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OPEN LETTER

Dear Ms Bergot,

The Central Staff Committee (CSC) takes note of your letter dated 22 of July 2016 which makes reference to the CSC paper entitled “The EPO Justice System – institutionalized injustice?”

Notwithstanding the critical tone of your letter, the CSC would nonetheless like to express its gratitude that you have finally taken note of a publication made by the Central Staff Committee: this stands in great contrast with the apparent, current management policy to ignore any input made by EPO staff representatives¹. However, with regards to the criticisms themselves, we would like to make the following comments.

1. The goal of our publication

You seem to put in doubt the good faith with which the CSC has simply presented the facts. The CSC would like to clarify the following: the paper was intended to render a more digestible interpretation of the comprehensive and very valuable study made by the Board of Auditors² on the EPO Appeal system.

We remind you that the CSC has never been granted effective, direct access to data in the EPO (for instance through FIPS): instead (and as pointed out above), the CSC receives only sporadic and often incomplete answers to letters or other formal requests for data, in particular for statistics. Further, it should be noted that since 2011 the Internal Appeals Committee (IAC) has no longer issued an official report. Lastly and as you rightly point out in your letter (see comment below), the CSC itself has had no nominee in the IAC since October 2014.

For these reasons, the CSC has to rely solely on publicly available data and statements. This brings to the fore a very practical difficulty of merging data from different sources that may be of a heterogeneous nature, such as the ILOAT homepage, the BoA reports and the Social Reports. The terminology used is often ambiguous or inconsistent, sometimes even within the same document (such as “pending cases” vs. “backlog” - see below). Furthermore, the figures can be inconsistent and/or modified from one year to the next (see for example consecutive Social Reports).

¹ For instance the [open letter](#) dated 21 April 2016, the CSC requested the President to allow non-elected staff to work on behalf of Central and/or Local Staff Committees annexes a non-exhaustive list of 16 unanswered communications made on the topic of the so-called “Social-Democracy”: Please note that, to this date, the latter letter also remains without answer, let alone acknowledgment of reception.

² CA 20/15, CA 21/15 and CA 210/16

Finally, your reaction on this matter is all the more surprising since all figures (besides those for 2015) were presented in a near identical document issued last year with the same title, same scope and same conclusions³. We note that this earlier document did not arouse any reaction from the Administration at the time.

2. Factual criticisms

We would like to clarify certain aspects of your response which may be considered as factual criticism.

2.1 Figures regarding the Internal procedure

Referring to the level of backlog of the IAC, you point out that the graph *“insinuates that the backlog is at 800”* and insist *“it is not and never was”*, unfortunately without offering actual figures to support this statement. We accept that the non-inclusion of figures for withdrawals (40 in 2014 and 48 in 2015) in the various BoA reports may lead to slightly lower figures, but these are insignificant when compared with the total backlog.

To be clear, the BoAs reports disclose backlog figures of **759 cases in 2014** (CA/21/15, p. 20/26) **and 678 cases in 2015** (CA/55/16, p. 52/72), both of which are in the “ballpark” of 700 to 800 cases without the need for any insinuation. We also note that other figures are listed in the Social Reports such as *“actions pending in front of the committee”*. Even though they indicate even lower figures of **680** pending cases for 2015 (CA 55/16, p.52/72) and **664** cases for 2014 (CA 55/15, p.53/77), they remain in the same ballpark.

You insist that the backlog has *“been reduced both in 2014 and 2015”*. Unfortunately, we can only note that the BoA have failed to recognise any such “achievement”⁴. Faster procedures may be unexpected good news for staff, but not if such extra speed has only been achieved by *“tackling efficiently”* said backlog in a way that is perceived to be at the expense of staff rights⁵.

In the light of the above argumentation, we see no need to correct the diagram. However, **for the sake of absolute transparency, we will publish both your letter and this clarification.**

2.2 Figures regarding the ILOAT

Referring to our slide 4, you say that the data about the ILOAT backlog are incorrect. Here too, we have only relied on the latest Board of Auditors report and their somewhat obscure references to “submissions to the ILOAT”⁶. You seem to suggest that the relevant numbers to be presented are not those, but rather the “new ILOAT

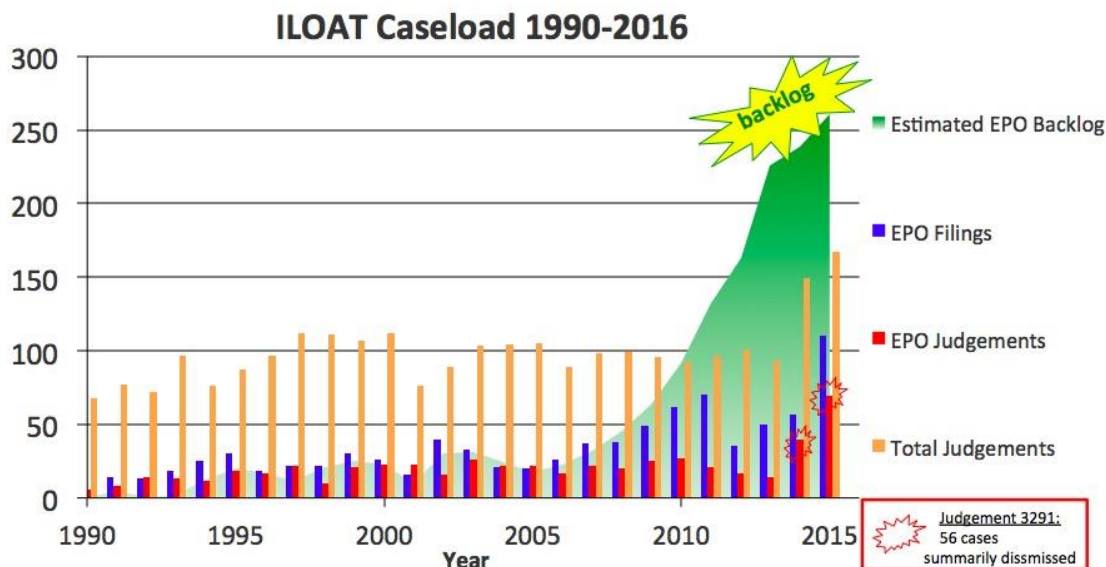
³ The paper dated 28.062015, entitled “EPO justice: analysis of board of auditors review (ca/20/15 & ca 21/15)”, concludes similarly that the “the ILO-AT is ill equipped to act as a trial court (j.3291)” and “there is no social peace without access to justice”.

⁴ The footnote on p.57/116, CA/20/16 e, is more nuanced: *“It is possible that the increase in appeal date - position date is due to increased processing of older cases, thus **reducing the actual backlog.** However, we have not verified this”*. Instead, it is clearly stated that *the “backlog of internal appeals in Dir. 5.3.2 increased constantly from 1 076 appeals in 2010 to 5 791 in 2014” (pt. 216).*

⁵ Footnote 17 of CA/55/16. p.53/72: *“The high rejection rate can be attributed to the high number of summary procedures done in 2015 (**42% of all cases** dealt with in 2015). Summary procedures are applied when cases **are manifestly inadmissible.**”- see annex;*

⁶ pt. 288, CA/20/16 e 58/116 - see annex;

files". We accept this clarification. A new diagram is presented below that reflects this change.



While the ILOAT backlog may no longer look like the “Matterhorn”, it remains an intimidating mountain despite very obvious Administration efforts to - also here - “tackle efficiently” the workload by “*summarily dismissing*” a large proportion of the cases. The backlog remains substantial to say the least and no amount of “reinterpretation” will change the reality that Staff members will have to wait long, indeed far too long, for their disputes with the EPO to be settled.

2.3 CSC Nominees in the IAC

You consider that the footnote on slide 5, “the IAC had no staff representatives”, qualifies as “*misleading and incorrect*”. First, although we might agree in substance to the clarifications you have listed (p.2, first para. of your letter), we would like to point out that, a “five line” footnote is impractical. Therefore, we will instead encourage any interested reader to refer not only to this presentation, but also to further publications from the Staff Representation⁷ on this issue.

Secondly and more importantly, you appear to have overlooked that the footnote in slide 5 actually reads “the IAC has no Staff Representatives **nominated by the CSC**”. As the three volunteers supposedly representing staff were not nominated by the CSC in 2015, the statement is correct and we see no need for correction. In this context, we recommend everyone to read [judgement 3694](#) from the last session of the ILO-AT, which deals in great detail about the [wrongful composition of the EPO Appeal Committee](#).

2.4 All things considered

To remove any and all misunderstandings, we recommend **the Office provides the same diagrams** for the same data and period of time. Even if all the changes you suggested had been implemented, it would not significantly affect the overall analysis made in our presentation: +/-50 cases of backlog will not change the situation

⁷ 04/12/2014, “[dysfunctions within the internal appeals committee \(iac\)](#)”; 03/10/2014, “[Open letter to the President, “Nominees to the IAC](#)”; 29/01/2015, “[update: irregularities in the appeals committee - how to deal with it?](#)”

“manifestly”: the present means of redress available to EPO Staff are not fit for purpose and none of the recent developments have been advantageous for staff.

3 Double standards

Your letter is surprising in its harshness. Besides the introductory paragraph in which you reiterate your fondness for freedom of expression⁸, you allege that our intention was to *“insinuate”, “unduly exaggerate”, “create confusion”, “mislead”, or make “incorrect”*⁹ statements and that our only aim is *“heavily discrediting the Office’s system”*. You go on to say that *“the proposed document is considered as not in line with principles of respectful and truthful publication of with our Code of Conduct”*. You also say that some wording is *“unnecessarily polemic and hurtful to the staff involved”*. With respect, these are gratuitous, unilateral assertions based on your own interpretation of the document.

First, the terminology used was chosen to be in accordance¹⁰ with the one used by the BoAs.

Second, it remains the duty of the CSC to shed some light on both the practices and results arising from the actions of a key organ for the access of Staff to justice. Fully recognising the necessary independence of that organ does not mean that its functioning cannot be critically assessed. The Office is always free to publish a rebuttal, supported by evidence, but merely asserting that *“all applicable legal provisions are applied by our legal and other parties involved”* is not helpful.

We all know that your use of terms like “discrediting” and “breaches of the code of conduct” imply that you may already be considering to impose further disciplinary sanctions on members of the CSC unless we agree to “shut up”. We remind you that both making unwarranted threats and unlawfully restricting the legitimate use of freedom of speech are grave breaches of the standard of conduct expected from a senior manager of the EPO.

Why should we all pretend that “all is fine” with institutional justice in the EPO? Whenever possible, we should strive to agree on facts. However, in the light of the abyss that separates our individual interpretations of these same facts, the CSC humbly suggests **we simply agree to disagree**.

The up-coming “Social Conference” has the alleged purpose to identify key issues that will enable the Office to move forward and out of the present social crisis. We maintain that the dysfunctions in our internal system of justice are among the most prominent of the stumbling blocks that need to be addressed and overcome before any progress can be made. Trying, by making threats, to muzzle critical voices is not inductive to an open and frank dialogue: we recommend that you ponder the consequences of your actions.

With these clarifications, we trust that there remain no legitimate objections to our publishing the CSC paper.

The Central Staff Committee

⁸ We do take note that despite this “lip service”, you conclude that the document cannot be published.

⁹ A dozen of adjectives and adverbs of the sort are used throughout the letter.

¹⁰ as far as possible for editorial reasons: see for instance the explicit explanations on slide 2; the terminology used by the BoA is not the same for the Reviews, the Appeals or the judgements.

Annex

Relevant passages of the Reports used for the figures cited in the present publication

71. Currently there are 759 pending cases with 5 761 appellants (as of 20 November 2014).

Backlog situation on 20.11.2014	Cases	Appellants
Stay of proceedings	24	185
Hearings took place	46	1 563
Opinions delivered	61	1 608
Summary procedure	91	374
Cases of settlement	62	126
PP delivered	119	363
Appeals waiting for PP	356	1 542
Total	759	5 761

CA/21/15 e 20/26

290) The backlog situation is as follows:

Workload status of D 5.3.2 - 2014	Number of cases 2014	Number of cases 2015
On hold / stay of proceedings	24	17
Follow-up of envisaged amicable solution	62	8
Prepare PP	358	418
Drafting 2 nd submission and / or pleading	126	102
Legal input on IAC opinion / final decision	198	133
Total	768	678

Table - Backlog Situation in 2014 and 2015

CA/55/16 e 52/72

In 2015, 226 registered appeals were lodged by 1 805 staff members.

The number of new appeals in 2015 increased by 24.9% compared to 2014, while withdrawals increased by 23.1% (from 40 withdrawals in 2014 to 48 in 2015).

There were 12 mass appeals¹⁶ in 2015 with 1 458 appellants. One mass appeal with 158 appellants concerned strike deductions for strike action in late 2014. The subject of another mass appeal with 40 appellants was the national taxation of pensions. The other mass appeals all concerned the New Career System (seven mass appeals – 597 appellants) and the invalidity reform (three mass appeals – 663 appellants).

The average time from filing of an appeal until the final decision of the President was taken in 2015 was 45 months. At the end of 2015 there were still 680 appeals pending before the Appeals Committee

CA/20/16 e 59/116

Table 60: Change in outcome of appeals at the EPO, 2014-2015

Final decision of the appointing authority on appeals	2014	2015
Appeals allowed	2%	0.5%
Appeals allowed in part	10%	0.5%
Appeals rejected	88%	17.99%

Source: Appeals Committee

¹⁷ This high rejection rate can be attributed mainly to the high number of summary procedures done in 2015 (42% of all cases dealt with in 2015). Summary procedures are applied when cases are manifestly inadmissible and focus on the issue of admissibility only. Moreover, in 2015 many appeals were dealt with by the Appeals Committee which were filed before the ILOAT had issued its hallmark judgment no. 3291. This judgment provided clarification that general decisions requiring implementation cannot in principle be appealed against, even by staff representatives defending general interests of staff.

CA/55/16 e

53/72

288) The workload of D 5.3.2 is as follows:

Settlement notes	Position paper	2 nd written submissions in appeal files	IAC pleadings	Legal input on IAC opinions
Data on appeals 2014				
12	134	79	80	150
Data on appeals 2015				
3	114	32	69	215

New ILOAT files	Submissions to the ILOAT	Judgments
Data on ILOAT 2014		
57	118	40
Data on ILOAT 2015		
110	130	69

Table - Workload of D 5.3.2 in 2014 and 2015

The tables do not include data on legal advice, participation in projects or involvement in processing requests for review. Beside the mentioned tasks, D 5.3.2 also has to deal with several projects. Overall Directorate's activity includes beside the re-litigation (ILOAT and internal appeals) also legal advice during the processing of requests for review ("pre-litigation").

In total, the number of data on appeals and data on ILOAT files were in 2015 higher than in 2014, and the backlog at the ILOAT has increased.

CA/20/16 e 58/116