

# Broken Governance of the European Patent Organisation

## A business as such

**The European Patent Office finances itself by fees from the patents which it grants.** It is free to use a certain percentage of these fees.

The Administrative Council has shown a tendency to treat the office **as a commercial entity** rather than as the public service organisation. Because of its financial independence of the EPO. This results in the continuing demands for ever more granted patents for its clients, while refusing to increase the resources of the European Patent Office accordingly. SUEPO, the Staff Union of the EPO soundly condemns this development due to the risks it poses to the quality of patent rights granted in Europe<sup>1</sup>.

Thierry Sueur, of BusinessEurope (ex UNICE, and a good friend of the patent industry) said:

Mr. Sueur expresses an opinion which is widely shared by the EPO staff: **"I am convinced that the way the EPO is managed today (by the Administrative Council) is such that it will mean either the death of the EPO or its transformation into a cash machine"**

## Conflict of interests leads to bad quality

The **Administrative Council of the European Patent Organisation is mainly populated by representatives of national patent offices<sup>2</sup>**, which are struggling over fee distribution, since their offices receive approx. 50% of renewal fees. That very governance structure creates incentives to **grant as many patents as possible**. Since the 1980s the EPO has lowered the standards of technicality, novelty, non-obviousness and industrial applicability and abolished examination quality safeguards so as to increase the number of granted patents by more than 10%.

Many stakeholders and academics<sup>3</sup> are criticizing this conflict of interests which tends to promote 'more patents, the better':

Question: The Administrative Council runs the EPO together with the President. **Most of its members work at national patent offices**. What effects does this combination of national and European offices have?

Professor Harhoff: It is undoubtedly good that the European Patent Organisation benefits from the experience of national institutions and experts. However, there are problems, on principle, with the fact that the EPC contracting states, or rather their national offices, profit financially from EPO-granted patents by virtue of their 50% share of the renewal fees, yet simultaneously would have to approve any measures leading to a greater focus on quality and thus to fewer patents. That is indeed an unsatisfactory situation requiring correction in the long term. The whole fee system is characterised by cross-subsidisation: expensive examination is partly financed by renewal fees. **That of course creates incentives to grant as many patents as possible. The Academic Advisory Council report did in fact criticise this.**

1 SUEPO: A Public Service Organisation out of control? <http://www.suepo.org/public/docs/2001/kontrol.htm>

2 <http://www.epo.org/about-us/epo/administrative-council/members.html>

3 <http://www.suepo.org/public/ex07125cpe.pdf>

Notably examiners ask for quality not quantity. Their trust in the governance of the EPO has declined to 4% in 2006<sup>4</sup>:

the Administrative Council (AC) and President have almost totally lost the confidence of the EPO staff. In 2004, **just 8% of staff expressed trust in the Administrative Council**, and 28% in the President. **In 2006 this figure had fallen to 4% and 7%.**

The EPO staff representative raised the institutional problem at the Administrative Council:

When Staff Representatives mentioned such potential conflicts of interest in a recent Council meeting, **some delegations reacted with irritation and even went so far as to threaten expulsion of the Staff Representatives from the Council if such allegations were made again.**

The Administrative Council of the EPO is mostly apolitical, most of its members are from the national patent offices, which are part of the executive power, not the legislator. The range of political views represented in this Council is pretty narrow, and they do not faithfully represent the political diversity that you can find in institutions like the European Parliament.

The apolitical aspect of the EPOrg is mentioned<sup>5</sup> by the President, Mr Grossenbacher, who is also President of the Federal Institute for Intellectual Property in Switzerland:

But he cautioned that the EPO, which has seven member states that are not members of the European Union, should not be subsumed into the EU: "Would the EU dominate the EPO? Would non-EU members be disadvantaged? **Another consequence would be if the EPO became politicized.** In such a situation, Switzerland might have to reconsider its position viz-a-viz the EPO.



*EPO examiners demonstrating their lack of trust in front of the house of the Mr Grossenbacher, President of the Administrative Council*

<sup>4</sup> <http://www.digitalmajority.org/forum/t-11357/epo-staff-blame-admin-council-for-epo-woes>

<sup>5</sup> ManagingIP: EPO chair hints at fee rises <http://www.managingip.com/Article/1864924/EPO-chair-hints-at-fee-rises.html>

## EPC2000: Power to the technocrats, but no Power to the EU-Parliament

EPC2000 Article 33 says the Administrative Council can modify the EPC parts II to VIII and Part X with only 75% (Art. 35)<sup>6</sup> of the votes of the member states (one country one voice). It means that the Administrative Council could decide to remove computer programs from the list of exclusions if they decide so. For example, the proposal to remove the computer programs exclusion of the EPC in 2000 had not generated much debate in the public at the time, while the proposed directive rejected in 2005 had generated one of the most heavily lobbied piece of legislation ever.

The Staff Union SUEPO clearly outlines this problem in its press release of 2001 "A Public Service Organisation out of control?"<sup>7</sup>:

### **Suepo: Further loosening of democratic control is contemplated**

This Administrative Council is currently contemplating far-reaching changes to the European Patent Convention. These changes will effectively mean that in future the Administrative Council can decide autonomously on the future direction of the law governing the award of patent rights in Europe, and the very law by which it is governed itself. **No agreement by the European Parliament or any other publicly accountable European organisation will be needed and, as in all deliberations of the Administrative Council, many of which are held in secret session, there will be no participation of society at large.** This opens the door to uncontrolled wide-ranging changes to the European Patent System. Recent events suggest that these changes may be **against the interest of European citizens.**

In its resolution on patent policy of October 2006<sup>8</sup>, the European Parliament reminded the lack of democratic control in the patent system:

"all legislative proposals should be accompanied by an in-depth impact analysis related to patent quality, governance of the patent system, judicial independence and litigation costs;" and mentioned the "growing concerns about undesirable patents in various fields and about a **lack of democratic control over the processes by which such patents are granted, validated and enforced**"

<sup>6</sup> [http://www.ipjur.eu/wiki/index.php/EPC2000\\_Article\\_35](http://www.ipjur.eu/wiki/index.php/EPC2000_Article_35)

<sup>7</sup> SUEPO: A Public Service Organisation out of control? <http://www.suepo.org/public/docs/2001/kontrol.htm>

<sup>8</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0416+0+DOC+XML+V0//EN>