

By email to Heads of Delegation

5 December 2014

From EPO-FLIER team
<mailto:epoflier@runbox.com>

Open letter

EPO examiners will no longer be able to ensure appropriate quality standards

Dear Heads and members of the Member States' delegations to the Administrative Council of the European Patent Organisation, dear Chairman, dear Mr Grandjean,

The European Commission's Industrial Property Rights Strategy for Europe of 2008¹ summarises

"High quality rights are an essential requirement for all aspects of the system – support for business including SMEs, facilitation of knowledge transfer and effective enforcement of rights to combat counterfeiting and piracy. Only with a quality system can Europe benefit from new opportunities in the global economy and fulfill its responsibilities."

The Commission had already stressed in 2006 that an innovation-friendly, modern Europe² urgently needs *"IPRs based on tough examination standards for novelty and inventive step. A low-quality patent system is a source of legal uncertainty and litigation"*.

The Commission's stated aim of strengthening IP matches the motivation and ethics of EPO examiners since 40 years. The EPO's career systems so far have secured a predictable compensation package and career progression based on a mix of merit and seniority. This allowed examiners to focus on delivering high quality search and examination in a team effort rather than on competing for the sake of income differentiation.

The proposal for a New Career System (NCS) is a strong push for more production. Absolute production already counts more than reliable grants. Priorities are set for best effect on presentation of production to the Administrative Council (AC) rather than for serving the European public. But so far, the seniority-criterion in career-advancement gave examiners - being motivated to deliver work that adds value to society - the necessary leeway to attain reliable quality levels despite management pressure, despite insufficient IT tools and despite short-termist policy-making.

Is this about to change? The EPO's president has already received strong support for the principle of the NCS in the Budget and Finance Committee (BFC). Are you going to decide on 11 December 2014 to introduce an entirely performance-based career proposal? This proposal is based on elements which will shift the focus of attention. Salary increases and bonuses depend only on performance. Seniority will no longer be a balancing factor. Those who do not enter into competition or fail to deliver what is defined by their manager (whose bonus is also dependent on the production achieved), will suffer economic losses. Due to the margin of discretion the examiner can apply, the level of quality is not strictly defined. Applying a higher quality level can be interpreted as excessive by the manager and can lead to a lower appreciation. Securing attractive remuneration will rely on maintaining an individual advantage in competition with colleagues, by comparison of production.

It is not as if the negative effects of such policies weren't known. There is an abundance of academic studies on the undesired effects of performance-related pay systems on public service

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0465:FIN:EN:PDF>

² <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0589&from=EN>

motivation. It is not suitable for work requiring cognitive skills. The article (based on an US study) „*Patent examiners more likely to approve marginal inventions when pressed for time*“³ puts it in a nutshell. Yet, the change will still be purported to be in line with ISO 9001 for compliance with rules set by the Office. But it will not deliver quality *results*.

Should you decide in favour of the proposal on 11 December, examiners of the EPO

- will no longer be able to give their main attention, during prior art search and the examination of the presence of novelty and inventive step, to legal certainty of patents without directly eroding their individual remuneration and pension prospects
- will no longer be able to support the priorities of the EU by delivering high quality patents, as maintaining the required professional standards seems to be against the political will of the EPO's president, and apparently of most of the member states

The interventions in the BFC meeting show that the delegations are not unaware of these issues. It is worrying that most of them still supported the proposal.

Low quality patents will harm business, primarily SMEs, private inventors and Universities, since the legal costs for an infringement and/or litigation procedure are so high that they normally threaten their financial foundation.

The European Commission, BusinessEurope and epi are observer delegations on the AC of the European Patent Organisation. There appeared to be declining interest amongst the observer delegations for attending AC meetings recently. The intended change in labour law is at the same time an implicit change in the (effect of) patent law. On this there should be stakeholder consultation beyond purely the members of the European Patent Organisation.

EPO staff have this year been on strong industrial action including strikes and high profile demonstrations, but Mr Battistelli seems unimpressed. EPO staff has got used to being ignored by the AC delegations. The president has now ensured that the staff's perspective can no longer be voiced by our elected representatives during meetings of our Governing Body⁴. Concerned examiners had in mind to present you with a petition signed by the colleagues, but the president's brisk pace in pushing through proposals did not allow for organising it in time for your meeting, hence this open letter.

There now is very little the EPO's employees can do to fence off the perverse effects - of what on the surface looks like 'only' a change to employment conditions - on the quality of patents. Are Member States committed to the Industrial Property Rights Strategy for Europe in the framework of the Lisbon strategy for growth and jobs? If so, we fail to see how at least those amongst you also representing EU Member States could possibly vote for the NCS proposal during your meeting in Munich on 11 December.

Please do not support this quality erosion. Vote against.

The EPO-FLIER Team,

a group of concerned staff of the EPO who wish to remain anonymous due to the prevailing harsh social climate and absence of rule of law at the European Patent Office

Copies to: Competent Ministries of the Member States
President of the European Patent Office

³ http://news.illinois.edu/news/14/0813patent_examiners_MelissaWasserman.html

⁴ *Central Staff Committee illegitimacy?*, 14.11.2014, sc14273cp