European Patent Office | 80298 MUNICH | GERMANY

Mr António Campinos
President of the EPO

By email

European Patent Office
80298 Munich
Germany

Central Staff Committee
Comité central du personnel
Zentraler Personalausschuss

centralSTCOM@epo.org

Reference: sc22135cl

Date: 11/11/2022

OPEN LETTER

Further restrictions on the rights of sick staff (CA/85/22)

Dear Mr President,

The Central Staff Committee became aware on 3 November of the content of CA/85/22 titled “Adjustments to health services”. The document is tabled for opinion in the COHSEC on 14 November and for GCC consultation in the meeting of 22 November.

In view of the wide implications, our COHSEC nominees expressed their concerns on 2 November 2022 and asked by email of 8 November 2022 the Chairman of the COHSEC to change the document category from “for opinion” to “for discussion” and to discuss it in a meeting in person. In a reply sent on the same day, the Chairman rejected the request by stating that already an “intensive amount of discussions” took place and that the “Working Group worked well and delivered results jointly supported”.

In our view, the document constitutes a misrepresentation of the situation at the EPO and instrumentalises the Working Group on “Health & Safety Services” to introduce further restrictions on the rights of sick employees which were not within the scope of the Working Group and have not been discussed.

Misrepresentation of the situation at the EPO

The document pretends that “*the 2015 reform of sick leave and invalidity (CA/14/15 and CA/D 2/15) stimulated a shift from a disability culture to a culture of integration in employment at the EPO”* (§ 39) and contributed *“to balance staff’s wellbeing and safety with business continuity as from the start of the pandemic in 2020”* (§ 40). It is worth recalling that several aspects of the reform are still being challenged and are currently negatively affecting staff:

European Patent Office
Grasserstr. 9
80339 Munich
Germany

- the computation of sick leave (Article 62a (7)(b) ServRegs) counting any part-time absence on a working day as a full day of sick leave is prejudicial to staff entering or in extended sick leave or (partial) incapacity because it resulted in them having salary deductions (e.g. in case of Covid-19 infections), contrary to the rest of staff.
- the abolition of the invalidity lump sum insurance[1] breached the legitimate expectations of EPO staff who had been contributing to the insurance for many years. The Appeals Committee unanimously considered that the Office breached its duty of care by not providing transitional measures. VP4, by delegation of authority, rejected[2] in February 2021 the opinion which was in favour of staff, thereby giving no other option to them than to challenge the decision in front the Tribunal right in the middle of the pandemic.
- the abolition of a medical committee (former Article 89 ServRegs) previously based on a balanced composition paved the way to an arbitrary and unbalanced procedure fully empowering the medical practitioner (advisor) chosen by the President of the Office alone for the purpose of providing medical opinions on incapacity.

Further misrepresentations of the situation are:

- the document alleges a *"positive impact of the reform"* on sick leave reduction although the average sick leave days had already started to decrease as of 2010 (see figure on page 2, §6) and sick leave is actually increasing again, especially in 2022. The decrease in 2021 was solely linked to very specific circumstances, the pandemic.
- there is no reference to the fact that our COHSEC members disagreed with the Mercer Marsh Benefits study which focused only on three countries. United Kingdom was included (although it is not a host state) for the purpose of justifying a merge of the Occupational Health Service and the Medical Advisory Unit which is actually unlawful in our major host state, Germany.
- the statement that *"COHSEC members welcomed the inclusive and constructive approach, which had led to agreement in many areas"* is misleading because there are crucial points of disagreement on issues which are now the basis of the amendments proposed.

[1] CA/14/15 Add. 1, page 20-21/40
[2] CSC publication of 19.03.2021

Occupational Health Services (OHS) and Medical Advisory Unit (MAU) must stay separate

Currently, there are two separate teams:

1) an Occupational Health Service (OHS) responsible for staff on sick leave (less than 125 days in 18 months) and who is providing advice and support to the staff member,
2) a Medical Advisory Unit (MAU) responsible for staff on sick leave for more than 125 days over a period of 18 consecutive months and who drafts opinions for the President for the purpose of taking potentially adverse administrative decisions (e.g. salary deductions, forced return to work…)

By using the same broad terms "health professionals" (§15), "health experts" and "medical experts" for both team, the document blurs the distinction between the current very different roles: who is from the OHS?, who is from the MAU?, who is a physician? and who is a nurse?

The document proposes (§18) to eliminate the organisational separation between the two health services teams: Occupational Health Professionals (OHP) and Medical Advisory Professionals (MAP). Such a change allegedly enables a staff member to be "supported" by the same "health professional" throughout a cycle of health-related absence.

While COHSEC members agree to the idea that the same Occupational Health Practitioner supports the sick staff members during the process from sick leave to incapacity, that same practitioner should at no point in time be involved in preparing adverse decisions (e.g. salary deductions, forced return to work) against the staff member. Such decisions must be prepared by another practitioner, a Medical Advisory Practitioner. The EPO's argues (§22) that the scope of services requested from Medical Advisory Practitioners, currently responsible for staff on long-term sick leave (beyond 125 days), would be considerably reduced. This argument is not convincing because it actually results in a shift (and increase) of the burden on Occupational Health Practitioners.

A sick staff member cannot build trust (§19) with the practitioner supposed to support him if this same practitioner is also actively involved in taking adverse decisions. The document pretends (§12) to maintain *"the independence of health experts in the execution of their tasks as enshrined in current Article 26c Service Regulations"* but this independence is at risk as the practitioner will find himself in an inherent conflict of interest.

In this respect, the two separate medical case management systems of OHS and MAU should not be merged. Contrary to the allegations in §35, it was an inherent strength of the system that medical data was accessed by different persons for different purposes: one to support staff, the other one (only if required) to be involved in taking adverse decisions. A merge of both systems would increase the number of "health professionals" and administrative support staff having access to the medical data of all staff and circulation without asking the staff member for their consent.

In your letter of 18 March 2022 (page 2, paragraph 2), you explained that *"Data Protection requirements will be re-evaluated with the new structure".* In this respect, we would like to know how the Data Protection Officer has been involved and have access to her opinion.

In conclusion, the proposed merge of the two separate teams is detrimental to staff, endangers the independence of the "health professionals", endangers medical secrecy and risks creating an atmosphere of mistrust.

Externalisation and reorganisation to save costs at the expense of staff health

Any medical task currently performed by OHS must be performed under the supervision of a medical doctor. Both medical doctors and nurses must be in-house staff. The advantages of in-house staff are:

- increased commitment to the mission of the EPO,
- internal knowledge of the Organisation, its practices and its culture,
- better continuity,
- higher quality of service and management,
- better knowledge of compliance with specific internal Data Protection Rules (DPR).

In view of the New Ways of Working (NWoW), the paperless workflow and the increasing number of tools, software ergonomics is even more important than in the past. The EPO needs an in-house software ergonomics professional and we suggest that a dedicated COHSEC Working Group on ergonomics be put in place.

There is no analysis, no business case, showing that externalisation would save costs. In addition, the proposal to have only a *"small […] team of internal experts"* (§31) by putting the focus on *"managing their long-term costs and liabilities"* (§31), combined with the fact that externalisation would "*mitigate a potential lack of occupational health*

resources" (§10) contradicts the alleged goal that the Office's priority would be the health of staff.

The document reveals that *"a tender was run and will be concluded by the end of 2022"*. This fait-accompli casts doubts as to whether the consultation was in good faith.

The mandate of the Working Group

The Central Staff Committee (CSC) appointed (see **Annex 3**) two staff representatives to a COHSEC Working Group in charge of discussing certain details of a further re-organisation of Health and Safety (H&S) departments. The mandate was explained in COHSEC/DOC 10/2022 (**Annex 1**) and confirmed in your letter of 9 March 2022 (**Annex 2**). The mandate was the following:

"In parallel, there are other aspects which will continue to be driven by the team and its management, as well as being discussed with the COHSEC members. The transition will focus on ***defining the future repartition of services between the Occupational Health function and the Medical Advisory function****. It will also* ***determine the scope of the hybrid service delivery model****, the* ***definition of the future roles and responsibilities*** *and the* ***review of the service catalogue****. These reflections can then inform the tender procedures planned in 2022, as many of the existing contracts are coming to an end by end of 2022."*

The mandate even concludes that *"[t]he scope does* ***NOT*** *include […] any changes in the service regulations outside the defined scope"*.

Amendments in the Service Regulations not within the scope and not discussed

The document pretends (§41) that the proposed amendments to the ServRegs are to support implementation of a seamless sick leave process. In our view, none of the amendments were necessary for this purpose. They have furthermore not been within the scope of the Working Group and were not discussed.

Our comments on particular amendments:

Abolition of distinction between medical adviser and occupational health:

The deletion of Article 26a ServRegs abolishes the distinction between medical adviser and occupational health (see section above). The merge is detrimental to staff, endangers the independence of the

"health professionals", endangers medical secrecy and entails the risk of creating an atmosphere of mistrust.

Regular medical appointments at all times:

The introduction of *"[r]egular medical appointments* [which] *will take place during the three phases"* (sick leave, extended sick leave and incapacity (Article 62(2) ServRegs)) has not been within the scope of the Working Group and was not discussed.

This measure would allow the EPO to impose mandatory medical appointments at all times and even for short periods of sick leave. The regularity of such appointments is undefined and unlimited. Experience has shown that such appointments have been an instrument of institutional harassment against staff members. The generalisation to any phase of sick leave leads us to suspect that the EPO intends to put undue pressure on staff members to reduce sick leave registration.

No requirement for prior medical opinion to enter extended sick leave (125 days in 18 months). Medical opinion to enter incapacity at any point in time before reaching 250 days in 36 months:

The abolition of requirements and deadlines for the EPO (new Article 62a(7)(b) and Article 62b ServRegs) would reduce predictability for sick staff because medical opinions for the potential purpose of taking an adverse decision could be triggered at any point in time and even long before reaching the limit of sick leave days.

Lack of transparency on the list of doctors:

The abolition of the requirement that the President draws the list of doctors every two years (Article 89(1) ServRegs) has not been within the scope of the Working Group and was not discussed.

The lack of deadline introduces a further lack of transparency, a potential risk of arbitrariness and a breach of the principle of regularity in the review of the list of doctors.

EPO medical practitioner may contact the employee's doctor without their consent:

For the purpose of the assessment, the medical (advisory) practitioner may now contact the employee's doctor <u>without the consent of the employee</u> (new Article 89(3) ServRegs). This measure has not been within the scope of the Working Group and was not discussed. It is intrusive and constitutes a breach of the employee's right to privacy

and a blank check to breach medical secrecy. The EPO should not allow itself to ask a question, if having it answered would be illegal (or not deontological for the physicians involved).

Use of personal medical data for other purposes. New conditions for ignoring evidence voluntarily submitted by the employee:

The current provisions (Article 89(3) ServRegs) already give a broad margin of discretion for the medical (advisory) practitioner to take into account inter alia pre-existing medical reports, or certificates, if they were submitted in due time by the employee.

Newly proposed Article 89(4) ServRegs now completely deprives the employee of this right to have voluntarily submitted evidence be taken into account. However, the new text allows the medical (advisory) practitioner to **access pre-existing medical reports or certificates provided by the staff member in the context of other medical procedures without their consent**. The conditions such as *"as long as they are not outdated, they are necessary and relevant, and their use if compatible with the purpose for which they had been originally provided"* are so broad and unclear that they may remain without effect in practice.

This allows unauthorised access to medical data of the employees and a breach of the duty of care. It deprives the employee from the possibility of handling their own medical situation in front of the employer. These new provisions have not been within the scope of the Working Group and have not been discussed

Restriction of the employee's right to access medical data:

Currently, an employee may request the President of the Office to ask the medical (advisory) practitioner to provide access to medical information recorded or used in the course of preparing their opinion. The new text abolishes Article 89(6) ServRegs which guaranteed the employee's right to access this medical information. Now access will be defined only in a lower-ranking document, which weakens staff's rights. This measure has not been within the scope of the Working Group and has not been discussed.

Restricted access to the arbitration procedure:

Currently, in case of disagreement with a medical opinion, an arbitration procedure may be triggered (Article 90 ServRegs) either by the EPO or by the staff member. The new provisions remove the possibility that *"the employee contests a medical opinion*

recommending not to extend the maximum period of sick leave as foreseen in Article 62a, paragraph 7" (former Article 91(1) ServRegs). This measure has not been within the scope of the Working Group and was never discussed. It contradicts the alleged preference of arbitration over litigation and constitutes a severe restriction on the means of redress of sick staff.

Conclusion

The amendments proposed not only go beyond the scope of the mandate but they introduce, after the 2015 reform, further restrictions on the rights of sick staff, calling into question whether the health and well-being of staff is the EPO's priority.

We urge you to withdraw this text and not to submit it to the Administrative Council.

Yours sincerely,

Alain Dumont
Chairman of the Central Staff Committee

Annexes:

1. COHSEC/DOC 10/2022: Mandate and composition of the COHSEC Working Group, 04-02-2022
2. Letter of the President, CSC nominations in the COHSEC Working Group on Health and Safety Services, 09-03-2022
3. CSC letter to the President, COHSEC Working Group on Health & Safety Services: appointments, 18-03-2022 (sc22028cn)

.cc: Mr Andreas Sattler, Chair COHSEC

Annex 1

Central Occupational Health, Safety and Ergonomics Committee

Document for the Central Health, Safety and Ergonomics Committee

Document number	COHSEC/DOC 10/2022
Meeting Date	23/02/2022
Title	Mandate for the COHSEC Working Group
Classification	For information
Date submitted	04/02/2022

Mandate and composition of the COHSEC working group

1. Background

In November 2020, the COSHEC was informed about the mandate for a dedicated H&S project (COHSEC/DOC/26/2020). This project was carried out by external consultants (Marsh Mercer Benefits) in collaboration with an internal project team in the following year. As part of the project, numerous stakeholder interviews were conducted, including the COHSEC (15 and 22 July 2021). The outcome of the study, including the key recommendations, was presented to the COHSEC on 16 December 2021. The entire report was subsequently shared and discussed in depth at the COHSEC meeting of 14 January 2022.

On the basis of the consultants' report and the input received by the relevant stakeholders, the new H&S structure was submitted for opinion to the COHSEC on 1st February 2022. In addition, it was suggested to establish a dedicated COHSEC working group to clarify the content of the Occupational Health and Medical Advisory Services, based on the work already done by the consultants, and supporting a smooth implementation of the new H&S structure. The aim of this document is to clarify the mandate, the composition as well as the deliverables and timeline of this working group.

2. Purpose

The purpose of the working group is to serve as a forum where an in-depth exchange can take place between the different stakeholders. The aim is to develop well-prepared proposals for the COHSEC, within the mandate of the COHSEC, and thereby allow a smooth discussion in this body. The forum aims to maximise the benefits of transparency and early involvement of all relevant stakeholder, including the representatives of staff in the COHSEC.

3. Mandate

The mandate for the working group can be derived from the COHSEC document "Organisational Changes in the Health and Safety" dated 1 February 2022:

> *"In parallel, there are other aspects which will continue to be driven by the team and its management, as well as being discussed with the COHSEC members. The transition will focus on **defining the future repartition of services between the Occupational Health function and the Medical Advisory function**. It will also **determine the scope of the hybrid service delivery model**, the **definition of the future roles and responsibilities** and the **review of the service catalogue**. These reflections can then inform the tender procedures planned in 2022, as many of the existing contracts are coming to an end by end of 2022."*

The scope does **NOT** include:

- any changes in the service regulations outside the defined scope,
- changes in the H&S structure,
- budgetary matters.

4. Composition

WG Role	Name	Function
WG Lead	Raffaella de Greiff	Director 422
WG deputy lead	Jan Boulanger	Director 423
Project Management Support	Barbara Wolff	Administrator 422
WG Administrative Support	Sanda Carganico	Admin employee 422
	Fiona Dullenkopf	DG expert 01
Other WG members	Richard Flammer	PD54
	Jean-François Vaccaro	Director 431
Experts	Barbara Bosch	Physician in D422 (D423)
	Detlev Schüder	Physician in D422 (D423)
	Ingmar Pfähler	Nurse 4226
	Angela Leemet	HoD 4226
Representatives of Staff in the COHSEC	NN (to be nominated by representatives of staff in the COHSEC)	
	NN (to be nominated by representatives of staff in the COHSEC)	

5. Time Scope and Framework

5.1. Time scope

The working group will ideally start already during March 2022 and will finalise its work by July 2022 at the latest. Regular meetings are planned on a monthly basis. They will be scheduled in advance on a fixed day and time.

5.2. Deliverables

The list of deliverables below is indicative, as are the delivery dates. A more precise list will be defined at the start of the Working Group.

What	When
Revised service catalogue	**April 2022**
List with clear repartition between occupational health and medical advisory functions	**May 2022**
Definition of the future roles and responsibilities	**May 2022**
Hybrid service delivery model	**June 2022**
Submission of documents to the COHSEC	**July 2022**

5.3. Next Steps

The following next steps are foreseen:

- Mandate of the working group approved by the President - 14 February
- Mandate presented to the COHSEC for information - 23 February
- Nomination of two representatives of staff in the COHSEC - by 15 March 2022
- Kick-off meeting - by last week of March if possible

Annex 2

European Patent Office | 80298 MUNICH | GERMANY

Mr Alain Dumont
Chair of the Central Staff Committee

Via e-mail: centralstcom@epo.org

European Patent Office
80298 Munich
Germany

Office address
Bob-van-Benthem-Platz 1
80469 Munich
Germany

epo.org

The President

Tel. +49 (0)89 2399 - 1000
Fax +49 (0)89 2399 - 2892
president@epo.org

Date: 09.03.2022

Your letter dated 24 February 2022 concerning the CSC nominations in the COHSEC Working Group on Health and Safety Services

Dear Mr Chair,

We refer to your letter dated 24 February 2022 concerning the CSC nominations to the COHSEC Working Group on Health and Safety Services.

We first note that there is a common agreement that the COHSEC is the right forum to discuss the different points as proposed in the mandate.

As mentioned previously, the Office is committed to involve different stakeholders, including two COHSEC members appointed by the CSC, by setting up a dedicated Working Group. It is recalled that the aim of this Working Group would be forward-looking by i.a. ensuring a good implementation of the reorganisation decided for the Health & Safety services. The idea is however not to reopen the discussions on the organisational changes, which have already been submitted to the COHSEC for opinion.

Secondly, concerning your reference to the different opinions expressed by some COHSEC members concerning the changes in the organisational structure of Health and Safety, be assured, as indicated already in our letter dated 14 February 2022, that the Office has well considered them before deciding to implement the proposed changes as of 1 April 2022, in particular for the following reasons:

- on the positioning of the occupational health physician and safety experts: the proposed new H&S structure doesn't change what has been done the last years, which have guaranteed a good collaboration between those functions without having them positioned higher in the hierarchy. Also, the recent ISO 45001 Audit, which included the positioning of Health and Safey experts, did not result in any non-conformities. Finally, the reporting level at EPO is in line with the situation in other international organisations. This has been confirmed by the external benchmark as well as by the external consultants.

- on the collaboration of occupational health physicians, nurses and safety experts: this is an important aspect which is not linked with the structure itself but more to the culture of collaboration as well as the different processes which will exist within the new structure. As rightly mentioned by the Medical Advisor in her opinion, this is a key point for the COHSEC Working Group which will deal with advising on the content of the Occupational Health and Medical advisory services within the defined structure;

- on the collection of medical information and medical confidentiality: administrative staff in Front Office receives medical confidential information but reports to a non-medical manager. Please note that this has been the case for the last 5 years. Again, it means no change compared to the current situation. Furthermore, as already aligned with the Data Protection Officer, now that the new Health and Safety organisational structure has been defined, the Data Protection requirements will be re-evaluated with the new structure, based on the updated workflows and processes.

For all the reasons mentioned above, there is no need to change the scope of the mandate which will remain as initially communicated.

Since it was your suggestion to create a COHSEC Working Group, it only makes sense to set-up this group if CSC members are nominated.

Hence, we would like to renew our invitation for you to nominate as soon as possible two CSC representatives for the COHSEC Working Group.

In alignment with the Chair of the COHSEC and in view of the importance of the Health and Safety topics for the EPO staff, as soon as your nominations will reach me or/and the Chair of the COHSEC, the Working Group will start its work to ensure that findings and recommendations, as mentioned in the mandate, are provided within the already communicated deadlines.

Yours sincerely,

António Campinos

Europäisches Patentamt
European Patent Office
Office européen des brevets

Annex 3

European Patent Office | 80298 MUNICH | GERMANY

Mr António Campinos
President of the EPO

By email

European Patent Office
80298 Munich
Germany

Central Staff Committee
Comité central du personnel
Zentraler Personalausschuss

centralSTCOM@epo.org

Reference: sc22028cn

Date: 18/03/2022

COHSEC Working Group on Health & Safety Services: appointments

Dear Mr President,

Thank you for your letter of 9 March 2022 in which you reiterate your invitation to nominate two staff representatives to a COHSEC Working Group in charge of implementing certain details of a further re-organisation of Health and Safety (H&S) departments (COHSEC/DOC 10/2022).

We share your view that the COHSEC must be involved in any redefinition of structure and functions of Health and Safety services and in any implementation of the changes derived therefrom. The disagreement expressed by some members of the COHSEC, including the CSC nominees, to the reform proposal COHSEC/DOC 10/2022 remains relevant and we deeply regret your refusal to consider any adjustment.

For this reason, we will observe and contribute to the next implementation steps with clear interest and preoccupation and we appoint the following two members for the COHSEC Working Group on Health and Safety Services, under duress:

Member: Lutz Müller-Kirsch
Member: Thomas Ellerbrock
Alternate member: Ingrid Peller

The participation of these two members (or the alternate member in case a member has to be replaced) does not replace statutory consultation in the COHSEC on any outcomes from the Working Group. It does also not prejudice the opinion of COHSEC members on such outcome.

European Patent Office
Grasserstr. 9
80339 Munich
Germany

With respect to the mandate of the working group, and while the CSC asked for participation on a Working Group tasked with the design and implementation of the Health and Safety (H&S) services, we note with dismay that the scope of the mandate of the proposed working group has been strongly limited to the clarification of certain processes, roles and responsibilities.

Thus, the mandate excludes any discussion on topics like present and future capacity needs, the administrative structure or recruitment needs within H&S, just for citing the most striking absences. We would like to underline that we consider the H&S services as currently understaffed and we reiterate our claim that at least two full in-house Occupational Health physicians and two in-house Occupational Safety experts should be the minimum for an Organisation of our size.

We fear that not tackling the main H&S needs in the reform will lead to a serious deterioration of the services and have an impact on the Organisation obligations derived from the Protocol of Privileges and Immunities. The approach chosen is also against the requirements of the ISO 45000.

We finally expect very much the adoption and implementation of a consensual reform of the H&S services, in view of the serious implications for staff. We regret to observe that the preliminary steps adopted already anticipate a new reform imposed on staff, which unnecessarily opens new sources of frictions and departs from a spirit of genuine social dialogue.

Yours sincerely,

Alain Dumont
Chairman of the Central Staff Committee

Cc: Mr Andreas Sattler, Chairperson COHSEC