ANNEX

CSC opinion on documents
CA/53/16 Rev.1 and CA/52/16 Rev.X

Introduction

The present opinion addresses topics in document CA/53/16 Rev.1, as well as in documents CA/52/16 Rev.1 and/or Rev.2.

A mandate was given to the President of the Office by the Administrative Council (AC) in resolution CA/26/16: "*noting that these disciplinary sanctions and proceedings are widely being questioned in the public opinion" and "make proposals that enhance confidence in fair and reasonable proceedings and sanctions*".

CA/26/16 was issued on 17 March 2016. It set a deadline for the structural reform of the Boards of Appeal and for reinforcement of the AC secretariat, not for the submission of "*a draft revision of the Staff Regulations which incorporates investigation guidelines (including the investigation unit) and disciplinary procedures*". Nevertheless, unrealistic deadlines were imposed by the President with a view to presenting proposals in the June AC meeting.

The documents have been revised by the Administration between June and September 2016. The changes are identified in comparison with the versions submitted in preparation of the June AC meeting, not in comparison with the presently prevailing Service Regulations. We also noted that some changes were not identified as such (see for instance the apparent deletion of Article 21a(6) ServRegs of CA/52/16 Rev.1, the addition of Article 21a(7) ServRegs in CA/52/16 Rev.2 or the deletions in Article 22 IR vs. IG). This makes comparison difficult. The CSC asked for a version identifying the changes vs. the ServRegs in their present form, to no avail.

Scope of the proposals by the President

The President has decided to include further topics in the proposals for the June AC meeting exceeding the mandate in the resolution, in particular revision of the procedure aiming at dismissal for professional incompetence (part of CA/53/16 Rev.1).

Lack of good-faith consultation

The Office waited 1 and 1/2 month after the March AC meeting before starting "consultation" with the Central Staff Committee (CSC). It consisted in a few meetings (most by video-conference about 1.5 hour each) for general discussion. The Administration provided concrete drafts to the CSC very late in June 2016.

The staff representatives appointed by the CSC requested repeatedly to give enough time to allow for proper discussions. After the AC decided in June to postpone the discussion on the reforms to October, the CSC requested further opportunities to discuss the documents. The Administration has ignored those requests but has consulted with the "Panel of External Experts" in September.

On 30 September 2016, the Administration published an open letter of response explaining at lengths that consultation had already been "*thorough and extensive*", with drafts of a revised Circular 342 being discussed between 19 and 31 May. It further published to staff (and the CSC) the final report on the discussions with the "Panel of External Experts". The CSC notes that the letter does not address the consultation process for the most important documents amending the Service Regulations. CA/53/16 Rev.1 was published and put on the agenda of the AC **prior to** the meeting of the GCC and CA/52/16 Rev.2 was submitted on the day of the GCC meeting of 6th October.

Restoration of the Audit Committee (CA/D 9/09)

If it had not been disbanded, the Audit Committee (CA/D 9/09) would have allowed the Administrative Council to:

- Obtain an independent review/opinion on the decisions taken by the President (Article 5(b)) in particular when the decisions diverge from the opinions of joint committees.
- Give relevant safeguards (Article 5(f)) to the independence of the Investigative Unit.
- Receive proposals from independent experts to solve problems (like those observed in CA/26/16).

The reasons explaining why such a committee was established (improving the governance of the EPO and making easier for the AC to perform its duties) can be found in many CA documents related to that matter and in particular in the interventions of the DE, NL and UK delegations when the Audit Committee was disbanded against their will, as well as in the opinion of the auditors.

Thus CA/D 9/09 should have been improved instead of being deleted. For instance, the representation of the Member States in the Audit Committee should have been enhanced as suggested by the French delegation in CA/159/08.

CA/53/16 Rev.1: Review of the disciplinary procedures framework

Basis for the revision of the disciplinary procedures

The proposal borrows from the relevant articles of the EU Staff Regulations. However, specific provisions deviate from or omit essential parts of the EU regulations. Moreover, the EU has significantly different institutional set-up and judicial supervisory structure as the EPO (different agencies and institutions, OLAF as an independent investigation body, CJEU). This leads to substantial differences in the nature and effects of the revised procedure.

In the following, the CSC points at differences between the regulations for the EPO and the EU. Most of them are not identified in the introduction of CA/53/16 or CA/53/16 Rev.1. Justifications for the changes are also not adduced. As will become apparent, many changes actually worsen the situation for active and former staff.

Preferred solution: a Disciplinary Board

A disciplinary or administrative body can have the characteristics of a "tribunal" within the autonomous meaning of Article 6 ECHR, even if it is not termed a "tribunal" or "court". The ILOAT clearly expects such a body to be "quasi-judicial" (see ILOAT Judgment No. 3694). In the ECtHR case law a tribunal is characterised in the substantive sense of the term by its judicial function, that is to say, determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. It must also satisfy a series of further requirements – independence, in particular of the executive; impartiality; duration of its members' terms of office; guarantees afforded by its procedure – several of which appear in the text of Article 6(1) ECHR itself (Belilos v. Switzerland, § 64; Coëme and Others v. Belgium, § 99; Richert v. Poland, § 43).

The CSC favours a proposal adapting the already-existing (quasi-)judicial system of the EPO, including a Disciplinary Board. It is further recommended to consider a reform of the internal justice system, and introduce a new body, fully independent from the President, to replace the current Appeals Committee.

Independence, and the perception thereof, would be best served by either installing the Disciplinary Committee as a chamber in the Boards of Appeal Unit (BoAU), or, alternatively, by allowing (legally qualified) members of the Boards of Appeal to take part in the proceedings, especially as the Chair (option 2). These options would fulfil the requirement that the first-instance committees are, and are perceived to be, quasi-judicial.

According to option 1, a new "Disciplinary Board of the European Patent Office" for employees and former employees should be established under the BoA, similar to the existing Board for Representatives (See Supplementary publication - Official Journal EPO 1/2016, pages 128 to 135), competent e.g. for dealing with infringement of the Code of Conduct by professional representatives. The provisions will need some adaptations to be applicable to EPO (former) employees, taking due respect of the two different appointing and disciplinary authorities.

In a nutshell, the Disciplinary Board should replace the Disciplinary Committee, or alternately serve as an internal appellate or review instance of disciplinary decisions. It should be composed with a majority of legally qualified members and a Chair from the BoA.

Experienced support services (registry, legal services and documentation) are already in place in the BoAU for dealing with similar proceedings.

According to option 2, members of the Boards of Appeal should be allowed to act on the Disciplinary Committee, as Chairman or members "*completely independent in the performance of their duties*" (see new Article 95(2) ServRegs). Nominating legally qualified members of the BoA, preferably former judges, would be a preferred option.

In this respect, the CSC regards the decision by the President of the Office barring members of the BoA from acting on the Disciplinary Committee as unjustified, for reasons already explained elsewhere *in extenso*. In brief, decision R 19/12 did not preclude such nomination, since the Enlarged Board of Appeal saw a problem, and an "obligation of distance" ("*Abstandsgebot*") between managerial and judicial functions (of Vice-President DG3), not between two quasi-judicial independent functions, clearly devoid of any managerial conflicts of interest. Furthermore, the CSC considers that the reform of the BoA in force from the 1st July 2016 makes that decision obsolete.

The Chairman / the Disciplinary Committee

The role of the Chairman (and of his deputy) is essential for due process and for confidence in the disciplinary system. New Article 94(3) ServRegs foresees that the Chairman and his alternate shall be chosen "*from outside the Office*". A three-year renewable contract is foreseen for the Chairman. Shorter terms of office are possible for alternates (including the alternate Chairman) and members.

Renewable contracts are used in some jurisdictions, notably the Court of Justice of the European Union (CJEU), where judges are appointed for a renewable 6-year term. Renewable contracts are in such cases already regarded as sub-optimal. They are considered compatible with the requirement of (perceived) independence because the judges are protected by the collegial nature of decisions, where diverging (minority) opinions are not written into decisions and where their individual contribution or opinion of the members and chairman cannot be elicited. This is be the case for the Chairman of the Disciplinary Committee in the EPO, to whom the ServRegs attribute a special role in deciding in procedural matters and where votes are tied, pursuant to new Article 95(4), as well as an exclusive role in delivering the opinion in the case of acknowledgment of misconduct, pursuant to new Article 98(2).

The conditions set out in new Article 94(3) ServRegs, especially the prospect of renewal of the contract, defeat real independence. A term of five years is normally considered too short for security of tenure. A reasonable term could be ten years (see for instance UN document E/CN.4/2000/61/Add.1, para. 169(c)). At the EPO, in order to ensure continuity and independence, it should be proposed to appoint the

Chairman and his alternate for a period longer than three years (e.g. least five, better ten, years) on a non-renewable contract.

In analogy with Article 12 (96) in Section 5 Annex II of the EU Staff Regulations, the selection of the Chairman and its alternate should be done from a list jointly drawn up by the President and the CSC, not merely "*in consultation with the Central Staff Committee*" as in new Article 94a(2) ServRegs, when the appointing authority is the President of the Office.

The CSC questioned in the past the appointment policy of the President of the Office to the Disciplinary Committee, which *de facto* consisted almost exclusively of Directors and Principal Directors as members. New Article 94(3)(b) ServRegs institutionalises this trend, by biasing the composition towards such employees from job groups 2 and 3. This is a clear departure from the "peer review" approach of the former Disciplinary Committee.

Secrecy and publicity

The proceedings of the Committee shall be secret. However, absolute secrecy may unduly restrict the right of the subject to defend himself, if no exception is tolerated. In investigation and disciplinary proceedings, a defendant should be able to depart from strict secrecy, when this is necessary for his defence, whilst taking all due care of the rights of other parties, most notably protection of witnesses. As stated recently by the Enlarged Board of Appeal (EBA) in disciplinary case D1/15, publicity may contribute to due process and serves the interests of the Organisation in transparency and accountability.

Article 18(3) of the Rules of Procedure of the EBA foresees publication of the final decision relating to petitions with disciplinary character, due regard being taken of the confidentiality. The EBA already ordered publication of three decisions in case D1/15 and well as public oral proceedings. In doing that, the EBA respects the rights of the defendants and of other individuals and the interests of the Organisation. So does the EPO Disciplinary Board for the code of conduct of European Patent Attorneys when it publishes its decisions. ILOAT judgments in disciplinary cases are other examples of what can be considered as non-confidential, after completion of the disciplinary procedure.

Article 29 (96) EU Staff Regulations in section 8 of Annex IX provides for a possibility of making good through suitable publicity the damage suffered by an employee. We welcome the introduction of new Article 105b ServRegs, for the sake of transparency and confidence in the procedure.

Five calendar days seem too short for raising objections in respect of members of the Committee because Office closure days could jeopardise this option. Instead, five working days are proposed, also in view of the fact that the time limits have been lengthened from one month to two months in new Article 100 ServRegs.

The CSC notes that the new regulations appear to be silent as to who should decide on an objection. Old Article 98(5) ServRegs has apparently not found its way into the new regulation.

Possible disciplinary measure: reduction of the retirement pension

New Article 96 ServRegs is allegedly based on Article 9 (96) EU Staff Regulations. Compared with old Article 93 ServRegs, it adds the separate, independent sanction of a reduction in the amount of the severance grant or of the retirement pension.

The EU regulations limit the reduction to employees "*in receipt of a retirement pension or an invalidity allowance*". By contrast, the proposed measure can be imposed on former EPO employees not yet receiving a pension, i.e. former staff under 60 having opted for deferred pension, or even on former employees under 50 not yet entitled to receive a pension. This measure thus targets younger staff than the EU regulation. Lastly, the EU regulations foresee a safeguard for dependants. A similar provision is apparently missing in the EPO ServRegs.

Contrary to the EU regulations, this reduction is not necessarily *pro tempore* or for a fixed period. A permanent reduction of pension is deemed a measure of expropriation, or a (forbidden) pecuniary sanction, taken into account the concerned employee's increasing contributions to the RFPSS over many years while holding successively higher grades and seniority steps.

Moreover, for EU staff, means of redress are readily available. By contrast, it is doubtful whether the ILOAT will regard as receivable a complaint against a disciplinary measure consisting in a pension reduction, if it does not affect the former staff member directly but will affect him in the future. Thus, the amendment creates legal uncertainty.

In conclusion, the added disciplinary measure is (much) more extensive in the EPO ServRegs than in the EU Staff Regulations, and the means of redress less certain. This will not contribute to increasing the confidence and the (perception of) fairness in the disciplinary procedures.

Suspension

New Article 103 ServRegs replaces old Article 95 ServRegs, which was last amended in December 2015 with CA/99/15 Rev. 1.

New Article 103(1) removes a condition ("*nature incompatible with his continuing in service*") for suspending an employee, so that a "mere" accusation of serious misconduct suffices for suspension. This worsening appears not objectively justified.

As already argued with respect to the amendments in CA/99/15 Rev. 1, a 24-month maximum period of suspension for Members and Chairs of the BoA is so long that it may be seen as a *de facto* removal from office circumventing Article 23(1) EPC. Furthermore, the maximum period for employees appointed by the President of the Office has been lengthened from four to six months.

By removing the entitlement of old Article 95(4) ServRegs to reimbursement of the amount of remuneration withheld if no final decision has been given within the limits

specified above, the legislator also removes an incentive for the disciplinary authority to complete the disciplinary procedure in a reasonable time.

Different from Article 24 (96) in section 6 in Annex IX of the EU Service Regulations, a possibility of extension in exceptional circumstances beyond these limits has been introduced for all employees, regardless of the appointing authority. A provision is absent requiring that the decision of extension shall give reasons and a limit in time. This negates the *interim* character of a suspension.

The "administrative inquiry"

New Article 93(2) ServRegs foresees that the appointing authority may "*carry out its own administrative inquiry or refer the matter to the unit in charge of administrative fact finding*" in cases of suspicion of failure to comply with obligations under the ServRegs. This decision is discretionary, depending on whether the appointing authority judges the available evidence sufficient. However an independent investigation may uncover exculpating evidence, whereas a mere administrative inquiry will normally not provide it. As a result, a clause needs to be included that all investigations prior to disciplinary proceedings should be performed by the IU, or at least that the employee concerned may request an investigation according to the investigation guidelines to complement the administrative inquiry.

Acknowledgement of misconduct

Contrary to the statement in the introduction of CA/53/16 and CA/53/16 Rev.1, new Article 98 ServRegs is not "similar" to the EU provision in that an acknowledgement of misconduct is not necessarily taken into account in the final decision. The CSC regards this provision as dangerous, and its presentation as highly misleading.

In Article 14 (96) EU Staff Regulations section 5 of Annex IX, acknowledgement of misconduct limits disciplinary measures imposed on the employee to the more lenient ones, i.e. up to relegation in step. By contrast, new Article 98 ServRegs leaves to the appointing authority the possibility of imposing any of the measures, up to the harshest (dismissal with reduction of the pension). Furthermore, taking the employee's acknowledgement into account "*as a mitigating factor for the final sanction*" is only a possibility ("*may... take... into account*" in new Article 98(2) ServRegs), not an effective safeguard.

Objection

New Article 94a(5) ServRegs should recite the general principle that an objection against a member of the Disciplinary Committee is to be raised within a prescribed time limit after the reason to object is known (or should have been known). The five-calendar-days rule would then be a particular case thereof. This would expressly allow objections based on incidents raising an objective suspicion of partiality later than five days following the Committee's establishment. Similarly, a provision ruling out an objection of suspected partiality could be introduced when a party has taken a procedural step while being aware of a reason for objection. An objection against the Chairman of the Disciplinary Committee should be possible in exceptional cases.

Examination of the case and hearing

Experience teaches that new allegations or facts are sometimes submitted, more often by the appointing authority, after the report within the meaning of new Article 97(1) ServRegs. New Article 99 ServRegs should recite that the admissibility of new allegations and facts added to the file or brought up only during the hearing are to be examined on a case-by-case basis by the Committee.

The right to confront the accuser or witnesses should be enshrined in the ServRegs, as well as in the investigative process, because the accused person has a right to defend himself properly in an adversarial procedure (see ILOAT Judgments No. 2014, No. 2475, No. 2601, No. 3065, No. 3200 (consideration 11)).

Proportionality and consistency of disciplinary measures

Recommending a sanction must *inter alia* take aggravating and mitigating circumstances into account. The CSC welcomes the addition of new Article 96a ServRegs informing the Committee and Staff about factors to be taken into account to determine the seriousness of misconduct. However, it regrets that the omission of the statement reflecting established ILOAT case law that misconduct must be proved beyond a reasonable doubt (see e.g. ILOAT judgment No. 969, consideration 16).

The situation is also far from satisfactory in that there is no guarantee that similar misconducts will result in similar recommendations for a disciplinary measure and in similar sanctions by the appointing authority. Consistency cannot be left *ex post* to the appointing authority, whose vocation it is not to deviate from the recommendations of the Disciplinary Committee. It cannot either be left to the ILOAT, which gives its judgments years after the sanction. Consistency should be ensured by the Disciplinary Committee in the first place.

There is presently no collection of case law easily available, be it published internally by the Disciplinary Committee, or collected from the judgments by the ILOAT, contrary to the situation in the EU (IDOC reports). This renders the work of the internal Disciplinary Committee partly hazardous. What is still missing are provisions, e.g. guidelines, assisting the Disciplinary Committee in recommending the appropriate disciplinary measure, having regard to the practice of the past as confirmed by the case law of ILOAT.

The Administration opposed strongly to this proposal. By contrast, the CSC is of the opinion that such collections are compliant with the requirements of confidentiality and data protection. The ILOAT itself publishes decisions on individual disciplinary cases in anonymised form. Publication of anonymised recommendations or judgments is in principle possible in the Organisation. The EBA publishes the final decision relating to petitions with disciplinary character, due regard being taken of the confidentiality. So does the EPO Disciplinary Board for the code of conduct of European Patent Attorneys when publishing its decisions. This makes the disclosure and establishment of case law possible.

In addition to the Secretariat, additional administrative services should be considered, e.g. in order to collect and summarise the case law and provide fast and

ad hoc support to the Disciplinary Committee if need be. A similar service (Directorate Legal Research & Administration) is already in place for the Boards of Appeal, to assist the Boards and to produce the highly appreciated "white book" on case law of the EPO Boards of Appeal and of the EPO Disciplinary Board.

Disciplinary measures not involving the Committee; the right to a hearing

Deviating from Article 11 (96) EU Staff Regulations, new Article 96b foresees that in case of a measure (written warning or reprimand) without consultation of the Disciplinary Committee, the subject may be heard in person or in writing. The reasons for choosing one alternative are unclear and may be seen as resulting from an arbitrary decision by the appointing authority. In order to increase (the perception of) fairness, the right of a hearing should be guaranteed, with a possibility for the employee to renounce this right if he so desires.

The reasoned opinion / divergent view

The reasoned opinion stating the measure considered appropriate by a majority of the Disciplinary Committee should be complemented by any divergent view, if expressed by a minority of the Committee, as is the case in Article 18 (96) EU Staff Regulations.

Deviating decisions

Decisions by the appointing authority deviating from the recommendations by the Disciplinary Committee are not addressed in the proposal at all, although it is a main cause for the staff's negative perception of the disciplinary procedures. Since no fast-track procedure is possible before the ILOAT, a clause should be introduced within the ServRegs, which entitles the employee, in case of a deviating decision, to request an independent review by an independent body (for example the BoA, arbitrators, ombudsman, an external expert committee or the Disciplinary Committee of the European Patent Organisation).

Costs

Provisions about apportionment of costs contribute to the equality of arms before the Committees and protect against excessive or weak procedures launched by the President of the Office. The proposal substantially weakens this compensation.

In Article 51 (9) chapter 4 of Title III EU Staff Regulations relating to professional incompetence, employees are *de jure* entitled to reimbursement of reasonable expenses if the request of the appointing authority is not allowed. Furthermore, Article 21 (96) section 5 of Annex IX EU Staff Regulations allows reimbursement "*in exceptional cases where the burden on the official concerned would be unfair*" otherwise. The reimbursement following a recommendation to that effect of the Disciplinary Committee in old Article 104 ServRegs should be re-instated, to cater for cases where the requests by the appointing authority were only (partly) allowed, for instance resulting in a mere warning ,or where procedural steps proved useless due to procedural abuse. New Article 101 ServRegs should be amended accordingly.

Rules of Procedure (RoP)

The present practice in disciplinary proceedings sometimes deviates from the wording in the ServRegs, does not follow good practice or due process. For instance, the file constitution and its availability to all Disciplinary Committee members and parties are presently unsatisfactory; documents are not systematically communicated to the members and parties. The practice may also vary in time or according to the Chairman in charge. This leads to inconsistent practice and to procedural disputes.

The RoP should complement new Article 95(5) ServRegs ("*all information and documents relating to the case*") for file constitution and new Article 95(6) ServRegs for the provision of copies of the minutes to the parties in a prescribed reasonable time (much less than one month). The latter is important because the defendant is heard by the appointing authority before it makes a decision.

In order to ensure uniform application of procedural rules, to enhance the perception of independence and to guide the parties and the Disciplinary Committee members, the Committee should autonomously adopt its own Rules of Procedure, with the appointing authority approving them. Article 2(4) ServRegs should be amended accordingly.

Assistance for staff

Legal assistance, for instance on the model of the UN Office of Staff Legal Assistance (OSLA), should be granted to staff members who envisage challenging a decision, either a disciplinary or another administrative one. Such services contribute to amicable conflict resolution and to preventing ligation.

The exclusive competence of the CSC to appoint to statutory bodies

Document CA/53/16 Rev.1 is misused to incorporate amendments not linked to a review of the disciplinary procedure.

In particular, new Article 36(2)(a) ServRegs empowers the President to make appointments to any statutory body, "*if the Central Staff Committee fails to make appointments to these bodies*". This provision complements the addition of Article 2(6) ServRegs decided in CA/99/15 Rev. 1, according to which the President may extend the terms of office of members of the statutory bodies without agreement of the CSC. The new provision legalises *ex post* the procedure applied for the internal Appeals Committee and more generally further weakens the prerogatives of the CSC, in particular its exclusive responsibility for making appointments to the statutory bodies under the Service Regulations.

The CSC has a duty to nominate to the statutory bodies with a view to representing the interests of staff. If the CSC has good reasons to consider that not nominating is the better alternative for representing staff, deliberately choosing not to nominate IS fulfilling this duty ("*refuser d'exercer son droit c'est encore exercer son droit*"). The CSC has explained the reasons why it could not nominate. This leaves no room and no entitlement for the President to determine what the best staff representation

should be and to take alternative steps which will result in appointees not representing staff according to the Regulations in force.

CA/53/16 Rev.1: Review of Articles 52 and 53 ServRegs (professional incompetence)

The amendment of these Articles is not covered by the mandate in resolution CA/26/16.

According to the present Chairman of the Disciplinary Committee, which presently deals with cases of professional incompetence, no major issues had been identified with the current procedure under present Article 52 ServRegs. It is therefore proposed to leave this Article unchanged.

Professional incompetence under Article 52

Article 52 ServRegs in its present version was applicable to all EPO permanent employees, including AC appointees. For Members and Chairs of the Boards of Appeal, Article 23(1) EPC offers additional protection against undue removal from office, making it conditional to a proposal from the Enlarged Board of Appeal.

New Article 52 ServRegs is applicable only to employees for whom the President of the Office is the appointing authority. Therefore, the corresponding procedure for Members and Chairs of the Boards of Appeal has been abolished. This poses the question as to how professional incompetence will be tackled for AC appointees in the BoA Unit.

In present Article 52(2) ServRegs, the appointing authority followed "*the procedure laid down in regard to disciplinary matters*". According to the present Chair of the Disciplinary Committee, no major issue was identified with the current procedure under Article 52 ServRegs. There was therefore no need for a change: Article 52 should remain unchanged and the establishment of an *ad hoc* Joint Committee is superfluous. Furthermore, by keeping both procedures aligned, any potential improvement in the disciplinary procedure would also benefit the procedure under Article 52.

The sanctions in a procedure for professional incompetence are essentially as serious as those in a disciplinary procedure, namely dismissal, downgrading or classification in a lower job group. The requirements of fairness and impartiality are therefore as stringent and the Committee should be quasi-judicial by nature. In practice, concrete cases are frequently a mix of incompetence issues and misconduct issues. Having two procedures differing in essential parts (composition of the Committee, facts and evidence in the procedures) will expose to the risk of forum shopping by the President of the Office. This will cause (a perception of) arbitrariness and unfair treatment.

In new Article 52 ServRegs, "*professional incompetence*" is directly linked to "*lack of ability and efficiency*". In particular efficiency is a new factor. This is worrying in that the formulation adopted is vague and performance assessment is more subjective than adherence to existing regulations, or inability to discharge one's duties. Efficiency is more a criterion for career advancement than for sanctions. Moreover, the safeguards in the EU regulations, where 3 or 5 consecutive unsatisfactory

appraisals are needed as a basis, are also absent in the EPO regulations. Instead, the President "*shall define procedures to identify, deal with and remedy cases of lack of ability and efficiency in a timely and appropriate fashion.*" The CSC regards this procedure as disquieting in its vagueness.

Appraisal reports are established by the line manager and are subject to very limited review: the employee concerned is entitled to making comments thereon which he considers relevant (Article 58(3) ServRegs). Any dispute about appraisal is reviewed by an "Appraisals Committee", which consists exclusively of management representatives in accordance with Article 110a(3), in practice exclusively of Principal Directors. No further means of redress against an appraisal report are possible. There is no provision in the ServRegs guaranteeing independence of this Committee.

The review procedure is limited in scope ("*arbitrary or discriminatory*") in Article 110a (4) and constrained by extremely tight time limits. Incompetence (or mere inefficiency) determined on the basis of appraisal reports should be open to challenge in front of an EPO "first-instance" body on any possible ground susceptible of being reviewed by the Administrative Tribunal. Therefore, grounds cannot be limited to arbitrariness or discrimination but they must also encompass e.g. abuse of power, errors of law or of material fact.

The CSC regards the composition of the Joint Committee as not satisfactory. The role of its Chairman is important. However, according to new Article 52a ServRegs, the Chairman is unilaterally nominated by the President. The Central Staff Committee is merely consulted. He/she will thus be (perceived as) less independent than the Chair of the Disciplinary Committee. Furthermore, the composition with members is biased towards management ("*job group 3 at least*"). Following a procedure with an Appraisals Committee already exclusively composed of management representatives, the whole Article 52 procedure will very much look like managers reviewing management decisions, which will foster distrust.

The reasoned opinion stating the measure considered appropriate by a majority of the Joint Committee should be complemented by any diverging view of any member, if expressed by a minority of the committee, as is the case in as is the case in Article 18 (96) EU Staff Regulations pertaining to disciplinary procedure. An express provision is presently missing in the EPO ServRegs.

In the EU regulations for professional incompetence, employees are *de jure* entitled to reimbursement of reasonable expenses if the request of the Administration is not allowed (see Article 51(9)). The corresponding provision is missing and it should be added as a safeguard against weak procedures initiated by the President.

In the EU regulations (Article 51 (96)), a reference of a sanction in the personal file may be deleted on request after six years. The corresponding provision is missing here and new Article 105 ServRegs applies only to a "*disciplinary measure*", i.e. a decision by the appointing authority taken after a disciplinary procedure. The Administration has confirmed that the intention was to leave sanctions relating to incompetence forever in the file. The CSC cannot accept that a decision on grounds of professional incompetence could not be deleted likewise.

Dismissal for other reasons under Article 53

The notice period, amounting to up to five months has been reduced to four months, without visible reasons. Alternatively, the period may be replaced by "*an equivalent lump sum paid in lieu of notice*". This change legalises *a posteriori* a measure already applied recently in the case of dismissal of a staff representative. This concrete case has shown the difficulty, and potential causes for dispute, in determining the equivalent lump sum taking all factors into account, including non-monetary benefits during the notice period (admission to schools...). This provision should be replaced by a suspension for the time until termination of service, should active service be impossible during the notice period, in order to maintain the participation to the pension scheme and coverage under the social security system during the notice period.

CA/52/16 Rev.X Revision of Service Regulations
Standards of conduct and administrative fact findings

The Council in Resolution CA/26/16 requests to submit a draft revision of the Staff Regulations which incorporates investigation guidelines and disciplinary procedures to enhance confidence in fair and reasonable proceedings and sanctions.

The content of documents CA/52/16 Rev.1 or Rev.2 was never submitted to, let alone discussed in, a working group. The documents fail to address the issue of perceived fairness of the procedure and do not improve the checks and balances as well as the distribution of powers and independence from the President as an appointing authority.

Non-discrimination

The CSC welcomes the introduction of new Article 1a ServRegs. However, a statement of positive discrimination would be desirable, more particularly a declaration relating to non-marital partnerships and with a view to ensuring full equality in practice between men and women in the EPO. We are also missing a declaration about maintaining or adopting measures providing specific advantages in order to make it easier for the under-represented sex, or for persons with disabilities, to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. Corresponding declarations are included in the EU staff regulations.

Standards of conduct

The introductory section of the document(s) claims that the framework at the EPO is clarified and strengthened. We however see in some places a reduction of legal certainty and predictability.

New Article 14(3) ServRegs provides that an employee "*shall abstain from any act and, in particular, any public expression of opinion which may reflect on the dignity of his office.*" However, the act is widened to any conduct which "*may pose a risk to or compromise the reputation and interests of the Organisation*". This provision appears speculative and unenforceable. If there is demonstrable damage to the reputation of the Office, then obviously there may be grounds for intervention. But it is not possible to assess a mere "risk" thereof. This provision also disproportionately and unilaterally limits in favour of the Office, or of the Organisation, the fundamental right to freedom of expression for the employee (and possibly his family), as enshrined in Article 10 ECHR, as well as the right to freedom of assembly and association enshrined in Article 11 ECHR (and Article 30 ServRegs).

New Article 19 ServRegs stresses the requirement of "*utmost discretion*" in the first place. By contrast, the EU Staff Regulations reaffirm in the first place "*the right to freedom of expression, with due respect to the principles of loyalty and impartiality.*" Article 12 in Title II of the EU Staff Regulations limits the freedom for acts relating to the employee's office, not to any vaguely defined (risk for the) reputation and interests of the Institution.

The revised regulations resorts to fuzzy or unenforceable concepts ("*undue considerations*", "*inappropriate purpose*" in Article 14a ServRegs, "*exposure of the Organisation to undue financial or reputational risk*" in new Article 14b(1)(p) ServRegs, "*the spirit of the values of the Organisation as embedded in the Code of Conduct*" in the introduction of the IR).

In particular, new Article 14b ServRegs lists "*grave breaches of national law, whether intentional or grossly negligent*" as misconduct. This is particularly problematic, since an employee is hardly able to assess which national law would be relevant. Furthermore, breaches of national law are to be judged by a national court, not by a disciplinary committee. This is the *raison d'être* of the provision about parallel criminal prosecution in new Article 104 ServRegs as well as the referral to national authorities in new Article 20 IR.

New Article 17(1, 2) ServRegs imposes on an employee to take immediate action to resolve situations which "*appear to call into question the integrity, objectivity or impartiality required by his status*". Non-compliance with this vague requirement would automatically constitute misconduct.

The Investigative Unit (IU) / its independence and accountability

The IU is presently part of the Principal Directorate Internal Audit and Oversight. In CA/D 9/09, the AC saw the importance of the independence of the Department and decided to appoint an external Audit Committee providing safeguards: the Head of the Department, the transfer or dismissal of the Head and the staff members employed as internal auditors, as well as any disciplinary measures relating to them, would be subject to the opinion of the Audit Committee (without prejudice to the President's authority under Article 10(2)(f), (g) and (h) EPC). The Audit Committee has been disbanded since with CA/D 4/11, thereby weakening the standing of the Department / the IU.

New Article 21a ServRegs specifies a department with extended functions ("*ethics and compliance function*", "*investigative function*") acting autonomously (by defining its own rules) and independently but without any checks and balances: activity reports are submitted only periodically to the Board of Auditors (see new Article 22(2) IR) and strict confidentiality prohibits any other type of review of the decisions on a case-by-case basis.

The independence of the IU should be implemented also in the organisational set-up. While the President holds the budgetary power, the supervisory function of the IU should be independent from the President, all the more so because it also investigates in matters affecting AC appointees. The purpose should be *inter alia* to assure actual independence and to supervise the procedural guarantees and the duration of the proceedings in all cases.

The IU is authorised to investigate EPO staff including also staff whose appointing authority is the AC, only in cases authorised by the Council. The set-up should also make posible an independent investigation on the President of the Office.

Analogous with the EU regulations, and remaining within the present framework of the EPC, the AC should appoint the Head of IU and as a senior officer and re-instate an external Audit Committee. The new IR go in the opposite direction in that they delete the mention of the "*Principal Directorate Internal Audit and Oversight*" of old Article 2(7) IR and replaces the "*Principal Director head of IU*" by a mere "*line manager*", i.e. under the direct authority of the President, in new Article 3(5) IR.

Investigators should be protected but should be accountable for their actions. Due process requires a clarification of roles. Line management, Human Resources and the President may not interfere with investigative processes. Accountability requires that compliance with the principles of independence, proportionality, due process and data protection of new Article 21a ServRegs should be reviewable with effective means at the disposal of the defendant. This is presently not the case.

Confidentiality

Confidentiality is codified in new Article 21a(6) ServRegs and further strengthened in new Articles 4 and 17 IR by putting additional constraints on involved parties. Confidentiality is necessary in the fact-finding process in order to protect the interests of all parties and the integrity of the process. However, it may also unduly restrict the right of the subject to defend oneself if no exception is tolerated. In investigation (and disciplinary) procedures, an employee should be able to depart from strict confidentiality, when this is necessary for his defence, provided all due care of the rights of other parties (e.g. the protection of witnesses) is exercised. Confidentiality should not be used to prohibit the accused from disclosing the mere fact that he is being, or has been, investigated and/or subject to a disciplinary procedure, particularly where the public (particularly other EPO employees) has a legitimate interest to know about it.

The right to remain silent and the duty to co-operate

The Office argues that the duty to fully cooperate stems from the lack of a law enforcement body in the EPOrg. However, replacing powers of police subject to judicial supervision by unfettered powers of the Investigative Unit is clearly disproportionate. Moreover, suspects normally have the right to remain silent and to legal assistance when interrogated by the police. In the context of a public service, the issue is to find the right balance between that duty and that right.

Disciplinary proceedings are *stricto sensu* no criminal proceedings. However, Article 6 ECHR grants entitlement to a "*fair hearing*" for everyone *"[i]n the determination of his civil rights and obligations or of any criminal charge*". According to ECtHR case law, the two aspects, civil and criminal, are not necessarily mutually exclusive. For instance in disciplinary case of Albert and Lecomte v. Belgium, the Court considered it unnecessary to give a ruling on the applicability of Article 6(1) ECHR under the criminal head but decided to examine the disciplinary case in the context of the interpretation of the notion of "fair trial".

National courts also examined the issue and increasingly ruled that the requirement of a fair trial should also apply to disciplinary proceedings, as well as investigative steps preliminary to such proceedings (BDiszG, NVwZ-RR 1999, 519, 520).

Protection against self-incrimination is for instance also codified for civil servants in their disciplinary law (see for instance the German Bundesdisziplinargesetz, § 20, or the Austrian Beamten-Dienstrechtsgesetz, §124(7)).

The CSC expressly welcomes the fact that the EPOrg at last recognises the right to be protected against self-incrimination and the possibility to "*refuse to give statements or to answer questions*" next to the duty to "*co-operate... in accordance with the applicable provisions*" in new Article 21a(5) ServRegs.

However, the proper balance is removed in Article 7(3) and 17(6) IR, by requiring that an interviewee may refuse to make a statement or answer a concrete question only by expressly claiming that "*by doing so he would incriminate himself*". This is tantamount to self-incrimination: answering the specific question "*Did you steal the money?*" with "*By answering this question, I would incriminate myself.*" is clearly self-incriminating.

Article 7(5) IR weakens the protection of the health of an interviewee. Medical reasons for temporarily not fully co-operating in the investigative process, as put forward by the employee's medical doctor, are checked and possibly overruled by the Office physician. Due to medical secrecy, a Disciplinary Committee or the ILOAT won't be in a position to assess the admissibility of the evidence so-gathered. This further violates the rights of sick staff to defend oneself.

Furthermore, the duty to co-operate in the case of access to private data and property is not satisfactorily clarified.

Application to the Boards of Appeal

According to new Article 1(8) ServRegs, the new Articles discussed above will be applicable regardless of the appointing authority. In particular, the investigative process mentioned in Article 21a ServRegs is also applicable to the members of the BoA.

The obligation to inform the President of the Office about incompatible activities of the spouse according to Article 16(2) ServRegs also applies to the AC appointees. This is inconsistent with the obligation according to Article 17(4) ServRegs to inform the Chairman of the Enlarged Board of Appeal in case of (other) conflicts of interest and may affect independence.

Election to public office / passive franchise

Formerly, candidacy to (national) public office entitled to unpaid leave and the appointing authority reviewed the administrative status of the employee only after election to such office. With new Article 18 ServRegs, the employee "*intending to run for public office shall inform the appointing authority prior to taking up any activity with a view to becoming a candidate*" and the appointing authority may take measures much sooner. In Germany, the obligation to inform about an intention to become a candidate would infringe Articles 28 and 38 Basic Law.

CA/52/16 Rev.X - Implementing Rule (Investigation Guidelines)

The Administrative Council requested in resolution CA/26/16 to submit a draft revision of the Staff Regulations which incorporates investigation guidelines and disciplinary procedures to enhance confidence in fair and reasonable proceedings and sanctions. The Implementing Rule (IR) should replace the Investigation Guidelines (IG) previously adopted by the President of the Office as Circular No. 342.

The declared aim is to "*strengthen the investigative function at the Office*" and to "*expand the mandate of the investigative unit to comprise a full Ethics and Compliance function*". No concrete provision substantially improves the fairness of the investigation process, or the perception thereof and essential provisions have been worsened:

- The independence of the Investigative Unit (IU) has not been improved.
- Data protection now lies exclusively within the responsibility of the IU. Data protection is *de facto* removed by removing any co-operation with the Data Protection Officer. Any resource or data may be seized and accessed in the Office, regardless of whether it is owned by the Office or the employee.
- A possibility of re-opening a dormant investigative process has been added.

Hierarchy of norms

The provisions on investigations should be included in the ServRegs and find their correct place in the hierarchy of norms. This is also expected by the AC in resolution CA/26/16.

The conflict between the IR/IG and express provisions of the ServRegs, for instance as regards *interim* measures (in particular suspension: suspension according to the ServRegs, suspension according to Article 14 IR or "house ban" according to the house rules, as imposed on a member of the BoA) is not completely solved. The IR also takes precedence over other rules, most notably the Data Protection Guideline, which should be imperative. This further contributes to legal uncertainty and possibly infringes EU data protection regulations.

Fundamental rights / compliance with legal norms

Fact-finding is preliminary to disciplinary action. It is therefore artificial to consider the principles and rights applicable in an investigation in complete isolation, without also considering the principles and rights applicable in a disciplinary procedure.

It is uncontested that fundamental rights and principles of due process should apply to disciplinary proceedings. Such rights are enshrined in Article 6 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), in Article 47 European Charter of Fundamental Rights, in Article 14 International Covenant on Civil and Political Rights (ICCPR) and in Article 55 ff. Statute of the International Criminal Court (ICC). It is also generally accepted that abolishing those rights in

steps preceding the actual disciplinary proceedings (but directly linked to them) *de facto* invalidates those rights and leaves staff unprotected.

The new IR undermines in particular the following rights:

- the right to legal counsel and legal assistance;
- the right to be protected against self-incrimination;
- the right to inspect the files;
- the right to a proper adversarial procedure;
- data protection, protection of private sphere and private property.

The Boards of Appeal (BoA)

Mentions of the BoA have been added in the IR, in particular "*due respect shall be given, where applicable, to the proper functioning and independence of the Boards of Appeal and Enlarged Board of Appeal*" and the obligation "*to inform the Chairman of the Enlarged Board of Appeal*". However, many of the objections and comments made by the BoA in relation to the initial draft of the IG remain essentially valid.

The board members are appointed by and subject to the disciplinary authority of the Administrative Council (Article 11 EPC). In the BoA Unit, the Chairman of the Enlarged Board of Appeal (EBA) is at the same time the President of the BoA, endowed with the power delegated to him by the President of the Office, including that of proposing disciplinary action. During the investigative process, the Chairman of the EBA cannot be competent under Article 23(1) EPC.

The existing legal framework for disciplinary matters requires that the Administrative Council or a unit appointed by the Administrative Council must perform <u>any decisive steps of the investigation proceedings</u>, including the initiation of such proceedings, the continuation of the proceedings after the initial review / the preliminary evaluation and any protective and *interim* measures. In contrast, the IR presently attributes the exclusive exercise of all these steps to a unit fully controlled by the President, thereby going beyond the power conferred to the President under Article 10(2)(h) EPC (i.e. the right to propose disciplinary action to the Administrative Council with regard to, *inter alia*, board members).

The following points illustrate the mingling of responsibilities introduced by the IR and the resulting conflicts of rules. As exemplary issues:

- The proceedings under the IR are fully controlled by the President, even if the subject concerned has been appointed by the AC. In particular, the Administrative Council has not even the right to request an investigation. The respective board chairman or the President of the Boards of Appeal, who, as immediate superiors of a board member, may induce disciplinary proceedings by filing a report to the Administrative Council, are not considered at all in the IR.
- Under new Article 14 IR, the President has the right to take *interim* measures against the subject of an investigation; the list of *interim* measures includes severe steps such as temporary suspension. However, in the ServRegs, a temporary suspension lies within the competence of the appointing authority,

i.e. the AC. This conflict of competence is illustrated in new Article 14(4) IR, where "*the President shall immediately inform the Chairman of the Administrative Council*" in such cases.

- Whereas, under the ServRegs, the appointing authority shall submit a report on the facts supporting disciplinary proceedings, according to new Article 18(5) IR, the IU prepares the written report on the findings of the investigation to be submitted to the Chairman of the AC. The Chairman of the EBA is merely informed of the findings.

If the investigation against a board member is not supervised by a responsible person or group of persons within the boards, there is a possibility that the fact-finding might extend, even unintentionally, to any information that has to be protected in the interest of the function of the boards (in particular, information covered by the secrecy concerning the boards' deliberations). This risk is exacerbated by the removal of any prior authorisation by the DPO in the new IR/IG.

Passages/provisions that are incompatible or even contradictory with the above-mentioned system of provisions of the EPC and the ServRegs may also affect the public perception of the Boards' independence, as well as the confidence in the investigative process.

Application to contractors

The language of new Article 1(2) IR is inconsistent. If a contractor misbehaves, one cannot seek application of rights and obligations by a later contractual agreement. Rights and obligations must be defined beforehand in the contract of service, and if they are violated (or other points of the applicable law are infringed), a national court is competent for violation of contract or general obligations.

Although the IR does not apply to the President of the Office, provisions with the same effects on his rights and obligations should be incorporated in the ServRegs and in the President's contract under control of the Administrative Council.

Misconduct

In new Article 2 IR, misconduct for a (former) staff member is "*any failure to comply with his obligations under these Service Regulations, whether intentionally or through negligence on his part*". Wilful, if not gross, negligence should be the yardstick.

Misconduct consisting in "*facilitation of or participation in any conduct specified in paragraphs (a) to (n) above*" omits the reference to any intent. Facilitation without knowledge, intent or gross negligence cannot be regarded as misconduct.

Even if misconduct cannot be positively defined to cover all particular cases, its meaning has to be clarified in a manner which allows staff to see the limits of compliant behaviour and which prevents arbitrary interpretation on a case-by-case basis. Case law summaries are a tried-and-tested way of delimiting the realm of misconduct and assessing their seriousness. Publication of collections of decisions in disciplinary cases would be most useful.

Burden and standard of proof / Nature of the investigative process

The burden of proof undoubtedly rests with the Organisation. The ILOAT standard of proof "*beyond a reasonable doubt*" (ILOAT judgment No. 969, consideration 16) applies to disciplinary proceedings. By contrast, the "*preponderance of the evidence*" of Article 18(6)(ii) IR prevails in the investigative process, which is supposed to gather all relevant evidence for subsequent disciplinary proceedings. New Articles 18 IR foresees that an investigation report is submitted if the IU concludes that "*the allegations are fully or partially founded*". This goes beyond the role of investigators, who are there to establish facts and to draw conclusions, and contravenes the principle of unfettered consideration of evidence. It is a prerogative of the Disciplinary Committee to interpret the facts and assess the evidence.

In actuality, these discrepancies illustrate the artificial distinction between the investigative process, supposed to be exclusively a non-adversarial, purely administrative fact-finding exercise, and the subsequent adversarial disciplinary procedure.

Principles in the conduct of an investigative process / due process

New Articles 3 and 16(6) IR put a burden in the investigators, who shall "*take into account*" and give "*due respect*" to other principles (in particular the independence of the BoA, proportionality of the steps taken in the process, data protection...). The correct application of these principles cannot be challenged in the investigative process. The Office also routinely submits in disciplinary proceedings that a correct application cannot be reviewed by the Disciplinary Committee either. A later review by the Board of Auditors, possible in theory pursuant to Article 22(3) IR, cannot replace the case-by-case decision during an investigation.

This shows that the rules of due process are not given enough attention in the drafting of the IR.

Assistance / accompaniment

As in the old IR, representation by a legal counsel during the investigative process remains forbidden. Different from the old IR, new Article 8 IR concedes that a legal counsel does not have to inform the IU that he has been consulted. This is a small improvement. However, it is annihilated in that the IU may ask him to sign a declaration of confidentiality, which may restrict his ability to prepare a defence. Furthermore, an investigator apparently may declare a legal counsel "*not eligible to provide advice and support if doing so might expose them to the risk of a conflict of interest*". This decision cannot be challenged in the investigative process. This arbitrarily limits the free determination of the defence.

According to new Article 8(6) IR, any involved person (the subject, his family, his legal counsel) "*must take, and upon request demonstrate, all reasonable measures to ensure the confidentiality of the fact-finding procedure*". This provision reverses the burden of proof from the outset and is at odds with the presumption of innocence. It also makes taking advice a risky endeavour since failure to convince

the IU that all reasonable measures to ensure confidentiality were taken might constitute misconduct.

The presence of a legal counsel during interviews is allowed in some international organisations. This possibility is ruled out in the IR and new Article 17 further worsens the situation. The "*accompanying person*" in the old IR is been replaced by a mere "*observer*", who mustn't interfere, even in cases of self-incrimination by a complainant or a subject. In the proposal, the IU would have the additional power to ban an observer from interviews in the investigative process. Again, this decision cannot be challenged. In particular this unduly limits, or prevents in the worst case, the staff representation from exercising one of its core activities.

***Interim* / protective measures**

Their scope and duration (up to eighteen months in new Article 14(3) IR) do not match the corresponding provisions in the ServRegs as well ILOAT case law.

These measures are often coupled with a "house ban", i.e. the prohibition of entering the Office premises. This renders the preparation of the defence more difficult for the subjects, e.g. by complicating access to Office data or contacts with colleagues.

In practice, suspension is sometimes also coupled with "house arrest", i.e. the obligation to stay at home during core time, which lends them punitive character to the protective measure, renders the preparation of the defence more difficult for the subject and does not serve "*to safeguard the investigation or to protect a party to the investigation*", which are the declared aims of the measures in new Article 14(1) IR.

Gathering of evidence / data collection and retention

New Article 10 IR specifies that the IU "*may start investigations on its own motion*". Data trawling is presented as "*pro-active*". If more than information relevant for the raised concrete allegation is sought and collected, additional concrete safeguards should be put in place. Presently, the deletion of old Article 5(3) IR results in no registration of such data collection. Furthermore, the potential subject may remain unaware of the data collected, if he was not already "*informed of the investigative process*".

Pursuant to new Article 21 IR, records about allegations may be retained for ten years, or possibly longer if "*there is a reasonable expectation that the matter will become subject to litigation*". This is all the more worrying in that it is unclear whether the IU underlies the DPG. This bears the risk of an uncontrolled accumulation of large amounts of data, "just in case" (data retention issue).

Data protection, private data and property

Article 12 of the Universal Declaration of Human Rights provides that "*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.*"

The Data Protection Guidelines (DPG) is *de facto* invalidated during the investigative process (Article 14(8) DPG: "*Where the provisions of this Article conflict with the provisions for internal investigative processes, the provisions on internal investigative processes shall prevail*").

Circular No. 342 distinguished between privately owned and Office-owned resources and data and foresaw prior authorisation by the Data Protection Officer (DPO) before access, seizure or collection. In the revised IR, all mentions of the DPG and the DPO have been removed. Furthermore, new Article 16(2) IR provides that the IU may "*secure, access and search all resources and documents which may reasonably have a bearing on the case*", regardless of whether they are owned by the Office or not. This means that, for instance, private mobile devices may be seized and secured without asking their owner. The IU confirmed this interpretation. Under national law, such seizure would constitute theft. The problem is likely to exacerbate in the future when a "Bring your own device" (BYOD) policy is adopted in the Office.

The only safeguard is the declaration that "*account shall be taken of the principles of proportionality and data protection*" when securing resources and documents. Those principles should be imperative. However, applying them lies in the discretion of the investigator alone, without cooperation with the DPO or any other authority.

The safeguards during physical inspections of "*office space*" have also been weakened. In the old provisions, the DPO or his delegate had to be present. New Article 16(4) IR now calls for an "*observer*" with no particular status or authority. Furthermore, it is unclear whether the provision also applies to the home workplace in the part-time home working (PTHW) scheme.

The duty to co-operate of Article 7 IR also seems to imply that an employee being asked by an investigator cannot refuse permission to provide access to personal evidence without risking being exposed to an allegation of "failure to co-operate". The concept of "*legal justification*" for refusing access is also too vague to be effective as a safeguard since the Office normally does not accept justifications not already foreseen in the ServRegs. The CSC notes that the "*right to refuse to answer*" of Article 17 IR cannot be invoked in such a case.

In conclusion, the proposal removes all checks and balances when gathering evidence and constitutes very severe intrusions into the privacy of staff, which might contravene national Data Protection regulations and Article 12 of the Universal Declaration of Human Rights.

The investigation and the right to know about it

In all cases, there is an obligation to inform the person concerned of an investigation (see ILOAT judgments No. 2138 and 2741), at the latest when the investigative process is complete and when there is no danger of affecting its integrity. The new provisions are not satisfactory for the following reasons.

According to new Article 15(3) IR, if the investigative process is closed without the issuance of a final report, the subject shall only be informed of the investigative process if he has a "*specific legal interest, for example if he was informed of the*

allegations". According to new Article 18(1) IR, a written summary of the findings is provided to the subject only "*[w]here the subject has been informed of the allegations*". Analogous to Articles 1(3) and 3(a) EU Service Regulations, the employee should be informed in writing in all cases and he may request that this report be inserted in his personal file, also in case no disciplinary procedure is launched after the investigation process.

New Article 11(3)(i) IR introduces a completely new step allowing the IU to collect and retain dormant data and to re-open an investigative process later, *"[i]f new or previously unknown relevant evidence becomes available*". In order to enhance trust in investigative processes and to comply with ILOAT case law, a subject should have the right to be informed even if no report is issued or if the report concludes that no misconduct has taken place. This would limit the temptation of speculative investigations based on weak allegations and evidence as well as unwarranted data retention.

Use of outside investigators

The use of external investigators can prove problematic. On the one hand, they are bound by national law and are not entitled to act on the basis of the EPO regulations outside the premises of the Office. On the other hand, according to new Article 13(2) IR, they are bound by the same procedural rules as the IU. Consequently, they cannot and should not be employed to investigate the conduct of employees outside the Office, unless the normal safeguards imposed by national law are applied and respected.

Privileged information / secrecy of deliberations

Article 9 DPG lists special categories of data enjoying particular protection. The list of privileged information should be complemented and made binding for the IU, in order to protect information held by physicians, by confidential counsellors, by staff representatives or by union officials. Any information relating to the deliberations of members of the Boards of Appeal and members of the Examining and Opposition Divisions should also be expressly protected against any type of collection by the IU. The declaratory safeguard ("*principles of proportionality and data protection*") in new Articles 3(2) and 16(3) IR is clearly not sufficient in this respect.

Interviews

Satisfactory procedural guarantees have already been designed for the EU. More guarantees are necessary in the EPO ServRegs due to the fact that the investigation is *de facto* the only opportunity of fact-finding, the power of the Disciplinary Committee to order an additional inquiry pursuant to new Article 93(2) ServRegs being exercised restrictively in practice.

New Article 6(2) IR introduces the right to defend oneself including the right to propose witnesses, subject to a discretionary permission of the investigators. Instead, the accused should have the right to call for witnesses in their favour, as well as to cross-examine hostile witnesses in order to complement the collection of exculpating evidence.

New Article 14(7) IR provides that *"[t]he investigative unit may decide, for reasons of protection of the parties, not to disclose the name of a complainant or witness."* Even if, in such a case, a finding of misconduct cannot be based directly on testimony provided by this complainant or witness, the accused has a right to hear / confront the accuser and witnesses in order to assure proper fact finding and to defend himself properly (see ILOAT Judgments No. 2014, No. 2475, No. 2601, No. 3065, No. 3200 (consideration 11)).

Witnesses and subjects should receive prior notice sufficiently in advance, including the allegations for the subjects, in order to prepare, seek assistance / accompaniment and be in a position to exercise the right to defend themselves. This contrasts with the current practice, where interviewees are often summoned at very short notice and have little or no possibility of finding assistance. A minimum duration for this prior notice should be specified in new Article 17(3) IR.

According to new Article 17(10) IR, a transcription of the audio recording of the interview is only an option. However, an accurate record of an interview, for instance an audio record, can be decisive and should be compulsory. In Judgment No. 3099 (consideration 10), the ILOAT found that *"the obligation to treat staff members with dignity and the duty of good faith required, at the very least, that there be an accurate record of the interviews, which could have been achieved by, for example, the making of a transcript by a competent stenographer."*

Statute of limitations

Statutes of limitations are necessary and appropriate. However, with new Article 19 IR, the time bar may be surpassed *"where the circumstances are such that a waiver of the three-year limitation is warranted"*. The vagueness of this provision gives the IU the indiscriminate and unlimited power to ignore the time bar, for example when the investigative process is re-opened in accordance with new Article 11(3)(i) IR. This provision, when combined with the *de facto* unlimited retaining of data foreseen in Article 21 IR, *de facto* almost removes any limitations.