

## **EPO – First request by the Administrative Council that the Enlarged Board of Appeal proposes the removal of a member of the Boards of Appeal from office held inadmissible**

### **Enlarged Board of Appeal, decision in case Art. 23 1/15 – Request for a proposal of removal from office**

#### **Background**

Pursuant to Article 23 (1), 1<sup>st</sup> sentence, EPC, a member of the Boards of Appeal may not be removed from office during his term of 5 years, “except if there are serious grounds for such removal and if the Administrative Council, on a proposal from the Enlarged Board of Appeal, takes a decision to this effect.”

On December 3, 2014, the President of the EPO suspended a member of the Boards of Appeal, imposing a house ban on him. Later on, it was revealed that the reason was the alleged spreading of defamatory material. In the following week, the Administrative Council (AC) confirmed the suspension until end of March 2015, agreed to set up a Disciplinary Committee and requested the investigation against the member be completed. For investigations, the present administration of the EPO created a special Investigation Unit, directly reporting to the President of the EPO and working on the basis of Investigation Guidelines. Furthermore, the EPO is said to use the services of a company “Control Risks” for investigative purposes. In March 2015, the Rules of Procedure of the EBA were amended, introducing an Article 12a, implementing Article 23 (1), 1<sup>st</sup> sentence, EPC. Article 12a RPEBA stipulates inter alia that a proposal for removal from office of a member of the Boards of Appeal may be made by the AC or by the VP of the EPO in charge of the Boards of Appeal.

On March 26, 2015, the AC instituted disciplinary proceedings against the Board member. The Disciplinary Committee (DC) recommended removal from office and on June 25, 2015 the Chairman of the AC filed a request asking the EBA to make a proposal, in accordance with Article 23 (1), 1<sup>st</sup> sentence, EPC, that the Board member be removed from office. On a request from the Board member, the EBA allowed in an interlocutory decision an objection to the first Chairwoman based on suspicion of partiality who was replaced accordingly. At the end of the oral proceedings of September 16 and 17, the EBA’s decision was announced.

#### **Decision Art. 23 1/15**

The written and reasoned decision was issued last week. So far it has not been put on the database of the decisions of the Boards of Appeal, but it has been made accessible inter alia by IPKat.

Headnote 1 of the decision deals with the composition of the EBA, headnote 2 reads:

*Article 12a (5) RPEBA requires that the request under Article 12a (1) RPEBA specify individual incidents and the evidence for them, and give reasons why they constitute a serious ground within the meaning of Article 23 (1) EPC.*

Headnote 2 summarizes the reasons for which the AC request was held inadmissible.

In the Reasons for the decision, the EBA notes that the request does not say what facts are held against the Board member. Instead the request, without adducing itself any relevant facts, merely refers to the opinion of the DC and declares it to be an integral part of the request. In this opinion, the accusations made by the EPO are grouped into five allegations. With regard to issues 1 and 2, the opinion

concluded that the Board member had committed certain acts he was accused of, however, as the EBA notes, without ultimately expressing a view on the reliability of the evidence produced. The EBA further notes that the opinion, with regard to allegations 3 to 5, provides no facts at all which are set out explicitly enough for evidential purposes. Even with regard to issues 1 and 2, the relevant facts and evidence were not set out explicitly enough for the accused to comment and for the EBA to examine them in order to come itself to an independent judgment.

The AC's representative submitted that the EBA had been presented with all the necessary evidence which was contained on a subsequently filed USB stick. The EBA disagrees and emphasizes that it is not good enough to simply refer to facts and evidence and leave the Board to reconstruct the events for itself. This is not sufficient for Article 12a (5) of the Rules of Procedure of the EBA requiring that the request must set out "the facts, arguments and evidence relied on". Lacking sufficient substantiation, the request was rejected as inadmissible and reimbursement of the costs incurred by the accused in the proceedings before the EBA was ordered.

### **Further proceedings**

After the oral proceedings before the EBA, the President of the EPO asked the AC to dismiss the Board member without a proposal of the EBA. Instead, the AC took an explicit decision on October 15, 2015 to request the EBA to make a proposal for removal from office. One may assume that this second request was made since it was a wide-spread assumption before issuance of the reasoned decision that the reason for the dismissal was that the Chairman of the AC was not duly authorized to file the first request. The accused Board member had argued that the Council as a whole must decide to make such a request. This position turned out to be wrong since the EBA concluded that the AC's decision to institute disciplinary proceedings could be understood to mean that, depending on the proposal of the DC, the AC had mandated its chairman to submit a proposal for removal to the Council. Considering this history, it may well be that the substance of the second request is not too different from the substance of the first request and the question may arise whether lack of substantiation is a remediable deficiency. Pt. 8.5 of the Reasons may be a hint that this is not possible.

So far removal of a Board member from office has been *terra incognita*. Thus, it is not surprising that there are many unresolved legal problems. This task is so different from other proceedings before the EBA that analogies to the usual procedural rules are difficult.

Some of the procedural aspects have become clearer by the reported decision, but fundamental questions remain unanswered until a request is examined as to its substance. The following may be mentioned:

- Can it be the role of the EPO, the administration to be controlled by the Boards, to be the prosecutor against a Board member?
- Who controls the Investigation Unit and its methods, and according to which standards?
- Has temporary removal to be equated with removal within the meaning of Article 23 (1) EPC, in particular if it absorbs an essential part of the Board member's term?
- If a member of a Board is removed from the composition as originally determined in a given case, as a consequence of a house ban imposed by the office or the AC, is the Board still correctly composed?