

Mr. Jesper Kongstad
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Sent by post and email:

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Brussels, 15 May 2015

Re: Independence of the Boards of Appeal of the European Patent Office

Dear Mr. Kongstad,

I am writing from the Council of Bars and Law Societies of Europe (CCBE). The CCBE is the representative organisation of more than 1 million European lawyers through its member bars and law societies from 32 full member countries, and 13 further associate and observer countries. The CCBE has examined the issue of Independence of the Boards of Appeal of the European Patent Office.

As you will be aware, parties appearing in the European Patent Office and particularly those with cases before the Boards of Appeal may be represented not only by European Patent Attorneys but also by lawyers from around Europe.

The decision (R 19/12) of the Enlarged Board of Appeal of 25.04.2014 and the President's paper (Proposal for a Structural Reform of the EPO Boards of Appeal) dated 6 March 2015 addressed to the Administrative Council have been reviewed by the CCBE, along with the report of the 143rd Meeting of the Administrative Council appearing on the EPO website.

You will appreciate that CCBE has an interest in both the reputation and the smooth functioning of all judicial organisations operating within Europe. You may also be aware that the CCBE has contributed regularly to the discussions in preparation for the setting up of the Unified Patents Court. In these submissions, the CCBE has sought to express views directed at ensuring that the UPC operates, from day one, in a manner which is both efficient and fair.

The CCBE understands that following the 143rd Meeting of the Council, it is now proposed to prepare draft Rules to address the issue of independence of the Boards of Appeal. As you are doubtless aware the concern is not just whether the Boards of Appeal are in fact truly independent of the EPO, but also whether they are perceived to be independent. Unless both those concerns are fully met there is a significant risk that the decisions of the Boards of Appeal will not meet with the degree of respect which is desirable for the smooth functioning of the patents system in Europe. In particular both National Courts, and the Courts of the UPC when it is set up, will be asked to have regard to decisions of the Boards of Appeal. At this juncture it seems to us that the Administrative Committee would be well advised to err on the side of changes which will engender a greater rather than a lesser perception of independence.

Our main concerns are:

1. We do not believe it is helpful to conflate the issues of efficiency and independence. If they are treated together there is a risk that initiatives directed at independence will be perceived as either directed at, or influenced by, concerns of efficiency. In that case the perception of independence may be weakened. If the Council or the President believe that efficiency should also be improved the arrangements for achieving this should be an entirely separate exercise.
2. It may be necessary for the EPC to be revised to assure independence. If so, as that may take some time, it would be desirable for the Council to implement some revisions in procedures on an interim basis.
3. It is unclear whether the proposed delegation of powers by the President of the EPO (which should be complete and irrevocable if independence is to be demonstrated) would be effective and licit.
4. We would encourage the Administrative Council to seek its own independent legal advice on constitutional law. It should not rely on advice obtained by the President of the EPO. Ideally this advice would be given by constitutional lawyers from more than one of the European traditions as it is intended that the Boards of Appeal's independence should be respected by litigants and the judiciary throughout the members of the EPC.

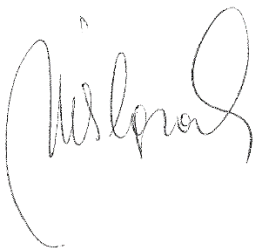
We would encourage the Administrative Council to take this advice immediately to assist in determining whether amendment of the EPC will be required and in formulating its detailed Proposals. It would also seem wise for the resulting proposals to be reviewed by such advisers before being advanced for adoption by the Council.

5. In the interests of perceived independence, it is highly desirable, both in dealing with these reforms and more generally, for any communications to be seen to come either from the Council or from the President, but not to be presented as a joint position.
6. The Boards of Appeal should have complete financial and organisational independence from the EPO.

We also enclose a short paper of detailed points on the Proposal for Structural Reform of 6th March.

We hope these remarks are of some assistance in formulating the Council's next steps. The perception that the Boards of Appeal are truly independent is in our view much to be prized and will not only increase respect for their decisions but help ensure the utility and success of the Unitary patent and the Unified Patents Court.

Yours sincerely,



Maria Ślęzak
CCBE President

Comments from the Council of Bars and Law Societies of Europe (CCBE)

Proposal for a Structural Reform of the EPO Boards of Appeal – 6 March 2015

1. Page 3/18, paragraph 11 – the comment “the best safeguard of independence is excellent and transparent performance”, is a direct quotation from page 9 of the paper to which it refers. Whilst it correctly argues that courts with excellent and transparent performance are more likely to retain their independence, it could equally be said that independence is necessary to give rise to excellent and transparent performance. Excellent performance provides no absolute guarantee of independence.
2. Page 4/18, paragraph 15 – it is important that the delegation of powers by the President of the EPO be both permanent and irrevocable. It is not clear whether as a matter of constitutional law that can be achieved; if not amendment of the EPC may be required.
3. Page 5/18, paragraph 19 – it is important that the delegation of powers by the President of the EPO be both permanent and irrevocable. See point 2 above.
4. Page 5/18, paragraph 20 – the proposal that staff be made available to the BOA by the EPO undermines the perception of the BOA’s independence. Whilst this may be necessary as a short-term expedient, ideally the Administrative Council would agree to move over a period of years (maybe 5) to a situation where there is complete independence of personnel (rather than personnel moving rather freely between the two organisations). It is important to ensure that there is complete and transparent separation after these reforms.
5. Page 6/18, paragraph 21 – the proposal that the BOA’s draft budget be “examined and discussed with the relevant EPO departments” could be taken to offer an opportunity for the EPO to interfere and apply pressure. This is undesirable. Whilst the mandatory word “will” in relation to the requirement for the President of the EPO to include the BOA budget request in his draft budget is to be welcomed, it is unclear how much pressure could have been applied before that stage is reached. The BOA budget should be submitted direct to the Administrative Council. If that cannot be achieved without revision of the EPC the EPO should, in the interim, have the obligation to pass on, uncommented and unamended, the draft budget proposed by the President of the BOA.
6. Page 6/18, paragraph 22 – it is unclear why the President of the EPO should be given the possibility to comment on the annual reports before they are provided to the Administrative Council. Again this implies a potential for interference. The President should be given the opportunity to comment on them only after they have been delivered.
7. Page 6/18, paragraph 23 – it is unclear what is meant by “in close co-ordination with the President of the EPO” in relation to communications. If the BOA are to be perceived as independent it must be clear that its utterances owe nothing to any position taken by the President of the EPO. It would not be acceptable in a democracy for any public statements by the Judiciary to be influenced by the Executive.
8. Page 8/18, paragraph 29 – see point 2 above on delegation of powers (permanent, irrevocable, but would it be effective and licit?).

9. Page 9/18, paragraph 31 – It is not clear what constitutes a “senior judge”. Some Presidents of national judiciaries would not necessarily be appropriate or available to oversee a court dealing with Patents. On the wording as it stands the proposal extends to judges who have nothing to do with Europe. It may be helpful to clarify that only judges operating in member states of the EPC should be considered.

The right of the President of the BOA to participate in BOAC meetings should be subject to the usual rules that he would leave any meeting at which e.g. his personal performance was under discussion.

10. Page 9/18, paragraph 35 – this raises again the question of preparation of the BOA budget and to what extent this can be completely insulated from the President of the EPO and his administration. See comment on paragraph 21 above.
11. Page 10/18, paragraph 37 – the reference to the President of the EPO having no **direct** involvement carries the unfortunate implication that he is to have indirect involvement in management. It is desirable that in the instrument by which the President of the BOA delegates his tasks, he makes it clear not only that the delegation is permanent and irrevocable, but also that it is complete.

The reference to the President of the EPO “deciding on the level of services to be supplied” raises the difficulty of the continued active engagement of the EPO with the running of the Boards of Appeal. Whilst this may be necessary in the short-term the Administrative Council should move to a complete separation of the two organisations. The possibility to “decide on the level of services” opens up the possibility of indirect influence being exerted on the Boards of Appeal by the President of the EPO.

12. Page 10/18, paragraph 38 – see point 2 on delegation (permanent, irrevocable).
13. Page 10/18, paragraph 40 – This is a work in progress, but care will need to be taken in setting up the Terms and Conditions for members of the BOA to ensure that their independence both on appointment, and during the performance of their work, is assured.
14. Page 11/18, paragraph 41 – consideration should be given as to how undertakings given by judges of the BOA about their behaviour after they leave the BOA should be controlled. By whom will breach of such an undertaking be determined and/or enforced?

At the end of the paragraph there is reference to specific guidance regarding external members’ “judicial activities at national level” – presumably this should also include judicial activities at international level, e.g. as judges of the UPC.

15. Page 12/18, paragraph 47 –the assignment of staff from the EPO to the BOA support staff and the possibility of maintaining staff rotation may be seen as necessary in the short term (and maybe desirable by the current EPO staff), but undermines the perceived independence of the BOA. The Administrative Committee should move to complete independence of the two groups of staff as soon as can reasonably be achieved.
16. Page 12/18, paragraph 48 – raises the question of full independence between the EPO and BOA and the risk that SLA’s could be used to apply subtle pressure. Whilst

allowing the BOA to avail themselves of the services of the EPO may be acceptable as a transitional measure, in due course it should become an entirely independent body.

17. Page 13/18, paragraphs 49-51 – Architecture and proximity are important factors in fact, as well as in external perception. The comment about the influence of potential daily contact is supported. If those who work at the BOA see themselves as part of the “larger EPO family” this reduces the impression of full impartiality. If they are known regularly to socialise with those whom they may be called on to criticise in their official functions this closeness is unhelpful to the external perception. Ideally the BOA would be situated well away from any part of the EPO, preferably in a different city.

If this cannot be achieved in any realistic timeframe then the need for full and transparent separation and independence in all other respects becomes even more important.

18. Page 13/18, paragraph 50 – in due course it would be best if the BOA were entirely independent and if the reality of that were reinforced by its location in a European city where the EPO is not present. Locating it in an entirely separate building would be a useful and desirable first step in that direction.
 19. Page 13/18, paragraph 51 – rather than the President of the EPO exploring the implications, this should be delegated by the Administrative Committee to an independent third party. There is a risk that the President’s advice will not be seen as entirely impartial.
 20. Page 18/18, annex 3 – a number of the comments made elsewhere are carried through into the Governance Chart and aspects of it should be changed. In particular, the apparent budgetary reporting line from the BOA to the President of the EPO is undesirable. Ideally, it should be made clear that the budget, even if it has to pass through the hands of the President of the EPO for reasons related to the current wording of the EPC, should pass directly through the President’s office, without comment or amendment. As soon as possible the budget of the BOA should be set entirely independently of the EPO.
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