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The EPO-FLIER wants to provide staff with uncensored, independent information at times of social conflict.

Five reasons why the EPO's president is bad for the EPO, and for Europe

Benoît Battistelli took office as President of the EPO on 1 July 2010 and is scheduled to leave on 30 June 2018. Based on his record to date, it seems likely that whenever he goes, his successor will have a mess to clean up. This article suggests five reasons for this.

Reason 1: A legacy of alleged human rights abuse that damages the reputation of all international organisations

The EPO and most other international organisations benefit from immunity from local jurisdiction in the performance of their work. This is not in order to give them a blank cheque to behave whatever way they like. Rather, "*Independence is ... an embodiment of the equality of Member States. Member States may be considered shareholders that maintain separate identities from that of the organization. They own equal shares with equal distribution of power both in terms of management and decision-making.*"¹

In order to avoid human rights violations, the Council of Europe proposed a number of options to increase the accountability of international organisations and to limit their immunity where it is not essential for their functioning².

The accusations against Battistelli of human rights abuse within the EPO are, amongst others, in respect to new internal rules to curb the powers of the union and the staff representatives³. He has restricted the right to strike, prohibited any other form of industrial action, and throttled the right of union and staff representatives to address their constituencies freely^{3, 4}. He has introduced an election procedure for staff representatives that has no parallel in the western world⁴.

His investigation guidelines do not include the right of an accused to remain silent or to have legal counsel. The rule of law is absent⁴.

¹ <http://chinesejil.oxfordjournals.org/content/10/1/97.full>

² <http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20310&lang=en>

³ <http://ipkitten.blogspot.co.at/2015/02/can-suepo-sue-epo-it-now-seems-so.html>

⁴ <http://ipkitten.blogspot.co.uk/2014/05/more-news-of-epo-unrest-reaches-ipkat.html>

His medical guidelines give him the power to force staff to undergo medical examinations by a doctor of his choosing, whenever he decides, even in the staff member's own home.

Most of these measures are subject to legal challenges and we will one day know which of them the courts consider to be breaches of human rights. For the purpose of this article, we do not need to know the outcome of all those cases. It is enough to note the pattern – the EPO's president is walking a very thin line, probably outside the law, at least in the view of the Dutch appeal court judges in their recent judgment, which received considerable attention across the IP community^{3,5}.

For what used to call itself a "model European organisation", this goes way too far. It is not just damaging to the EPO to see the comments on the internet about these alleged breaches, but it exposes all international organisations to unwanted public scrutiny. After all, the member states of the European Patent Organisation are democratic countries based on the rule of law. The EPO should be "whiter than white" when it comes to respecting fundamental rights.

Cedric Ryngaert, senior lecturer in international law in Utrecht said in an interview with the Dutch newspaper De Volkskrant: "*International organisations are putting themselves even more above the law, although it's already a problem.*"⁶

Siegfried Broß, a former judge of the German Constitutional Court, recently commented that the European states, including Germany, should never have ratified the EPC since "*it places the fundamental and human rights of EPO employees at the disposition of the Office Administration*"⁷.

⁵ http://ipkitten.blogspot.co.at/2015/02/the-epo-privileged-and-immune-says_24.html

⁶ <http://www.volkskrant.nl/binnenland/opstellen-uitspraak-rechter-geldt-niet-voor-europese-instelling~a3873491/>

⁷ *Recht haben und Recht bekommen*, Süddeutsche Zeitung, 27.02.2015; <http://www.suepo.org/archive/ex15092cp.pdf>

Reason 2: Changing staff's working conditions without regard to the consequences for the patent system

What does this attitude toward the most fundamental of rights tell us about the Office's attitude to other forms of legal process, such as patent granting and appeals procedures?

Normally, outsiders would say that it is an internal matter for the EPO if the management and the staff are at odds about working conditions. And normally, this would be correct. At the EPO, however, there are wider implications than for a regular employer.

Let us just consider the financial side of things. First of all, the EPO is not supposed to make a profit, so it needs to balance income and expenditure. If the staff costs drop by, say, 20%, due to a reformed career system, then it will need to drop its income by a corresponding amount. Will it decrease its fees? Then the EPO will return to balanced books. However, it is already in that situation today, so why will balanced books in the future be better than the balanced books it has today? Are lower fees so important that it is worth damaging the motivation of highly competent and professional staff?

Then there is the question of pensions and medical insurance. If staff salaries drop by 20% then contributions to the pension and medical insurance schemes will also drop accordingly. The office will be forced to react. It will either increase contributions, which may be difficult considering they are already high, or reduce the benefits, thus once more making it a less attractive employer.

Beyond the financial considerations, there is the wider question of how to treat a body of staff with the talent and qualifications that EPO staff have. EPO workers are highly educated people, but they are not treated as such. New rules are imposed upon them without reasonable consultation with their representatives and an explanation of why the new rules are necessary. Battistelli's effect on morale is evident to anyone who makes the effort to speak to staff members. They are demoralised, and very sad at seeing what is happening to the proud organisation they work for. This sadness is likely to lead to demotivation or resignation, and will have an impact on the functioning of the EPO. The fact that the outside world has not noticed a significant change in the quality of the EPO's work is testimony to the professionalism and dedication of its staff. Up to now, staff have worked despite their president, not thanks to his inspirational leadership. But morale is suffering and cracks are starting to appear. The drop in morale is already so widespread that the impact will be significant. Exactly what that impact is, will become clear with time. It is unlikely to be positive.

We predict that staff will give up trying to maintain quality under the pressure of production^{8,9}. Those setting the priorities may like to reflect on something that Forbes¹⁰ published: "*Efficiency' in the private sector means profit. Hence, to ask that the government be run like a business is tantamount to asking that the government turn a profit. The problem in a nutshell, is that not everything that is profitable is of social value and not everything of social value is profitable*".

Reason 3: Alleged cronyism brings his home country, France, and much of Europe into disrepute

France has had its share of scandals when it comes to cronyism at the top. Edith Cresson was forced out of office as European Commissioner when it came to light that she had engaged a personal friend as a "visiting scientist". Jacques Chirac was convicted of corruption for paying members of his party for jobs that did not exist. And now, even IMF President Christine Lagarde is under investigation for negligence in a corruption case.

France can have no interest in another of its high-ranking nationals being accused of creating jobs for his friends and relatives. Yet Battistelli stands accused of exactly that. Since joining the EPO, he has put French citizens in many of the key positions: Head of International Co-operation, Head of Human Resources, Member of External Audit, Head of IT and Head of Internal Communication. No matter how qualified and deserving these people are, this just looks bad. A balanced and Europe-minded president would have avoided any risk whatever of favouritism. Instead, all dealings with the member states, every HR decision, and other aspects of the EPO's work are susceptible to criticism that they are tainted by a conflict of interest.

Europe is on the whole very sensitive to conflicts of interest in high office, and the EPO is no different, as revealed in the recent decision of the Enlarged Board of Appeal R19/12, which addressed the dual role of the Vice-President of DG 3 as part of the EPO management and simultaneously as a chairman of the Enlarged Board of Appeal. It said, "*Es reicht aus, das eine Besorgnis, d. h. ein Anschein, der Befangenheit vorliegt*" (see Entscheidungsgründe, paragraph 7) ("*It is enough that there is concern, i.e. an impression of impartiality*").

⁸ <http://www.fosspatents.com/2014/12/european-patent-office-examiners-fear.html>

⁹ <http://www.ip-watch.org/2014/12/10/epo-supervisory-body-to-face-patent-quality-judicial-independence-fears/>

¹⁰ <http://www.forbes.com/sites/johntharvey/2012/10/05/government-vs-business/>

Reason 4: Behaviour that has led to the complete discrediting of the Administrative Council as a supervisory body

Almost one year ago, French MP Pierre-Yves Le Borgn' spoke about "*l'incompréhensible placidité*" (the unfathomable placidness) of the Administrative Council.¹¹ With these two simple words, he encapsulated an issue that is likely to reverberate for many years^{12,13,14,15}.

Why has the Administrative Council simply rubber-stamped all of Battistelli's submissions to them?

Basically Mr Battistelli has set sail on a collision course and his overseers are doing nothing about it. He, and thanks to him, the EPO, and the entire European Patent Organisation, are in the processing of colliding:

- with Human Rights (and Dutch courts)
- with EPO staff
- with the European Patent Convention (e.g. the house ban of a member of the Boards of Appeal⁹, and the likely effects of the reformed career on patent quality⁸)
- with IP interested circles and the public
- with the stakeholders of the European patent system

With the endorsement of the house ban by the Administrative Council, it has become clear that the Council itself is prepared to cruise on the absolute limit of the law, possibly cross that limit.

An explanation for part, if not all, of this must surely lie in the bizarre but true fact that the Administrative Council approves the budget for the office's international co-operation. In other words, they, as Council delegates, are the approving body for the money used to subsidise them in their role as national patent offices. They approve the overall budget, based on a proposal from the president; then the president decides how to distribute it. Theoretically, Battistelli simply has to award and withdraw subsidies as a reward or punishment for votes in Council decisions, and Council delegates will soon learn what they have to do to get a reward. What happens in reality, no one is saying.

And it gets worse. The countries for which patents play a vital economic role are in the minority in the

¹¹ <http://www.pyleborgn.eu/2014/04/interrogations-sur-la-gouvernance-de-loffice-europeen-des-brevets/>

¹² <http://www.fosspatents.com/2015/01/pressure-mounts-on-epo-president-and.html>

¹³ <http://ipkitten.blogspot.de/2014/12/what-is-eating-european-patent-office.html>

¹⁴ <http://ipkitten.blogspot.de/2015/01/developments-at-european-patent-office.html>

¹⁵ <http://ipkitten.blogspot.de/2014/12/battistelli-and-kongstad-respond-to-epo.html>

Administrative Council. So for most delegates, they vote on topics that don't have any relevance for them. They've nothing personally to lose or gain, except for Battistelli's favour.

The behaviour of the Administrative Council has now become the topic of discussion forums on the internet¹², especially IPKat^{13,14,15}. The pressure is already mounting for a fundamental review of who governs the European Patent Organisation, and how. Maybe this will ultimately be one good thing that comes out of Battistelli's tenure as president, but it is probably not something that he intends or wants. And it is certainly something that will introduce more uncertainty into European patenting until things settle down again, which may take years.

Reason 5: A complete lack of vision and strategy for a patent system fit for Europe

You could forgive an impassioned leader who brought in a few friends to help him achieve a truly worthy goal. Or one who ignored a few rules. Or even one that damaged an organisation's short-term reputation in the long-term interest.

Battistelli is, however, not an impassioned leader. He has not described his vision for the European patent system of tomorrow. He has not explained why his actions will be good for the European economy or for innovation. He hasn't even said why what he is doing will be good for the EPO.

This apparent lack of strategy might of course be a veil for a strategy that exists but would never be accepted by stakeholders if he were to go public. Or it could simply be that his behaviour is based on jealousy and greed, and on a thirst for power. He does it because he can.

Commentators are beginning to realise that there is no strategy statement, no justification for what is going on. Various IP blogs show a growing sense of unease about the future of the EPO. The catalyst for this was the house-ban imposed on a member of the Boards of Appeal, but the commentators clearly understand that the issue is wider than that¹⁵. When the European patent system was created, its founders were united in the belief that it had to exist on the principle of a "high presumption of validity". Through his acts, Battistelli is showing that he questions this most fundamental of concepts. He has not said it, but the measures he has taken indicate that his values and his goals lie elsewhere. Commentators are picking up on this and are increasingly asking what the long-term consequences of the current developments at the EPO will be^{12-16,17}.

¹⁶ http://www.fosspatents.com/2015_02_01_archive.html

¹⁷ <http://www.fosspatents.com/2015/03/epo-human-rights-issues-and-eu-patent.html>

We can but hope that, echoing the March 2015 information letter of French MP Pierre-Yves Le Borgn¹⁸, the commentators' voices will grow, and that they will be heard by the people who have the authority to do something about the situation at the EPO before it is too late.

¹⁸ <http://www.pyleborgn.eu/2015/03/office-europeen-des-brevets-a-quand-la-sortie-de-crise/>