

INTERNATIONALE GEWERKSCHAFT IM EUROPÄISCHEN PATENTAMT

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UNION SYNDICALE DE L'OFFICE EUROPEEN DES BREVETS

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PAX: a recipe for bad Quality

Summary

The high quality of search and examination has given the Office the competitive edge over the national Patent Offices. In the past 10 years the Office has already demanded an increase in productivity of over 30% from its examiners. PAX focuses on production and productivity even more strongly than before and seeks to impose ever more ambitious objectives on all examiners Thus PAX strongly threatens the quality of search and examination. In doing so PAX risks to destroy the very foundations on which the EPO's success was built.

Quality: the EPO's main asset

Patent quality is currently a hot topic in the media and in politics. Economists are starting to realise that the surge in patent applications does not reflect any corresponding technological progress. Trivial patents are increasingly being recognised as a potential brake on technical development and a high additional cost factor for industry. The US patent system has been seriously criticised¹. The infamous "Blackberry" agreement is merely one example of a costly mistake of the USPTO. Ultimately, a flood of trivial patents, the ensuing increase in litigation costs and the decreasing public trust in the patents could lead to a backlash that could destroy the patent system.

The EPO is still getting a better press than the USPTO. But there are voices claiming that the quality standards must be more strictly applied and that the current level of inventive step is too low. Amongst those there are some very authoritative sources². Criticism has also been levelled at the EPO's overly "customer"-friendly attitude and at the fact that there exists a built-in bias towards grants at the expense of refusals³. It is important to realise that the quality of its searches and examinations are the Office's main asset. The procedures at the EPO have never been extremely fast nor particularly cheap. What made and still makes applicants opt for the EPO, and makes them defend the EPO against attempts at decentralisation, is its quality⁴.

¹ E.g. "Innovation and its Discontents: How our broken patent system is endangering innovation and progress, and what to do about it" by Adam B. Jaffe and Josh Lerner, Princeton University Press.

² Dr. Landfermann, Präsident des Bundespatentgerichts, Vortrag 30. März, 2006; T. Sueur and J. Combeau, "Un monument en péril: le système des brevets en Europe", in *Droit et économie de la propriété intellectuelle* (ed. by M.-A. Frison-Roche and A. Abello, Paris: LGDJ, 2005), p. 95-131 (see in particular p. 116).

³ Francis Hagel, "Serving two masters", Patent World, April 2004; MEDEF paper "Manifeste pour les brevets" of 29 June 2004, (http://www.medef.fr/staging/medias/upload/66296_FICHIER.pdf); Mr. Mercer, President of *epi* and Mr. Combeau, President of UNICE, statements made at the EPO Quality conference held on 21-22 Nov. 2005; Piéta - in preparation.

⁴ Documents supporting the EPO in the strategy debate have been submitted by UNICE (CA/79/06) and PDG (CA/95/06). Both stress the quality of the EPO's work as the most important reason for their support of a centralised patent procedure. See http://ac.european-patent-office.org/strategy_debate/documentation/index.en.php

The non-supporters

The delegations in the EPO's Administrative Council are mixed in their support for quality. Although some stress the importance of quality (see e.g. CA/92/05), the majority seems more focussed on quantity. One reason may be that the delegations realise that there is an inverse relation between quality and quantity, and quantity is what gives the Contracting States their financial returns. Another possible reason may be that the delegations also realise that it is quality which gives the EPO its competitive edge over the National Patent Offices. If the quality of the EPO's work were to become indistinguishable from that of the National Offices a major argument against decentralisation would fall.

The single-minded focus of the EPO senior management on quantity and the corresponding neglect of quality is less easy to understand. Sure, senior managers spent more time reading the Medium Term Business Plan than reading the European Patent Convention. And the concept of "public service" has gone out of fashion, at least in the Anglo-Saxon world, to be replaced by more business-oriented way of thinking. But even good business managers study the market, listen to their customers, and focus on the companies' strengths, because neglecting these strengths would be playing into the hands of the competitors. Granting low quality patents encourages the filing of low quality applications and hence increases the already high work pressure on the Office. This is definitely *not* what the administration should want. The only explanation that we can find for the behaviour of EPO senior managers is a lack of courage and ability to stand up to the Administrative Council.

PAX and QUALITY

What does this have to do with PAX? The answer is: a lot. The purpose of an Office like the EPO is not just to *grant* patents (an easy administrative act which does not require some 3500 examiners) but to *examine* patents and to grant only those that merit a patent, in a scope that is commensurate with the technical contribution made. It is the duty of the EPO examiners to protect the European public and the European economy against trivial, overly broad or otherwise unjust patents. Already under the current reporting system the emphasis is on productivity. Over the past 10 years alone the EPO has demanded an increase in productivity of over 30% from its examiners⁵, against a background of increasingly complex files and steadily increasing prior art. The EPO has a highly refined system to measure the individual examiner's productivity, but not the examiner's quality. Quality is rarely questioned as long as the productivity is good. Productivity is the main determinant for the overall note in the staff report: less than 5% of the examiners who have a "good" in productivity end up with a "very good" overall. Apart from anything else, the focus on productivity clearly signals to staff that a high productivity is what is most important, and is what is expected from them. PAX will clearly make this situation worse in setting higher production targets for everyone, low producers and high producers alike. Higher production targets are most easily achieved at the cost of quality, i.e. through quick searches and quick grants. Refusing or limiting bad or overly-broad applications is much more time consuming and hence severely penalised both under the current reporting system and under the PAX system as now proposed. Examiners should have enough time to do their job properly and not be put in a conflict of conscience because of their production targets.

The staff representation strongly opposes the PAX system because it lacks transparency and is inherently unfair as a reporting system. But we even more strongly oppose PAX because of its likely adverse effects on the quality of the search and examination at the EPO, and the potential consequences for the European Patent system.

The Committee

Attached is a SUEPO paper entitled "Measurement dysfunction" that was distributed in Munich a year ago. It summarises some of the scientific literature on the negative effects of misguided focus on a limited set of easily measurable factors on the overall functioning of an Organisation, and discusses the relevance for PAX. Although the paper is a year old now, it is still highly relevant.

⁵ See "Examiner productivity reviewed" available at <http://munich.suepo.org/archive/ig6405.pdf>

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Measurement dysfunction

Summary

The present paper summarises some of the literature on the intentional and non-intentional effects of measuring and managing performance in organisations. It also discusses the implications for the EPO, in particular for the measuring of and reporting on examiner productivity.

Introduction

In management circles the need for measuring performance is rarely questioned. It is generally assumed that measuring performance of workers will focus their attention on the important dimensions of their performance and cause them to excel on those dimensions, in particular if improved performance is coupled with increased reward. The above thinking has led to the introduction of “Management by Objectives” systems, “Performance Related Pay” and/or a Balanced Score Card. An analogy that is often cited as a justification for measurement at the organisation level is that of an airplane: nowadays nobody would dream of flying a major airplane without the readings on height, speed, fuel flow etc. available in the cockpit. It would similarly seem folly to direct a major enterprise without detailed information about what is going on. What this model forgets, however, is the human factor. To use the metaphor of Robert Austin¹: imagine what would happen if feedback about the position of wing flaps, fuel flow etc. were transmitted by tiny little gremlins who would risk gremlin replacement if the readings were not as expected by the pilot. It would not be surprising if airplanes guided this way occasionally flew into a mountainside when they would seem to be processing smoothly towards their destination. The present paper analyses in some more detail what measurement systems are more or less likely to motivate the gremlins to distort the information to the cockpit, and what the implications are for the Office.

¹ “Measuring and Managing Performance in Organizations”, Robert D. Austin, 1996 (ISBN 0-932633-36-6)

Informational vs. motivational measurement

In the true airplane analogy, the purpose of the measurement is to provide the pilot with the technical information required for making decisions, i.e. it is purely informational.

In an organisation it would indeed seem desirable that management has detailed information about the cash flow, productivity, stocks, user satisfaction etc. in order to make decisions about investments, process design and/or how much staff to hire. In the context of organisations, however, measuring not only serves to make technical judgments, but also to judge on the value of the company to the shareholders and on individual performance of workers with possible consequences for rewards. Measurement which is designed primarily to decide whom to reward and whom to punish, and thereby influence the behaviour of the worker, is called motivational measurement. The ultimate aim of motivational measurement systems is to incite the worker to put more effort in the job than he/she would do otherwise and/or direct those efforts towards which are considered by management to be more in line with management strategy. It is, however, important to realise that almost any information can be used for any purpose and that people who are working on activities that are being measured are aware of this. Unless trust between workers and managers is higher than in most organisations, workers who believe that the available information can be used for the evaluation of their performance will prepare for that possibility. Even where performance measurement is credibly put in place purely for providing technical information to management, it is probably interpreted as a definition of the important aspects of the job and will hence have an influence on worker behaviour.

What you measure is what you get

In a situation where all important dimensions of performance are measured and fed back to the workers ("full control"), workers honestly trying to improve their performance in order to obtain a given reward should be able to do so. In a situation of full control it should also be possible to detect dishonest workers trying to cheat, making it easy for management to distribute just rewards. However, in real life situations, in particular with complex intellectual jobs, full control is almost never achievable. Now imagine a situation of a job with 10 dimensions, each necessary for an optimal result. Four dimensions are measured by management, but the remaining 6 aren't because they have either been overlooked or because they are too difficult to measure ("partial control"). What could be the effect of an increased pressure on the worker to improve the results? If the honest worker knows that all dimensions are important for the overall result he/she will at least initially try to improve the non-measured dimensions along with the measured dimensions. However, with increasing production pressure the temptation to decrease effort over the non-measured dimensions in favour of the measured dimensions will increase. Less knowledgeable or less scrupulous workers may immediately make less effort in the non-measured dimensions ("if that's what the bosses want, that's what I give them"). Because some dimensions are not measured, it will be difficult for management to detect cheating and distribute the rewards in a just manner. Accidentally rewarding some "cheaters" would further increase pressure on the honest worker to abandon effort towards the non-measured dimensions. If the non-measured dimensions were important the net result of the introduction of a costly performance measurement system could thus be a loss of effectiveness of the overall output (i.e. a negative return on investment) as well as a demotivated workforce since the honest worker is likely to recognise and resent the resulting measurement dysfunction.

Why try ?

The management literature is replete with examples of performance management systems that have become dysfunctional. Nevertheless managers in many organisations are still trying to impose management by objectives and/or performance related pay systems on their workers. Why? One possible explanation is a natural desire of managers to control. Measuring

performance, and doling out rewards and punishments gives the manager power over the subordinates and a feeling of being in control. A contributing factor is probably that many managers underestimate the complexity of the job others perform and their own ability to control such jobs, i.e. they presume wrongly that all aspects of the workers job can be measured. Maybe significantly, a currently highly influential A6 in the Office, when questioned about the risk of distorting the performance of the formalities staff in The Hague with the Balance Score Card that he had introduced, answered that if distortion arose measurements simply needed to be improved until “they (the staff) can run but they cannot hide”, i.e. he apparently believed that full control is possible and desirable. Management consultants furthermore make a living out of introducing performance management systems and other “change processes” in organisations and therefore have a strong incentive for publicising and selling the alleged merits.

And what about the EPO examiners ?

Actually measuring performance is feasible only for major groups of staff and for jobs that have an easily measurable output. Consequently the EPO has always measured the quantitative output of the examiners and of the members of the boards of appeal. Some form of productivity measurements have more recently been introduced for other jobs but the relevance of these measurements are much less clear. In the very early days of the Office the productivity measurement was largely informational. Nevertheless performance was better than expected: e.g. substantive examiners did better than the 55 grants per year minimally expected from them. This shows the power of intrinsic motivation: when left to their own devices *most* people can actually be trusted to do a good job. Over the years the function of the measurement has become more and more motivational as the measured dimension – productivity – has become the primary basis for the decision on rewards. The resulting measurement dysfunction is there for all to see and ranges from obvious abuse (e.g. the “no searches”) to a much more wide-spread subtle neglect of quality and/or investments. The new reporting system for examiners, PAX, is unlikely to improve the situation. Contrary to claims by management the new reporting system is neither trust-based², nor does it encourage self-responsibility and independence of the examiner. The new reporting system actually tries to increase the level of control over the examiners by contractually defining more dimensions in more detail. These dimensions are then continuously monitored by MUSE and/or the director and the results fed back to the examiner who knows that achievement or non-achievement of the measured dimensions will be the basis of the decisions on reward. The goal of the exercise is thus clearly to increase management control over examiner behaviour. Although an attempt has been made to include also non-productivity dimensions such as investment these are poorly defined. The main missing dimension is, as ever, quality.

Is there an alternative ?

It is clear that the current examiner reporting system, with its single-minded focus on productivity, has started to cause dysfunction. Although maybe ideally full responsibility for quality and quantity should be given to the examiner without counting anything, under the present climate of distrust neither examiners or administration would be prepared to go to a system where nothing is measured. Improvements in the EPO's performance cannot, however, be expected from a further refinement of the dimension that is already measured - productivity - but must lie in a strengthening of the dimensions which are currently not, or not sufficiently appreciated and measured: quality, investments, cooperation, where necessary supported by further training. This does not necessarily require a revolutionary change of the reporting system. Considerable progress could be made through a correct implementation of the system we have, with due weight

² Trust is demanded from, but not given to, the examiner.

given to all dimensions, ideally by well-trained technically competent directors. Clearly, the role of (initially) the coaches and the examining divisions guarding quality should be recognised and strengthened.

Some simplification of ProPro-II and a better weighting of the actions would nevertheless be welcomed by most of the staff. A higher weighting of rejections would support examiners in rejecting the increasing number of speculative patent applications that are a burden on technical progress rather than a contribution to it, and which are causing the patent system as a whole a bad reputation with the general public. A higher weighting of oppositions – the most economically relevant of our procedures – could avoid increasing criticism from the patent profession on the quality of the EPO's service³.

Management should furthermore improve measurement of the quality dimension by checking the quality of the searches. Another obvious suggestion would be to look systematically at the overall quality of the work of the highest producers. Quality control should, however, not be left to "quality controllers" that are hand-picked by, and report to, a Principal Director. Given that the results of a cluster are also fed back to higher management levels and contribute to cluster performance evaluation, leaving control in the hands of the Principal Directors would carry the risk of "manager gremlins" distorting the flow of information to the cockpit.

Conclusions

The EPO seems on its way to become a case study for measurement dysfunction, despite a highly educated and highly motivated staff that has tried to resist this development.

The resulting work stress is probably one of the contributors to the EPO's high sick leave amongst examiners and formalities officers. The EPO administration would do well to rethink its strategy of using measurement to increase control over its work force.

It may be more appropriate to move towards a real culture of trust and self-responsibility instead.

The Committee

³ Recently Lord Justice Jacob in a Judgment of 18 Jan. 2005 sharply criticised an EPO opposition division for revoking a patent on formal grounds (added subject-matter) without considering the other grounds thus risking considerable delays in considering those grounds if the board of appeal would not follow the opposition division on the formal grounds.