

Battistelli and the illusory independence of VP3

The issue

The structure of the EPOrg, with the Boards of Appeal being embedded within the Office, has long been a subject of discussion. In 2004 a proposal¹ to make DG3 more independent was discussed in the Administrative Council. The Council came to the conclusion that the project should be put on the agenda of a diplomatic conference² but this has never happened.

Recent developments

The issue has now been put back into the picture by an interlocutory decision of the Enlarged Board of Appeal³. The Enlarged Board of Appeal is traditionally chaired by the Vice-President of DG3 (VP3). VP3 is nominally independent in this function, despite being a member of the Management Committee (MAC).

This arrangement has been challenged by a petitioner (a patentee) who argued that the function of Chairman of the Enlarged Board of Appeal is not compatible with the role of VP3 in the management of the Office and that this double role could lead to conflicts of interest. The Enlarged Board of Appeal (with its usual Chairman replaced) agreed with the petitioner noting that indeed e.g. instructions from the President regarding efficiency goals for DG3 could conflict with the obligation of VP3 as a Chairman of the Board to protect rights of parties in proceedings, even if these could possibly decrease efficiency.

It will take some time for the full consequences of the above decision to become clear. The issue is not trivial. As pointed out in a British IP blog⁴ the question of the independence of the Boards of Appeal has been the first plea in the actions of Spain *against* the regulations on the unitary patent.

“Strengthening” the GAC

The one thing that is clear is that this will cause some serious headaches for Mr Battistelli. Mr Battistelli's decision to put the MAC, *including* VP3, into the GAC upset the fragile balance cautiously kept by his predecessor. We note that as a Member of the GAC VP3 had to give an opinion on the proposal of the President to introduce the EPO Investigation Guidelines that also apply to the Members and Chairs of the Boards, thereby potentially compromising their independence. VP3 had to choose between the interests (instructions?) of the President and those of his staff. He chose to support the President. By “strengthening” the GAC Mr Battistelli weakened the position of VP3.

¹ [See CA/46/04](#)

² [See CA/85/04](#)

³ [See R 0019/12](#);

<https://register.epo.org/application?documentId=EV0ZJBW50569684&number=EP99947419&lng=en&npl=false>

⁴ <http://www.eplawpatentblog.com/eplaw/2014/05/epo-vice-president-dg3-as-chairman-of-the-enlarged-board-of-appeal-conflict-of-interests-between-the.html>

The EPO and fundamental rights

Arguments brought forward in the above and in another pending procedure may have further consequences for the patent procedures in the Office. In a legal opinion⁵ written by a highly respected judge⁶ at the German constitutional court (“Bundesverfassungsgericht”) that was submitted in this context, comments were made on the right to due process prescribed by the European Convention of Human Rights (ECHR; in German: *EMRK*). These include the right to an independent and impartial Court, where complaints are treated within reasonable time and in fair, public procedure.

According to the legal opinion the obligation of the Member States to respect such Conventions applies also in the context of international organisations. We cite: “*Anders gewendet bedeutet dies, dass alle Vorschriften des EPÜ ... im Lichte und nach dem Gehalt der Gewährleistungen der EMRK gehandhabt und ausgelegt werden müssen, weil sich die Vertragsstaaten des EPÜ aufgrund ihrer völkerrechtsvertragsrechtlichen Verpflichtungen mit dem Beitritt zur EMRK nicht von diesen befreien durften*“ (p. 93).

This is exactly what SUEPO has argued for years !

The legal opinion also criticised DG3 for its tendency to produce rather minimal minutes of hearings and for the sometime considerable delays in sending those minutes. The failure of the EPO to respect the ECHR in its dealings with staff seems, however, to be of a more serious nature than a mere 6 months’ delay in sending minutes. SUEPO has repeatedly criticised the unacceptable delays in the appeals procedure. We note that the independence of the Tribunal’s judges is in serious doubt⁷ and that no part of the procedure other than the judgment is public. Mr Battistelli’s new strike regulations and sick-leave verifications also seem to offend fundamental rights such as of freedom of association and inviolability of the home.

The impact

We expect a renewed debate about the structure of DG3 and the procedural rules that the EPO has to respect when dealing with applicants and patentees.

SUEPO has filed lawsuits challenging the EPO’s lack of respect for the ECHR and other international conventions. Mr Battistelli likes to dismiss such complaints as coming from a small vociferous fringe of radicals. R0019/12 demonstrates that he is wrong. The concerns of SUEPO are shared by others. We expect that a wider discussion of these problems will lead to them being, finally, acknowledged and solved.

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⁵ [ex14126cp](#)

⁶ http://de.wikipedia.org/wiki/Siegfried_Bro%C3%9F, <http://www.zak.kit.edu/1173.php>

citation from the latter: “Prof. Dr. Siegfried Broß ist Richter geworden, weil er wollte, dass sich der Stärkere nicht allein aufgrund seiner Position durchsetzt.”

⁷ The Tribunal’s judges are appointed by an organ of a defendant organisation (ILO) on 3 year renewable contracts. Given the honour and material benefits associated with the posts, the ILO-AT judges are unlikely to take the risk of inconveniencing their employer.