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Munich, 09.05.2003

SUBJECT: Organisational autonomy of the Boards of Appeal of the European Patent Office within the European Patent Organisation

DRAWN UP BY: President of the European Patent Office

ADDRESSEES: Administrative Council (for opinion)

SUMMARY

A proposal is presented for the organisational autonomy of the Boards of Appeal of the European Patent Office within the European Patent Organisation. The Boards of Appeal and their associated administrative services, that is to say Directorate-General 3, are to be detached from the European Patent Office and established as the third body of the European Patent Organisation alongside the Administrative Council and the Office.

The aim is to make the independence of board members as enshrined in Article 23(3) EPC clear and convincingly apparent to the outside world by an institutional separation. The principles and structures essential for the Boards of Appeal to function as a judicial body are to be systematically enshrined in the EPC. Until now they have been regulated only in a fragmentary manner and, to some extent, only in the Implementing Regulations (eg Presidium of the Boards of Appeal, registries).

The proposals embody the ongoing evolution of the EPC on the basis of the existing structure and will not have any disadvantages for the parties in the appeals procedure.

The Administrative Council is requested to give its opinion on the proposal. In particular it is asked to present its comments on whether the Office should submit appropriate proposals for the amendment of the European Patent Convention in the light of a Diplomatic Conference due to take place early next year.

I. INTRODUCTION

1. In June 1996 the EPO President set up a Working Party on Directorate-General 3 of the European Patent Office under the chairmanship of Ms. Sedemund-Treiber, President of the Federal German Patents Court. The working party's task was to establish whether the independence of the members of the Boards of Appeal and the Enlarged Board of Appeal should be safeguarded by legal measures and/or made more apparent, particularly with respect to the outside world.
2. In November 1997 the working party's final report was presented to the Administrative Council (CA/84/97, known as the Sedemund-Treiber report). In point 70 of this report the working party came to the conclusion that, within the framework of a revision of the EPC, serious consideration should be given to making DG 3 an autonomous judicial body of the European Patent Organisation that is independent of the Office. The current organisational inclusion of the Boards of Appeal and the Enlarged Board of Appeal in the Office could create the mistaken impression that they were on the same footing as other departments such as the Receiving Section, the search, examining and opposition divisions, or the Legal Division (and that, like these, they were bound by the President's instructions). It was therefore proposed that by appropriately revising the European Patent Convention it should be made quite clear that DG 3 was an independent judicial body of the Organisation.
3. With this in mind a DG 3 working party under the chairmanship of the Vice-President responsible for the Boards of Appeal considered the question of detaching the boards from the Office but keeping them within the Organisation.

II. STARTING POINT

4. The current legal position provides for Boards of Appeal which, together with their associated administrative services, are integrated into the European Patent Office as Directorate-General 3. They are responsible for reviewing decisions of the Legal Division, of the examining and opposition divisions, and of the Receiving Section of the European Patent Office in a judicial procedure.
5. Under Article 23(1) to (3) EPC, board members are independent both personally and in their decisions. This is not only enshrined in the EPC itself but is also reflected in the Service Regulations. As a result of the board members' independence and the judicial nature of the appeals procedure laid down in Articles 106 ff EPC, the boards function as a judicial body. The administrative and

organisational attachment of the boards to the EPO, which is an administrative authority, is not commensurate with their function as a judicial body.

6. Legal certainty and the smooth administration of the law are dependent, in particular, upon acceptance by the parties and the public of the verdict given by the appropriate body. This acceptance derives from the independent authority of the court, which must be apparent and clearly perceptible to the outside world. That is not the case with the present structure, as the Sedemund-Treiber report highlighted. Board of Appeal decisions are not always perceived by the public as decisions by an independent court, because they are made by a department of the European Patent Office, which is directed by the President (Article 15 EPC). This lack of awareness undermines the authority of the Boards of Appeal and results in the Office's work not being seen as subject to independent review. This can be seen particularly in procedures for the grant of patents in the fields of genetic engineering or computer technology.

III. PROPOSAL FOR THE FUTURE POSITION OF THE PRESENT DIRECTORATE-GENERAL 3

7. The following proposal is based on the view that the only legal amendments to be made to the EPC and to related conventions such as for example the Protocol on Immunities are those needed to make the Boards of Appeal institutionally independent of the European Patent Office and to make this fact apparent to the outside world. The way the Boards of Appeal and the support services work will, on the other hand, remain essentially unchanged, as will the procedure for the parties and the staff members' relations with the Organisation under employment law.
8. A body that performs judicial functions must not only be institutionally independent in the eyes of the outside world but must also make this independence apparent and comprehensible through the transparency of its internal structure. This requirement will be met by enshrining in the EPC with their respective key duties the Presidium of the Boards of Appeal, the Disciplinary Board, and the selection boards preparing the appointment of board members, as administratively autonomous organs, as well as the Board of Appeal registries. The details of their organisation and further responsibilities will be laid down in the secondary legislation.
9. The fact that under this proposal the EPO and the judicial body can and must work together at administrative level does not cast doubt on the independence of the Boards of Appeal. This arrangement also makes it possible to use the EPO's infrastructure, which works well, and to keep down the cost of implementing the changes.

A. KEY POINTS

10. The Boards of Appeal and the Enlarged Board of Appeal, together with their registries and the other support services in the present DG 3, are to be detached from the European Patent Office and established as the third body of the European Patent Organisation alongside the Administrative Council and the Office. Its seat will remain in Munich, which will enable it to use EPO logistical structures and will mean the least number of changes for all concerned.
11. The Organisation would, *mutatis mutandis*, adopt the separation of powers typical in a state bound by the rule of law, into legislature, executive and judiciary, the latter being the new judicial body. The division into three will be given a legal foundation in the Convention in so far as the new judicial body will be referred to as the third organ alongside the Office and the Administrative Council in Article 4 EPC. A separate chapter will also be devoted to the new judicial body, starting after the present Article 20 EPC.
12. The new judicial body will therefore be independent of the Office not only in its decision-making in pending proceedings, as at present, but also in its administration of the staff and resources made available to it.
13. The Administrative Council will supervise the new judicial body without prejudice to the judicial independence of its members as provided for in Article 23 EPC.
14. The budget adopted annually by the Administrative Council is the European Patent Organisation budget and not that of the European Patent Office. No change needs to be made, but the EPC should expressly state that the Organisation will make available to the new judicial body the resources it needs to perform its duties.
15. All the new judicial body's staff will continue to be employed by the Organisation, which alone has legal personality. Unlike at present, however, the permanent members of the Boards of Appeal are no longer each to be appointed for a term of five years but "for life" (ie until their appointment is terminated by resignation or retirement; for removal from office see point 24). This is justified by the fact that the appointment presupposes considerable professional experience, which in effect appreciably curtails the "lifetime appointment". However, the major significance of the new provisions lies in ensuring the institutional independence of the individual members of the chambers.

B. STRUCTURE OF THE NEW JUDICIAL BODY

16. The new judicial body, which could for example be called "Beschwerdegericht der Europäischen Patentorganisation/Court of Appeals of the European Patent Organisation/Cour d'appel de l'Organisation européenne des brevets", consists of a President, a Presidium, the Beschwerdekammern/Appeal Chambers/Chambres de recours, a Grosse Kammer/High Chamber/Grande Chambre, the registries and the other support services.

(a) President of the Court of Appeals

• Status

17. The President of the Court of Appeals will also be a member of the Appeal Chambers and will be appointed by the Administrative Council. He should also be appointed chairman of the High Chamber by the Administrative Council, in line with current practice.
18. A standardised selection procedure involving members of the Appeal Chambers will ensure that he has the qualifications needed to direct the judicial body and to exercise his judicial activities.
19. The President will be appointed for a five-year term, with the possibility of reappointment. If he is not reappointed, he will remain a member of the Appeal Chambers.

• President's administrative functions

20. For the purposes of his administrative functions the President will, in particular, have the following powers and duties:
- without prejudice to the judicial independence of the Court he can take any action, including issuing internal administrative instructions and publishing information for the public as needed and/or as expedient for the operation of the judicial body
 - he can submit to the Administrative Council proposals relating to the Court of Appeals
 - he establishes and implements that part of the Organisation's budget applicable to the new judicial body
 - he is the appointing authority, as defined by the Service Regulations, for non-judicial staff and has disciplinary power over them
 - he supervises the work of Court of Appeals employees, but that of judicial staff only in so far as their judicial independence is not thereby affected

He must account to the Administrative Council for his performance and is answerable to it for his administrative activities.

(b) Presidium

21. The status of the Presidium as an administratively autonomous judicial organ, and its key tasks in that role (adoption of the rules of procedure and allocation of the caseload to the Appeal Chambers), will be enshrined in the EPC. In the light of the new judicial structure the Presidium should be assigned further tasks, in particular
- in connection with the designation of the composition of various committees (eg selection boards for members and chairmen of the Appeal Chambers, see point 23, and of the Disciplinary Board, see point 28)
 - participation in the selection of the Court of Appeals President (see point 18)
 - in connection with the designation of the composition of the High Chamber in the event of a removal procedure (see point 24)
 - advising the President of the Court of Appeals and being consulted by him in the matters to be specified in secondary legislation.

(c) Appeal Chambers

● **Responsibilities and composition**

22. The Appeal Chambers will retain responsibility for the review of appeals against decisions of the Office's Receiving Section, examining and opposition divisions, and Legal Division. Their composition will also remain unchanged.

● **Appointment of members of the Appeal Chambers**

23. The members of the Appeal Chambers other than the President of the Court of Appeals will be appointed by the Administrative Council on a proposal by the President of the Court of Appeals. The Court President's proposals will be drawn up by a selection board composed of members of the Appeal Chambers and chaired by the Court President. Details of the selection procedure will be set out in the secondary legislation.

● **Term of office of members of the Appeal Chambers**

24. The term of office of the Chamber members ends on termination of their appointment by resignation, retirement or removal from office. The principle of appointment for life is viewed in many legal systems as crucial to ensuring judicial independence. Removal from office is possible only on serious grounds, namely if a Chamber member no longer fulfils the requisite conditions or meets the obligations arising from his office. A member can be removed from office only by an Administrative Council decision and only on a proposal to this effect by the High Chamber in its extended composition (see point 25).

(d) High Chamber

- **Responsibilities and composition**

25. The High Chamber will still be responsible for deciding on points of law referred to it under Article 112 EPC, and later also for deciding on Article 112a petitions. It will also be responsible for the proposal to remove a member of the Court of Appeals from office. In the latter case the High Chamber will have nine members, and the inclusion of external members will be mandatory. In all other cases its composition will be the same as at present.

- **Appointment of members of the High Chamber**

26. The members of the High Chamber will be appointed from among the members of the Appeal Chambers by the Administrative Council on a proposal from the Court President (for the appointment of the chairman see points 17 and 18, however). They will be appointed for a five-year term, with the possibility of reappointment. The appointment proposals will be drawn up by a selection board chaired by the Chairman of the High Chamber.
27. As at present, national judges or members of quasi-judicial bodies who can simultaneously continue their activities at national level can also be appointed members of the High Chamber. They will be appointed by the Administrative Council, after hearing the Court President, for a three-year term with the possibility of reappointment.

(e) Disciplinary procedures

28. The Administrative Council retains the disciplinary power over Chamber members. The conduct of disciplinary proceedings and the proposal for disciplinary action against Chamber members will be the responsibility of a Disciplinary Board composed of Chamber members. Disciplinary proceedings can be initiated only by the Court President.
29. The Administrative Council has disciplinary power also over the Court President; the right to initiate proceedings will lie with the President of the Administrative Council.
30. In both cases there will continue to be the possibility of appealing to the Administrative Tribunal of the ILO against the decision.

(f) Procedure before the new judicial body

31. Proceedings before the new judicial body, and its procedural powers, will stay the same. The Office's language arrangements will also apply to the new judicial body.

(g) Staff and other resources

32. The employment-law and social-law status of the new judicial authority's staff as employees of the Organisation will not change as such. This will apply particularly to the Service Regulations, the Pension Scheme Regulations, the Pension Reserve Fund, the Collective Insurance Contract, long-term care insurance and internal tax. These regulations will be amended only as far as is technically necessary.
33. The other resources needed to enable the new judicial body to perform its tasks can for the most part be made available under administrative agreements with the Office. Services such as automation, salary administration, language service, meeting rooms and accounting could be provided in this way. The EPO President and the President of the Court should be given the appropriate duties and powers.

(h) Relations with the outside world

34. As at present, only the EPO President will represent the Organisation with respect to the outside world.

(i) Budget

35. The new judicial body has its own budget. The Organisation's obligation to make available to the new judicial body the resources it needs to perform its tasks will be expressly enshrined in the EPC.
36. The budget of the new judicial body will be established and presented to the Administrative Council by the President of the Court. He will implement it and be directly answerable to the Administrative Council in this regard.

IV. REQUEST

37. The Administrative Council is requested to give its opinion on the above statements. In particular it is requested to present its comments on whether the Office should submit an appropriate proposal for the amendment of the European Patent Convention in the light of a Diplomatic Conference due to take place early next year.
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