

# EPLAW

## European Patent Lawyers Association

Association européenne d'avocats spécialisés dans le droit des brevets d'invention  
Europäische Vereinigung der im Patentrecht spezialisierten Rechtsanwälte

Amsterdam, 29 December 2014

To the Representatives of the Delegations to the Administrative Council of the EPO

Dear Representatives,

1. EPLAW is the association of European lawyers specialized in patent matters. Its members represent parties in patent litigation before the national courts in Europe and before the European Patent Office (EPO). EPLAW is actively engaged in shaping the Rules of Procedure of the future Unified Patent Court (UPC) and in training the future UPC judges.
2. EPLAW is aware of the Administrative Council's meeting of 10 and 11 December 2014 and has read the relevant press communiqué dated 12 December with interest. The subject of that communiqué largely is the relationship between the members of the Boards of Appeal of the EPO and the management of the EPO. That relationship has received a lot of public attention in the days prior to the Council meeting; not only in the press and on various legal blogs, but also – and publicly - from members and external members of the Enlarged Board of Appeal.
3. This public attention regarded certain measures, taken at the request of the President of the EPO and effected on 3 December 2014, vis-à-vis a member of the Boards of Appeal of the EPO (BoA) which member is apparently accused of having disseminated defamatory material. As the various reports convey, an EPO investigative unit took the relevant member's computer from him, escorted him out of the EPO office building, and ordered him to work from home until further notice.
4. EPLAW notes with approval that the Council took the opportunity during its meeting to reiterate its full endorsement of and support for the principle of independence of the members of the BoA as set out in Article 23 EPC and as generally embodied in internationally recognised principles.
5. The independence of the members of the BoA is indeed a cornerstone of the authority of the EPO. In the words of a former member of the Enlarged Board of Appeal: "*The independent status of the individual members of the Boards of Appeal is provided by the EPC and is essential to the maintenance of public confidence in the appeal system.*" (Gerald Paterson, *The European Patent System*, 2001, p. 138). It is at the same time generally accepted that members of the BoA are "*judges in all but name*" (the phrase was coined by the High Court of England & Wales, see [1997] R.P.C. 245).
6. The independence of the judiciary is also at the core of the procedural guarantees enshrined in Article 6(1) of the European Convention on Human Rights (ECHR) and Article 10 of the Universal Declaration of Human Rights. Article 6(1) ECHR requires independence of judges not only from parties, but also from the executive branch (see ECtHR 16 September 2003, No. 41134/98). In other words, the separation of powers is an important characteristic of judicial independence.
7. EPLAW is of the opinion that this judicial independence is guaranteed only when the power to suspend or to remove a judge is with his peers, and not with an executive or administrative body. In this respect

---

Siège : Avenue Louise, 149 (boîte 20) 1050 BRUXELLES - BELGIQUE  
Association sans but lucratif (Loi du 27 juin 1921)  
VAT-no. BE0476.673.737

President : Richard Ebbink advocaat (NL)  
Vice Presidents : Penny Gilbert solicitor (GB)  
Klaus Haft Rechtsanwalt (DE)  
Secretary : Sabine Agé avocat (FR)  
Treasurer : Jonas Westerberg advokat (SE)

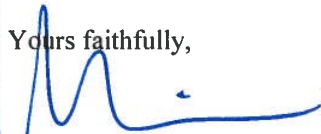
Members of the Board : József Tólas ügyvéd (HU)  
Giovanni Casucci avvocato (IT)  
Rainer Hilli asianajaja (FI)  
Thierry Calame Rechtsanwalt (CH)

Article 11(4) EPC – which provides the Administrative Council with the power to exercise disciplinary authority over the members of the BoA – falls short.

8. Moreover, the Guidelines for Investigation at the EPO promulgated in 2013 may have caused the President of the EPO to believe that the executive of the EPO has the power to temporarily take a BoA member's computer from him and to order a house ban against him. If that is so, these Guidelines would contravene Article 11(4) EPC and as such fall short of guaranteeing judicial independence even further.
9. EPLAW further notes from the Council communiqué that, at the President's request, the Council decided to provisionally suspend the relevant member from active duty until 31 March 2015 and that it requested the EPO investigation to be completed as soon as possible so as to allow the Council to decide on the next steps.
10. Whatever the outcome of the hopefully expeditious investigation and the Council's next steps, EPLAW urges the Council to use this opportunity to propose an amendment to Article 11 EPC and in any event to critically review the Guidelines for Investigation so as to avoid any further concern with respect to the principle of judicial independence at the EPO.

On behalf of the Board of Directors of EPLAW,

Yours faithfully,

A handwritten signature in blue ink, appearing to be 'Richard Ebbink', written over a vertical blue line that serves as a separator.

Richard Ebbink  
(President)

- cc. the President of the EPO
- cc. members of the Enlarged BoA of the EPO (Gabriele Alt et al.)
- cc. external members of the Enlarged BoA of the EPO (Christopher Floyd et al.)