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Mr Benoît Battistelli
The President

Mr Jesper Kongstad
The Chairman of the Administrative Council

European Patent Office
80298 München

29 June 2015

Reform of the BOA – User Consultation

Dear President Battistelli,

Dear Chairman Kongstad,

Thank you for your letter of 29th April, 2015 concerning the above subject. **epi** is grateful for the opportunity to comment on the points raised in your letter.

We note that your proposal is that you will collect all comments on your consultation and then provide an anonymised report. We feel that the position **epi** takes should be known and we intend to publish it on our website and in our journal. In the meantime we would appreciate if all the members of the Administrative Council (“AC”) could receive a copy of our comments.

epi has considered the proposal for reform of the Boards of Appeal as set out in CA/16/15. We believe that the most important point to deal with is the independence of the Boards. We agree with much of the content of CA/16/15, and we have some further proposals.

The basic concept in our paper is that the day-to-day management of the Boards of Appeal should be carried out by a Presidium, including external members and chaired by the newly-proposed President of the Boards of Appeal, with users having observer status. The Presidium would be responsible to the AC who would be represented by a BOAC, an advisory committee consisting of three members of the Administrative Council and four external members, with users having observer status. The BOAC would advise the AC since the AC would have to formally take all decisions. We envisage that the BOAC would provide to the Presidium broad objectives to be met but would not make detailed prescriptions regarding the operation of the Boards of Appeal.

We feel it is important to have a further body responsible for appointments/reappointments of members and chairmen for the Boards of Appeal and the Enlarged Board of Appeal as the

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presence of members of the AC in the BOAC might be seen as limiting the independence of the Boards of Appeal.

In general, we consider that it is important to ensure that the Boards of Appeal are perceived to be independent. We hope that our answers to the questions raised in the consultation, which are found in the Annex, will be useful as well our general comments on CA/16/15.

Yours sincerely

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke extending to the right.

Antonius Tangena
President

Attachments: - **epi** Response to the User Consultation
- **epi** Position paper on CA/16/15



29 June 2015

Reform of the Boards of Appeal
epi Response to the User Consultation

Question A: Position of the Boards of Appeal – Independence

- Appointment and Reappointment Procedure

Responsibility for recruitment, appointment and re-appointment of members of the Boards and the Enlarged Board will still be with the Administrative Council (AC), but a Judiciary Committee (JC), a body similar to the bodies which carry out judicial nominations in most contracting states, should support the AC and propose members for appointment/reappointment. The JC should consist of a majority of external members of judicial appointment bodies in a contracting state or for a European tribunal or court and some members of the Boards of Appeal (BoA) elected by their peers; users would not have observer status. The Chairman would be elected by the JC from among the external members to be appointed by the AC.

The AC should, except in exceptional circumstances, accept the decisions made by the JC. (In the longer term, if the EPC is amended, the power to make decisions in this respect should be given to such a JC.) The AC could provide to the JC broad criteria regarding appointments and re-appointments. In connection with making re-appointments, the JC should take into account proposals and appraisals from the Presidium.

- Attracting more External Members in the BoA and Enlarged Board of Appeal (EBoA)

epi believes that the panels of the EBoA dealing with petitions for review should comprise external members in light of the criticism of having review cases dealt with solely by internal members. We refer you to our letter of ... copy of which is attached.

- Conflicts of Interest

The rules on conflict of interest should only require that a member of a Board has no interest in any case on which he has to make a decision. However, there does not seem to be any real difficulty in having this as the rule.

The question about conflicts of interest also relates to attracting external members. An external candidate will no doubt have a position in his or her home country, from which he or she will have



to resign. No doubt, such candidates would envisage, after completing a term as a Board member, returning to his or her former position or a similar position. If any rules on conflict are too strict, then it would be difficult for such a person to return to his or her former position or a similar position. Therefore, any rules on conflict of interest need to be drafted to be as limited as possible to ensure that the Boards are in fact independent and are perceived to be independent. However, there should be differences between those applying to members in post and members no longer in post.

One particular area of concern for **epi** is that the rules on conflict should not be so broad as to exclude members of the Boards taking part in general educational matters. There possibly might be a conflict of interest if a Board member gave private education to one person or one firm. However, **epi** cannot see how there could be any conflict of interest arising from a Board member giving a general lecture on appeal procedures to an unrestricted audience.

There is always a tendency to try to write detailed rules to cover all possible situations. These attempts generally fail. **epi** considers that it is preferable to provide guidance against which Board members can judge any particular situation. It is suggested that it should be possible for any Board member to consult the proposed Boards of Appeal Committee (BOAC) about any particular situation.

Question B: Work of the Boards of Appeal - Efficiency

- Do you have any suggestions on how the efficiency of the Boards of Appeal could be improved?

This question would appear not to be linked to the independence of the BoA. In fact, it might even be seen to limit the independence of the Boards of Appeal.

We suggest that the AC should provide the management of the Boards, which we think should be the Presidium, with suitable broad guidelines and then to require the management to report to the BOAC, if necessary with suggestions for rule changes or other measures.

- What would in your opinion be the optimal length of the proceedings?

epi believes that the length of proceedings is not directly linked to efficiency, for example in case of insufficient staffing of the Boards. Moreover the question asked cannot be answered in a general sense. Each case is different and so each case has its own answers to the questions. The cases before the Boards vary from simple cases, such as some appeals from an Examining Division, where there may only be one issue and a few documents, to very complex cases, such as some appeals from an Opposition Division, where there may be many parties, many issues, large numbers of documents, many auxiliary requests and very complicated technology. Moreover, it is not possible to judge the complexity of a file by its size. Cases with not many documents and not



many issues can turn out to be very complex while a case where there is a vast amount of documentation may, in the appeal, be limited to a single point. Thus, it is not possible to say what the optimal length of the proceedings is. The only general principle is that justice delayed beyond the parties' or the public's expectations is justice denied.

There is also the question of the technology involved. In the consumer electronics field, technology moves on very quickly. In cases in this field, the parties may want a final decision in a very short period of time. However, in the pharmaceutical field, where obtaining approval to market a new drug can take a long time, there may be no need for a decision until after the drug has been approved. The need for fast proceedings differs from case to case and **epi** suggests that more consideration should be given to a system like PACE, taking better account of the needs or even the wishes of the parties. Today, prioritization and acceleration can be requested, with variable success, but the request has to be motivated and is made public.

Question C: Work of the Boards of Appeal – Procedure

- Which changes to the procedures could contribute to increasing efficiency and/or predictability and transparency of proceedings?

This question also would appear to have no link with the independence of the BoA.

The main problem with the procedure before the BoA is that, in fact, there are many procedures. The present Rules of Procedure contain many rules which leave each Board a large amount of discretion. This means that there are a large number of different procedures as each Board has its own procedural traditions. **epi** considers that the degree of discretion the Boards have regarding procedure should be more limited. However, the degree to which it should be limited is difficult to gauge.

With the new structure, any proposal made for a change of the Rules of Procedure (RoP) will be discussed in the BOAC with the involvement of users. If fundamental changes are considered, a user consultation should be held.

Proposals for amendments of the RoP should come from the Presidium, possibly triggered by very general guidelines set by the BOAC. To increase involvement of all stakeholders, users should have observer status in the Presidium. At present, the RoP are drafted by the Presidium with no user involvement. By the time that the Rules reach the AC, there is very little time for any user input and generally it has no effect.

- Do you have any suggestions of improvement of the procedures before the Boards of Appeal?



The one change in procedure that is considered would make a significant difference to harmonising procedure would be to require all Boards to issue a detailed preliminary opinion before oral proceedings. This should happen in sufficient time to allow parties to withdraw their appeal whilst allowing a reallocation of the date for oral proceedings.

The rule that the entire case of a party should be contained in the grounds of appeal or in the response thereto is already a good rule.

Furthermore, a workshop could be organized with members of BoA, users of the system and members of judiciary panels (such as courts dealing with infringement and/or validity of patents) to analyse their respective procedures and discuss best practices.

Question D: Boards of Appeals Committee (BOAC)

- Do you think that the users should be given a seat in the BOAC?

It is considered that the BOAC will be an advisory sub-committee of the AC, such as the CPL, BFC or TOSC. **epi** is of the view that, as in these committees, there should be no user representatives sitting on the BOAC. Nonetheless, user representatives should be allowed as observers at meetings of the BOAC.

- Would you be in favour of the BOAC carrying out surveys among users concerning the general functioning of the Boards of Appeal with a view to make general proposals for improvements?

No value is seen in general surveys. As noted above, all cases are different and so a general survey will not provide any useful results. It is worth pointing out that the number of attorneys who appear before BoA more than once or twice per year is relatively low. It may be less than 500. It would therefore be more sensible to have a user group, drawn from, or consisting of, attorneys who have appeared before BoA a number of times, which could be consulted electronically by the BOAC. Such a consultation would be seen of particular value if fundamental changes are envisaged.

- Would you in particular be in favour of the BOAC having the possibility to make proposals for changes to the Rules of Procedure of the Boards of Appeal?

According to the EPC, the Presidium shall adopt the RoP and it is considered that most changes to the Rules of Procedure should originate with the Presidium. It is suggested that the BOAC should also have the possibility to initiate changes to the RoP. However such changes should then be submitted to the Presidium for opinion and discussed within the BOAC and also with user representatives before they are submitted to the AC for approval. The AC would obviously take into account any comments of the Presidium before deciding on such changes.



Question E: **Proceedings of petitions for review**

In light of the criticism of having review cases dealt with solely by internal members it is considered that it should be mandatory for external members to be present in panels of the Enlarged Board constituted for review cases. Such appointments should be made by the Presidium.

Question F: **General**

The proposal for a structural reform of the BoA is very much welcomed. The proposal is aimed at making the BoA's organisational and managerial autonomy stronger and more visible, while at the same time increasing their efficiency. The proposal made (CA 16/15) is a good basis for further action. Important issues are the creation of a new body for appointment/reappointment of BoA members, the creation of a new advisory committee – the BOAC – and involvement of all stakeholders in the discussion when amending the RoP.



29 June 2015

epi Position Paper on CA/16/15

1. Opening Remarks

1.1. **epi** generally welcomes CA/16/15 which contains a proposal for a structural reform of the Boards of Appeal (BoA). The proposal is aimed at making the BoA's organisational and managerial autonomy stronger and more visible, while at the same time increasing their efficiency (point 11 CA/16/15). The European Patent Office (the Office) is thanked for all the work it has carried out to prepare the proposal. **epi** considers that the proposal is a good basis for further action.

1.2. However, **epi** considers that the proposal in its present form contains provisions which may prevent it from serving its purpose. Comments on the points where **epi** has concerns are set out below.

1.3. **epi** considers that the issues of independence and efficiency should not be dealt with together, but the focus should be on the structural changes. With the proposed structure, the Presidium of the BoA should be responsible for managing the efficiency of the proceedings, supervised by the Boards of Appeal Committee (BOAC) and should receive a budget that will allow for sufficient personnel and technical support.

1.4. Also, **epi** considers that, in order for the proposal to become effective, it will be necessary for there to be amendments to the Rules of the EPC, for instance Rules 9(1) and 12(1), and for further Rules to be made, for instance under Article 11(3) EPC, in order to put the proposal into effect. As the proposal does not contain any suggestions for Rule amendments, **epi's** position cannot be fully formed and **epi** looks forward to seeing a proposal for the relevant Rule amendments.

1.5. The proposal also contains indications that it will be necessary to amend the Service Regulations for BoA members. As the present Service Regulations are not publicly available and as there are no proposals for revision of the Service Regulations for BoA members, it is not possible to comment on these indications. However, **epi** considers that these are crucial for the success of the proposal, especially for recruitment to the BoA, and so should be published as soon as possible so that interested parties can comment.

1.6. **epi** further notes that the proposal refers to diverging practices between different Boards. **epi** in this regard considers that this should be dealt with by the Presidium of the BoA with consultation of users and with a focus on procedural harmonisation.

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2. With regard to the Reform of the Institutional Framework

2.1. **epi** appreciates that, due to the presence of Article 15 EPC, it is not at present possible for the BoA to be organised as a separate organisational entity outside the Office but within the European Patent Organisation (the Organisation) (point 14 of CA/16/15). However, **epi** considers that, once the new system has been put in place, tested and validated, the EPC should, if necessary, be amended to make the system a part of the EPC. In this respect, **epi** considers that it is sensible to test the system before amending the EPC to ensure that the system does work as envisaged before it is made almost permanent by an amendment of the EPC.

2.2. **epi** considers that the Administrative Council (the AC) should make a binding commitment to review the new system after a period of, say, three years and, if appropriate, to initiate an amendment of the EPC after a period of, say, five years.

3. Delegation

3.1. **epi** notes that the proposal at various places refers to the President of the Office “delegating” or “waiving” some of the powers given to him by the EPC. The ability of the President of the Office to delegate powers is provided for in Article 10(2)(i) EPC. However, it is not clear what “delegate” means in this Article. The usual meaning of “delegate” implies that the person delegating the powers still retains responsibility for those powers and can still use those powers should it appear to him to be necessary. Therefore, if the President of the Office merely delegates the relevant powers in this sense, then one of the objectives of the proposal, to make the President of the BoA responsible for the management of the BoA, cannot be achieved as that responsibility will remain with the President of the Office. **epi** therefore supports the suggestion raised at the most recent AC meeting that a binding statement or “concordat”, similar to the one referred to by the UK delegation, between the AC, the President of the Office and the President of the BoA be entered into which makes it clear that the President of the Office has given up his responsibility and powers in respect of the BoA. If this is not done, it will still appear that the BoA are not independent of the President of the Office.

4. President of the BoA (point 15 of CA/16/15)

4.1. **epi** welcomes the creation of this new position but refers to the point made above regarding delegation. It seems necessary to define clearly the concrete responsibilities and powers which will be given up by the President of the Office and taken over by the President of the BoA. These should include, in particular, the responsibility to propose re-appointment of BoA members and to carry out staff appraisals. **epi** considers that the President of the BoA should work with a Presidium (in a revised composition, see below).

5. The Budget of the BoA

5.1. According to the proposal, the President of the BoA will be entrusted with the task of preparing a budget for the BoA which will be included by the President of the Office in the draft budget he submits to the AC for approval (point 21 of CA/16/15). From the text of the proposal



(points 22, 28 and 32 of CA/16/15), it seems that the President of the Office will have the right to comment on the BoA budget. **epi** considers that this is a sensible provision but also considers that the President of the Office should not be entitled to make any amendments to the BoA budget. It should be made clear, for instance in the “concordat”, that responsibility for approving or amending the BoA budget should be entirely with the AC so that there is no appearance that the President of the Office has even indirect control of the BoA.

5.2. Since the budget of the BoA will be incorporated in the overall budget, it will be considered by the Budget and Finance Committee (BFC) of the AC and so the AC will be in a position to receive advice on the BoA budget from the BFC as well as the President of Office, the President of the BoA and the BOAC (see below).

5.3. The proposal further states that the first draft budget for the BoA will be prepared solely by the President of the EPO (point 21 of CA/16/15). It seems that the first budget could be critical to the success or failure of independence of the BoA and so **epi** considers that the first budget should be prepared by the present VP DG3 with the assistance of the President of the Office.

6. Constitution of a Judiciary Committee (point 24 of CA/16/15)

6.1. The proposal states that a BOAC will be set up as a subsidiary body of the AC (Article 14 of the Council's Rules of Procedure). Since the proposed seven-membered BOAC will consist of three members of the AC and will be chaired by a member who is also a member of the AC (point 31 of CA/16/15), the BOAC would not be independent of the AC. **epi** believes that this would give the appearance that the AC is exercising political control over the BoA and therefore does not support the suggestion. Rather, **epi** considers that an independent Judiciary Committee (JC) should be constituted that is responsible for appointments/reappointments.

6.2. The JC should consist of nine members, four of whom should be members of the BoA elected by the BoA and five of whom should be members of judicial appointment bodies in a contracting state or for a European tribunal or court or who have expertise in HR matters. The five members should be appointed by the AC. The Chairman would be elected by the Committee from among the five appointed members.

6.3. **epi** considers that the JC should be similar to bodies existing in many contracting states, such as the UK, Belgium and Spain, which carry out judicial appointments. Thus, the JC should be responsible for providing nominations to the AC for appointment and re-appointment of the President of the BoA, the members and Chairmen of the BoA and the members, both internal and external, of the Enlarged Board of Appeal. In providing the nominations, the JC would be required to take into account proposals for re-appointment and appraisals made by the Presidium. The JC would be responsible for recruiting new members of the BoA. Although responsibility for appointing and re-appointing members and Chairmen would have to remain with the AC until the EPC is revised, **epi** considers that the AC should accept the nominations of the JC unless there are exceptional circumstances in an individual case.



6.4. True independence of the BoA would imply appointment until retirement at a fixed age. (This is effectively the situation as it is at present.) However, in light of Article 23(1), this is not possible. Therefore, **epi** considers that any member or Chairman should be re-appointed automatically unless there is an adverse opinion from the Presidium or the JC. As this would not change the present situation, it would not lead to any reduction in independence.

6.5. The AC should provide to the JC published criteria, for instance regarding conflicts of interest, for appointment as members or Chairmen of BoA and members of the Enlarged Board of Appeal. The JC may propose amendments to the criteria for approval by the AC.

6.6. **epi** considers that responsibility for disciplinary measures for BoA members should ultimately remain with the AC, as under the present system. Under the present EPC, the report would have to be submitted to the AC for decision. If the EPC is amended, the power to take disciplinary measures should be given to the Disciplinary Committee. The President of the BoA or the Chairman of the AC (under the present EPC) and the Chairman of the BOAC (under an amended EPC) should have power to act in urgent cases.

6.7. **epi** further considers that the Presidium should have responsibility for management of the BoA, including, for instance, proposing to the AC or BOAC salary levels for the member of the BoA, selecting panels for the BoA and the Enlarged Board of Appeal, drafting rules necessary for the organisation of the BoA's work and for enhancing their independence, a code of conduct, internal instructions, principles for establishing performance criteria and general criteria for case distribution and checking that there are no conflicts of interest (point 26 of CA/16/15). The management of the BoA would need to be reviewed at a high level by the BOAC.

6.8. No member of the Presidium should be a member of the BOAC or the JC. It is also suggested that no member of the Presidium (except the President of the BoA) or the BOAC should remain in position for more than five years and that replacement of members should take place in stages to ensure that there is continuity of membership.

6.9. **epi** considers that there should be external input into the Presidium. It is therefore suggested that the Presidium should consist of the President of the BoA, five Chairmen of the BoA, five members of the BoA and two or three of the external members of the Enlarged Board of Appeal. The members of the Presidium (apart from the President) would be elected by their peers (respectively the members of the BoA and the external members of the Enlarge Board of Appeal).

6.10. **epi** further considers that the Presidium and the BOAC should be set up in a similar manner to the AC and its bodies so that there are user observers at all meetings of the Presidium and the BOAC except if they are considering an individual disciplinary case.

6.11. The Presidium should report to the AC through the President of the BoA on its management activities. The AC should receive an opinion on the report from the BOAC.

6.12. **epi** welcomes the suggestion that there should be proposals for the appointment of external members to hear review cases in light of the criticism of having review cases dealt with solely by



internal members (point 29 of CA/16/15). **epi** considers that it should be mandatory for external members to be present in panels of the Enlarged Board constituted for review cases, as set out in our letter of 6th February, 2015. Such appointments should be made by the Presidium.

7. Rules of Procedure for BoA and EBoA

7.1. **epi** considers that, as in other systems, the legislator AC should approve any amendment of the Rules of Procedure on a proposal of the Presidium of the BoA and after consultation of stakeholders. The procedure should be the same as that for amending the Implementing Rules where any proposed amendment is discussed in the CPL as an advisory committee and is adopted by the AC.

7.2 It is suggested that the BOAC should also have the possibility to initiate changes to the RoP. In such a case, the BOAC should submit a proposal to the Presidium for opinion and then discuss it within the BOAC and with user representatives before it is submitted to the AC for approval.

8. With regard to the Conflicts of Interest

8.1. Special regulations concerning possible conflicts of interest for members of the BoA should be designed in a way that avoids not only real conflicts but also any perception of conflict or partiality of the judiciary (point 44 of CA/16/15). However, these rules do not need to be as wide-ranging as suggested in the proposal, in particular with reference to a BoA member's family. The BOAC should be tasked with producing the regulations on conflict of interest for approval by the AC.

8.2. While a person is a member of a BoA, the rules on conflict of interest should be reasonably strict. However, these rules should not be so strict once a person is no longer a member of a BoA, particularly after a certain period (perhaps from 12 to 24 months) following departure from the BoA. If the rules applying to ex-members of the BoA are too strict, it will not be possible for such persons, especially members who joined the BoA from outside the EPO, to obtain further employment. This will discourage persons of high calibre from applying for positions as members of the BoA.

8.3. The proposal indicates that CA/D 10/14 will not apply to the BoA and that there will be "specific provisions" regarding external activities. **epi** considers that it will be necessary to see proposals for an AC decision regarding CA/D 10/14 and the specific provisions to ensure that the objectives of the proposal are achieved. These provisions should not prevent BoA members from giving lectures but should provide for a point of reference to check whether the provisions are complied with.

9. With regard to the Reform concerning the EPO Premises

9.1. **epi** is not in favour of relocation of the BoA. In **epi**'s view, it is far more important to set up a legal system where there is effective organizational separation of the BoA from the Office than to have physical separation. Moving the BoA to a different building, let alone to another city, would be



an expensive gesture, but would not contribute to the legal independence of the BoA. The EPO branches in The Hague and Berlin are physically separated from the EPO branch in Munich but are still under single control.

9.2. In this regard, the proposal states that the presence of the BoA in the same premises as other EPO departments which are taking decisions potentially subject to review by the BoA (i.e. examiners) can give rise to concern. Nonetheless, physical separation of BoA and examiners is already in place. There are a very few occasions where Opposition Divisions hold oral proceedings in Room 102 or Room 128 but the examiners involved are not permanently present in the Isar Building. There are also a few members of DG5 who are located in the Isar building and who occasionally serve as legal members on opposition divisions. However, these occasional occurrences do not detract from the fact that the BoA are effectively isolated from the EPO staff who deal with examination and oppositions.

9.3. Besides, if it were to be decided to move the BoA to another city (e.g. Berlin), there would be a high risk of losing a great number of experienced BoA members who have families and social contacts in Munich.

10. With Regard to Support Staff for the BoA

10.1. **epi** considers that selection and recruitment of support staff for the BoA should be the responsibility of the President of the BoA. However, the BoA should not set up its own HR system but should use the Office's existing systems. If any assignment of a support staff member into or out of the BoA is contemplated, it should be mutually agreed between the President of the Office and the President of the BoA.

10.2. The system put in place for appointments of members of the BoA and support staff for the BoA should not prevent examiners from the Office taking up limited-term internships in the BoA.

11. The Proposal Does not Address Consistency among the BoA

11.1. It seems absolutely necessary to ensure that the proposed independence of the BoA from the Office does not mean that the BoA will end up being independent from each other. Some regard lack of consistency between BoA as being a greater problem than independence of the BoA. It is essential that each Board decides each case solely on its merits. However, it is equally essential that the processes and procedures are the same between all the BoA. The tendency for individual Boards to have their own (unwritten) processes and procedures should be reversed. The Rules of Procedure of the Boards of Appeal should be amended, with the benefit of user input, to set out a consistent process to be followed by all BoA. The AC could provide the management of the Boards, which we think should be the Presidium, with suitable broad guidelines and then require the management to report to the BOAC, if necessary with suggestions for rule changes or other measures.



However, this should be carried out by the Presidium, not by the AC. The AC should be able to set very general criteria, such as the requirement for high quality decisions in a reasonable time, the only general principle being that justice delayed beyond the parties' or the public's expectations is justice denied. However, responsibility for meeting these general criteria should be with the Presidium and the report of the President of the BoA should include a report on how the BoA are meeting these criteria.

12. The Proposal Does not Address the Vacancies in the Present BoA

12.1. **epi** has noted that there are a number of open positions in the present BoA and is concerned that this may lead to delays in processing of appeals. Since the present proposal may not come into force for some time, the AC is requested to consider this problem on an urgent basis. In particular, the appointment of Chairmen, who run each of the BoA, and legal members, who can be allocated to a number of BoA, would assist in further reducing the delays in processing appeals.