

# EPO FLIER No. 31

The EPO-FLIER wants to provide staff with uncensored, independent information at times of social conflict

## Reform marathon continues

With its March 2016 resolution<sup>1</sup>, the Administrative Council (AC), among other things, instructed the president to make a proposal for revising the investigation guidelines and the disciplinary procedures. Since then, the president has failed several times to provide a draft revision that met the expectations of the delegations. Several delegations intervened and came up with own suggestions<sup>2</sup>. While the current proposal (**CA/58/17**) solves some of the issues, it is still flawed. The major concern for staff lies in a lack of independence of the Disciplinary and Appeals Committees and a new *fast-track* procedure for judging on employee's *professional incompetence*. *Board 28* nevertheless signaled that they intend to support the proposal<sup>3</sup>.

And although the AC pressurised the president to halt the reform process, the Office is unilaterally proposing further reforms: a re-structuring of DG1 and DG2 (**CA/65/17**), and a change to the Supervisory Body of the Reserve Fund for Pension and Social Security (RFPSS).

This paper summarises the most important aspects of the planned reforms and points out the likely effects on the staff.

- 1 <http://www.hipo.gov.hu/en/news/sztnh-hirek/hirek-esemenyek/147th-meeting-of-the-administrative-council-of-the-european-patent>
- 2 eg the so-called "Swiss wish list" containing proposals of the Swiss delegation (Minutes of the 149<sup>th</sup> meeting of the AC, 12 and 13 October 2016; **CA/PV 149**) and the joint proposal **CA/32/17** (by FR, DE, NL and CH)
- 3 **B28/6/17** "The majority sentiment was that ... the proposals were now ripe for decision"

### Standards of conduct

According to the planned reform (**CA/58/17**), any failure of a permanent or former employee to comply with his obligations under the Service Regulations, "*whether intentionally or through negligence on his part*", may constitute misconduct (Article 21) and may make him liable to disciplinary action (Article 93). The original proposal from the "Swiss wish list" that only intentional or grossly negligent breaches of the Service Regulations should be relevant for disciplinary proceedings has not found its way into the current proposal. The current wording leaves leeway for arbitrary use of the regulation and abusive punishment.

(Article 111) and their alternate or vice-chairs shall "*possess the qualifications required for appointment to high judicial office*" or be "*lawyers with experience in the area of disciplinary law acquired at national or international level*", and they shall not be employees of the Office.

But unlike in the present system, the chair and their alternate or vice-chairs would be unilaterally appointed by the president<sup>4</sup>. The Disciplinary and Appeals Committees would therefore not be entirely paritary and thus not be independent. Moreover, the president's final decision, i.e. the punishment imposed, may still exceed the Committee's recommendation.<sup>5</sup>

### Disciplinary and Appeals Committees

The chairman of the Disciplinary Committee (Article 97a) and the Appeals Committee

- 4 [https://www.theregister.co.uk/2017/05/23/euro\\_patent\\_office\\_internal\\_rule\\_changes/](https://www.theregister.co.uk/2017/05/23/euro_patent_office_internal_rule_changes/)
- 5 *Reform of the EPO justice system* (**CA/58/17**); sc17098cl (16 June 2017)

## Professional incompetence

The planned reform foresees a separation of the procedures for disciplinary matters and professional incompetence. According to the Office, “*professional incompetence does not constitute per se misconduct*” and the Disciplinary Committee is, for this reason, not the appropriate body to address it (CA/58/17, page 11). For dealing with professional incompetence, a new body called *Joint Committee on Articles 52 and 53* will be created. The chair and alternate of the Joint Committee will be appointed by the president (Article 53a).

According to the proposed revised Article 52 “*the President shall define procedures to identify, deal with and remedy cases of lack of ability and efficiency in a timely and appropriate fashion.*” When these procedures are exhausted, the president may, after consulting the *Joint Committee on Articles 52 and 53* take a decision on whether, on the basis of (two or more) consecutive appraisal reports, an employee shall be “*dismissed, classified in a lower job group with or without downgrading or downgraded*” on grounds of professional incompetence.

The new route for dealing with lack of “professional ability and efficiency” would significantly reduce the safeguards for staff.<sup>5</sup>

## Investigative process

While progress has been made on the right to remain silent, the Investigative Unit (IU) will still be able to secure, access and search mobile electronic devices, including private ones.

And several other items of the “Swiss wish list” (i.e. demands of the Council) have not been dealt with: nomination of the head of the IU by the AC to secure his independence from the Office president, and duty of the IU to inform the Council when investigations are launched against staff representatives or union representatives.

## Revision of presidential decisions

After exhaustion of all internal means of legal redress, (former) employees can apply to the Administrative Tribunal of the International Labour Organisation (AT-ILO).

But the ILO as the highest instance for disputes between the EPO and its employees does not hold public hearings, has no means of legal enforcement, and does not allow the filing of injunctions<sup>6</sup>. Judgments are only delivered after several years.

Worse, the ILO had several bilateral talks with the EPO administration - a party in the dispute - without informing or inviting representatives of the employees<sup>6,7</sup>.

Siegfried Broß, a former judge at the German Federal Court of Justice (DE) and later at the German Federal Constitutional Court, recently said during a lecture<sup>8</sup> that “*The legitimate, individual basic rights of the people employed by the EPO are currently not sufficiently secured by an independent judiciary.*”<sup>9</sup> He does not consider the Administrative Tribunal of the ILO a “*proper court*”<sup>9</sup>.

## Change of the governance of the Reserve Fund for Pension and Social Security (RFPSS)

The payment of pensions of former EPO staff is guaranteed by the Member States. The Pension Reserve Fund supports the EPO’s pension scheme by providing appropriate reserves (Article 38 EPC).

To avoid undue interference, the RFPSS was set up in 1991 with the aim of obtaining a *de facto* independent reserve fund. It therefore has a tripartite Supervisory Board (SB) with a parity composition of representatives from the Member States, the Office and the staff (1/3-1/3-1/3). It is the only EPO body where representatives of the Office and of the staff play an equal part in decision making.

The current proposal (CA/47/17 Rev 2) will mean replacing one of the two voting staff

6 ILO-AT: 90 years old and in need of repair; su17040cp (3 May 2017)

7 [http://www.ilo.org/wcmsp5/groups/public/-/ed\\_norm/---relconf/documents/meetingdocument/wcms\\_457526.pdf](http://www.ilo.org/wcmsp5/groups/public/-/ed_norm/---relconf/documents/meetingdocument/wcms_457526.pdf)

8 titled “The Patent Granting Practice under the EPC – Erosion of the Rule of Law?” (at Max Planck Institute for Innovation and Competition, Munich)

9 <http://kluwerpatentblog.com/2017/05/25/rule-law-epo-ugly-writing-wall/>

members in the SB with a pensioners' representative, and adding two experts with voting rights. If the proposal gets approval, the staff's voting weight would be reduced from 1/3 to 1/8, and its representation in the Board's meetings would be diluted to at best 1/10. The influence of the Office would be strengthened since the AC would appoint the experts based on a proposal by the president.

The representation of the stakeholders in the Board would no longer be paritary. The current proposal, if adopted, would thus weaken the independence of the SB and violate the principle of "fair representation". The CSC considers the proposal to be "neither mature nor fit for purpose"<sup>10</sup>.

## DG1-DG2 reorganisation

The aim of merging Patent Administration (PA) with patent examination is to achieve a "fully digitalised end-to-end [patent grant] process in

10 *Position of the Staff on CA/47/17 Rev 2 - Change of the RFPSS Governance;*  
sc17096cl (16 June 2017)

*the short term"* (CA/65/17, page 2). But the necessary deliveries from the IT Roadmap have not yet materialised.

The likely effects of the thus premature DG1-DG2 reform have been analysed in an earlier publication<sup>11</sup>, and can be summarised as follows:

*'The planned "end-to-end patent granting process", if implemented, is likely to have a negative effect on the quality and harmonisation of PA services delivered to external users, while increasing the work pressure for the majority of the formalities officers.*

*The introduction of a direct reporting line between the new COOs and the president would give him even more control over the patent examination process while marginalising the role of VP1 and VP2. This planned organisational change respects the wording of Rule 9 EPC but conflicts with its spirit.'*

11 EPO-FLIER No. 30 "DG1-DG2 Reorganisation" ([www.epostaff4rights.org](http://www.epostaff4rights.org))

## Enjoying power - and not being accountable if anything goes wrong

' "We believe that the President is simply trying to shift the responsibility for these new, flawed proposals from himself to the Council," the [CSC] letter warns. '<sup>14</sup>

Staff voted last week for strike in great numbers. We must keep the pressure up and show the Administration and the Council that we are fed up: **through a strong strike.**