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SUBJECT: Governance of the EPO

SUBMITTED BY: President of the European Patent Office

ADDRESSEES: Administrative Council (for information)

SUMMARY

This document is submitted by the staff representatives via the President of the European Patent Office, in accordance with Article 9(2.2)(b) of the Administrative Council's rules of procedure (see CA/D 8/06).

During his three years in office, Mr Battistelli has embarked upon an ambitious program of "reform" which appears to be primarily aimed at strengthening the position of the President of the Office vis-à-vis the two other main stakeholders: the Administrative Council and the Office staff. In his dealings with both these parties, he has adopted a highly authoritarian leadership style, typified by his apparent inability or unwillingness to enter into discussions or to even acknowledge opinions other than his own. In particular, staff discontent is quashed with increasingly repressive regulations. Social dialogue inside the Office has completely broken down.

The Central Staff Committee turns to the Administrative Council as the supervisory body ultimately responsible with overseeing the European Patent Office for support with re-establishing a proper balance in the Organisation's governance and to restoring a better working environment within the Office for us all.

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I. STRATEGIC/OPERATIONAL

1. Strategic

II. RECOMMENDATION

2. Not relevant

III. MAJORITY NEEDED

3. Not relevant

IV. CONTEXT

4. The ongoing social conflicts in the EPO

V. ARGUMENTS

Introduction

The European Patent Organisation was created with the classical governance structure prevailing at the time as the model for international organisations. Discussions about governance have been ongoing for many years¹, but no real progress has ever been made on this issue. Within the Office, power remains centralized with the President who is accountable only to the Administrative Council.

Like many other international organisations, the EPO functions very much like a “state within a state”. Its premises are inviolate (Art. 1 PPI). Within the scope of its official activities, it has immunity from national jurisdiction (Art. 3 PPI). The EPO is not bound by the finance or the labour laws either of its host countries or of the EU. The Organisation has created its own financial regulations, its own labour law and its own social security system. The Staff Regulations can be changed at any time by the Organisation and the resulting changes unilaterally imposed on staff. *This high level of staff dependency on the Organisation consequently imposes a high duty of care for staff on the Organisation.* Amendments to the regulations are subject to only a very limited level of external checks and balances (see below). Once again, this puts an extra burden of responsibility onto the shoulders of the decision makers.

Unlike the governance model of most modern democratic states, the Organisation’s

¹ E.g. CA/93/07 submitted by the Central Staff Committee; B28/2/08 point 7 (« in conformity with the mandate given by the Council in June 2007 »), A/64/08.

governance lacks any genuine separation of powers. The primary function of the President of the Office is that of the Chief Executive. However, in practice he also functions as the legislative authority since proposals for legislative amendments submitted by him are almost invariably adopted by the Administrative Council. Within the Office, the President has additional roles such as head of the “Internal Police” (i.e. the Investigation Unit), chief prosecutor (initiating disciplinary proceedings) and ultimately as judge for the final decision.

Decisions adversely affecting staff can, at least in principle, be challenged at the Administrative Tribunal of ILO (Article 13 EPC). However, the Tribunal bases its judgments on the actual law in force in the Organisation and it exercises very little, if any, normative control on the legislation itself. Moreover, although the Organisation recognises the jurisdiction of the Tribunal pursuant to Article 13(1) EPC and is thereby formally obliged to abide to its rulings, the Tribunal lacks any means to enforce implementation of the judgments it hands down.

The Organisation: traditional checks & balances by the Administrative Council

The relations between the European Patent Office and its governing body, the Administrative Council, are complex:

- Since its founding, the Organisation has expanded from 7 to 38 Member States, all of whom have a single vote in the Council.
- The Heads of delegations in the Administrative Council are almost without exception also the Heads of their national patent offices.
- 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 certain extent for the same work.
- At the same time the national patent offices (particularly those of the larger Member States) depend financially on fees paid on patents granted by the EPO.
- Cooperation between the EPO and the national patent offices, largely financed by the EPO and mainly of benefit to the smaller member states, adds another level of interdependence.

The information about the Office made available to the Administration is almost exclusively provided by the President, who is also prominently present when the Administrative Council meets at the premises of the Office. This makes it difficult for the Administrative Council to form an independent opinion on developments in the Office.

The Organisation: traditional internal checks & balances

As in other international organisations, the internal checks & balances in the EPO are based simply on mutual respect. The General Advisory Committee, the Internal Appeals Committee, Disciplinary Committees and the Promotion Board are all advisory bodies. Ultimately, the decision-making power remains with the President of the EPO alone.

However, the ILO Tribunal has consistently ruled that opinions provided by such advisory bodies, in particular when unanimous, must be taken seriously by the international organization and it has normally ruled in favour of the complainant where this had not been done.

RECENT DEVELOPMENTS

Abolition of the Audit Committee

The audit function traditionally comprises two elements:

- an external audit, carried out by an independent body reporting to shareholders (in the private sector) and to the governing body (in the public sector)
- and an internal audit established within the entity to provide a service to that entity and reporting usually to the highest level of the entity's executive body.

A third element consisting of an (independent) Audit Committee has assumed increasing importance since the private-sector corporate debacles in the USA and Europe (e.g. Enron, Worldcom, Parmalat, etc.) resulting mostly from control/supervision/governance failures in the 1990s. The reaction of legislators and professional bodies was to establish a number of principles on corporate governance.

One of the main corrective actions was the strengthening of the audit process and the establishment of an independent audit committee. Such audit committees provide an additional level of assurance to stakeholders (in EPO's case: the Administrative Council) in matters such as transparency, risk management and control, as well as managing internal and external audit.

In 2008 the Administrative Council, at that time with Mr Battistelli as its Chairman, decided in favour of the introduction of an Audit Committee. The reasons given included the following (taken from CA/140/08):

"An audit committee ... would enhance a climate of mutual trust between the Office and the Council to the advantage of the whole Organisation and lastly of the

stakeholders (citizens and industry). It would also improve the trust of the staff in the top management and in the Council in enhancing high standards of integrity, transparency and fairness and in enabling effective fraud prevention mechanisms and a better response to sensitive issues".

CA/140/08 also recommended strengthening the independence of the EPO's Internal Audit (IA), *inter alia* "to ensure that the supervision of IA does not rely entirely on the President".

One of Mr Battistelli's first actions upon being appointed President of the EPO was to propose the abolition of the Audit Committee (CA/55/11), after only one year of operation. This proposal was accepted by the Administrative Council without any apparent opposition from any quarter. As a next step Mr Battistelli removed the then Head of Internal Audit from his post, a decision that would not have been possible without the agreement of the Audit Committee, had that body still been in existence.

Strengthening of Internal Audit

Mr Battistelli subsequently strengthened Internal Audit by the creation of an Investigative Unit. Internal Audit is a department that is directly under the authority of the President, reporting to and taking its orders exclusively from him.

However, the creation of the Investigative Unit and the introduction of the Investigation Guidelines were not introduced through amendments to the Service Regulations, duly enacted following a decision of the Administrative Council, as foreseen in Art. 33(2) of the EPC. In fact, they were promulgated unilaterally by the President by means of a simple Circular (342). The scope of Circular 342 is much more far-reaching than conventional circulars: it has the effective character of primary legislation, albeit in parallel to the Service Regulations rather than being incorporated therein. The Administrative Council has neither been informed about this Circular, nor (even worse) given the opportunity to decide upon it. By introducing the relevant measures in such a manner, the President effectively bypassed or usurped legislative powers from the Council.

Furthermore, in contrast to the disciplinary procedure (Art. 98(3) ServRegs) and the appeals procedure (Art. 111(1)(b) ServRegs), the investigation procedure does not foresee involvement of the Administrative Council when the subject concerned is an appointee of the Administrative Council pursuant to Article 11 EPC, i.e. principally Members and Chairmen of the Boards of Appeal, but also Vice-Presidents.

More generally, the Investigation Guidelines governing the investigation procedure fail to respect fundamental rights of staff such as the right to remain silent and the right to be

assisted by a lawyer. The Guidelines appear to encourage non-managerial staff and oblige managers to report any suspected “misconduct”, i.e. to denounce their colleagues. In this regard, the Guidelines make no distinction between types of misconduct which are properly the responsibility of the line manager (conduct at work), and other types of misconduct such as harassment or criminal matters (fraud) which would normally fall under the remit of the Personnel Department or external agencies such as the police. Without any distinction being made, this implies that all possible types of “misconduct” are now to be reported and dealt with centrally by Internal Audit, which, as noted above, operates directly and exclusively under the authority of the President without any other external oversight. Initial experience with the Investigative Unit suggests there is a serious lack of independence. However, due to the lack of transparency within which it operates, it is impossible to obtain more than a cursory overview.

The Investigation Guidelines have since been complemented by a **Code of Conduct** which demands that (emphasis added): “*We act with loyalty and solely in the interest of the Office. We perform our tasks under the authority of the President of the Office ...*” The corresponding Article in the Service Regulations refers, however, to the interest of the Organisation and not of the Office.

Art. 14 ServRegs also puts this statement into context with a second half-sentence saying that a staff member: “*shall neither seek nor take instructions from any government, organisation or person outside the Organisation.*” This clarifying context has been omitted from the Code of Conduct and has been replaced by a reference to the authority of the President. This opens the door for the Office’s Administration to target any member of staff, including those appointed by the Council, for conduct considered not in harmony with the policies of the President.

More on loyalty

Since Mr Battistelli took-up office, about half a dozen managers have been transferred against their will, some of them to non-existent jobs. Meanwhile, persons considered “loyal” by the President have been appointed to key positions in the Office. Almost without exception, these “loyalists” are native French speakers, several of whom were colleagues of Mr Battistelli prior to his appointment as President of the EPO.

Weakening of the Internal Appeals system

Decisions of the Administration that adversely affect individual staff members or prejudice the collective rights of staff can always, at least in principle, be challenged by means of an

internal appeal. In 2012 the President announced a reform of the internal appeals system which included the introduction of a new, preliminary “**management review**” step. Ostensibly, this was to make the management department that was responsible for the contested decision reflect upon and possibly revise its decision. However, such a step was already foreseen in the existing procedure, even if it almost never actually led to a revision.

The new obligatory “management review” step in the procedure has not produced any change in this unsatisfactory state of affairs. Perhaps it is significant that almost all of the obligations associated with the current review procedure fall upon the appellant. In terms of its practical effect, the management review step seems to merely add a further 3 months delay to an already lengthy appeal procedure. Indeed, the internal appeals reform has failed to resolve the backlog in the internal appeals system which has grown to almost 700 by the end of 2013.

The President has thus far also failed to take effective measures to tackle the increasing backlog of EPO cases at the ILO-AT. One of the contributing factors to this problem, apart from the lack of capacity at the Tribunal, is the Administration’s unwillingness to concede any fault on its part in growing the backlog. It appears that VP4, by delegated power of the President, routinely ignores recommendations of the Internal Appeals Committee that are in favour of the appellants (i.e. staff).

Such actions on the part of the Administration offer a sole means of recourse for the staff member: they are obliged to lodge a complaint at the ILO-AT in order to seek judgment on their claims. This in turn adds to both the backlog of work and delays at the Tribunal.

The overall proceedings remain excruciatingly slow. The total duration of the appeals procedure (both internally and at the Tribunal) has increased from about 3 years to about 7 years for some of the most recently judged cases and will surely be even longer for newly filed appeals. The current measures taken to reduce the backlog merely mean that the overall duration will probably not exceed 15 years.

In any event, it remains very likely that the President will never be confronted with a judgment from the ILO-AT concerning a decision he makes during his term of office.

Moreover, as mentioned before, the Tribunal has no means to enforce its judgments upon the EPO and the President is known not to have followed judgments that were not appreciated by him². The end result is that an important source of genuinely, independent external control which provides vital feedback to the EPO on the legality of the

² E.g. Judgment 2919 was not respected in that the required outsourcing policy was not delivered within the delay set and, more seriously, does not fulfil the requirements set by the Tribunal.

Administration's decisions has effectively been rendered ineffective.

Weakening of the Statutory Bodies and the Consultation Process

The General Advisory Committee (GAC) is a statutory body with equal numbers of members appointed by the administration and by the staff committee that must be consulted by the President on any proposal which concerns the whole or part of the staff or the recipients of pensions" (Art. 38 ServRegs). The function of the GAC is to advise the President in order to enable him to take the best possible decision.

From the day that the EPO first opened its doors in 1977 until 2011, no President had ever nominated staff of grade higher than A6 to the GAC. In 2011 Mr Battistelli departed from this established practice and allegedly "strengthened" the GAC by nominating all Vice-Presidents to the body.

For a variety of reasons, such a change in composition of the GAC is not in line with its intended, non-partisan statutory function:

- As direct subordinates of the President, the Vice-Presidents can be and will be consulted by Mr. Battistelli at any time – such consultation does not require a GAC meeting.
- The Vice-Presidents are part of the senior management of the EPO and may deputize for the President, which means that as GAC members they are often essentially advising themselves.
- Their independence may also be adversely affected by the fact that they are appointed on the basis of 5-year contracts.
- At the time of their nomination to the GAC, three of the five Vice-Presidents were new to the Office. Such lack of experience with the Office and its staff has a negative impact on their ability to give a meaningful opinion on a whole range of significant matters affecting staff.

It is worth noting that since 2011, the GAC members nominated by the President have not ventured to give a single negative opinion on any proposal of the President. In the same time period, negative opinions expressed by the GAC members nominated by the Staff Committee have been ignored by the President. The obvious conclusion is that rather than strengthening the GAC, the President has in fact weakened it and in so doing has seriously eroded the credibility of the statutory consultation process.

Similar developments can be observed in the case of other statutory bodies:

- Mr Battistelli routinely ignores recommendations of the Internal Appeals Committee which are in favour of staff (see above).
- He has ignored the unanimous findings of invalidity by Medical Committees.
- In 2013 he also ignored the recommendations of a Disciplinary Committee and applied a sanction that was even more severe than that originally claimed by his Administration and recommended by the Committee.

Such routine rejection of reasoned recommendations is indicative of a fundamental lack of respect for the competent statutory bodies.

A further weakening of the statutory bodies, including the Staff Committee, is planned under the highly misleading banner of "Social Democracy". This reform will be addressed in a separate document.

The President's record on employment law

Mr Battistelli's communication style often assumes an almost propagandistic character, with the apparent intention of playing down or putting an artificially positive spin on actions that will increase his level of control over staff while at the same time further degrade our working conditions.

A prime example is the President's initiative labelled as "*increasing well-being and staff working conditions*" which essentially amounts to a repressive set of measures to intimidate staff with health problems to return to work prematurely and thereby reduce sick leave in the Office.

It is interesting to note that the relevant changes to Circular 22 go well beyond the normal level of implementing regulations and assume the character of primary law. A "duty to cooperate" obliges staff to give the Office access to their home, without any of the safeguards against such actions normally provided under national law. The relevant provisions have not been submitted to the Administrative Council for decision. The Administrative Council has, in fact, not even been informed about the Circular.

A similar situation has occurred with the new strike regulations unilaterally imposed by Mr Battistelli on staff during an ongoing social conflict. The new strike regulations foresee that the Administration (i.e. the employer) and not the Staff Union is entrusted with organising the strike ballot, while the corresponding Circular 347 allows the administration a period of one month to do this. At the same time it limits the duration of any strike action to a maximum of one month, independent of the number of actual days of strike within that period. Although the new strike regulations do not actually ban strikes (which would be

illegal), they make strikes almost impossible to organize and implement.

As happened with Circular 341 (Investigation Guidelines), again the Administrative Council has not been fully informed about the scope of these new strike regulations and their possible legal impact.

In the last three years the relations between the President of the EPO and staff have degraded to an historical low point. A Staff survey performed by SUEPO in 2013 showed that only 7% of the staff of the EPO trusts its President. Unfortunately, their trust in the Administrative Council is even lower, no doubt in part due to its perceived failure to restrain the President. Such an extremely low level of trust in governance is unheard of in any other national or international organization.

Staff participation in the ballot on a recent call to strike initiated as a grass roots initiative by a group of staff was at almost 70%, with 90% of staff voting in favour of strike. The eventual participation in the strike was much lower, no doubt due to the fact that strike participation was not (and could not be) anonymous and considerable pressure was exercised on various groups of staff (managers; staff in DG5) **not** to strike. The ballot itself should, however, be understood to be a massive vote of no confidence in the President.

Since then, strike initiatives continue to be launched by staff even within the restraints of the new strike regulations. Frustrated by a lack of access to internal legal remedies, staff and their representation have also turned to national courts to make their voice heard. These complaints have been successful insofar that the Courts ruled that the immunity of the EPO may be lifted if it fails to provide effective legal remedies itself.

It is perhaps significant that the President has decided not to carry-out the re-run of the EPO Staff Survey that was initially foreseen for 2013 and he does not seem intent on doing so in 2014. Suppressing the message does not, however, change the situation.

It is important to note that although the financial situation of the Organisation is better than it has ever been, staff have made no claims to improvements in their benefits. On the contrary, they have by a clear majority rejected the recent offer of a bonus as not appropriate, particularly at this time, in an international civil service organisation.

The current social conflict is about respect for staff and their fundamental rights e.g. to due process, access to courts and protection from arbitrary decisions. The reaction of the Administration has been to try and quash the unrest with threats and with increasingly repressive measures against those who complain.

Conclusions:

Mr Battistelli as President has shown a profound lack of respect for staff and their rights, including fundamental rights such as the right of due process. This has led to a massive yet still escalating social conflict. Any worsening of the situation risks impacting the external image and good-functioning of the Office.

It would appear that the Administrative Council has not been fully informed by the President of the EPO either of the underlying reasons of the current social unrest or of the possible risks that several of the changes that have been implemented under his presidency will ultimately be considered illegal. The Staff Committee has tried to make the Administrative Council aware that there are serious problems: the Administrative Council must have noticed the demonstrations of staff in front of its meetings.

However, simply being badly informed about the changes taking place in the EPO and the risks they engender does not take away the responsibility of the delegations in the Administrative Council vis à vis staff at the EPO and vis à vis their national governments.

The Staff Committee strongly urges the Administrative Council to become better informed of the decisions which have been or are being taken in its name, in particular any decisions that affect the rights of staff, some of which already seem to be in disaccord with commonly accepted legal principles, if not European law. The potential consequences of doing nothing may be grave for the functioning, governance and overall reputation of the Organisation.

The Staff Committee also requests the Administrative Council to take its responsibility and arrange mediation between the President and EPO staff in order to avoid further escalation of the situation.

VI. ALTERNATIVES

5. Not relevant

VII. FINANCIAL IMPLICATIONS

6. Not relevant

VIII. LEGAL BASIS

7. Not relevant

IX. DOCUMENTS CITED

8. None

X. RECOMMENDATION FOR PUBLICATION

9. Yes.