

European Patent Office | 80298 MUNICH | GERMANY

Mr António Campinos
President of the EPO

By email

OPEN LETTER

European Patent Office
80298 Munich
Germany

Central Staff Committee
Comité central du personnel
Zentraler Personalausschuss

centralSTCOM@epo.org

Reference: sc22130cl

Date: 28/10/2022

Demand for immediate execution of Judgment No.4551 (emails)

Dear Mr President,

In your letter of 30 September 2022, you allege that the Office is committed to executing [Judgment No. 4551](#) of the Tribunal as swiftly and comprehensively as possible. Almost four months after the judgment, the Staff Committees are still waiting for its execution, i.e. restoration of the *status quo ante* as in Communiqué No. 10 of 29 March 2006, as ruled by the Tribunal.

It appears that you decided to maintain the limit of the number of email recipients to 50 and to add a “*new feature*” as a precondition for executing the judgment, i.e. to introduce a right for staff to unsubscribe from the relevant mailing lists. You try to justify the additional constraint imposed on the CSC with the right to privacy and data protection.

Official activities and the right to object

We note that you obviously chose to not invoke data protection and respect for private life before the ILOAT, so that there is actually no place for additional privacy pleadings at this stage. Nevertheless, we note the following:

- The CSC¹ is not just an entity “*like other entities*”: it is a statutory body² performing the functions assigned to it in Chapter of the Service Regulations³. They mainly consist in representing the interests of all staff and contributing to the smooth running of the service by providing a channel for the expression of opinion by the staff. The duties undertaken by its members are deemed to be part of their normal service and you must grant them the resources and facilities required to exercise their functions. Consequently, there can be no doubt that using official email addresses (...@epo.org) of employees for communicating with them is a processing for an official activity⁴.

European Patent Office
Grasserstr. 9
80339 Munich
Germany

¹ The same applies to the four Local Staff Committees.

² See Article 2(1) ServRegs.

³ See in particular Article 34 ServRegs.

⁴ The Data Protection Officer admits to this in her opinion, on page 5.

- The Service Regulations already contain provisions to protect fundamental rights and freedoms as well as personal data of employees in the course of their official activities, by giving them the right to object to the processing of any personal data relating to their particular situation⁵. This right, as currently codified, guarantees the balance of fundamental rights, including the right to privacy. We are committed to respecting this essential right like any other statutory body. However, obliging us to give employees an additional right not to have their official email address (...@epo.org) used if “*they do not wish*” to receive our emails (regardless of any particular individual situation) is an additional right different from the statutory right to object. It imposes on us an unnecessary and abusive precondition and therefore violates our right to freely choose the means by which communications are sent to all staff, as confirmed in the judgment⁶. In short, there is no need and no legal basis for any additional limitation on our right to communicate.

On 19 October, your administration has convened us to a meeting and disclosed their proposal, which is essentially to hire an external service provider managing distribution lists without us knowing how the lists will look like. Again, they misrepresented the right to unsubscribe as subsumed under the right to object. We have already informed them that the implementation presented in the meeting was incompatible with the ruling of the Tribunal⁷.

The Data Protection Officer’s opinion

You have sought the formal opinion of the Data Protection Officer (DPO) on two questions. We regret that her independence has led her to ignore the judgment and depart from the letter and spirit of the Service Regulations and the Data Protection Rules (DPR):

- Question a: would a mass email sent to staff without any possibility for them to unsubscribe comply with the EPO data protection framework?
The DPO does not answer the question with a clear “no”. Instead, she recommends that the way to balance the fundamental rights of data subjects to privacy and data protection with the fundamental right of freedom of speech would be to foresee an opt-out alternative because “*the purpose and objective to inform the data subjects can be effectively accomplished using another less intrusive option (a different channel to*

⁵ See Article 1b(5) ServRegs: “*Where personal data might lawfully be processed because processing is necessary to carry out tasks in the exercise of the official activities of the European Patent Organisation..., a data subject shall nevertheless be entitled to object to the processing of any personal data relating to his or her particular situation. It should be for the controller to demonstrate that its compelling legitimate interest overrides the interests or the fundamental rights and freedoms of the data subject.*” [emphasis added]. See also its implementing Article 23(1) DPR.

⁶ See considerations 10 and 12 in the judgment.

⁷ See our letter (sc22129cl) of 21 October 2022.

inform), namely by publishing the communications on a dedicated page on intranet.” This is in clear contradiction with the judgment⁸.

- Question b: would a mass email sent to staff with an unsubscription option made available to them comply with the EPO data protection framework?
In her three-line answer, the DPO associates an additional right to unsubscribe to the right to object. This contradicts the letter and the spirit of Article 1b(5) ServRegs and Article 5.a. DPR, according to which processing of email addresses for official activities is *a priori* lawful without that additional right comparable to free consent in accordance with Article 5.d.DPR. It also makes communication by email entirely dependent on the wish of employees.

Wider-ranging consequences

For reasons of equal treatment, the DPO recommends extending the additional right to unsubscribe also to communications coming from other statutory bodies⁹. Since a right to unsubscribe would belong to every employee as a data subject, there would be no legal basis for refusing this right to any recipient of any email sent for an official purpose, regardless of the number of simultaneous recipients. This would make job-related communication by email dysfunctional.


Conclusion

We therefore reiterate the demand made in two previous letters for the immediate execution of Judgment No. 4551, in its entirety and without any additional obstacles, which have no legal basis or justification whatsoever.

Sincerely yours,

The CSC

Yours sincerely,



Alain Dumont
Chairman of the Central Staff Committee

⁸ See consideration 12 in the judgment: “... *In the present case, the alternative means offered by the Organisation consisted in an intranet webpage on the Organisation’s website. This is, manifestly, a less viable means of communication and, moreover, it is under the supervision and the management of the Organisation, and not under the complete control by and availability for the staff representatives*”.

⁹ As in Article 2 ServRegs: for instance the GCC, the Appeals Committee, the Data Protection Board...