

To the Chairman and
the Heads of Delegations
of the Administrative Council
of the European Patent Organisation

European Patent Office
80298 Munich
Germany

Zentraler Personalausschuss
Central Staff Committee
Le Comité Central du Personnel

Tel. +49 (0)89 2399 - 4355
Fax +49 (0)89 2399 - 8470
mnstcom@epo.org

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Date: 09.06.2016

Dear Madam,
Dear Sir,

The CSC is pleased to provide you with this

PRO MEMORIA

to assist you with the preparation of the Council meeting of June.

FOLLOW-UP OF COUNCIL RESOLUTION CA/26/16

1. **Disciplinary sanctions and proceedings should be fair and seen to be so¹.**

- a) The President has reviewed the case of Elizabeth Hardon and has decided to maintain the decision to dismiss her, but has revoked the decision to curtail her pension rights.
- b) No analysis of the proceedings leading to the sanctions against Elizabeth Hardon, Ion Brumme and Malika Weaver has been carried out. No impartial reviewer, much less an arbitrator or mediator, has been involved.
- c) No proposal has been made so far outlining how to enhance confidence in fair and reasonable proceedings and sanctions.
- d) Investigations against staff representatives / union officials have not been formally discontinued. The threat remains.

¹ The Council expects the President “to ensure that disciplinary sanctions and proceedings are not only fair but also seen to be so, and to consider the possibility of involvement of an external reviewer or of arbitration or mediation” The President is also asked “pending the outcome of this process and before further decisions in disciplinary cases are taken, to inform the AC in appropriate detail and make proposals that enhance confidence in fair and reasonable proceedings and sanctions”

- e) The case of Mr Prunier remains unresolved. In actual fact, the vexations continue unabated contrary to the demand of the Council to put such things on hold pending a thorough review of the procedures.

2. Revision of the Staff Regulations concerning Investigation Guidelines, Investigative Unit and disciplinary procedures².

- a) The Council expects a review of the rules to make sure that they are fair and seen to be fair. It also expects them to be incorporated in the Service Regulations.
- b) Many amendments of the Service Regulations proposed in CA/52/16 and CA/53/16 are of cosmetic nature – tidying up inconsistencies and spelling out general principles that should be evident to common sense. They do not provide watertight procedures and solid safeguards that would make them fair and seen to be fair. In actual fact, several proposals increase the power of the President without introducing any adequate safeguards for staff, including staff representatives and union officials who are not protected.
- c) In an attempt to appease the Council, the President presents the changes as mirroring rules in force at the EU. This is not so. The texts of the EU have been cherry-picked, modified and purged to further weaken safeguards in respect of investigations, disciplinary procedures, procedures for professional incompetence³, and alleged conflict of interest (see CA/29/16) while increasing the powers of the President⁴.
- A contradiction, which is only illustrative, is that employees are obliged to denounce any misconduct, yet in the same breath it is forbidden to denounce improprieties when the issue concerns confidential dealings. This makes the “whistle-blower” provision ineffective in denouncing fraud and corruption.
 - Another result is that employees cannot disclose in legal proceedings any “non-public document of information of which he has knowledge by reason of his duty”. This means that the right of defence in legal proceedings is restricted and is at the discretion of the President.
 - Professional incompetence has now been redefined as “lack of ability and efficiency”, which we interpret as being a much lower threshold than “incompetence”.

² The Council expects “a draft revision of the Staff Regulations which incorporates investigation guidelines (including the investigation unit) and disciplinary procedures which have been reviewed and amended.”

³ Note: the Council did not ask for any changes in these procedures

⁴ Among many other defects: The President will retain and increase his already vast powers, over *all matters* (not only those related to official duties) and *even on former employees*, while general safeguards are weakened. The Disciplinary Committee will henceforth be chaired by a (former) external judge on a renewal three-year contract.

- d) Also, highly controversial points concerning the functioning of the Investigative Unit (IU) are maintained at the level of a Circular (amended Circular 342). There is no intention to enshrine a suitable policy in Articles of the Service Regulations as requested by the Council. Keeping the Guidelines, which also affect Council appointees, at the level of a Circular enables amendments without the supervision of the Council. At the same time, the President downplays the reform as a regular periodical review of the Investigation Guidelines, which however aims to strengthen the investigative function and expand the mandate of the Investigative Unit⁵.
- e) In this context, it is interesting to note that the operations of the IU have been reviewed by an External Review Panel applying the Uniform Guidelines of the Conference of International Investigators. The Panel has found a number of serious deficiencies and has formulated corresponding recommendations. When the recommendations involved “tightening the grip” over staff, they have been adopted. However, wherever they involved *safeguards* for staff or *independence* of the investigators, the recommendations have neither been adopted nor addressed in the revised Circular 342 (or for that matter in CA/52/16, CA/53/16). In particular, the Panel criticized the lack of independence of the IU. There are indications that the President intends to increase his stronghold on this body’s operations and independence by placing its successor, the “Ethics and Compliance Office”, under his direct supervision.
- f) Data Protection is severely eroded. Currently resources owned by the Office are distinguished from private ones. According to the proposed Investigation Guidelines (Article 16) “all resources and documents which may reasonably have a bearing on the case” may be searched including e.g. privately owned mobile devices.
- g) The process of consultation was deficient:
- The Administration has hired external consultants (direct placement) through an opaque procedure, without any involvement of the CSC.
 - The CSC was involved in working groups, but received only incomplete and systematically late information, so that a proper preparation was not possible. For instance, the report of the External Review Panel was published after closure of the working groups and with the publication to staff of final documents CA/52/16 and CA/53/16. Statutory consultation of the General Consultative Committee will take place on 23 June, i.e. after submission of the documents to the Council.

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In paragraphs 11 and 13 in CA/52/16

3. MoU with SUEPO⁶

- a) The President signed a MoU with FFPE-EPO on 24.2.2016. SUEPO did not sign that agreement, and informed the Council of its reasons on 29.2.2016⁷. SUEPO also reminded the Council that it had submitted a draft proposal of “Framework Agreement” as early as 05.02.2014 (two thousand and fourteen), a proposal that was entirely ignored⁸.
- b) In March, the Council called on the Office to sign an MoU simultaneously with both unions, and specified that the MoU should be negotiated without preconditions. Presumably, the Council signalled its dissatisfaction with the path chosen by the Office.
- c) So far, the Office has been silent on this front. It has not approached SUEPO to create the premises for resuming a healthy dialogue.
- d) Instead, the President continues to deal exclusively with FFPE-EPO, a tiny union that counts 76 members in The Hague and no section in other places of employment. In their recent elections, 31 members voted. The new Chairman has received 9 (nine) votes. FFPE-EPO is systematically called to participate in working groups, including matters affecting places of employment where they have no section. The Office is misleadingly presenting this as a major success in “social dialogue”.

4. Reform of the Boards of Appeal⁹

- a) The Council expects a proposal for a structural reform of the BoA, on the lines of the 5 points agreed by the Council at its December 2015 meeting and of the legal advice given by Prof. Sarooshi, and taking into account comments from the Presidium of the BoA.
- b) The document that will be tabled to the June meeting of the AC actually goes in the opposite direction. The Presidium and AMBA - who have not been consulted adequately - have already expressed their concerns. We share their worries and fear that the adoption of such a reform would further endanger the independence of the Boards as (sole and) final

⁶ The Council expects the Office to sign “*within the framework of the tripartite negotiations, an MOU simultaneously with both trade unions, which would have no pre-conditions or exclude any topics from future discussions*”.

⁷ Letter su16029cl

⁸ Letter su14020cl of 5.2.2014; The Office did not even acknowledge receipt. SUEPO then reminded the Office of the draft proposal and resubmitted it, when the Office launched the working group on Union Recognition in 2015 (letter su15182cl of 24.4.2015).

⁹ The Council expects the President “*to submit proposals to the AC at its June 2016 meeting, after discussion in B28, for immediate implementation of the structural reform of the BOA, on the lines of the 5 points agreed by the AC at its December 2015 meeting and of the legal advice given by Prof. Sarooshi, and taking into account comments from the Presidium of the BOA*”.

judicial instance and negatively impact the reputation of the Organisation, which is currently under close scrutiny of all interested circles.

5. Reinforcement of the Council Secretariat¹⁰.

- a) The CSC is not aware of any plan to reinforce the Council secretariat. On the contrary, there are indications that the President intends to change the secretariat's personnel to bring its operations more firmly under his personal control.

CONCLUSIONS AND RECOMMENDATIONS

In the light of the above considerations, the CSC recommends the Administrative Council **to reject** proposals CA/29/16, CA/52/16 and CA/53/16 in their present form. They are not in line with resolution CA/26/16; they are liable to bring the EPO into further disrepute and to undermine further the public's confidence in the EPO's ability to respect the Rule of Law.

Yours sincerely,

The Central Staff Committee

We confirm that this letter was legitimately decided and produced by the Central Staff Committee¹¹

¹⁰ The Council expects the President "to submit proposals to the AC at its June 2016 meeting, after discussion in B28, for reinforcement of the AC secretariat and a clarification of its position in terms of governance."

¹¹ Pursuant to Article 35(3) ServRegs, the Central Staff Committee shall consist of ten full and ten alternate members.

The CSC presently consists of 17 members, because two have resigned in Dec 2014 and one has been dismissed in Jan 2016 (against the recommendation of the Disciplinary Committee).

One full member of the CSC has been downgraded in Jan 2016 (against the recommendation of the Disciplinary Committee). In fact, the Office has launched investigations and disciplinary procedures against nearly all SRs, which further caused health problems.



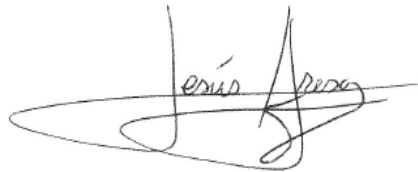
Ion Brumme
(dismissed Jan 2016)



Alain Rosé



Malika Weaver
(downgraded Jan 2016)



Jesus Areso
(warned)



Alain Dumont



Laurent Prunier
(on sick leave
since Nov 2015)



Jose Ramon Ambroa



Iordanes Thanos



Michael Kemény



François Brévier
(not allowed as the de jure
replacement for a full
member who resigned in
Dec 2014)



Thomas Franchitti
(working part-time
following sickness
since Sep 2015)



Philippe Couckuyt



Mathieu Guillaume



Loïg Plouzenec



Michael Sampels



Joachim Michels



Florent Béraud



Carmen Schuhmann

cc.: Mr B. Battistelli; President of the EPO
Mr Y. Grandjean, Director Council Secretariat