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SUEPO

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MAKING EPO FIT FOR THE FUTURE (SUEPO SOLUTIONS) or AVOIDING GLOBAL WARMING

Summary

The success of the EPO is recognised worldwide. This success is the direct result of a number of key factors which will be discussed in this paper. We also explain the changes and challenges we are currently facing and policies which would ensure the continuity of the EPO success, as well as warn of developments that could jeopardize its efficiency. We hope this contribution will help the President and the MAC to design a policy with a long term strategy ensuring the long term future of the EPO, rather than a policy aimed at creating the illusion that something has been achieved within a short term mandate.

THE KEYS TO THE EPO's SUCCESS

The European Patent Office was created 30 years ago. It quickly set a worldwide standard for quality and remains the standard even if more recently the quality of the processes are under pressure, due to management policy.

The first key is the central procedure:

The founding fathers created the EPO in order to develop a central procedure. For this, they established a centralisation protocol which aimed at progressively diminishing the activity of national patent offices in the granting procedure. The scale effect has allowed for a technical specialisation which cannot be matched in the national patent offices (NPOs) of member states. It started for historical reasons with separate search and examination procedures. This ensured that the solid knowledge in documentation and search in the IIB could be kept at the start of the EPO, whilst examination know-how from the member states was added to provide the necessary skills. A culture of quality examination was then

developed in Munich and continued in this way for many years.

It was then decided to implement BEST and online searching, with increasing automation in all areas of the patenting process. At that time, SUEPO already suggested a model whereby BEST would not be compulsory but some examiners should be given the chance to stay in the activity in which they had specialised, e.g. documentation and search or examination and opposition. We also suggested a model where one could enlarge a bit, for example documentation search and examination or search, examination and opposition. This was not accepted by management. Instead, it was decided to proceed full speed with BEST implementation and the associated alleged productivity gains. Most staff gladly took up these new challenges, developed new tools for searching online and trained (as far as this was on offer) to increase their skills and adapt to the changing environment. All in all, staff also increased their productivity during these years, since the comparative evolution of staff numbers and number of filings show a

diverging evolution. This in a context of applications becoming more complex, and a fast-changing environment (the latest example being the EPC 2000).

The second key is (was) the quality of searches:

This starts with an orderly documentation. The EPO has always allowed, until recently, a lot of effort to be put into documentation, and has refused to outsource it. This is an absolutely central element to the quality of output.

The third key is timeliness of searches:

A well-functioning patent office must be in a position to provide applicants with a solid basis for their future investments within a reasonable time. The introduction of BEST has had the positive effect that the search capacity has drastically increased and provides the flexibility to ensure delivery of timely searches. The EPO is the only Office in the world able to provide a substantive examination report together with a search report before publication of the application.

The fourth key is an adequate level of examination:

This has also traditionally been one of the strengths of the EPO. The constant attempts by management to increase productivity and to decrease training time have recently put pressure on this quality. In other words, you don't need to raise the bar: just put it back where it used to be.

The fifth key is some flexibility on the timeliness of examination.

Completing examination in record times must not be an aim in itself. To do so would have a number of perverse effects. First, it would require from the EPO a huge work capacity, and would limit the flexibility given by a possibility to delay somehow examination. Second, when applicants themselves do not want to rush the examination procedure, they are not cooperative, thus slowing it down and consuming EPO resources. Third, grant fees (50% thereof) are kept by the member states, whereas the application fees (pre-grant fees) remain in their entirety within the EPO, where they are used to cover expenses linked with the patent granting procedure.

THE CHALLENGES WE FACE

In recent years, the exorbitant requests of management on productivity have become a real threat to our quality. We hear more and

more in the outside world that quality at the EPO is no longer what it used to be. Reversing this trend is the first challenge.

The EPO and other major offices currently face a steady increase in applications. At the same time, our recruitment market is rather dry. Engineers able to work in our three official languages are a scarce resource and European citizens wanting to work abroad are also not numerous. This is the second challenge.

The good news is that in parallel with the increase in applications, the EPO is getting an unprecedented increase in financial resources, not only in the form of procedural fees, but also in the form of renewal fees, both for applications and for granted patents. This makes the financial situation of the EPO very good. However, this will only be good news if the EPO is able to keep these resources inside the organisation. We know, that some delegations have tried to extract more and more money out of the EPO, either for their national patent office (despite the steady decrease in their activity) or is even diverted for other purposes which have nothing to do with innovation.

It remains to be seen where Ms Brimelow stands on fee policy. This is a crucial question. The newly-implemented increase of procedural fees could be considered as a good move. However, the justification for this increase, i.e. too great a dependence on renewal fees, is worrying: it could be a sign that, in the long run, Ms Brimelow intends to surrender the renewal fees to the member states. This would be a very bad move for the system and for the EPO. If renewal fees were to be renounced by the EPO, this would destroy the balance of the system, which currently permits easy access through low entry fees, and increased costs for the successful inventions only later through the annual renewal fees. Unduly upsetting this balance would either force the EPO to raise the procedural fees further so as to be able to function, or to lower still further its quality standards.

MAKING THE EPO FIT FOR THE FUTURE

1. Keeping the money inside the EPO

It is essential that the income generated by the work of the EPO largely stays within the EPO and is used for making the EPO fit for the future. National patent offices see a regular decrease of their activity, at least in the field of

patent granting. Even if they reorient their activity towards patent information, or according to the Lisbon agenda towards "stimulation of innovation", the current level of income from renewal fees is enough for this. The national offices should not attempt to get a larger part of these fees. Ms Brimelow should not leave the Administrative Council under the illusion that she could propose this in order to be re-elected

SUEPO is of the opinion that an independent external audit should be made in the member states to see how the money they get from the work of the EPO is used, to see whether this is in conformity with the aims of the Lisbon agenda. This is all the more important, in that the traditional contributors (US and Japan) will soon be complemented by China, India and Korea. This means that the contribution of Germany, for example, will become marginal compared to its received benefits (Seat, most staff including a great number of nationals, buildings and land sold above its value, high concentration of patent attorneys, very high social security bill paid by the EPO, tax adjustment, use of the margins in the staff complement to the benefit of Germany and to the detriment of the Netherlands, etc.).

The result of the proposed audit should be used to adapt our recruitment policy in our host countries and to distribute cooperation money fairly amongst all member states. The increasing renewal fee revenue (currently 300 million Euros annually) Otherwise risks becoming "a tax on innovation" rather than a contribution to it.

2. Recruitment

SUEPO considers that a massive recruitment campaign should take place. This starts, of course, with examiners. The current first measure of Ms Brimelow, i.e. adapting the recruitment plan for 2007 to the level obtained in 2006 was not sufficiently ambitious. The only advantage was that she could tell the Council that her recruitment policy was successful. However, *de facto* it meant planning for an increase of the backlog, since this recruitment was only just enough to maintain the current examining capacity. We therefore hope the recruitment policy will be changed to try to recruit all the examiners the EPO needs.

Instead, we see pressure on examiners to increase productivity further without the provision of any means to do so. The proposed mechanisms for increasing this pressure are

performance-related pay and punishment of examiners. This is the wrong path. The administration already implemented changes in the career development in 2002, and we reached the limits of what is acceptable in terms of career difference at the EPO, without threatening quality and working atmosphere and ultimately doing more harm than good. Demotivating 90% of staff is a greater danger for production than motivating further the 10% who are already very motivated, and who, in many cases, will have a short examining career followed by rapid promotion to a "better" post.

The EPO needs not only examiners. The decision announced in the last MAC communiqué to "*impose a six-month moratorium on the recruitment*" (sic) of support staff, primarily in DG2, creates major problems. It means another six months lost, while internal expertise slowly disappears. Many essential core activities are outsourced and this both costs more money and is less efficient. Staff have to deal with the increasing work and are becoming sick, making the situation for those remaining even more difficult. The prospects for yet another miracle e-tool that will suppress the need for all staff is as unlikely as it was in the past, e.g. phoenix. In the meantime, the EPO allows private companies to employ staff on its premises under conditions, which are closer to modern slavery than to a model international organisation. Tell us about pride.

In order for the required recruitment to be successful, management should certainly not reduce the working conditions, as was already done for new staff employed on or after 01.01.2009, when the Administrative Council decided to cancel the tax adjustment last year.

3. Investment in staff (training)

The EPO should start to reinvest in training rather than continuing to make short-term savings at the cost of reducing training. Training is an essential investment in staff and staff is the only asset of the EPO.

4. Investment in tools

The EPO should invest with top priority in the tools needed for its own core activity. Staff systematically indicate "functioning of the computer systems" as the biggest obstacle to efficiency. Computer programmes have a different "look and feel" depending on when they were created. None of the programmes are ergonomically up to date and some are downright painful to use for extended periods, thereby contributing to a high level of upper-

limb disorders (including some leading to invalidity) within the Office. In the past improvements in the EPO's computer systems have often fallen victim to demands from the Administrative Council for the Office to make various tools available to national patent offices. The Office should also go on mastering the procedures. This starts with documentation, which should not be outsourced as is currently planned since this could have a strong negative effect on quality. Last but not least: the Office should actively support its formalities officers and examiners in dealing with low-quality applications that cause a lot of work (and expense) at no benefit to society.

5. Technical cooperation

The EPO could reinforce its technical cooperation with the national patent offices of the member states in the fields of patent information and stimulation of innovation. Funds should be diverted from countries with well-established national patent systems to the countries that need it. Funds should certainly not go to the countries that already benefit enormously from the presence of the EPO.

6. Tax "cooperation" and fairness

The decision of the Administrative Council to impose on the EPO the burden of the tax adjustment is scandalous. SUEPO has asked the EPO to establish which countries will benefit more from this absurd decision. With 500 pensioners on their soil out of the current 1200, Germany's share will be disproportionately high. This decision should be cancelled. If not, corrective measures have to be implemented as soon as possible. The most obvious is the alignment of our Protocol on Privileges and Immunities (PPI) with that of the EU. It would be encouraging to see our President committing herself to that goal. With the adoption of the London agreement by France and the prospect of progress on an EPLA-like structure, the Community Patent may no longer be so distant. It would be wise to already include the change in the PPI as a necessary change for the EPO. Pending this application, SUEPO has proposed measures to solve the problem of double taxation, while making sure that the member states are treated in a fair and equal way.

7. Stabilizing good management

Unable to agree on a single presidential candidate, The Administrative Council appointed two, sharing a single term. This shorter term of office has further increased their dependence on the Administrative Council. In recent years two Vice-Presidents

with the "wrong" nationality have been forced to leave the Office. One of these Vice-Presidents remained in post for only 3.5 years after which he left with very substantial benefits.

In the last years of the last decade the Office has expanded the number of Principle Directors in the examining area from 6 to 14. It would seem that new planned restructurings are set to decrease their numbers once again. We note, however, that Principle Director posts have been created in non-core areas. Some of the apparently "redundant" core Principle Directors have either been parked on an empty post, transferred to a less than essential non-core post, driven into invalidity or put on a specially created director post. Such a policy can be accurately characterised by the words chaos, instability and inefficiency. Small wonder that this results in an unprecedented lack of staff confidence in management, as revealed by recent staff surveys.

The current instability at MAC and even Principal Director level is a concern for all staff especially since top-level managers can be seen jostling one another not only to get a better position, but also just to keep their own. This can only distract them from their duty to lead this organisation taking into account its long term interests.

To make things worse, an external, allegedly independent, study has come to the conclusion that managers should be paid even more, whereas B staff members, whose career was badly damaged some years ago, should be paid less. This recommendation is an insult to the intelligence of our colleagues. This "independent" study has already cost almost 570.000 euros (excluding the costs of the expected "follow-up") This wasted money could more usefully have been invested in new B posts (or a 300 euros bonus for every support staff member).

Directors are the next group of staff for which performance management will be implemented next year. In the core area proposals to increase the size of directorates to 60-80 examiners are being seriously considered. This size had already been achieved by some B-staff units. Note that this would mean that directorates in the core area would be bigger in size than many principle directorates in non-core areas. From this it would seem that the EPO management views effective management of core areas as less important than that of non-core areas.

CONCLUSIONS:

"The Union has a long term vision, whereas management has a short-term vision"

This quotation is from Mr. Ciaran McGinley, at the time President of the Staff Union, when the Vice-Presidents were still permanent staff. Now, even the Principal Directors are under contract, and will have a performance related pay. We know how this can end in the financial world. What would Mr McGinley, now Head of the Controlling Office, say if he were President of the Union today?

SUEPO looks forward to the re-election of Ms Brimelow if she can prove to staff she is the strong President this Organisation needs to defeat the aggressive views of some members of the Administrative Council. We do not look forward to the prospect of an EPO President being a puppet in the hands of the Chairman of the Administrative Council, currently Mr Grossenbacher, and seemingly intent on dismantling the EPO and its pension reserve fund, destroying the working conditions of staff and preparing the global warming of the EPO.

The President is faced with two options:

1. AVOID GLOBAL WARMING OF THE EPO

Ms. Brimelow could choose to side with the Organisation and its staff and use the money available to make the EPO fit for the future. With this option, the EPO has a chance to go on working properly, recruiting the staff it needs by paying them adequately. Staff needs again to be trained properly. Staff should be left to concentrate on their work rather than having it disrupted by repeated demands to produce more, by threats to their working conditions and by an endless series of restructurings. The EPO should also stop wasting money on consultants who slickly package the message that management wants to hear. Instead realistic measures (as suggested by staff and staff representation in various fora) should be taken that will help regain the quality loss of recent years. Under this scenario, we believe production of both searches and grants will be acceptable already this year and will improve gradually in the future, to the satisfaction of the delegations of the Council.

2. PROVOKE GLOBAL WARMING OF EPO

Ms. Brimelow could also continue to pretend that the Organisation is facing a financial crisis, as an excuse to cut staff posts, to cut investments and to attack staff working

conditions ("staff as a liability"), whilst continuing to allow the delegations of the Council to siphon off an increasing amount of money and decrease *their* liabilities for the Organisation. This policy will jeopardize the functioning of the EPO and launch the last assault on the quality of our work. Under this scenario, we believe the number of grants in 2008 will again fail to meet the expectations of the delegations and this situation will only become increasingly difficult in the future. Ms. Brimelow may see her prophecy of doom fulfilled through her own actions.

SUEPO hopes that there are still enough delegations in the Council that would like the EPO to be run properly, independently of short-term needs for election or re-election of the President.

The future of the Office will depend on her choice.

The Central Executive Committee