

## **EPO – The independence of the Boards of Appeal – Responsibilities of the Administrative Council**

This Blog has recently published an open letter<sup>1</sup> of the European Patent Lawyers Association (EPLAW) to the Delegations of the Administrative Council (AC) of the EPO. EPLAW joined the chorus of patent professionals expressing their concerns about the temporary removal of a member of the Boards of Appeal (BoA) from office, as ordered by the President of the EPO and confirmed by the AC.

In addition to public discussions among patent professionals, further developments regarding the status of the BoA have taken place "behind the scenes". The following is a summary of proposed or already enacted measures that have come to my attention:

Among others, the AC adopted in its December meeting an amendment to the Service Regulations<sup>2</sup> affecting the status of the members of the BoA as civil servants of the EPO. Inter alia, this amendment provides the following:

- Introducing a probation period for Board members;
- Including the members of the BoA in the category of employees of the EPO who are subject to reporting on their ability, efficiency and conduct;
- Defining the drawing up of appraisal reports as a managerial task;
- Introducing a new salary adjustment procedure
  - replacing step advancement based on seniority;
  - providing step advancement and payment of bonuses based on performance and competence as assessed by the responsible manager.

This may open the possibility of giving a reward to Board members producing the expected numbers (or kinds) of decisions with the expected results and penalizing those members not measuring up to the expectations of the EPO management.

In the same meeting, the AC decided on appointments and re-appointments of Chairpersons and members of the BoA. From the Council Secretariat's Communique and the new Business Distribution Scheme for the BoA as published in the meantime, the following points are apparent:

- No new appointments of Chairpersons and members of the Technical BoA have been made;
- The re-appointments of members whose term of appointment terminates in early 2015 have been delayed – deviating from previous practice – until the last minute.

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<sup>1</sup> <http://www.eplawpatentblog.com/eplaw/2014/12/eplaw-blog-judicial-independence.html>

<sup>2</sup> [http://www.epo.org/modules/epoweb/acdocument/epoweb2/159/en/CA-D\\_10-14\\_en.pdf](http://www.epo.org/modules/epoweb/acdocument/epoweb2/159/en/CA-D_10-14_en.pdf)

As a result of this conduct, two chairs of Technical BoA have been vacant as of January 1, 2015, one of them being BoA 3.5.01 competent for the field of business methods, having a particularly heavy backlog. No new appointments were made in the December meeting for technically or legally qualified members, nor have, so far, any vacancies been announced by the EPO with the consequence that no selection procedures preceding a proposal for appointment have been initiated. On the contrary, as alleged in one of the comments in IPKat, several candidates already selected in terminated selection procedures have not been proposed for appointment by the President since decision R 19/12 was issued. It is not apparent on which basis the President of the EPO and the AC can assume that a substantial reduction of the number of chairpersons and members can remain without serious effects on the working of the BoA, in particular on the pendency of appeal cases.

In the Council Secretariat's Communique on the December meeting, the AC expressed "its full endorsement of and support for the principle of independence of the members of the Boards of Appeal, as specifically set out in Article 23 EPC and generally embodied in internationally recognised principles of judicial independence".

Alas, the reality appears to be different. The decision on the amendment to the Service Regulations was taken having recognized that the status of the BoA had become an extremely delicate political and legal question following the unprecedented action of the Office Administration against a Board member. It would have been an easy matter to exempt the members of the BoA from the new career and salary system. The omission to do this is difficult to understand.

Similar concerns appear to be justified by assessing the role of the President in re-appointment proceedings. Having only the right to be heard on re-appointments under the Convention, he obviously has extended this right to a right of proposing re-appointments. In the context of the reporting system under the amended Service Regulations, the present manner of handling the matter would allow the President to restrict re-appointments to members who are seen as particularly compliant with the management's objectives.

It is the task of the AC to supervise the EPO. Having seen that AC documents on re-appointments had not been produced in good time, it would have been a proper task for the Chairman of the AC to put the re-appointment of Board members on the AC's agenda. If necessary, the Chairman could have simply asked for a list of members due to re-appointment. In this way the impression would have been avoided that the President could take the instrument of re-appointment for exercising pressure on members of the BoA.

The task of supervision implies that there is a certain distance between the Office and its supervising body. In the present context, the public and the users of the European

patent system could expect that the AC would examine the President's temporary removal of a Board member from office and its effects on the independence of the BoA independently. Instead, the Chairman of the AC gave a common interview with the President of the Office conveying the impression of a common conviction that everything is under control and in order.

Lack of separation and control and delays in readying the BoA for the future is not what the users of the EPO, in particular the applicants financing the EPO with their fees, expect from EPO management and the AC. The public concern expressed in many letters and in numerous discussions about the recent actions clearly shows that not everything is in order and that the AC should use its authority to supervise the Office in order to implement the necessary short-term and long-term changes. Cooperation between the AC and the EPO is in many situations the best choice. However, for the sake of safeguarding the independence of the BoA, simply avoiding independent and critical assessment of obvious flaws for the sake of the appearance of "business as usual" is not good enough and is not in the long-term interest of the EPO users. Obviously, the President has intervened in the activities of the BoA and information obtained in the meantime has not indicated that this will not happen again in the future. Transparency is of crucial importance and the AC should try to regain the lost confidence of the users of the EPO, e.g. by seeking external advice from judges, users and last but not least by members of the BoA before taking far-reaching decisions.

According to the President, the AC "decided that in full respect of the Office regulations concerning investigation, the Office Investigative Unit is the competent body to pursue this investigation and to deliver the report". This sounds like a general approval of the Investigative Unit's activities based on the Guidelines for investigations at the EPO. These Guidelines became known by the letter of the internal members of the Enlarged BoA requesting the members of the AC to take appropriate measures for ensuring the independence of the BoA.

The users expect that the AC reviews the role of the Investigative Unit in general and in particular as far as members of the BoA are concerned. It is not to be reconciled with the internationally recognized principles of independence as confirmed by the AC that an Office acts as prosecutor against its judiciary. As rightly stated by Sir Robin Jacob in his letter to the Chairman of the AC written on behalf of the Intellectual Property Judges' Association (IPJA)<sup>3</sup>, if there are criminal charges this is a matter for action by the criminal law enforcement authorities, not the Office Administration. In this context, it appears necessary for the AC to scrutinize the powers and actual activities of the Investigative Unit. For example, EPO staff requests that it should be examined whether the applicable data protection requirements<sup>4</sup> comply with international standards and whether there is an independent body ensuring that the

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<sup>3</sup> <http://ipkitten.blogspot.de/2015/01/judicial-independence-europes-ip-judges.html>

<sup>4</sup> <http://techrights.org/wp-content/uploads/2014/10/DPG-2014.pdf>

Investigative Unit's way of actually collecting and using such data complies with such requirements.

In any case, parties to appeal proceedings should be given an unrestricted guarantee that the first instance is denied any access to means of communication used by the members of the BoA. Particularly, for a number of parties who have filed objections based on allegations of suspected partiality of the Chairman of the Enlarged BoA, it might be a rather disturbing consideration that the Investigation Unit may have access to the communication between members of the Enlarged BoA.

Finally, the representatives of the EU member states in the AC may be reminded of their responsibility to make the EPO fit for its tasks under the regulation on the unitary patent. Spain has based its action against this regulation on the main and first argument that a regulation has been established on the basis of a right granted by the European Patent Office, whose acts are not subject to judicial review. The Advocate General succeeded in his opinion to avoid this problem by arguing that the Regulation does not affect the EPC. However, the ECJ has not yet taken its decision and the recent actions of the President of the EPO demonstrating his powers over the BoA may prompt the ECJ to look closer at the matter and to ask the question whether it is in agreement with EU law that the unitary patent as an EU industrial property title may be revoked by the EPO's opposition division. Juliane Kokott concludes in her opinion written for the Advocates-General in the previous case G 1/09<sup>5</sup> that this is a body whose decisions are not subject to judicial review complying with the requirements of an efficient judicial control within the meaning of Article 47 of the EU Charter of Fundamental Rights.

The dangers for the independence of the BoA based on the fundamental problem of the BoA's administrative integration into the Office (see Festschrift "50 Jahre Bundespatentgericht", Cologne 2011, p. 911) have materialized in an unforeseen manner. The EPO has buried the project for a revision of the EPC implementing the organisational autonomy of the BoA of the EPO within the European Patent Organisation by taking the basic proposal for a Diplomatic Conference, Doc. CA/46/04 of May 28, 2004<sup>6</sup>, from the EPO's website. Now, it is up to the AC to take legislative initiative.

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<sup>5</sup> <http://www.ipeg.eu/blog/wp-content/uploads/Advocates-General-Opinion-1-09.pdf>

<sup>6</sup> <http://legaltxts.arcdev.hu/law-practice/legislative-initiatives/autonomy.html>