

BREACHES OF BASIC AND FUNDAMENTAL RIGHTS AT THE EPO

Specialists In Public International Law

Rule of Law | Human Rights | IHL | International Organisations Law

Bretton Woods Law, 1 King Street, London EC2V 8AU
Tel: +44 (0)20 7764 0745 Email: enquiries@brettonwoodslaw.com www.brettonwoodslaw.com

LONDON BERLIN GENEVA THE HAGUE ABIDJAN MANILA WASHINGTON DC



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)(i), 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 20th 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 2nd April 2014, together with the amendment to Article 33-37 of the Service Regulations through CA/D 2/14 entered into force on 1st 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 25th 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 24th 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 1st 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 1st 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 29th June 1992 and entered into force on 1st 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 21st 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 256th meeting of the GAC on 11th February 2014 in Munich’ which was issued by the Central Staff Committee on 26th 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 19th March 2014 and entered into force on 1st 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 13th 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 5th 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 28th 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 Kontrolllücke’*), including a possible amendment of the EPC. In a letter dated 7th 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 9th 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 8th 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.