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## Feedback from the 128<sup>th</sup> Meeting of the BFC and of the 154<sup>th</sup> meeting of Administrative Council in Munich

*That motley drama—oh, be sure  
It shall not be forgot!  
With its Phantom chased for evermore  
By a crowd that seize it not,  
Through a circle that ever returneth in  
To the self-same spot,  
And much of Madness, and more of Sin,  
And Horror the soul of the plot.*

(E. A. Poe, The Conqueror Worm)

### 1) “New investment guidelines of the European Patent Office” (BFC)

The EPO is one of the few self-financing international organisation in the world. Thanks to the applicant’s eagerness to ask for and maintain patents, and to the EPO’s staff diligence in providing the corresponding services, the EPO has accrued a staggering 2.3 billion EUR of cash reserves..

What to do with it? President Battistelli asked for the power to invest it almost as he sees fit. While no one can seriously advocate squandering such sums, it is plain common sense that surplus money should be stored cautiously, “*en bon père de famille*”.

Instead, Battistelli proffered platitudes like “we can earn a lot of money” and “doing nothing is not an option”. He did not provide any insight on what prudent investments could or would be done, or on who and how would supervise them. Once more, he expects unfettered power for himself or his successor, Mr Campinos. What could possibly go wrong, eh?

To their credit, the German delegate (and Head of the German Patent Office) in the Budget & Finance Committee objected:

(Translated from German, not verbatim) “*We have submitted the proposals to the Federal Court of Auditors. Their assessment is that*

*the risk is too high. Capital preservation should be in the foreground. First, one should move closer to the RFPSS guidelines. Provision should be made for cumulative risk of default. Sanction mechanisms should be provided. Under g) in the RFPSS guidelines, there is a list of approved and unauthorized instruments of investment. We cannot agree today. If contracts with the fund managers existed, we may be able to decide otherwise, but not yet today.”*

Several Delegations (IE, IT, DK, UK, NO, CZ, HU, SI) and the staff representatives, too, voiced substantial concerns and called for prudence and strict governance. In the end, out of 32 delegations, 6 voted against, 2 courageously abstained – the rest (24) voted in favour (Italy requested a secret the vote with the apparent aim to prevent possible retaliation from Battistelli; So we do not know who voted what).

So much for transparency, prudence and financial accountability.

We wish Mr Ernst, the German Chair of the Administrative Council, good luck in explaining this fiasco to his own government and to the German Federal Court of Auditors.

## **2) “Modernizing the Employment Framework of the EPO”**

We currently have a statutory cap on contract staff set at 5% of the EPO staff complement, which has not yet been reached (there are currently 3% of EPO staff under contract). In October, the Council was requested to approve a complete (!) abrogation of the cap. Sent back homeward “tae think again”, Battistelli & Bergot now ask for a measly 40% cap.

It is easy paraphrase Battistelli & Bergot’s Epic Rhapsody into layman’s words:

*The world is a-changing, the EPO must change with it.  
Time-limited contracts are good for new recruits.  
Other International Organisations have more contracts than we have so we must catch up.  
No doubt it will be a success since the EPO received 20,000 applications to work for us last year.*

Vapid and vacuous, voluptuously devoid of data and rigorous reasoning, the proposal did not impress even the more docile delegations.

Several delegations questioned the carpet-dealer tactics of going from 5% to 100%, to then settle back to 40%, as evidence that the plan has not been thought through properly. Concerns were raised about the impact on recruitment on a broad geographical basis, about the de-facto introduction of a fifteen-years-long probation period, about the inconsistency with the European norm favouring permanent employment, about job security for their own citizens employed by the EPO etc. Again the German delegate rose to the occasion with sarcasm normally expected from other longitudes:

*(Translated from German, not verbatim). As president of a large or a medium-sized office, I have experience in human resources*

*planning. I could just go ahead and say that you should do it that way. We could then recruit many examiners who will not come to you. On behalf of the German Delegation, I cannot agree. Examining patents requires highly qualified experts. This speaks against such model. Every year I speak with 50 examiners that we have hired. They tell me that it is attractive to have a secure job. They say that their workplace, the atmosphere and the leadership are good. This makes a job attractive. The special significance of patent examiners for the society justifies a special employment relationship. We cannot accept 40% in any case. We speak here about young colleagues to hire. We require five years of professional experience. Which colleagues should actually train their colleagues when they are only five years in office? Investment in training may be lost. I want you to do a gap analysis. In CA/39/14<sup>1</sup> you wrote that there is a need for strategic personnel planning. It says there that the needs analysis is done. A gap analysis is to be made. A transitional regulation should be made. Before we do anything else, please look at that. I also read the social study. The German version of the paper may be different than the English, but there is nothing about fixed-term contracts. Time limits may be limited to directors, etc., job group 2. The transitional arrangements can and must be in the Statute. You have started the social dialogue. I am interested in the results of the consultations. We need reliable figures for the BFC for different scenarios. We will need this for the supply system a fortiori. We need more fundamentals to be able to decide something like that.*

The Staff representatives intervened to remind the Delegations of a “few details”:

1. The EPO is currently struggling to recruit suitable candidates for patent examiners. The number of 20,000<sup>2</sup> applications in 2016 may look impressive, but it says nothing about the quality of the applicants. How many are discarded immediately for not meeting the minimum requirements?
2. We can hardly recruit patent examiners from the United Kingdom, Scandinavia, Ireland or Switzerland. In the most recent rounds of recruitment in November when it became known that no permanent posts were to be offered, several successful candidates declined the offer of the EPO. For the first time in a long while, only ten new patent examiners begin their training in January and February, only four in Munich and only six in The Hague (it now appears that the Office considers cancelling the January/February academies for new recruits).
3. The orientation paper gives the impression that there are difficulties in adapting human resources to the workload. It is claimed that the number of patent applications in technical areas such as telecommunications are down by 43% and audiovisual equipment by 31%. These figures are not consistent with those published by the Office in its annual reports. Also, the colleagues in

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<sup>1</sup> HR Roadmap

<sup>2</sup> According to our information, this figure hides the reality of examiners recruitment: the number of application for examiner jobs would have been halved from 14,000 in 2016 to about 7,000 in 2017.

these departments cannot confirm such a decline. However, colleagues confirm that due to some wrong analysis and forecast, in some technical areas over-recruitment has occurred. All this shows that, first of all, a thorough investigation of the number of applications, the capacities and the backlog is required before action be taken.

4. The orientation paper gives the impression that the EPO, with its permanent employment, would be an exotic international organisation. But why are we being compared with the European Central Bank or CERN? These organisations have completely different responsibilities than those of the EPO. Would not a comparison with other patent offices be more appropriate? For example, Germany recruits patent examiners only as permanent civil servants.
5. The orientation paper gives the impression that renewable five-year contracts are not a problem at all from a legal point of view. On the one hand, the EU Directive 1999/70 on fixed-term work remains unconsidered. Why have employer representatives and millions of workers in Europe agreed that permanent contracts are the norm? And the EPO should do it differently now? On the other hand, potential legal problems, when sovereign tasks such as the granting of patents are no longer made by civil servants, are not addressed at all. Should the legal effect of the European patent really be jeopardized?
6. The orientation paper gives the impression that switching to fixed-term contracts has no financial impact. Why is the paper silent about the fact that the training of a patent examiner takes at least three years? Training requires capacity and therefore money. On the other hand, it is not unrealistic to imagine that a patent examiner on a five years' contract will take the training and leave the EPO as soon as possible to work as patent attorney (as used to be the case in the USPTO).

### 3) Patrick Corcoran

P. Corcoran is the Judge of the Boards of Appeal who was suspended for close to three years (out of which two at half pay) because the President accused him of misconduct.

You may remember that Battistelli assumed the role of victim, accuser, public prosecutor and judge, and tried to pressure the Boards to do his bidding and sack P. Corcoran. The ATILO has rebuked the President in Judgments 3960 and 3958 in unusually harsh words. These judgments have not gone unnoticed in the public domain. For brevity's sake, we refer you to one of the more balanced summaries, that of [IPKat](#).

For the moment, we have only two comments:

1. The ATILO ruled, among other things: "*The complainant shall be immediately reinstated in his former post*". This order has not been obeyed. First, the house ban has not yet been lifted, with the exception of the "Haar building" (the Boards of Appeal building outside Munich). Then, the Administrative Council was advised

to demote P. Corcoran and not to re-appoint him to the Board of Appeal. For all intents and purposes, he is to be reinstated in DG1, as an examiner, at the mercy of Battistelli. Can we say “corporate harassment”?

2. It has also transpired that Battistelli and Topić filed a “criminal defamation” case against P. Corcoran before the German Court (case 24 Qs 18/17 as disclosed in [IPKats comments](#)). We suspect that this was a mere ruse to keep the “case pending” so that the Council would not have to look into the substance of the matter. The München Landgericht dismissed the case, with the decision of 6 November 2017. A redacted copy of the decision can be requested from the [Landgericht](#).

Ignominy aside, our next question is: **who paid for this lawsuit?** Did Battistelli and Topić disburse the legal fees themselves, or did they appropriate Office funds for this purpose?

Your SUEPO Committee The Hague