

INTERNATIONALE GEWERKSCHAFT IM EUROPÄISCHEN PATENTAMT

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STAFF UNION OF THE EUROPEAN PATENT OFFICE

SUEPO

UNION SYNDICALE DE L'OFFICE EUROPEEN DES BREVETS

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NEMESIS: SOCIAL CONFLICT AT THE EUROPEAN PATENT OFFICE

The EPO

The European Patent Organisation was created in 1977 through the European Patent Convention (EPC). A diplomatic Conference of the Contracting States is responsible for any amendment to the Articles of EPC. Otherwise, the highest supervisory and legislative body is the Administrative Council, which consists of delegates of the member states who gather several times a year. The delegates are non-elected civil servants, typically from the national patent offices. The European Patent Office (EPO) is the executive body of the Organisation. Led by a President and Vice-Presidents appointed by the Administrative Council, the EPO comprises about 7000 staff members. It is the second-largest intergovernmental organisation in Europe after the European Commission.

Its tasks

The tasks of the EPO consist primarily in processing European patent applications and grant patents on behalf of the contracting states. As a designated authority, it also processes worldwide patent applications under the Patent Cooperation Treaty. The European Commission has further entrusted the EPO with the processing and granting of EU unitary patents, as well as keeping the registry and administering the renewal fees.

Its impact

The economic impact of the EPO cannot be underestimated. A study on behalf of the European Commission¹ in 2004 estimated the actual and potential market for patents in eight European countries² between 15 and 24 billion EUR. Moreover, it is estimated that the presence of the EPO in its host states generates about three jobs for each EPO staff member within the jurisdiction³. In contrast, the EPO does not generate any cost to the European taxpayer. It is fully self-financed through the processing fees of the applications and, above all, through the patent renewal fees, notwithstanding the fact that half of the renewal fees are distributed to the member states. The industrial landscape strongly depends on the patents as granted at the EPO.

¹ ETD/2004/IM/E3/77;

http://ec.europa.eu/internal_market/indprop/docs/patent/studies/final_report_lot2_en.pdf

² DE, DK, ES, FR, HU, IT, NL, UK; see Table 1 of ETD/2004/IM/E3/77

³ Louter P, van Eikeren P "The economic importance of the European Patent Office", Oct. 2009

Its staff

The employees of the EPO are highly educated professionals from all of the 38 member states. They fall into two main categories: administrative and professional. Administrative staff is in charge of the formal side and record keeping. Aside from the necessary qualifications, they have to master at least two of the official languages of the EPO (EN/DE/FR). Aside from HR professionals and lawyers, the majority of the professional category consists of patent examiners. They all hold advanced degrees in science and engineering (MSc level of higher), and must be proficient in all three official languages of the EPO, in addition to their own language. They must be able to understand and report on complex technical and juridical texts in EN/FR/DE. The majority of staff, in particular examiners, have a good understanding of legal principles, since their job involves taking decisions that have legal effects (granting or refusing patents).

The remuneration package⁴ of the EPO staff is generous but is commensurate with their qualifications and the economic impact of their work. Their remuneration is exempt from national taxation (in order not to give host states and undue advantage over other contracting states) but is subject to an internal taxation, the proceeds of which go to defray the running costs of the EPO. This enables the EPO to use only a portion of the patent renewal fees for its operational costs, and the excess (currently, one half) thereof is distributed to the member states.

Reforms

The European Patent Convention is 40 years old. The EPO is set up according to principles of the international civil service, and some of the principles date back to the early 20th century. As early as 2007, the Administrative Council has mandated the Presidents of the EPO to develop and introduce a number of reforms. So far, most of them concern human resources management and working conditions. None address the issues of transparent governance and accountability of management. (For instance, the remuneration and ancillary benefits of the President is a well-guarded secret, as are the bonuses of the Vice-Presidents.) The working conditions laid down in the Service Regulations are not published; once the Administrative Council adopts new working conditions, they are implemented without any possibility for an independent instance to control thoroughly their compatibility with fundamental rights or with the generally accepted principles of law.

Controversial decisions

Staff is used and expects to be consulted in good faith about the nature and timing of any need to adapt social and technical matters that have an impact on their work. This is recognized by the fact that management is required to consult staff on such matters. In the past, staff representative were normally in a position to cooperate towards possible solutions. However, since 2007 staff has been consistently put before *faits accomplis*, with questionable reforms allegedly addressing undefined problems. Many of the changes introduced are perceived as being senseless and disruptive, and inconsistent with subsequent changes. This has caused widespread discontent.

⁴ which is comparable to all intergovernmental organisations

Repression of dissent

Even though the outcome was less than satisfactory, the EPO management must be credited for trying, between 2007 and 2010, to allay the concerns of staff by engaging in dialogue with the elected staff representatives, and with the staff union. This has changed dramatically under the current President⁵. Instead of dialog, he has chosen the path of systematically repressing any expression of dissent, not to speak of opposition.

Thus far, to silence any dissenting voice, the President⁶ has:

- Changed the rules to make it legally *impossible* to challenge internally a decision.
- Refused to recognize the staff unions⁷ as a legitimate social partner, in spite of the fact that the union SUEPO counts as its members nearly 50% of staff.
- Forbidden the staff representation to send mails to more than 50 staff members, thereby severely curtailing the possibility of communicating with staff.
- Inflicted disciplinary measures (reprimands) on staff representatives who defied the prohibition.
- Installed a filter blocking the delivery to staff of any mail originating from the Union (who has its own outside server).
- Refused to distribute Union publications through the internal mail.
- Subjected staff representation publications to censorship.
- Introduced “investigation guidelines”, under which any employee may be investigated without necessarily being told so. The investigation may be started at the instigation of even anonymous accusers. Colleagues may be interrogated and have a duty to cooperate, or they will be accused of professional misconduct. The person investigated is also obliged to “cooperate”, failing which (s)he will be liable to disciplinary measures for misconduct, and this means not being able to keep silent in order not to incriminate oneself. The person investigated cannot be assisted by legal counsel. There is no system in place to monitor the lawfulness and proportionality of the investigation.
- Proposed changes to the structure and functioning of the staff representation and of the statutory consultative bodies, which changes substantially reduce the role of staff in the decision-making process on issues that affect them directly;
- Proposed changes in the way staff representatives are elected (until now, the electoral process was chosen and supervised by staff itself through general assemblies);
- Blocked an online opinion poll which the staff representation had organized to allow staff to voice an *opinion* about the proposed changes in staff representation structure and elections, and summarily suspended a colleague who advised the staff representation on how to carry out an online poll efficiently and securely;
- Changed the rules allowing for industrial actions (strikes): calling for a strike now requires a *petition* to the president, signed by at least 10% of all staff; following which the president himself decides whether the grievance is receivable and if so submits the matter to a vote, where 40% of all staff must participate to have a valid quorum.

⁵ Benoît Battistelli (FR) took up the position of President of the EPO in July 2010. A graduate of the French National School of Administration (ENA), he is the former General Director of the French Patent Office (INPI). Since taking up his duties in 2010, he has surrounded himself with no less than 5 former INPI colleagues, whom he has appointed to key positions within the EPO.

⁶ with the apparent complacency of the Administrative Council

⁷ the largest of which is SUEPO, active in all four establishments of the EPO (Munich, The Hague, Berlin and Vienna). A much smaller union, FFP-EPO, is active in The Hague

The Union is no longer authorized to call for industrial action independently, and to submit the matter to its own members only⁸;

Moreover, the current President has:

- Refused to carry out an enquiry for the possible causes of the suicide of a colleague in 2013, who took his life at the work place and during working hours.
- Demoted a staff representative for voicing, within the staff representation, concerns about a possible managerial responsibility for the suicide of another colleague in 2012. He demoted the employee in spite of the unanimous recommendation of the Disciplinary Board to stop the procedure for abuse of process and unfounded claims.
- Systematically refused to follow the recommendations of the Internal Appeals Committee (who analyses grievances of individual staff members), even when unanimously finding in favour of the claimant.
- Threatened employees with severe disciplinary sanctions for being prepared to testify, *if so ordered by the Court*, against the EPO in civil suits by third parties.

No effective access to justice

Staff is particularly aggrieved because it has no reasonable way to seek relief through judicial review:

- The internal dispute resolution process (the Internal Appeals Committee), and the external instance (the Administrative Tribunal of the International Labour Organisation) are reserved for individual grievances, once the alleged damage has occurred. Only in very exceptionally circumstances can a general decision, such as a decision modifying working conditions, be challenged before it is implemented.
- The staff union has no access to either the Internal Appeals Committee or to the ATILO. As a corporate body established under national law, the Union may have access to the domestic court, but the EPO shields itself behind its functional immunity from jurisdiction and execution.
- Even when staff members have access to the statutory dispute resolution process, it takes in average 3-5 years for a grievance to be assessed⁹ by the Internal Appeals Committee, and if the grievance proceeds to the ATILO the claimant must count on a minimum of 3-4 years before the grievance is heard. All in all, with the current increasing backlog in the Internal Appeals Committee and at the ATILO, it is expected that grievances lodged after 2011 will not be adjudicated before roughly a decade.

The interest of the European Commission

With Regulation (EU) No 1257/ 2012 of the European Parliament and of the Council of 17 December 2012, implementing enhanced cooperation in the area of the creation of unitary patent protection¹⁰, there is an institutional link between the European Commission and the EPO. The European Commission intends to entrust a substantial part of its policy (the unitary patent) to an organisation that is not formally under the Commission's authority. Thus, as a stakeholder, the Commission has a legitimate interest in monitoring what happens structurally within the EPO.

⁸ it has been pointed out that such measures are unprecedented in Europe, apart from Italy's *Carta del Lavoro* (B. Mussolini, 1927) and Spain's *Fuero del Trabajo* (F. Franco, 1938), of very sinister memory.

⁹ There is a backlog of some 700 cases in the Internal Appeals Committee; rather than increasing the manpower to face this backlog, Mr Battistelli has decreased it.

¹⁰ http://archive.epo.org/epo/pubs/oj013/02_13/02_1113.pdf

Of the 38 contracting states of the EPC, 25 are members of the European Union and have ratified Regulation (EU) No 1257/ 2012. Thus, the states that will participate in the Unitary Patent system have a clear majority in the Administrative Council of the EPO, yet so far their respective positions have been focused on their national interests rather than on Community ones. With the introduction of the Unitary Patent, the Commission has an interest in overseeing a common policy.

There is a serious problem of governance in the EPO. The opacity of its decision-making processes and the lack of accountability is anachronistic in Europe and in the 21st century, at a time when states require from their institutions and from each other financial transparency and accountability. While the EPO may still be a competitive employer (in terms of remuneration benefits), its internal human resources policies (in terms of interpersonal relationships) are antiquated and brutal.

Generally speaking, European society will not tolerate that some of its citizens are deprived of their fundamental rights *only because they are employed by an intergovernmental organisation, or because they are well paid.* This is true in particular when the member states of said organisation are, in their overwhelming majority, also members states of the European Union. Yet this is exactly what has happened.

The Administrative Council of the EPO, and thus vicariously the member states, are complacent at best, grossly negligent at worst. The Council has largely given the President *carte blanche*, without asking what the consequences would be or how he would use his powers. Structurally, the President of the EPO acts as accuser, investigator, judge and final arbiter on all matters; there is no separation of power guaranteeing a healthy system of checks and balances. The nearly absolute power the current President enjoys and the manner in which he uses it has been the source of particular concern and dismay¹¹. Staff and their unions consider the limitations on the freedom of expression and freedom of associations (embodies in the right to strike), and the right to effective access to justice as a breach of their fundamental rights as European Citizens.

Now that the European Commission holds a solid majority in the Administrative Council of the EPO, and if it is serious about **using and promoting the** Unitary Patent as one of its important pillars to exercise its policy, it is high time it took a keen interest in what is happening at the EPO and insist that the house be put in order. By introducing proper policies through consultation and negotiation. Not through repression and intimidation.

¹¹ Mr Battistelli has been reported in the press as being perceived as behaving like a “*small African dictator*” (Die Zeit, 20 March 2014)