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[Translation – email to German representative of Administrative Council of EPO]

Concerns about judicial independence at the EPO

Dear Mr. Ernst:

I first would like to apologize for my somewhat unusual manner in addressing you in your capacity as the German representative of the Administrative Council of the European Patent Organisation.

I am deeply concerned about the judicial independence at the EPO and about the EPO's worldwide reputation.

This concern begins with the plans, which were already discussed on various occasions, of the President of the European Patent Office, Mr. Battistelli, to introduce a performance-based remuneration also on a judicial level. My concern is drastically increased by the most recent events:

As can be gathered from the popular blog IPKat of December 4, 2014 (see <http://ipkitten.blogspot.de/2014/12/in-suspense-about-european-patent.html>) and the Juve news of the same date (see <http://www.juve.de/nachrichten/namenundnachrichten/2014/12/strukturreform-europaeisches-patentamt-will-beschwerdekammern-eugh-unterstellen>), of December 3, 2014, a Member of the Board of Appeal of the European Patent Office was forced to leave his office. At the same time he was prohibited from entering the EPO premises – which, of course, has the quality of a suspension, as de facto, a removal from office takes place – allegedly due to a misconduct which was not described in more detail.

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This is a transgression of competence on the part of the Management of the EPO which causes deep concern and is likely to fundamentally question the independence of the Boards of Appeal which anyway is not always perceptible from outside.

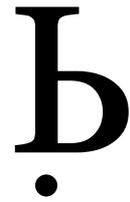
Pursuant to Article 23(1) EPC, the personal independence of the Members of the Boards of Appeal is to be guaranteed precisely by the fact that they are appointed for a period of five years and cannot be removed from their office during this period of time, “unless there are serious grounds and the Board takes a respective decision at the suggestion of the Enlarged Board of Appeal”.

Consequently, the President, in case that he asserts a serious misconduct on the part of a Member of the Board, is, if need be, empowered to refer the case to the Enlarged Board of Appeal. The latter may then, after examination, suggest a decision of removal from office to the Administrative Council which was also competent for the appointment of the member (Article 11 EPC).

The President of the EPO disregarded the legally determined competences: neither was there a referral to the Enlarged Board of Appeal, nor did the solely competent Administrative Council decide in this matter. Rather, the President obviously acted autonomously by using disciplinary power over all staff members of the EPO.

However, a transgression of competency of this kind is unacceptable under the principles of the rule of law: The exertion of the disciplinary power by the “executive” over the “judiciary” of the EPO abolishes the separation of powers and jeopardizes the judicial character of the Boards of Appeal which is substantially determined by the independence of its Members.

In a second point which is less obvious to the public, the President also transgresses his powers. The Chairmen and Members of the Board of Appeal so far have been, as a matter of routine, reappointed after the lapse of an appointment period. Since the issuance of the decision R 19/12, no members have been reappointed so far. Whereas according to Article 11(3) sentence 1 EPC the President has a right of suggestion for the appointment, he precisely does not have such a right with regard to the reappointment. In such a case, he is merely to be heard,



according to sentence 2. Nevertheless, the President de facto controls the reappointments. He does not limit himself to communicate the members to be reappointed to the Board or to have them communicated to the latter and to eventually give his comments, but he withholds this information from the Administrative Council. It is obvious that Members of the Board whose appointment period is due to expire shortly consider themselves put under pressure by the President until their reappointment has been made. The personal independence, the indispensable requirement of an also critical examination of administrative decisions, cannot be guaranteed under such conditions.

In addition to these described developments at the Boards of Appeal, there seems to currently prevail an “atmosphere of fear and terror” which results in numerous disciplinary procedures against unwelcome staff members of the EPO.

With these measures of the President, a functioning and balanced system which enjoys great acceptance on the part of the users is ultimately discredited, which should cause all persons responsible for this system, in particular the representatives of the Member States in the Administrative Council to take measures which are appropriate for safeguarding the independence of the Boards.

Yours, sincerely

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