

SOCIAL CONFLICT AT THE EUROPEAN PATENT OFFICE

The EPO

The European Patent Organisation was created in 1977 through the European Patent Convention (EPC). A diplomatic Conference of the Contracting States is responsible for any amendment to the Articles of EPC. Otherwise, the highest supervisory and legislative body is the Administrative Council, which consists of delegates of the member states who gather several times a year. The delegates are non-elected civil servants, typically from the national patent offices without necessarily having legal qualifications, particularly in labour law. The European Patent Office (EPO) is the executive body of the Organisation. Led by a President and Vice-Presidents appointed by the Administrative Council, the EPO comprises about 7000 staff members. It is the second-largest intergovernmental organisation in Europe after the European Commission.

Its tasks

The tasks of the EPO consist primarily in processing European patent applications and grant patents on behalf of the contracting states. As a designated authority, it also processes worldwide patent applications under the Patent Cooperation Treaty. The European Commission has further entrusted the EPO with the processing and granting of EU unitary patents, as well as keeping the registry and administering the renewal fees.

Its impact

The economic impact of the EPO cannot be underestimated. A study on behalf of the European Commission¹ in 2004 estimated the actual and potential market for patents in eight European countries² between 15 and 24 billion EUR. Moreover, it is estimated that the presence of the EPO in its host states generates about three jobs for each EPO staff member within the jurisdiction. In contrast, the EPO does not generate any direct cost to the European taxpayer. It is fully self-financed through the processing fees of the applications and, above all, through the patent renewal fees, notwithstanding the fact that half of the renewal fees are distributed to the member states. The industrial landscape

¹ ETD/2004/IM/E3/77;

http://ec.europa.eu/internal_market/indprop/docs/patent/studies/final_report_lot2_en.pdf

² DE, DK, ES, FR, HU, IT, NL, UK; see Table 1 of ETD/2004/IM/E3/77

strongly depends on the patents as granted at the EPO, since high patent quality is insuring legal certainty and very likely preventing undue litigation expenses.

Its staff

The employees of the EPO are highly educated professionals from all of the 38 member states. They fall into two main categories: administrative and professional. Administrative staff is in charge of the formal side and record keeping. Aside from the necessary qualifications, they have to master at least two of the official languages of the EPO (EN/DE/FR). Aside from HR professionals and lawyers, the majority of the professional category consists of patent examiners. They all hold advanced degrees in science and engineering (MSc level or higher), and must be proficient in all three official languages of the EPO, in addition to their own language. They must be able to understand and report on complex technical and juridical texts in EN/FR/DE. The majority of staff, in particular examiners, have a good understanding of legal principles, since their job involves taking decisions that have legal effects (granting or refusing patents). The remuneration package³ of the EPO staff is generous but commensurate with their qualifications and the economic impact of their work and guarantees the independence of the decision-making divisions. Their remuneration is exempt from national taxation (in order not to give host states and undue advantage over other contracting states) but is subject to an internal taxation, the proceeds of which go to defray the running costs of the EPO. This enables the EPO to use only a portion of the patent renewal fees for its operational costs, and the excess (currently, one half) thereof is distributed to the member states.

Reforms

The European Patent Convention is 40 years old. The EPO is set up according to principles of the international civil service, and some of the principles date back to the early 20th century. As early as 2007, the Administrative Council has mandated the Presidents of the EPO to develop and introduce a number of reforms. The need for reform is understandable; it should strive to make the organisation compatible with the needs and values of the public it professes to serve. So far, most of the reforms concern human resources management and working conditions. None address the issues of transparent governance and accountability of management⁴. The working conditions laid down in the Service Regulations are not published; once the Administrative Council adopts new working conditions, they are implemented without any possibility for an independent instance or for the public to control thoroughly their compatibility with fundamental rights or with the generally accepted principles of law since the EPO enjoys immunity, whereas at the behest of the President, the system of external audit has been abolished. Far from being an academic concern, the issue of control and enforcement of fundamental rights is very concrete. So, for instance, there are major concerns among staff about the newly introduced far-reaching "investigation guidelines", whereby investigations are carried out by an internal unit that answers only to the President and without sufficient safeguards; about deficient data protection; about inadequate conflict resolution mechanisms and access to effective justice.

Democratic deficit

³ which is comparable to all intergovernmental organisations

⁴ For instance, the remuneration and ancillary benefits of the President is a well-guarded secret, as are the bonuses of the Vice-Presidents.

Staff members should have a right to be consulted in good faith about the nature and timing of any need to adapt social and technical matters that have an impact on their work, working conditions, and lives. This is not an extravagant expectation. All citizens of any democratic country retain, at least indirectly, a certain degree of influence in rules and legislation that will apply to them. They can always take part through internal procedures of political parties in the elaboration of proposals, participate in public debates, and ultimately they can vote legislators out of office at the next election. Not so at the EPO. Binding rules are enacted by the Administrative Council (which consists of non-elected civil servants from member states), on recommendation of the President of the EPO. Staff has virtually no say, and judicial control is very limited. Technically, until recently, Staff had the means to form its opinion and could at least provide, via its representatives, a reasoned opinion on the measures that the EPO intended to introduce – even though their opinion was not in any way binding and was regularly ignored. As of 1.7.2014 even this last vestige of influence has disappeared; Staff representatives, deprived of effective means to communicate with staff, now can participate in a so-called “General Consultative Council”, presided over by the President himself, where they can ask questions and signal their approval or opposition by a show-of-hands vote – but they are not entitled to provide a reasoned opinion or recommendations. Staff is consistently and increasingly put before *faits accomplis*, with questionable reforms allegedly addressing problems which however remain mostly undefined. Many of the changes introduced are perceived as being senseless and disruptive, and inconsistent with subsequent changes. This has caused widespread discontent.

Repression of dissent

Even though the outcome was less than satisfactory, the EPO management must be credited for trying, between 2007 and 2010, to allay the concerns of staff by engaging in dialogue with the elected staff representatives, and with the staff union. This has changed dramatically under the current President⁵. Instead of dialogue, he has chosen the path of systematically repressing any expression of dissent, not to speak of opposition. Thus far, to silence any dissenting voice, the President⁶ has:

- Changed the rules to make it legally *impossible* to challenge internally a decision.
- Refused to recognize the staff unions⁷ as a legitimate social partner, in spite of the fact that the union SUEPO counts as its members nearly 50% of staff.
- Forbidden the staff representation from communicating with staff with emails and internal (paper) mail.
- Inflicted disciplinary measures (reprimands) on staff representatives who defied the prohibition.
- Installed a filter blocking the delivery to staff of any mail originating from the Union (who has its own outside server).
- Refused to distribute Union publications through the internal mail.
- Subjected staff representation publications to censorship.

⁵ Benoît Battistelli (FR) took up the position of President of the EPO in July 2010. A graduate of the French National School of Administration (ENA), he is the former General Director of the French Patent Office (INPI). Since taking up his duties in 2010, he has surrounded himself with no less than 5 former INPI colleagues, whom he has appointed to key positions within the EPO.

⁶ with the apparent support of the Administrative Council

⁷ the largest of which is SUEPO, active in all four establishments of the EPO (Munich, The Hague, Berlin and Vienna). A much smaller union, FFP-EPO, is active in The Hague

- Introduced “investigation guidelines”, under which any employee may be investigated without necessarily being told so. The investigation may be started at the instigation of even anonymous accusers. Colleagues may be interrogated and have a duty to cooperate, or they will be accused of professional misconduct. The person investigated is also obliged to “cooperate”, failing which (s)he will be liable to disciplinary measures for misconduct, and this means not being able to keep silent in order not to incriminate oneself. The person investigated cannot be assisted by legal counsel. There is no system in place to monitor the lawfulness and proportionality of the investigation.
- Blocked an online opinion poll which the staff representation had organized to allow staff to voice an *opinion* about the proposed changes in staff representation structure and elections, and summarily suspended a colleague who advised the staff representation on how to carry out an online poll efficiently and securely.
- Changed the rules allowing for industrial actions (strikes): calling for a strike now requires a *petition* to the president, signed by at least 10% of all staff; following which the president himself decides whether the grievance is receivable and if so submits the matter to a vote, where 40% of all staff must participate to have a valid quorum. The Union is no longer authorized to call for industrial action independently, and to submit the matter to its own members only⁸.
- Evicted the largest Union (SUEPO) from the premises, after 35 years of presence. They had to move out within 5 working days; no reason was given. The President accuses in public SUEPO of defamation because the union criticises certain reforms and the manner in which they are introduced, thereby disregarding the fact that nearly half of staff, especially examiners are SUEPO members -- they are thus the staff that has made the EPO a success so far.
- Unions may still hold meetings in the premises, but must ask permission with advance notice of at least 3 days. The EPO reserves its right to deny permission depending on the topics to be discussed (the agenda).

Moreover, the current President recently has:

- Refused to carry out an enquiry for the possible causes of the suicide of a colleague in 2013, who took his life at the work place and during working hours.
- Demoted a staff representative for voicing, within the staff representation, concerns about a possible managerial responsibility for the suicide of another colleague in 2012. He demoted the employee in spite of the unanimous recommendation of the Disciplinary Board to stop the procedure for abuse of process and unfounded claims.
- Systematically refused to follow the recommendations of the Internal Appeals Committee (who analyses grievances of individual staff members), even when unanimously finding in favour of the claimant.
- Subjected to very harsh, and arguably disproportionate disciplinary proceedings the two nominees of the staff representation in the Internal Appeals Committee, for allegedly having disrupted the work of the IAC – when in fact there was only a conflict on how to deal with the increasing backlog while safeguarding the procedural rights of the appellants and the quality of the work.
- When the Union called for a peaceful assembly to inform staff and express support, the EPO prohibited it based on its agenda.

⁸ it has been pointed out that such measures are unprecedented in Europe, apart from Italy's *Carta del Lavoro* (B. Mussolini, 1927) and Spain's *Fuero del Trabajo* (F. Franco, 1938).

Finally, he has transformed the Staff Committees in a useless and ineffective body, because he has:

- Changed the way staff representatives are elected. Previously, the electoral process was chosen and supervised by staff itself through general assemblies. Now it is the President who defines who can stand as candidate, who organises and controls the ballot.
- Changed the structure and functioning of the staff representation and of the statutory consultative bodies, which eliminate any possible influence staff may have previously had in the decision-making process on issues that affect them directly. Before, the Staff Committees had a time budget, so that they could nominate experts in working groups. Now, virtually all nominees to working groups must be elected staff representatives – who do not always have the expertise required. This further reduces any possibility of critical input, while time budgets cannot be used (transferred) in case of sickness of elected staff representatives.
- The Staff Committee never had co-decision powers. It is purely a body that represented the interest of staff by channelling opinions. Before, it could do so by providing reasoned opinions in the General Advisory Committee (GAC). The GAC has been abolished, and its successor, the General Consultative Committee (GCC), only foresees that staff representative indicate whether they are for or against a given proposal. They no longer must give a reasoned opinion, and if they do, their opinion is not only ignored: it is not even put on record.
- Before, there were the four staff committees (Vienna, Berlin, Munich, The Hague), which together formed the Central Staff Committee. At the local level, they handled local issues. Together, at the central level, they handled issues that concerned all staff. Now, the local and central bodies are totally separate and segregated, creating an artificial split between places of employment.
- The Central Staff Committee consists of 10 full members working exclusively (100%) as staff representatives, and 10 deputy members, working as staff representatives at 50%. The 10 full members are also ex officio members of the GCC, which is chaired by the President himself (thus, he gives advice to himself). If a full member needs to be replaced by a deputy for participation in the GCC, he needs to submit a reasoned request!
- The local and central staff committee members working full time on staff representation are placed administratively directly under PD43, the Principal Director of Personnel essentially in charge for all reforms of the working conditions. It is PD43 that approves or denies their requests for leave, training, travel. The 20 members of the CSC are supposed to be able to work together, assigning dossiers among them. However, sometimes they need to meet to coordinate. Thus far, PD43 has consistently limited the possibility to meet.
- The CSC has the prerogative of adopting its own rules of procedure. However, PD43 has declared them unacceptable.

No effective access to justice

Staff is particularly aggrieved because it has no reasonable way to seek relief through judicial review:

- The internal dispute resolution process (the Internal Appeals Committee), and the external instance (the Administrative Tribunal of the International Labour Organisation) are reserved for individual grievances, once the alleged damage has occurred. Only in

very exceptionally circumstances can a general decision, such as a decision modifying working conditions, be challenged before it is implemented.

- The staff union has no access to either the Internal Appeals Committee or to the ATILO. As a corporate body established under national law, the Union may have access to the domestic court, but the EPO shields itself behind its functional immunity from jurisdiction and execution.
- Even when staff members have access to the statutory dispute resolution process, it takes in average 3-5 years for a grievance to be assessed⁹ by the Internal Appeals Committee, and if the grievance proceeds to the ATILO the claimant must count on a minimum of 3-4 years before the grievance is heard. All in all, with the current increasing backlog in the Internal Appeals Committee and at the ATILO, it is expected that grievances lodged after 2011 will not be adjudicated before roughly a decade.

Conflict

The management style that currently prevails in the EPO may well be detrimental to its proper functioning, and undermine its reputation on the international stage. This has generated considerable number of articles in the mainstream press and blogs on intellectual property. Questions were even raised in several European parliaments¹⁰. Still, the organization fails to adhere to European values.

To try and ease the situation, the staff representation has repeatedly proposed to Mr. Battistelli to use an external mediator ; this suggestion has been rejected. The Union has proposed a framework agreement to regulate relations between itself and management ; the proposal has been ignored. The German court in Munich also suggested mediation to resolve a dispute with the union ; Mr. Battistelli has flatly rejected the Court's recommendation.

The interest of the European public

There is a serious problem of governance in the EPO. The opacity of its decision-making processes and the lack of accountability, which the EPO justifies on the basis of "its immunity", is anachronistic in Europe and in the 21st century, at a time when states require from their institutions and from each other financial transparency and accountability. While the EPO may still be a competitive employer (in terms of remuneration benefits), its internal human resources policies (in terms of interpersonal relationships) are antiquated and brutal.

Generally speaking, European society should not tolerate that some of its citizens are deprived of their fundamental rights *only because they are employed by an intergovernmental organisation, or because they are well paid*. This is true in particular when the member states of said organisation are, in their overwhelming majority, also member states of the European Union. Yet this is exactly what is now happening at the EPO.

⁹ There is a backlog of some 700 cases in the Internal Appeals Committee; rather than increasing the manpower to face this backlog, Mr Battistelli has decreased it.

¹⁰ See http://www.suepo.org/public/EPO_in_the_Public_Eye

The Administrative Council of the EPO, and thus vicariously the member states, are complacent at best, grossly negligent at worst. The Council has largely given the President *carte blanche*, without asking what the consequences would be or how he would use his powers. Structurally, the President of the EPO acts as accuser, investigator, judge and final arbiter on all matters; there is no separation of power guaranteeing a healthy system of checks and balances. The nearly absolute power the current President enjoys and the manner in which he uses it has been the source of particular concern and dismay. Staff and their unions consider the limitations on the freedom of expression and freedom of associations (embodies in the right to strike), and the right to effective access to justice, as breaches of their fundamental rights as European Citizens.

It is high time that the competent authorities take a keen interest in what is happening at the EPO and insist that the house be put in order. By introducing proper policies through consultation and negotiation. Not through repression and intimidation.

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

THE SUEPO CENTRAL COMMITTEE