

CA/100/11

Orig.: en

Munich, 24.11.2011

SUBJECT: Internal appeal against CA/D 4/11

SUBMITTED BY: President of the European Patent Office

ADDRESSEES: Administrative Council (for decision)

SUMMARY

At its 128th meeting, the Administrative Council decided to abolish the Audit Committee it had set up in June 2009.

Two employees, one of whom is a staff representative, have filed an appeal with the Council against such decision.

The appeal being directed against a decision adopted by the Administrative Council, it is, in accordance with Article 110(3) of the Service Regulations, to be dealt with by the Administrative Council.

Since no favourable reply can be given to the appeal, it is proposed that the Council refer it to its Appeals Committee for an opinion, and appoint the Office as its representative for this case.

The present document has been drawn up in accordance with Article 18(1) of the Council's rules of procedure.

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I. STRATEGIC/OPERATIONAL

1. Operational

II. RECOMMENDATION

2. The Administrative Council is requested to refer the appeal to its Appeals Committee for opinion.

III. MAJORITY NEEDED

3. Simple.

IV. CONTEXT

4. At its 128th meeting, the Administrative Council adopted decision CA/D 4/11, thereby abolishing the Audit Committee it had set up in June 2009 (see also CA/55/11).

V. ARGUMENTS

A. PROCEDURE

5. An internal appeal (Annex 1¹) has been filed with the Council by an individual employee and the Chairperson of the Munich Staff Committee.

6. The appellants challenge the lawfulness of the Council's decision CA/D 4/11 on different grounds, including the lack of consultation of the General Advisory Committee (GAC) on the President's proposal to disband the Audit Committee (CA/55/11). They request that the Council's decision CA/D 4/11 be set aside and that their costs be reimbursed.

7. Under Article 108(1) of the Service Regulations (ServRegs), "*internal appeals are to be lodged with the appointing authority which gave the decision appealed against*".

8. The decision challenged having been taken by the Administrative Council, the Administrative Council is competent to deal with the appeal.

¹ The appeal is annexed in the original language. The individual appellant's name is not shown for confidentiality reasons, but it is available to delegations on request to the Council Secretariat.

B. RECEIVABILITY OF THE APPEAL

9. The appeal against the Council's decision of 30 June 2011, published on 6 July 2011, was lodged within the prescribed time period.
10. Yet the only receivable claim is the one of the Chairperson of the Munich Staff Committee concerning the lack of consultation of the GAC, insofar as it relates to her rights as a staff representative entitled to appoint members of such a joint consultative committee.
11. The other claims are irreceivable, because the Council's decision CA/D 4/11 to abolish the Audit Committee is a general decision which has no adverse effect on the legal situation of employees within the meaning of Article 107 ServRegs. The appellants do not therefore have cause of action to challenge it.

C. MERITS OF THE APPEAL

a) GAC consultation was not required

12. The appellants argue that the decision is procedurally flawed because the President's proposal to disband the Audit Committee (CA/55/11) should have been submitted to the General Advisory Committee (GAC) for consultation since it affected staff to whom the Service Regulations apply (on the one hand employees assigned to internal audit, due to the removal of a level of protection against retaliatory decisions of the management, and on the other hand the entire staff, because of an ensuing weakened governance structure).
13. However, contrary to what the appellants believe, there was no obligation to consult the GAC on the proposal to abolish the Audit Committee. The President did not consult the GAC prior to proposing the institution of the Audit Committee (see the wording of CA/D 9/09 which does not refer to GAC consultation) and this was never questioned. Indeed, the institution of a sub organ of the Administrative Council on the basis of Article 14 of the Council's Rules of Procedure is not a matter concerning the conditions of employment of "*a whole or part of the staff*" within the meaning of Article 38(3) ServRegs. According to the principle of parallelism of procedures, there was therefore no need to consult the GAC on the proposal to abolish said Committee.

b) On a subsidiary basis: other procedural and substantive aspects

14. The appellants further argue that the decision is procedurally flawed because the Audit Committee was not represented during the Council's 128th meeting.

15. In addition, according to the appellants, the Council overlooked a material fact, namely the letter addressed to it by the Chairman of the Audit Committee, which was not discussed during the 128th meeting.
16. They also consider that the Council's decision is based on an error of fact because the Board of Auditors themselves deny carrying out part of the tasks of the Audit Committee as put forward in CA/55/11.
17. Lastly they consider that the Council inappropriately failed to take into account the auditing standards generally applied to intergovernmental organisations as well as the problems highlighted in CA/140/08.
18. The appellants' arguments are unfounded for the following reasons:
19. No legal provision or principle required that a representative of the Audit Committee attend the 128th meeting of the Council. Hence the contention that the Council's decision CA/D 4/11 would be flawed because of the absence of any such representative can only be rejected.
20. Moreover, the Audit Committee's position was made known to the members of the Council through communication of a letter of the Chairman of the Audit Committee in which it was recommended to reject the President's proposal to disband the Committee (CA/55/11) as premature (Annex 2). In this respect, the appellants' argument that the Council's decision CA/D 4/11 is flawed because such letter was not discussed during the Council's meeting is bound to fail, as the opinion given therein was nevertheless duly considered by the members of the Council before casting their vote on the proposal.
21. Concerning the Board of Auditors' alleged position on the statements made in CA/55/11, the appellants provide no evidence thereof. If reference is made to the statement of the spokesman of the Board during the 100th Budget and Finance Committee meeting (see CA/48/11, paragraphs 22 and 23) that "*the two bodies had completely different jobs*", the following can be said:

Pursuant to Article 77(3) of the Financial Regulations (FinRegs), the Board of Auditors receives all reports of internal audit as well as its annual programme. Also, as pointed out by the Board of Auditors itself in CA/148/08 Add.1 (part II.B on page 3), the INTOSAI (International Organisation of Supreme Audit Institutions) standards which the Board complies with (and to which the appellants themselves refer) "*make it quite clear that internal audit [...] is itself subject to the independent scrutiny of external audit*".

The Board of Auditors therefore clearly checks the "*efficiency of internal audit*" (see Article 1(b), Article 5(1)d) to f) and (2)a) as well as Article 6(c) of CA/D 9/09). In addition, the Board of Auditors establishes whether "*procedures are efficient and economical*" (Article 76(2)d) FinRegs) and looks at "*the effectiveness of the Office's internal control arrangements generally*" (see CA/20/10, page 43 in relation to Article 6(b) of CA/D 9/09), in application of the principle of sound financial management.

Through the Board of Auditors, internal audit has the possibility to ensure that its observations are made known to the governing body, therefore its independence cannot be put into question.

22. As far as the taking into account of the INTOSAI standards is concerned, it is unclear what the exact point of the appellants is. Such standards do not prescribe that international organisations must have an Audit Committee in addition to external and internal auditors. Those two types of auditing combined with the role of the President, Budget and Finance Committee and Council provide an adequate governance structure for the Organisation with sufficient control mechanisms. In fact, this was confirmed by the Board of Auditors in 2008 when they stated that the EPO's existing system (i.e. without an Audit Committee) "*complies with INTOSAI standards*", in other words that "*the existing arrangements under the EPC and FinRegs are perfectly compliant with the 1977 Lima requirements*" (see section IV.A on pages 5 and 6 of document CA/148/08 Add.1).
23. As for the alleged disregarding of the problems which had justified the creation of the Audit Committee in the first place, the discussions that took place at the Budget and Finance Committee preceding the 128th meeting of the Council in reality show that the delegations did have their previous discussions in mind (paragraphs 9, 13, 17, 19 of CA/48/11).
24. In accordance with Article 33(2)e) EPC, the Council adopted the President's proposal, submitted pursuant to Article 10(2)c) EPC, to abolish the Audit Committee after a thorough discussion and analysis of all relevant aspects. Reference can be made to judgment No. 429 of the Administrative Tribunal of the ILO (ATILO) which makes clear that "*only the body empowered to amend [certain provisions] may determine whether the amendments it adopts are desirable. That is a matter for the governing bodies of the organisation, not the Tribunal, to decide*" (consideration 8).

25. Where in principle and in some other organisations, an Audit Committee may have different functions than those of internal and external auditing, at the EPO it appeared that such Committee, which had an exclusively advisory role, in fact only constituted an additional body which did not bring about significant added value to the audit governance of the Organisation. Moreover, it is worth pointing out that at its 129th meeting, on a proposal from the President as foreseen in CA/55/11, the Council adopted an amendment to Article 81 FinRegs in order to include the functions of internal audit and thereby strengthen its position (see paragraph 12 and draft amendment in CA/38/11).

D. CONCLUSION

26. Since no favourable reply can be given to the appeal, it is proposed that the Council refer it to its Appeals Committee for opinion.
27. It is further suggested that the Council decide to appoint the European Patent Office as its representative for this case, in accordance with Article 18(2) of the Council's rule of procedure.

VI. ALTERNATIVES

28. In view of the above, there are no feasible alternatives.

VII. FINANCIAL IMPLICATIONS

29. If the Council does not take a decision, it would be implicitly rejecting the appeal. The appellants could then lodge a complaint with the ATILo within the deadline laid down in its statute. That would involve costs for the Organisation.

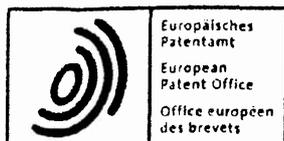
VIII. LEGAL BASIS

30. Articles 108(1), 109(1) and (2), and 110(3) of the Service Regulations;
Article 18(1) and (2) of the Council's rules of procedure

IX. DOCUMENTS CITED

CA/D 4/11, CA/55/11, CA/140/08, CA/148/08 Add. 1, CA/D 9/09, CA/48/11,
CA/38/11, CA/20/10

Annex 1



Mr J. Kongstad
Chairman of the
Administrative Council
R. 1041

Munich, 28.09.2011

Internal appeal against Abolition of the Audit Committee (CA/D 4/11)

Dear Mr Kongstad,

please find attached an internal appeal against the CA/D 4/11.

Yours sincerely,

Chairperson Staff Committee Munich

APPEAL AGAINST THE CA/D 4/11

Facts and submissions

In May 2008, a workshop on governance was held in Ljubljana, associating President, heads of delegations and senior management of the Office. In this workshop, one of the main topics was the creation of an audit committee (see CA/62/08).

In the subsequent meetings of the BFC and the AC, proposals made by the Office (CA/140/08) and opinions expressed by the Board of Auditors (CA/148/08 + Add. 1) were intensively discussed. The compelling case for the Organisation to establish an audit committee is thoroughly explained in the part III of the document CA/140/08. One of the main reasons was to protect the independence of Internal Audit in order to allow it to fulfil its tasks according to the audit standards and its Code of ethics. This was explicitly supported by the Board of Auditors (CA/148/08 Add.1, p. 4).

CA/140/08 stated in particular: "an independent mechanism (such as an Audit Committee) would provide further assurance of the correct functioning of IA, particularly in view of the fact that even at the highest management level situations can occur that call for the independence of IA". Many examples of such a situation are given by the ILOAT case-law database.

The reflection of the governing bodies continued in 2009 (see in particular CA/33/09). Eventually, the AC decided unanimously to establish an audit committee (CA/D 9/09), in line with the practice of other organisations.

In its 128th meeting (29-30 June 2011) the Administrative Council decided to follow a proposal of the President of the Office (CA/55/11) and to abolish the newly created Audit Committee with immediate effect, without providing for any alternative for the functions outlined in CA/140/08.

This decision (CA/D 4/11) was flawed *inter alia* in view of the following:

- the main reason for the decision was that the tasks of the Audit Committee "can be and are effectively carried out by the Office's Internal Audit unit and by the Organisation's Board of Auditors" (CA/55/11, § 7), what is denied by the Board of Auditors itself;
- no reference is made in CA/55/11 to the problems highlighted in CA/140/08, which were acknowledged by the governing bodies and by the Office;
- the Audit Committee was not represented during the meeting;
- a letter addressed to the Council by the chairman of the Audit Committee was not discussed in the session;
- standards generally applied to intergovernmental organisations (e.g. INTOSAI) were ignored.

The abolishment of the Audit Committee negatively affects the staff of the EPO as a whole because it weakens the governance structure of the Organisation.

Staff in Internal Audit (PD 0.6) are furthermore negatively affected because for them the abolishment of the Audit Committee removes a level of protection against wilful decisions of the Management and prevent them from "reporting significant issues to those charged with governance" (see INTOSAI GOV 9140, sections 8 and 9).

The decision is furthermore flawed since, affecting staff to whom the Service Regulations apply, it should have been made subject to statutory consultation under Art. 38 ServRegs. No such consultation took place; the General Advisory Committee was merely "informed" on the intention of the President.

Requests

The Administrative Council is requested to set aside its decision CA/D 4/11 dated 30.06.2011.

The appellants furthermore requests reimbursement of their costs.

Munich, 28.09.2011

(Chairperson MSC)



To:
Cc:
Bcc:
Subject: Letter from the chair of the Audit Committee

Letter from the chair of the Audit Committee

Council to: ematysiak, spb, borghildur, safet.emruli, safet.sula, miklos.bendzsel, skopecka, btotic, christian.bock, leonor.trindade, godwin.warr, john.alty, sean.dennehey, habip.asan, jkratochvil, zeljko.topic, alexandru.strenc, bruno, susanne.sivborg, loredana.gulino, mauro.masi, jsantos, matti.paets, gr, arj, juri.zurej, gerard.barrett, guus.broesterhuizen, elin, eeleftheriou, irenaj, deptcomp, jko, Lex.Kaufhold, friedrich.roedler, ybirinci, p.h.m.vanbeukering, zilvinas.danys, mojca.pecar, alberto.casado, bjk, fclaireau, ssta, darina.kylianova, claude.sahl, eamonn.laird, gabor.varga, aadamczak, toomas.lumi, pekka.launis, kmar, roland.grossenbacher, lukrecia.marcokova, michelle.bonello, gerardo.penas, andrea.kushti, maria.duna, ekheng, cornelia.rudloff-schaeffer, mrasheva, peter.matt, mihaly.ficsor, geoffrey.bailleux, ljiljana.kuterovac, silvia.rossi.ubm, jerome.debrulle, bbilenkatic, per.holmstrand, jekaterina.macuka, ylapierre, ernst-ch, telmo.vilela, rauni.hagman, andrea.scheichl

24-06-2011 10:17

Sent by: **John Ormrod**
Cc: JKO, TRI, Yves Grandjean

Dear Sir/Madam,

Please find attached a letter which Mr Schellekens, the chair of the Audit Committee, has asked us to forward on his behalf.

[attachment "European Patent Organisation_001.PDF" deleted by Nicole Vareil/EPO]

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European Patent Organisation
Chairman and Members of the Administrative Council,
Erhardtstraße 27,
D-80331 München,
Deutschland.

Datum The Hague 22 June 2011

Betreft Subject: CA/55/11 Disbanding the Audit Committee

Ons kenmerk: AD / 11098701

The Audit Committee of the EPO is established by a decision of the Administrative Council (CA/ D9/09) in June 2009. The rationale for this decision was argued in document CA/140/08. With the appointment of its members per January 2010 this decision has been effectuated. The Audit Committee submitted its first annual report to the Administrative Council 20 January 2011. Document CA/55/11 proposes to repeal of the Administrative Council's June 2009 decision for reasons of efficiency and disband the Audit Committee.

The purpose of an independent Audit Committee is to provide assurance on the adequacy of the organisation's risk management framework and the associated control environment; scrutiny of financial and non-financial performance to the extent that it affects exposure to risks and weakens the control environment; review of internal audit activities and management responses to the outcome of such activities. An Audit Committee is a key component of the governance triangle formed together with the external auditors and internal auditors and provides a forum for discussion of risk factors that may influence the approaches respectively to internal and external audit planning. The role of the Audit Committee therefore supports accountability and transparency, and is fundamental to ensuring that the Office functions according to good governance as well as adopting appropriate risk management arrangements. The Audit Committee serves in an advisory capacity to the Administrative Council and the President to help them to exercise their governance and supervising responsibilities with respect to the Office's various operations.

The Committee is advisory only and would not threaten or vary the authority or responsibility of the President, the Administrative Council or the Board of Auditors.

The members of the Audit Committee strongly recommend rejecting this proposal CA/55/11 as premature. This proposal does not address or solve the problems set out in CA/140/08 (III) which document provided the arguments for the "compelling case" to establish the Audit Committee. The role of the Audit Committee is not an overlap with the internal and external audit but a key component of a balanced auditing and governance structure of the Office as it is in most international organisations..

Reconsidering of the *role* of the Audit Committee is more appropriate at the end of the current mandate. The Audit Committee would then have been functioning for three years which would enable the Administrative Council to evaluate the role of this Committee regarding the needs of the Administrative Counsel in fulfilling its governance and supervising responsibilities.

Yours sincerely

W. Schellekens RA
Chair of the Audit Committee

Annex CA/140/08