

The Administrative Council's fiduciary duty to the European Patent Organisation and the Office's duty of care

Dear heads and members of the delegations to the Administrative Council of the European Patent Organisation, dear Chairman, dear Mr Grandjean,

Ever since the founding fathers drafted the European Patent Convention, a high perception of legal validity of a granted patent has taken the Office from strength to strength. Highly qualified staff has for a long time dealt with significant workload increases while maintaining the quality of work that has drawn applicants to the EPO. However, we are now observing an accelerated change for the worse. Strong professional ethics are gradually giving way to rubber stamping in order to meet entirely arbitrary production targets. Despite embellished statistics allegedly showing otherwise, staff's health is on the decline and the EPO is no longer an employer of choice.

Is it not the Administrative Council's (AC's) and the President's duty to hand over to any successor an Office that is at least as healthy as it was when he took it over? And should the AC not be seen to be positively influencing good housekeeping and a constant pursuit of excellence?

Who is the boss?

It was so refreshing to see the AC take its responsibility when it issued a resolution with clear and achievable objectives for the President. Very briefly there was a marked improvement of the atmosphere in the Office. Very briefly, the AC had switched on the light at the end of the tunnel.

But instead of complying with unambiguous instructions, Mr Battistelli is playing games like an adolescent who is testing the envelope. He has not even tried to comply. Instead, he is doing the opposite, challenging his supervisory body, rebelling against his "parents".

It is time for the members of the AC to stop flogging a dead horse:

Mr Battistelli is causing immeasurable damage to the Office; he is now untenable.

The President's extravagances

The AC delegations are aware of and endorse the costs for the President's luxury fortress on the top floor of the Isar Building and his alleged need for highly expensive personal body guards. The EPO further pays for hosting high-profile events that seem to be mainly instigated for the greater glory of the President.

The Office should not be seen to be celebrating some inventors as being better than others. It risks reputational damage by highlighting the success of *some* inventions, especially if they later could prove not to work (see media coverage on Elizabeth Holmes' dysfunctional blood testing equipment). For critical observers, her results looked too good to be true. The same applies to the current EPO results.

EPC changes through the back door?

Sinking almost endless resources into the IT Roadmap, with its badly managed outsourcing and brain-drain (due to salary cuts and a poor work atmosphere), is failing to provide appropriate tools. The changes in operation – above all an ill-conceived new career system in combination with management by intimidation – are resulting in more products per staff member, but with an outcome that no longer compares favourably to past quality standards.

Critical observers have started speculating about the effects the dramatic increase in the number of patents granted may have¹. Applicants have started observing a decline in the quality of the EPO's products and sometimes share their concerns with individual examiners. The existing quality indicators are not reliable. IAM^{2,3} is sponsored by the Office and the EPO's own quality measuring system 'CASE' suffers from a built-in conflict-of-interest. The way it has been designed, it will always indicate excellent quality, no matter what the actual quality is.

A presumption of invalidity of granted patents leads to higher litigation costs. Big applicants might be able to finance such higher costs, but SMEs will suffer economically from low quality patenting⁴. The EPO can foster economic growth only if it returns to the previously high search and examination standards⁵.

The AC is the guardian of a non-discriminatory application of the EPC.

That is not possible under the leadership of this President.

EPO - employer of choice?

Word has got out that all's not well at the EPO. The Office no longer attracts the same calibre of staff and therefore has had to resort to recruiting what it gets. That's why the EPO is currently abandoning previous quality criteria, such as language skills, or a balanced geographical distribution⁶, in the selection of new staff.

The recent Technologia survey on psycho-social risks for EPO employees is alarming, and the comparison of three surveys from consecutive years shows that the situation is deteriorating. Despite the AC's mandate to the President to go easy with HR reforms, the Administration is still instigating some highly undesirable changes.

The self-proclaimed Dr. med. Battistelli and Dr. med. Bergot judge on the fitness of staff for work. The EPO exposes vulnerable staff to its medical advisors, who now have a direct reporting link to a PD Human Resources, who herself has a reputation of being vindictive. The Office now has the tools that it needs to breach medical secrecy indiscriminately and to abuse information given to medical practitioners in confidence.

The unfair dismissal of two staff representatives, the downgrading of a third and the ongoing attacks on other members of the staff representation are unacceptable, and have been criticised by the Council itself. Staff are dumbfounded by the way that an organisation that has a legal function (granting and refusing patents) behaves in ways that are contrary to the rule of law in its member states and how representatives of countries with a great legal tradition can condone such behaviour.

¹ <http://ipnoncredere.blogspot.de/2016/06/high-how-will-ball-bounce.html>

² <http://www.iam-media.com/Blog/Detail.aspx?q=77979ee9-60a0-4b2c-b074-e9a2b2623a0c>

³ 65% of the respondents rated the quality of patents granted by the EPO as excellent or very good.

⁴ http://www.theregister.co.uk/2016/06/15/patent_trolls_innovation_and_brexit/

⁵ <http://www.fosspatents.com/2014/12/european-patent-office-examiners-fear.html>

⁶ It seems that in the EPO the „brexit“ is taking place, as according to the Social Report for 2015 **CA 55/16**, page 22, the recruitment of Brits is down by 80%, while according to page 8, the EPO lost 7% of UK staff in one year. Further, no Irish, Swedish, Norwegian, Finnish, Danish and Swiss personnel was recruited.

Mr Battistelli continues to undermine the rights of staff

EPO staff undergo a stringent selection process and have a long probationary period before being appointed as permanent staff. But in the interpretation of the EPO's very senior management it is professional incompetence if staff members do not meet inflated output demands. In the President's plans there will be no intervention of any meaningful advisory review instance in decisions for dismissal for reasons of professional incompetence (**CA/53/16**). If the proposal gets approval, Mr Battistelli will be in a position to expose staff of the EPO to unemployment without a social security system, which he aggravates by claiming exclusive rights to permit gainful employment a full two years following departure from the Office (**CA/29/16**).

The review of the Investigation Guidelines (**CA/52/16**) will, if adopted, increase the autonomy and powers of the Administration. The guidelines would become an even more dangerous weapon if put in the wrong, i.e. in Mr Battistelli's and Ms Bergot's, hands. Due process, duty of care and state-of-the-art HR management are completely absent from the Office now.

And all the time, the members of the Office's only supervisory body watch it happen. To the neutral observer there is no doubt: this Administration is professionally incompetent, and the supervisors are doing nothing about it.

The President and his cronies have to be stopped. By you. Now.

The Council and President have to show that they are good caretakers of the great organisation that has been put in their custody and entrusted to them. It is time to live up to the expectations of the founding fathers, the European public and the staff of the Office.

You will be in the spotlight during the June Council meeting.

Please do not support the President's change proposals in CA/29/16, CA/52/16 and CA/53/16.

Instead, please do what needs doing: restore a constructive climate at the EPO, under leadership of a President who wants to join the effort for the continued success of the Office.

For the undersigned, that President is not Benoît Battistelli.

With our best regards,

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