize "emotional" factors and "felt quality", as Dr. Ernst argued with some force, but where one should also be wary of the fact that there is a huge temptation to overestimate one's own quality if asked to measure it. There is a famous saying that 80% of German Professors believe that their work is above the average of their peers. And in view of the EPO management's impeccable record on "own-trumpet blowing", as Robin Jacob LJ. once acidly remarked, I think that the Administrative Council would be well advised to have quality

checked by an independent authority, or by a comprehensive user consultation, rather than putting too much trust in the judgment of the EPO management. Another probably sensible proposal was recently filed by a reader of this blog in regard to one of my earlier contributions:

Beside the meaningless quality marker under ISO 9000 which is regularly trumpeted to be excellent, the EPO should publish the real quality statistics which are set up by the audit department. The figures will probably look quite different, hence a reason why they are a well-kept secret.

Maybe the Administrative Council (AC) could talk to someone from this audit department and find out what their findings are (to be fair, perhaps they have already done so, but Dr. Ernst mentioned nothing about that). From the discussion following Dr. Ernst's speech, it became pretty clear that most in the room – a mixed audience of patent attorneys, attorneys at law, academics, EPO members and judges – were anything but convinced that quality has not suffered as a result of the latest changes in EPO policy (see [my earlier reports](#) on this blog). Perhaps this will give the AC Chairman something to think about, although I am not so sure. I am afraid his mindset is more that he first wants to see evidence of a quality problem before starting to address it. Appropriate and fact-supported comments by readers are welcome! Prof. Hilty made an interesting concluding remark on this, i.e. who actually has the burden of showing that quality has not suffered as a result of the greatly increased productivity pressure?

But let us put quality aside and turn to the really good news. The Chairman of the EPO's Administrative Council said – and I am not joking here! – that the understaffing problem has meanwhile been solved. He literally stated that the (vacant) positions have been filled again (“die Stellen sind jetzt wieder besetzt”).

How great!

Except that this is unfortunately simply not true.

While a few Board of Appeal chairmen were appointed (out of current board members) and a number of current board members were apparently re-appointed in the last AC meeting, the overall result was such that EPO users can only be very disappointed. Following Dr. Ernst's speech, I asked around and quickly learnt that there have, in fact, been virtually no new appointments of technical members lately. Very unfortunately, the official [communiqué](#) on the recent Administrative Council's meeting as published on the EPO's website again hides this fact from the public by using the usual and completely meaningless verbiage

The Council also decided on appointments and re-appointments to the Enlarged Board of Appeal, the Boards of Appeal and the Disciplinary Board of Appeal.

(which raises the question as to why the AC does not itself draft and publish its own communiqués? – more substantive information and less hagiography to the EPO President would be a better fit for a supervisory body than the current setting – sorry, if I am too direct here).

In any case, it cannot be denied that the large majority of the more than 20 open positions as shown

by the [latest complete business distribution scheme](#) from the end of 2016 have **not** been filled. Just to mention one [example](#), the pharma board 3.3.02 now (finally!) has a new chairman, but still no (zero!) technical members. Its cases go to TBA 3.3.01. The backlog of cases grows and grows. This cannot be the solution!

Dr. Ernst was confronted with this fact by some members of the audience after his speech. He seemed genuinely surprised, if not even a little embarrassed, on hearing this and said he was not aware of this.

This raises serious questions.

I assume that Dr. Ernst genuinely told the audience what he believed to be true. If so, one must wonder how on earth he could come to this view. 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?

As I wrote in the introduction, the Administrative Council's primary role is to "supervise" the European Patent Office. I am not sure that the AC lives up to this challenge at this point in time, especially if its chairman does not even know that the body he is supposed to supervise is doing (almost) nothing to improve the meanwhile catastrophic backlog of EPO appeal cases. I can only repeat myself: **URGENT ACTION IS REQUIRED HERE!** This matter should not be allowed to wait until the next EPO President takes over. It is a shame that most of the vacant positions are not even being advertised at the moment.

But this can only get better. Dr. Ernst did give me the impression that he is genuinely interested in a dialogue and ready to listen. At least he emphasized his openness time and again during the quality discussion. I will send him a copy of this contribution and of your comments, if any, and will encourage him to establish better and more direct contact to EPO users and to EPO staff about where exactly there are perceived problems and what can be done to solve them. Dr. Ernst concluded his Q&A session with the statement: "One achieves the most positive results by a critical dialogue".

I could not agree more. Let us take him and the AC up on this and work together for a future of the EPO where staff again feel appreciated and trusted by management rather than put under constant pressure and super-supervision, where users are satisfied with the quality of the EPO decisions/patents, and where opposition and appeal proceedings take no more than 1.5 years per instance without depriving parties of their fundamental right to present their cases fully and adequately in two instances. It is possible if all hands work together: EPO users, EPO and BoA staff, and – in particular – the EPO management, properly supervised by the EPO's Administrative Council.

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