

SUBJECT: Post-service integrity: prevention of conflicts of interest

SUBMITTED BY: President of the European Patent Office

ADDRESSEES: Administrative Council (for decision)

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### SUMMARY

This document replaces CA/29/16 dated 10.06.2016. The amendments are indicated by grey hatching.

In order to strengthen the public perception of the independence and integrity of the members and Chairmen of the EPO's Boards of Appeal (hereinafter referred to as "members of the Boards")-EPO's services, and thereby enhance trust and confidence in the EPO's appeal system ~~the EPO's role as the Patent Office for Europe~~, it is proposed to introduce provisions allowing for the monitoring and prevention of potential conflict of interest situations after termination of service.

For this purpose, the proposed reform introduces a temporary obligation applicable to all ~~former EPO employees~~ members of the Boards to inform the ~~appointing authority~~ Administrative Council of their envisaged post-service activities, with the possibility of prohibiting specific activities which imply a real, apparent or potential conflict of interest on a case-by-case basis.

~~Note: This document is being published prior to the meeting of the General Consultative Committee (GCC). The President will inform the Council of the opinion of the GCC and of any action taken following this opinion.~~

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## PART I

### **I. STRATEGIC/OPERATIONAL**

1. Operational.

### **II. RECOMMENDATION**

2. The Administrative Council is requested to approve the proposed amendments to the Service Regulations set out in Part II of this document.

### **III. MAJORITY NEEDED**

3. Three-quarters of the votes.

### **IV. CONTEXT**

4. A proposal to regulate potential conflicts of interests came up as part of the ongoing discussions on the independence of the EPO's Boards of Appeal (BOA) (CA/16/15, CA/82/15). ~~These discussions were the trigger for a more general reflection on the standard of ethical conduct applicable to all EPO employees.~~
5. The EPO is committed to the public-service values of independence and integrity. Its legal framework already contains a number of provisions on the integrity expected of staff members while in service.<sup>1</sup> Specifically for members of the Boards and chairmen of the BOA and EBOA, this includes the Code of Conduct concerning outside activities (CA/105/95). ~~Moreover, guidelines on the avoidance and disclosure of potential conflict of interest situations are offered for all staff in the EPO's Code of Conduct, which raises awareness in this respect.~~
6. In order to foster the public's trust in the integrity of the EPO's appeal system services provided by the EPO, it is important to prevent the risk of real, apparent or potential conflicts of interest not only during service, but equally after its termination.

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<sup>1</sup> Articles 1(4), 14(2) and 15 to 18 ServRegs, Circular No. 135, Communiqué No. 22.

7. Post-service activities of ~~civil servants~~ members of the Boards generally give rise to three types of concerns. Firstly, with the assistance of a former ~~employee's~~ member's insider information or contacts, a user of the ~~public service~~ EPO's appeal system might gain an unfair advantage over competitors (*unfair competition*). Secondly, suspicions of *improper personal benefit* of the ~~civil servant~~ former member of the Boards may arise if the latter receives a job or business offer from an external organisation or individuals with whom he had extensive official dealings during his service. And lastly, a former ~~public official~~ member of the Boards may use the specific skills and knowledge obtained during service in order to engage in an activity that is contrary to the ~~interests of the organisation~~ *integrity of the EPO's appeal system* itself.
8. The EPO's legal framework already provides for specific obligations applicable after termination of service: an obligation to behave with integrity and discretion as regards the acceptance of certain appointments or benefits (Article 19 of the Service Regulations), and an obligation not to disclose professional information (Article 12 EPC and Article 20(3) of the Service Regulations).
9. For the time being these provisions appeal to the ethical conscience of the former ~~staff~~ members of the Boards, without providing for any compliance monitoring mechanism. Also, there is no express provision as to who should decide whether a specific post-employment activity meets the required standards of integrity. The existing provisions are therefore considered too vague to provide, on the one hand, clear guidance to former ~~staff~~ members of the Boards and, on the other, to effectively prevent the risk of real, apparent or potential conflicts of interest.
10. With the aim of strengthening the perception of the EPO's independence of the EPO's BOA, it is therefore proposed to amend the Service Regulations and to introduce a monitoring mechanism and decision-making power to enforce the existing post-service integrity standards for members of the Boards.

11. This proposed reform would provide ~~employees~~ members of the Boards with more clarity about the scope of the applicable integrity obligation, and allay legitimate public concerns regarding conflicts of interest, without creating impediments to bringing knowledgeable and experienced people into the service of the EPO's BOA, and while respecting the individuals' freedom of work. To achieve this, the proposal takes into account examples of solutions in place at other international organisations<sup>2</sup> and in the national public sectors, including the judiciary,<sup>3</sup> of different European countries. In particular, the relevant similar provisions of the EU<sup>4</sup> were used as a benchmark for the proposed amendments to the Service Regulations.
12. Since the present proposal is presented in the framework of the structural reform of the BOA, it is at this stage limited to members of the Boards. At the same time, it is a first step towards the introduction of specific post-service integrity provisions applicable to all employees of the Office.

## V. ARGUMENTS

### A. MAIN LINES OF THE PROPOSAL

13. In order to allow for an effective prevention of conflicts of interest, it is proposed to introduce a monitoring mechanism and specify a decision-making process for the enforcement of the existing post-service integrity obligation applicable to all ~~former staff~~ members of the Boards. To this end, it is proposed to add relevant provisions to the current Article 19 ServRegs.<sup>54</sup>

#### a) Scope of application

14. The proposed measures would apply to all ~~employees~~ members of the Boards, ~~whether appointed by the President or the Administrative Council.~~
- ~~14. They would also apply to contract staff,<sup>6</sup> except for short-term contract staff having~~

<sup>2</sup> In particular, the European Commission.

<sup>3</sup> The 2014 OECD survey on "Managing conflict of interest: Pre- and post-public employment" shows 13 European countries with specific rules and procedures for preventing conflicts of interests in post-public employment.

<sup>4</sup> ~~Article 16 of the Staff Regulations of Officials of the European Communities.~~

<sup>5 4</sup> It is noted that the numbering of the provision may change subject to the approval of other pending reform proposals. The draft decision in Part II below may need to be adjusted accordingly.

<sup>6</sup> ~~Part II of this document refers to "permanent employees" in order to ensure consistency in the wording of the Service Regulations. Contract staff are, however, fully covered, pursuant to the provisions of Article 1(4) to (7) of the Service Regulations, in combination with Article 6 of the Conditions of employment for contract staff, Article 8 of the specimen contract for Vice Presidents and Article 4 of the specimen contract for Principal Directors.~~

~~served up to three years, who would be expressly excluded.~~

**b) Form**

15. For the purpose of monitoring post-service activities, all former ~~employees~~ members of the Boards would for a certain time after leaving the service be obliged to inform ~~their appointing authority~~ the Administrative Council prior to engaging in any occupational activity, be it gainful or not.
16. If the envisaged activity is related to the work they carried out immediately before leaving the service, and could lead to a conflict with the ~~legitimate interests of the Office~~ integrity of the EPO's appeal system, the former ~~member of the Boards~~ employee could be exceptionally prohibited from taking up this activity, by decision of the ~~appointing authority~~ Administrative Council. ~~In order to make the prohibition relevant, only the duties carried out during the last three years of service would be taken into account.~~
17. A similar model of a general duty to inform and case-by-case prohibition is currently in place at the EU (European Commission, decentralised agencies).
18. For the sake of offering a reasonable timeframe for the ~~appointing authority's~~ Administrative Council's decision, while minimising the practical constraints imposed on former ~~employees~~ members of the Boards through a long waiting time, it is proposed to limit the timeframe for notifying a prohibition to two months after receipt of the information by the ~~appointing authority~~ Administrative Council.
19. ~~The same conditions will apply mutatis mutandis to Council appointees. Concerning the members, Chairmen and the President of the Boards of Appeal, The~~ the decision of the Administrative Council should be taken after consultation of the Boards of Appeal Committee. A lack of response from the ~~appointing authority~~ Administrative Council by the end of the above-mentioned period would be deemed to constitute implicit acceptance.
20. Further terms and conditions for the application of the measures described above, in particular regarding the form and content of the information to be provided, may be laid down by the ~~appointing authority~~ Administrative Council.

### c) Duration

21. It is proposed to limit the above duty to inform to one year for ~~employees-members~~ of the Boards having served ~~one five-year term or less than five years~~ and to two years for those who have served longer. For comparison, post-service conflict of interest rules are applied in some European countries for periods varying between six months and five years.<sup>75</sup> EU civil servants are subject to a duty to inform for two years.

### B. NO NEED FOR FINANCIAL COMPENSATION

22. The proposed measures merely provide for the compliance monitoring and enforcement of the already existing standard of integrity applicable to ~~all EPO employees-members~~ of the Boards, both during service and after its termination.
23. The monitoring and case-by-case assessment of envisaged post-service activities would help to clarify the practical scope of the integrity obligation. Decisions of the ~~appointing authority~~ Administrative Council would be the result of a careful consideration and weighing-up of the interests of the former ~~employee-member~~ of the Boards (freedom of work) and the service. Prohibitions would only be applied in exceptional cases, where an envisaged post-service activity raises concrete integrity-related concerns, and thereby puts at stake the general integrity obligation. Thus, the former ~~employees'-member's~~ freedom of work would not be limited in such a way as to justify financial compensation.
24. This is in line with the solution applied at the EU and in national public sectors.<sup>86</sup>

### C. COMPLIANCE MECHANISMS

25. Compliance mechanisms start with ensuring that ~~staff members~~ of the Boards leaving service are increasingly made aware of the applicable post-service integrity standards, and of types of activities that may give rise to concerns in this regard.
26. The new provisions would allow ~~the EPO to monitor~~ for monitoring of the respect of for these applicable standards in practice. The corresponding administrative burden is expected to remain limited considering the presumably rare occurrence of envisaged activities which would effectively give rise to conflict-of-interest-related concerns.

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<sup>75</sup> Examples range between six months in Austria and up to five years in Germany.

<sup>86</sup> Of the 13 European countries with post-service restrictions for civil servants mentioned in the 2014 OECD survey on "Managing conflicts of interest: Pre- and post-public employment", 11 do not provide for any financial compensation.

27. Any failure by ~~employees~~ members of the Boards or former members of the Boards ~~employees~~ to comply with these obligations would fall within the scope of Article 93 of the Service Regulations and render them liable to disciplinary action.

#### **D. ENTRY INTO FORCE**

28. The new regulations would enter into force on 1 January 2017.

29. Former ~~members of the Boards~~ ~~employees~~ are already prohibited from engaging in post-service activities which could lead to a conflict with the integrity of the EPO's appeal system ~~legitimate interests of the EPO~~, pursuant to the applicable fundamental obligation to behave with integrity after the termination of service, enshrined in Article 19 of the Service Regulations. This pre-existing obligation remains unchanged.

30. The reform proposal merely affects the practical enforcement of this pre-existing standard: while its respect is currently a matter for each ~~employee's~~ ~~member's~~ ethical conscience, the proposed reform adds a monitoring mechanism and provides the ~~appointing authority~~ Administrative Council with a decision-making power in order to settle questions of interpretation. These measures are mere modalities of implementation, and do not have a substantial impact on the existing ~~employees'~~ ~~members'~~ employment conditions.

31. Accordingly, it is proposed that the new rules be applied to all ~~members of the Boards~~ ~~staff~~ immediately after entry into force. Conversely, they would not apply to former members of the Boards ~~staff~~ who had already left the service before the entry into force of the reform.

#### **VI. ALTERNATIVES**

32. None.

#### **VII. FINANCIAL IMPLICATIONS**

33. None.

#### **VIII. LEGAL BASIS**

34. European Patent Convention and in particular Articles 10(2) and 33(2)(b) thereof.

35. Service Regulations for permanent employees of the European Patent Office and in particular Article 19 thereof.

36. Rules of Procedure of the Administrative Council of the European Patent Organisation and in particular Article 4(1) thereof.

**IX. DOCUMENTS CITED**

37. CA/105/95, Code of Conduct concerning outside activities of the members of the Boards of Appeal
38. CA/16/15, Proposal for a structural reform of the EPO Boards of Appeal (BOA).
39. CA/82/15, Proposal for a structural reform of the EPO Boards of Appeal – Results of the user consultation.

**X. RECOMMENDATION FOR PUBLICATION**

40. Yes.

## PART II

### Draft

DECISION OF THE ADMINISTRATIVE COUNCIL  
of [date of decision]  
amending Article 19 of the Service Regulations for  
permanent employees of the European Patent  
Office

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THE ADMINISTRATIVE COUNCIL OF THE EUROPEAN PATENT ORGANISATION,

Having regard to the European Patent Convention and in particular Articles 10(2)(a) and (c) and 33(2)(b) thereof,

Having regard to the Service Regulations for permanent employees of the European Patent Office (hereinafter referred to as "the Service Regulations") and in particular Article 19 thereof,

Having regard to the Rules of Procedure of the Administrative Council of the European Patent Organisation and in particular Article 4(1) thereof,

On a proposal from the President of the European Patent Office, submitted after consulting the General Consultative Committee,

HAS DECIDED AS FOLLOWS:

### **I. Amendments to the Service Regulations**

#### Article 1

Article 19 of the Service Regulations shall read as follows:

#### **"Article 19**

##### **Obligations after termination of service**

(1) A permanent employee shall, after leaving the service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits.

(2) A member of the Boards permanent employee or former member of the Boards permanent employee intending to engage in an occupational activity, whether gainful or not, within two years of leaving the service shall inform the appointing authority Administrative Council thereof. If that activity is related to the work he carried out during the last three years of his service and could lead to a conflict with the legitimate interests of the Office integrity of the EPO's appeal system, the appointing authority Administrative Council may, having regard to his interests and to those of the service EPO's appeal system, either forbid him from undertaking it or give its approval subject to any conditions it thinks fit.

~~(3) Where the appointing authority is the President of the Office, he shall notify his decision within two months of being so informed.~~

(43) ~~Where the appointing authority is the~~ The Administrative Council, it shall notify its decision within two months of the date on which the information was submitted to the first meeting of the Council after its receipt, taking due account of any specific provisions applicable for the submission of documents to the Council laid down in Article 9 of the Rules of Procedure of the Administrative Council.

~~(54) For members of the boards, t~~ The decision under paragraph 3-4 shall be taken after consultation of the Boards of Appeal Committee.

~~(65) If no decision has been notified by the end of the period prescribed in paragraph 3 or 4, this shall be deemed to constitute implicit acceptance.~~

(76) Paragraphs 2 to 6-5 above

~~(a) shall not apply to former contract staff who have served three years or less;~~

~~(b) shall cease to apply to former members of the Boards permanent employees who have served five years or less one year after termination of their service.~~

~~(87) Each appointing authority~~ The Administrative Council may lay down further terms and conditions for the application of this Article ~~to those employees appointed by it~~, in particular with respect to the form and content of the information to be provided under paragraph 2.

## II. Entry into force

### Article 2

This decision shall enter into force on 1 January 2017.

Done at Munich, [date of decision]

For the Administrative Council  
The Chairman

Jesper KONGSTAD