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SUBJECT: Governance of the EPO: a Staff Perspective

DRAWN UP BY: President of the European Patent Office

ADDRESSEES: Administrative Council (for information)

SUMMARY

The trust of the EPO Staff in its highest governing bodies, including the Administrative Council, is worryingly low. The present document analyses some of the underlying causes.

This document is submitted by the staff representatives via the President of the European Patent Office, in accordance with Article 9 (2.2) (b) of the Administrative Council's rules of procedure (see CA/D 8/06).

TABLE OF CONTENTS

Subject	Page
I. INTRODUCTION	1
II. CAUSES OF STAFF MISTRUST	2
III. THE OUTSIDE VIEW	3
IV. THE FUTURE	4

I. INTRODUCTION

The 2004 Staff Survey, conducted in DG1 by Research International, showed a worryingly low level of trust of the EPO staff in their highest governing bodies. At the time only 8% of the Staff confirmed the statement "I trust the Administrative Council" and only 28% the statement "I trust the President / MAC". Trust in the President / MAC was 23 points below the established benchmark, i.e. much lower than expected.

Despite attempts to "Go East" (i.e. to delegate responsibilities to lower management levels) and to improve communication with the staff, the results of the 2006 Staff Survey, conducted Office-wide, again by Research International, were even worse. In 2006 only 4% of all staff expressed trust in the Administrative Council, closely followed by the MAC at 6% and the President at just 7%. Benchmark figures were no longer given, but from the previous benchmark it can be understood that such low trust figures cannot be considered "normal". In marked contrast, in the 2006 survey 63% of the staff rated their trust in the staff representation as "high" or "very high".

Why does EPO staff have such a low trust in the **MAC** and in its **President**? The results of the Staff Surveys provide some of the answers. For instance, the statement "I identify with the views put forward by the MAC" received only 6% affirmative answers in the 2006 survey, down from 12% in 2004¹. When asked to identify "opportunities to improve efficiency", the most frequently chosen were "*better functioning of the computer systems*", "*clear and consistent instructions*" and "*better balance between workload and capacity*". These answers point at deficiencies in the daily management of the Office. The very low positive response rate (8%) for the statement "the MAC is actively supporting the quality development process" points at a fundamental difference in setting of priorities between staff and management. Research International concluded that EPO staff perceives their management as "totally disconnected from my reality".

Neither the 2004 nor the 2006 Staff Survey contained further questions relating to the EPO Administrative Council. However, the open comments provide some answers as to why EPO staff does not trust its **Administrative Council** (see CA/86/06 Add. 1). Of these open comments 93.7% were negative, 5.5 neutral (mostly "no comment") and only 0.7% positive. More than two-thirds of the comments pointed at conflicts between national or

¹ In 2004 the corresponding question was "I identify with the views put forward by management".

personal interests, and the interests of the EPO. From these comments we can conclude that staff perceives the delegations in the Administrative Council as representing their "own" interests rather than the interests of the EPO.

II. CAUSES OF STAFF MISTRUST

What are the particular issues that are causing the lack of trust in the Administrative Council? It is a matter of fact that a majority (at present about two-thirds) of the heads of delegations hold a function in a national patent office. This document argues below that this leads to a conflict of interest which is clearly perceived as such by the EPO staff.

The two major issues that stand out amongst the open comments in the 2006 staff survey are **decentralisation** and **self-interest**. The push towards decentralisation of some Member States in the Administrative Council is perceived by the staff as an attempt to weaken and even to dismantle the EPO to the benefit of national offices. Attempts to limit staff recruitment or to worsen the working conditions for EPO staff, in particular at a time where the EPO is having difficulties recruiting examiners, are easily interpreted as a further attempt to increase the EPO backlogs and to "renationalise" its work.

The perception that the Council is pursuing **financial self-interest** is linked to the fee structure. Patent offices throughout the world are financed through procedural and renewal fees. In the case of the EPO the renewal fees are, however, not paid directly to the EPO but to the national offices, which retain half of these fees and transfer the other half to the EPO. The perception of this "fee-sharing" by the delegations and the staff is very different. Whereas some delegations (national offices) perceive this sharing as the Member States subsidising the EPO², the EPO staff perceives it as the EPO subsidising the national offices. There is a strong belief amongst staff that the financial benefits to the Member States arising from the renewal fees motivate the Administrative Council, and consequently the EPO administration, to focus on the quantity rather than the quality of the granted patents.

Staff furthermore perceives the **attitude of the Council delegates towards staff** as negative. We refer to comments made by the previous Head of the Dutch delegation and by various other Heads of Delegation in the past years.

² See e.g. <http://www.report.at/artikel.asp?kid=1&mid=5&aid=11638>; „Kritik am Europäischen Patentamt, Rödler vermisst Effizienz and Sparsamkeit.“

Particularly in the last two meetings of the Council, members of certain delegations have made comments implying, or even explicitly stating, that they consider EPO staff to be, among other things, unprofessional, inefficient, overpaid and malingering. Such comments are not conducive to improving the relationship between the EPO's body of highly professional and educated staff, and the Administrative Council. It has not gone unnoticed by these staff that certain of these comments even appeared to have the implicit support of the Chairman of the Council.

Concerning the latter, it has not escaped the attention of staff that the Chairman of the Administrative Council, as head of a national office which has to pay the tax adjustment for pensioners living in his home country from the budget of his office, stands to benefit from the abolition of said tax adjustment, a proposal that he very actively defended in the Council. We note that the position of the Council Chairman in relation to the Community patent is an equally delicate one. In the 2005/2006 financial report, the Head of the Swiss Patent Office points out that if the Community Patent were finally to mature, the Swiss Patent Office would risk losing a substantial part of its current designations.

Another development that is not seen positively by the EPO staff is the shift towards the Council in the balance of power between the President and the Administrative Council. This has been achieved through the introduction of Vice-President contracts which are not renewable and which foresee rewards that are highly performance related, the level of said rewards, as well as the definition of "performance", being decided by the 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. It is, however, the duty of the Staff Representation to point at potential weaknesses in the governance of our Organisation in order that these can be addressed.

III. THE OUTSIDE VIEW

The EPO staff is not alone in its concerns about the functioning of the Administrative Council. A recent report commissioned by the British government³ also pointed at an inherent conflict of interest if the head of a

³ See http://www.hm-treasury.gov.uk/media/583/91/pbr06_gowers_report_755.pdf

national patent office is to decide on general policy matters, including matters relating to the EPO. The same observation has been made by Mr. Braendli⁴ (previous President of the EPO), Mr. Bossung⁵ (a close advisor to Mr. Haertel, one of the founding fathers of the EPO) and by Mr. Sueur⁶ (an intellectual property expert of BusinessEurope).

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". Concerns about the governance of the EPO are also expressed in the reports of Piéta⁷ and of the French government "Commission de l'économie de l'immatériel"⁸ (both issued in 2006). The Governance of the European Patent System was furthermore a key issue in the recent (2006) STOA⁹ Workshop on Policy options for the European Patent System¹⁰.

IV. THE FUTURE

The British delegation has addressed the issue of the governance of the EPO in a document (CA/8/07) submitted to the March 2007 Council. We appreciate some of the points made (e.g. "members of the Council ... are not appointed to further the managerial interest of their own office or to usurp the role of the President").

However, the document defines the role of members of the Council as being "to ensure that the Organisation is delivering the expectations of the member States in the effective and efficient granting of European Patents". Following

⁴ See Europäisches Patentübereinkommen - Münchner Gemeinschaftskommentar, volume 22 comments of P. Braendli, pages 29 - 33

⁵ See http://www.suepo.org/public/bossung_en.htm "Thus the management of the EPO is dominated by the delegates of the contracting States in the Administrative Council. It is entirely natural that their thoughts and actions are primarily guided by the national sector. Hence it is national interests, the interests of the national patent offices, national patent attorney, national lobbies, national business sectors and other national interest, that are the decisive forces within the Administrative Council of the EPO."

⁶ See http://president.internal.epo.org/documents/AP12_Book_of_Interviews_000.pdf, bottom p. 344.

⁷ See http://www.cawa.fr/IMG/pdf/Rapport_PIETA_2006.pdf

⁸ See http://www.finances.gouv.fr/directions_services/sircom/technologies_info/immateriel/immateriel.pdf

"Recommandation no. 40: La France doit prendre position en faveur du maintien de critères rigoureux d'obtention des brevets afin de garantir la qualité des titres ainsi délivrés."

"Recommandation no. 41: La Commission considère que la France devrait lancer une refondation politique de l'OEB, tout d'abord en renforçant la légitimité politique de l'OEB par la participation à son conseil d'administration des autorités politiques des États membres."

⁹ Scientific and Technological Options Assessment, European Parliament.

¹⁰ See http://www.tekno.dk/pdf/projekter/patent-system-STOA/background_document.pdf

from this, their duties include: “to conduct critical review of the performance of the organisation” and to “set and monitor performance targets, and to hold the President accountable for performance”. In this context, the document notes “the current shortfall of performance”.

Sadly, these statements summarize well the interests of the delegations as described above, namely to increase the number of granted patents at any cost. In contrast, there is nothing in the document about the "directorial duty" of the Member States to develop the role and influence of the EPO in the European patent system as a whole. This would ensure the long term sustainability of the system. The document is also silent on the question of monitoring if the patent system fosters research and innovation and does not consider the system's impact on the European economy as a whole which would ensure that it benefits the European public as a whole and not only its “clients”. In this context, we wish to point out that the staff of the EPO is amongst the EPO stakeholders, something which has been overlooked by the drafters of the document. Without these elements, the document is sadly lacking.

Furthermore, CA/8/07 does not make any clear, specific proposals for the steps to be taken to address the governance issues. Nor does the Gowers report. Nevertheless there seems to be a consensus that it is undesirable to have the Administrative Council dominated by staff of the national patent offices (*supra*) and that experts from the responsible ministries would be suitable as representatives for their States.

Closer alliance to the EU and the European legislators has also been suggested as a solution (Ms. Schneider, STOA Workshop¹¹). In fact, should the Community Patent be realised, this will require changes to the EPC¹² with far reaching effects on governance at the EPO - see in particular proposed Articles 24a and 149i and 149k. It would furthermore seem desirable to give industry and the patent profession a stronger voice in the Council since these are amongst the major stakeholders.

However, most of the above aims, although desirable and offering potential solutions to the governance issues within the European Patent Organisation, are not achievable in the short-term. In the name of the EPO staff, we therefore strongly appeal to the present Members of the Administrative

¹¹ <http://www.tekno.dk/pdf/projekter/patent-system-STOA/Schneider.pdf>

¹² http://ec.europa.eu/internal_market/indprop/docs/patent/sec01-744_en.pdf

Council and to the President to work together at the national level *and* at European level, in order to maintain and improve the high quality of the European patent system.

A strong, high quality European patent system requires highly qualified and highly motivated staff. We therefore appeal to the President and to the Members of the Administrative Council not to alienate the staff of the EPO by measures that seem short-sighted and tainted by self-interest, but to focus on maintaining a high level of staff competence and staff satisfaction through continued training, by improving the technical working conditions and by showing respect for the staff and their work.