

“The new president must restore harmony”

Christoph Ernst faces a Herculean task. He has to steer the European Patent Office into calmer waters while also managing the situation resulting from a complaint filed against the Unified Patent Court now in the hands of the German Constitutional Court. The Deputy Director General of the Federal Ministry of Justice is also Chairman of the EPO Administrative Council. In an interview with JUVE Patent, he talks about obstacles encountered on the way to forming the UPC, errors made in the Battistelli era – and the expectations awaiting his successor.

10 November 2017 by Mathieu Klos

Brexit

European Patent Office

Germany



Dr. Christoph Ernst (63) has chaired the Administrative Council of the European Patent Organisation since 1 October 2017. Ernst, born in Bremen, is familiar with the EPO and its problems: he spent a long time on the AC as head of the German delegation. Since 2010, his main occupation has been Head of Directorate for general commercial and economic law, including intellectual property, at the German Federal Ministry of Justice. **In this role, Ernst was also responsible for the negotiations on the new Unitary Patent and Unified Patent Court.**

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JUVE: The European Patent Office is constantly dogged by infighting between the Council's management and its staff, the launch of the UPC is clouded with uncertainty. The outlook is rather dismal, isn't it?

Christoph Ernst: No, the situation is certainly not as bad as that. We must get something straight: The European patent system is functioning. Currently, the European Patent Office is receiving a great number of applications. This is a result of global growth and also increasing innovation in the business world. And up to now the EPO has managed very well to meet these requirements. We of course can't afford to ease off in terms of this process. There will always be a requirement for us to deliver not just quantity, but also outstanding quality.

And the best way to do that is with motivated staff, right?

Without question, and therefore we have to revive the social dialogue within the Office also. We need working conditions that make all employees feel happy. The constitutional complaint filed in Germany against the ratification of the UPC is indeed a very different issue – and blame here cannot be attached to the EPO.

Yet the constitutional complaint is the real pressing issue of the day right now for patent experts throughout Europe. It is blocking the launch of the new court and the Unitary Patent issued by the European Patent Office. Do you have any new information about the court case?

The German Federal Constitutional Court has asked a number of individuals and institutions, including the Federal Ministry of Justice, to make statements related to the matter. We are currently examining the grounds for complaint in great detail, and we will respond by stating our own official position. We are confident that we can present a convincing case demonstrating that the UPC project and the legislation presented by us is constitutionally sound.

The complainant and Düsseldorf lawyer Ingve Stjerna, specifically criticized the way the German Parliament (Bundestag) voted on the UPC legislation. Could this current problem be resolved simply by the incoming German Parliament holding another vote?

At the moment, that is merely a hypothetical question. We are convinced that the previous German Parliament carried out the vote in the correct manner.

The Federal Constitutional Court is in possession of separate complaints that criticize what they see as the inadequate legal status of the EPO's Boards of Appeal. Now the judges have also asked the EPO to provide comment. Can it be assumed that the judges' stance on this element of the UPC complaint is a critical one?

Whether the inquiry into the EPO was really triggered by the criticism of the Boards of Appeal, one can only speculate. I personally think it unlikely, since there are obviously plenty of other good reasons for seeking consultation with the Patent Office regarding the UPC. The EPO will after all play a crucial role in the future system, for example with its responsibility for administering the Unitary Patent.

The European Patent Office in Munich is experiencing turbulent times under President Benoît Battistelli. ©EPO

The Administrative Council, newly chaired by yourself, adopted a structural reform of the EPO Boards of Appeal in summer 2016. How satisfied is the German Federal Government with how this has been implemented?

We feel that the necessary steps have been taken to ensure the independence of the Boards of Appeal. The debate on the reforms did indeed take some time – but in the end a very good solution was found. It wasn't easy, because the European Patent Convention (EPC) set the legal guidelines here. In accordance with these guidelines, it would not have been allowed to create a Court that was completely

separate from the EPO. Had we wanted to go that far, we would have needed to amend the EPC – but none of the 38 member states deemed this appropriate or necessary.

Where do you see firm proof of success achieved by the reform?

The reform has significantly strengthened the independence of the Boards of Appeal. There is now a Board of Appeal President, who operates similar to a court president. Gone are the days when a Vice President of the EPO was also Chairman of the Boards of Appeal. In this, we have made a clear separation between the EPO's executive level and its legal arm. The judges now report to the Board of Appeal President instead of to the head of the Office. This bears proof that the Boards of Appeal extensively meet the requirements for a proper competent national court.

This reform represents a key event under the tenure of the incumbent EPO President, Benoît Battistelli. What is your overall assessment of President Battistelli's work over the past eight years?

An undoubtedly positive one, despite certain acknowledged imperfections. Put plainly, President Battistelli has initiated a large number of necessary reforms, and has implemented these following the Administrative Council's approval. In doing this, he has significantly strengthened the EPO's position overall. The working processes now run better, productivity is higher, and the Boards of Appeal have been reformed. In addition, Battistelli has initiated a number of social reforms that were also necessary on a general level.

“Battistelli approach to implementing reforms was too heavy-handed.”

What do you mean by acknowledged imperfections?

The verdict on the success of reforms he achieved will certainly be clouded by the fact that President Battistelli has overseen a very rigid regime with a heavy-handed approach. I would have occasionally liked to see more compromise and more understanding for differing interests.

What social reforms were necessary?

One example was the disputed reform of the right to take strike action. A precedent had established itself within the EPO which had to be put on a legal footing. The resulting regulation is definitely a step forward here. Details can always be debated, and this is also being put into practice.

At the start of October, the Administrative Council chose as the successor for President Battistelli, the current head of the European Union Intellectual Property Office, António Campinos. Can you explain why there was only one single serious candidate for such an attractive and well-remunerated position at the head of an international organization?

I can't see into the minds of any potential applicants. Maybe some were deterred from applying due to the fact that, from quite early on, it was known that António Campinos was applying, and it was also clear that he enjoyed strong support among the Administrative Council. But it is indeed true that many members of the Administrative Council would have liked to see more applicants and greater competition for the position of President. Campinos has now though been elected with a large majority, and I also think he is a very appropriate appointment.

What expectations does the Administrative Council have regarding the new President?

We expect António Campinos to resolutely take on the many challenges that the EPO faces and to set out a vision for

the future. The EPO must continue to work effectively and deliver high quality – while at the same time living up to its public responsibility. It must anticipate an ongoing rise in the number of patent applications made, especially if the EU Patent system becomes reality. António Campinos must also ensure that EPO staff uphold high standards of quality when examining patent applications. The issue of quality is a central consideration for the Administrative Council and the Federal Government: patent protection, which in the end produces a monopoly, can only be justified for good patents.

What does the EPO's social responsibility extend to?

I want to see the Patent Office look beyond simply the framework of patenting, and encompasses the subject of bio-patents, for example.

And what about social conflicts within the EPO?

Improving the social culture is quite clearly a relevant area to address going forward. We need to reinvigorate dialogue between the relevant parties within the Office. We want to achieve social harmony. Before the appointment of António Campinos, it was made clear that all 38 Member States are looking for action on this from President Battistelli's successor.

How can Campinos achieve this?

The work carried out at the EPO is demanding and carries huge importance for the European, and even global, economy. Staff enjoy very good salaries. However, there is clearly a sizeable number of employees who are not happy. Mr Campinos must address this issue and boost motivation, for the overall good of the Patent Office. This is a challenging task for any good executive, which António Campinos most certainly is.

What makes you so optimistic that Campinos is the right man to break the current deadlock?

He is a very dynamic person, who looks to move forward. He can get staff on board. His previous tenure in Alicante shows this, and we expect that this will prove to be the case in Munich, too.

He is also reputed to enjoy a close relationship with President Battistelli, though. Wouldn't that be an obstacle here?

I cannot say how close that relationship is. They may both share similar views on some issues. But that doesn't necessarily mean that Campinos will simply follow Battistelli's example. I can imagine, for example, that they differ in their approach in terms of communication or in involving employees.

That would also be necessary with respect to dealing with SUEPO, the key union at the EPO. What does the Administrative Council expect from the union?

We expect a willingness to sit down with the new president and discuss objectives and how to achieve them. The battle lines have become hardened, and it will require goodwill from both sides to overcome this situation. I hope that the SUEPO will prove to be a constructive contractual partner, in line with what it has said many times in the past. No one side can look to force through hard-line positions in this conflict.

As a show of goodwill, could the EPO management and the Administrative Council not halt the pending disciplinary proceedings against one of the EPO judges?

This case has attracted a lot of public controversy. The Administrative Council is responsible here for disciplinary oversight of the Boards of Appeal. Currently, legal obstacles remain before the case can be brought to a conclusion. We need to see whether we can overcome these hurdles in the time that remains.

How you want to use your role to revive dialogue within the Patent Office?

Like my colleagues from the other EPC countries, I want to promote dialogue in the best way possible. But I must make one thing clear. It is the future President and the staff representatives, and, in certain circumstances, the trade unions, who will play the key role in this matter. The Administrative Council is not strictly speaking a social partner.

Further controversy in the debate over the EPO is Battistelli's efficiency strategy. Why is efficiency such an important issue?

It is important in the interests of patent applicants and the economy, both of which rightly expect patent applications to be processed within a reasonable time frame. Nobody gains from patent claims remaining unexamined for lengthy periods of time. At the same time, applicants do expect granting decisions to be based on careful and sound consideration.

But that seems to constitute a conflict of interests. German lawyers regularly specifically criticize the EPO's ever greater drive for increased efficiency for compromising the quality of its examinations of patent requests.

We are taking this issue seriously. Recently, the Administrative Council held in-depth discussions raised in a quality report, which we had urged the Administrative Council President to present. Currently, we are discussing how we can improve evaluation of the quality of the patents granted.

The Administrative Council takes the quality issue seriously, says Christoph Ernst

Many critics seem to be quite blunt in their assessment of this issue. They clearly see a drop in the quality of the patents granted by the EPO.

This criticism seems to me to stem more from a hunch — because nobody has come up with any verifiable numbers here up to now. Just because our work is being performed faster, and more decisions are being made, doesn't automatically mean that the quality of the work is lower. The Administrative Council is more than open to discussing these matters with experts, but such discussions are only useful if based on reliable facts.

Are there other challenges facing the European Patent Organisation that you want to address during your tenure?

Yes, I would like to significantly raise the profile of the future role of the Administrative Council. We are a body within the European Patent Organisation, and a strong Administrative Council is in the interest of the EPC contracting states. The President of the EPO is responsible its overall leadership, but we consider ourselves to be equal partners. We will place a premium on dialogue and good governance.

This interview was conducted by Christina Schulze and Mathieu Klos.

One system, a multitude of Problems

Several major issues are currently plaguing the new European Patent system

Greater uniformity

Up to now, national patents and the bundle patent granted by the European Patent Office (EPO) have dominated the

scene in Europe. In future, this arrangement is likely to change, with the introduction of the Unitary Patent for 25 EU states. Exclusive authority over the Unitary Patent and bundle patent will lie with the Unified Patent Court (UPC).

Stumbling blocks

Repeated delays have hit the introduction of the new European patent system (Unitary Patent and UPC). The Brexit vote was first up, and, since July, a Constitutional Court appeal has blocked the key German ratification. The launch date of the UPC remains uncertain.

Unresolved Brexit Impact

Also still unresolved is whether the UK will remain a member of the UPC after it exits the EU. It is also unclear where the UK will stand in future regarding other intellectual property rights in the EU. However, the UK will, as a non-EU country, be able to be served by the European Patent Organisation and therefore benefit from its bundle patent.

Controversial structural Reform

The EPO's Boards of Appeal scrutinize patents granted by the EPO but are actually subordinate to it. Many patent experts have complained that, as a result, the Boards of Appeal do not constitute an independent court, especially given the meddling of incumbent President Benoît Battistelli in internal matters of the court. The argument reached its peak in December 2014 when Battistelli suspended an EPO judge. At the start of the year, the judge was not retained. In response to public criticism, in summer 2016 the Administrative Council brought in structural reform aimed at creating more independence.

Poor Image

The EPO has repeatedly attracted negative publicity over the past three years, mainly due to internal infighting. Dominating public press for the EPO are issues such as the dispute between staff and the EPO management and the ongoing confrontation between the main Union, SUEPO, and EPO heads. During the dispute, practically all of SUEPO's leaders resigned en masse. Battistelli began disciplinary proceedings against several of the trade union leaders. Several no longer hold their positions.

Quality problems

Mainly patent lawyers, but also industry representatives, have for some years now complained about the deteriorating quality of the EPO's examination and granting of patents. They also criticize the increase in decisions landing with the Boards of Appeal due to formal deficiencies as opposed to the examination of the inventive steps. The lawyers attach blame here to the key efficiency strategy pursued by the EPO, through which Battistelli wanted to ensure the EPO was fit for the future.