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SUBJECT: Final report of the Working Party on Directorate-General 3 of the European Patent Office

DRAWN UP BY: President of the European Patent Office

ADDRESSEES: Administrative Council (for opinion)

SUMMARY

Annexed below is the above report, drafted by the working party set up by the President in June 1996 with the Council's approval. The report includes the Office's comments on some of the working party's proposals, and is submitted to the Council for opinion. It may be considered a basis for further reflection about institutional reform designed to ensure the independence of members of the boards of appeal and the Enlarged Board of Appeal. The increased administrative autonomy for DG 3 advocated by the working party for the longer term, with the aim of creating an independent judicial body within the European Patent Organisation, is to be seen as just one part of the forthcoming debate on the patent system in Europe prompted by the European Commission's Green Paper on "Promoting innovation through patents" (COM(97) 314 final). The report also contains numerous other ideas; some of these could be implemented without further ado, whereas others would require the Council to amend the Implementing Regulations to the EPC. In due course, once its internal discussions are concluded, the Office will submit concrete proposals on any matters requiring a Council decision. The present paper is intended to give the Council an early opportunity to conduct a general exchange of views on the working party's various proposals.

1. The Office herewith submits to the Council for opinion the report drawn up by the working party on DG 3 of the EPO, prefaced by the following comments of its own:

I. SELECTION OF BOARD MEMBERS AND CHAIRMEN

2. The Office welcomes the working party's proposals (see report, points 19 to 22 below) that more external members be considered also for technical member posts, and that member posts be advertised more widely.

II. APPOINTMENT/REAPPOINTMENT

A. SELECTION PROCEDURE

3. Before the Office can submit specific proposals on the selection procedure for board members (see points 23 to 28), it must first clarify the legal position as regards the EPO Service Regulations (ServRegs) in conjunction with higher-ranking law (Article 11 EPC).

B. PRESIDENT'S RIGHT OF PROPOSAL

4. Regarding the proposal under point 30, the Office's view is that if the President decides not to follow a selection board recommendation he is under no obligation to substantiate that decision and discuss it with the board.
5. The suggestion in point 31 that in a future revision of the EPC the President's right of proposal under its Article 11(3) be transferred elsewhere appears at odds with the Convention's fundamental principles.

C. REAPPOINTMENT

6. The proposals and issues raised in points 33 to 36 (reappointment of board members) require further study. Any blurring of responsibilities and powers must be avoided.

D. AD HOC MEMBERS UNDER ARTICLE 160(2) EPC

7. Before the proposals for increased participation on the Enlarged Board of Appeal of *ad hoc* members under Article 160(2) EPC (see points 37 to 41) are implemented, the details must be clarified.

III. INDEPENDENCE AND STATUS OF BOARD MEMBERS

A. TITLES FOR BOARD CHAIRMEN AND MEMBERS

8. The proposal under point 45 that the independence of board members be underlined by calling them "judges" and "presiding judges" would mean amending the EPC.

B. POSITION OF THE VICE-PRESIDENT DG 3

9. The arrangements for deputising for the President under Article 10(3) EPC do not require a Council decision as stated in point 55; on 6 July 1978 the Council took a decision along the lines suggested (see CA/D 11/78, OJ EPO 6/1978, 326) and the then President duly implemented it straight away.
10. Furthermore, the proposals under point 55 can only be understood to mean that the Vice-President DG 3 must support the President in his task of directing the EPO.

C. ORGANISATIONAL INDEPENDENCE OF DG 3

(a) Image of the boards

11. Regarding points 62 to 66 concerning the boards' external image, the Office believes that DG 3's special role and board members' independent status are brought home more clearly by the existing organigram (asterisk and footnote) than by a separate one as proposed in point 65.

(b) Further organisational measures

12. The increased administrative autonomy and separate accommodation advocated for DG 3 for the longer term in order to create an independent judicial body within the European Patent Organisation (see points 68 to 70) are to be seen as just one part of the forthcoming debate on the patent system in Europe prompted by the European Commission's Green Paper on "Promoting innovation through patents" (COM(97) 314 final).

IV. EXERCISE OF DISCIPLINARY AUTHORITY

13. The proposal under point 71 that the President delegate his right under Article 10(2)(h) EPC to propose disciplinary action against board members requires further careful consideration.

V. CONCLUDING REMARK

14. The President welcomes the remaining proposals, not commented on above, which can be regarded as a basis for practical implementation in DG 3 and - in so far as necessary - for concrete proposals by him to the Council for amendment of the EPC Implementing Regulations and the ServRegs.
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Final report of the Working Party on
Directorate-General 3 of the European Patent Office

SUMMARY

The working party's brief was to examine whether the independence of the members of the boards of appeal and the Enlarged Board should be safeguarded by legal measures and/or made more apparent to the outside world. The working party began by reviewing the possibilities offered by the EPC as it stands. It then considered what amendments might be made if the EPC were to be revised. In discussing possible improvements, it was guided by Recommendation No. R (94) 12 on "the independence, efficiency and role of judges", adopted by the Council of Europe's Committee of Ministers on 13 October 1994. The main immediate action which the working party now proposes is that the transparency of recruitment and promotion procedures be increased, the Presidium's administrative autonomy strengthened, and conditions created which are more appropriate to the boards' function as a judicial body. For the future, the working party recommends that Directorate-General 3 enjoy greater administrative independence within the European Patent Organisation, and be accommodated separately from the Office.

I. SETTING UP THE WORKING PARTY

1. The President informed the Administrative Council at its 62nd meeting (12 to 14 June 1996) that he proposed to set up a working party to establish whether the independence of the members of the Enlarged Board of Appeal and the boards of appeal should be safeguarded by legal measures and/or made more apparent, particularly with respect to the outside world (CA/51/96).
2. The following were appointed as members of the working party:
 - Antje Sedemund-Treiber (DE), President of the Federal German Patents Court in Munich (chair)
 - Professor Jan J. Brinkhof (NL), Vice-President of the Regional Court of Appeal (Gerechtshof) in The Hague
 - Bengt Nilsson (SE), judge (hovrättslagman), head of the Second Division of the Court of Appeal (Svea Hovrätt), Stockholm
 - Tommaso Troise (IT), Ministre Plénipotentiaire, head of the Italian delegation on the Administrative Council
 - Peter Messerli (CH), EPO Vice-President DG3 from 1 December 1996
 - Ingwer Koch (DE), EPO director 5.1.2 (secretariat).
3. Mr Troise having become unavailable to serve on the working party, Paolo Gori (IT), former Vice-President DG 3, was appointed to replace him.
4. The following members of DG 3 also contributed as experts:
 - Gerald Paterson (GB), chairman of Technical Board of Appeal 3.4.1 (physics), legally qualified member of the Enlarged Board of Appeal and official representative *pro tempore* of the Vice-President DG 3
 - Jean-Claude Saisset (FR), chairman of the Legal Board of Appeal and legally qualified member of the Enlarged Board of Appeal
 - Jean-Charles de Preter (BE), member of the Legal Board of Appeal, alternate legally qualified member of the Enlarged Board of Appeal and legally qualified member of Technical Board of Appeal 3.2.2 (mechanics)

- Paul Alting van Geusau (NL), technically qualified member of Technical Board of Appeal 3.2.1 (mechanics)
 - Gillian Davies (GB), member of the Legal Board of Appeal, alternate legally qualified member of the Enlarged Board of Appeal and legally qualified member of Technical Boards of Appeal 3.2.1 (mechanics) and 3.5.1 (electricity).
5. Mr Justice Jacob (GB), Senior Patents Judge at the High Court of Justice in London, attended the working party's fourth meeting as an expert to discuss the appointment of national judges as ad hoc members of the Enlarged Board of Appeal under Article 160(2) EPC (see points 41-46 below). The working party did not think it necessary to hear any other external experts (such as patent agents); in SACEPO, the interested circles (including patent agents) already have a long-established right to comment on specific proposals by the President to amend the EPC Implementing Regulations.

II. PRELIMINARY WORK

6. A report commissioned by the President from Professors Bruchhausen (DE, deceased) and Brinkhof (NL) in November 1993 concluded that the independence of the boards of appeal enshrined in Article 23 EPC should be interpreted in the broadest possible sense, and that it was essential to avoid any appearance of board members being bound in their decisions by instructions from, say, the President and his EPO staff. The independence and impartiality of chairmen and members of the boards were largely safeguarded by the EPC and the EPO Service Regulations, eg Article 23 EPC relating to the independence of board members, Article 23(3) EPC stating that they are not bound by any instructions, and Article 12 EPC in conjunction with Articles 15(3) and 20(1) ServRegs on their duty not to disclose information. However, the report also mentioned that the case law of the European Court of Human Rights in Strasbourg made it clear how important it was for states and judges to do all they could to avoid creating the impression among parties and the public that judges were not independent.

7. In February 1996 the Italian delegation again raised this topic, which had been discussed at length by the heads of delegation in 1995 on the basis of a proposal from the President (CA/48/95) but not put to the Administrative Council for decision. This led to the Council's decision at its June 1996 meeting to set up a working party.

III. WORK PROGRAMME

8. The working party discussed the following topics:
- Strengthening the independence of individual board members:
 - criteria for selection and promotion of staff
 - appointment and reappointment procedure
 - independence from presidential instructions
 - disciplinary authority over board of appeal members
 - Strengthening the independence of DG 3:
 - greater organisational independence of DG 3
 - tasks of the President regarding DG 3
 - tasks of the Vice-President DG 3
 - tasks of the Presidium
 - administrative autonomy
 - Improving DG 3's standing in the outside world:
 - presenting DG 3 to the outside world as a court
 - strengthening DG 3's standing as an independent judicial body
9. At the Administrative Council's 65th meeting (3 to 6 December 1996) the working party submitted an interim report (Info 5/AC 65) setting out its work programme and progress to date.
10. Between October 1996 and July 1997 the working party met five times. At its 2nd meeting (10 December 1996) it decided to give all board members and the head of the DG 3 Registry the opportunity to comment on the issue of strengthening the independence of individual board members. With the President's agreement, this written consultation was conducted on the following topics:

- criteria for selection and promotion of staff
- appointment and reappointment procedure
- independence from instructions
- exercise of disciplinary authority

Those addressed were further advised that they could also comment on other aspects.

11. By 20 January 1997, 15 submissions had been received, including one from the "Forum", an open group of board members formed in 1993 following a seminar on multicultural communication, primarily to foster discussion of matters of professional interest to DG 3. The Forum's submission was signed by 56 board members and chairmen. Proposals from individual board members also found broad support from others.
12. The working party evaluated these submissions from board members and the head of the DG 3 Registry, mainly at its 3rd meeting (4 to 5 February 1997).

IV. CONCLUSIONS

13. In considering how best to ensure the independence of board members and of their position within the European Patent Office, the working party was guided by Recommendation No. R (94) 12 on "the independence, efficiency and role of judges", adopted by the Council of Europe's Committee of Ministers on 13 October 1994. This recommendation is based in turn on Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, which says that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". The recommendation takes as given "the need to reinforce the position and powers of judges in order to achieve an efficient and fair legal system", urging states to "adopt or reinforce all measures necessary to promote the role of individual judges and the judiciary as a whole and strengthen their independence and efficiency".
14. The working party's conclusion - in agreement with the November 1993 report from Professors Bruchhausen and Brinkhof - is that essentially the independence of

individual board members is guaranteed by virtue of Article 23 EPC, but there is room for some improvement in its practical implementation. Hence its reflections and proposals below, designed to strengthen and bring out more clearly DG 3's status as a court and that of board members as independent judges.

A. SELECTION OF BOARD MEMBERS AND CHAIRMEN

(a) General principles

15. Principle I point 2.c of CoE Recommendation No. R (94) 12 says there must be "guarantees to ensure that the procedures to appoint judges are transparent and independent in practice" and that appointments must be made only on objective criteria. The working party agrees; it is essential that appointment and promotion criteria should be as objective and transparent as possible. This will not only help recruit qualified staff but also increase confidence in the boards' work. The working party thinks that existing procedures for selecting board members need some improvement.
16. The working party also firmly believes that for the boards to work effectively and convincingly it is essential that priority be given to performance when their members are selected. Notwithstanding the importance of ensuring an appropriate nationality distribution, the main criterion must be the ability to perform judicial tasks to the required standard.

(b) Advertising vacancies

17. Vacancies should be advertised more widely, to increase the possibility of attracting more qualified external candidates with experience as judges or as professional practitioners before the courts. This could be helpful to the quality of DG 3's work, and enhance its standing as a judicial body.
18. In addition, the criteria to be fulfilled by applicants should be made more transparent. To this end, the note entitled "Requirements for candidates for a post within the

boards of appeal of the EPO" issued by the Vice-President DG 3 to all chairmen on 3 August 1995 should be made available (as since amended) not only to all applicants for such posts but also generally, in appropriate form. For example, the basic "job profile" could be published in the vacancy notice (see point 20 below), and the full text (as updated in the light of changing requirements) supplied on request.

19. The working party would also like to see more external candidates considered for posts as technical members, not just legal ones.

(aa) Advertising member posts

20. In future, such vacancies should not only be announced internally (on the notice-board and in the EPO Gazette) and to delegations on the Administrative Council, but also published in the Official Journal with a reasonable closing date of say two to three months.

(bb) Advertising chairman posts

21. For chairman posts, in contrast, the working party recommends continuing the present practice of advertising them only internally and by letter to the heads of delegation. This restricted publication is justified because as a rule the only qualified candidates will be serving board members. Experience has shown that only in exceptional circumstances could an external appointee be considered as chairman. An important criterion for chairmanship is many years' experience as a member.

(cc) Advertising Enlarged Board of Appeal posts for legal members

22. Similarly, positions on the Enlarged Board should also be advertised only internally within DG 3, and the present practice of restricting these posts to the chairmen and legal members of the other boards should continue. This would not affect the proposal that national judges be used more as *ad hoc* members of the Enlarged Board under Article 160(2) EPC (see points 37-41 below).

B. APPOINTMENT/REAPPOINTMENT

(a) Appointment

23. There is general agreement on the working party that appointments should continue to be recommended by DG 3's own selection boards. Clearer rules are needed however on these boards' composition, to comply with the CoE recommendation (see principle I, point 2.c) that the procedure be transparent and objective.

(aa) Selection procedure

24. Selection boards should have **seven** members, and always be **chaired** by the **Vice-President DG 3**. Their members and alternates should be appointed by the Presidium for the posts to be filled in each business year. If a board chairman is unavailable, he should be replaced by another chairman, preferably from the same technical discipline as the post to be filled.
25. The working party thinks that for **chairman** posts too there should be a formal selection procedure (see point 23 above). To that end, up to two members who are not chairmen should be able to sit on the selection board. The working party appreciates that this is at odds with **Article 1 of Annex II to Article 7(2), 1st sentence, ServRegs**, which stipulates that members of selection boards must be of a grade at least equal to that of the post to be filled. An exception would therefore

have to be made in Article 1, 2nd sentence, of Annex II. All selection boards should thus comprise at least five board of appeal chairmen, including the selection board chairman.

26. If possible, the **chairman of the Legal Board of Appeal** should be appointed to every selection board. Otherwise, the proportion of technical and legal members on the board should be determined by the nature of the post to be filled: if it is a technical post, there should be no more than three legal members (including the chairman); if it is a legal one, there should be no more than three technical members. The technical members and chairmen appointed to selection boards should preferably come from the same technical discipline as the post to be filled.
27. The selection board for **legal members of the Enlarged Board of Appeal** should comprise the Vice-President DG 3 (who also chairs the Enlarged Board) and the remaining six (ordinary) members.
28. The working party also thinks that before the **chairman of the Enlarged Board** is chosen all its members and alternate members should be heard.

(bb) President's proposal to the Administrative Council

29. The working party agrees that **as the law stands** the President cannot be bound by selection board recommendations, because under Article 11(3) EPC it is he - not the boards - who proposes appointments to the Council.
30. It believes however that if the President chooses not to follow a selection board recommendation he should feel obliged to substantiate his decision to the board and discuss the matter with it.
31. The working party takes the view that in future, in order to demonstrate clearly to the outside world the division of powers within the EPO, appointments to DG 3 (the judiciary) should no longer be proposed to the Administrative Council (the legislative

body) by the President (as head of the executive). It recommends that **in a future revision of the Convention** the President's right of proposal under Article 11(3) EPC be transferred to the Vice-President DG 3, leaving the President with a right to be heard. There could then be no suggestion of his using his right of proposal to influence the boards' case law.

(cc) Appointment by the Administrative Council, and the "oath or undertaking" under Article 15(1) ServRegs

32. In view of the importance of the judge's oath, board members newly appointed by the Administrative Council under Article 11(3) EPC should in future give their "oath or undertaking" under Article 15(1) ServRegs before the assembled Enlarged Board of Appeal.

(b) Reappointments

33. The working party's view is that the **five-year term for which board members are appointed** under Article 23(1) EPC could be seen as disadvantageous to their independence. Reappointment thereafter should therefore be the rule, except where the expected DG 3 caseload no longer justifies it or where the Enlarged Board of Appeal - meeting in its normal composition without *ad hoc* members - finds that the member is having serious difficulties with the work.
34. Where a board member is not reappointed for the latter reason, the working party questions whether Article 41(3) ServRegs (assignment to another post at the same grade) should apply.
35. **Should the EPC be revised**, the working party discussed increasing the initial term of appointment by two years to seven and introducing a two-year probation period making it possible to dispense with the services of a board member whose

performance of DG 3 judicial functions was clearly not up to expectations. One objection to this was that a probation period would certainly not be acceptable to external candidates, who to join the EPO had to give up very senior positions at national level to which they could not easily return. It would therefore clash with the aim of attracting more qualified external candidates, especially from the contracting states further afield. The working party also discussed the possibility of introducing a probation period in conjunction with a binding guarantee of further employment in the EPO or some other financial security. However, the majority view was that, **even if the EPC is revised**, the term of appointment should not be extended in combination with a probation period for board members.

36. The working party notes that for **reappointments of board members** under Article 11(3) EPC the President has only a right to be heard, not a right of proposal. To make their independence of the President clearer to the outside world, this provision should be observed. To avoid any impression that reappointment - contrary to the sense and wording of the EPC - is in some way dependent on the President, such proposals under Article 11(3) EPC should be initiated by the Vice-President DG 3 and submitted to the Administrative Council by its chairman, after hearing the President, rather than by the President as at present.

(c) *Ad hoc* members under Article 160(2) EPC - participation of judges from the contracting states in decisions of the Enlarged Board of Appeal

37. Particularly after hearing Mr Justice Jacob (GB), and following a written proposal from Bengt Nilsson, the working party thinks that **more national judges should serve as *ad hoc* members of the Enlarged Board of Appeal** under Article 160(2) EPC. This would help harmonise substantive patent law and promote the acceptance of Enlarged Board of Appeal case law.

38. After thorough discussion, the working party reached a consensus to the effect that of the four legal members on the Enlarged Board of Appeal as composed at any one time, up to two should be *ad hoc* members under Article 160(2) EPC. It came down against a more far-reaching proposal - at least three such members - because having more national *ad hoc* members than other legal members might endanger the continuity of Enlarged Board of Appeal case law on fundamental points of substantive patent law. Pursuing greater acceptance of Enlarged Board case law by contracting state courts did not mean overlooking the value of legal certainty and predictability for appellants. Continuity of case law on fundamental issues was of prime importance to the public.
39. As regards **qualifications, *ad hoc* members** should be serving national patent judges of many years' standing, and fluent in at least one EPO official language. Each contracting state should be able to nominate one judge for appointment under Article 160(2) EPC. The working party was against appointing less experienced national judges to the Enlarged Board under Article 160(2) EPC for training purposes, but thinks that contracting state judges should have more opportunity to attend its oral proceedings as observers.
40. Appointments of members of the Enlarged Board of Appeal under Article 160(2) EPC should be proposed to the Administrative Council by its chairman, after hearing the President, and without any formal interviews of candidates by a selection board.
41. This increased involvement of *ad hoc* members on Enlarged Board cases should be limited to those which go beyond internal EPO issues, although in case of doubt it should be assumed that the question does indeed have such broader significance. The working party also assumes that "permanent" legal members of the Enlarged Board will have practical court experience as judges or professional practitioners in

their contracting state of origin. And when *ad hoc* members work on the Enlarged Board under Article 160(2) EPC, care must be taken to ensure that its nationality distribution remains balanced.

(d) Composition of the Enlarged Board of Appeal

42. The composition of the Enlarged Board for specific referrals should be based on transparent, objective criteria (see also point 52 ff below). The nationality distribution should be balanced, with no more than two members of the same nationality hearing a given case. To select *ad hoc* members under Article 160(2) EPC for individual cases, an agreed rotation system should be used. This is preferable to random methods such as drawing lots, because of possible language problems and the overriding need for a balanced nationality distribution.

C. INDEPENDENCE AND STATUS OF BOARD MEMBERS

43. As already mentioned, in considering how best to ensure the independence of board members and of their position within the EPO, the working party was guided by 1994 CoE Recommendation No. R (94) 12 on "the independence, efficiency and role of judges", which proposes that all necessary measures be taken to respect, protect and promote their independence.

(a) Judicial activity

44. Under Article 23(3) EPC, board members are not bound in their decisions by any instructions, and are required to comply only with the EPC. For their **judicial activity**, therefore, the EPC essentially affords board members the independence called for in the CoE recommendation. The working party would nonetheless like to see further improvements in the procedure for selecting and reappointing board members and as regards judicial autonomy (for details see points 17 to 36 above).

(b) Appropriate titles for board chairmen and members

45. To show the position of Directorate-General 3 and of board members more clearly to the outside world, the working party recommends **amending Rules 10 and 66 EPC** and using the terms "judge" and "presiding judge" in the headings to board of appeal decisions, and in external communications and correspondence. Appointment by the Administrative Council under Article 11(3) EPC of "members, including the Chairmen, of the Boards of Appeal and of the Enlarged Board of Appeal" would remain unaffected pending appropriate amendment of the EPC in due course.
46. In this connection, the working party discussed the term "board of appeal" (which in English particularly is open to misunderstanding), with particular reference to Mr Justice Jacob's High Court judgment of 20 December 1996 (*The Queen v. The Comptroller of Patents, Designs and Trade Marks ex parte Lenzing AG*) and his comments on the question "Does a board of appeal provide a means of judicial review?", which included in particular the following:

"They (the members of a board of appeal) are judges in all but name - and it is rather a pity that they were not so-called by the Convention."

47. The working party also considered the reference in this decision to the House of Lords' judgment of 26 October 1995 (*Merrill Dow Pharmaceuticals Inc. et al. v. H.N. Norton & Co. Ltd.*), which says:

"These decisions (of the EPO) are not strictly binding upon courts in the UK but they are of great persuasive authority; first, because they are decisions of expert courts (the boards of appeal and Enlarged Board of Appeal of the EPO) involved daily in the administration of the EPC."

(c) Non-judicial activities

48. In agreement with the report by Professors Bruchhausen and Brinkhof, the working party thinks it important to ensure that in their **non-judicial activities** also - given their necessary independence under Article 23 EPC - board members remain free of any influences which might be regarded as detrimental to their judicial independence.

49. Its general view therefore is that board members can be assigned non-judicial tasks outside DG 3 only on a voluntary basis and in agreement with the Vice-President DG 3. It may be appropriate to extend the DG 3 "Code of conduct" (CA/105/95), accepted by the very large majority of board members, to cover such activities.
50. On this basis, the working party considers it compatible with board member status to take part in particular in the following non-judicial activities:
- selection and promotion boards for other directorates-general
 - European qualifying examination
 - training on topics of relevance to DG 3
 - technical co-operation, eg with developing or CIS countries on topics of relevance to DG 3 such as training national patent judges
51. The working party also regards acting as an independent judicial expert as compatible with board member status. Nor (again in line with the Bruchhausen/Brinkhof report) does it see any reason why they should not sit on committees, working parties or delegations discussing legal reforms, or attend conferences, seminars or similar public events, given that they are not bound by instructions from the President. They should not however write or say anything liable to create the slightest impression of prejudice for future decisions.

(d) Composition of boards/business distribution

52. Here again the working party took as its basis **CoE Recommendation** No. R (94) 12, whose Principle 1, point 2.f reads:

"A case should not be withdrawn from a particular judge without valid reasons, such as cases of serious illness or conflict of interest. Any such reasons and the procedures for such withdrawal should be provided for by law and may not be influenced by any interest of the government or administration. A decision to

withdraw a case from a judge should be taken by an authority which enjoys the same judicial independence as judges."

53. As regards the **boards' business distribution** and changing their composition, the working party considers that in line with the CoE recommendation every effort should be made to ensure continuity in the boards' composition, and a change made only if the board concerned has expressly noted that a member is indisposed, or for some comparable reason. For example, a member's standpoint as expressed during the preparation of a decision and/or oral proceedings is not a reason for altering the board.
54. The working party group is agreed that it would be desirable for the **internal business distribution** on the boards and Enlarged Board to be governed as far as possible by objective criteria. It appreciates that the situation differs from that in national courts in that attention has to be paid to a balanced nationality distribution and, where necessary, to the language of the proceedings when appointing the rapporteur. A majority on the working party accepts that with a view to efficiency a rapporteur's technical qualifications may also be a criterion in individual cases.
- (e) Position of the Vice-President DG 3 - member of the administration/judicial body**
55. The working party thinks it important to emphasise the Vice-President DG 3's judicial function, bringing it out more clearly vis-à-vis the outside world. He should therefore be relieved as far as possible of all non-DG 3-related general administrative tasks. For example, he should not feature in the arrangements for deputising for the President under Article 10(3) EPC, unless DG 3 matters are concerned. This would require a Council decision. Nor should he have to attend meetings of the EPO management meetings unless specific DG 3 business is being discussed.
56. The working party would also like to see the President, within the overall framework of the EPC, gradually delegating his organisational and management powers in respect of DG 3 under Article 10 EPC to the Vice-President DG 3.

(f) Presidium

57. The working party considers the Presidium an important organ of judicial administrative autonomy whose powers should therefore be strengthened and clarified, eg by amending Rule 10(2), 1st sentence, EPC so that the President is no longer a member.
58. The Presidium's **tasks** are:
- allocating the caseload to the boards and designating the regular and alternate members of the various boards and Enlarged Board under Rule 10(1), 1st sentence, EPC
 - deciding on conflicts about caseload allocation between two or more boards, Rule 10(3) EPC
 - adoption and amendment of the rules of procedure of the boards, Rule 11, 1st sentence, EPC
 - choosing the members of selection boards (as Presidium sub-committees) for member and chairman posts
 - addressee for the Vice-President DG 3 on matters concerning the EPO judiciary generally
59. The working party also thinks that the annual caseload allocation and designation of the regular and alternate members of the individual boards and the Enlarged Board of Appeal under Rule 10(1) EPC, and the appointment of members of selection boards, should be done by an "extended" Presidium including all the chairmen.
60. For all its other tasks, the Presidium should comprise - in addition to the Vice-President DG 3 as chairman - an equal number of board chairmen and members. Six of each should be elected to the Presidium every year, with all twelve being elected by all the judges (ie chairmen and (ordinary) members) together; elections according to separate groups should not take place.

61. The composition of the Presidium should broadly reflect the proportion of technical to legal members in DG 3. So if possible, three of the twelve elected members should be lawyers. The Presidium should include at least one legal chairman, one legal member, one technical chairman and one technical member.

(g) Organisational independence

(aa) Image of the boards, working conditions

62. The general view on the working party is that DG 3 should have fitting working conditions.
63. **Appropriate accommodation** for the boards is important in impressing upon parties that they are appearing before an independent body as opposed to EPO examining and opposition divisions. The working party would therefore like to see **appropriately furnished courtrooms** and a proper consultation room for the boards, as is usual for courts.
64. The working party discussed whether **judges' robes** might help the boards' **image** outside the EPO. Opinions were divided. The general conclusion was to keep the idea in mind, and at least sound out those concerned in due course.
65. In addition, the EPO **organigram** should bring out DG 3's independent status more clearly. The existing version is unsatisfactory and can give outsiders the wrong impression. One solution might be to give DG 3 its own organigram, and merely include a reference to it in the general EPO one.
66. The working party thinks it would help DG 3's image in the outside world if its **publications** were more obviously from DG 3, eg in the form of its own collection of

decisions or a special "decisions section" in the EPO Official Journal for which DG 3 alone would be responsible. Also, DG 3 notices such as the boards' business distribution scheme or the composition of the Presidium should appear not as "Information from the EPO" but separately as "Information from DG 3".

(bb) Training, communication with national judges

67. The working party recommends encouraging training for board members, regular invitations to national judges to lectures and informal talks, and meetings of board members (eg in small discussion groups). Regular exchanges of views and information between judges is essential for understanding each other's case law, and thus helps harmonise substantive patent law.

(cc) Further organisational measures

68. **In the future**, the working party would like to see DG 3 enjoy more administrative autonomy within the Organisation.
69. By a majority, it recommends that DG 3 be accommodated separately from the other directorates-general, and would like to see it given its own completely separate building when the opportunity arises.
70. **Within the framework of a revision of the EPC**, serious consideration should be given to amending Article 10 EPC to make DG 3 an autonomous judicial body, independent of the Office. When the boards and Enlarged Board are attached organisationally to the Office - Article 15 EPC calls them departments "set up within the European Patent Office" - the mistaken impression may be given that they are the same as other departments such as the Receiving Section, the search, examining and opposition divisions, or the Legal Division. This can be put right by making **appropriate amendments to the relevant provisions such as Articles 4, 10 and 15 EPC when the Convention is revised**, and making it quite clear that DG 3 is an independent judicial body of the Organisation.

D. EXERCISE OF DISCIPLINARY AUTHORITY

71. The working party is agreed that in future the President should exercise his right under Article 10(2)(h) EPC to propose disciplinary action against board members, apart from the chairman of the Enlarged Board, only at the instigation of the Vice-President DG 3 (internal delegation under Article 10(2)(i) EPC).
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