Dear Mr. Battistelli,

Regarding: **Reform of the BoA – User consultation**

1. EPLAW is the association of European lawyers specialized in patent matters. Its members represent parties in patent litigation before the national courts in Europe and before the EPO. EPLAW is actively engaged in shaping the Rules of Procedure of the future Unified Patent Court (UPC) and in training the future UPC judges.

2. This letter is in reaction to your letter of 29 April 2015 requesting contributions regarding the reform of the Boards of Appeal (‘BoA’) as proposed by the EPO in document CA/16/15 of 6 March 2015 (‘the Proposal’), and expanded on in the six questions further to the Proposal mentioned in your letter (‘the Questions’).

3. EPLAW is pleased to see that the Administrative Committee (AC) and the EPO are actively engaged in furthering the independence of the BoA.

4. We note that in the meantime the Council of Bars and Law Societies of Europe (CCBE) in its letter to Mr. Jesper Kongstad of the AC of 15 May 2015 (copy enclosed) has provided various detailed comments to the Proposal. EPLAW is in full agreement with these comments which, given their general and fundamental nature, lend themselves to be addressed to the EPO as well.

5. Two aspects of the Proposal cause most concern to EPLAW.

6. One is that the EPO almost equates the (desired) perceived autonomy of the BoA with their (undesired) perceived inefficiency; in fact most of the Questions deal with this perceived inefficiency. We believe that these subjects (autonomy/independence and efficiency) require separate handling. The independence of the BoA is a much more fundamental issue than its (in)efficiency. Moreover, we don’t think that the connection suggested by the EPO - that excellent performance (efficiency) would generate independence (autonomy) - has any basis in law. Efficiency is a matter of perceived fact, whereas autonomy is a matter of constitutional law.

7. The second point is that the EPO stresses that any improvements should be achieved within the legal framework of the current EPC. The current EPC envisages that both the AC and the President of the EPO have certain powers vis-à-vis the BoA. The Proposal in essence suggests that (only) the President’s powers be delegated to a newly to be created President of the BoA, rather than to revise the relevant EPC-based AC and Presidential powers. The CCBE in their letter to Mr. Kongstad have raised the question whether such delegation would withstand the scrutiny of constitutional lawyers: Does it achieve the desired independence of the BoA (to be compared with the judicial branch of a state), or could the delegation be withdrawn by the President of the EPO?

8. EPLAW understands that a revision of the EPC - 15 years after the last revision – is not a task to be taken lightly. On the other hand the present issue – the desired judicial independence of the BoA – is a fundamental issue. Treaty revision seems all the more desirable in light of the very likely establishment of the UPC. After all, the multiple divisions of this EU inspired court system will in practice have a power almost identical to the power of the BoA: The power to revoke an EPO granted patent for all Contracting Member States.
9. The larger task of a treaty revision should not detract from the benefits the proposed reforms could bring in the interim, of course. Against that background EPLAW in particular supports the creation of a President of the BoA and the delegation of powers to him by the President of the EPO.

10. EPLAW is of the opinion that users need opposition decisions within time frames that fit the life-cycle of the relevant products, which is often shorter today than it was in the past. That is why EPLAW is pleased that the EPO and the AC are also thinking of ways to assist the BoA in achieving greater efficiency.

11. At this point in time EPLAW prefers not to enter into a debate with the EPO about the various aspects of efficiency and the general functioning of the BoA as highlighted by the majority of the Questions. It is not always easy to reconcile the requirement of speed of the decision with the requirements of quality, cost and predictability. All have much to do with justice, and much depends on context. Our membership is accustomed to the fact that the national courts of one state often do not balance these requirements in the same way as the national courts of another state.

12. EPLAW hopes that you will find the opportunity to make use of the above contribution when continuing your discussions with the AC.

Yours sincerely,

Richard Ebbink
(President)

cc. Jesper Krogstad (AC);
cc. Robin Jacob (AIJA);
cc. Maria Slazak (CCBE)