

Kluwer Patent Blog

The EPO's Vision (V) – Trust

Thorsten Bausch (Hoffmann Eitle) · Saturday, March 31st, 2018

This is the last post of my series on the EPO's vision and the current reality, this time dealing with the issue of EPO and "trust", including trust-building measures such as transparency, fairness and respect. Let's begin by recalling the yardstick by which the EPO wants to be measured, its "vision":

Our vision – what we want to be

With expert, well-supported staff, motivated to set worldwide standards in quality and efficiency, we will continue to contribute to innovation across Europe, and play a leading role in developing an effective global patent system. **All our relationships – within our Office and with partners around the world – will prosper through trust, transparency, fairness and mutual respect.**

The last sentence, which I have highlighted in bold, sets the bar high. And I dare say, albeit with much regret, that the management under President Battistelli and the EPO's Administrative Council have spectacularly failed in this category more than in any other.

"Trust" begins and ends with how you treat other people. Every time I enter the EPO premises these days and am subjected to the Office's "security" control, I think to myself: Does a patent office, in which public hearings are regularly held, really need this? If so, why were such controls not introduced in 1981 when the EPO opened, but only in 2016 or 2017? Why does the EPO think it needs to screen an EPO representative's suitcase and jacket, after they have checked his/her identity? Does the EPO management really think that EPO representatives or parties to oral proceedings pose a threat to anyone in the office? If not, why are we then subjected to such controls?

Don't tell me this is all to protect the EPO against terrorists – it is a laughable proposition that the current "security checks" might intimidate, let alone stop a bunch of terrorists with machine guns or explosive belts.

Note that I am certainly not advocating here that there should be no security anywhere in the EPO and everybody should have free access to every office. But I have to say that I liked the policy of past EPO presidents much better, who allowed a (semi)-public space without body controls for identified parties to oral proceedings, such as EPO representatives and their clients.

Furthermore, 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 justification seems to be that allegedly defamatory material against the President was said to be sent from these computers. Yet this raises at least three questions: Firstly, who decides what is "defamatory"? Remember that [defamation](#), by definition, is the communication of a **false** statement that harms the reputation of an individual person. Have demonstrably **false** statements been spread from this computer? And even if they have, does the purpose of identifying the offender justify this significant intrusion into the private and confidential professional sphere of European Patent Attorneys? And how can all of this be reconciled with the EPO's vision of trust?

Trust on the other side, i.e. from examiners towards their President, is not better, I am afraid to say. According to [Wirtschaftswoche](#) (in German), they internally call him "Putin". The latest [EPO FLIER No. 36](#) bears the laconic title:

Trust is broken & quality in decline

EPO staff have lost trust in their employer

Not too much trust left, it seems.

Nonetheless, let me be very clear here that a mutual lack of trust does not justify acts like sending anonymous emails personally threatening the EPO President or any other EPO employee or even [cutting the brakes of anyone's bicycle](#). I strongly condemn such actions, which only serve to further escalate the situation and destroy mutual trust. Such actions may partly be responsible for the current EPO President feeling that he should always be accompanied by at least one of his body guards, who – rumours have it – are even armed within the EPO premises. How low have we sunk that it came to this?

Is there at least some more trust between the President and the Boards of Appeal? Well... What immediately springs to mind again in this context is the plea letter by the Enlarged Board of Appeal to the Administrative Council and its subsequent [decision](#) to refuse making a proposal to remove Mr. Corcoran from the office on which I reported [here](#). In this decision, which you will probably not find anywhere on the EPO's website although the Enlarged Board even provided it for publication in the Official Journal of the EPO, the Enlarged Board stated this about the Administrative Council ("the Petitioner") and the Office President in the catchword:

For the Enlarged Board to be able to continue with these proceedings the position of the Petitioner would have to be that it did not agree with the Office President and acknowledge that, from an institutional point of view, the pressure exercised by the Office President in the present case was incompatible with the judicial independence of the Enlarged Board guaranteed by the EPC. As the Petitioner did not clearly

distance itself from the Office President's position, there is a threat of disciplinary measures against the members of the Enlarged Board. It is then the Enlarged Board's judicial independence in deciding on this case which is fundamentally denied.

Hmmm, does not exactly sound like there is a lot of trust here. It is then fitting that the Office President did not come to the inauguration of the new building of the Boards of Appeal in Haar, but instead sent his VP Mr. Lutz. Maybe he was not even invited. Here is the beginning of the EPO's [Press Release](#) about this event:

The new building for the Boards of Appeal Unit of the EPO in Haar, Munich, was officially inaugurated yesterday. The ceremony was attended by EPO Vice President for International and Legal Affairs Raimund Lutz, Boards of Appeal President Carl Josefsson, the Chair of the Administrative Council of the European Patent Organisation, Christoph Ernst, and Gabriele Müller, the Mayor of Haar, as well as by members of the Boards of Appeal and delegations from the Administrative Council.

“Enhancing the perception of the independence of the Boards of Appeal of the EPO has been a long-standing project of our organisation. Today's inauguration marks an important step in the reform of the Boards. We wish Carl Josefsson and all his staff a very successful start to this new chapter in the Boards' operations,” Raimund Lutz said.

Well and good, Mr. Lutz. I would have a few [ideas](#) how to enhance not only the perception of the independence of the Boards of Appeal, but actually their very independence for a start, but I will not repeat myself here.

How then about trust in the EPO and its current management by industry? Well, to be honest, I am not from industry and thus probably not the right person to ask. It would be great if some of my readers from industry chime in here and let us know their views directly. What I have read in [JuVe](#) about a year ago does not sound very enthusiastic in this regard (my translation):

87 percent are of the opinion that the EPO President is not doing a good job. The main reason: the tough conflict between Battistelli and parts of the staff. The dispute with the main union SUEPO alerts the industry representatives. 79 percent of companies are concerned about this.

They view Battistelli as the main cause of the misery. An overwhelming majority of 96 percent think that the EPO president should be less confrontational with the unions. The president's efficiency strategy is no longer very popular: 71 percent of companies do not think it makes sense, 4 percent support it and the rest abstain from an evaluation.

If this poll is representative of industry's view, I dare say that trust in the EPO President from this side is limited as well.

Only the Administrative Council seems to love the President. Sometimes I wonder why.

I am not completely naïve: it is plainly obvious that Member States like it if they receive more money from the EPO in renewal fees after grant. Thus, a “production increase” by the EPO might be in their (short-term) interest. But there are a few buts: Firstly, the current production increase will not be sustainable for years to come; at best it is a straw fire. The EPO cannot grant more applications than are filed. Secondly, patents of mediocre quality will generate additional economic costs, because they unlawfully limit free competition and may impose an additional significant burden on the courts of the member states. Thirdly and importantly, the money the EPO gives to its Member States has to be taken from somebody; in the end EPO official fees are nothing but a sort of tax for those who want to file patent applications and those who want to (or have to) fight against patents that they think have been unfairly granted to their competitors. Normally, patent costs are seen as a tax-deductible investment. Therefore, what the member states earn in official fees, they will typically lose in corporate or income taxes. I concede that this is only approximately correct, since non-EPO applicants are not paying taxes in the EPO member states, and it may also be true that some smaller states having very little own patent activity just profit from the EPO’s revenue stream, all things being considered. Nonetheless, it would be a delusion to believe that official fees just pour in *ad libitum* from a generous universe.

Taking one more step back, I would like to caution against choosing profits or money as the new “golden calf” of a patent office. It is NOT the EPO’s vision or mission to make profits – the EPO is an office designed to fairly reward inventors, whose inventions satisfy the requirements of the EPC, with a monopoly right (i.e. a patent). It is hoped and expected that this system will promote technological progress, no more no less. Official fees are absolutely secondary in this respect and should only serve to keep the patent office liquid and operational (of course allowing for accruals to secure staff pensions). If the EPO makes more profit than necessary for sustainably running the office, it should in my opinion lower its fees.

The EPO has considerable leeway to do this. It literally sits on a heap of money; so much money that the President has [written](#) to the AC’s Budget and Finance Committee, asking them to liberalize the Investment Guidelines, so that the EPO can start investing in more exciting financial instruments such as currencies, derivative instruments, asset-backed securities (ABS), mortgage-backed securities (MBS), Credit Default Swaps (CDS) or in summary: “a diversified portfolio managed by external experts”. I highly recommend everyone to study this document in full, which has already been critically discussed on [this blog](#). I share this criticism and just note that the experiences of [Harvard University](#) and others in 2008/2009 should be a lesson to all of us. In any case, the status quo is this: Even after deduction of 650 million EUR to fund the pension scheme, there is still a “treasury” of the Office amounting to **2.300.000.000 EUR**:

The treasury of the Office has grown steadily over the last two decades and particularly during recent years under the Efficiency and Quality strategy applied since 2011: 400 m€ in 2006, 1.700 m€ in 2014, 2.200 m€ in 2016. Part of the operational surplus was used to fund the RFPSS (650 m€ during the last five years) in addition to the normal contributions of the Office and the staff. The remaining part of the treasury (currently 2.300 m€) is managed under the constraints of the investments guidelines defined in the 1990s and marginally updated from time to time (1998, 2006, 2015), focussing on short/mid-term asset classes.

What should the EPO do with this incredible amount of money, taken away from applicants?

In my opinion, the best option would be to lower the official fees significantly so as to melt down this surplus and to give applicants (partly) back what is theirs. The second-best option would be to pay this money out to the contracting states to reduce their considerable national debt. A positive side effect of both options might be that nobody in a responsible position at the EPO would be brought to bad ideas. And if and when the EPO needs more money again (according to the above document, this will not be before 2036), the official fees may well be raised again according to the office's needs. In the meantime, I see no justification for the EPO hiring (expensive) external experts to manage a (risky) portfolio of assets. This is not the EPO's job, mission or vision.

First and foremost, however, we (the public) need to trust that the EPO will deal with this money responsibly.

Unfortunately, I must confess that I am currently lacking this confidence. To begin with, the EPO's financial reports are not accessible to the public in any meaningful detail, which makes any objective evaluation impossible. However, what I and others have observed, for example, is that millions of Euro are being spent on lavish "inventor of the year" ceremonies every year. I am not against rewarding and praising inventors in general, but does one have to make a costly "event" out of that? And even worse, I suspect that further millions of Euros of "official" fees have been spent (or should I say, wasted?) to convert the office space of the 10th floor of the EPO's main building on the Isar river into the President's own private penthouse. You think this figure must surely be exaggerated? Okay, judge by yourself. [Here](#) are pictures of the stylish architecture of this penthouse. Maybe I'm a little old-fashioned, but I think this is simply incredible.

I do not think I exaggerate much by voicing the opinion that the EPO and its Administrative Council have set "worldwide standards" in pampering its Office President, rather than in trust and/or public accountability. I would be extremely surprised to learn of any other patent office in the world where its President privately lives in a lavish penthouse on top of "his" office.

Which raises the [six-hundred-thousand Euro question](#): Why did the Administrative Council allow this?

I would really like to know that – and much more – from the Administrative Council, but I am afraid I, and the public, will never receive an answer. I find it hard to imagine even in my wildest dreams that this penthouse in the 10th floor was necessary for the well-being or proper functioning of the European Patent Office. The President is entitled to a housing allowance of 3000 EUR per month according to the Service Regulations, which I find generous but still reasonable even though it comes on top of a basic salary that is higher than the one of the German Federal Chancellor. Be that as it may, at least in my opinion, the EPO President is not entitled to a full-fledged penthouse built for his private use at the expense of the EPO.

In my humble opinion, there is no reason to treat the EPO management and its Administrative Council any differently from a point of view of public accountability than a company listed on a public stock exchange. [Allbusiness.com](#) explains the following principles for SEC-listed companies:

You can find information on the compensation of officers of public companies in the company's filings with the U.S. Securities & Exchange Commission. Public

companies that list on an exchange or NASDAQ must file quarterly and annual reports with the SEC. Among other things, these reports include information on company officers, directors, and certain shareholders including salary and various fringe benefits, and transactions between the company and management.

I wonder where to find accurate information about salaries and fringe benefits of the EPO's upper management and the Administrative Council in the EPO's reports. I am afraid nowhere, but I would be perfectly happy if I were corrected. The Specimen Contract for the EPO President (CA/186/09), which is part of the EPO's [Service Regulations](#), just includes the following obscure statement about the possibility of yet further additional boni:

The Council considered it desirable to take up in due course, after an in-depth technical evaluation, any future proposals with regard to extending to the President the procedure for performance appraisal introduced progressively for all top managers. The adoption of any such procedure would call for a detailed analysis; moreover no reference is made to it in the vacancy notice. It cannot therefore be reasonably included in the contract resulting from the present selection exercise.

And in regard to the Administrative Council, similar questions arise, as I am afraid to say. My trust in this institution would be very much enhanced, if there is complete transparency on (i) the compensation and fringe benefits of each member, (ii) any fringe benefits awarded by the EPO to the staff and family members of each member, and (iii) any payments and benefits awarded by the EPO to national patent offices, other national organisations (parties, campaigns) or individuals by way of cooperation programs and the like. I have heard and read wild rumours, which I refuse to believe and spread further here. Yet I do think it would massively help to silence such rumours and build trust in a proper governance of the EPO, if the AC showed maximum transparency in this regard.

Speaking about transparency, let me finish this critique with something positive, i.e. a confirmation of news on which I reported [earlier](#) and for which I have been waiting for years. The following announcement was recently made by the President of the Boards of Appeal:

BoA appointments and re-appointments

21.03.2018

Appointments and re-appointments by the 155th Administrative Council

Dear colleagues,

At its 155th meeting, the Administrative Council of the European Patent Organisation has just appointed **Jean-Michel Schwaller** (FR, for board 3.3.06) and **Paul Scriven** (GB, for board 3.4.01) as chairmen of technical boards of appeal and technically qualified members of the Enlarged Board of Appeal, both with effect from dates to be agreed upon between the candidates and the President of the BoA.

It has also appointed **Silke Albrecht** (BE, for board 3.3.07) and **Juan José de Acha González** (ES, for board 3.2.01) currently examiners in DG 1 as technically qualified members of the Boards of Appeal, with effect from 1.5.2018. It has also appointed

Corinne Barel-Faucheux (FR, for board 3.5.07), **Fabian Giesen** (DE, for board 3.5.02), **Christian Kallinger** (DE, for board 3.4.02) and **Claudia Denise Vassoille** (DE, for board 3.5.02) currently examiners in DG 1 as technically qualified member of the Boards of Appeal, with effect from 1.6.2018 as well as **Eric Duval** (FR, for board 3.3.07) currently also examiner in DG 1 as technically qualified member of the Boards of Appeal, with effect from 1.9.2018.

Rainer Moufang (DE) has been reappointed as a chairman of a technical board and legally qualified member of the Enlarged Board of Appeal with effect from 1.11.2018.

The following colleagues have been reappointed as technically qualified members of the boards:

- **Gabriele de Crignis** (DE) with effect from 1.10.2018
- **Armin Madenach** (DE) with effect from 1.10.2018
- **Klaus Schenkel** (ES) with effect from 1.10.2018
- **Gudrun Seufert** (DE) with effect from 1.10.2018
- **Maria Rosario Vega Laso** (ES) with effect from 1.10.2018
- **Ronald de Man** (NL) with effect from 1.11.2018
- **Andreas Haderlein** (AT) with effect from 1.11.2018
- **Paula San-Bento Furtado** (PT) with effect from 1.11.2018 and
- **Ambrogio Usuelli** (IT) with effect from 1.11.2018.

I congratulate all concerned on their appointments and reappointments, both personally and on behalf of the Council.

The Administrative Council also decided on the promotion and non-promotion of members to grade G 15, step 1, in accordance with my recommendations and the proposals by the Chairman of the Administrative Council.

Carl Josefsson
President of the Boards of Appeal

Congratulations also to you, Mr. Josefsson and AC! This is finally and clearly a step in the right direction, and I am even more delighted that the EPO website seems to show additional vacancies for further BoA posts. My euphoria would be even greater, had I been able to find an official link to this circular on the EPO's website. But after 2 hours of searching I had to give up and just hope this is no hoax from the EPO. Anyway, I do not think this news is (or should be) secret. On the contrary, I am only too happy if I have an opportunity to praise the EPO and tell my clients that at least a first credible step has finally been made to end the unbearable backlog at the Boards of Appeal.

Easter is a time of hope. Let me thus conclude this long series of observations on the "EPO's vision" with my best wishes and thanks to all readers, particularly to those who engage in the discussion by providing their own comments, and with an expression of hope for the resurrection of a European Patent Office that will again fulfil its ambitious vision in the not too distant future.

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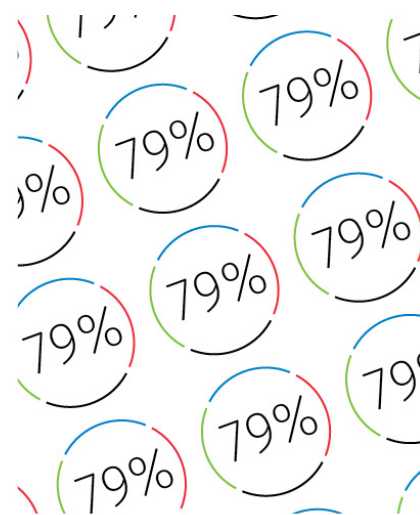
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