“The new President must restore harmony”

Christoph Ernst faces a Herculean task: He has to steer the European Patent Office (EPO) into calmer waters while also managing the situation resulting from a complaint filed against the Unified Patent Court (UPC) now in the hands of the German Constitutional Court. The Deputy Director General of the Federal Ministry of Justice is also Chairman of the EPO Administrative Council. In an interview with JUVE, he talks about obstacles encountered on the way to forming the UPC, errors made in the Battistelli era – and the expectations awaiting his successor.

JUVE: The European Patent Office is constantly dogged by infighting between the Council’s management and its staff. The launch of the UPC is clouded with uncertainty. The outlook is rather dismal, isn’t it?

Christoph Ernst: No, the situation is certainly not as bad as that. We must get something straight: The European patent system is functioning. Currently, the European Patent Office is receiving a great number of applications. This is a result of global growth and increasing innovation in the business world. And up to now, the EPO has managed very well to meet these requirements. We of course can’t afford to ease off in terms of this process. There will always be a requirement for us to deliver not just quantity, but also outstanding quality.

And the best way to do that is with motivated staff, right?

Without question, and therefore we have to revise the social dialogue within the Office also. We need working conditions that make all employees feel happy. The constitutional complaint filed in Germany against the constitutionality of the UPC is indeed a very different issue – and blame here cannot be attached to the EPO.

Yet the constitutional complaint is the real pressing issue of the day right now for patent experts throughout Europe. It is blocking the launch of the new court and the Unitary Patent issued by the European Patent Office. Do you have any new information about the court case?

The German Federal Constitutional Court has asked a number of individuals and institutions, including the Federal Ministry of Justice, to make statements related to the matter. We are currently examining the grounds for complaint in great detail, and we will respond by stating our own official position. We are confident that we can present a compelling case demonstrating that the UPC project and the legislation presented by us is constitutionally sound.

The complainants and Rheinisch-Lippische Staatsanwaltschaft, specifically criticized the way the German Parliament (Bundestag) voted on the UPC legislation. Could this current problem be resolved simply by the incoming German Parliament holding another vote?

At the moment, that is merely a hypothetical question. We are convinced that the previous German Parliament carried out the vote in the correct manner.

The Federal Constitutional Court is in possession of a separate complaint that criticizes what they see as the inadequate legal status of the EPO’s Boards of Appeal. Now the judges have also asked the EPO to provide comment. Can it be assumed that the judges’ stance on this element of the UPC complaint is a critical one?

Whether the inquiry into the EPO was really triggered by the criticism of the Boards of Appeal, one can easily speculate. Personally, it seems unlikely since there are obviously plenty of other good reasons for seeking a clarification of the EPO’s role regarding the UPC. The EPO will deliver after all a crucial role in the future system, for example with its responsibility for administering the Unitary Patent.

The Administrative Council, newly chaired by myself, adopted a structural reform of the EPO Boards of Appeal in summer 2016. How satisfied is the German Federal Government with how this has been implemented?

We feel that the necessary steps have been taken to ensure the independence of the Boards of Appeal. The debate on the reforms did indeed take some time – but the end was a very good solution was found. It wasn’t easy, because the European Patent Convention (EPC) set the legal guidelines here. In accordance with these guidelines, it would not have been allowed to create a Court that was completely separate from the EPO. Had we wanted to go that far, we would have needed to amend the EPC – but none of the 38 member states deemed this appropriate or necessary.

Where do you see firm proof of success achieved by the reform?

The reform has significantly strengthened the independence of the Boards of Appeal. There is now a Board of Appeal President, who operates similar to a court president. Gone are the days when a Vice
President of the EPO was also Chairman of the Boards of Appeal. In this, we have made a clear separation between the EPO’s executive arm and its legal arm. The judges now report to the Board of Appeal President, instead of to the head of the Office. This shows how much the Boards of Appeal extends to meet the requirements for a proper competent national court.

This reform represents a key event under the tenure of the incumbent EPO President, Benoît Battistelli. What is your overall assessment of President Battistelli’s work over the past eight years?

One system, a multitude of problems
Several major issues are currently plaguing the new European Patent system:

- Gender uniformity: Up to now, national patents and the bundle patent granted by the European Patent Office (EPO) have dominated the scene in Europe. In fact, this arrangement is likely to change, with the introduction of the Unitary Patent for 25 EU states. Exclusive authority over the Unitary Patent and bundle patent will lie with the Unified Patent Court (UPC).

- Stumbling blocks: Important delays have hit the introduction of the new European patent system (Unitary Patent and UPC). The first vote was first used, and since July, a Constitutional Court appeal has blocked the key German installation. The launch date of the UPC remains uncertain.

- Unfairness to inventors: Also still unresolved is whether the UK will remain a member of the EU after it leaves the Union, and whether the UK will remain a future member. The recent event of the referendum on the future of the UK will put an end to these expectations.

- Controversial structural reform: The EPO’s Boards of Appeal scrutinize patents granted by the EPO. But the system is actually the main obstacle to it. Many patent experts have complained that, as a result, the Boards of Appeal do not operate as independent courts, especially given the role of Benoît Battistelli in the EPO’s internal matters of the court. The argument reached its peak in December 2016 when Battistelli suspended an EPO judge. At the start of the year, the judge was not released in response to public criticism, in 2016 the Administrative Council hung up on structural reform aimed at creating more independence.

- Poor image: The EPO has repeatedly attracted negative publicity over the past three years, mainly due to internal disputes. Translating public pressure for the EPO into issues such as the dispute between the staff and the EPO management and the ongoing corruption between the main Union, EPO, and EPO judges. During the dispute, practically all of the EPO’s leaders resigned en masse. Battistelli began disciplinary proceedings against several of the trade union leaders. Several were in line to hold their positions.

- Quality problems: Many patent lawyers, but also industry representatives, have for some years now complained about the deteriorating quality of the EPO’s examinations and granting of patents. They also criticize the increase in decisions making binding with the Boards of Appeal due to formal procedures opposed to the examination of the inventive steps. The lawyers attached to these here for too long efficiency strategy pressed by the EPO, through which Battistelli wanted to ensure the EPO was good for future.

An undoubtedly positive one, despite certain acknowledged imperfections. Put plainly, President Battistelli has initiated and implemented a large number of necessary reforms, and has implemented them following this Administrative Council’s approval. In doing this, he has strongly strengthened the EPO’s position overall. The working process is now better, productivity is higher, and the Board of Appeal have been reformed. In addition, Battistelli has initiated a number of social reforms that were also necessary on a general level.

What do you mean by acknowledged imperfections?

The verdict on the success of reforms he achieved will certainly be clouded by the fact that President Battistelli has overseen a very rigid regime with a heavy-handed approach. I would have occasionally liked to see more compromise and more understanding for differing interests.

What social reforms were necessary?

One example was the disputed reform of the right to take strike action. A precedent had established itself within the EPO which had to be put on a legal footing. The resulting regulation is definitely a step forward, but details can always be detailed, and this is also being put into practice.

As the start of October, the Administrative Council chose as its successor for President Battistelli, the current head of the European Union Intellectual Property Office, Antonio Campinos. Can you explain why there was only one single candidate for such an attractive and well-remunerated position at the head of an International organization?

I can’t see into the minds of any potential application. Maybe some were deferred from applying due to the fact that, from quite early on, it was clear that Antonio Campinos was applying, and it was also clear that he enjoyed strong support among the Administrative Council. But it is indeed true that many members of the Administrative Council would have liked to see more applicants and greater competition for the position of President. Campinos has never been elected with a large majority, and I also think he is a very appropriate current appointment.

What expectations do the Administrative Council have regarding the new President?

We expect Antonio Campinos to continue to take on the many challenges he faces and to see the EPO rise up to its public responsibility. It must anticipate an ongoing rise in the number of applications made. Especially if the EU Patent system becomes reality. The EPO must ensure that the EPO staff uphold high standards of quality when examining patent applications. The issue of quality is a central concern for the Administrative Council and the Federal Government’s patent protection, which in the end produces a monopoly, can only be justified for good patents.

What does the EPO’s social responsibility extend to?

We want to see the Patent Office play a central role in the framework of our society, and encompass the social reality of our society, for example.

And what about social conflicts within the EPO?

Improving the social climate in the EPO is quite clearly a relevant area to address going forward. We need to re-establish a dialogue between the relevant parties within the EPO. We need to achieve social harmony. Before the appointment of Antonio Campinos, it was made clear that all 38 Member States are ready to act on this from President Battistelli’s succession.

BATTISTELLI’S APPROACH TO IMPLEMENTING REFORMS WAS TOO HEAVY-HANDED.

How can Campinos achieve this?

This work carried out at the EPO demands and carries huge importance for the European and even global economy. Staff enjoy very good salaries. However, there is clearly a sizable number of
employees who are not happy. Mr Campinos must address this issue and boost motivation, for the overall goal of the Patent Office. This is a challenging task for any good executive, which Antonio Campinos most certainly is.

What makes you so optimistic that Campinos is the right man to break the current deadlock? He is a very dynamic person, who looks to move forward. He can get stuff done and has previous tenure at Siemens. This shows that we can expect that this will prove to be the case in Munich, too.

He is also reputed to enjoy a close relationship with President Battistelli, though. Wouldn’t that be an obstacle here?

I cannot say how close that relationship is. They both share many ideas on some issues, but that doesn’t necessarily mean that Campinos will simply follow Battistelli’s example. I can imagine, for example, that they differ in their approach to communication or in involving employees.

That would also be necessary with respect to dealing with SUEPO, the key union at the EPO. What does the Administrative Council expect from the union?

We expect a willingness to sit down with the new president and discuss objectives and how to achieve them. The battle lines are drawn, and it will require goodwill from both sides to overcome this situation. I hope that, together with the SUEPO, we will be able to get to a constructive arrangement. It is critical that everyone work towards a joint solution.

This is why a show of goodwill, could the EPO management and the Administrative Council not hold the pending disciplinary proceedings against one of the EPO judges?

Yes, this case has attracted a lot of public controversy. The Administrative Council has previously stated that the EPO management was responsible for disciplinary oversight of the EPO's decision. Currently, the case remains before the EPO and the Administrative Council. We need to see whether we can overcome these hurdles in the time that remains.

How do you want to use your role to revive dialogue within the Patent Office?

Like my colleagues from the other EPO countries, I want to promote dialogue in the best way possible. But I must make one thing clear. It is the future President and the staff representatives, and, in certain circumstances, the trade unions, who will play the key role in this matter. The Administrative Council is not actively seeking a social partner.

Further controversy in the debate over the EPO’s Battistelli’s efficiency strategy. Why is efficiency such an important issue?

It is not only in the interests of patient applicants and the economy, both of which can expect patent applications to be processed within a reasonable time frame. The quality of the work is lower. The Administrative Council is more than open to discussing these matters with experts, but such discussions are only useful if based on reliable facts.

Are there other challenges facing the European Patent Organisation that you want to address during your tenure?

Yes, I would like to significantly raise the profile of the future role of the Administrative Council. We are a body within the European Patent Organisation, and a strong Administrative Council in the interest of the EPO contracting states. The President of the EPO is responsible for its overall leadership, but we consider ourselves to be equal partners. We will place a premium on dialogue and good governance.

This interview was conducted by Christian Schulze and Mathias Knoe.

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**Performance record**

The European Patent Office is consistently receiving large numbers of patent applications.

**Country of origin of applicants**

- South Korea: 159,353
- Japan: 160,004
- China: 152,703
- USA: 123,898
- Canada: 5,966
- Other: 15,270

Approx. 50 percent of the EPO’s clients in 2016 came from overseas.

**Public responsibility.** For Christian Schulze, the race to set new on the EPO and its Future President.