

EPO FLIER No. 13

The EPO-FLIER wants to provide staff with uncensored, independent information at times of social conflict.

The spirit of the regulations

“We are not here trying to build a reform which is compatible with each of your nation's, with each of your state's law. We are trying to build something which is useful for the Office, for the Organisation. So, if in some cases, it is not compatible with the German law, or the UK law, or the French law, this is not the issue. The issue is: is it useful for the Organisation?”¹

This statement of the president raises a number of questions:

1. **If Mr Battistelli thinks that a (career) reform does NOT need to comply with national law, does he take care that it respects any other (labour) law standard, such as the European Convention on Human Rights, or conventions of the International Labour Organization?**

There is no evidence that he does.

Modern democracies usually work by the **rule according to a higher law**. It means that no law may be enforced unless it conforms with certain universal (written or unwritten) principles of fairness, morality, and justice ².

Mr Battistelli does not see a need to respect this general rule ³:

During the past two years, the president has repeatedly demonstrated that he respects no standards other than his own. He has managed to win the delegations over to support regulations which can only survive in the context of the Office's immunity ⁴. He undertakes a structural dismantling of legal recourse. He introduced investigation guidelines that would have made Securitate, Stasi or NSA happy. He undermined the right to freedom of association. When the president introduced the strike regulations, he showed that **international conventions** ratified by the Member States do not count. He muzzles unions and staff representatives. He abuses powers to discipline dissenting voices ⁵. He shows a complete disregard for (even unanimous) opinions of the Internal Appeals Committee or the Disciplinary Committees by passing harsher judgment than recommended ^{4,6}. He repeatedly demonstrated that neither the letter nor the **spirit of the Service Regulations** count ⁷. This applies to those parts of the regulations he inherited and even to those he wrote himself ⁸.

¹ Mr Battistelli, commenting on the career reform during the BFC meeting on 20 November 2014

² https://en.wikipedia.org/wiki/Rule_According_to_Higher_Law

³ SOCIAL CONFLICT AT THE EUROPEAN PATENT OFFICE, <http://www.suepo.org/public/su14294cp.pdf>

⁴ EPO-FLIER No. 8 – Balancing views, Annex: “Des Sonnenkönigs neue Kleider”

⁵ <http://www.worldipreview.com/news/epo-suspends-former-committee-member-7363>

⁶ Letter of Union Syndicale Fédérale to the Administrative Council's chairman (21.03.2014),

<http://suepo.org/public/su14076cp.pdf>

⁷ Communiqué No. 41 and IFLRE strike notification, www.suepo.org/archive/sc13173cl.pdf

⁸ <http://www.sueddeutsche.de/muenchen/europaeisches-patentamt-beschaefigte-begehren-auf-1.1826233>

The above clearly shows that - for Mr Battistelli - **standards for legal recourse** as defined for instance by the European Court of Human Rights do not count.

Also public observers, represented by newspapers⁹ and patent attorneys' homepages¹⁰, come to realise that – under the presidency of Mr Battistelli – there is an absence of the rule of law at the EPO.

2. Is the proposed reform useful for the Organisation? Can the EPO examiners - in the absence of the rule of law - still correctly and consistently apply the EPC and Guidelines to patent examination? Can the EPO still fulfill its mandate of providing legal certainty to the public?

The SUEPO Central Committee recently posed a similar question:

“If the EPO is granting patent rights to inventors and European industry, how credible are those rights if delivered by an institution that is ostensibly unable to comply with the rule of law in its own internal affairs?”³

Let's try to find an answer to these questions. Mr Battistelli recently said:

*“Most of our managers have **not** been chosen for their managerial capacities. They have been chosen because they were acknowledged experts in their field. We have to transform these managers into real managers.”¹*

What does the president have in mind when he talks about “real managers”? Technical expertise is obviously no longer required. Are “real managers” expected to follow the example of our VPs and PDs, who (already) obey and blindly follow our larger-than-life president?¹¹ An entirely performance-based career system puts managers and employees under pressure to increase production. With the rule of law being absent, and in a working environment being dominated by fear and intimidation, not only ill-motivated managers but also weak and intimidated ones are tempted to put their subordinate employees under pressure to fulfill even the most unrealistic targets. And in the presence of threats, many of them will fulfill these expectations, while lowering the search and examination standards.

Mr Battistelli further said:

“Except an exceptional professional conscience and personal motivation, nothing incents them to work harder or to work less.” ... “By opening this technical career ... we will provide incentives until the very last day of their professional life.”¹

Mr Battistelli has apparently no respect for the professional attitude of EPO employees which made the European patent system a success. The EPO is not listed at the stock exchange. It is a public service provider. And blotting out professional conscience and ethics produces adverse effects. Some examiners already started distancing themselves from their work. This leads to a lower examination quality, and – consequently – to less legal certainty of the granted patents.¹² A consequence of a lack of dialogue. The New Career System was developed without acknowledging receipt of, without discussing, and certainly without taking account of any of the elements and arguments of the career counterproposal of the CSC.

⁹ [Revolte an der Isar, FAZ am Sonntag, 23.11.2014, http://www.suepo.org/public/ex14289cp.pdf](http://www.suepo.org/public/ex14289cp.pdf)

¹⁰ <http://www.fosspatents.com/2014/12/european-patent-office-pays-for-health.html>

¹¹ EPO-FLIER No. 11 - “You break every rule of good man-management”

¹² *Patent examiners more likely to approve marginal inventions when pressed for time*
http://news.illinois.edu/news/14/0813patent_examiners_MelissaWasserman.html

If voted by the Administrative Council this week, the New Career System will be introduced without any transitional period. All current EPO staff will be exposed to a radical change of their working contract. For the examiners, this means that - due to the entirely income-based incentives – the EPO abruptly stops rewarding efforts for compliance with the EPC mandate. Being pushed by their managers, they will be forced to fulfill unrealistic targets, and many will react to this pressure by lowering their quality standards for search and examination.

Mr Battistelli can consult the **spirit of the regulations** whenever he runs out of arguments ⁷. But it would possibly lead to some irritation amongst the patent applicants if examiners – being pressed for time – would rather generally refer to **the spirit of the EPC**, instead of developing a sound reasoning based on the Articles and Rules of the EPC.

Mr Battistelli's decision to introduce a fully performance-based career system has either been taken on the ground of wrong assumptions, or for ulterior motives. He still insists to introduce this system, against the will of staff, and in an environment where the rule of law is absent. It is already difficult to deliver high quality work in the current hostile working climate. If the New Career System is introduced in its current form, the EPO will no longer be able to fulfill its mandate of providing legal certainty to the public.

3. Is Mr Battistelli good for the Office, for the Organisation?

The EPO employees have already given their answer. During a staff union General Assembly held on 4 March 2014 in Munich, 750 staff members voted for the following resolution:

"The staff has lost trust in Mr Battistelli and is concerned not only about its own future, but also about the negative repercussions on the functioning of the European patent system as a whole. It has become clear that the proper performance of the tasks of the individual staff members, and therefore of the European Patent Office, is incompatible with the continuing presidency of Mr Battistelli." ¹³

The answer to this question should normally be given by the members of the Administrative Council who are responsible for ensuring good governance in the Organisation. Voting for the New Career System on 11 December would implicitly confirm a mandate to the president to continue on a destructive course. At least some delegations seem to share the discomfort of staff and interested circles. And the EPO employees are not the only ones waiting for their answer. Also the stakeholders of the European patent system and others being interested in intellectual property rights expect an answer to this question ¹⁴.

The attached Open Letter to the delegations in the Administrative Council, of 5 December 2014, elaborates on the implicit change of patent law entailed in the New Career System.

¹³ <http://munich.suepo.org/archive/su14047ml.pdf>

¹⁴ <http://ipkitten.blogspot.de/2014/12/in-suspense-about-european-patent.html>

By email to Heads of Delegation

5 December 2014

From EPO-FLIER team
<mailto:epoflier@runbox.com>

Open letter

EPO examiners will no longer be able to ensure appropriate quality standards

Dear Heads and members of the Member States' delegations to the Administrative Council of the European Patent Organisation, dear Chairman, dear Mr Grandjean,

The European Commission's Industrial Property Rights Strategy for Europe of 2008¹ summarises

"High quality rights are an essential requirement for all aspects of the system – support for business including SMEs, facilitation of knowledge transfer and effective enforcement of rights to combat counterfeiting and piracy. Only with a quality system can Europe benefit from new opportunities in the global economy and fulfill its responsibilities."

The Commission had already stressed in 2006 that an innovation-friendly, modern Europe² urgently needs *"IPRs based on tough examination standards for novelty and inventive step. A low-quality patent system is a source of legal uncertainty and litigation"*.

The Commission's stated aim of strengthening IP matches the motivation and ethics of EPO examiners since 40 years. The EPO's career systems so far have secured a predictable compensation package and career progression based on a mix of merit and seniority. This allowed examiners to focus on delivering high quality search and examination in a team effort rather than on competing for the sake of income differentiation.

The proposal for a New Career System (NCS) is a strong push for more production. Absolute production already counts more than reliable grants. Priorities are set for best effect on presentation of production to the Administrative Council (AC) rather than for serving the European public. But so far, the seniority-criterion in career-advancement gave examiners - being motivated to deliver work that adds value to society - the necessary leeway to attain reliable quality levels despite management pressure, despite insufficient IT tools and despite short-termist policy-making.

Is this about to change? The EPO's president has already received strong support for the principle of the NCS in the Budget and Finance Committee (BFC). Are you going to decide on 11 December 2014 to introduce an entirely performance-based career proposal? This proposal is based on elements which will shift the focus of attention. Salary increases and bonuses depend only on performance. Seniority will no longer be a balancing factor. Those who do not enter into competition or fail to deliver what is defined by their manager (whose bonus is also dependent on the production achieved), will suffer economic losses. Due to the margin of discretion the examiner can apply, the level of quality is not strictly defined. Applying a higher quality level can be interpreted as excessive by the manager and can lead to a lower appreciation. Securing attractive remuneration will rely on maintaining an individual advantage in competition with colleagues, by comparison of production.

It is not as if the negative effects of such policies weren't known. There is an abundance of academic studies on the undesired effects of performance-related pay systems on public service

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0465:FIN:EN:PDF>

² <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0589&from=EN>

motivation. It is not suitable for work requiring cognitive skills. The article (based on an US study) „*Patent examiners more likely to approve marginal inventions when pressed for time*“³ puts it in a nutshell. Yet, the change will still be purported to be in line with ISO 9001 for compliance with rules set by the Office. But it will not deliver quality *results*.

Should you decide in favour of the proposal on 11 December, examiners of the EPO

- will no longer be able to give their main attention, during prior art search and the examination of the presence of novelty and inventive step, to legal certainty of patents without directly eroding their individual remuneration and pension prospects
- will no longer be able to support the priorities of the EU by delivering high quality patents, as maintaining the required professional standards seems to be against the political will of the EPO's president, and apparently of most of the member states

The interventions in the BFC meeting show that the delegations are not unaware of these issues. It is worrying that most of them still supported the proposal.

Low quality patents will harm business, primarily SMEs, private inventors and Universities, since the legal costs for an infringement and/or litigation procedure are so high that they normally threaten their financial foundation.

The European Commission, BusinessEurope and epi are observer delegations on the AC of the European Patent Organisation. There appeared to be declining interest amongst the observer delegations for attending AC meetings recently. The intended change in labour law is at the same time an implicit change in the (effect of) patent law. On this there should be stakeholder consultation beyond purely the members of the European Patent Organisation.

EPO staff have this year been on strong industrial action including strikes and high profile demonstrations, but Mr Battistelli seems unimpressed. EPO staff has got used to being ignored by the AC delegations. The president has now ensured that the staff's perspective can no longer be voiced by our elected representatives during meetings of our Governing Body⁴. Concerned examiners had in mind to present you with a petition signed by the colleagues, but the president's brisk pace in pushing through proposals did not allow for organising it in time for your meeting, hence this open letter.

There now is very little the EPO's employees can do to fence off the perverse effects - of what on the surface looks like 'only' a change to employment conditions - on the quality of patents. Are Member States committed to the Industrial Property Rights Strategy for Europe in the framework of the Lisbon strategy for growth and jobs? If so, we fail to see how at least those amongst you also representing EU Member States could possibly vote for the NCS proposal during your meeting in Munich on 11 December.

Please do not support this quality erosion. Vote against.

The EPO-FLIER Team,

a group of concerned staff of the EPO who wish to remain anonymous due to the prevailing harsh social climate and absence of rule of law at the European Patent Office

Copies to: Competent Ministries of the Member States
President of the European Patent Office

³ http://news.illinois.edu/news/14/0813patent_examiners_MelissaWasserman.html

⁴ *Central Staff Committee illegitimacy?*, 14.11.2014, sc14273cp