

Federal Ministry of Justice
and Consumer Protection
Mohrenstrasse 37
10117 Berlin

For the attention of the Minister, Heiko Maas

European Patent Office (EPO)

Dear Minister,
Dear Mr. Maas,

In collaboration with the Staff Union of the European Patent Office (IGEPA / SUEPO / USOE) and the local Staff Committee of the Munich branch of the EPO, my law firm has represented the interests of EPO staff for many years.

Having regard to its core activities which involve the examination and granting of European patents – and regardless of its status as an organ of the European Patent Organisation which has been established in the form of an International Organization – the EPO occupies a central role in the system of values and legal norms subscribed to by the community of European states in the field of intellectual property protection.

The staff of the EPO, irrespective of their staff grades, are highly qualified persons who, guided by the European ideal, decided to move from their home countries in the respective member states to the offices of the EPO in The Hague, Munich, Berlin or Vienna, and in doing so, they often accepted considerable social and material inconveniences for themselves and their families.

The operating results arising from the collective efforts of these highly-motivated - and, contrary to the disparaging claims of their detractors, hard-working - employees generates, *inter alia*, a significant financial contribution to the budgets of the Member States.

Thus, for example, based solely on a consideration of the validation of European patents for the Federal Republic of Germany, an estimated sum of EUR 140 million in annual renewal fees flows into the coffers of the Federal German treasury.

As founding members and host states of the European Patent Organisation as well as signatories to the Seat Agreements and to the Protocol on the Privileges and Immunities, the governments of the Federal Republic of Germany, the Republic Austria and the Kingdom of the Netherlands and their delegations on the Administrative Council have a particular responsibility for ensuring that legal rights which are guaranteed on a national level are respected and may be exercised by EPO staff. Needless to say, this also applies to the fundamental rights which are guaranteed by national constitutions, and more generally, to human rights in keeping with the spirit of the objectives and values of the European Union and the liberal democratic and social order of the Federal Republic of Germany.

The developments in the area of EPO personnel policy in recent years, and, in particular the most recent events, give legitimate cause for doubt as to whether the delegations of the host countries are living up to the responsibilities which are incumbent upon them as detailed

above, and whether the national governments are doing enough to ensure that their delegates are respecting and monitoring compliance with the aforementioned fundamental principles. From the perspective of “good governance”, it might even be that the actions of individual delegates deserve to be the subject of further discussion.

Referring now to the upcoming meeting of the Administrative Council on 25th to 26th March 2015 whose agenda will *inter alia* include deliberation on the President’s proposal for the reform of the regulations governing sick leave and invalidity CA/14/15, and without wishing to make any claim to an exhaustive treatment of the subject, we take the liberty of presenting a few cursory examples of issues which give cause for concern in relation to the measures which have been adopted so far in the context of the implementation of the HR roadmap (CA/110/11 and CA/39/14) and in relation to certain aspects of the latest proposal. Furthermore, we would like to propose at least a temporary moratorium on the implementation of these reforms pending further consultation, in particular taking due account of the applicable laws of the host state.

1. With the introduction of the Guidelines for Investigations in the EPO, Circular no. 342, persons who are accused in the context of these proceedings are deprived, under the threat of disciplinary sanctions, of their fundamental rights, such as for example: the right to remain silent, the right not to be compelled to incriminate one’s self, the right to be heard and to have access to legal counsel;
2. In the course of the reform of the Internal Appeal procedure, the preliminary “management review” procedure, which corresponds to the opposition procedure foreseen under Article 126 of the German Civil Service Act, and Article 68 of Administrative Court Procedure Code and which is intended to provide a mechanism for the Administration to review its own acts, excludes the involvement of members of the legal profession [*on behalf of the complainant*] which effectively amounts to an infringement of the right to be heard;
3. In the context of amendments to the provisions of the Staff Regulations governing staff representation, the hitherto democratically mandated local Staff Committees were abruptly dissolved and new rules of procedure were imposed under the aegis of the EPO President who undermined the principle of democracy and the right of these bodies to organise their own affairs by according himself extensive participatory rights with regard to the election and constitution of the local and central Staff Committees;
4. With Circular No. 347, the President of the European Patent Office imposed a partial restriction on the right of freedom of association and at the same time granted himself extensive participatory rights with regard to the adoption and implementation of measures for exercising the right to strike guaranteed under Article 30a of the EPO Staff Regulations;
5. In the case C/09/453749/KG ZA 13-1239, the EPO was condemned for its violation of human rights by the Appeal Court of the Hague. The Judgment of the Appeal Court concerning the recognition of activities of the Staff Union [*SUEPO*] is not accepted by the President of the EPO and in “Communiqué 69” he commented on it in a disparaging manner and undermined its execution. This constitutes a blatant and egregious violation of the principle of judicial independence and a disregard for the fundamental organisational principles of a state based on the rule of law in which the principle of the separation of powers acts as a guarantor of freedom and democracy.

6. Towards the end of 2014, in violation of Art. 11 EPC which safeguards the principle of the separation of powers by assigning disciplinary authority [*over members of the Boards of Appeal*] to the Administrative Council, the President interfered in the judicial independence of the Boards of Appeal of the European Patent Office by ordering the suspension of a member of the Boards of Appeal. This constitutes a flagrant and grievous disregard for the principle of the separation of powers and, consequently, an attack against the rule of law as well as fundamental national and European norms.

The new career system will lead to a further restriction of judicial independence. In future, a mandatory probationary period is foreseen for both the members and the chairpersons of the Boards of Appeal.

7. By means of a threat of disciplinary consequences directed against the organisers and participants, the President of the EPO prohibited a demonstration planned for the end of February 2015 which had been proposed by the Staff Union (SUEPO) and approved by the municipal authorities of the city of Munich. Due to the threat of disciplinary action announced by the President, the organisers and the participants feared that they would be subject to sanctions if the demonstration went ahead. By his actions the President thus coerced the participants into abandoning their plans to demonstrate. In this way, they were prevented from exercising one of the most venerable rights of a free and democratic social order, namely the right to assemble and to freely express one's opinion.
8. Both the previous amendments to the provisions of the Service Regulations governing sick leave and invalidity and the further regulations now proposed under CA/14/15 impose dramatic and - from a legal perspective - unacceptable restrictions on those affected:
 - 8.1 Sick persons who are temporarily or permanently unfit for work are obliged to be present in their home on a daily basis between 10.00 - 12.00 and from 14.00 - 16.00 (Circular No. 22 containing Implementing Rules for Article 62 of the Staff Regulations). Absences from the place of residence must be requested and approved. This amounts to imposing a mandatory residence obligation which has an absolute and temporally unlimited character and is in no way correlated to the needs or interests of the Organisation.
 - 8.2 The affected person is further obliged to tolerate spot-checks intended to verify their presence [*at home*] and also to permit the performance of medical examinations [*in the home*]. This constitutes a direct and unlawful encroachment on the inviolability of the home which is protected by law.
 - 8.3 The currently existing medical committee consisting of an EPO medical officer and the patient's own physician is to be abolished and the assessment of medical matters will be assigned to the sole and exclusive responsibility of a medical doctor or expert appointed by the President of the EPO. Thus, in future the President will effectively assume unlimited powers of assessment and evaluation in this area. Having regard to the lack of any effective system of legal protection (internal appeals against decisions of the President in these matters are excluded) and the sole possibility of filing a complaint with the Administrative Tribunal of the I.L.O.

(which is not a fact-finding instance) the affected persons are *de facto* left without any rights.

- 8.4 Instead of the previously applicable invalidity status (an incapacity to work of more than 50%), the entry into force of the new rules foresees the introduction of a graded model according to which even significant incapacity (i.e. a partial or total loss of the ability to perform duties involving a degree of incapacity exceeding 70%) will no longer lead to assignment to non-active status (retirement). Rather, an obligation to remain in active service for at least another 10 years is envisaged. A further cumulative pre-condition which must be met in order to qualify for retirement for health reasons is that the staff member must have reached the age of 55.
- 8.5 The affected person may no longer engage in any external employment for the duration of the illness / incapacity as long as he or she remains in active service and, likewise, after reaching the [*early*] retirement age [*i.e.* 55]. It is proposed to abolish without replacement the current rules according to which paid or unpaid external activity could be undertaken (as long as this did not involve any conflict of interest *vis-à-vis* the EPO) whereby any remuneration from gainful employment was deducted from the invalidity allowance.
- 8.6 The specific benefits to be paid in cases of incapacity and invalidity are to be revised or abolished without replacement. In particular, the once-off payment of an invalidity lump sum is to be abolished without replacement and no transitional provisions are foreseen for pre-existing cases. The monthly benefits [*i.e. the invalidity allowance*] are to be significantly reduced.

The proposed measures will apply to all cases of invalidity (including pre-existing cases) apart from those where invalidity status was confirmed prior to the 2007 reform. They will thus disrupt the stability of the “social security covenant” [*“Versorgungszusage”*] by means of both genuine and artificial retroactive effects. For this reason, the proposed reform is null and void from a legal point of view.

The existing benefits are based on a “covenant” [*“Versorgungszusage”*] established by the employer which is entered into at the commencement of employment (Article 84(1)b ServRegs) and according to which the employer has agreed to pay two-thirds of the contribution required to meet the insurance of the risks (Article 84(4) ServRegs). This covenant further relies on the payment of a contribution by the employee (Article 84(4) ServRegs). Having regard to the covenant established by the employer on the one hand, and the receipt of the [*employee’s*] contributions on the other hand, a right to the protection of legitimate expectations arises. The point to be noted here is that, by means of the contributions which they have paid for that specific purpose, the employees themselves have to a large extent provided the financial resources needed to insure the risks which the covenant is intended to cover. For this reason, it is not permissible to make the application of the new provisions dependent on the point in time at which the insured event [*i.e. invalidity*] occurs. The only appropriate solution would be to take into consideration the complete span of the period over which contributions have been paid relative to the subsequent period for which the employees have made no further contributions to cover the risk. If, following due and proper consideration of all relevant aspects, a decision was taken to amend the applicable regulations, this should result in economically just transitional measures involving a properly graduated transitional

scheme which takes account of the relevant actuarial factors. These considerations apply with equal force to the proposed reduction of the monthly benefits [*i.e. the invalidity allowance*], in particular having regard to the degressive compensatory payment which it is now proposed to introduce after the age of 55.

Considered in terms of their overall effect, the new regulations (according to which invalidity status prior to reaching retirement age no longer applies and is to be replaced by an assignment to retired status after reaching the age of 55) will result in a budgetary shift to the detriment of the Pension Fund. This will in turn lead to an encroachment on the acquired rights of staff in relation to pension entitlements which can only be compensated for in financial terms by means of higher contributions and/or by a meltdown of the “pension covenant” [*“Pensionszusagen”*].

9. Let us conclude by considering the following fictitious example:

After acquiring initial experience in industry, a graduate of an elite Spanish university moves with his family from Spain to Germany upon joining the EPO. At the age of 42 he suffers from a severe and incurable disease. The effects on his health result in a permanent degree of incapacity of at least 70%. The consequence of applying the amended regulations in this case will be that despite being incapacitated this person will remain on active service until he reaches the age of 55 (the first stage) whereupon he will be assigned to an early retirement status (the second stage) until he finally reaches retirement age (65).

During the entire period of 23 years, this person will be under an obligation to be present at his home address between 10:00 to 12:00 and 14.00 - 16.00 and is subject to unannounced spot-checks to verify this. Since the exercise of any external employment (e.g. as an editor, a textbook author or a lecturer etc.) is prohibited irrespective of how marginal such activity might be, this person is condemned to idleness for 23 years (!) and is *de facto* reduced to the status of a “prisoner” in his own home. One could also speculate here about the further potential negative effects on marriage and family life, on the wider social environment, not to mention the concrete danger to “life and limb”.

For this reason it is cynical to describe the concept detailed in CA/15/14 in terms of “*a comprehensive framework based on early prevention of incapacity, focusing on health recovery, return to work and maintenance of the employment link*”. These nicely formulated phrases merely serve to camouflage what is a perfidious and straightforward strategy for getting rid of unproductive staff members in a faster and more cost-efficient manner. Contrary to what might be expected, the considerations underlying the proposed “reform” do not focus on preventative measures against illness but rather on measures which will either lead to employees attempting to maintain their participation in “working life” at any cost and in disregard of medical indications to the contrary (which, for example, in the case of mental illnesses may increase the incidence of decompensation* or in the case of cardiovascular diseases may lead to strokes or heart-attacks) or else result in the affected persons simply quitting the service by taking a pro-active decision to act in the interests of their health and life rather than against those interests.

[* *Decompensation: psychological imbalances or personality disturbances arising due to a failure to cope with stress.*]

10. Dear Minister, we submit our letter to you accompanied by the hope that your Ministry in cooperation with the appropriately qualified departments of the other Ministries will carry out a detailed and comprehensive examination of the aforementioned matters relating to the EPO and likewise in relation to the activities of the Administrative Council. Any such examination which is to be undertaken in this regard should preferably not be limited to the standard reporting route.

Having regard to the Federal Republic of Germany's role as a founding member state of the European Patent Organisation and as a host state of the European Patent Office, your Ministry has a particular obligation to take appropriate action to have the matters described above subjected to due and proper scrutiny in order to ensure that the core values of our society are respected and adhered to.

The situation at the European Patent Office has by now overstepped all acceptable limits and from today's vantage point it appears that it will require many years of personnel-related confidence-building measures in order to restore the trust of the staff in the senior management and the EPO Administration.

With kind regards,

Alexander Holtz

Copies sent to:

Ms. Andrea Nahles, Minister for Labour and Social Affairs and member of the Federal Parliament.

Mr. Frank-Walter Steinmeier, Minister for Foreign Affairs and member of the Federal Parliament.