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## Explanations of industrial action "work to rule" and "go slow"

### 1. Are industrial action/actions such as work to rule and go slow legal?

The answer is clear:

**Yes, such industrial action/action is perfectly legal.**

The EPO had long tried to suppress "work to rule" and "go slow" industrial action with specially introduced regulations. These regulations, in particular the circular 347 were declared illegal and void by the Administrative Tribunal of the International Labour Organization (ILOAT) in the sensational judgment 4430 of 07.07.2021. This was the final instance to establish that the EPO had violated the fundamental right to strike and freedom of association for many years.

Judgement 4430 states under point 16(i), literally:

*"Secondly, "go slow" and "work to rule" are legitimate forms of industrial action protected by the ordinary conception of the right to strike. Accordingly, by declaring that employees engaging in these forms of industrial action did not have the "protection granted by the right to strike" as ordinarily understood, this provision violated the right to strike."  
(Underscore added)*

Any colleague who follows any of the "work to rule" and "go slow" industrial action measures are protected by the right to strike and by the right to freedom of association legally protected.

### 2. Are such industrial actions effective?

**Yes, such industrial actions have proven to be very effective in the EPO in the past.**

Before the illegal regulations were introduced (see above), the last time SUEPO called for such an action (so-called "blocking B84/B85 communications") was in 2001. It was essentially carried out by patent examiners.

The aim of the action was to delay the further processing of the file and thus the publication of the granting decision in the European Patent Bulletin after the decision to grant a patent.

Since the member states can only receive their share of the renewal fees from the applicant after the effective grant decision, this industrial action significantly delayed the payments of the patent proprietors to the member states, which led to reduced income for latter.

During the phase of the labour dispute at that time, the incumbent EPO President, Ingo Kober stated in his Circular No. 74 dated 28.03.2001 among other things:

*"The action plan adopted on 27 March also calls for a blocking of B84/B85 communications. During the past two years, these actions have already caused serious damage and disruption. They are deliberately designed so that the participants can only be identified long afterwards, if at all. They seek, through (covert) industrial action, to pressure management, which has no possibility of taking counter-measures."*

In order to end the industrial action, the EPO made extensive commitments to the employees at the time.

### **3. What could such an industrial action look like under today's conditions?**

In principle, all colleagues can take part in the "work to rule" or "slow work" campaigns by adhering exactly to the applicable working time regulations and not exceeding the specified daily working hours.

In particular, all examiners and all colleagues who are involved in the search, the patent granting process and in the publication of the decision for grant can take part in the campaigns.

Nonetheless, all directors and team leaders are also called upon to make their contribution to the campaigns, because their interests are also represented with the demands for salary methods and careers.

As a first measure, all examiners are called upon to concentrate on working on the search backlog. Since the search backlog increased from 2020 to 2021, there should be enough research files on average - even if there is little or no inflow of search files in individual directorates or teams. If the research inflow in a team is too low and there are no search files in stock, the further measures below are definitely also available for participation in the campaigns.

The second measure aims to significantly improve the quality of the grants. According to the quality report, the rate of non-objectionable grants in recent years was well below 80%. Therefore, all examiners are called upon to apply the provisions of the EPC, the case law of the Boards of Appeal and the internal rules for patent examination, especially for grants, with particular care.

As an example, reference is made to the Internal Patent Instruction (IPI) "Bringing the description in line with the amended claims" of July 20, 2020, in particular point 3.1, which states:

*"The applicant is asked in the first place to perform the amendments needed in the description, in particular when the examiner proposes a suggestion to overcome objections."*

The applicant's reply to a communication requesting that the description be amended should then be available later in the year and can be further processed accordingly if necessary.

Encouraging collaborative work and knowledge transfer is Key Initiative 4 under Goal 3, "Deliver high-quality products and services efficiently" of the Strategic Plan 2023. In accordance with the aims of the EPO and the Strategic Plan 2023 to improve the trusting cooperation among each other, all colleagues, examiners, formalities officers, team managers, directors are called upon to treat each other even more respectfully, calmly, collegially and trustingly. Above all, it is about helping each other to improve quality and working together in discussions objectively, openly, constructively and benevolently. Any accusations clearly stand in the way of trusting cooperation.

When processing the search backlog, the stock managers, team members and team managers can exchange information to agree on a fair distribution of the search files. In addition, the respective individual goals in relation to the team goal could also be taken into account.

Examiners and formalities officers are particularly in demand when it comes to improving quality. Should queries or discussions among one another be necessary here, respectful and collegial interaction with one another is very important with a view to strengthening a trusting cooperation.

As emphasised in the Strategic Plan 2023 (see page 68 therein), the cooperation of the members of the Examining Division is of central importance. In principle, therefore, the original composition of the Examining Division should not be changed arbitrarily, but only in specific cases, such as when a member retires or is on extended sick leave. In this way, the results of deliberations and work already done are not unnecessarily lost on the way to improved quality.

The members of the Examining Division should discuss solely among themselves and, above all confidentially, the matter of a patent application and how to proceed in the substantive examination thereof<sup>1</sup>. This allows each individual member to express their own opinions openly and without fear. In case of doubt, it is better to discuss within the Examining Division once too much than once too little. In any case, the discussion should also remain confidential and no transcripts should be made. A note in the Patent Workbench should therefore remain generic so that no individual member can be identified.

This applies in particular to cases in which the line manager makes inquiries about the status of the substantive examination. Here, too, only the Examining Division as a whole should provide information to the manager in order to avoid unduly influencing an individual member of the Examining Division. As a result of a consultation with the Examining Division, the superior could be informed, for example, that the Examining Division has decided to instruct the first examiner to issue a further communication under Rule 71(3) EPC.

Even if internal instructions may suggest otherwise: The Examining Division and thus its its members alone, are responsible for jointly deciding on a patent application. Their name and the signatures serve to identify the decision's authors and express that they unconditionally assume responsibility for its content. This requirement is aimed at preventing arbitrariness and abuse and ensuring that it can be verified that the competent body has taken the

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<sup>1</sup> see decision of the Boards of Appeal, T305/01, reasons 5.3

decision<sup>2</sup>. Anyway, all instructions given by someone outside of the Examining Division towards a determined way forward in a specific examination procedure can be documented in the confidential part of the respective examination file.

In the big picture, it must be acknowledged that the salary losses resulting from the application of the new salary method in the last two years are quite higher than the salary gains from promotion or the fastest possible advancement in career, i.e. the simultaneous advancement by two seniority levels.

The formalities examiners and colleagues who continue to process the file after the internal grant decision of the Examining Division can help with the actions. You are requested to check all application documents for correctness with reasonable care and calm before forwarding them internally for publication in the European Patent Bulletin and, if necessary, to provide feedback in order to eliminate any quality problems.

Since all supervisors, such as team leaders and directors, also benefit from the actions against a deterioration of the salary adjustment method, one may count on their implicit solidarity with their team members. The superiors can support all measures by strengthening the composition of the Examining Divisions, allowing them to carry out their tasks unhindered and objectively independently, and by supporting all other colleagues.

As for senior management, rescinding the deterioration of the salary method would help them too; anyhow, there are better ways for them to compensate for the financial losses, for example with high bonuses and allowances. From their side it is rather expected that attempts to torpedo the actions and to weaken the solidarity among the supporters will be undertaken. Here are steadfastness and collegiality required, but also creativity to find ways to continue to participate in the actions and not openly oppose any concrete instructions.

The following applies: Let's all send a clear signal of our displeasure to the Administrative Council!

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<sup>2</sup> see decision of the Boards of Appeal, J16/17, catchword 2 and J9/10, reasons 2.8