



8 June 2018  
su18041cp

## Doing what needs to be done – the right time and opportunity for improving governance, transparency and accountability at the EPO

A discussion paper on the governance of the EPO

### Summary

*The developments that have taken place at the EPO over the last five to six years have revealed serious weaknesses in the governance of the European Patent Organisation (EPOrg), some of which are common to international governmental organisations, others typical for the EPOrg. The present document tries to analyse those weaknesses and suggest approaches for improving the situation.*

### Introduction

When the European Patent Office (EPO) opened its doors in 1977, the Organisation (EPOrg) had only 7 Contracting States. Expectations were that the number of patent applications would grow to 30,000 a year and then reach a plateau. However, at the time of writing (May 2018), the number of Contracting States has increased to 38. The Office now receives more than 165,000 applications per year<sup>1</sup>. Staff numbers have grown to about 7,000. The annual budget of the Office has increased to over 2 billion EUR<sup>2</sup>.

In 2000 the European Patent Convention (EPC) was revised as part of a modernisation of the European patent system<sup>3</sup>. Staff's working conditions and the internal structures of the EPO have been reformed many times. The governance structure of the European Patent Organisation, however, has remained essentially unchanged. Within the Office, power remains centralised with the President. The President is accountable only to the Administrative Council, whose members can be subject to various conflicts of interest and who depend on the President for information as well as financial and secretarial support.

In recent years, social relations within the Office have degraded to such an extent as to raise concerns in the Administrative Council<sup>4</sup>. The degradation of the internal relations is partially due to the character and leadership style of the current President, Mr Battistelli<sup>5</sup>. But the recent

<sup>1</sup> <https://www.epo.org/about-us/annual-reports-statistics/annual-report/2017.html>

<sup>2</sup> [http://www.epo.org/modules/epoweb/acdocument/epoweb2/289/en/CA-50-17\\_Add\\_1\\_B\\_en.pdf](http://www.epo.org/modules/epoweb/acdocument/epoweb2/289/en/CA-50-17_Add_1_B_en.pdf)

<sup>3</sup> [https://en.wikipedia.org/wiki/EPC\\_2000](https://en.wikipedia.org/wiki/EPC_2000)

<sup>4</sup> [CA/26/16](#)

<sup>5</sup> <http://www.sueddeutsche.de/wirtschaft/europaeisches-patentamt-aufstand-gegen-den-sonnenkoenig-1.2229665> ;

developments also expose fundamental deficiencies in the governance of the EPO, raising questions as to whether the EPOrg in its current form can continue to fulfil the function for which it was created, namely to grant patents with a high presumption of validity.

The governance of the European system<sup>6</sup> and its potential impact on the quality of the patents granted<sup>7</sup> were the subject of discussion in the first decade of the new millennium. They are coming under criticism again<sup>8</sup>. It would seem that another round of reflection, involving all stakeholders and academia, is due. This is particularly important at a time that the EPO is expected to take on new tasks with respect to the unitary patent<sup>9</sup>.

The present document focuses on governance issues that threaten to have a negative impact of the overall functioning of the European Patent Organisations and propose remedies. The potential impact on the quality of the patents granted has been dealt with in more detail elsewhere<sup>10</sup>.

## Composition of the Administrative Council

The relations between the European Patent Office and its governing body, the Administrative Council, are complex<sup>11</sup>. Contracting States vary widely in how much they contribute to and benefit from the European patent system. Just as an example: in 2016, some 13,710 EP direct applications (almost 10% of the total) originated from patent applicants registered in a single state, Germany, whereas 20 Contracting States contributed only 100 or fewer applications each, adding up to a total of 474 applications for these 20 States together<sup>12</sup>. A similar range exists for the validation and maintenance of European patents in the Contracting States upon grant. Every Contracting State nevertheless has a single vote in the EPO Administrative Council: Monaco like France, Liechtenstein like Switzerland, San Marino like Italy. Consequently the votes cast by the group of small Contracting States with little economic interest in the European patent system dominate the decision-making processes in the Council.

The heads of delegations in the Administrative Council are almost without exception also the heads of their national patent offices<sup>13</sup>. Other stakeholders are poorly represented. BusinessEurope, epi, the EU and staff of the EPO are present as observers<sup>14</sup> but have no voting rights. They are furthermore frequently excluded from the discussion when the Administrative Council operates in closed (confidential) session.

Historically, the growth of the EPO has been at the expense of the national patent offices since the EPO and the national offices compete to a large extent for the same work. At the same time the

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[https://www.lemonde.fr/idees/article/2015/04/06/un-si-bon-office\\_4610059\\_3232.html?xtmc=oeb&xtcr=1](https://www.lemonde.fr/idees/article/2015/04/06/un-si-bon-office_4610059_3232.html?xtmc=oeb&xtcr=1) ;  
<http://ipkitten.blogspot.com/2017/03/curtain-merpels-final-epo-post.html> ;  
<https://www.juve.de/nachrichten/namenundnachrichten/2017/01/industrie-umfrage-zum-europaeischen-patentamt-mehrheit-fuer-ruecktritt-von-amtschef-battistelli>

<sup>6</sup> Thierry Sueur and Jacques Combeau, *Un monument en péril*, Droit et économie de la Propriété intellectuelle, p. 95-131 (2005); [rapport Pietà](#) (2007);

STOA report, [Policy options for the European patent system](#) (2008); Bruno van Pottelsberghe, *Lost property, the European patent system and why it doesn't work* (2009)

<sup>7</sup> e.g. SUEPO working paper, [A quality strategy for the EPO](#) (2002);  
 Nature news, [Examiners crack under pressure](#) (2004);  
 Francis Hagel, *Serving two masters*, Patent World # 161, p. 22-24 (2004);  
 MEDEF, [Manifeste pour les brevets](#) (2004)

<sup>8</sup> <http://patentblog.kluweriplaw.com/2018/03/05/epos-vision-iii-quality/>  
<https://www.juve.de/nachrichten/namenundnachrichten/2017/01/industrie-umfrage-zum-europaeischen-patentamt-mehrheit-fuer-ruecktritt-von-amtschef-battistelli>

<https://www.worldipreview.com/news/wipr-survey-epo-patent-quality-is-endangered-claim-readers-15689>

<sup>9</sup> Gottfried Schüll, Prof. Dr. Siegfried Broß (2017), <https://www.cohausz-florack.de/de/mehr/blog/article/news/detail/News/der-moderne-rechtsstaat-wird-zur-farce/>

<sup>10</sup> « Good enough ? A discussion paper »

<sup>11</sup> See [CA/XXX/14](#) for an earlier report on the governance of the EPO

<sup>12</sup> CA/F 5/17, page 7/68

<sup>13</sup> <https://www.epo.org/about-us/governance/administrative-council/representatives.html>

<sup>14</sup> <https://www.epo.org/about-us/governance/administrative-council/composition.html>

Contracting States, through their national patent offices, benefit from annual renewal fees paid on patents granted by the EPO<sup>15</sup>. The sums concerned can be significant: currently approx. 23 million EUR/year for Austria, 65 million EUR/year for the UK and 185 million EUR/year for Germany<sup>16</sup>.

Cooperation between the EPO and the national patent offices, largely financed by the EPO and estimated to cost the EPO between 30 and 40 million EUR/year<sup>17</sup>, adds another level of interdependence. The co-operation agreements are bi-lateral and not published. Information on which Contracting States receive what sums for which purpose is extremely limited<sup>18</sup>.

The Administrative Council decides on the nominations to the Organisation's working bodies. Daily allowances and other benefits<sup>19</sup> make these positions very attractive for the representatives in the Administrative Council. The Administrative Council is also the appointing authority for the financially attractive higher management positions (President and Vice-Presidents) in the EPO. Maybe significantly the current President and all three Vice-Presidents were previously heads of delegation in the Council.

Finally, the delegates vie for the honour and the material benefits associated with hosting EPO events, IP3 or IP5 meetings and in particular the EPO "European Inventor Award" in their home country, if not "claimed" by the President<sup>20</sup>.

It has long been recognised that the above-mentioned levels of interdependence inevitably lead to conflicts of interest<sup>21</sup>. It is difficult, for example, to imagine the delegations in the Council discussing "efficiency" and the examination backlog at the EPO *without* having their annual renewal fees also in mind<sup>22</sup>.

Whereas it seems difficult to avoid the tensions inherent in the above situation completely, the impact can be mitigated by greater stakeholder involvement and (see herein further below) greater transparency.

### ► Recommendations

- Hold, at the earliest possible date, the five-yearly conference of ministers that was due in 2012 (Article 4a EPC) to discuss fundamental questions about governance, patent quality and social policies at a higher level.
- Introduce a two-year "cooling-off period" for members of the delegations before they take over positions in the EPO, analogous to the regulations adopted for members of the boards of appeal.
- Publish the existing cooperation agreements with the Contracting and non-Contracting States as well as the various memoranda of understanding signed by the President on behalf of the EPO with the heads of national European and non-European patent offices or other institutions

<sup>15</sup> Renewal fees due while the applications are still pending remain with the EPO.

<sup>16</sup> See e.g. CA/50/17, page 180.

<sup>17</sup> According to CA/16/18, point 52: "Over the period 2012 to 2017, more than 148m EUR were invested in the co-operation activities (33.3m EUR in direct costs under the co-operation budget Art 3301 and 114.8m EUR in indirect costs)".

CA/16/18, point 48: "EPOQUE services are furthermore provided with a 83% discount that amounts to 17.6m EUR per year." The 13 million EUR / year usually mentioned seems to concern only direct costs, i.e. without labour provided by the EPO. This amount is apparently set to increase to almost 80 million EUR a year by 2022, see comprehensive summary 2018 budget, page 33.

<sup>18</sup> CA/14/17, page 12/12: less than 7 million Euro of the total of 13 million Euro mentioned is attributed to a defined purpose, of which almost 5 million for "multiple" (Contracting States).

<sup>19</sup> Members of Council bodies and experts invited by the EPO receive free urgent medical care and dental treatment while in Munich (CA/79/14, point 45) – at the discretion of the President .

<sup>20</sup> E.g. IP3 (2011) in Saint-Germain-en-Laye; IP5 (2012) in Corsica; Inventor of the Year (2015) in Paris; Inventor of the Year (2018) again in Saint-Germain-en-Laye.

<sup>21</sup> Putting the burden of paying the tax adjustment on the Office instead of the Contracting States is an example of a decision in which the Administrative Council acted in the interest the Contracting States and against the interests of the Organisation.

<sup>22</sup> Otto Bossung; *"The Return of European Patent Law in the European Union"*. IIC. 27 (3/1996). "Thus the management of the EPO is dominated by the delegates of the contracting States in the Administrative Council. It is entirely natural that their thoughts and actions are primarily guided by their responsibilities in the national sector. Hence it is national interests, the interests of the national patent offices, national patent attorneys, national lobbies, national business sectors and other national interests, that are the decisive forces within the Administrative Council of the EPO."

(EUIPO, WIPO).

- Review and strengthen stakeholder participation in EPO policy discussions.
- Involve academia as a proxy for the economic interests of society at large (“the public”).
- Develop a fee structure (fee redistribution system) that minimises perverse incentives for the Administrative Council delegates.
- Abandon the free medical insurance for visiting delegates and experts, or at least provide an overview of which delegations benefit to what extent.
- Develop a more proportional voting system.

## Transparency of the Administrative Council

Public information about the functioning of the European Patent Organisation and the Administrative Council is very limited:

- the meetings of the Administrative Council and its dependent bodies (Budget and Finance Committee, Patent Law Committee, Board of Appeal Committee, Select Committee etc.) are not open to the public,
- the agendas and minutes of the Administrative Council meetings and its dependent bodies are not available to the public,
- the documents discussed in the Administrative Council meetings and its dependent bodies are generally not made public and those that are made public are difficult to find,
- the majority of decisions of the Administrative Council and its dependent bodies are not made public and those that are made public are difficult to find.

Such a level of secrecy cannot be justified by the mission of the EPO which is neither of military nor of political nature but primarily administrative. The EPO is furthermore funded by industry and (indirectly, through the costs of patented products) by the public. The public and the users of the patent system have a legitimate interest in knowing how the EPO spends its funds. They also have a legitimate interest in knowing how the representatives vote in the Council.

### ► Recommendations

- Publish the agendas and the minutes of the meetings of Administrative Council and its dependent bodies, as well as the documents discussed in the meeting, including the budget and the audit reports, on the external website of the EPO in such a manner that these are expeditiously and readily accessible to the public.
- Allow public attendance to, and provide live streaming of the discussions of the Administrative Council and its dependent bodies.
- Limit confidential session to recruitment and disciplinary matters.

## Checks and balances in the EPO finances

The EPOrg is financially independent. Its income mainly derives from procedural and renewal fees. It currently has an operating budget of about 2.1 billion EUR/year. Article 42 EPC stipulates that the Organisation’s budget should be **balanced**. At present, however, the EPOrg has an operating surplus of roughly 400 million EUR/ year<sup>23</sup>. This corresponds to about 20% of the budget. The Organisation’s cash reserves stand at around 2.3 billion euro. These sums are likely to increase further when the construction of the New Main building in The Hague<sup>24</sup> is finished.

The EPOrg considers itself not to be bound by national or European law or finance regulations. Articles 37 to 51 EPC set out the broad financial framework for the EPOrg, mainly how the EPOrg is to be financed. More detailed financial regulations, including tender and investment guidelines, are adopted by the Administrative Council (Article 33 EPC) upon proposal of the President, the only

<sup>23</sup> Extrapolation from « year to date » figure on EPO Finance Dashboard Sept. 2017 (305 million EURO ; final figure not yet available at the time of writing)

<sup>24</sup> <https://www.epo.org/news-issues/news/2014/20140625.html>

limitation set by the EPC (Article 50) being that these regulations must lay down “*the generally accepted accounting principles on which the budget and the annual financial statements shall be based.*” The EPO publishes an annual financial statement<sup>25</sup> and a comprehensive summary of its budget<sup>26</sup>. Both are difficult to find and seem to receive little public scrutiny. The recently adopted investment guidelines<sup>27</sup> have been criticised for lack of safeguards both by external observers<sup>28</sup> and by some of the delegations (DE, GB, CH)<sup>29</sup>.

Article 49 EPC stipulates that: “*The income and expenditure account and a balance sheet shall be examined by auditors whose independence shall be beyond doubt, appointed by the Administrative Council for a period of five years, which shall be renewable or extensible.*” This arrangement does not meet modern standards of independence. Given the conflicts of interest within the Administrative Council (see above), the selection and appointment of auditors by the Council cannot guarantee truly independent examination<sup>30</sup>. The EPO Audit Reports have been remarkably uncritical<sup>31</sup> despite evidence of problems being found by other sources<sup>32</sup>. When problems are flagged, the President is not obliged to act upon the comments made. An Audit Committee, set up in 2009 to strengthen the audit function<sup>33</sup> was abolished after only two years<sup>34</sup>.

The EPO’s yearly operating expenses, other than staff benefits, are of the order of 300 million euro. The Administrative Council must be informed of all contracts exceeding EUR 250,000<sup>35</sup> but otherwise there is no external oversight over the EPO procurement procedures. A considerable number of the contracts awarded by the EPO are not tendered, but made as direct placements. In such cases the public (including potential competitors) are not informed. A complaint against a clearly irregular<sup>36</sup> direct placement filed by a Staff Committee member will be dismissed by the ILO-AT as irreceivable with the argument that staff is not affected by the outcome of tender procedures<sup>37</sup>. Direct placements can thus in practice not be challenged.

The conflicts of interest in its governance (see above), the lack of transparency and the lack of external control put the EPOrg at risk of abuse of power and corruption.

#### ► Recommendations

- Make the Financial Regulations of the EPOrg, including its Tender Guidelines available for public scrutiny.
- Make documents pertaining to the contracts awarded by the EPO<sup>38</sup> public.
- Make the EPO external audit reports (CA/20 of each year) available for public scrutiny.
- Strengthen the internal audit function by an Audit Committee.
- Appoint external auditors on non-renewable and non-extendible seven-year contracts to improve their independence.
- Initiate a study of the EPO integrity system by Transparency International as has been done for the EU integrity system<sup>39,40</sup>.

### Governance of the Boards of Appeal (DG3)

<sup>25</sup> <https://www.epo.org/about-us/annual-reports-statistics/financial-statements.html>

<sup>26</sup> [http://www.epo.org/modules/epoweb/acdocument/epoweb2/289/en/CA-50-17\\_Add.1\\_B\\_en.pdf](http://www.epo.org/modules/epoweb/acdocument/epoweb2/289/en/CA-50-17_Add.1_B_en.pdf)

<sup>27</sup> [CA/F 18/17 rev. 1](#)

<sup>28</sup> <http://patentblog.kluweriplaw.com/2018/01/31/flexible-investment-guidelines-european-patent-office/>

<sup>29</sup> CA/109/17

<sup>30</sup> Mr Angermann, one of the auditors, was [employed](#) at the INPI by the current EPO President. This in itself raises concerns about his independence.

<sup>31</sup> See e.g. [CA/20/16](#) and [CA/20/17](#)

<sup>32</sup> E.g. Berenschot (2010) on unassigned IT costs.

<sup>33</sup> CA/D 9/09

<sup>34</sup> sc11122mp; see also [interview with Paul Ernst](#), Member of the Audit Committee (2011)

<sup>35</sup> Art. 58(4) FinRegs; see e.g. CA/F 6/17

<sup>36</sup> CA/20/09, pages 156, 159 ; ILO-AT judgment 3343

<sup>37</sup> ILO-AT Judgment 3343

<sup>38</sup> CA/F 6/17, CA/F 16/17

<sup>39</sup> European Union Integrity System report (2014)

<sup>40</sup> IPKat 2015 : <http://ipkitten.blogspot.de/2015/05/a-call-for-financial-transparency-from.html>

When the EPOrg was created, it was decided that the Boards of Appeal (BoAs), responsible for reviewing the decisions of the examining and opposition divisions, would be part of the Office. This arrangement can be and has been criticised as insufficient to guarantee the independence of the Boards. Proposals to improve the independence of DG 3 were made in 1999/2000 but failed to achieve a consensus and were put into a “second basket” to be tackled later. Until recently the arrangement has nevertheless functioned without major problems thanks to the respect of the independence of the judiciary shown by previous presidents.

Since then the situation has deteriorated:

- A member of a Board of Appeal has been suspended by the President. Several disciplinary proceedings followed, all marred with formal flaws. The ILO-AT ordered the EPOrg to restore the board member to his previous position. The administration did so for two weeks after which the person concerned was transferred to a wholly unsuitable position in another place of employment<sup>41</sup>.
- The President has refused to publish important board of appeal decisions that were not to his liking<sup>42</sup>.
- A recent reform<sup>43</sup> with the alleged aim “*to improve the perceived [!] independence of the Boards of Appeal*” combined with the removal of the Boards to a suburb of Munich have further made it clear that the current arrangement is insufficient to guarantee the necessary independence of the EPO Boards of Appeal. The reform has created a governance structure that is not in accordance with internationally recognised standards<sup>44</sup> for judicial independence as recommended by the European Network of Councils for the Judiciary (ENCJ) – an organisation whose members include the judicial councils of 20 of the EPO’s Contracting States and whose observers include the ministries of justice of another 12 EPO Contracting States.

#### ► Recommendations

- Invite the ENCJ to carry out a study of the institutional framework governing the Boards of Appeal and their members and to provide expertise, experience and proposals to the EPOrg, as an international organisation, in accordance with the [ENCJ statutes](#)<sup>45</sup> (see Article 4, third bullet point).
- Fully transfer the decision-making powers of the President of the Office to the President of the Boards of Appeal and give financial autonomy to DG3.
- In the longer run: transform DG3 into a separate organ of the EPOrg, governed by a Council for the Judiciary set up in accordance with the ENCJ recommendations.

### Governance of human resources

In its dealings with its staff, the EPOrg considers itself not to be bound by national or European labour law and regulations. National law does apply to external staff working in the Office but is in practice not enforceable due to the EPO’s immunity.

The Service Regulations of the EPO were initially based on those of the European Commission staff<sup>46</sup> and of a high standard. Over the years, the EPO service regulations have been modified independently, i.e. without any reference to those of the Commission. Consequently, the two have drifted apart. This complete independence leads to the service regulations existing in something of a legal vacuum, being only a small body of law themselves. This situation is not unique to the EPO<sup>47</sup>, but has been exacerbated by the highly authoritarian leadership style of its current management.

<sup>41</sup> See [https://en.wikipedia.org/wiki/Art.\\_23\\_1/15,\\_Art.\\_23\\_2/15\\_and\\_Art.\\_23\\_1/16](https://en.wikipedia.org/wiki/Art._23_1/15,_Art._23_2/15_and_Art._23_1/16) for details

<sup>42</sup> E.g. Enlarged Board of Appeal decision R19/12 on the independence of VP3, which was circulated only internally and in German only, and decisions Art. 23 1/15, 2/15 and 3/15 on the suspension of a Board of Appeal member.

<sup>43</sup> [CA/16/15](#)

<sup>44</sup> [Distillation of ENCJ Principles, Standards and Guidelines](#)

<sup>45</sup> [ENCJ Statutes](#)

<sup>46</sup> Das Dienstrecht der Internationalen Organisationen, page 40; G. Ullrich (2009)

<sup>47</sup> <http://www.ialcoe.org/the-big-issues/>

The most striking feature of the current administration has been its single-minded focus on “efficiency”, i.e. productivity. External observers<sup>48</sup> and patent examiners<sup>49</sup> have raised concerns that the enforced strong increase in productivity and production (e.g. 40% more grants in 2016) has had an impact on the quality of the patents granted. Any suggestion that the quality of the “products” (granted patents) or services may have suffered is vehemently contradicted by the administration<sup>50</sup>. Systematic independent verification of the quality is, however, missing.

Apart from having suffered from a general degradation of their working conditions in recent years, staff has also been affected:

- in their right to freedom of speech (by strongly enforced confidentiality requirements),
- in their right to freedom of association (see “Social Dialogue” below),
- in their right to privacy (e.g. inadequate data protection; unrestricted duty to co-operate with investigations by the EPO including the duty to give access to private property or the home),
- in their right to a fair trial (see “Internal Justice System” herein below).

Moreover:

- The most recent Office-wide staff survey initiated by the administration dates from 2010, i.e. eight years ago. It showed considerable problems in staff-management relations<sup>51</sup>. A further degradation in the situation is to be suspected (see below). The administration claims improvements but fails to provide any evidence.
- SUEPO-initiated independent staff surveys done in 2010, 2013 and 2016 show increased stress levels (i.e. a degradation in staff health) and a further deterioration of staff-management relations<sup>52</sup>.
- Working conditions at the EPO have become such that the EPO risks no longer being able to attract the best candidates.
- Staff perceives career progression and promotions as being based primarily on “loyalty” and not on competence.
- Examiners consider that they no longer have the time to do their job correctly<sup>53</sup>.
- The hierarchical position of the EPO medical department (within the HR department) no longer provides for a sufficient guarantee that normal standards of medical secrecy and occupational health will be respected.
- The EPO’s data protection arrangements have come under serious criticism in the past<sup>54</sup>. Since then the situation has not changed. Data protection is relevant not only for staff but also for applicants. Concerning the new EU Data Protection Directive which will come into force on 1 May 2018, the Office position is it is not bound by this Directive because it is not an addressee. It recognizes that it may be indirectly affected as the recipient of data since the EU states may only transfer to a “safe harbor”. It relies, however, on the general exception foreseen for international organizations: if the transfer is in the public interest, then the transfer can take place.

Article 20 of the EPO Protocol of Privileges and Immunities stipulates that  
*“The Organisation shall co-operate at all times with the competent authorities of the Contracting States in order ... to ensure the observance of ... regulations concerning public health, labour inspection or similar national legislation<sup>55</sup>, and to prevent any abuse of the privileges, immunities and facilities provided for in the Protocol.”*

The reading of the Article suggests that observance of national public health regulations was intended. Indeed, there seems to be no objective justification for the EPO setting up its own public

<sup>48</sup> Van Pottelsberghe, supra; [Juve \(2017\)](#); [Kluwer blog \(2018\)](#); [WIPR \(2018\)](#)

<sup>49</sup> [Petition from EPO examiners \(2018\)](#)

<sup>50</sup> <https://www.epo.org/about-us/services-and-activities/quality/quality-indicators.html>

<sup>51</sup> Report pulse survey by Towers Watson; CA/156/10

<sup>52</sup> [https://www.suepo.org/results\\_of\\_the\\_2016\\_european\\_patent\\_office\\_staff\\_survey/d-43311](https://www.suepo.org/results_of_the_2016_european_patent_office_staff_survey/d-43311)

<sup>53</sup> [https://www.theregister.co.uk/2018/03/15/patent\\_quality\\_has\\_fallen\\_confirm\\_euro\\_examiners/](https://www.theregister.co.uk/2018/03/15/patent_quality_has_fallen_confirm_euro_examiners/)

<sup>54</sup> [Süddeutsche Zeitung \(June 2015\)](#); [Süddeutsche Zeitung \(Sept. 2015\)](#); [CA/xxx/16](#); Letters from the Bavarian Data Protection Commissioner (Thomas Petri) to the Federal DPC (Andrea Vossstoff) - 05.05.2014 and from the Federal DPC (Andrea Vossstoff) to Justice Minister (Heiko Maas) - 28.8.2014

<sup>55</sup> Data protection laws would seem to fall under « similar regulations ».

and labour health regulations. The same applies to data protection. The EPO has nevertheless created its own regulations. In practice, there is very little cooperation with the national authorities in the area of health and safety, and none in the area of Data Protection.

Overall current management practices are probably best characterised as “management by intimidation<sup>56</sup>”. This is not sustainable on the long run.

### ► Recommendations

- Amend the EPO Service Regulations to reflect best national and international labour law and practice. The EPO Service Regulations should not contain regulations that are below generally accepted standards in any of the host countries.
- Monitor the impact of the EPO’s HR policies on staff morale and staff health<sup>57</sup> by bi-annual Office-wide surveys.
- Recognise as law applicable to the EPOrg international conventions signed by all or a majority of Contracting States, such as the ECHR and the ILO Conventions.
- Recognise EU Guidelines and other EU regulations, e.g. in respect of health and safety and data protection, as applicable law and adapt the Service Regulations accordingly.
- Arrange for and formalise the cooperation with the national authorities foreseen by Article 20 of the EPO-PPI.
- Audit the EPO for compliance with the EU general data protection regulation (GDPR) 2016/679 of 27 April 2016<sup>58</sup>.
- Establish a truly independent verification of the quality of the searches and grants delivered by EPO, e.g. through peer review with the major national patent offices (Germany; UK).

### Social dialogue

The EPO’s set-up for staff rights and staff involvement dates from the 1970s and has never been modernised. On the contrary: developments in recent years have been a step backwards. The Service Regulations stipulate that the statutory staff representation, the Staff Committee, must be *consulted* on matters concerning staff but there is no right of participation (In German: “Mitspracherecht”), not even in matters like staff health or social insurances to which staff contributes financially. In recent years, consultation has become a mockery. Although the Staff Committee continues to give fundamental and constructive feedback<sup>59</sup> on the proposals made by the administration, such feedback is systematically ignored by the administration and by the Administrative Council. The consistency with which any suggestion from the Staff Committee is ignored is remarkable. The author has been unable to find a single instance in recent times where input from the Staff Committee led to the meaningful modification of a proposal. It is unlikely that the Staff Committee was unable to put forward a single constructive proposal in this time. More probable is the existence of an unspoken policy to block all staff influence. The EPO’s main staff union, SUEPO, has never been recognised as a negotiation partner. The present administration has tried to promote a small fringe union with about 70 members in one location only as “the” recognised union but staff support has been lacking. The smaller union no longer seems active. Representation rights are in practice denied to external staff working in the Office<sup>60</sup>.

In recent years, the functioning of the staff representation (Staff Committee and Union) has been systematically hindered and disrupted by:

- Infringements to the autonomy of the Staff Committee, e.g. abolition of the right to organise elections and the right to nominate experts (freely).
- Infringements to the autonomy of the Staff Union, e.g. a restriction in the right to call for strike and

<sup>56</sup> [www.acua.org/ACUA\\_Resources/Auditor/Summer2006.pdf](http://www.acua.org/ACUA_Resources/Auditor/Summer2006.pdf)

<sup>57</sup> An « EPO-wide occupational health survey » has been initiated several years ago but this initiative has since been abandoned.

<sup>58</sup> [EU general data protection regulation](http://www.european-council.europa.eu/media/e3000000/1/press/pr160427_en.pdf) (GDPR) 2016/679 of 27 April 2016

<sup>59</sup> Reasoned, substantive feed-back is no longer desired. The new regulations (Article 38(3) ServRegs) foresee no more than a vote.

<sup>60</sup> Gutachten Ms Okyay (2009); ILO-AT Judgments 2919 and 3395



the banning, under threat of disciplinary measures, of any form of industrial action other than full strikes.

- The President has threatened staff and organisers with disciplinary measures should a planned demonstration actually take place<sup>61</sup>.
- Recent reforms have imposed on staff representation a structure and a whole range of other regulations that have had the effect of (and seem designed to) make its functioning impossible, e.g. the exclusion of non-elected experts as nominees, a maximum time allowance of 50% for staff representation work, suppression of administrative support, drastic reduction in the provision of office space, refusal of travel requests etc.
- Time allowance for staff representation, secretarial support for the staff representation and duty travel for the staff representation has been more than halved.
- The right to freedom of expression has been almost totally suppressed: criticism of the current management inevitably leads to accusations of defamation, breach of confidentiality and disloyalty. Dissent seems recorded on file and may lead to a career freeze (no promotion or increase in step) or even forced sideways transfers.
- Significantly, in the last three years, about half of the (elected and/or nominated) staff representatives have been investigated for alleged misconduct, resulting in three dismissals, four cases of downgrading and a warning letter<sup>62</sup>.

This has had a devastating impact on the ability of the elected staff representatives to represent staff and to recruit successors.

The antagonistic relations between management and staff representation reflect those between management and staff. Authoritarian, non-inclusive leadership tends, however, to be ineffective in the long run. The re-establishment of a respectful social dialogue should therefore be a top priority for the Organisation.

#### ► Recommendations

- Restore downgraded and/or dismissed staff representatives to their former positions.
- Restore the due independence of the Staff Committee in organising elections and amend the Service Regulations accordingly.
- Restore to the Staff Committee's time allowances, administrative support and other facilities necessary for its proper functioning.
- Restore to the Staff Committee its due freedom in appointing experts and other nominees.
- Grant the Staff Committee a right to co-determination in matters concerning staff health as well as social insurances to which staff contributes financially.
- Unconditionally recognise SUEPO as a negotiating partner.
- Recognise and respect the autonomy of SUEPO in organising industrial actions within the framework that is generally accepted in Europe.
- Recognise and respect representation rights of the Staff Committee for external staff working in the Office in accordance with national regulations.

#### Internal justice system

The EPO, like other international organisations, enjoys immunity in the exercise of its official functions. It creates its own labour law and has its own social security system. Whether the EPO is bound by international conventions such as the ECHR, ILO Conventions and by EU regulations is a matter of dispute. It seems only logical that the Contracting States, when creating an international body, cannot confer upon that body freedoms or rights that they themselves do not have<sup>63</sup>. It would

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<sup>61</sup> Demonstration at the British consulate planned for 25 Feb. 2015

<sup>62</sup> <https://regmedia.co.uk/2016/11/22/epo-csc-battistelli.pdf>

<sup>63</sup> Matthew Parish, *Mirages of International Justice* (2011);

seem that Contracting States remain bound to uphold the general higher order commitments that they signed up to, such as the above-mentioned conventions.

Recently, the Parliamentary Assembly of the Council of Europe issued a document<sup>64</sup> in which it stressed that “*the staff of international organisations benefit from the human rights and fundamental freedoms as guaranteed by the ECHR ... as well as the European Social Charter.*”

It is also noted that Article 33(1) EPC explicitly foresees adaptation of the Convention “*to bring them into line with an international treaty relating to patents or European Community legislation relating to patents.*” Logically the same should apply to the Service Regulations, i.e. these should be adapted to bring them in line with international treaties and European Community legislation relating to labour law<sup>65</sup>.

The EPOrg and ILO-AT, the Tribunal responsible for disputes between staff and the administration (see below) take, however, the position that since the EPOrg is not a signatory of the ECHR and other conventions, these conventions do not apply<sup>66,67</sup>. ILO-AT claims to recognise the “general principles” underlying such conventions but these “general principles” are not defined and rarely applied. The President of the ECtHR does not deny applicability of the ECHR but made it clear that the Court exercises “*at the highest degree an attitude of self-constraint*” when dealing with international organisations and will only intervene in flagrant cases of manifest insufficiency<sup>68</sup>. It has not done so yet<sup>69</sup>.

Its high level of autonomy and the absence of external normative control makes the EPOrg very much a “state within a state”. Its legal environment is, however, incomplete. Among others, the EPOrg does not have the separation of powers that is the norm in modern democracies:

- The President is the executive authority of the EPO.
- The President of the EPO proposes the body of employment law to be applied to staff within the EPO to the Administrative Council, the supervisory body of the EPOrg. The Administrative Council almost without exception endorses these proposals thereby *de facto* giving the President wide-ranging legislative powers.
- The President is the ultimate decision-making authority within the Office, i.e. he formally takes all of the administrative decisions that can be challenged by staff. The President is also the head of the internal quasi-judicial system. He is the one who initiates investigations and who calls for disciplinary procedures. Disciplinary Committees and the EPO Appeals Committee only *advise* the President. The President remains free to decide. He is prosecutor, party and judge.

All parts of the internal justice system (internal appeals procedure, disciplinary procedures, harassment procedures) have been reformed under the present administration, some more than once. An investigation unit has been created, and a new, simplified procedure for dismissal for professional incompetence has been introduced. The impact of the latest reform of the internal appeals procedure is yet to be seen but up to now generally the main effect of these reforms has been to increase further the powers of the President at the expense of staff.

The way the current President manages the internal justice system can best be illustrated by a set of

Paul Beckett, [Opinion on the applicability of international human rights norms to the internal workings of the European Patent Office](#) (2015); Robin Silverstein, [Revisiting the legal basis to deny international civil servants access to a fundamental human right](#) (2017)

<sup>64</sup> [Resolution 2206](#) (2018), point 4

<sup>65</sup> See also <https://www.msuir.org/volume-24-issue-2-2017/2017/6/25/revisiting-the-legal-basis-to-deny-international-civil-servants-access-to-a-fundamental-human-right>

<sup>66</sup> ILO-AT Judgment 3058 consideration 2: *the Convention is not in any event applicable as such to international organisations within the legal system to which the Tribunal belongs (see, for example, Judgments 2236, under 11, 2611, under 8, or 2662, under 12).*

<sup>67</sup> AILC report II, [The non-compliance of the International Labour Organisation Administrative Tribunal with the requirements of Article 6 ECHR](#) (2005)

<sup>68</sup> Guido Raimondi (2018), *La jurisprudence de la cour européenne des droits de l'homme sur le droit de la fonction publique internationale*; [http://www.ilo.org/tribunal/news/WCMS\\_613944/lang--en/index.htm](http://www.ilo.org/tribunal/news/WCMS_613944/lang--en/index.htm), pages 99 – 108.

<sup>69</sup> See <https://www.msuir.org/volume-24-issue-2-2017/2017/6/25/revisiting-the-legal-basis-to-deny-international-civil-servants-access-to-a-fundamental-human-right> for an excellent overview

figures provided by the EPOs auditors<sup>70</sup>: of the 194 cases (336 appellants) that crossed the President's desk in 2015 for a final decision after internal appeal, *two* individual cases were allowed and *two* were allowed in part. The remaining 190 cases (332 appellants) were all rejected. In 2016, the Appeals Committee made recommendations in 239 cases (898 appellants), of which *one* case was allowed, and *two* were allowed in part; 236 cases (895 appellants) were rejected.

As indicated above, the final arbiter of disputes between the Organisation and employees of the Office is the Administrative Tribunal of the International Labour Organisation (ILO-AT). The ILO-AT does not meet modern standards of independence. The Tribunal is hosted by ILO, which is one of the client organisations and a party to the proceedings. The judges are selected and appointed on three-year renewable contracts by the governing body of ILO<sup>71</sup>. Support staff working for the ILO-AT is employed by ILO. The judges are paid per case<sup>72</sup>. The Tribunal does not provide injunctive relief. Requests for hearings are invariably refused. The odds are stacked in favour of the defendant organisations, as they may file the final submissions. Reforms were discussed in 2002<sup>73</sup> but little has been achieved since<sup>74</sup>.

In judging its disputes, the ILO-AT mostly confines itself to verifying whether the regulations that the Organisation gave itself are correctly applied. As a consequence, an amendment of the Service Regulations can render a judgment that is favourable for staff void for the future. In recent years, the case law of the ILO-AT has become increasingly unfavourable for staff, in particular staff of the EPO<sup>75</sup>. The ILO-AT exercises little, if any, normative control on the legislation itself. It is probably significant that despite the implementation of highly contested reforms, in recent years not a single case affecting the whole or a significant part of the staff has been won by staff. The EPO administration takes pride in its success rate of over 80% at the Tribunal and sees this as a confirmation of its opinion that unreasonable staff is to blame for the current problems at the EPO. Other explanations are, however, possible.

ILO and the Tribunal have repeatedly expressed their dismay about the number of cases coming from the EPO<sup>76</sup>. Talks have taken place between the administration and the ILO / Tribunal about how to best handle the situation<sup>77</sup> but requests from the staff representation (representing the other party in the proceedings) to be involved in these talks or separately heard have been rejected. Maybe as a partial "solution" to the perceived backlog problem, the Tribunal has sent several hundred cases back to the EPO on the grounds that the composition of the EPO Appeals Committee that dealt with the cases was flawed, instead of quashing the final decisions that were based on these flawed proceedings<sup>78</sup>. Individual cases are also frequently remitted to the EPO for further consideration, thereby increasing the already unacceptable delays and the costs for the complainant. The (newly reformed) Appeals Committee now not only has to treat the new cases being filed but also about the three and a half years' worth of cases that have been remitted. Some of the cases concerned were already several years old before they initially reached the Appeals Committee and had been waiting at ILO-AT several years since. This means that it may take a decade before the cases concerned are finally judged. It is clear that whatever the outcome of these cases the situation created by the contested decision will be irreversible. This is also likely to have an impact on the outcome of the cases as the Tribunal, even if it were willing, simply will no longer be in a position to provide effective repair.

## ► Recommendations

<sup>70</sup> CA/20/17, point 183

<sup>71</sup> [http://www.ilo.org/tribunal/news/WCMS\\_561015/lang--en/index.htm](http://www.ilo.org/tribunal/news/WCMS_561015/lang--en/index.htm) ; [http://www.ilo.org/gb/GBSessions/WCMS\\_620045/lang--en/index.htm](http://www.ilo.org/gb/GBSessions/WCMS_620045/lang--en/index.htm)

<sup>72</sup> See e.g. GB.294/PFA/18/2 (on top of travel costs and daily allowance)

<sup>73</sup> [Opinion by Geoffrey Robertson Q.C.](#); ILO Staff Union bullet points

<sup>74</sup> AILC, [The judicial independence of the International Labour Organisation Administrative Tribunal: potential for reform](#) (2007);

Flaherty, [Legal Protection in International Organizations—A Practitioner's View](#) (2012)

<sup>75</sup> [su17040cp](#)

<sup>76</sup> [GB.325/PFA/9/1\(rev.\)](#) ; [GB.326/PFA/12/2](#)

<sup>77</sup> [GB.326/PFA/12/2](#)

<sup>78</sup> ILO-AT Judgments 3785 and 3796; [GB.329/PFA/11/1](#), points 5 and 6

Reference is made to recent documents issued by the Parliamentary Assembly of the Council of Europe<sup>79</sup>, triggered largely by the situation at the EPO.

The Assembly recommends, among others, that international organisations:

- be encouraged to bring about greater transparency of their staff policies
- ensure that legal means of redress are also available to staff unions and other groups working to protect the rights of staff
- carry out a study of the extent to which the internal remedy systems in international organisations are compatible with Article 6 of the ECHR.

Furthermore:

- Staff representatives are to be involved in the discussions with ILO and the Tribunal on how to solve the most acute problems.
- The selection, contractual situation and the remuneration of the ILO-AT judges are to be reviewed.
- The Statute and procedures of the ILO-AT are to be reviewed.

## Conclusions

The deficits in governance, transparency, accountability, due process, legal certainty for employees, legal validity of patents for the applicants are manifest. It is high time for these to be addressed in order to restore trust<sup>80</sup> of applicants and the European public in the EPO as patent granting authority on the one side, and as attractive employer with strong ethics and compliant processes on the other.

With a new President assuming operational responsibility for the EPO on 1 July, the timing is ideal to discuss these issues with the stakeholders. One of these is the staff of the Office. The representatives of the Staff Union are prepared and open for constructive social dialogue in line with the mandate given to the new President by the Administrative Council.

SUEPO Committees Munich & The Hague

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<sup>79</sup> [CoE Report – 29 Nov. 2017](#) ; [Resolution 2206 – 26 Jan. 2018](#) ; [Recommendation 2122 – 26 Jan. 2018](#) ; [CoE Opinion – 24 Jan .2018](#)

<sup>80</sup> <http://patentblog.kluweriplaw.com/2018/03/31/epos-vision-v-trust/>