

INTERNATIONALE GEWERKSCHAFT IM EUROPÄISCHEN PATENTAMT



STAFF UNION OF THE EUROPEAN PATENT OFFICE

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Trias Politica

Beyond the problems, the way out:

"Feuille de Route" for Social Democracy by SUEPO

In 2013 the social unrest in the EPO has reached an unprecedented level eventually leading to diverse industrial action summing up to 13 600 Strike registration¹ and an equivalent loss of production of more than 14 000 Products² as of end of October. The subjects of discontent are multiple and seem to proliferate as the President rolls out his "road-map" ([CA 110/10](#)). Last in date, a reform called "Social Democracy" is being announced to be implemented within 3 months, so the threat: from experience SUEPO expects it will mean a curtailing of the last independent organ in the Office, the Staff Representation.

SUEPO is of the view that the apparent chaos³ under President Battistelli's presidency boils down to three different categories of problems. *First*, from the most fundamental to the most practical, all the issues stem from the fact that the Office **lacks the Rule of Law**⁴. The *second category* directly derives from the first and concerns the lack of **Social Dialog** at all level of the institution and in particular with the Intuitional Social Dialog Partners, such as SUEPO. The *third category* concerns all practical and often urgent matters of **Social Contract** and the corresponding ill-conceived reforms⁵ that have been rushed-through over the last 2 years.

Taking History's guidance on dealing with autocratic systems, SUEPO proposes to reform the governance model for all staff matters in the EPO along the **principle of Trias Politica**: a **genuine Social Democracy** comprising a system of check and balances based on the **effective separation of powers between the Legislative, Executive and Judiciary**. Such a system must be combined with a set of fundamental rights, amongst which the access to court, the freedom of speech and the freedom of association.

On this solid basis and as a second step, the Social Dialog should be addressed comprising the **recognition of the Union** and after negotiation the agreement of a **Framework Agreement** (Accord Cadre). As a third step and based on the previous, the issues related to the **Working Conditions** should be addressed (see overview in Annex I).

¹ according to the Office official figures. SUEPO believes the effective number to be much higher and the loss in man years to be effectively over 12 600 man-days Office-wide amongst which ca. 10 000 examiners days². The ratio between the missing production and working days hint at other effects presumably a motivation loss amongst staff.

² estimation based on the November and February Dashboard

³ more than 100 letters and communiqués have been written by the President, VPs, PDs, diverse local and central Staff Representation bodies, Unions or the different allowed and unauthorised petitions such as LIFER, IFLRE, FAIR, etc...

⁴ see [SUEPO Report - the EPO Internal Justice System](#)

⁵ and reforms of reforms: even though it has not been in place for more than five months that the President intends to amend Circ. 347.

Executive summary

SUEPO believes that a governance system based on principles of **Social Democracy**, as generally accepted in our modern society should be indeed introduced in the EPO to make it fit for the 21st century.

First **the Rule of Law** must be put in place and the Office must be undeniably seen as doing its outmost in enforcing it⁶. Then, the **Social Partners** should be recognised and their role enshrined in a **Framework Agreement**⁷ based on the principle of "Mitbestimmungsrecht" for matters touching all aspects of the social contract in the EPO. Last but not least, within said Framework agreement, key aspects of the **Social Contracts, like careers, salaries, pensions and health matters** should be jointly negotiated and agreed upon.

Such an involvement is the only way to insure a large acceptance amongst staff for all reforms of the Staff working conditions. Only when Justice is established and peace is returned, will the staff be able to concentrate again on what they are good at, that is contributing to fulfilling the mission of the EPO in the interest of the European public.

<h3 style="margin: 0;">Proposal: 3 levels of Priorities & order to solve conflict</h3>		
1st	Judicial system	<div style="display: flex; align-items: center;"> <div style="margin-right: 10px;"> <p>L</p> <p>I</p> </div> <div> <p>1. Legal protection: create an independent 1st instance juridical Court</p> <p>2. Investigation: Reform Investigation Guidelines</p> </div> </div>
2nd	Social Partner	<div style="display: flex; align-items: center;"> <div style="margin-right: 10px;"> <p>F</p> <p>E</p> </div> <div> <p>1. <u>recognise the union</u> as negotiation partner</p> <p>2. <u>negotiate & agree a Framework Agreement:</u></p> <ol style="list-style-type: none"> 1. Freedom of association (ex: Fair Strike regulation) 2. Freedom of communication (Email) 3. Means & Responsibilities (time, budget, areas) 4. Dialog & conflict solving procedure based on "Mitbestimmungsrecht" </div> </div>
3rd	Social Contract	<div style="display: flex; align-items: center;"> <div style="margin-right: 10px;"> <p>R</p> </div> <div> <p>1. <u>Pillars of the employment conditions:</u></p> <ol style="list-style-type: none"> 1. Career: Repair the Promotion and careers 2. Salary: Salary method and contributions 3. Pension: Pension & Social Security Schemes 4. Health & safety: "well-being"/Sickness control </div> </div>

⁶ A similar conclusion is reached by external actors, albeit with a different construct: in an article of EPI, it is recommended to establish the appeal body for labour disputes in the EPO Board of Appeals - see "*Hearing within a reasonable time*" by Steenbeek (NL) in [EPI information 3/2013](#), pp.118-120

⁷ see previous document on the issue, for instance CA84/92, Joint communiqué VP4-SUEPO from 2002 and [CA 94/09](#)

1. BATTISTELLI'S PRESIDENCY IS DIFFERENT

it is not the purpose to repeat many of the issues that underlie the present conflict, as they have been discussed extensively in the past (see [SUEPO Archives](#)). For this reason, the present document focuses on solutions rather than problem definition. One question remains: the Office has been existing since 1977, what is different today?

Clearly all presidents in the past had an identical general framework and the same powers on the paper. However, as described in [previous publication](#), the President has in practice reformed the Office structures: by weakening all existing feedback loops and he has reinforced his means of actions in the structure and created an effective command and control structure under his direct power.

Further, beyond the structure, the actors make the difference: by creating a climate of repression and fear suggested by the regular removal of uncomfortable subordinates (for instance PDs in key posts), on the one hand and on the other by creating a culture of accepted ideology, reinforced by the nomination of loyal subordinates in key positions, the President is able to use and extend the envelope of the possibilities given by the EPC.

excesses and the fulfilment of its mission must be reformed.

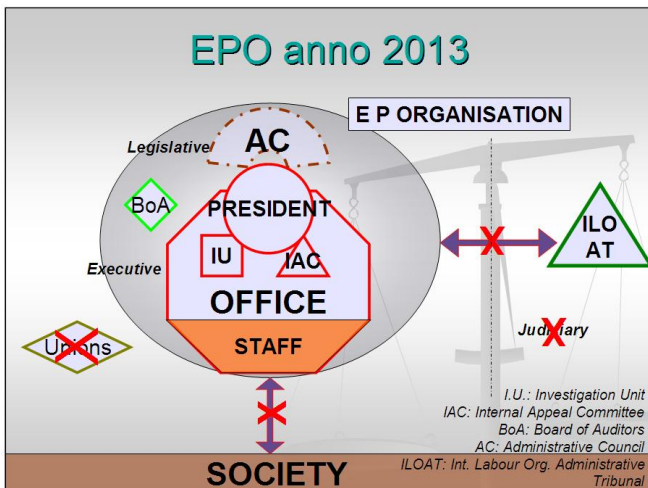
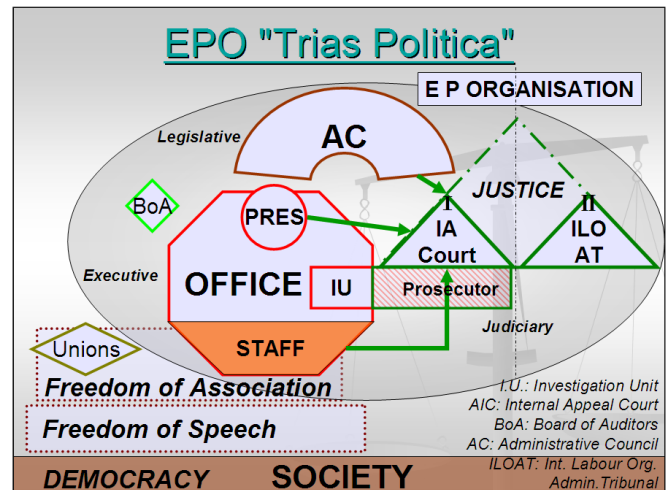
For this reason SUEPO believes that a debate on Social Democracy in the EPO of the 21st Century is indeed overdue (see Annex 1) and should aim at creating a solid system which is consistent with the fundamental and today generally accepted principle of Trias Politica⁸.

2. LEGAL SYSTEM

2.1. "IT'S THE JUSTICE, STUPID!"⁹

What have the reformed Internal Appeal procedure, the "Well-being", the Circ.347, the cap on promotions in common? All these policies lack the spirit of justice:

- it is doubted that are they exercised with independence
- and the lack of possible legal redress is obvious for all



As proven by the second half of Mr. Kober's presidency, a form of "enlightened absolutism" can work. Despite such positive example, a governance system which requires the adequate will, good sense and the intelligence of its key actors to avoid

To take one example: the possibility to declare under extreme circumstances a strike action as illegal is foreseen in all democratic states. But it seems obvious that if the entity taking such decision is party to the conflict, e.g. the President, the outcome is foreseeable and bound to be challenged¹⁰:

⁸ the precise term is ascribed to the French Enlightenment (Montesquieu) but it should be understood as the governance mechanisms developed in the Western world (see the "checks and balances" of the US constitution, set up in the UK and the fundamental rights as reinforced in Germany after WWII)

⁹ in reference to ["it's the Economy stupid"](#)

¹⁰ in his [Communiqué 41](#) the President decided based on dubious legal and stylistic ground (inadequate tone) to reject the [IFLRE petition](#): despite the fact it had been signed by more than 1000 Staff Members

that is the reason why such a decision can only be taken by an independent body, usually a court of justice. To add insult to injury, in effect, said decision, cannot be challenged in the EPO¹¹. A similar reasoning applies through the whole range of unilateral decisions taken by the President.

SUEPO believes that as a first priority, finding a solution to the cultivated vacuum of fundamental rights is paramount to dealing with all the other issues at hand.

2.2. LEGAL PROTECTION

As a first step SUEPO proposes that International law standards are recognised in the EPO. These comprise amongst others the fundamental principles such as the access to justice and a fair and diligent trial.

In practice it is suggested to create a Juridical Court of first instance. This court could be supervised by all parties involved: the Administrative Council, the Office and the Staff¹². It should be provided with the adequate means and professional staffing (amongst which jointly appointed judges and experts) required to fulfilling its mission.

According to the areas of conflict, specialised sub-commissions could be created and manned by the three parties: for instance normative law questions and changes to Service Regulations should be treated differently from the financial disputes or decisions regarding disciplinary measures and reporting.

Last but not least, a contingency plan must be put in place to address the short term issue, that is dealing urgently with the existing backlog and the transitory situation. Further, in this context, a reflection on further options, like Arbitration should be given serious thoughts.

2.3. INVESTIGATION UNIT

Staff Representation fulfils a similar mission to that of the press and participate to the

and handed out according to his own newly introduced Circ.347, "no ballot will be organised" - see also [Com 42](#) and the [answer from SUEPO](#)

¹¹ " SUEPO Report on EPO Internal Justice System"

¹² see as a reference the RFPSS Supervisory Board.

balance of power in our organisation¹³: by hearing concerns, carrying out independent investigations and speaking aloud its views it represents the last organ in the Office which is independent from the President,

For this reason, SUEPO has always been in favour of structures and procedures against fraud and misconduct. Recognisably Investigation Guidelines and a corresponding unit is an essential component of such a set-up. Unfortunately, under Mr. Battistelli, such structure has in effect been perceived essentially as a mean to "clean-wash" high managers in function¹⁴ and as a tool to attack "trouble makers"¹⁵. Even if these perceptions were unfounded, it is essential that such instance is perceived as being independent and fair.

SUEPO believes that such an investigation set-up must be rebalanced and put into conformity with the fundamental rights of the individual.

To that effect SUEPO suggest that such an institution be given more independence and legitimacy. For example it is suggested that a quasi-judicial independent instance could be created in the form of a judge with prosecutor powers acting under the Judiciary court defined above.

In such a model, the Prosecutor responsibility would be to initiate the process based on an officially filed charges ("Anzeige"). According to the area under investigation, the prosecutor may, under express mandate and supervision of the First Court, or one of its commission, lead an administrative investigation by the Investigation Unit.

Individual rights should be reinforced. This could be achieved for instance by informing the staff member diligently at a early point of the procedure of all steps and available information. The later should also have the right to be represented by an attorney and/or

¹³ sometimes referred to as "fourth estate"

¹⁴ [Communiqué 29](#) clarifies that all accusations against VP4 are unfounded, even though allegations keep circulating in the public and judicial are pending.

¹⁵ While no statistics are available but a remarkable number of Staff Representative are rumoured to be or are as a matter of fact target of such investigation

a staff representative of his choice. The staff member may exercise his right to remain silent and any confidentiality clause may not be used to impede the individual to defend itself.

Once this first pillar of Social Democracy has been put in place, the Social Dialog should be addressed.

3. SOCIAL DIALOG

Acting as an absolute ruler, the President has relentlessly discouraged his line-management and weakened his advising institutions to such a point that their work is hardly worth the large quantity of paper their opinions are written on. Further "dialog" with staff and their representatives has been reduced to a primitive form of [Kasper Theatre](#). While all these aspects are essential and should be addressed, for now we will focus on the role which SUEPO believes the institutional social partners should play in the Social Dialog.

3.1. FREEDOM OF SPEECH AND ASSOCIATION

First of all, The President of the EPO should recognise the different roles that staff representation's institutions have. A prerequisite for Dialog is the recognition of the Union as a negotiation partner for collective bargaining¹⁶. On the other hand the CSC should be recognised for what it is, an official EPO organ used as a platform for organising dialog and introducing agreements previously negotiated with the Union.

Further, basic SR functioning must be recognised. For instance the following staff right should be recognised:

- right to organise themselves according to rules of their choice.
- right for Staff Representatives and Unions to communicate with their constituencies
- principle of SR democratic processes, for instance the need for regular mandates or agreements from their

¹⁶ beyond its more common meaning in politics, [Social Democracy](#) is "defined as a policy regime involving a universal welfare state and collective bargaining schemes" according to Wikipedia

constituencies, which means also allowing enough time for such processes to take place

- basic protection for minorities, for example small groups of staff, like grades or duty stations or units, etc...

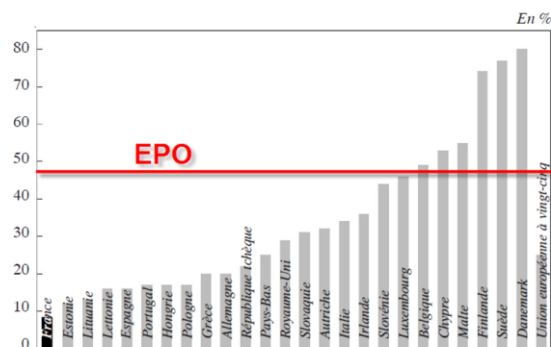
As a first step the over-restrictive and ill-conceived Circ. 347 and the existing ban on communication should be abolished and discussed in the framework of a larger Framework Agreement

3.2. FRAMEWORK AGREEMENT

The President regularly complains about the multitude of social partners¹⁷ and their pretended inability to speak with one voice.

First it should be noted that, despite the inherent democratic process (see above), all the institutions of the Staff Representations have expressed a remarkably consistent opinion over the last year. Further this opinion is also consistent with the claims raised in the spontaneous and somewhat organic initiatives leading to the LIFER petition (and subsequently to IFLRE) and which has found the support of 90% of the whole staff EPO wide¹⁸. In other words claiming that the messenger is the issue is a mere smoke screen attempting to hide the real problems.

3. Salariés syndiqués dans les pays membres de l'Union européenne, 2006



Source : Commission européenne (2006), ici repris de Wolf (2008).

Secondly it should be noted that SUEPO has a level of organisation of roughly half of all active permanent Staff of the EPO. In the

¹⁷ such a grotesque picture is drawn by mixing different levels of representations (local, central), institutions (Staff committee and Unions) and functions or statutory organs (diverse Advisory Committee)

¹⁸ with 70% of participation - see the [LIFER ballot has turned into a vote of non confidence](#)

light of the cultural diversity of staff and the high level of organisation of the Union in our institution, SUEPO believes that an Accord Cadre should be developed based on German and Scandinavian models of Social Dialog.

As it is obvious that a Social Partnership in general cannot be introduced unilaterally, a Framework Agreement has to be negotiated and agreed between the social partners. It should encompass the following means and responsibilities for both Staff Committees and Unions:

- *adequate independent resources*: as an illustration this could include the necessary training, time and financial budgets as a defined percentage of the salary mass, premises, facilities and services
- *adequate involvement and structural interfaces*: as an illustration this could include elected representatives in management committee(s), the right to mandate external Auditors, the requirement of an agreement on defined fields (i.a. Reforms of working conditions)

Further such a Framework Agreement should in particular foresee negotiated & jointly agreed rules on:

- Conflict, i.e. new Fair Strike regulations
- Communication in particular Email and Intranet presence
- Dialog & conflict solving procedure based on principle of the German "Mitbestimmungsrecht"

Clearly "Mitbestimmung" is not co-management: Management has the unchallenged and recognised difficult role and responsibility in governing the Office, that is setting strategic directions, developing policies, and eventually implementing them so that the EPO can fulfil its duties.

SUEPO only requests that the role of Staff Representation in general and the Union in particular in facilitating reforms touching staff matters should also be recognised. In practice, it means that for key areas of the Social Contract, i.a. reforms of working

conditions, not only the opinion of the staff should be sought but its full agreement.

4. SOCIAL CONTRACT

Key areas of the social contract existing between Staff and the Office are traditionally Careers, Salaries, Pensions, Health and general working conditions¹⁹.

4.1. CAREERS

Reporting and Careers is a cornerstone of the Social Contract: the Office issues with the career a form of IOU²⁰, that is an assurance to its staff of a defined extra remuneration, in the form of an advancement, if during a defined period of time a defined performance has been achieved. In other terms, the Staff renders an advanced service with extra work during 6, 10 15 years against a promise or at least a solid expectation of a coming promotion. It ensures that the performance-related component of the contract is sustainable and aligned with the long term objective of the Organisation.

Unfortunately, from 2012 onwards, the Office has "defaulted on its debt" as it has failed to grant some of the expected promotions²¹. The Office response to just create a new career to "solve the problem" is a mistake.

SUEPO has insisted that before any new career is issued, the old obligations need to be met. The question is not the few promotions which could be considered as a marginal problem, but the question of principle: Staff need to have confidence in the Office that in the future, such basic contractual obligation will be met. Otherwise, what is the sense in the extra effort?

Here the Social Partner can help the Office in designing a new career system which every agent can trust as offering a similar chance as the old successful system. Indeed, the last career system jointly negotiated between the social Partners and put in place in 2002, has

¹⁹ This list is not an exhaustive (working time, tools, reporting, contributions, SSP, social security, etc...)

²⁰ a debt or "I owe you"

²¹ some 34 staff blocked in 2012 and a [similar number in 2013](#) - the long term outlook is even gloomier - see [Roadmap to Chaos](#)

had a paramount influence in sustaining and improving the high level of the performance of the Office, an extra effort which was necessary in dealing with the ever-increasing pressure in patent applications. If we want this success story to continue, it is critical that such a trust-based machine is not broken.

4.2. SALARIES

As we all know, the Salaries is another cornerstone of the Social Contract and of the social peace in the Office. To avoid having a conflict every year on the subject, a transparent method has been devised which helps in a measurable manner keeping our institution on track²², compared to national civil servants and cost of living in Europe. It is not a salary increase but a necessary correction²³ to remain both accountable to the public and competitive with the outside world²⁴.

Here too, the staff representation has played a determining role in agreeing to the Salary Method at its creation in 1988 and continues to play a role at monitoring its implementation every year and re-discussing and agreeing to its prolongation every five years²⁵. So far at least. We believe that this role should be officially recognised and embedded as a basic element of the Social Dialog in the EPO of the 21st century.

4.3. PENSIONS

The third cornerstone is the Pension scheme, which, being a deferred salary, is simply an extension of the first two above. Here again, it is a key element of the social package and a very long term part of the Social Contract in which trust that the Office will meet its obligation is paramount to the social peace in the EPO.

To reinforce the trust of this elementary IOU, the member states have committed to secure the pension ([Art. 38 b](#)) & [40 EPC](#)). Despite

²² in accordance with the [Noblemaire](#) Principle

²³ from 1984, to 2013: German inflation: +71%; real Salary adjustment: +9% (see [CA 61/13](#), pt.46&49)

²⁴ in particular in the view of recruitment and the existing competition with the rest of the IP world to recruit highly qualified staff

²⁵ CA/D 20/88, CA/D 4/96, [CA/D 6/97](#), [CA/D 8/02](#) [CA 160/07](#),

this sovereign re-assurance, the Staff Representation played a significant role in helping putting in place in 1993 a further level of assurance, the Pension Reserve Fund and later in transforming into a Reserve Fund for Pension and Social Security (RPFSS).

In this specific case, Staff Representation role is acknowledged: through its participation to its Supervisory Board, it monitors its functioning and Staff agreement is partially required for decisions regarding all necessary adaptation of the [RFPSS Regs., Serv.Reg.](#)

However, nothing alike is foreseen for the the Pension Scheme itself ([PenReg., Chapt. IX, Serv.Reg.](#)). Staff Representation does support the work of the Joint Actuarial Advisors, contributing to the acceptance amongst staff of the regular adaptation, i.e. increase of the contributions of the diverse schemes, but in effect it has no actual say in it. SUEPO is of the opinion that, just like for the Salaries, any modification of that essential part of the Social Contract should require the preliminary agreement of Staff.

4.4. HEALTH

The well being of the Staff is a key issue for both staff members and Office management alike. What should be in essence a joint issue is not dealt with accordingly. Proof of it, if needed is the latest reform cynically labelled "well-being", which is nothing else then a system to control staff absence while in sick-leave.

SUEPO is of the opinion that as a first step the ill-conceived parts of this reform should be diligently revoked: in particular the part authorising the Office doctor to make investigations at the private home of the staff member should be put into conformity with fundamental rights (see the part 2 above).

In general, here too, SUEPO is of the opinion that staff agreement should be sought for modification of all parts of the social contract regarding the health of Staff. That encompasses all practical health related policies as much as the insurance contract and the contribution to the diverse schemes.