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Zentraler Personalausschuss
Central Staff Committee
Le Comité central du Personnel

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Dear Colleagues,
The Local Staff Committee in The Hague published on 12.09.2016 an interesting analysis on the issue of quality. ***We invite you to read it.*** *We reproduce it below with their kind permission.*
The analysis is particularly relevant now that the President is advertising our quality all over the world.
The Central Staff Committee

LSCTH, 12/09/2016

MEASURE FOR MEASURE

Quantity, Quality, & Timeliness for Europe

The Office has lofty ambitions: to decrease the backlog of pending applications, to deliver products on time, and to grant patents with a high presumption of validity. All of this without increasing investments in personnel[1].

Clearly, receiving quality products on time is a valuable service to the European public and to European industries – particularly SMEs and R&D enterprises (including Universities, who are more and more pushed towards self-financing, partly through the exploitation of patents). They need quality products on time to exploit their patents safely. Conversely, they need to know where their competitors stand, so as to operate freely and safely in the technical field without the risk of infringing the competitors' rights.

How are we faring in providing this valuable service?

The Office reached remarkable production levels in 2015: up 14% in production an +7% in productivity from 2014. In 2016 management expects another quantum leap in production and productivity. At the current pace it is expected that DG1 will produce about 400,000 "products"[2], an increase of +14% from 2015. This is not the result of having more examiners to do the work: in the same period of time, the number of examiners has remained constant (within 1% fluctuation). Thus, it is the existing examiners who manage to produce more.[3] It looks like the so-called "efficiency scenario" of Mr Battistelli is a success. Is it too good to be true? What is the price to be paid?

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[1] It appears that the salary mass is decreasing, in spite or recruitment efforts. Also, due to resignations and departures into retirement, there is no significant increase in effectives.

[2] Search and final actions (grants/refusals)

[3] The number of filled examiner posts has remained stable in the past years: it went from **4180** in 2014 (average over Jan-Dec) to **4215** in 2015 (average over Jan-Dec) and is currently at **4235** in 2016 (average over Jan-Jul), i.e. an "increase" of 1% (Source: DG1 official figures).

An incredible performance

Nobody can deny that the Office is becoming more efficient in delivering high numbers of what EPO management calls "products".

Year	2015/2014	2016/2015	**2016/2014**
Production increase	+14%	+8% *	**+23%**
Productivity increase	+7%	+4% *	**+11%**

(*) Estimate based on actual increase when comparing the first 7 months of 2016 and 2015.

In addition, a sharp increase in the number of "B1 publications", i.e. granted patents, has been observed in the first five months of 2016. It is predicted that the number of patents granted in 2016 will exceed 93,000[4] (!), a premiere in the history of the Office where this figure has always been around 65,000[5]. Such high numbers are not on a par with the increase of production in 2015.

What had to give way?

Most managers should normally know the following equation:

$$Quantity \times Quality = \frac{Capacity \times Resources}{Hurdles}$$

In laymen's language: unless more real time and/or more resources are made available, or hurdles are decreased, a sharp increase in production will necessarily be at the expense of quality -- and vice versa.

In our case:

- The "*Resources*" available to the individual examiner can, at best, be considered constant[6] since 2011. It is an open secret that there have been no significant improvements of the IT tools that could explain the productivity increase. Indeed, the so-called "IT roadmap", which was supposed to revolutionise the EPO IT, has been mainly successful in drastically overshooting its budget. The originally *total* envelope planned in 2011[7] was of 68 millions € in 2011. Today, 83 millions € have already been spent[8], and the total *planned* envelope for the IT Roadmap was increased *in 2014* to 140 millions €[9]. Yet, so far, there is no indication that the expected, ambitious results will materialize soon.

[4] See also: http://ipnoncredere.blogspot.nl/2016/09/european-patent-grants-update.html

[5] The number of published patents was stable over the 5 years' period 2010-2014 (58126 - 62119 - 65677 - 66714 - 64611). It started increasing in 2015 (68422) and should reach 92000 in 2016 (Source: DG1)

[6] In some cases, it could even be said that resources have decreased. In some fields, the introduction of the CPC has brought more challenges than solutions. It can be more difficult in its use than the old ECLA, and it does not allow for ad hoc amendments. This is really an issue in booming technology fields, which evolve rapidly. Add to this the fact that late-classified documents are not a high priority issue right now, and it is clear that the ability to search efficiently in some fields has been affected negatively.

[7] CA/46/11

[8] CA/20/16 (Auditors report)

[9] CA/46/14 rev: **45.8 millions €** spent in 2011-2013 + **94 millions €** planned expenses for 2014-2017 = **140 millions €**

- By having each examiner concentrate on core tasks, the individual *capacity*[10] (time an examiner is available to work on Search & Examination/Opposition) has slightly increased, mostly at the cost of training[11] and documentation maintenance.

- At the same time, however, also the "*hurdles*" term has been increased. Aside from the increasing length and complexity of prior art documents in many fields, examiners must now also consult and cite Asian prior art, the assessment of which through imperfect machine translation is time consuming. The allocation to examining divisions of tasks previously carried out by formality officers[12] are other examples of increasing hurdles.

- Due to the introduction of the AoC many examiners have changed technical fields – without proper training and after implementation of CPC. Due to increased production requirement, examiners have increasing difficulties in seeking and obtaining advice from colleagues who know the field, and even in learning how to use the documentation properly (e.g. CPC classification scheme). Not to speak of the newcomers who are no longer given a decent learning curve to learn what should be… For them, the search tool "Ansera" may be the Answer – but this software appears to be useful only in certain technical fields, whereas in others it still requires a lot of improvement before being reasonably operational.

- A reasonable way to increase output without compromising quality is to maintain constant the expectations from the single examiner and increase the number of examiners. This number has not been increasing significantly over the past 2 years, see above. Moreover, every examiner knows that the *individual* targets have increased in some cases by more than 30% in the past 3 years.

The rosiest of views is that any increase in time available for a search and examination has been nullified by the increase in the hurdles and/or decrease in resources, leading to the following relationship applicable to the individual examiner:

$$Quantity \times Quality = k$$

It is not too difficult to infer where we are going with an unbridled "efficiency scenario". Increasing the quantity of file produced by an individual examiner can only be done at the expense of quality. This has been even in the forefront of the Administrative Council's preoccupations: When Mr Battistelli presented them the 2015 EPO results in March 2016, many delegations, including influential ones, expressed concerns about the balance between quantity and quality of the EPO work. They reiterated their concerns in the June 2016 meeting.

Similar concerns must apply also to the exceptionally high number of grants in the first semester of 2016: are we becoming a rubber-stamping authority? Is that why DQA[13] has been asked, already for a while now, to be less picky? Are we shifting from a primarily substantive treatment of applications to a primarily formalistic one? Is that the purpose of the "ISO9001 certification" in the form it was implemented?

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[10] To avoid confusion: Capacity and « time available » to treat one file are different concepts. While individual capacity has been slightly increased, in view of the higher production demands, clearly more files have to be squeezed in the available time, leading to a decrease in « time available »

[11] Total continuous training time decreased by13% over the last 18 months. Total initial training of new examiners decreased by more than 25% over the same period (while the EPO has been massively recruiting the past 2 years).

[12] Also Patent Administration in DG2 is now critically understaffed.

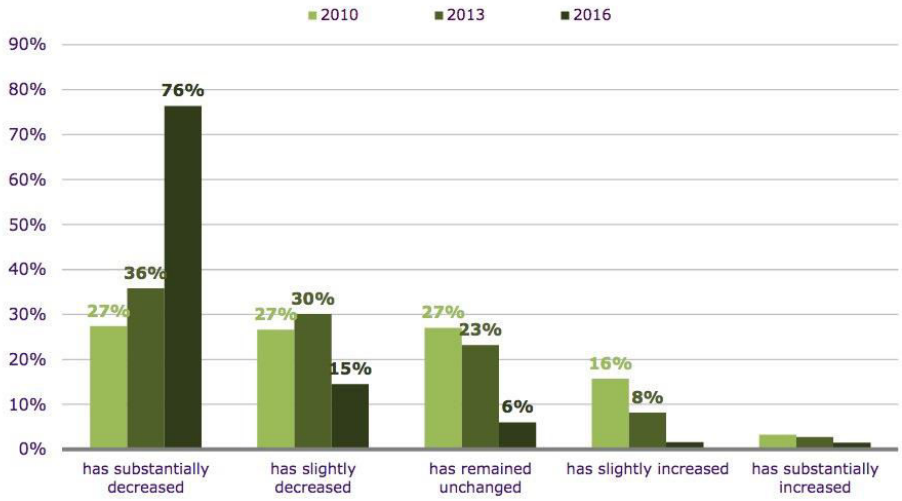
[13] Directorate Quality Audit

The Technologia 2016 Staff Survey

The 2016 Technologia EPO Staff Survey has confirmed that staff has serious concerns about quality. The graph below shows how staff perceives the position of quality in respect of quantitative targets. The surge in 2016 of 76% of EPO staff considering it has "substantially decreased" (coming after a previous 36% in 2013) is quite revealing.

Q39. For the last three years, the position of quality in respect of quantitative targets:

Technologia



The unpalatable reality is that the “efficiency scenario” may be unsustainable in the current circumstances. The perception is that something had to give way – and that was quality. Or rather, a specific type of quality: that of accurate searches and in-depth substantive examination to provide a high presumption of validity of the patents.

Quality or compliance?

Right now, the new obsession is with delivering “products on time”. Timeliness is undoubtedly one of the factors in determining whether a service has been provided with quality. But it is not the only one.

It is a serious mistake to think that timeliness and overall quality are co-extensive. In other words, timeliness provides legal certainty – but only if the content of the work is sufficiently high to provide a high presumption of validity of the patents. Without that presumption, timeliness is worth less than the paper the search report or communication is written on.

That is why, correctly, the “quality roadmap” presented in 2011 foresaw the need to monitor and enforce quality. The ISO9001 certification and the "Conformity Assurance in Search and Examination" (CASE) ensued in DG1, but were inadequate to fulfil this need. The CASE was doomed to fail – and fail it did:

As required by the EPC, examining divisions normally work as a team; when a recommendation to grant is about to be issued, the members give each other feedback and point out any problem still outstanding. When a recommendation to issued, and checked by three people, it is virtually

certain to be compliant. If CASE had been conceived as an anonymous record of this process, it might have been crowned with success. But the CASE record does not provide only anonymous quality indicators: one can infer from it "who did what wrong when". Understandably, examiners perceive it as a "policing tool" that can be misused against single members of the divisions, if not against the divisions themselves. To avoid this risk, many resort to certifying only the final step – after all of the problems, if any, are resolved internally. As a result, CASE compliance was nearly 100% in most DG1 directorates. Rather than question the premises of the system, DG1 management tried to "correct the aberration" by instructing managers to intervene and "encourage" the examining divisions to find faults in their own decisions… It is difficult to assess the degree of artificiality introduced in the system; suffice to say that DG1 management "succeeded" in *lowering* the overall compliance rate from 99% in 2014 to 98.7% in 2015, something the President reported in his first 2016 Intranet communiqué[14]. The EPO is a very strange creature indeed: nowhere else is *decreasing* a quality indicator a management objective…

Bury the bone

CASE is quality-measuring system controlled by DG1. Aside from its inherent flaws, it also lack independence: it's DG1 checking its own quality.

DQA is the only EPO department assessing DG1's quality from *outside* DG1. DQA operates in the Principal Directorate "Internal Auditing and Overseeing" of DG0. The figures delivered by DQA are not as rosy as the ones from CASE, in particular with respect to grants, where the compliance rate is lower than CASE's: in 2015 compliance was found to be at 85% -- and is not showing any sign of improvement.

This means that the work of DQA is more reliable, and perhaps more important than ever in the context of Early Certainty. Yet, there are ominous signs that DQA is to be weakened. VP1 Mr Minnoye pushed hard to halve the number of DQA auditors (from 14 to 7) in 2015. Perhaps the purpose was to shift 7 examiners back to production in DG1, but inevitably DQA would have been severely impacted. Even though VP1's proposal was rejected at the time, rumour has it the staff complement in DQA will decrease over the years anyway[15]. Is this really the right juncture for weakening DQA?

The Priorities

A thought should also be spent on the priority-setting of the Office. As mentioned above, there is an increased focus on timeliness in delivering products. Delivering products on time increases "legal certainty". However, delivering on time a product of poor quality surely does not. A reasonable balance must be found, and in our opinion we are drifting away from that goal.

The "priority lists" push on top: all searches, and all examination files following "positive" searches. In other words, priority is given to files that produce points. But from the perspective of increasing legal certainty, would it not be at least as arguable that all "manifestly positive" applications should be a low priority, since it will be clear to the public that they concern patentable inventions? Conversely, would it not be more pressing to treat speedily the problematic applications, so as to protect industry and the public from the effect of over-ambitious claims, in a timely fashion?

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[14] "*At the end of December 2015, the CASE compliance index was at 98.6% in search and 98.7% in examination [...]*"

[15] This might no longer be true with the on-going development of "mega-directorates" in DG1, i.e. very large directorates with 70-80 examiners: potentially supernumerary DG1 Directors have already been "invited" by their hierarchy to apply to auditor posts available in DQA.

Resisting or giving in?

The vast majority of examiners – if not all of them – have always had a professional conscience and have taken pride in delivering quality products.

It has not been easy. Before, we had "PAX" objectives, which rewarded searches and final actions, whereas the necessary intermediate actions went unrewarded. The consequence was that we had to "chase points", often leaving unrewarded actions in the cupboard, awaiting to be dealt with in the future.

Now, we have a new system, which has even increased the tension between producing the numbers desired by management and the drive to provide quality work.

Actually, Examiners are ranked according to their output: only the ones with the highest numbers of Searches and Grants get a reward[16]. In the new career system the quality of the work plays *no role* in the allocation of rewards (bonus, step, promotion). On the contrary, the new career system creates the fear of degradation or dismissal in the event of poor staff appraisal, which in turn is linked primarily to production demands and not quality. Of course examiners will concentrate on counting their beans. Add to that the fact that production expectations[17] are increased regularly and substantially and the appalling vista of a rat race to churn out products (of dubious quality) opens up.

Although DG1 management *speaks* a lot about quality, the new career system is in practice undermining it. Sticking to high quality standards has become a handicap in the new career system.

Sometimes, though, sticking to quality becomes an act of resistance, an act to protect one's integrity and dignity as a professional. For who would be satisfied with skyrocketing "direct" or quick grants of dubious quality? With searches that do not cite much beyond "A" documents? Of classification that is so scant as to become useless?

And deliver us from temptation…

But who can really resist for long? Who can credibly withstand excessive production demands and not cave in, sooner or later, to the temptation of cashing in "easy points" by lowering quality? What can one do, if sloppiness is the path to rewards, whereas investing time in delivering products of truly excellent quality will bring you a hair away from being labelled "professionally incompetent"?

Time-consuming patent applications are clearly bad news for the examiner who must produce inordinate amounts of files. Clearly, he would much prefer an application that can be granted directly after search. Will he not be tempted to increase his chances of having files ready for direct grants by carrying out a minimalist search, e.g. by only checking the relevance of prior art documents delivered by a fully automatic search tool?

Will we see an inflation of "false positives", meaning direct grants justified by a search citing only "A documents", but in fact not *properly* searched? If, as we are told, there is already a surge in direct grants this year, some probing questions would be more than legitimate.

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[16] in a totally opaque way, as DG1 top management forbids DG1 directors to disclose to their examiners the criteria imposed on them.

[17] Bear in mind that in some DG1 clusters, managers are reorganising the directorates by merging high productivity fields with low productivity fields, such as to increase steeply the "average" examiner productivity to be expected.

A scenario for the future

The impact of a decrease of quality of the EPO work will become only visible many months, if not years, after the work is done, but will be serious.

Low quality is synonym with low presumption of validity of patent and, worse still, of abundance of patents that should never have been granted. If (when?) that happens, there will be necessarily a surge in litigation, starting with opposition – involving substantial costs for the competitors of the patentee as well as the patentee. This will affect SMEs more than large companies, who have enough money and resources to deal with deficient patent authorities.

There will be also a surge in the operations of trolls, who will acquire junk patents and try to enforce them against European enterprises. As settling is often cheaper than litigating, the result will be extortion of undue settlements. Again, the SMEs will be those most penalized.

SMEs are nowadays the main driver of the economical development and employment in Europe. Is our obsession with making the EPO look good through “efficiency scenarios” doing justice with the actual needs of Europe? Or are we being myopic?

In our opinion, if the EPO wants to contribute to the economic growth of Europe, it must ensure that the *quality* of the granted patents is sufficiently high to guarantee that SMEs do not get "paper tiger" patents they cannot successfully oppose to their competitors, primarily from outside Europe, and that they do not get harassed by the various patent trolls that will inevitably come out of the woodwork if bad patents become the norm rather than the exception.

We have no doubt that the Office will reassuringly say they are “studying the matter”, and that they will prepare an action plan to safeguard quality. But, assuming that effective measures will materialise, will they not be too late?