

In Focus: European Patent System

***Called to account:***

*The management style of EPO President in office Benoît Battistelli is coming in for criticism from a wide majority from the industrial sector*

**Clear Orders**

2017 is scheduled to see the start of the new patent system of the European Union. After some considerable squabbling to do with the European Patent Office (EPO) and the planned Unified Patent Court (UPC), the way is now clear for this to go ahead. But the industrial sector still has its concerns, and in the JUVE Patent Survey 2016 some clear expectations have been formulated for the people in charge at the Office. The industrial sector wants to see a unified court system that functions properly – and another style of management at the EPO, if need be without the President currently in office, Benoît Battistelli.

By Mathieu Klos

“The situation is really alarming, and for a European authority the working conditions for the staff are a scandal.” The manager of the patent department of a pharmaceutical giant isn’t pulling his punches. The authority in question is the European Patent Office (EPO), which together with the Unified Patent Court (UPC) is the central element in the planned European patent system. But even before the system has officially started there are already substantial signs of impending doom.

In the early summer of 2016 in particular, things came to a head – from the point of view of the patent legal eagles, too. In May, first of all it was the turn of the Enlarged Board of Appeal of the European Patent Office to give Office boss Benoît Battistelli something of a black eye, when they took the view that he had got too involved in a disciplinary procedure against an EPO judge. The most senior judges in disciplinary procedures refused to give their agreement to the removal from office of their colleague who had been suspended by Battistelli. The Administrative Council of the Office, which is actually the determinant body when it comes to disciplinary matters involving the Boards of Appeal, have no choice other than to reinstate the judge – at least in the opinion of experts. Up to now, a decision is still pending.

***Method***

*At the end of November 2016 the JUVE Editorial Board for the first time conducted a survey of the managers of the patent departments of 168 selected international technology companies. These included German industrial corporations as well as middle-sized businesses and international technology giants, such as from Silicon Valley. The companies questioned in the JUVE Patent Survey 2017 represent all major technology sectors, and file patents with the European Patent Office. 14.3 percent of the persons contacted by JUVE took part in the survey.*

***Things aren’t running smoothly:***

*At the Munich headquarters of the European Patent Office, the conflict between the Office management and the staff union is overshadowing the work of issuing patents.*

The case has added fuel to the already intense debate about the influence exerted by the management of the Office on the EPO court. Critics say that the court is not independent, and that its users are not granted adequate legal protection. The 38 Member States of the European Patent Organization, which operates the EPO, are accordingly tinkering with a reform. After more than two years squabbling, they agreed last June with the Office management on a reform package, but plainly without letting the EPO court have an entirely free hand. Half-heartedly, broad sections of industry have gone along with this, as has been shown six months later by a survey by the JUVE Editorial Board among patent department managers of global-scale technology concerns (*For the Great Solution, page 100*).

But it didn't stop with the suspension of the judge. Suspensions of staff union members and protests by the workforce followed. The EPO was topic number one on the patent scene.

Until 23 June. When Britain voted for Brexit, suddenly the second key pillar of the system, the Unified Patent Court (UPC) took a wobble. Great Britain must ratify the UPC treaties in order for the Court, and with it the new EU patent, to get off the ground. Would the British Government, in the light of the vote, now still be ratifying the UPC treaty before exiting the EU? Patent experts were convinced the answer would be no.

Optimists were hoping that the UPC, in the best case scenario, would simply start work a little later, when Great Britain had left the EU, and the remaining EU States would start the system as a Continental European version. In any event, the prospects of establishing a European patent system in the near future, with uniform implementation before a single court, are once again slim.

### **End of the Mini-State**

In this situation, the industrial sector is pinning a lot of hope on a unified court system, as the JUVE Editorial Board survey shows. 67 percent of those who took part are far from happy about the Brexit-incurred delay in the start of the UPC. But the system is not without its detractors; 25 percent regard the UPC and the EU Patent as damaging to the European patent system, and indicated that they were content with the interim uncertainty about the start date.

Nevertheless, the great majority are interested in a unified patent system in Europe. 62.5 percent of those asked would welcome a UPC, even without the involvement of Great Britain, and around two-thirds would even favour a new initiative if the UPC were to come to grief. This should, however, please be good enough to cover the territory of the European Patent Organization – in other words, the territory of 38 States. In the final analysis, what good does it do if the European patents from the EPO do indeed offer protection over an area which is substantially bigger than the European Union, but this protection can only be put into effect by courts at the national level.

The industrial sector made these feelings felt accordingly in the late summer, in particular in Brussels, and also pointing out that the Kingdom might well be excluded from the UPC system if London failed to express its intentions with regard to ratification. But London reacted to the pressure. At the end of November the British Government finally gave notice that it would be ratifying the UPC treaties, despite the Brexit vote. Sensation.

Since then, the Brits have seriously set about implementing the treaties. This is the British Government grasping at the last straw for allowing their home industry to enjoy unified patent protection in future on the EU Internal Market. Once Great Britain and Germany have concluded ratification, the Court will at long last be able to start work. Cautious estimates are looking at next October – but more likely a few months later.

What is not yet clear is whether the Kingdom can in fact continue to take part in the UPC after it leaves the EU. In legal terms, this appears entirely possible, but politically it remains uncertain. Leading European concerns, among them Siemens and Deutsche Telekom, said repeatedly in the autumn that they would prefer the UPC still to involve the participation of

Great Britain. No captains of industry are willing to forego the skills of the well-versed British patent judges. In the final analysis, too, the new Court has strong associations with the British Common Law.

### **Dark clouds over Munich**

So, while the future for the European Patent Court looks rosy again since the end of November, the industrial sector is still worried about the tense situation at the European Patent Office in Munich.

The ongoing conflict between the Office management grouped around EPO President Battistelli and sections of the workforce and the main staff union SUEPO, is causing alarm among leaders of industry. 79.2 percent of those asked are uneasy about how things are going, and they see Battistelli as largely responsible for the misery. An overwhelming majority of 96 percent believe that the EPO President should be less confrontational with regard to the unions; only 4 percent take the view that this is not an issue.

The European Patent Organization member states called on Battistelli as early as in February 2016 to settle the conflict with the unions by the summer of that year. It is true that in the interim Battistelli has indeed recognised a splinter union as a social partner; but despite the appeal, the Frenchman is still on a confrontational collision course with the main union SUEPO.

### **Union on the way out?**

More than ever it is becoming clear that the conflict between the politically experienced and tactically adroit Frenchman and the management of the influential union is developing into a wearisome legalistic war of attrition, which it is possible the main union Suepo may not be able to maintain in the long run. In the meantime, one Suepo functionary has been downgraded, and three leading unionists have even been suspended from office, and will be facing disciplinary proceedings. And, because they usually end up before the International Labour Organization in Geneva, long drawn-out proceedings are threatened, with no clear outcome. The people concerned are worried about their pensions, and one of them is even concerned about how his wife and children are going to survive.

Almost the entire Suepo leadership is affected by disciplinary measures, which is a body blow for the union. "The signal from the President is unambiguous. Anyone who gets in the way of the Office and its management is putting their livelihood at risk", according to sources close to the union. And some people in the know are going so far as to say that Suepo isn't getting any new members.

The EPO Administrative Council has been concerned about the way things are going for a long time, but up to now has been unable to exercise any decisive pressure. According to the press release from its last meeting in December, the Member States are calling on Battistelli "to make rapid progress, as a matter of urgency, with regard to the social agenda". The President of the Administrative Council and the Presidency of the Office are scheduled to work out joint specific proposals by June.

### **Quality above all**

The internal wranglings could lead to a loss of quality. Representatives from industry have been voicing this fear repeatedly in background discussions with JUVE. Even now, only 46 percent of the survey participants are content with the quality of the patent issuing procedure – and 54 percent are not. And when it comes to the appeal procedure, a slight majority of 50.2 percent see quality problems as well.

As well as demotivated workers, corporate representatives also blame the efficiency strategy for the shortcomings. This is Battistelli's flagship project. The aim is to make the Office fit for the future in the face of international competition. Patent examiners have

complained to JUVE again and again about the time pressure imposed on searches. Attorneys and in-house legal experts criticise the fact that appeal procedures too often only follow formal criteria rather than the thorough examination of the novelty of an invention. One survey respondent demanded that “the entire system should be made to comply with technical and industrial criteria again”. In the end, it’s the patents that are at issue, not formalities.

### **For the Great Solution**

**For most industrial representatives, the reform currently underway at the EPO Court does not go far enough**

Yes

No

Undecided

*The structural reform of the Boards of Appeal will allow for more independence.*

*I would have liked a complete detachment of the Boards of Appeal.*

*President Battistelli should not meddle in the affairs of the Boards of Appeal.*

### **Only a mini-reform**

The industrial sector is also worried about the independence of the Boards of Appeal. 96 percent of those asked insisted that Battistelli should no longer meddle in the dealings of the EPO court. Many of them regard the case of the suspended judge as an example of the President exceeding his authority, as well as the introduction of performance-related assessment criteria and efficiency increases in dealing with cases.

Not even a third of those asked were in favour of the reform of the Boards of Appeal, which is intended to give the EPO court greater independence (*For the Great Solution*). 83 percent even wanted the court to be detached from the Office entirely. This call comes too late. The Administrative Council decided in the second half of 2016 on far-reaching measures to implement the reform compromise. The first President of the Boards of Appeal has been decided on, in the person of the Swede Carl Josefsson. The introduction of this post is an important part of the reform. Josefsson will in future run the Boards of Appeal both legally and administratively. The EPO President is assigning him the powers needed for this, but when it comes to the budget and re-appointment, Josefsson will have to depend on the President.

***96% of those asked regard Battistelli as too confrontational.***

Nevertheless, the Swede is seen by EPO judges as a source of hope. In the first place, he is a judge, and not, like earlier executives of the Boards of Appeal, an administration appointee. Secondly, he has come into the patent organization from the outside, and is accordingly regarded as neutral. Josefsson reports directly to the Administrative Council, but he will be working closely with the Boards of Appeal Committee. The Swiss Roland Grossenbacher is heading up the sub-committee of the Administrative Council, also a new creation. He is regarded as an opponent of Battistelli, and the two of them together could form a counterweight to the President.

### **Criticism of the EPO management**

*President Battistelli is doing a good job*

*President Battistelli’s efficiency strategy is a good idea*

*President Battistelli should resign*

### **... but appreciation of the value of the Office**

*The EPO is an authority which works well.*

*The EPO plays a central part in the patent application strategy of my company*

*My company regards the present situation at the EPO as negative, and is strongly in favour of national patent applications*

It has also been decided to separate the Court physically from the Office. In the summer, the Boards of Appeal will be moving out of the Inner City to Haar, on the eastern outskirts of Munich. Some of the judges are regarding this as a punishment by the Office management for their recalcitrant behaviour, but it could equally well prove to be the foundation stone for the structure of independence of the EPO court.

### **Change of leadership**

The man who many experts regard as responsible for the misery is Benoît Battistelli. The Frenchman is causing polarisation, among other things because he is forcing through his efficiency strategy without yielding in the least, and it's a strategy which the majority of the representatives of industry find doubtful, both in sense and purpose. Even more obvious is the rejection of their view by Battistelli's management body. The Frenchman has no support among any of those asked (*Criticism of the EPO Management ...*). A slight majority of the in-house representatives are even calling for Battistelli to go.

Several times it has looked as if the Frenchman has shot his bolt, but every time he comes bouncing back, and the strong support he gets from the Administrative Council still appears to unbroken, including after its last session before Christmas.

As well as that, Battistelli can also count on the fact that the criticism will have hardly any consequences on the patent application strategy of the companies. The industrial world turning away from the EPO, a fall in the number of patent applications, and resultant lower earnings would be the things that would undermine Battistelli's position. Two-thirds of those asked, however, take the view that the EPO is working (*... but value estimation for the Office*), despite everything. This can also be seen as praise for the workforce. For 92 percent of the representatives of industry, the Office continues to play a central part in their patent application strategy.

This support for the Office and its European Patent is encouraging, because in the final analysis, it will be the Munich patent authority which will be issuing the new EU Patent. Its Boards of Appeal will be largely the people responsible for deciding on the quality of the patents, and it will be the UPC which then decides on infringements or nullity. But the Office management, the Administrative Council, the staff and their unions, will all continue to be called upon to work with one another without any scandals – with or without Battistelli. And in any event, with a new culture of togetherness.