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Munich, 06.03.2015

SUBJECT: Proposal for a structural reform of the EPO Boards of Appeal (BOA)

SUBMITTED BY: President of the European Patent Office

ADDRESSEES: Administrative Council (for opinion)

SUMMARY

The President of the EPO informed the Administrative Council about decision R 19/12 of the Enlarged Board of Appeal (EBOA) of 25.4.2014. The Council then decided in June 2014 to task its Board pursuant to Article 28 EPC (B28) to discuss the decision's possible consequences for the organisational and managerial autonomy of the EPO's Boards of Appeal (BOA). Thereafter the President of the EPO was asked to submit a proposal for a structural review of the BOA within the current legal framework of the EPC. The proposal is based on the orientations given by the B28, following discussions which took place on 16.10.2014 and 11.2.2015.

The goals of the reform are to increase the organisational and managerial autonomy of the BOA, the perception of their independence (enshrined in Article 23 EPC) and also their efficiency, in order to respect the principle of effective legal protection within the legal framework of the current EPC. The aim is to improve the functioning of the BOA within the system of the EPO, in line with national, European and international developments in the judiciary. Implementation of the reform will include major issues concerning the institutional framework, human resources and premises. A timeline is proposed.

The Administrative Council is asked to give its opinion on the orientations set out in this document. The President will then submit to the Council the necessary changes to the regulatory framework.

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I. STRATEGIC/OPERATIONAL

1. Strategic.

II. RECOMMENDATION

2. The Administrative Council is requested to give its opinion on the proposed orientations for the reform of the BOA.

III. CONTEXT

3. The President of the EPO informed the Administrative Council about decision R 19/12 of the Enlarged Board of Appeal (EBOA) of 25.4.2014. The Council then decided in June 2014 to task its Board pursuant to Article 28 EPC (B28) to discuss the decision's possible consequences for the organisational and managerial autonomy of the EPO's Boards of Appeal (BOA). Thereafter the President of the EPO was asked to submit a proposal for a structural review of the BOA system within the current legal framework of the EPC.
4. The goals of the reform are to increase the organisational and managerial autonomy of the BOA, the perception of their independence (enshrined in Article 23 EPC) and also their efficiency, in order to ensure the principle of effective legal protection within the current legal framework of the EPC. The aim is to improve the functioning of the BOA, in line with national, European and international developments in the judiciary. Implementation of the reform concerns the institutional framework, human resources and premises. The reform necessitates changes to the regulatory framework (EPC Implementing Regulations, EPO Service Regulations and the Rules of Procedure of the BOA). Proposals will be submitted to the Administrative Council in the course of 2015. A proposed timeline is contained in Annex 1.

IV. ARGUMENTS

A. BACKGROUND

5. The independence of the BOA of the EPO and their members is enshrined in the EPC (see Article 23 EPC). The independent judicial status of the BOA has been recognised by the European Court of Human Rights (ECHR) as well as by national courts. However, measures to strengthen the autonomy of the BOA in organisational, managerial and institutional matters and to improve the perception of their independence, as well as their efficiency, are recommended. These measures will proactively support the continuation of a sustainable appeal system within the EPO for the future.
6. For the reasons set out in paragraphs 3 and 4 above, a concept is proposed with the aim of improving the functioning of the BOA, and in particular of increasing their organisational and managerial autonomy, the perception of their independence and also their efficiency, in order to respect the principle of effective legal protection.
7. For the present proposal a benchmarking analysis of national, European and international systems has been carried out. In particular, recommendations and reports of the European Network of Councils for the Judiciary (ENCJ) and the Burgh House Principles (drawn up by the International Law Association in 2004) have been duly considered.
8. As regards efficiency, the current average duration of 34.3 months for proceedings before the BOA needs to be improved, as does the average number of cases dealt with by each member of the BOA (see statistics in Annex 2). At the end of 2014 there were almost 8 000 cases pending. Concerning the timeliness and length of proceedings, the principle of effective legal protection needs to be taken into account and respected. Indeed, at national, European and international level, it is recognised that “justice delayed is justice denied”.

9. For instance, the Court of Justice of the European Union (CJEU) has found that the assessment of whether the length of proceedings is excessive depends on the particular circumstances of the case, taking into account in particular the complexity of the case, the conduct of the parties and procedural matters. It has opined that if the length of proceedings before the General Court (formerly Court of First Instance) could not be justified by any of the circumstances in connection with the case, the procedures breached the right of the parties to have their case heard within a reasonable time conferred by the Charter of Fundamental Rights of the European Union (EU). The CJEU has mentioned the possibility of claiming for compensation for the damage caused by failure to adjudicate within a reasonable time.
10. Furthermore, the timeliness of the BOA has also increasingly become an issue in the event of parallel national court proceedings, since the practice of numerous national courts is to stay proceedings until a final decision has been issued by the BOA. This shows and reinforces the need to ensure efficient and expedited proceedings of high quality before the BOA.
11. The proposal aims at making the BOA's organisational and managerial autonomy stronger and more visible, while at the same time increasing their efficiency. The judiciary in general achieves legitimacy and respect through excellent performance in the form of impartial, well-reasoned and timely decisions. The best safeguard of independence is excellent and transparent performance. This is also confirmed by the European Network of Councils for the Judiciary in its Report 2013-2014 "Independence and Accountability of the Judiciary".
12. The proposed measures can be taken by Administrative Council decisions, and by amendments to the EPC Implementing Regulations, the EPO Service Regulations and other internal regulations, and the Rules of Procedure of the BOA (RPBOA). These measures will allow the aforementioned goals to be achieved quickly and smoothly, avoiding the long and difficult process of revising the EPC.

B. PROPOSALS

13. The implementation of the proposed reform includes the following major issues:

1. Institutional framework

a. Enhancing the organisational and managerial independence of the BOA

14. The BOA will be given more organisational and managerial independence. To this end, the BOA will be organised as a separate organisational entity within the EPO. The BOA will no longer be a Directorate-General of the EPO, although, without a review of the EPC (in particular its Article 15 EPC), the BOA will remain part of the EPO (see governance chart in Annex 3).

b. President of the BOA

Position and role of the President of the BOA

15. A new function will be created: the President of the BOA, to whom managerial and organisational tasks will be delegated by the President of the EPO. He will be chair of the EBOA but not Vice-President (VP) of the EPO, which will further enhance the autonomous character of the BOA. In particular, the President of the BOA will have no function of assisting the President of the EPO in general EPO matters, and no association with EPO management through assisting the President of the EPO. Accordingly, the President of the BOA will be excluded from any EPO management-related tasks and will only be involved in matters specifically concerning the BOA.

16. The position held by the President of the BOA will be similar to that of president of a national, European or international court, including in particular the performance of internal administrative tasks relating to the functioning of the BOA as well as chairing the EBOA.

Responsibilities of the President of the BOA

Managerial and organisational responsibilities

17. The President of the BOA will have managerial and organisational responsibilities and powers over the BOA with respect to their administration, management and work organisation. This will include everything necessary to ensure that the BOA function well and efficiently, in accordance with the guidance given and objectives set by a newly-created BOA Committee (BOAC) (see section c below). He will be responsible for the allocation of cases to the BOA on the basis of objective criteria determined under the RPBOA, and for the adoption of internal administrative instructions.
18. The President of the BOA will also have the task of staff appraisal for chairpersons and members of the BOA. The reporting system as adopted by the Administrative Council (CA/D 10/14) will not apply to the chairpersons and members of the BOA. Separate specific provisions will be inserted into the Service Regulations. Likewise the President of the BOA will be responsible for the authorisation of external activities, which will be governed by specific provisions.
19. The President of the EPO, in order to further enhance the autonomy of the BOA, intends to delegate to the President of the BOA, under Article 10(2)(i) EPC, his right under Article 11(3) EPC to propose appointments of BOA members and to be consulted on reappointments. The President of the BOA will thus be in charge of the recruitment procedures for appointing BOA members and proposing their reappointment. The Administrative Council will formally take note of the decision of the President of the EPO once it has been taken.
20. Lastly, the President of the BOA will have responsibility for the management and supervision of all administrative staff made available to the BOA by the President of the EPO. He will also have the right to grant or refuse entry ("Hausrecht") to the BOA premises.

Preparation of the BOA budget

21. The President of the BOA will be entrusted with the task of preparing a substantiated budget request to meet the BOA objectives. This request will be examined and discussed with the relevant EPO departments and the BOAC before being submitted by the President of the BOA to the President of the EPO. The President of the EPO will include the BOA budget request in the draft budget he submits to the Administrative Council for approval. A similar structure has been approved by the Council and is currently in place for the EPO's RFPSS. The budgetary powers of the President of the EPO and of the Administrative Council under Articles 10(2)(d) and 46(2) EPC will thus not be affected. The President of the BOA will implement the budget of the BOA. To enable the new system to start at the beginning of 2016, as envisaged, the first draft budget for the BOA under the new structure will be prepared by the President of the EPO as a transitional measure.

Reporting to the BOAC and the Administrative Council

22. The President of the BOA will report to the BOAC on his managerial and organisational tasks. In particular, he will submit periodic management reports to the BOAC. The President of the BOA will also provide annual reports to the Administrative Council, after giving the President of the EPO the possibility to comment on them. The President of the BOA will have the possibility to consult the BOAC on any matters concerning the functioning of the BOA in general. He will submit to the BOAC any proposal concerning the functioning of the BOA and will ensure the implementation of the general directions and objectives issued by the BOAC.

Communication and representation

23. The President of the BOA, in close co-ordination with the President of the EPO, will be responsible for the BOA's communication and information to the outside world. The President of the BOA will in particular organise and provide separate communication means for the BOA, such as a separate website and separate publications.

c. Constitution of a BOA committee (BOAC)

24. Many European states have councils for the judiciary, or similar institutions which monitor the independence and efficiency of the judiciary. A committee with similar functions will be set up for the BOA.

Role of the BOAC

25. It is proposed to create a BOAC, to be set up by the Administrative Council as a subsidiary body (Article 14 of the Council's Rules of Procedure), with advisory and preparatory functions. The Council's powers in all issues relating to the BOA will remain unaltered (see paragraphs 35 and 36 below). The BOAC will have the task of monitoring the independence and efficiency of the BOA and of making appropriate proposals for improvement. The BOAC will create a link between the Administrative Council and the BOA, will report to the Administrative Council and will provide guidance to the BOA and their President on their management and organisation. The BOAC will consider proposals on general EPO administrative and managerial issues which affect the BOA and will raise relevant matters with the Administrative Council.

Responsibilities of the BOAC

Monitoring the independence of the BOA

26. The BOAC will monitor the independence of the BOA and make all the necessary proposals to enhance their independence. This concerns the organisational and administrative autonomy of the BOA as well as the personal independence of members of the BOA, including the avoidance of conflicts of interest. In particular, the BOAC will advise on and propose rules necessary for the organisation of the BOA's work and for enhancing their independence, for example by means of a code of conduct and internal instructions. The relevant proposals will be submitted by the BOAC for approval to the Administrative Council after the President of the BOA has been heard.

Improving the efficiency of the BOA

27. The BOAC will monitor the smooth functioning of the BOA and their management by the President of the BOA with a view to increasing their efficiency, in particular by setting general objectives for the BOA and their President in handling the caseload and reducing pendency times, by providing guidance on management of the BOA and by assessing the BOA's general performance on a regular basis according to the general targets it has set. In addition, the BOAC may make proposals on principles for establishing performance criteria and general criteria for case distribution. It may also set general criteria for a quality-assurance system for the BOA's internal administration. In this regard, the measures foreseen by the President of the BOA, aimed at implementing the general targets and global objectives set by the BOAC, will be submitted to the BOAC for approval. The BOAC will also be able to make proposals for necessary amendments to the RPBOA and the Rules of Procedure of the EBOA (RPEBOA) for approval by the Administrative Council.
28. The BOAC will give its opinion on the draft annual report of the BOA, drawn up by the President of the BOA, before its submission to the Administrative Council together with the comments of the President of the EPO (see paragraph 22). Similarly, the BOAC will give its opinion on any request by the President of the EPO concerning the BOA, for instance on budgetary or HR matters.

Giving guidance on recruitment issues

29. The BOAC will be responsible for making proposals concerning general criteria for the selection, recruitment and appointment of BOA members and chairpersons. In addition, it will have a consultative role for the election and appointment of the President of the BOA. The Administrative Council will remain the appointing authority (Article 11 EPC). However, the President of the EPO intends to delegate to the President of the BOA, under Article 10(2)(i) EPC, his right under Article 11(3) EPC to propose appointments of BOA members and to be consulted on reappointments (see paragraph 19 above). The criteria for reappointment of BOA members to be defined by the BOAC will take into account the workload of the BOA as well as the quality and efficiency of the work of the BOA members. The composition of the EBOA will be reviewed and the BOAC will be given the task of making proposals for the appointment of external members to hear review cases, where the composition consisting exclusively of internal members has been criticised.

Composition and administrative support

30. The members of the BOAC will be nominated and appointed by the Administrative Council, upon proposals from the delegations.
31. It is proposed that the BOAC be composed of seven members, with three being members of the Administrative Council and four being external members to be chosen by the Council from among presidents and/or senior judges of national, European and international courts upon proposals from the delegations. The BOAC will be chaired by one of its members who is also a member of the Administrative Council. The President of the BOA will have the right to participate in the BOAC meetings, but no voting rights.
32. Under Article 14 of the Rules of Procedure of the Administrative Council, the President of the EPO has the right to attend meetings of the BOAC. The President of the EPO intends to waive that right for this specific subsidiary body of the Council. The BOAC can invite the President if it deems it necessary, for example when budgetary issues are being discussed.
33. For the functioning of the BOAC, the Council Secretariat will be entrusted with providing the appropriate services and resources (see Article 32 EPC).
34. In accordance with Article 14(2) and (5) of the Rules of Procedure of the Administrative Council, the BOAC will draw up its own rules of procedure on a proposal from its chairperson. An initial set of BOAC rules of procedure will be submitted to the Administrative Council for approval, together with the decision setting up the BOAC. However, the BOAC, once set up, can amend its rules of procedure, subject to the approval of the Administrative Council.

d. Powers of the Administrative Council and the President of the EPO

35. Within the new structure of the BOA, the Administrative Council will retain all its current powers, including approval of the budget of the BOA which is submitted by the President of the EPO as part of the EPO budget. The budgetary powers of the President of the EPO will not be affected. However, as indicated in paragraph 21 above, the preparation and implementation of the BOA's budget is a task of the President of the BOA.

36. Furthermore, the Administrative Council will continue to appoint and reappoint the members of the BOA (Article 11(3) and (4) EPC), and will need to approve the RPBOA and the RPEBOA proposed by the BOAC. It will also maintain its disciplinary authority over the members of the BOA, under the conditions laid down in Article 23(1) EPC and in particular through the Disciplinary Committee to be set up as decided by the Council on 11.12.2014 at its 142nd meeting.
37. The President of the EPO will have no direct involvement or managerial powers with respect to the BOA, their members or their President. He intends to delegate his managerial tasks to the President of the BOA. The President of the EPO's role will encompass those aspects where the EPO makes resources available to the BOA (such as finance, support staff, infrastructure and facilities). In this respect, the President of the EPO will decide on the level of services within the constraints applicable for the EPO (see paragraph 48 below). The President of the EPO may consult the BOAC on any matters relating to the BOA.
38. In order to further enhance the visibility of the BOA's independence, the President of the EPO intends to delegate to the President of the BOA his right under Article 11(3) EPC to propose appointments of BOA members and to be consulted on reappointments (see paragraph 19 above).

2. Human resources

Members of the BOA

39. Taking into account the special status and independence of members of the BOA, relevant derogations and specific provisions will be laid down within the existing Service Regulations, in particular concerning the career and appraisal system, performance management and disciplinary measures (see CA/D 10/14 and the decision taken by the Administrative Council at its 142nd meeting on setting up a Council Disciplinary Committee).
40. For example, it could be envisaged that there will be no probationary period for BOA members, and no bonuses during terms of service as a member of the BOA. Performance monitoring would be under the responsibility of the President of the BOA, taking into account the general objectives set by the BOAC. These elements will be taken into consideration for step advancement, promotion and the appointment of chairpersons and the reappointment of members and chairpersons of the BOA by the Administrative Council.

41. Special regulations concerning possible conflicts of interest for members of the BOA will be necessary, governing *inter alia* permission for external activities during the term of service, activities permitted after the end of the appointment, and the declaration of possible conflicts of interest. Pursuant to the EPC, the appointing authority being the Administrative Council for members of the BOA, implementing decisions on these matters are to be taken by the President of the BOA by delegation from the Administrative Council. A procedure for approving such activities, and an appeal procedure, need to be foreseen. Obligations after termination of service will apply both to BOA members recruited from within the EPO and to those recruited from outside. For members recruited from outside who after the end of their term of service may want to take on other functions in the private or public sector, the regulations will be framed accordingly. For the external members of the EBOA (Article 11(5) EPC) specific guidance will be issued regarding their judicial activities at national level. Relevant regulations concerning conflict of interest are in place for example at the CJEU (Article 4 of Protocol No. 3 of the Statute of the CJEU) and also foreseen in the Agreement on a Unified Patent Court (Article 17 and Statute of the UPC, Articles 6 and 7).
42. An obligation to declare relevant professional activities and positions of BOA members' family members (spouses, children) is also to be foreseen. This will enhance transparency and avoid any possible or apparent conflict of interest, and can be considered, for example, in the allocation of cases to members of the BOA.
43. Furthermore, there should be a general obligation to give information about any professional activities envisaged after the term of service. Any activities which could give rise to a suspicion of conflict of interest should be prohibited.
44. A typical situation of foreseeable conflicts of interest is when a former BOA member works as a professional representative before the EPO soon after the end of his term of service on the BOA. Rules on conflicts of interest are to be designed in a way that avoids not only real conflicts but also any perception or appearance of risk for the impartiality of the judiciary. For instance, the Burgh House Principles (see paragraph 7) give examples of possible situations of conflict of interest.

45. Furthermore, specific provisions with respect to public expression and freedom of association for members of the BOA (see Article 15 ServRegs, Circular No. 135, CA/105/95, and Communiqué No. 22 of 5.4.2007) will be envisaged. Members of the BOA are required to exercise their freedom of expression and association in a manner compatible with their office and in a way which does not affect or appear to affect their independence and impartiality. While members of the BOA are free to participate in public debate, they must not comment on pending cases or applications, or on opposition proceedings pending before the EPO, and must avoid expressing views which may undermine the standing and integrity of the BOA or the EPO.
46. BOA members will be excluded from general EPO functions and from committees that are not specifically related to the BOA. They will also not be represented by the EPO staff representatives, but may set up their own staff representation.

Support staff of the BOA

47. The BOA will have their own administrative support staff, managed and supervised by the President of the BOA. An appropriate number of EPO staff will be assigned as BOA support staff. The assignment of general EPO staff will maintain the possibility of staff rotation.

Service level agreements BOA/EPO (SLAs)

48. For the functioning of the BOA, SLAs between the EPO and the BOA will be foreseen. In this case, the EPO will provide the BOA with agreed packages of services in line with the adopted budget, such as for IT; HR services - payments, leave, administrative support for recruitment procedures; facility management (including oral proceedings infrastructure); library services; support staff for tasks other than those of the members of the BOA such as for the BOA Registry and general administrative support. As a transitional measure, pending the finalisation of the SLAs, a general clause allowing the BOA to avail itself of the general services of the EPO, within the budgetary framework, will also be envisaged.

3. Premises

49. In order to improve the perception of independence of the BOA, the question of their location must obviously be addressed. In this respect, their presence in the same premises as other EPO departments which are taking decisions potentially subject to review by the BOA can give rise to concern. Indeed, doubts could be raised in the public eye about the influence of potential daily contacts between the BOA members and, for example, the patent examiners or lawyers of the EPO.
50. This is a long-standing issue which was already part of the discussions in previous reform plans (see CA/105/95 and CA/46/04). In the process it was discussed whether to relocate the BOA to another European city, e.g. Riga, Warsaw or Venice. Considering the public's increasing sensitivity towards the independence of the judicial systems in Europe, and the objective conditions for improving its perception of such independence, this issue appears even more relevant nowadays. Therefore it is necessary to ensure a clear separation between the BOA and the operational units, and to locate the BOA in a separate building.
51. To implement this, there are two main options. Option A is to use the existing EPO building in Berlin, currently under renovation, and dedicate it to the BOA; option B is to find a separate building in Munich, where the BOA are currently located. The President of the EPO will explore the financial, technical, organisational and social implications of these two options.

4. Procedural issues of the BOA – RPBOA

52. Once set up, the BOAC could consider launching a survey of users, as well as an efficiency study about the internal organisation of the BOA and on proceedings before the BOA. The user survey could address the RPBOA and the BOA's existing practices, in particular to identify issues and procedures which could be revised with a view to increasing the efficiency of the BOA. The efficiency study could look in particular at the composition and the working methods of the BOA. Based on this survey and study, the BOAC could submit proposals to the Administrative Council for further changes, in particular a revision of the RPBOA.
53. In this context, issues such as the EBOA's composition in review proceedings, and diverging practices of different BOA, in particular concerning the content of the annex to the summons to oral proceedings, acceptance of new requests and remittal to the first instance, could be discussed and reviewed. Modern options for communication and proceedings could be carefully considered. For example, the Administrative Council has already decided to amend Rules 124 to 129 EPC to make possible a more effective use of electronic communication.

V. FINANCIAL IMPLICATIONS

54. The major financial implications will result from relocating the BOA in a separate building. This can only be assessed once the options have been explored (see paragraphs 50 and 51 above). The financial implications will therefore be presented to the Budget and Finance Committee after the relevant decision has been taken.

VI. LEGAL BASIS

55. Article 10(1) EPC

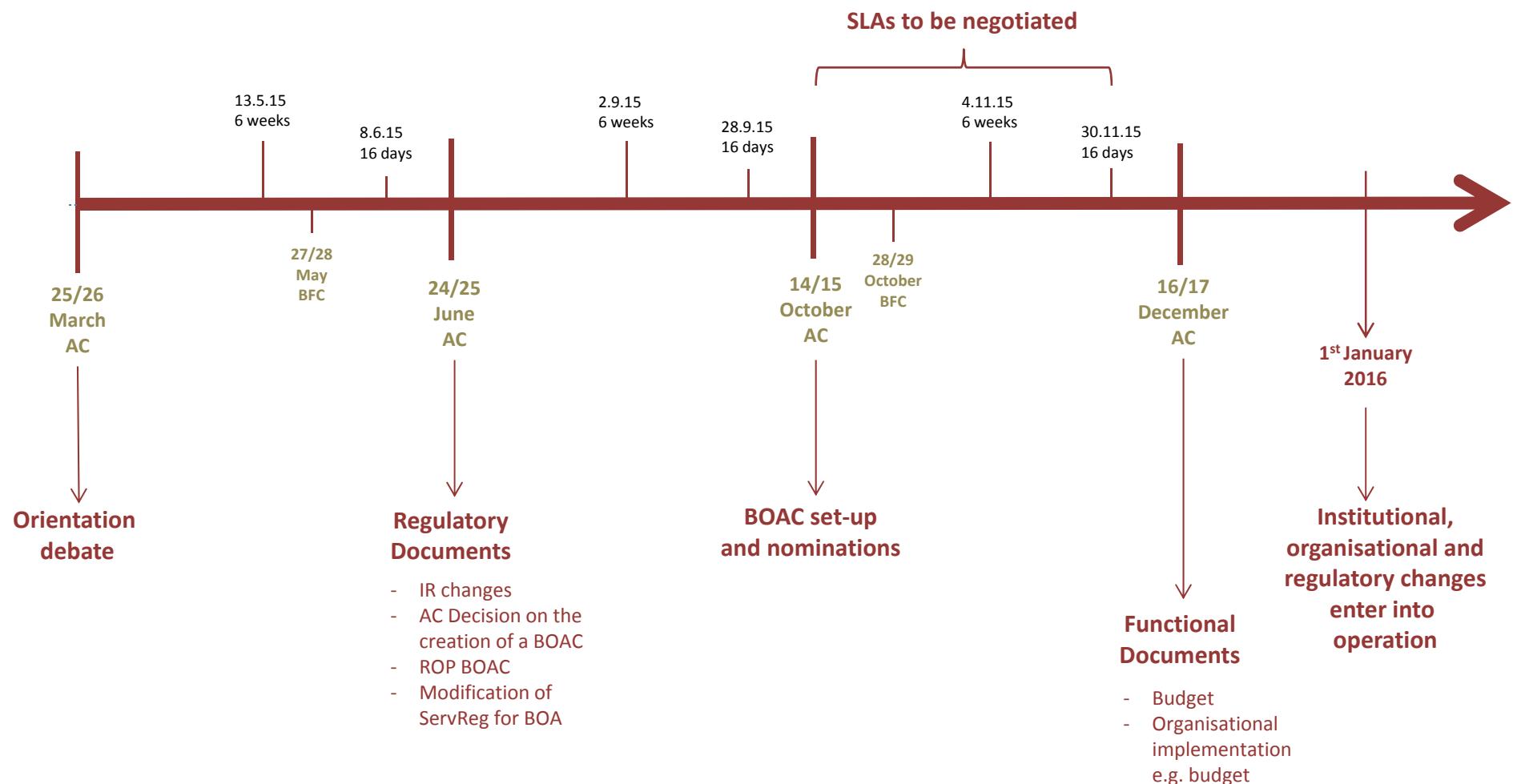
VII. DOCUMENTS CITED

56. CA/D 10/14; CA/105/95; CA/46/04.

VIII. RECOMMENDATION FOR PUBLICATION

57. Yes

BOA Governance Timeline



ANNEX 2

Statistics

Statistics BOA¹

The EPO BOA consist of 28 Technical Boards (TBOA), 1 Legal Board, the Disciplinary Board and the Enlarged Board (EBOA). The work of the TBOA is allocated according to technical areas and subject-matter (based on the IPC classification). Staffing levels have been stable (2014: 167 members, 2015: 177 members – CA/50/14, page 181), as has the number of appeals settled per member or chair per year: around 13 (or around 9 not counting withdrawals). The work involved in technical appeals relies very much on the rapporteur, who is a technically qualified member. The number of technical appeals settled per technically qualified member per year is around 21 (or around 14 not counting withdrawals). The cases are dealt with by experts in the respective technical areas, working in the language of the proceedings (English, French or German) without any need for translation. The average duration of technical appeals in 2014 was 34.3 months (+8.2% compared with 2013).

Year	New cases	Settled cases	Withdrawals (amongst settled cases)	Settled cases without withdrawals	Difference new/settled cases	Difference new/settled cases without withdrawals
2009	2 484	1 918	453	1 465	566	1 019
2010	2 545	1 962	502	1 460	583	1 085
2011	2 657	1 875	548	1 327	782	1 330
2012	2 602	2 029	593	1 436	573	1 166
2013	2 515	2 137	681	1 456	378	1 059
2014	2 354	2 300	800	1 500	54	854

Statistics of other courts

At the Court of Justice of the European Union (CJEU), which currently has 28 judges at both the General Court (GC) and the Court of Justice (CJ), the number of cases dealt with in 2014² was 719 by the CJEU and 814 by the GC.

¹ Data provided by DG3 – on TBOA cases only.

² Data from the CJEU (www.curia.europa.eu), Annual Report 2013 and Press Release No 27/15 of 3.3.2015.

The average duration of proceedings was:

- at the CJ (2014): 14.5 months for appeals, 15 months for referrals for preliminary rulings, and 20 months for direct actions;
- at the GC (2013): 13.9 months for appeals, 18.7 months for intellectual property cases (Community trademarks and designs), and 24.9 months for other direct actions (see the CJEU's Annual report 2013, at www.curia.europa.eu).

Neither the CJ nor the GC is a specialised court; they both deal with a wide variety of fields of law. Furthermore, the proceedings can be in any one of the EU's 24 official languages, but the CJEU's working language is French. As a result, translations have to be done (from the language of the proceedings into French and then back into the language of the proceedings), which delays the proceedings accordingly.

At the end of 2013, according to its annual report, the German Bundespatentgericht (Federal Patent Court) had 117 judges who dealt with 2 320 cases altogether. The average duration of proceedings was 23.56 months for nullity cases.

BOA Governance Chart

