



**Europäische
Patent-
organisation**

Verwaltungsrat

**European
Patent
Organisation**

Administrative Council

**Organisation
européenne des
brevets**

Conseil d'administration

CA/62/23 Rev. 1

Orig.: en

Munich, 23.11.2023

SUBJECT: Modernisation of the EPO's external governance – Implementation of the second set of Basket I measures

SUBMITTED BY: Chairperson of the Administrative Council

ADDRESSEES: Administrative Council (for decision)

SUMMARY

This document replaces CA/62/23 dated 06.10.2023. The amendments are indicated by grey hatching.¹

At its 175th meeting in June 2023, the Administrative Council exchanged views on the second set of Basket I measures (CA/C 8/23). Taking into account the feedback received from the delegations, and particularly their views expressed during the 176th Council meeting in October 2023, this document presents proposals for implementing those measures, which concern the publication of and third-party access to Council documents. These measures are to be implemented by amending the Council's Rules of Procedure (Part II), adopting a policy for the publication of Council documents (Part III) replacing the recommendations as set out in CA/26/12 Rev. 1 ("Publication of Administrative Council's documents through the EPO's public web site"), and adopting a policy for access to Council documents (Part IV).

The Administrative Council is invited to approve the amendments to its Rules of Procedure, as well as to adopt the policies in the form of Council decisions.

¹ In order to enhance the readability of the document, elements which have been deleted from the text of CA/62/23 have not been struck through but have been removed from the document.

Following the Council's feedback on CA/C 8/23, the proposal to review and consolidate the mandate, working methods and objectives of the Council's Technical and Operational Support Committee (TOSC) is currently being further explored by the Committee's Chairperson together with the members of the TOSC. Once their assessment is complete, a proposal will be submitted to the Council for decision.

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PART I

I. STRATEGIC/OPERATIONAL

1. Operational.

II. RECOMMENDATION

2. The Administrative Council is requested to approve the proposed amendments to its Rules of Procedure (RoP), and to adopt the policy for the publication of Council documents (Part III), as well as the policy for access to Council documents (Part IV).

III. MAJORITY NEEDED

3. Three-quarters.

IV. CONTEXT

4. Continuously improving its governance has always been a key objective of the EPO. With a view to introducing even more improvements and taking account of best practices and the highest governance standards, a programme aimed at modernising the EPO's governance was included in the SP2023 as a central component of its long-term sustainability (Goal 5, Key Initiative 1).
5. Following an exchange of views by the Administrative Council in June 2023 on the second set of measures proposed under Basket I of the roadmap for the modernisation of the EPO's external governance (CA/C 8/23), and with the active involvement of the Board of the Administrative Council ("B28"), this document sets out proposals for implementing these measures. This will involve amending the Council's RoP, adopting a policy for the publication of Council documents (Part III) replacing the recommendations set out in CA/26/12 Rev. 1 ("Publication of Administrative Council's documents through the EPO's public web site"), as well as adopting a policy for access to Council documents (Part IV).²
6. The proposals were submitted by the Chairperson of the Council to the members of the B28 for discussion. Following the discussions in the B28, and reflecting the feedback received from the delegations during the 176th Council meeting in October 2023, the proposals were further refined and are now submitted to the Council for decision.
7. Following the Council's feedback on CA/C 8/23, the proposal to review and consolidate the mandate, working methods and objectives of the Technical and Operational Support Committee (TOSC) is currently being further explored by the Committee's Chairperson together with the members of the TOSC. Once their assessment is complete, a proposal will be submitted to the Council for decision.

² For the purpose of this document references to the Administrative Council in the context of the adoption of the two policies are to be understood as also encompassing the Council's subsidiary bodies.

V. ARGUMENTS

8. In line with the proposals presented at the Council meeting in March 2023, and following the exchange of views by the Council in June 2023, it is proposed to adopt a policy for the publication of Council documents (Part III) replacing the recommendations as set out in CA/26/12 Rev. 1, to adopt a policy for access to Council documents (Part IV), and to amend the Council's RoP accordingly.

a) Policy for the publication of Council documents

9. Following the proposals outlined in CA/C 8/23, and in line with the feedback received from the delegations, it is proposed to adopt a policy for the publication of Council documents that will replace the current publication recommendations set out in CA/26/12 Rev. 1. This policy will also lead to a clearer categorisation of documents by classifying documents submitted to the Council either as public, restricted or confidential:
- If a document is classified as "public", it will be accessible on MICADO to Council meeting participants and Office staff, and will also be made available to the public on the Organisation's website after the meeting to which it was submitted.
 - If a document is classified as "restricted" (e.g. minutes, budget documents, contracts), it will only be disseminated to Council meeting participants, and will not be made available to the public. It will, however, be accessible on MICADO to Council meeting participants and Office staff.
 - If a document is classified as "confidential", it will only be disseminated to the participants in the relevant closed session (accessible only on MICADO-C) and will not be made available to the public.
10. Moreover, it is proposed that the policy for the publication of Council documents be issued, on the basis of Articles 29(4) and 33(2)(e) EPC, in the form of a Council decision.

b) Policy for access to Council documents

11. In line with the proposed distinction between confidential/restricted (non-published) Council documents on the one hand, and non-confidential (public) documents on the other, the legal procedure governing the disclosure of documents to a third party on request also needs to be clarified. Therefore, a policy for access to Council documents is proposed. This policy outlines basic principles and establishes clear workflows and criteria for dealing with access requests.³

³ It should be noted that such requests for access to Council documents have remained, thus far, a relatively rare phenomenon.

12. Initially, the policy clarifies its scope by stipulating that, in accordance with its administrative autonomy under Article 4 EPC,⁴ the European Patent Organisation will assess, in accordance with its legal and policy framework, a request by a third party for access to documents which have been submitted to the Administrative Council.⁵ Additionally, it also clarifies that any such assessment is without prejudice to provisions under domestic law governing the disclosure of documents.
13. Based on these considerations, and in line with the policy for the publication of Council documents, the following treatment of documents in relation to their accessibility is envisaged:
- Public documents are published on the Organisation's website and are freely accessible.
 - Restricted documents are only disseminated to Council meeting participants and are not made available to the public or disclosed to third parties. Exceptionally, however, such a document may be disclosed if, in the Council's assessment, the disclosure of the document would not seriously undermine the Organisation's decision-making process or the international relations between any of the Contracting States and the Organisation, or between the Contracting States.
 - Confidential documents are not made available to third parties in order to maintain their confidentiality. Exceptionally, however, such a document may be disclosed if, in the Council's assessment, a requester has successfully demonstrated that the document sought is patently relevant to their case in the context of litigation proceedings and that no higher interest stands in the way of its disclosure.
14. These considerations relating to accessibility aim to strike a balance between ensuring the transparency of the EPO's external governance and the public's interest in freedom of information on the one hand; and safeguarding the Organisation's decision-making process and the international relations between any of the Contracting States and the Organisation or between the Contracting States, on the other.
15. Moreover, the policy also clarifies that the rules on access to Council documents are without prejudice to the provisions of the Data Protection Rules of the Administrative Council (CA/D 2/23). This means that, even if the decision to grant a request for access is taken, data protection and privacy principles will still have to be respected (which may involve redacting certain passages in a document containing personal data, for example).

⁴ In this context, it should be noted that the Council's prerogative to classify documents (e.g. on the basis of the Council's Rules of Procedure or the recommendations as set out in CA/26/12 Rev. 1) has never been called into question to date.

⁵ On the other hand, documents prepared by the delegations themselves for their own internal purposes (delegations' own notes, minutes, speaking points, reports to their authorities, etc.) are outside the EPO's legal framework as far as requests for access to documents are concerned.

16. Confidential documents are protected in particular by the provision that such documents are, as a general rule, not disclosed to third parties. The only exception to this rule is that such documents may be disclosed in the context of ongoing or expected litigation proceedings. In such a case the Council will assess whether the requester has successfully demonstrated that the documents sought are "patently relevant"⁶ to their case, and whether or not higher interests (e.g. relating to matters of core strategic importance or the Organisation's long-term sustainability) speak against disclosing a confidential document, even if it may be of relevance to the requester.
17. Moreover, CA/C 8/23 broached the idea of delegating the competence to assess requests for access to restricted or confidential documents from the Council (as a body) to its Chairperson. However, in view of the concerns raised by a number of delegations, it is proposed that the Council as a whole should retain the authority to assess such requests for access, at least until the respective workflows and criteria for granting or rejecting such requests have become well-established.⁷
18. Lastly, it is important to note that when requests for access to EPO documents are received by national authorities (e.g. by a ministry), such requests are to be treated according to the rules applicable to such requests under respective domestic law. In other words, the respective national authorities will have to assess how they comply with requirements under domestic law, as well as with their State's obligations as a Contracting State under international law (for example obligations arising under the EPC).⁸ The workflows proposed are therefore based on the understanding that the national authorities in the Contracting States (with the EPO's assistance, if desired) will ultimately decide how these obligations are met.
19. On the basis of these considerations, the following workflows are proposed:
- (i) Request for access directly submitted to the EPO**
20. Where a third party submits a request for access to a Council document directly to the Office or the Administrative Council, the Council Secretariat will process the request in line with the following considerations:
- Public Council documents are freely accessible on the Organisation's website. Third parties requesting access to them will therefore be referred to the website by the Council Secretariat.
 - If the request relates to a restricted or confidential document, the Council Secretariat will process the request based on the principles applicable to such

⁶ While the ILOAT has not provided a specific definition of the term "patently relevant" because it is evaluated on a case-by-case basis, in the context of employment law disputes it can, however, be inferred that it refers to documents that have a clear connection and direct relevance to a specific case; and are clearly needed by requesters to defend their rights.

⁷ To expedite the decision-making process and ensure a timely response to any such requests, recourse can be made to written procedures under Article 10(4) RoP. (If, for example, relatively tight deadlines under domestic law require an even quicker decision, the model of accelerated written procedures that was applied during the first months of the COVID-19 pandemic can be followed.)

⁸ A benchmarking exercise indicated that, inspired by the provisions enshrined in Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, quite a few Contracting States allow national authorities to refuse access to a document where disclosure would undermine the protection of, for instance, the public interest as regards international relations. The argument that access to an international organisation document may be refused if and when such access might have an adverse effect on (or even seriously undermine) the international relations between a Contracting State and the EPO was confirmed by a German court in October 2022 (see *Verwaltungsgericht Berlin*, Judgment of 24.10.2022, 2 K 149/21).

documents (see paragraph 13) and, with the support of the Office departments concerned, assist the Chairperson of the Council in drawing up a proposal on how to handle the request.⁹ Based on the Chairperson's proposal, the Council will decide to grant access to the Council document or reject the request.

- Once a decision has been taken, the Council Secretariat will inform the third party accordingly.

(ii) Request for access received by a delegation of a Contracting State

21. If a request for access to a Council document is received by a delegation of a Contracting State, and without prejudice to the fact that the treatment of such requests is to be determined according to the rules applicable under respective domestic law, the following steps are envisaged:

- If the request concerns a public document, the requester may be informed that such documents are freely accessible on the Organisation's website.
- If the request relates to a restricted or confidential document, the delegation should contact the Council Secretariat to seek the Council's guidance. The Council Secretariat, with the support of the Office departments concerned, will assist the Chairperson of the Council in drawing up a proposal on how to handle the request. Based on the Chairperson's proposal, the Council will provide its guidance as to how to respond, in accordance with the principles applicable to such documents (see paragraph 13).
- Once the Council has provided its guidance, the Council Secretariat will inform the delegation accordingly. The delegation or the initial recipient of the request may then further process the request in accordance with their domestic law.

22. The policy also clarifies that, if the recipient of a request for access to a Council document is a public authority in a Contracting State, the receipt of the request should be communicated to the Council Secretariat through the delegation of that Contracting State. In addition, the policy also provides that the workflows apply, *mutatis mutandis*, to States with right of accession and observers in respect of documents to which they have been granted access through their participation in Council meetings.

23. Moreover, if a request for access (received by the Organisation or a delegation of a Contracting State) relates to a non-confidential document which was submitted to the Council before the policy for access to Council documents entered into force and has remained unpublished, the Council Secretariat will need to ask the Council to decide (for requests received by the Organisation) or to provide guidance (for requests received by a delegation of a Contracting State) on whether the document should be disclosed to the requester and will inform the requester or the delegation accordingly.

⁹ If, in the Chairperson's view, the request in question does not appear to be sufficiently substantiated, the Chairperson will invite the requesting third party to provide additional explanations and/or justifications.

24. Lastly, as noted above, recourse can be made to accelerated written procedures to expedite the EPO's decision-making process and ensure a timely response to such requests (including in light of potential deadlines that apply under the respective domestic law).¹⁰

c) Amendments to the Council's RoP

25. To accommodate the proposed policies in the EPO's institutional legal framework, a new Article 12a ("Documents") needs to be inserted into the Rules of Procedure and paragraph 2 of the current Article 13 ("Confidentiality") has to be deleted.
26. It is proposed that the new Article 12a contain two provisions concerning Council documents. They will stipulate that each document submitted to the Council is allocated to one of the categories designated in the policy for the publication of Council documents; and that Council documents may be made accessible to third parties on request in accordance with the rules set out in the policy for access to Council documents. Moreover, both provisions will clarify that the respective categories and rules will be established through two separate Council decisions.
27. Given that the provision under the new Article 12a will also govern requests for access to confidential documents, the current provision regulating this issue in paragraph 2 of Article 13 needs to be deleted.
28. Finally, it is proposed to amend Article 14(5) RoP so that both the policy for the publication of Council documents and the policy for access to Council documents will apply, *mutatis mutandis*, to the Council's subsidiary bodies too.

VI. ALTERNATIVES

29. None, as the current recommendations as set out in CA/26/12 Rev. 1 ("Publication of Administrative Council's documents through the EPO's public web site") no longer reflect best practice or adequately regulate access to Council documents. They also fail to provide delegations with the support that several of them have requested for handling access requests (cf. CA/C 11/22, paragraphs 35-37).

VII. FINANCIAL IMPLICATIONS

30. N/A

¹⁰ While deadlines under domestic law may, at first glance, not be reconcilable with the time required for the EPO's decision-making process, the need to consult an international organisation about access to one of its documents should be cited by the respective national authority as a reason justifying an extension of an impending deadline.

VIII. LEGAL BASIS

31. Article 4 EPC; Article 29(4) EPC; Article 31(2) EPC; Article 33(2)(e) EPC.

IX. DOCUMENTS CITED

32. CA/26/12 Rev. 1; CA/C 11/22; CA/C 8/23.

X. RECOMMENDATION FOR PUBLICATION

33. Yes.

PART II

Draft

DECISION OF THE ADMINISTRATIVE COUNCIL
of [date of decision] inserting a new Article 12a into
and amending Articles 13 and 14 of its Rules of
Procedure

THE ADMINISTRATIVE COUNCIL OF THE EUROPEAN PATENT ORGANISATION,
Having regard to the European Patent Convention, and in particular Article 33(2)(e) thereof,
HAS DECIDED AS FOLLOWS:

Article 1

The following new Article 12a is inserted into the Rules of Procedure of the Administrative Council:

"Article 12a Documents

- (1) Each document submitted to the Council shall be allocated to one of the categories designated in the policy for the publication of Council documents. The policy shall be established by a decision of the Council.
- (2) Council documents may be made accessible to third parties on request in accordance with the rules set out in the policy for access to Council documents. The policy shall be established by a decision of the Council."

Article 2

Paragraph 2 of Article 13 of the Rules of Procedure of the Administrative Council is deleted. Paragraph 3 becomes the new paragraph 2.

Article 3

Paragraph 5 of Article 14 of the Rules of Procedure of the Administrative Council is amended to read as follows:

"(5) Article 1, paragraph 4, Articles 2 and 4, paragraph 4, and Articles 6, 7, 8, 10, 11, 12a, 13, 15a, 16 and 17 shall apply, where possible, to subsidiary bodies *mutatis mutandis*."

Article 4

This decision enters into force on [date of decision].

Done at Munich, [date of decision]

For the Administrative Council
The Chairperson

Josef KRATOCHVÍL

PART III

Draft

DECISION OF THE ADMINISTRATIVE COUNCIL of [date of decision] establishing a policy for the publication of Council documents

THE ADMINISTRATIVE COUNCIL OF THE EUROPEAN PATENT ORGANISATION,
Having regard to the European Patent Convention, and in particular Article 33(2)(e) thereof,
HAS DECIDED AS FOLLOWS:

Article 1

Each document submitted to the Administrative Council shall be allocated to one of the following categories:

- a) Public documents: documents classified as "public" can be accessed in the Organisation's database of Council documents ("MICADO") by Council meeting participants and European Patent Office staff. They are also made available to the public via the Organisation's website after the meeting to which they were submitted.
- b) Restricted documents: documents classified as "restricted" are disseminated only to Council meeting participants. They are not made available to the public. Restricted documents can, however, be accessed on MICADO by Council meeting participants and European Patent Office staff.
- c) Confidential documents: documents classified as "confidential" are disseminated only to the participants in the relevant closed session and made accessible only in the Organisation's database of confidential Council documents (MICADO-C). Confidential documents are not made available to the public.

Article 2

- (1) The policy set out in this decision replaces the recommendations given in CA/26/12 Rev. 1 ("Publication of Administrative Council's documents through the EPO's public web site").
- (2) This decision enters into force on [date of decision].

Done at Munich, [date of decision]

For the Administrative Council
The Chairperson

Josef KRATOCHVÍL

PART IV

Draft

DECISION OF THE ADMINISTRATIVE COUNCIL of [date of decision] establishing a policy for access to Council documents

THE ADMINISTRATIVE COUNCIL OF THE EUROPEAN PATENT ORGANISATION,
Having regard to the European Patent Convention, and in particular Article 33(2)(e) thereof,
HAS DECIDED AS FOLLOWS:

Article 1

In accordance with its administrative autonomy under Article 4 of the European Patent Convention ("EPC"), the European Patent Organisation shall assess, in accordance with its legal and policy framework, a request by a third party for access to documents submitted to the Administrative Council. Any such assessment shall be without prejudice to provisions under domestic law governing the disclosure of documents.

Article 2

In accordance with the policy for the publication of Council documents, access to Council documents shall be granted to third parties, on request and without prejudice to the provisions of the Data Protection Rules of the Administrative Council (CA/D 2/23), in line with the category to which the document has been allocated:

- (a) Public documents are published on the Organisation's website and are freely accessible.
- (b) Restricted documents are disseminated only to Council meeting participants and are not made available to the public or disclosed to third parties. Exceptionally, however, such a document may be disclosed if, in the Council's assessment, the disclosure of the document would not seriously undermine the Organisation's decision-making process or the international relations between any of the Contracting States and the Organisation, or between the Contracting States.
- (c) Confidential documents are not made available to third parties. Exceptionally, however, such a document may be disclosed if, in the Council's assessment, a requester has successfully demonstrated that the document sought is patently relevant to their case in the context of litigation proceedings and that no higher interest stands in the way of its disclosure.

Article 3

- (1) Where a third party submits a request for access to a Council document directly to the Organisation, the Council Secretariat shall process the request in accordance with Article 2.
- (2) If the request relates to a public document of the Council, the Council Secretariat shall, in accordance with Article 2(a), refer the third party to the Organisation's website.
- (3) If the request relates to a restricted or confidential document, the Council Secretariat shall assist the Chairperson of the Council in drawing up a proposal on how to handle the request. Based on the Chairperson's proposal, the Council shall, in accordance with Article 2(b) and (c), decide to grant access to the Council document or reject the request.
- (4) Once a decision has been taken, the Council Secretariat shall inform the third party accordingly.

Article 4

- (1) Where a request for access to a Council document is received by a delegation of a Contracting State, and without prejudice to the fact that the treatment of such requests is to be determined according to the rules applicable under respective domestic law, the following shall apply:
 - (a) Third parties requesting access to public documents of the Council may be referred to the Organisation's website.
 - (b) Upon receipt of a request for access to a restricted or confidential document, the delegation should contact the Council Secretariat for the Council's guidance. The Council Secretariat shall assist the Chairperson of the Council in drawing up a proposal on how to handle the request. Based on the Chairperson's proposal, the Council shall, in accordance with Article 2(b) and (c), provide its guidance as to how to respond.
 - (c) Once the Council has provided its guidance, the Council Secretariat shall inform the delegation accordingly. The delegation or the initial recipient of the request may then further process the request in accordance with their domestic law.
- (2) If the recipient of a request for access to a Council document is a public authority in a Contracting State, the receipt of the request should be communicated to the Council Secretariat through the delegation of that Contracting State.
- (3) The practices outlined in this Article shall apply, *mutatis mutandis*, to States with right of accession (Article 166 EPC) as well as observers (Article 30 EPC) in respect of documents to which they have been granted access through their participation in Council meetings.

Article 5

- (1) If a request under Article 3 relates to a non-confidential document which was submitted to the Council before this policy entered into force and has remained unpublished, the Council Secretariat shall ask the Council to decide whether or not it shall be disclosed to the requester and shall inform the requester accordingly.
- (2) If a request under Article 4 relates to a non-confidential document which was submitted to the Council before this policy entered into force and has remained unpublished, the Council Secretariat shall ask the Council to provide guidance as to whether or not it should be disclosed to the requester and shall inform the delegation accordingly.

Article 6

This decision enters into force on [date of decision].

Done at Munich, [date of decision]

For the Administrative Council
The Chairperson

Josef KRATOCHVÍL

ANNEX 1 COMPARISON BETWEEN EXISTING AND NEW TEXT

Existing text	New text
	Article 12a – Documents
	(1) Each document submitted to the Council shall be allocated to one of the categories designated in the policy for the publication of Council documents. The policy shall be established by a decision of the Council.
	(2) Council documents may be made accessible to third parties on request in accordance with the rules set out in the policy for access to Council documents. The policy shall be established by a decision of the Council.
Article 13 – Confidentiality	Article 13 – Confidentiality
(1) All persons taking part in meetings and receiving documents shall preserve the confidentiality of proceedings and votes relating to Category C items (Article 9, paragraph 3), of associated documents and of other documents marked confidential, regardless of the manner of their transmission.	(1) All persons taking part in meetings and receiving documents shall preserve the confidentiality of proceedings and votes relating to Category C items (Article 9, paragraph 3), of associated documents and of other documents marked confidential, regardless of the manner of their transmission.
(2) Non confidential documents may be made available to third parties or to the public, unless the Council decides otherwise in a particular case.	deleted
(3) Persons taking part in meetings shall, as such, have no right to inspect the files of, or to request any information concerning, European patent applications or patents, except insofar as they are available to the public.	(2) Persons taking part in meetings shall, as such, have no right to inspect the files of, or to request any information concerning, European patent applications or patents, except insofar as they are available to the public.
Article 14 – Committees, working parties and other subsidiary bodies	Article 14 – Committees, working parties and other subsidiary bodies
(1) The Council may establish committees, working parties or other subsidiary bodies to advise it on particular questions.	(1) The Council may establish committees, working parties or other subsidiary bodies to advise it on particular questions.
(2) Unless provided otherwise in this article, each subsidiary body shall establish its own procedure on a proposal from its chairperson.	(2) Unless provided otherwise in this article, each subsidiary body shall establish its own procedure on a proposal from its chairperson.
(3) The President of the European Patent Office shall have the right to attend, or be represented at, any meeting of a subsidiary body.	(3) The President of the European Patent Office shall have the right to attend, or be represented at, any meeting of a subsidiary body.
(4) Documents submitted to a subsidiary body and reports on its deliberations shall be drawn up in English, French and German.	(4) Documents submitted to a subsidiary body and reports on its deliberations shall be drawn up in English, French and German.
(5) Article 1, paragraph 4, Articles 2 and 4, paragraph 4, and Articles 6, 7, 8, 10, 11, 13, 15a, 16 and 17 shall apply, where possible, to subsidiary bodies <i>mutatis mutandis</i> .	(5) Article 1, paragraph 4, Articles 2 and 4, paragraph 4, and Articles 6, 7, 8, 10, 11, 12a, 13, 15a, 16 and 17 shall apply, where possible, to subsidiary bodies <i>mutatis mutandis</i> .