

**CA/71/04**

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Munich, 25.05.2004

SUBJECT: Organisational autonomy of the boards of appeal

DRAWN UP BY: Chairman of the Administrative Council

ADDRESSEES: Administrative Council (for information)

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The Council Chairman herewith forwards to delegations a contribution received from AMBA on the above topic.

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Translation of letter dated 17 May 2004

From: Reinhard Freimuth, AMBA Secretary General

To: Roland Grossenbacher, Council Chairman

AMBA is pleased to send you, as Council Chairman, the attached letter addressed to Council delegations. It concerns an essential aspect of the boards' organisational autonomy - a topic on the agenda for the next Council meeting. We would be most grateful if you could bring our letter to the delegations' attention, ideally in CA-document form as mooted by your secretariat.

We intend to send these letters to the EPO President as well.

Yours etc.



To the  
Delegations  
of the Contracting States  
in the Administrative Council  
of the European Patent Organisation

Munich, 17 May 2004

## **Organisational Autonomy of the Boards of Appeal – Unlimited Appointment of Judges**

Dear Heads of Delegations,

Our association - the Association of Members of the Boards of Appeal ("AMBA") welcomes the proposal (CA 103/03, CA/PL 4/04 rev 1), made by the President of the European Patent Office at the instigation of the Administrative Council, for the organisational autonomy of the Boards of Appeal within the European Patent Organisation – this has always been a major objective of our Association. We recognise this as a significant confirmation to the relevant public of the independence of an established judicial body in keeping with the principle of the separation of powers.

In the context of the discussion about this organisational autonomy of the Boards of Appeal, different views have been expressed in the Administrative Council and its committees in relation to the suggestion of the President of the Office that the

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Vereinigung der Mitglieder der Beschwerdekammern / Europäisches Patentamt

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appointment of judges to the new European Patent Appeal Court should be without limitation of time.

Our Association of Members of the Boards of Appeal – in effect the judges of the future European Patent Appeal Court – views unrestricted appointment, and the consequential permanence of office, as an essential element in securing judicial independence.

As the third force in the separation of powers, judges must be independent. This is no mere privilege of office but a means of ensuring that judges will administer the law without fear or favour and guarantees the effective rule of law. The independence of Board of Appeal members in their function is already contained in Article 23(3) EPC. Their personal independence is the necessary corollary of that functional independence and is required to protect the judges against personal consequences in the case of unpopular decisions. It is here that members of the Boards of Appeal in their capacity as judges suffer from a structural weakness in the present system since their limited appointment can be seen as a dilution of their individual independence. The final report CA 84/97 of the working group “Directorate-General 3 European Patent Office” made clear that the “five-year term for which the Board members are appointed...could be seen as disadvantageous to their independence”; and the Sedemund-Treiber/Ferrand report (CA 103/03 Add 2), commissioned by our Association and submitted to the Administrative Council, stated at paragraph II.1.1.2.1 that for the reasons given above “a lifetime appointment is more desirable”. This is a fundamental principle of national courts throughout Europe, and more often than not enshrined in constitutions.

For such sound reasons the non-removability of judges until retirement, i.e. their appointment without limitation of time, is an established provision in the judicial systems of the states which recently joined the European Union (“Monitoring the EU Accession Process – Judicial Independence”, 2001, paragraph V.B.1). What is appropriate for the legal order of the European Union must also be appropriate for the future European Patent Appeal Court.

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In this respect reference has been made to some other international courts whose judges hold limited appointments. However this cannot be applied to the future European Patent Appeal Court, since this is a specialist court similar to a national civil or administrative court in which the judges are permanently in post; whereas generally the judges of other international courts are, on account of the character of the court's business, seconded for a limited period from their national judicial systems.

The present time-limit in the appointment of members of the Boards of Appeal was included in the EPC to take account of the possibility, as it was then seen, of a drop in the workload of the Boards of Appeal. Given the overall success of the European Patent Organisation, this fear can now be seen as unfounded.

For the above reasons we consider the unrestricted appointment of judges to the European Patent Appeal Court to be both appropriate and advisable. We accordingly ask you to take the opportunity to end the time-limit on the appointment of judges in the organisationally autonomous Boards of Appeal and adopt unlimited appointment.

Yours sincerely,

