

**LEGAL OPINION**

CONSIDERING THE ACTIONS OF THE PRESIDENT,  
THE ADMINISTRATIVE COUNCIL AND  
MEMBER STATES  
OF THE  
EUROPEAN PATENT OFFICE

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## 1. INTRODUCTION

- 1.1. We are instructed by the Staff Union of the European Patent Office ('EPO' or 'Office') to produce an opinion in respect of the rights of staff members and potential remedies regarding amendments to the laws of the Office by its President, Benoît Battistelli and the response of the oversight bodies of the Office, namely, the Administrative Council and the Member States.
- 1.2. This Opinion aims to provide a consideration of the legal framework and structure for challenging alleged breaches of the rights of Staff Members of the EPO. Annex 1 of this Opinion deals with specific examples and provides analysis of where breaches may have occurred. The annexed document should be read in conjunction with this Opinion.

## 2. BACKGROUND AND CONTEXT

- 2.1 The EPO is currently in a state of considerable social unrest with allegations that the President has acted *ultra vires* and in a capricious and arbitrary manner. Furthermore, it has been suggested that the bodies with responsibility for oversight of the Office and the actions of the President have failed properly to discharge their duties and obligations.
- 2.2 The European Patent Organisation ('EPOrg' or 'Organisation') is an international organisation of which the European Patent Office is one of two organs, the other being the Administrative Council. As such, the Organisation, its President and staff members enjoy a number of privileges and immunities from legal suit by virtue of the European Patent Convention (5<sup>th</sup> October 1973, as amended; the 'Convention' or 'EPC') and the annexed Protocol on Privileges and Immunities of the European Patent Organisation (the 'Protocol on Privileges and Immunities' or 'PPI'), which in turn incorporates the Vienna Convention on Diplomatic Relations of 18 April 1961 ('Vienna Convention').
- 2.3 The EPO, like other international organisations which enjoy functional immunity from legal suit, must provide an alternative internal legal system in order to fill the



lacuna left by the application of immunities. This is done, in the case of the EPO, through its internal laws as collected in the Codex and International Administrative Law. In the case of the EPO, the ultimate tribunal in which Staff Members may seek redress is the International Labour Organisation Administrative Tribunal ('ILOAT'). Regrettably, this Tribunal is well known for considerable delays in hearing complaints, a disregard for normative legal standards and predisposition in favour of the institutions which chose to subscribe to it.

- 2.4 Having regard to the demonstrably autocratic conduct that the President has exhibited and the apparent failure by the Administrative Council and the Member States of the EPOrg to check such behaviour, the first job of this opinion must be to start at the source of the EPO's legitimacy, for ultimately, the Member States giveth and the Member States taketh away.

### 3 THE LAW: TREATIES AND CONVENTIONS

- 3.1 The authority for the existence of the EPO is derived from treaties between contracting States. Absent such treaties, the EPO has no legal personality. The relevant constituent treaty is the Convention on the Grant of European Patents 1973 (as amended) ('EPC'). The relevant provisions of the EPC are reproduced and considered below and they include those relating to the functions, powers and duties of the President and the Administrative Council, the Privileges and Immunities of the EPOrg, the Office and the President as well as provisions and circumstances for waiver of the same through intervention by the Administrative Council and the Member States.

#### **Function, powers and structure**

- 3.2 Part 1, Chapter 1 of the EPC contains General Provisions. Article 4 of the Convention sets out the hierarchy and structure of the Organisation:

*1. A European Patent Organisation, hereinafter referred to as the Organisation, is established by this convention. It shall have administrative and financial autonomy.*



2. *The organs of the Organisation shall be:*
  - a. *The European Patent Office;*
  - b. *The Administrative Council.*
3. *The task of the Organisation shall be to grant European patents. This shall be carried out by the European Patent Office supervised by the Administrative Council.*

It is clear and unequivocal then, that the Office is subject to supervision by the Administrative Council.

3.3 The legal personality of the Organisation exists only by virtue of the agreement of the Member States as codified in the EPC at Part 1, Chapter 2, Article 5 and which also states that *'The President of the European Patent Office shall represent the Organisation'* that being a function which is subject to supervision and not a power, *per se* (EPO G 0005/88).

3.4 Article 10, EPC contains provisions in respect of management, which subjects the President of the Office to the authority of the Administrative Council and then sets out his functions and powers:

1. *The European Patent Office shall be managed by the President, who shall be responsible for its activities to the Administrative Council.*
2. *To this end, the President shall have in particular the following functions and powers:*
  - a. *he shall take all necessary steps to ensure the functioning of the European Patent Office, including the adoption of internal administrative instructions and information to the public;*
  - b. *unless this Convention provides otherwise, he shall prescribe which acts are to be performed at the European Patent Office in Munich and its branch at The Hague respectively;*
  - c. *he may submit to the Administrative Council any proposal for amending this Convention, for general regulations, or for decisions which come within the competence of the Administrative Council;*
  - d. *he shall prepare and implement the budget and any amending or supplementary budget;*
  - e. *he shall submit a management report to the Administrative Council each year;*
  - f. *he shall exercise supervisory authority over the staff;*
  - g. *subject to Article 11, he shall appoint the employees and decide on their promotion;*
  - h. *he shall exercise disciplinary authority over the employees other than those referred to in Article 11, and may propose disciplinary action to the*



*Administrative Council with regard to employees referred to in Article 11, paragraphs 2 and 3;*

*i. he may delegate his functions and powers.*

*3. The President shall be assisted by a number of Vice-Presidents. If the President is absent or indisposed, one of the Vice-Presidents shall take his place in accordance with the procedures laid down by the Administrative Council.*

3.5 Once again it is clear that the President is accountable for his actions to the Administrative Council.

3.6 Furthermore, Article 11 of the EPC deals with the appointment and discipline of senior employees and not only provides authority for, but also mandates – through the use of the imperative ‘shall’ – the exercise, by the Administrative Council, of disciplinary authority over the President, Vice-President and Chairmen of the Boards of Appeal:

- 1. The President of the European Patent Office shall be appointed by the Administrative Council.*
- 2. The Vice-Presidents shall be appointed by the Administrative Council after the President of the European Patent Office has been consulted.*
- 3. The members, including the Chairmen, of the Boards of Appeal and of the Enlarged Board of Appeal shall be appointed by the Administrative Council on a proposal from the President of the European Patent Office. They may be re-appointed by the Administrative Council after the President of the European Patent Office has been consulted.*
- 4. The Administrative Council shall exercise disciplinary authority over the employees referred to in paragraphs 1 to 3.*
- 5. The Administrative Council, after consulting the President of the European Patent Office, may also appoint as members of the Enlarged Board of Appeal legally qualified members of the national courts or quasi-judicial authorities of the Contracting States, who may continue their judicial activities at the national level. They shall be appointed for a term of three years and may be re-appointed.*

3.7 It is submitted that a straightforward reading of the ‘black letter law’ as contained in Articles 10 and 11 makes it clear that the Administrative Council not only has authority over the President, but also that it *shall* (and not ‘may’) exercise



disciplinary authority over, *inter alia*, the President. That is a function of and an obligation on, the Administrative Council: a failure to do so would surely amount to an abrogation of the responsibilities of the Administrative Council and indeed the Member States. If those bodies that are charged with the responsibility for oversight of the EPO and the proper application of the EPC are absent or remiss, then it is certainly arguable that the terms of the EPC and consequently, the Privileges and Immunities that were granted pursuant to the EPC, are no longer being met and complied with. Immunities are granted on the basis of representations concerning the system that will be put in their stead; it cannot be the case that, immunities, once granted, will continue to exist in perpetuity regardless of whether the terms on which they were granted are complied with. The reality is that in the case of international organisations, immunities are granted as part of a compact between signatories and the terms should be respected.

### **Privileges and Immunities**

- 3.8 Article 8 of the EPC deals with the Privileges and Immunities of the EPOrg in the following terms:

*The Protocol on Privileges and Immunities annexed to this Convention shall define the conditions under which the Organisation, the members of the Administrative Council, the employees of the European Patent Office, and such other persons specified in that Protocol as take part in the work of the Organisation, shall enjoy, in each Contracting State, the privileges and immunities necessary for the performance of their duties.*

- 3.9 The mechanisms for giving effect to the Privileges and Immunities are codified in the PPI, the relevant parts of which are dealt with below. Article 13 concerns the immunity of the President of the Office:

1. *Subject to the provisions of Article 6, the President of the European Patent Office shall enjoy the privileges and immunities accorded to diplomatic agents under the Vienna Convention on Diplomatic Relations of 18 April 1961.*
2. *However, immunity from jurisdiction shall not apply in the case of a motor traffic offence committed by the President of the European Patent Office or damage caused by a motor vehicle belonging to or driven by him.*



Article 6 of the Protocol referred to relates to the application of taxes and so is not reproduced for the purposes of this Opinion.

3.10 Before turning to the text of the Vienna Convention, it is important to note the articles of the PPI which follow, and **qualify**, the privileges and immunities that are set out in Article 13, most notably, Articles 19, 20 and 25 of the Protocol. Article 19, which deals with the purpose of the immunities and specifically limits their scope, states (with emphasis added):

1. *The privileges and immunities provided for in this Protocol are not designed to give to employees of the European Patent Office or experts performing functions for or on behalf of the Organisation personal advantage. They are provided solely to ensure, in all circumstances, the unimpeded functioning of the Organisation and the complete independence of the persons to whom they are accorded.*
2. *The President of the European Patent Office has the duty to waive immunity where he considers that such immunity prevents the normal course of justice and that it is possible to dispense with such immunity without prejudicing the interests of the Organisation. The Administrative Council may waive immunity of the President for the same reasons.*

A number of important points emerge from Article 19 of the Protocol. The first is that the purpose of privileges and immunities certainly is not personal advantage; rather their **sole** purpose is the unimpeded function of the Organisation. As such, privileges and immunities only relate to the performance by an individual of official functions: indeed, they are just that – a privilege and not an entitlement. This is a point which appears to have been forgotten by the President in his conduct and the Administrative Council and Member States are in danger of similar ignorance if they fail properly to discharge their supervisory duties. Article 19(2) also gives clear guidance as to the way in which such privileges and immunities are to be applied and the ethos that should be adopted by those charged with administering them. The Protocol creates, not just a discretion, but a positive **duty** on the President to waive such immunity from legal suit where it prevents the normal course of justice (where the interests of the Organisation are not prejudiced) and crucially, **the Administrative Council is under exactly the same duty in respect of the President.**



3.11 Furthermore, Article 20 also envisages that the privileges and immunities of the EPO will not be absolute; rather it states that:

1. *The Organisation shall co-operate at all times with the competent authorities of the Contracting States in order to facilitate the proper administration of justice, to ensure the observance of police regulations and regulations concerning public health, labour inspection or other similar national legislation, and to prevent any abuse of the privileges, immunities and facilities provided for in this Protocol.*
2. *The procedure of co-operation mentioned in paragraph 1 may be laid down in the complementary agreements referred to in Article 25.*

3.12 Article 25 states:

*The Organisation may, on a decision of the Administrative Council, conclude with one or more Contracting States complementary agreements to give effect to the provisions of this Protocol as regards such State or States, and other arrangements to ensure the efficient functioning of the Organisation and the safeguarding of its interests.*

It is abundantly clear from the provisions of the Protocol on Privileges and Immunities that they are not there to give the President or any other staff member of the EPO *carte blanche* to behave as he or she sees fit and they are a clear reminder that the EPO does not operate in splendid isolation. On the contrary, it exists by virtue of the consent of its constituent Member States and its offices are accommodated at the pleasure of its host countries as part of an agreement of cooperation set out in the EPC (Articles 6 and 7). In order to enjoy and maintain such privileges and immunities, the EPO and those responsible for its oversight and administration must fulfill their side of the agreement: the EPC, once agreed does not *necessarily* exist in perpetuity; rather the cooperation envisaged in it should continue to be maintained.

3.13 Having regard to the express and unequivocal provisions above and the guidance concerning interpretation, one might quite reasonably expect that, in the appropriate circumstances, the Administrative Council would have no reluctance in waiving immunities of the EPO in accordance with its duties under the EPC. However, before considering this point further it is necessary to consider the Vienna Convention, the effect of which is incorporated by reference.





## The Vienna Convention

- 3.14 The sentiments expressed above in respect of interpretation are reiterated in the Introduction to the Vienna Convention, which is incorporated, by reference, into the EPC Protocol on Privileges and Immunities. It states (*inter alia*):

*Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States,*

and further, that:

*Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention*

This unequivocal statement makes a number of things clear about the way in which the paragraphs which follow it should be read and interpreted. Again, the purpose of diplomatic immunity is not to give those on whom it is bestowed *carte blanche* to do as they please. On the contrary, the purpose is to ensure the proper performance of the functions of the organisation to which the immunity applies. Secondly, it is not absolute, but instead it works in conjunction with other laws such that the rules of customary international law continue to apply to matters not expressly regulated by the convention. As such, the extent of diplomatic immunity is confined to the performance of the official functions of the individual or organisation asserting such immunity.

- 3.15 The immunity itself is set out later at Article 31 of the Vienna Convention, which states:

1. *A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:*

*(a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;*



*(b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;*

*(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.*

2. *A diplomatic agent is not obliged to give evidence as a witness.*
3. *No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.*
4. *The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.*

This provision does indeed create immunity from civil and administrative jurisdiction in the host state (with three exceptions which are not relevant for the purposes of this opinion). The immunity does *not* exempt the diplomatic agent in question from the jurisdiction of the sending State. The question in respect of the President of the EPO is whether he can be said to have a 'sending State' at all, for unlike traditional diplomatic relations, he is not sent as the representative of a State, but rather of a multilateral institution constituted at the will of many. The answer, then, would seem to be one of three options: first, there is no such sending State, but then this would appear to be contrary to the essence of the express provision of the Protocol which does provide for waiver of the Privileges and Immunities. Secondly, the 'sending state', for the purposes of interpretation, is the EPOrg itself, which would seem to be supported by Article 19(2) of the Protocol which expressly provides for waiver. Or thirdly, the national State of the President which, in this case, is France, which also seems unsatisfactory, for the nationality of the President is merely incidental and he is not exercising his functions on behalf of the French Republic.

- 3.16 Article 32 of the Vienna Convention, which is not excluded by the Protocol also sets out provisions for waiver of diplomatic immunity by the sending State:



1. *The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 [which is not relevant for this opinion] may be waived by the sending State.*
2. *Waiver must always be express.*
3. *The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim.*
4. *Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary.*

3.17 The Vienna Convention is only relevant *because* the EPC incorporates it by reference. As such, it cannot be the case that it was the intention of the draftsman that another convention which is referred to as a point of reference would have the effect of contradicting or trumping the very document which refers to it. As such, the only logical way in which to interpret references to ‘sending State’ in the Vienna Convention would seem to be in such a way that they will be consistent with the explicit provisions concerning waiver contained in the EPC. With this in mind, the EPOrg appears to be tantamount to the sending State referred to in the Convention and it clearly has the authority to waive immunity by virtue of the EPC. This means that it is all the more important that the role of the Administrative Council of performing a supervisory function over senior members of the EPO is taken seriously because, unlike diplomatic representatives of States proper, such individuals might otherwise be able to evade their responsibilities and abuse their privileges under the immunities granted to them; and if they are able to do this, then the immunities of the Organisation itself might be imperiled by reason of breach of - for want of a better phrase – the ‘terms and conditions’ of the EPC.

### **Observations in respect of the European Patent Convention**

3.18 All too often, privileges and immunities are applied by courts blindly, without considering whether the conditions precedent to their grant continue to be satisfied. The Protocol on Privileges and Immunities and the Vienna Convention, whether read together or separately, make it clear that any immunities from legal



suit enjoyed by the staff or President of the EPO are not absolute; rather they are functional and are designed only to further the interests and mission of the Organisation. It is contended that where staff or the President of the EPO act contrary to this objective or outside of their powers, then they may no longer be said to be acting within their official functions and consequently, should be prevented from asserting and benefiting from the privileges and immunities that would otherwise apply as part of the normal functioning of the Office.

- 3.19 Having regard to the Protocol on Privileges and Immunities, the Administrative Council and consequently, the Member States which agreed to adopt those provisions in furtherance of the Organisation's functions, have a duty incumbent upon them to waive the immunity of the EPO or its President where the proper administration of justice requires it (and it does not prejudice the interests of the Organisation).
- 3.20 Perhaps the most clear-cut example of a situation which would warrant the waiver of immunities is where a staff member or official assaulted someone. Take an absurd and far-fetched example, where there is evidence that the President of the EPO physically assaulted a staff member. In those circumstances, the Administrative Council would be faced with a serious allegation against a senior official over whom they have disciplinary authority. In this example, no argument can be made that such actions were undertaken in performance of official functions. The Administrative Council would surely be duty-bound to waive immunities in furtherance of its obligation of cooperation *to facilitate the proper administration of justice* and *to prevent any abuse of the privileges, immunities and facilities provided for in* the Protocol on Immunities. Yet this palpably absurd and frankly offensive situation, when it materialised in reality<sup>1</sup>, was met with a refusal by the Administrative Council – without reasons – to waive the immunities of the President. An argument can clearly be made in these circumstances that the Administrative Council and the Member States of the Organisation were remiss and/or that they erred in law in failing properly to exercise their discretion and duty of supervision. Whilst this unfortunate position arose in the past, it is demonstrative of the need for members of the Administrative Council to take

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<sup>1</sup> Appeal by *In re. Rombach-Lé Guludec*, ILOAT 1581, attempting to have the immunities of President Braendli lifted.



their duties and responsibilities seriously. Attitudes to privileges and immunities have moved on and if such a predicament were to arise today, it is highly likely that the EPOrg would – quite rightly – find its immunities imperiled.

- 3.21 Indeed, the current situation at the EPO gives clear cause for concern. It is extraordinary that the Vice President of an organisation – which is itself merely a product of treaty – would pronounce on national television, in respect of a case in which judgment remains extant, that the senior officials of that organisation have such little regard for the laws of their host nation that they will simply ignore the finding of the appellate court of that country.
- 3.22 There are very clear and justified reasons for concern that the proper functioning of the EPO is being impeded by the conduct of its senior officials. The Administrative Council has the theoretical legal tools to remedy the failings of officials of the Office and indeed, a duty to do so would also seem to be a condition of the EPO maintaining its privileges and immunities. However, it should also be noted that the Administrative Council must be given the practical capacity to discharge its obligations, for a theoretical ability absent the means of enforcing the same is meaningless. To this end, the Administrative Council must be afforded sufficient resources in its secretariat to give effect to its legal and supervisory rights and responsibilities.

#### **4 THE LAW: HUMAN RIGHTS CONSIDERATIONS**

- 4.1 The Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights ('ECHR')) emanates from the Council of Europe ('CoE') and provides access to a remedy in the European Court of Human Rights ('ECtHR'). Ratification of the ECHR was a condition precedent of membership of the CoE.
- 4.2 The ECHR sets out a number of rights, the most relevant of which are as follows:



## **Article 6: the right to a fair trial**

- 1 *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

In addition to which there are further rights which, whilst they relate to criminal offences, the principles may be applied in analogous cases. These concern the presumption of innocence, the right to be informed of the charge against him, adequate time and facilities for preparation of his defence, legal assistance – which shall be free where the interests of justice so require – and the right to examine witnesses.

## **Article 8: the right to respect for private and family life**

- 1 *Everyone has the right to respect for his private and family life, his home and his correspondence.*
- 2 *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

## **Article 10: freedom of expression**

- 1 *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
- 2 *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*



## **Article 11: freedom assembly and association**

- 1 *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
- 2 *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

## **Article 14: Prohibition of discrimination**

*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

## **Article 17: Prohibition of abuse of rights**

*Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.*

- 4.3 It is not hard to see that many of the circumstances that have arisen at the EPO amount to violations of the rights contained in the ECHR. To list but a few: fair trial provisions are fundamentally absent at the EPO, since the President sits as a judge in his own cause; there is a lack of equality of arms, delays, an absence of due process and a tribunal that is itself beholden for its funding to the very institutions it is being invited to find against. The provisions in respect of sick leave (and the effective 'house arrest' of staff members) appear to contravene the right to a private and family life. The arbitrary treatment and abuses of the system in respect of staff representatives appear to be an attack on all of the rights listed above.
- 4.4 Many of the Member States of the EPO are signatories to the European Convention on Human Rights (ECHR). Whilst the EPO itself is not directly



bound by the ECHR, it seems perverse that citizens of countries which are signatories and who would ordinarily benefit from such protections in domestic jurisdictions should be actively prevented from accessing comparable rights and norms simply because they have agreed to serve at the EPO.

4.5 Diplomatic immunity emerged as a means of securing safe passage for the representatives of states so that, even in times of hostility, lines of communications might remain open. Yet the application of these same privileges and immunities in circumstances where no such issues are at play, but where the agents are instead concerned with coffee or olive oil production<sup>2</sup> or indeed patents, seems at best to be anachronistic and at worst, an affront to basic legal standards and norms. However, there appears to be a shift in attitudes towards the application of immunities in a number of the Member States of the EPO. The Dutch courts have lifted the immunities of Office; final judgment is current being awaited. The Court of Appeal of England and Wales considered the issue of the assertion of diplomatic immunity in an employment case in 2015, in the joined cases of *Janah v Libya; Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33<sup>3</sup>. In those cases, the Court found that certain provisions of the State Immunity Act 1978 breached Articles 6 and 14 of the ECHR and held that the Charter of Fundamental Rights of the European Union requires those provisions to be disapplied insofar as they bar employment law claims that are within the material scope of the EU law. This is significant because this is an example of a Member State of the EPO concluding that absolute diplomatic immunities are no longer sustainable; rather they are to be balanced with other rights and laws.

4.6 Patents are a means of protecting intellectual property and are capable of possessing value: indeed this is one of the primary motivations for seeking the grant of a patent. The EPO is currently pursuing the European Patent with Unitary Effect which can be relied upon within signatory states. However, the protection and peaceful enjoyment of property is also enshrined within the ECHR (Article 1 of The First Protocol). But what of the situation where there is tension

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<sup>2</sup> Both the International Coffee Organisation based in London and the International Olive Oil Council based in Madrid enjoy immunity from legal suit.

<sup>3</sup> *Janah v Libya; Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33





between the two? Will the EPO simply assert immunity from the ECHR in that situation too? It would seem fanciful for the EPO to be promoting on the one hand a unitary patent as a means of protecting property in Member States, whilst simultaneously denying the protections afforded to property under the ECHR.

- 4.7 It is misleading to suggest that domestic laws are unknown to the EPO; rather, the Organisation engages directly with national jurisdictions in respect of patent applications as evidence by, *inter alia*, the publication of a booklet called *National law relating to the EPC* as well as the recognition of domestic patents.

### **Domestic Remedies**

- 4.8 If staff members of the EPO found themselves without a remedy, the position would likely be very different if they were in their home States. Not only do those in many national jurisdictions enjoy a plethora of rights pursuant to the ECHR, they also enjoy access to independent employment tribunals, the ability to seek the protection and punishment of the criminal justice system against aggressors, a civil remedy for wrongs, for example, through actions in negligence and, of course, judicial review of decisions of public bodies which act unlawfully or which fail to act where they should.
- 4.9 National Governments are represented at the EPO by delegates from their national intellectual property offices. During missions to the EPO, representatives of those national offices enjoy the privileges and immunities of the Organisation. However, unlike the President, they *are* present at the behest of their domestic governments and as such, it would seem that they do remain subject to the laws of their sending State. With this in mind it might well be possible to challenge a failure by national delegations to discharge their supervisory functions in the domestic courts of the sending State.



## The Human Rights Mission Statement of the European Union

4.10 In 2004, European Union foreign minister adopted *Guidelines on Human Rights Defenders*<sup>4</sup> (the ‘Guidelines’) which set out the EU’s role and aspirations for cooperation with human rights defenders and propose practical means of assisting at-risk activists. The European Union has made it clear that the promotion of human rights is a priority:

*‘Support to human rights defenders is one of the major priorities of the EU’s external human rights policy. Human rights defenders are our natural and indispensable allies in the promotion of human rights and democratisation in their respective countries.’*

Annex 1 to the *Guidelines* contains the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, which states, *inter alia*:

*The General Assembly,*

*Reaffirming the importance of the observance of the purposes and principles of the Charter of the United Nations for the promotion and protection of all human rights and fundamental freedoms for all persons in all countries of the world,*

...

*Stressing that all members of the international community shall fulfil, jointly and separately, their solemn obligation to promote and encourage respect for human rights and fundamental freedoms for all without distinction of any kind, including distinctions based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and reaffirming the particular importance of achieving international cooperation to fulfil this obligation according to the Charter,*

...

*Reiterating that all human rights and fundamental freedoms are universal, indivisible, interdependent and interrelated and should be promoted and implemented in a fair and equitable manner, without prejudice to the implementation of each of those rights and freedoms,*

*Stressing that the prime responsibility and duty to promote and protect human rights and fundamental freedoms lie with the State*

After which the specific Article rights are outlined.

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<sup>4</sup> Available at: [http://eeas.europa.eu/human\\_rights/guidelines/defenders/docs/16332-re02\\_08\\_en.pdf](http://eeas.europa.eu/human_rights/guidelines/defenders/docs/16332-re02_08_en.pdf)



- 4.11 Regrettably, it would appear, that this quite proper concern for human rights and the rule of law expressed in the EU's foreign policy and by its Member States has yet to reach staff members serving at the EPO. It is hard to see how a lack of action and an unwillingness to protect the rights of staff members on the part of the Member States of the EPO can be compatible with these clearly stated policy objectives and it would seem to give rise to a quite justifiable claim of hypocrisy: how can Member States of the EU pursue these objectives for others, whilst simultaneously neglecting to protect the rights of, and promoting rule of law protections for, their own citizens serving in international organisations abroad?

## 5 THE LAW: INTERNAL JURISDICTION OF THE EPO

- 5.1 The maintenance of privileges and immunities by the EPO, like other international organisations, is such that the internal laws, rules and procedures of the organisation take on far greater significance than might otherwise be the case in institutions in which staff members have recourse to national mechanisms of redress and normative standards of justice.
- 5.2 Within international administrative law, causes of action are typically characterised as flowing from conduct which is: 1) *ultra vires*, that is to say, that the decision-maker acted beyond or indeed, outside of his powers; 2) a *détournement de pouvoir* whereby the individual exercising discretion did so with an irregular motive or purpose; or 3) in breach of the procedural regularity, *per se*.
- 5.3 Whether or not officials of the EPO have acted *ultra vires* or with *détournement de pouvoir* is a matter to be determined on the facts of a particular case, although it would seem appropriate to note at this juncture that much of the conduct complained of by the staff of the EPO would certainly seem to fall within these actionable causes. Procedural irregularity, on the other hand, may give rise to a remedy without the need to demonstrate that the decision-maker acted beyond his powers or with some improper purpose.



- 5.4 Amerasinghe is a former judge, an eminent lawyer and international administrative law academic; his book *The Law of the International Civil Service*<sup>5</sup> remains a leading practitioner text on the subject. As he points out: *International administrative law tribunals have not hesitated to emphasize the need for fair procedure to be followed in taking discretionary administrative decisions*<sup>6</sup>. It is a point that was made by the World Bank Administrative Tribunal in the case of *Salle*<sup>6</sup> which concerned the non-confirmation of a probationary appointment:

*The Tribunal deems it necessary to emphasize the importance of the requirement sometimes subsumed under the phrase 'due process of law'. The very discretion granted to the Respondent in reaching its decision at the end of probation makes it all the more imperative that procedural guarantees ensuring the staff member of fair treatment be respected.'*

- 5.5 The EPO enjoys functional immunity from legal suit; as a consequence, in the normal course of affairs, its staff members have no recourse to national courts<sup>7</sup>. For this reason, procedural regularity takes on even greater significance in international organisations. Adherence by the Organisation to its Regulations and the checks and balances that should be applied, is fundamental to protecting the rights and interests of its staff members.
- 5.6 A consideration of the conduct of the President, the Administrative Council and the Member States of the EPO gives significant cause for concern. It would appear that there have been significant breaches of the internal law of the EPO which might well be contrary to the ECHR. The specific instances of breach are considered in depth at Annex 1 to this Opinion.
- 5.7 The situation at the EPO and the apparent disregard by senior officials for procedural regularity and due process is of concern not only for staff members, but also for the Administrative Council and Member States, for such conduct clearly *'prevents the normal course of justice'*. Furthermore, the impact that this conduct

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<sup>5</sup> Amerasinghe, C.F., *The Law of the International Civil Service* (1994) OUP 2<sup>nd</sup> Ed. p366

<sup>6</sup> WBAT [1983, Part 1], Decisions No.10 at p23

<sup>7</sup> The importance of consultations, engaging with staff and providing access to a proper remedy have been demonstrated by the lifting of the immunities of the EPO by the Dutch Courts.



has had on the morale and levels of discord amongst staff is contrary to the interests of the Organisation. As such, it is certainly arguable that permitting the situation to continue without remedy would itself imperil the immunities of Organisation, first, because such conduct may be contrary to the EPC and secondly, because of linked human rights violations.

## 6 CONCLUSION

6.1 Having considered the constituent treaties, conventions and laws of the EPOrg, it seems clear that the Administrative Council not only has a *right* to exercise supervisory jurisdiction over senior officials of the EPO, but a *duty* to do so. It would also seem that a compelling case can be made out to challenge the immunities of the Organisation where the terms of the EPC are not complied with or where the Administrative Council is negligent in respect of its responsibilities. Furthermore, challenging Member States in domestic courts would seem to be an avenue worth exploring further.

6.2 In light of the above, it would seem that Member States, by virtue of their representation on the Administrative Council, have a number of responsibilities at various different levels:

1. To the EPOrg, in discharging its supervisory functions;
2. To the signatories of the EPC (and in particular, the host States), in fulfilling their obligations under that Convention and in remaining compliant with the conditions pursuant to which the immunities of the Organisation were granted;
3. to *all* staff members of the EPO, in fulfilling their obligations on the Administrative Council in accordance with the EPC; and
4. Specifically to the staff members of the EPO, in ensuring that, their actions are compliant with their domestic legal obligations under legislation which gives effect to the ECHR.



- 6.3 This opinion has considered a number of different areas of responsibility and liability. It may be pragmatic to undertake further work which would look in considerably more detail at the mechanisms and avenues for pursuing Member States in the domestic courts in respect of potential domestic and ECHR remedies.
- 6.4 Finally, readers are invited to consider Annex 1 to this Opinion which provides in-depth analysis of specific breaches and violations at the EPO.

If we can assist further or if you require clarification in respect of any of the points above, please do not hesitate to contact us.

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Tuesday, 31<sup>st</sup> May 2016  
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**BREACHES OF BASIC AND FUNDAMENTAL RIGHTS AT THE EPO**

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## Executive Summary

This document is an annex to, and should be read in conjunction with, the *Legal Opinion Considering the Actions of the President, The Administrative council and the Member States of the European Patent Office*. This document considers the specific reforms to the European Patent Office introduced by its current President, Mr. Battistelli, and in doing so, it has regard to the law and systems of oversight of the EPO, as well as basic European democratic and legal standards. The areas that have been adversely affected by the changes introduced by the President are considerable and they impact on, *inter alia*: the Investigative Guidelines; audit and oversight; freedom of association and the right to strike; the internal justice system; sickness provisions; medical confidentiality; data protection; and the basic freedoms of staff members, even post-employment. The relevant instruments and circulars which give effect to these changes and the circumstances surrounding them, are considered below.

### 1 Circular No. 342 '*Guidelines for Investigations at the EPO*'

- 1.1 Having regard to the importance of procedural regularity in international organisations, the conduct of the President and the failures of the Administrative Council in supervising his conduct, give rise to cause for concern, for it appears that little regard has been had to even the most basic legal and democratic standards. Particular attention should be paid to Circular No. 342 '*Guidelines for Investigations at the EPO*' ('Circular No. 342').
- 1.2 Circular No. 342 was promulgated by the President on 30 November 2012 and entered into force on 1 January 2013. The Circular has a background of requests for review, addressed to the Administrative Council, issued by those members of the General Advisory Committee ('GAC') that were nominated by the Staff Committee; by the Staff Committee itself; and by the Central Staff Committee ('CSC'), all of which expressed serious concerns about the investigations that were being conducted and whether they were independent, fair and proportionate. Indeed, doubts were expressed as to whether they would comply with even the most basic due process requirements or whether they would safeguard the rights of staff. With these concerns in mind, the CSC drew the attention of the Council to various contentious issues relating to Circular No. 342. It was noted, *inter alia*, that the Investigative Guidelines gave excessive powers to the President of the EPO and to the Investigation Unit and that they failed to provide staff with basic protection against self-incrimination, incrimination of family members and violation of private property. The CSC requested an independent legal evaluation of Circular No. 342 and the related Circular 341 to determine whether their provisions were in compliance with international human rights conventions, and whether they afforded EPO staff a level of protection equivalent to that provided





in the EPO contracting states, against arbitrary interference with privacy, family, home and correspondence. In February 2014, in a document entitled '*Governance of the EPO*', the CSC addressed the Administrative Council, as the supervisory body of the EPO and requested support to re-establish proper balance in the Organisation's governance and to restore a better working environment within the Office. In this document, the CSC once again attempted to draw the attention of the Council to its concerns relating to Circular No. 342. The CSC requested that the document be submitted to the Council in accordance with Article 9(2.2)(b) of its rules of procedure. The President declined to submit the document to the Administrative Council.

### **The Legality of Circular No. 342**

- 1.3 An inspection of Circular No. 342 raises serious concerns in respect of both of its content and legal basis. In the context of the EPOrg, the EPC has the status of primary law. The '*Service Regulations for permanent employees of the European Patent Office*' constitute a body of 'secondary law' adopted by the governing body of the Organisation, namely, the Administrative Council. The competence to adopt and to amend the Service Regulations is vested solely and exclusively in the Council under Article 33(2)(b) EPC. The President is empowered to take all necessary steps to ensure the functioning of the EPO, including the adoption of internal administrative instructions and information to the public (Article 10(2)(a), EPC). However, a Circular is a non-legislative instrument of general application which is intended to provide implementing rules for a specific hierarchically superior provision of the Service Regulations. Under normal circumstances, a Circular is promulgated by the Office Administration following the adoption of a corresponding amendment to the Service Regulations by the Administrative Council. Following the applicable hierarchy of norms, the EPC prevails over the Service Regulations which prevail over Circulars and similar documents. As such, in the event that the President intends to introduce, change or amend regulations that lie within the legislative competence of the Council, he has to submit a proposal to the Council. He is not competent to introduce such regulations of his own motion without the prior approval of the Council. Having regard to the above, it is striking that Circular No. 342 does not provide implementing rules for any hierarchically superior provision of the Service Regulations. One must look to form and not only title and despite being promulgated in the form of a Circular, it is effectively an autonomous and parallel regulation which constitutes a *de facto* **amendment** of the Service Regulations. In light of the fact that Circular No. 342 was never subject to scrutiny and approval by the Council pursuant to Article 33(2)(b) EPC, but was instead unilaterally promulgated by the President, one might argue that Circular No. 342 is a product of *ultra vires* actions by the President, which has no satisfactory legal basis in the EPC or in the Service Regulations. Consequently, the decisions which flow from it unlawful.



- 1.4 The organisational and procedural legal deficiencies are concerning. The Investigative Unit introduced by Circular No. 342 is directly subordinate to the President and thus lacks the separation of powers which would be necessary to ensure the independence and impartiality of the investigative procedure. As a matter of fact, the Investigative Unit forms part of the EPO's Principal Directorate Internal Audit and Oversight (PDIAO); article IV.5 of the EPO Charter for Internal Audit and Oversight reads as follows:

*'PDIAO's work shall be carried out on the President's behalf (or on behalf of the Supervisory Board of the Funds). The Head of PDIAO shall report administratively to the President, be directly subordinate to him alone and be answerable to him for disciplinary purposes.'* (emphasis added).

- 1.5 Now, in this context, it is evident that the independence of the Investigative Unit is seriously threatened by its own nature of part of a Directorate reporting and responding to the President only. Moreover, the appointment and dismissal of the Head of PDIAO (PD 0.6) is under the President's discretion and this is a further indication of the Unit's lack of independence and subordination to the President. The existing institutional arrangements are insufficient to ensure the independence and impartiality of the investigative process.
- 1.6 From a procedural perspective, Circular No. 342 foresees two triggers for the investigative process: (a) an allegation of misconduct (Art. 9(2)), or (b) a request by the President (Art. 9(3)). With respect to allegations of 'misconduct', the Guidelines make no distinction between types of misconduct (e.g. violation of the code of conduct, harassment, fraud etc.). The absence of any such distinction implies that all possible types of misconduct are now to be reported to and handled by Internal Audit, which, as noted above, operates directly under the authority of the President without any external oversight. In addition, according to Articles 10 and 11, allegations of misconduct are subject to initial review and preliminary evaluation before an investigative process is started. This is not the case for requests by the President which do not require a suspicion of misconduct or any other justification. There is nothing in the Guidelines to prevent the President from investigating whomever he wants, for whatever reason he may choose and without any obligation to inform the subject of the investigation.
- 1.7 Circular No. 342 does not recognise the right to remain silent. According to Art. 8(1) *'All persons covered by [...] this Circular shall be obliged to co-operate fully with the investigative unit'*. According to Art. 8(3), *'failure to co-operate without legal justification'* may constitute misconduct and hence expose the



person concerned to disciplinary proceedings. Neither the Service Regulations nor the Guidelines provide any legal basis for non-cooperation: the duty to co-operate thus seems absolute and there is no guidance on what might be considered legitimate grounds for non-cooperation. Moreover, considering the above, the fact that according to Art. 17(6), the subject of an investigation does not have the right of legal assistance during hearings is even more concerning and may violate Article 6, paragraph 3(c), of the ECHR.

- 1.8 Other clear examples of unlawful applications of Circular No. 342 will be analysed in the following paragraphs. Circular No. 342 foresees the search and seizure of all data and materials owned by the Office or present on its premises. There is no effective protection against access to private material (e.g. personal mobile phones) or confidential information (e.g. medical file, appeals procedures or legally privileged material) other than, in some specific cases, a requirement for prior authorisation of the Data Protection Office which can be dispensed with if this would jeopardise the investigation.
- 1.9 Circular No. 342 expressly foresees access to evidence located outside the Office premises (Art. 16(9)). It is stipulated that the investigative unit *‘must abide by all the applicable provisions of local law or obtain prior written permission from the individual concerned’*. Yet, in practice, having regard to the duty to co-operate, it would seem that such written permission cannot be refused without exposing the subject of the investigation to the risk of further allegations due to a purported ‘failure to co-operate’.
- 1.10 The results of the investigation form the basis for further decisions ultimately taken by the appointing authority, which in most cases will be the President. If the investigative unit concludes that allegations of fraud, misconduct or harassment are ‘substantiated’, this could lead to disciplinary proceedings and ultimately dismissal. According to Art. 18(4)(ii), the investigative unit will base its conclusions ‘on a preponderance of the evidence’. Given the potentially serious consequences, this is an unacceptable, arbitrary standard of proof.
- 1.11 According to Article 18(7) *‘the subject of an investigation shall receive a copy of the report if and when, on the basis of the report, disciplinary proceedings are initiated’*, meaning that an investigative report on a staff member may exist without his or her knowledge of the allegations. Such a lack of transparency would not seem acceptable in any contracting state and may well contravene data protection laws.
- 1.12 Another major deficiency in Circular No. 342 is the lack of any effective means of redress in the case of unlawful, abusive or otherwise disproportionate actions of the investigative unit.



According to Art. 18(9) Circ. 342, the report does not constitute an act or decision within the meaning of Article 108(1) Service Regulations and thus cannot be independently appealed. Under this provision, the redress available to a staff member adversely affected by the actions of the investigative unit is limited to the means of redress against any decision taken on the basis of the report. This results in a situation in which the investigators can act with impunity during the investigative process as they are effectively immune from any independent control or oversight. This is particularly clear in relation to medical issues, where the investigative unit takes the position that it does not recognise medical certificates issued by external medical practitioners, but only the opinion of medical practitioners acting on behalf of the EPO. Even the Data Protection Guidelines (DPG) contain a series of derogations applicable to the ‘investigative processes’, which can be invoked to negate rights that the data subject would normally enjoy. Article 14 DPG (*Rights of the data subject*) explicitly accords precedence to Circular No. 342, stating in paragraph (8) that:

*‘[w]here the provisions of this Article conflict with the provisions for internal investigative processes, the provisions on internal investigative processes shall prevail’.*

As such, ‘data subjects’ whose rights are infringed by the actions of the investigative unit do not appear to have any effective means of redress.

- 1.13 In CA/33/13, the Central Staff Committee (CSC) expressed doubts whether Circular No. 342 is in accordance with Art. 12 of the Universal Declaration of Human Rights, according to which:

*‘No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.’*

- 1.14 The CSC requested the Administrative Council to commission an independent legal evaluation of Circulars 341 and 342 in order to answer the following questions: (a) are Circulars 341 and 342 in compliance with international human rights conventions, and (b) do Circulars 341 and 342 afford staff of the EPO a level of protection against arbitrary interference with his or her privacy, family, home or correspondence that is equivalent to that provided in the EPO Member States? It is understood that, to date, the requested independent legal evaluation has not taken place.
- 1.15 The considerations above raise a number of practical issues which appear to make the investigative process tainted and biased. The absence of a clear definition of misconduct, the vague information



provided on the allegations, the way interviews are conducted without proper basic guarantees for accused persons, such as legal assistance and the application of a reverse burden which is created by the imposition of a duty of cooperation, demonstrate that the process is far from fair, impartial and independent. The overall impression is that rather than being used in an objective and impartial manner to investigate *bona fide* incidents of alleged 'misconduct', Circular No. 342 is being employed in a selective and politically biased manner as an instrument for targeting individuals who are perceived by the Office Administration as being 'irksome'. Regardless of whether this is *in fact* the case, there is nothing in the Circular that prevents the Organisation from acting in this way.

- 1.16 In connection with this, Circular 341 (Part. II, Art. 2(2)) foresees that '*A single incident can constitute harassment if it is so severe that it has a negative impact on the overall working environment.*' This could represent a very convenient basis for raising accusations of harassment in politically motivated cases targeting staff representatives. It would appear from the 2013 Activity Report issued by the investigative unit, that following the introduction of Circulars No. 341 and 342, there are no longer cases of harassment within the EPO, other than those involving staff representatives. It is submitted that the data – if accurate – speaks for itself: the investigative process *has* been misused and abused as an instrument for targeting individual staff members. This clearly raises issue of procedural irregularity and *détournement de pouvoir*.

## 2 The Audit Function

- 2.1 Intimately related to the above, is the abolition of the Audit Committee, the corresponding strengthening of internal audit and the consequent function of the Investigative Unit reporting to the President (as analysed above in the context of the Circular No. 342), which occurred when Mr Battistelli was appointed as President of the EPO. It is important to notice that the audit function in the international organisations' system traditionally comprises two elements:

1. an external audit, carried out by an independent body reporting to the governing body; and
2. an internal audit established within the entity usually reporting to the highest level of the entity's executive body.

A third element consisting of an independent Audit Committee has assumed increasing importance since the private-sector corporate debacles in the USA and Europe resulting mostly from control, supervision and governance failures during the 1990s. The reaction of legislators and professional bodies was to establish a number of principles on corporate governance. This trend also gained traction in the public sector. The corrective actions taken were the strengthening of the audit process and the establishment of an independent audit committee. Such audit committees provide



an additional level of assurance to stakeholders in matters such as transparency, risk management and control, as well as managing internal and external audit.

- 2.2 In 2008 the Administrative Council decided in favour of the introduction of an Audit Committee. The reasons given included the following (CA/140/08):

*‘An audit committee ... would enhance a climate of mutual trust between the Office and the Council to the advantage of the whole Organisation and lastly of the stakeholders (citizens and industry). It would also improve the trust of the staff in the top management and in the Council in enhancing high standards of integrity, transparency and fairness and in enabling effective fraud prevention mechanisms and a better response to sensitive issues’.*

CA/140/08 also recommended strengthening the independence of the EPO’s Internal Audit (IA), *inter alia* “to ensure that the supervision of IA does not rely entirely on the President”.

- 2.3 One of Mr Battistelli's first actions upon being appointed as President of the EPO was to propose the abolition of the Audit Committee (CA/55/11), after only one year of operation. The Administrative Council accepted the proposal without any apparent opposition. Having achieved this change, Mr Battistelli then removed the then Head of Internal Audit from his post – a decision that would not have been possible without the agreement of the Audit Committee, had that body still been in existence. The President then strengthened Internal Audit through the creation of the Investigative Unit. As stated above, Internal Audit is a department that is directly under the authority of the President, reporting to and taking orders exclusively from, him. However, significantly, the creation of the Investigative Unit and the introduction of the Investigation Guidelines were not introduced through amendments to the Service Regulations, duly enacted following a decision of the Administrative Council, as foreseen in Art. 33(2) of the EPC. In fact, they were promulgated unilaterally by the President by means of Circular No. 342.
- 2.4 The scope of Circular No. 342 is much more far-reaching than conventional circulars: it has the effective character of primary legislation, albeit in parallel with the Service Regulations, rather than being incorporated therein. The President has effectively bypassed the Council’s legislative powers. Furthermore, in contrast to the disciplinary procedure (Art. 98(3) Service Regulations) and the appeal procedure (Art. 111(1)(b) Service Regulations), the investigative procedure does not foresee any involvement of the Administrative Council when the subject of an investigation is an appointee of the Administrative Council, pursuant to Article 11 EPC, i.e. Members and Chairmen of the Boards of Appeal and Vice-Presidents.



### 3 Freedom of Association and the Right to Strike

- 3.1 Another important chapter of the unlawful measures adopted *ultra vires* by the President concerns staff representation and the right to strike. The new strike regulations unilaterally imposed by Mr Battistelli on the staff during an on-going social conflict foresee that the Administration (i.e. the employer) and not the Staff Union is entrusted with organising the strike ballot, while the corresponding Circular 347 allows the administration a period of one month to do this (Art. 3 Circ. 347). At the same time, it limits the duration of any strike action to the employer's discretion and in any case, to a maximum of one month (Art. 4 Circ. 347), independent of the number of actual days of strike within that period. Although the new strike regulations do not explicitly ban strikes, the effect is similar, for they make strikes almost impossible to organise and implement. This appears to be a further usurpation by the President of the prerogatives of the Administrative Council.
- 3.2 Several recent practical examples are indicative of the Office's and, in particular, the President's attitude against strikes and other initiatives organised by the staff. Staff at the EPO have always had the right to strike (reference is made to, e.g., ILOAT No. 1041 or the strike instructions of 2006). Previously, the right to strike also covered other industrial actions such as B84/85 actions (see ILOAT No. 2516). The new regulations dramatically limit those rights. A clear violation of the freedom of association occurred in February 2015 when a planned demonstration was forbidden by the President; in his letter dated 20<sup>th</sup> February 2015, he threatened to use disciplinary measures against staff willing to take part in the demonstration, stating: *'Should the planned demonstration actually take place...those concerned will be held liable for the breach of their obligations under the EPC and the Service regulations'*. The President has refused requests for strike ballots (see e.g. Communiqué No. 54), behaviour something which is not foreseen by the new regulations.
- 3.3 Frustrated by the lack of access to internal legal remedies, staff and their representatives have also turned to national courts to make their voice heard, by challenging the unlawfulness of the strike regulations before a Dutch national court. A final decision of the Dutch Supreme Court remains extant. However, in an extraordinary display of arrogance in the face of one of the Organisation's host states, the Vice-President of the Office has stated on Dutch national television that the organisation will simply ignore the decision of that Court.
- 3.4 In the last three years the relations between the President of the EPO and staff have degraded to an historical low point. A staff survey performed by SUEPO in 2013 showed that only 7% of the staff of the EPO trust its President. Unfortunately, their trust in the Administrative Council is





even lower, no doubt in part due to its perceived failure to restrain the President. It is understood that the results of the 2016 survey (which have yet to be published) demonstrate a further deterioration. Such an extremely low level of confidence in governance does not appear to have any precedent in any other national or international organisation. It is striking that staff participation in the ballot on a recent call to strike was at almost 70%, with 90% of staff voting in favour of the strike. The actual participation was much lower due to the fact that considerable pressure was applied to various groups of staff not to strike. The ballot itself should, however, be considered as an impressive lack of confidence in the President.

#### **4 Interference with staff representation**

- 4.1 In the context of staff rights to representation, it is also of note that the system of staff committee elections has been amended through Circular 355 '*Regulations for Staff Committee elections*' which entered into force on 2<sup>nd</sup> April 2014, together with the amendment to Article 33-37 of the Service Regulations through CA/D 2/14 entered into force on 1<sup>st</sup> April 2014. Circular 355 puts the organization of Staff Committee elections entirely under the control of the employer (Art. 3(2), 7(2), 8, 9 Circ. 355) and imposes a '*single non-transferable vote*' system that does not appear to have precedent in Europe or in any other international organisation (Art. 6(5) Circ. 355). The previous system provided for correlation between the number of votes. The current system allows only one non-transferable preference per person, narrowing the inclusion of independent elected members. In addition, Art. 7(3) Circ. 355 foresees that if a full member of the CSC resigns, he/she shall be replaced by the first available alternate who obtained the most votes. The President refused to apply this rule in the case of a particular a CSC (The Hague) staff member and there is concern of interference by the administration with nominations.
- 4.2 Article 34 Service Regulations exists to protect staff representatives against retaliation. This Article is clearly not respected by the administration: thus far, five staff representatives (two nominated and three elected) have been subjected to disciplinary measures and many more have been threatened with them. The Administration and the President have breached important rights of the staff members to have independent elections.

#### **5 Disregard for supervisory bodies, contrary to the EPC**

- 5.1 The General Advisory Committee ('GAC') is a statutory body with equal numbers of members appointed by the administration and by the staff committee that must be consulted by the President on any proposal which concerns the whole, or part, of the staff or the recipients of





pensions (Article 38 Service Regulations). The function of the GAC is to advise the President in order to enable him to take the best possible decision. From the day that the EPO first opened its doors in 1977 until 2011, none of the Presidents had ever nominated staff of grade higher than A6 to the GAC. In 2011 Mr Battistelli departed from this established practice on the pretence of strengthening the GAC by nominating all Vice-Presidents to the body.

- 5.2 Such a change to the composition of the GAC is not in line with its intended, non-partisan statutory function: as direct subordinates of the President, the Vice-Presidents can be consulted by Mr. Battistelli at any time: such consultation does not require a GAC meeting. Moreover, the Vice-Presidents are part of the EPO's senior management and as such, they may deputise for the President. This has the perverse effect of degrading the status of the GAC, for as members, they are essentially advising themselves. Their independence may also be adversely affected by the fact that they are appointed on the basis of five-year contracts. In light of the suspicion that the GAC has effectively been 'packed' with supporters of the President, it is striking that, at the time of their nomination to the GAC, three of the five Vice-Presidents were new to the Office. Furthermore, such a lack of experience of the Office and its staff has a negative impact on their ability to give a meaningful opinion on a whole range of significant matters affecting staff members. Finally, it is worth noting that since 2011, the GAC members nominated by the President have not given a single negative opinion on any of his proposals. In the same time period, negative opinions expressed by the GAC members nominated by the Staff Committee have been ignored by the President. The conclusion is that rather than strengthening the GAC, the President has in fact weakened it and in so doing has seriously eroded the credibility of the statutory consultation process.
- 5.3 Similar developments can also be observed in the case of other statutory bodies. Indeed, the President routinely ignores recommendations of the Internal Appeals Committee which are in favour of staff (see below); he has ignored unanimous findings of incapacity by the Medical Committees; and in 2013 he even ignored the recommendations of a Disciplinary Committee and applied a sanction that was even more severe than the that which was originally claimed by his Administration and recommended by the Committee. The President's approach and the absence of reasoned recommendations is exacerbated because the GAC vote by a show of hands and the minutes of the GAC meetings are drafted and finalised by the Administration (whilst the approval of staff representatives is not required). This situation is indicative of a fundamental lack of respect for the competent statutory bodies and flies in the face of the clearly mandated supervisory functions contained in the EPC.



## 6 Functioning and weakening of the Internal Justice System

- 6.1 Decisions taken by the Administration that adversely affect individual staff members or prejudice the collective rights of staff can always, at least in principle, be challenged by means of an internal appeal. In 2012 the President announced a reform of the internal appeals system which included the introduction of a new, preliminary ‘management review’ step. Ostensibly, this was to make the management department that was responsible for the contested decision reflect upon, and possibly revise, its decision. However, such a step was already foreseen in the existing procedure, even if it almost never actually led to a concrete revision of the challenged decision.
- 6.2 The new mandatory ‘management review’ step has not produced any change in the unsatisfactory *status quo*. Perhaps it is significant that almost all of the obligations associated with the current review procedure burden the appellant. The success rate for staff, i.e. the percentage of cases allowed or allowed in part was about 5% in 2014 and 4% in 2015 (CA/20/16 page 55). In terms of its practical effect, the management review step thus merely adds a further three months’ delay to an already lengthy appeal procedure. Indeed, the internal appeals reform has failed to resolve the backlog in the internal appeals system which now stands at many hundreds of cases. The President has thus far also failed to take effective measures to tackle the increasing backlog of EPO cases before the ILOAT. One of the contributing factors to this problem is the role of the Administration in causing so many cases to be brought. The President routinely ignores recommendations of the Internal Appeals Committee that are in favour of appellant staff members. Of the 243 cases decided by the President in 2015, only one was allowed in full and another one was allowed in part. The other 241 were rejected (CA/20/16 page 57). Such an approach by the Administration offers only one means of recourse for staff members: they are obliged to lodge a complaint before the ILOAT in order to seek a judgment on their grievances. As a consequence, both the backlog of work and the delays at the Tribunal constantly grow.
- 6.3 The overall proceedings remain excruciatingly slow. The total duration of the appeal procedure (both internally and at the Tribunal) has increased from about three years to seven years for some of the most recently judged cases and it will surely increase for newly filed appeals. The current measures taken to reduce the backlog merely mean that the overall duration will probably not exceed 15 years. In any event, it remains very likely that the President will never be confronted with a judgment from the ILOAT concerning a decision he made during his term of office. Moreover, the Tribunal has no means of enforcing its judgments within the EPO and the President understood to have ignored adverse judgments. The result is that an important source of



independent external control, which would provide crucial feedback on the legality of the Administration's decisions, has essentially been rendered null and void.

## **7 Sick leave entitlements and the related issue of medical opinions**

- 7.1 The text of article 62a (5) and (6), read in combination with Section B of Circular 367 (dated 11 May 2015) is striking:

*'(5) If a permanent employee wishes to spend sick leave elsewhere than at his place of residence referred to in Article 23, he shall obtain prior permission of the President of the Office.*

*(6) The President of the Office may verify by means of medical examinations whether the permanent employee's state of health justifies sick leave. These medical examinations may be conducted at the present address of the permanent employee. The terms and conditions for performing such examinations, which may also be conducted by external service providers, shall be laid down by the President of the Office.'*

This is a power that nation states do not purport to exercise over their citizens, with a few notable exceptions. If a staff member is planning medical consultation and treatment in a place other than the place of residence (which, according to Art. 23 is where the employee works), he or she has to inform the President and obtain his permission. These provisions pay no regard for the confidentiality of medical data and the dignity of staff members. In addition, the President of the Office is entitled to verify sick leave by medical examination at a permanent employee's present address and for this purpose the employee on sick leave must be available at that address from 10:00 to 12:00 and from 14:00 to 16:00 (Section B, Art. (3) Circ. 367). The only occasions that national governments may mandate the presence of an individual at a specific location is pursuant to a warrant or court order, whilst they are held in custody pursuant to criminal proceedings or subject to a court sentence of imprisonment or 'house arrest/detention', or in accordance with proceedings under mental health legislation which provides for detention. All of these circumstances are subject to extraordinarily high levels of review and oversight. This provision does not need supplementary comments as it is self-explanatory: the violation of basic staff rights is palpable. Quite how such a provision has been permitted by those charged with oversight of the EPO beggars belief.



7.2 Furthermore, according to art. 62a (7):

*‘[...] regardless of any working time arrangement or applicable salary deduction, for the purpose of computing sick leave accumulation, any absence on a working day shall be counted as a full day of sick leave’*

which means that any part of a day’s absence counts as a full day towards the 125 days sick leave that triggers a salary reduction, and this applies to a person working 80% of the time for health reasons. After 125 days of full or partial sick leave, a 10% deduction is made to the salary, again independently of whether the next 125 days are full or partial sick leave. During this period only full days annual leave may be taken. This is important because staff contributions to the social security and pension scheme are calculated on the basis of the full salary (Art. 62a (9) Service Regulations), therefore staff members with health issues working part-time, to whom extra care and consideration should be given, end up being penalised by their own health situation and paying a higher rate of contributions.

7.3 With reference to articles 89-91 of the Service Regulations, medical opinions shall be provided by a medical practitioner chosen by the President (Art. 89 (1)) and that the medical practitioner chosen by the President may, but does not have to, consult the employee’s doctor to obtain further information on the employee’s health status (Art. 89(3)). The President of the Office shall decide whether to follow the medical practitioner’s conclusion or to seek an additional medical opinion (Art. 89(5)). One would question the basis of the President’s competence to medical conclusions. However, in case of disagreement between the employee and the President the opinion of a second medical practitioner can be obtained and should this second opinion differ from the first one obtained, a third one can be sought. The regulations do not provide guidance on who is entitled to choose the medical practitioner responsible for giving the additional binding medical opinion, but from the tenor of the analysed provisions, one may infer that the choice must fall within the list of medical practitioners compiled by the President (art. 89 (1)).

7.4 According to Circular 367, Section C, permission of the Office is necessary for any absence from the place of residence such as vacation or a family visit and this is another questionable foray into the private sphere which should not be allowed in any work place. In addition to that, a retirement pension for health reasons shall be payable only once the incapacitated staff member has reached the age of 55 and has been totally incapacitated for at least 10 years (Art. 12a Pension Regulations; CA/D 2/15). This means that during incapacity, the employee, who may need help and care from his/her family, must remain at his or her duty station for a minimum of 10 years and at least until



55 years of age. This limitation of movement is unacceptable also in light of European basic principles such as freedom of movement and establishment and it represents a significant imposition on such staff members. Art 15 of the Pension Regulations also makes it clear that a former employee who receives a pension for health reasons is not allowed to perform any gainful activities or employment. Whether or not a staff member is able to perform her function at the EPO by reason of disability is a separate issue to whether he or she is able to perform *any* gainful activity. The only issue that should concern the EPO and over which it has any jurisdiction should be matters which appertain to the functioning of that organisation: where the activity is not in competition with, or does not result in the disclosure of sensitive information related to the activity he or she was performing at the Office, then there can also be no claim of conflict of interest. It is not hard to see that such oppressive regulation might well have an impact both on the physical and mental health of staff members affected. This does itself give rise to the issue of the EPO's liability for civil torts which arise from the imposition of such measure. The same concerns apply to those who were on invalidity sickness and have now been moved to the new scheme (CA/D 2/15, Art. 72, page 33/34), those same provisions applying, *mutatis mutandis*, to newly incapacitated staff members (CA/D 2/15, Art. 15(1), page 20/34).

- 7.5 The regulations and provisions related to incapacity have already changed several times raising serious questions about legal certainty for some of the Office's most vulnerable staff members. The frequent amendments to the incapacity scheme regulations by the Office in the past would seem to be demonstrative of a lack of genuine thought, consideration and consultation when it comes to making changes.

## **8 Confidentiality of medical data**

- 8.1 On 25<sup>th</sup> June 2014 the separation of the then Director of the Medical Advisory Unit (MAU) at the EPO – a medical doctor – was announced. The newly appointed Director had a degree in industrial relations but does not possess any medical qualification. On 24<sup>th</sup> March 2016, it was announced that the *ad interim* Director of the MAU was appointed Director of the newly created joint Health and Safety Unit ('H&S') with effect from 1<sup>st</sup> April 2016.
- 8.2 Whilst it is accepted that a non-medical person can manage a medical unit, this should be subject to certain requirements. Specifically, (i) respect for the confidentiality of medical records; (ii) separation of, and access to, medical information for non-medically qualified managers; (iii) direct supervision by medical practitioners should health and safety unit staff have cause to handle medical files, and (iv) the independence of medical doctors such that they should be free to carry



out their medical duties without interference from managers. The position at the EPO is striking as no such guarantees or safeguards have been put in place. Reference is made in particular to an organigram which appeared in the Gazette of January 2016, which showed that the units administering medical files ('Medical advisory and general administration' and 'Occupational health and safety') are under the direct authority of the Health & Safety Director while the medical advisor (or OH physician), appear to enjoy a merely consultative role.

- 8.3 The Health and Safety Director has four direct reports: the Head of section for medical advisory and general administration; the Head of department for the occupational health and safety unit; the OH physician and the medical advisor. The Director of the Health & Safety department is in turn under the authority of the Principal Director Human Resources. As such, there is concern that the administrative departments which store and administer medical data and which ultimately report to human resources lack the requisite independence and safeguards to protect medical confidentiality.
- 8.4 The new Director H&S is not bound by the Hippocratic Oath. If the Principal Director HR, as her superior, were to demand access to the medical file of a staff member, the Director H&S lacks the authority to refuse such a request; indeed, a refusal to comply would presumably result in a charge of insubordination. This set-up therefore lacks the institutional safeguards that are necessary to guarantee the confidentiality of staff medical data.
- 8.5 This also gives rise to the concern that the EPO may be placing external doctors acting for the organisation in danger of breaching their own professional obligations: medical doctors are personally responsible for ensuring the confidentiality of any medical data in their possession. They are not allowed to transmit medical information or records produced in their professional capacity to persons other than medical professionals, and even this requires specific and express consent by the staff member. Indeed, it should not be forgotten that the duty of confidentiality is one which is owed *to* the staff member *by* the medical professional; waiver may be granted by the staff member alone and it is not prerogative of medical professionals to disclose confidential information, absent express consent.
- 8.6 In April 2015, the Central Staff Committee wrote to the *ad interim* Director MAU, expressing its concerns about the confidentiality of the files managed by her Unit. The Committee then turned to the Vice-President of DG4, once again raising concerns in respect of the appointment of the *ad interim* Director MAU and the confidentiality of medical data. Mr Topic replied with a letter dated 27 April in which he postponed the discussion and accused the Committee of being an obstacle to the smooth running of the Office. To date no satisfactory answer has been received.



## 9 Data protection framework

- 9.1 The European Union does, quite rightly, take data protection seriously. Yet the framework at the EPO gives rise to significant cause for concern, which has also been expressed by the national data protection authorities of the main host state – the Federal Republic of Germany.
- 9.2 The Guidelines for the Protection of Personal Data in the European Patent Office ('EPO Data Protection Guidelines' or 'EPO DPG'), which were unilaterally adopted by the President and which entered into force on 1<sup>st</sup> April 2014. The current EPO DPG appear to fail to meet the standards of both EU data protection law and the national data protection laws of the Contracting States, in particular, the host countries of the EPO. As such, they do not provide a satisfactory framework for safeguarding the data protection rights of data subjects within the Office.
- 9.3 A key component of the EU data protection framework and which is reflected in the national data protection laws of all EU member states is the existence of an independent oversight body; yet this is conspicuously absent at the EPO. Indeed, the deficiencies in the existing system of data protection established by the EPO's Data Protection Guidelines have come to the attention of the national data protection authorities in the host state of the EPO's headquarters (Germany) and have even been the subject of a discussion in the Legal Affairs Committee of the German Federal Parliament (Bundestag).

### Background

- 9.4 The original version of the EPO Data Protection Guidelines was promulgated by the then President, Mr. Paul Braendli, on 29<sup>th</sup> June 1992 and entered into force on 1<sup>st</sup> July 1992. The 1992 Guidelines (hereinafter EPO DPG 1992) were prefaced by the following statement of 'Object and Purpose' (emphasis added):

*'The purpose of these guidelines is to ensure **that every person mentioned in Article 1 of the Service Regulations for Permanent Employees of the European Patent Office (EPO) and every other person whose personal data are used by reason of a relationship of service or former service of a person mentioned in Article 1 of the Service Regulations is guaranteed protection of his privacy and fundamental rights** with regard to the automated handling (collection, processing, transmission) of personal data within the EPO. **The rights of EPO employees under the Service Regulations shall not be affected by these guidelines.**'*

A draft proposal for the revision of the EPO Data Protection Guidelines was submitted to the General Advisory Committee (GAC) on 21<sup>st</sup> January 2014 as GAC/DOC 4/2014 (Revision of Data Protection).





- 9.5 The opinion of the GAC members nominated by the Staff Committee was not in favour of the revision. The objections raised by the Staff Committee nominees are summarised in the ‘Report of the 256<sup>th</sup> meeting of the GAC on 11<sup>th</sup> February 2014 in Munich’ which was issued by the Central Staff Committee on 26<sup>th</sup> February 2014.
- 9.6 In their submissions, the Staff Committee nominees noted that the guidelines proposed in GAC/DOC 4/2014 also applied to all external users whose data was processed by the EPO, which effectively increased the scope of the existing guidelines (i.e. EPO DPG 1992). In view of the proposed enlargement of scope, the question was raised as to whether the matter should not properly lie within the competence of the Administrative Council rather than the President.
- 9.7 Although extensive reference had been made to the EU Regulation (EC) 45/2001, it was noted that the proposed guidelines were not in conformity with the EU Regulation and would not be adequate for any EU institution. In particular, the equivalent of a fully independent supervisory authority (corresponding to the European Data Protection Supervisor established in the EU Regulation) was omitted. This needed to be taken into account in view of the fact that the EPO should grant Unitary Patents for the European Union. It was therefore recommended that the EU be consulted on the matter prior to any decision.
- 9.8 The Staff Committee nominees also objected to the flawed consultation procedure and pointed out that the Central Staff Committee had not been consulted, in violation of Art. 15(3) and 22(3) of the EPC at that time applicable guidelines (EPO DPG 1992).
- 9.9 Particular concern was expressed on certain proposed amendments, which appeared to significantly weaken the independence of the existing structures and reinforce the power of the President. In this regard, it was noted that reference to the respect of fundamental rights contained in the EPO DPG 1992 (and in European law, such as in Directive 95/46/EC) had been removed. The role of the Data Protection Officer, the figure responsible of the DPG oversight, had been weakened and the consultative role accorded to the Staff Committee under the EPO DPG 1992 had been completely omitted.
- 9.10 Finally, it was noted that according to European law, the processing of personal data for purposes other than those for which the data had been collected (so called ‘change of purpose’) is subject to exceptional circumstances. The proposed guidelines suggested that the President would be able unilaterally to decide on a ‘change of purpose’ within the EPO, without anybody being in a position to oppose it. In European institutions, only serious criminal offences could trigger





exceptional measures subject to the oversight of an independent supervisory authority. However, under the proposed guidelines, ‘serious offences’ as defined by the President of the EPO could be used to trigger internal investigations and thereby override the rights of data subjects.

- 9.11 Despite the considerable concerns expressed by the Staff Committee nominees on the GAC, the revised version of the EPO Data Protection Guidelines (hereinafter EPO DPG 2014) was signed by the President on 19<sup>th</sup> March 2014 and entered into force on 1<sup>st</sup> April 2014.

## **EPO DPG 2014**

### ***A unilateral and ultra vires enactment of the President***

- 9.12 The EPO DPG 2014 do not provide implementing rules for any hierarchically superior provision(s) of the Service Regulations. The introductory section of the EPO DPG 1992 contained a statement explicitly acknowledging that the Service Regulations (adopted by the Council) took precedence over the DPG (promulgated by the President). However, this statement was deleted in the ‘Preamble’ of the revised version of 2014. This amendment creates uncertainty about the status of the EPO DPG 2014 vis-à-vis the Service Regulations and its position in the applicable hierarchy of legal norms. Despite having been promulgated in the form of a Circular, the EPO DPG 2014 might be considered to possess the character of a legal norm claiming equivalence to the provisions of ‘secondary law’ and as such, a *de facto* amendment to the Service Regulations. Given that the EPO DPG 2014 were never subject to scrutiny and approval by the Administrative Council pursuant to Article 33(2)(b) EPC, but rather, were unilaterally promulgated by the President, it is arguable that the EPO DPG 2014 constitute a unilateral and *ultra vires* act of the President which has no lawful basis in either the EPC or the Service Regulations.
- 9.13 In their present form, in particular having regard to the derogations introduced in respect of investigative procedures as detailed below, the EPO DPG 2014 appear to constitute a further unilateral extension of presidential power by means of a Circular thereby effectively circumventing the oversight and scrutiny of the Administrative Council.

### ***Summary of deficiencies in the current data protection framework***

- 9.14 The EPO DPG 2014 fail to provide an effective data protection framework to ensure the protection of privacy and rights of EPO staff members. The most conspicuous deficiency in the current data protection framework is the lack of independent oversight. Despite certain nominal safeguards, the EPO DPG 2014 ultimately create a situation in which unfettered powers are



accorded to the President without any effective system of checks and balances to prevent abuses. Under the EPO DPG 2014, no role is foreseen for the Staff Committee. All references to the Staff Committee contained in the EPO DPG 1992 have been deleted. The lack of any effective means of redress in circumstances where the rights of data subjects are infringed is particularly concerning, for it effectively nullifies any protections, rendering them impotent.

### ***Lack of independent oversight***

- 9.15 Under the terms of the EPO DPG, the Data Protection Officer (DPO) is responsible for monitoring the observance of the DPG with respect to all processing operations performed by the European Patent Office (Article 1 (2) and 19(1) EPO DPG). However, being the Data Protection Officer (DPO) appointed by the President under Art. 18 (1) EPO DPG, he or she cannot be considered an ‘independent supervisory authority’ within the meaning of EU data protection law. Although the provisions of the DPG grant nominal independence to the DPO who ‘*shall be independent in his function*’ (Art. 1(2)) and ‘*shall not be required to follow instructions*’ (Art. 18 (4)), the DPO is effectively subordinate to the President because of his or her position as an employee of the EPO. This would seem to fail to meet EU standards of ‘independence’ in relation to data protection supervisory authorities as established in the case law of the CJEU (cf. C- 288/12, C- 614/10, C-518/07 as referred to ANNEX 1). Furthermore, what of the situation where the President or his office breaches the protections that should be afforded to staff members?

### ***Unfettered powers accorded to the President***

- 9.16 Apart from the *de facto* lack of independence of the DPO vis-à-vis the Office Administration, the role of the DPO is essentially of a consultative and advisory nature (cf. Art. 19 EPO DPG). The recommendations and opinions of the DPO are not binding and he/she does not have powers of enforcement or authority to take corrective measures in cases of DPG breaches. There are, of course, ample examples of the President ignoring the formal recommendations of bodies which lack the power of enforcement: one only has to look at recommendations of the Internal Appeals Committee, which despite the quasi-judicial function of the body, are routinely rejected by him. As such, in circumstances where the DPO has no authority to require a remedy for breaches, it is clear that there is a fundamental lack of independence and the force of the protections is essentially nullified. Hence, it is perfectly reasonable to conclude that the President’s powers in the sphere of data protection are essentially unfettered. This is particularly evident in certain amendments to the EPO DPG 2014, such as articles 6, 8 and 9 thereof.



- 9.17 Art. 6 EPO DPG ('Change of purpose') effectively allows the President unilaterally to decide that data may be processed for purposes other than those for which they have been collected. Although Art. 8(1) specifies that such a change of purpose requires consultation with the DPO, it has been demonstrated that the DPO's advice is not binding on the President. Art. 8(2) makes reference to 'serious offences' without specifying what exactly this is intended to cover and further includes a derogation for 'internal investigative processes' – a provision which, in the absence of any effective safeguards, would seem to be open to abuse.
- 9.18 Art. 8 EPO DPG (*'Transmission to recipients outside the European Patent Organisation'*) refers in paragraph (3) to the EU Data Protection Directive 95/46/EC concerning the adequacy of the protection afforded by the relevant country or international organisation to which data is to be transmitted. According to Art. 8(4), in cases of doubt, the President decides on the adequacy of the protection afforded by the relevant country or international organisation. Under Art. 8(6), the President may authorise a transfer or a set of transfers of personal data to a third country or international organisation which does not ensure an adequate level of protection *'where the controller adduces adequate safeguards with respect to the protection of the privacy of individuals and as regards the exercise of the corresponding rights'*, i.e., where the data controller can demonstrate that a sufficiently high level of data protection will be provided in the specific case.
- 9.19 The provisions of Art. 8 EPO DPG are modelled on art. 25 and 26 of the Data Protection Directive 95/46/EC and Article 9 of the Data Protection Regulation (EC) No 45/2001. In the case of the Data Protection Directive the relevant supervisory powers are vested in the European Commission and, in the case of the Data Protection Regulation, in the European Data Protection Supervisor, an independent supervisory authority. No such provision exists at the EPO as the powers in question are vested solely and exclusively in the President, who is subject to no oversight in this regard.
- 9.20 Art. 9 EPO DPG ('Processing special categories of data') refers in paragraph (4)(a) to the processing of data relating to offences, criminal convictions or security measures and stipulates that such processing may be carried out only if the European Patent Organisation's interest therein is legitimate and outweighs other interests. Although the Article specifically refers to the interest of the Organisation, the power to decide the matter is vested solely and exclusively in the President who is only required to 'consult' with the DPO. No role in the decision-making process is foreseen for the Administrative Council which is the governing body of the Organisation and which clearly has a legitimate interest in decisions relating to such matters.



## **Interventions by the German data protection authorities**

### ***Initial intervention by the Bavarian Data Protection Commissioner***

- 9.21 The lack of compliance by the EPO with EU standards for data protection is demonstrated by interventions from domestic Data Protection Commissioners. The Bavarian Data Protection Commissioner, Thomas Petri, received an e-mail dated 13<sup>th</sup> April 2014 containing a complaint in respect of an alleged lack of compliance with data protection norms at the European Patent Office.
- 9.22 After conducting a preliminary investigation, Mr Petri concluded that, under the current legal framework, data protection matters at the EPO are not subject to oversight by a fully independent supervisory authority, which would be highly desirable in the interests of safeguarding the data protection rights of both citizens and EPO employees.
- 9.23 As the contracting party to the European Patent Convention is the Federal Republic of Germany rather than the individual federal state of Bavaria, this was a matter falling within the remit of the Federal Data Protection Commissioner. Accordingly, the Bavarian Data Protection Commissioner sent a letter dated 5<sup>th</sup> May 2014 to the German Federal Data Protection Commissioner, Ms Andrea Voßhoff, headed 'Supervision of Data Protection at the European Patent Office' informing her of his preliminary investigation and suggesting to pursue the matter at a federal level, in particular with the Federal Ministry of Justice and Consumer Protection, in order to work towards establishing oversight of data protection matters at the EPO by a fully independent supervisory authority.

### ***Intervention by the Federal Data Protection Commissioner***

- 9.24 In a letter dated 28<sup>th</sup> August 2014, the Federal Data Commissioner brought the matter to the attention of the competent Minister of Justice and Consumer Protection, Mr. Heiko Maas. In her letter, she referred to the lack of independent oversight of data protection at the EPO under the prevailing legal framework and requested the assistance of the Ministry, in particular, in assessing the legal framework and the measures to remedy the deficiencies in oversight and inspection (*Maßnahmen zur Schließung dieser Aufsichts- und Kontrollücke*), including a possible amendment of the EPC. In a letter dated 7<sup>th</sup> November 2014, the Federal Ministry of Justice and Consumer Protection replied noting *inter alia* that Germany is only one state of 38 sitting in the Administrative Council and that an amendment of the EPC would require a diplomatic conference. The letter concluded with an assurance from the Ministry that in the context of committee work at the EPO,



it would endeavour, to the extent possible, to support the observance and development of higher data protection standards and an independent data protection framework.

### *Further intervention by the Federal Data Protection Commissioner*

- 9.25 In a letter dated 9<sup>th</sup> July 2015 sent to Ms. Renate Künast, Chairperson of the Committee for Justice and Consumer Protection of the German Federal Parliament (the 'Bundestag'), the Federal Data Commissioner noted that her efforts to secure improved data protection oversight at the EPO had been unsuccessful, she consequently wanted to alert the German Parliament to the issues existing at the EPO, which had become even more apparent following the publication of an article in the 'Süddeutsche Zeitung' on 8<sup>th</sup> June 2015 concerning the alleged use of covert surveillance measures at the EPO. She pointed out that a wide range of personal data from both patent applicants and staff are processed at the EPO. Hence, the lack of any independent external oversight increases the risk of infringements of the fundamental right to 'information self-determination' ('das Grundrecht auf informationelle Selbstbestimmung'), i.e. the right of the data subject to decide what personal data should be communicated to others and under which circumstances. According to the Federal Data Commissioner, the existence of such a risk became apparent in light of the above-mentioned case reported by the *Süddeutsche Zeitung*: allegations were made to the effect that two publicly accessible computers at the EPO had been placed under surveillance using keyloggers and video cameras without the users being informed that such surveillance measures were in place. The current legal framework implies that an independent external data protection authority is not in a position to investigate these allegations. Thus, persons who may have been affected, in particular delegates to the EPO's Administrative Council, patent attorneys, EPO staff and visitors, could not report the matter to an independent instance in order to ensure the respect of their rights. The Federal Data Commissioner urged the Committee for Justice and Consumer Protection to further investigate the matter.
- 9.26 Having regard to the above, it is clear that the situation at the EPO falls far below the standards expected and the rights enjoyed by citizens in the rest of Europe.

## **10 Interference with post-employment private and family life**

- 10.1 As has been discussed, the European Convention on Human Rights provides certain safeguards, including the right to respect for private and family life by virtue of Article 8, ECHR. However, the text of CA/29/16 and the stated intention on the part of the management of the EPO to dictate the activities that both current and former staff members may, or may not, undertake gives



cause for serious concern that the EPO is seeking quite improperly to encroach on areas that would, for ordinary EU citizens, be out of bounds and in breach of their Convention rights. Furthermore, the EPO is seeking to exercise such a power irrespective of whether or not the activity in question is gainful. The proposed amendment to Article 19 of the Service Regulations reads as follows:

*A permanent employee or former permanent employee intending to engage in an occupational activity, whether gainful or not, within two years of leaving the service, shall inform the appointing authority thereof.*

*If that activity is related to the work he carried out during the last three year of his service and could lead to a conflict with the legitimate interests of the Office, the appointing authority may, having regard to the interests of the permanent employee or former permanent employee and the service, either forbid him from undertaking that activity or give its approval subject to any conditions it thinks fit.*

- 10.2 It is important to recognise at the outset that a distinction must be made with normal contracts of employment in domestic jurisdictions: it is quite possible for employees to agree to clauses which prevent them acting for competitors after they cease to be employed by a company. However, their scope is limited, they often receive some form of consideration for agreeing to such a term and crucially, the remedy for non-compliance in such circumstances is for the former employer to bring an action for breach of contract. The former employer has no *power* to prevent a former employee from taking up an alternative occupation, it has no impact on the duties owed by that employer to the former staff member and furthermore, the ultimate decision as to whether there has been a breach rests with an independent judicial body. Conversely, at the EPO, the President (or *mutatis mutandis* the Administrative Council) sits as judge in his own cause and is granted quite extraordinary discretion by the proposed amendments. Indeed, the Circular is striking in a number of respects.
- 10.3 First, the discretion it seeks to grant appears to be unchecked by any form of oversight; secondly, the mere *possibility* of conflict is sufficient for the exercise of the discretion; thirdly, no criteria is provided for how the determination as to whether there *could* be a conflict is to be made; fourthly, no indication is given as to how purportedly competing interests are to be weighed against each other; and fifthly, the quality and quantity of the conditions that may be attached to the granting of conditional approval is seemingly unfettered and unlimited. This represents an extraordinary level of control over a person's life in any circumstances, let alone where that person is no longer an employee of the Office. Such conditionality would seem more akin to that experienced by criminals on parole or probation, than that which should apply to distinguished members of



society who happen to have served as staff in an international organisation. Indeed, the imposition of '*monitoring*' raises serious ethical issues about the appropriateness and legitimacy of such a measure, particularly when viewed in light of the considerable data protection concerns, discussed above.

- 10.4 Equally concerning is the fact that the proposals are silent as to the consequences for non-compliance. It would seem that there would be nothing stopping a vindictive president, for example, from intervening to reduce the pension payments of a former staff member whom he deems to be in breach. What of the situation where a former staff member continues to assist with Staff Union matters? On the basis of the extremely wide provisions presented in CA/29/16, that would appear to be sufficient motive and justification for the President to intervene and impose restrictions on that individual. Indeed, one would be forgiven for thinking that this was precisely the scenario that was being contemplated when these provisions were being drafted. The amendments are presented by the EPO merely as giving effect to existing provisions, yet in reality, the text of the proposed amendment seems to have the effect of legitimising what would otherwise amount to arbitrary, capricious and consequently, unlawful behaviour.
- 10.5 Finally, it is of note that the practicalities for decision-making are inherently flawed and do themselves have the effect of preventing current and former staff members from undertaking the occupational activities in question. Indeed, the amendments seek to allow for a period of two months for a decision to be taken, yet it is clear that many of the opportunities that will be being contemplated by those affected will be rendered null and void by the imposition of such a time period. As such, irrespective of the decision of the President, his assigns or the Administrative Council in respect of either approving or forbidding the activity, the opportunity may well be extinguished by virtue of the excessive time allowed for making such a decision.