

SUBJECT: Reform of the Boards of Appeal

SUBMITTED BY: President of the European Patent Office

ADDRESSEES: Administrative Council (for decision)

SUMMARY

The structural reform of the Boards of Appeal (BOA) aims to increase their organisational and managerial autonomy, the perception of their independence (enshrined in Article 23 EPC) and also their efficiency, in order to respect the principle of effective legal protection within the current legal framework of the European Patent Convention (EPC).

Following the favourable opinion of the Administrative Council on the main orientations presented by the Office at its March 2015 meeting, intensive preparatory work was carried out over the following months, including the consultation of stakeholders. The requirement of the Administrative Council that the reform be conducted within the existing framework of the EPC made it necessary for the Office to seek independent, external legal advice on the compatibility of some of the envisaged reform elements with the EPC.

Aligning the organisation and functioning of the BOA with national, European and international developments in the judiciary requires a comprehensive reform covering five main elements: a new institutional framework, a specific career system, the regulation of potential conflicts of interest, the allocation of a separate building, and the improvement of the cost coverage of the appeal system.

The document presents these different elements of the reform as part of a comprehensive package submitted to the Administrative Council for decision. By addressing all elements which improve the perception of independence of the BOA without requiring a revision of the EPC, this reform constitutes a landmark step for reinforcing the status, efficiency and long-term sustainability of the EPO's appeal system.

This document reflects the discussions with the delegations in the Administrative Council and incorporates the agreed changes. It replaces CA/43/16. The changes are highlighted in grey hatching.

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I. STRATEGIC/OPERATIONAL

1. Strategic.

II. RECOMMENDATION

2. The Administrative Council is requested to approve the reform of the Boards of Appeal (BOA) presented in this document under five main pillars constituting a comprehensive package:

- **Part A** dealing with the structural reorganisation of the BOA, including the necessary changes to the Implementing Regulations (**Annex 1**), the setting-up of a Boards of Appeal Committee (BOAC) as a subsidiary body of the Administrative Council (**Annex 2**), a unilateral act of delegation of powers from the President of the Office to a newly created President of the BOA (**Annex 3**, but see point 4 below);
- **Part B** dealing with a new career system for members and Chairmen of the BOA (**Annex 4**);
- **Part C** dealing with the relocation of the BOA to a separate building in Munich;
- **Part D** dealing with ~~a new fee policy~~ better cost coverage for appeals;
- **Part E** dealing with specific rules on conflict of interest for ~~employees of the Office, including those appointed by the Administrative Council. As this proposal is not limited in its scope to members and Chairmen of the BOA.~~ ~~it~~ It is submitted in a separate document CA/29/16.

3. The submission of the draft decision to set up a Boards of Appeal Committee (BOAC) as a subsidiary body of the Administrative Council (**Annex 2**) falls within the remit of the Chairman of the Administrative Council. Since the creation of the BOAC is also provided for in the draft revision of the Implementing Rules to the EPC, falling within the remit of the President of the Office, the draft decision to set up the BOAC is already included in the present, single, document.

4. The Administrative Council is requested to take note with approval of Annex 3 concerning a unilateral act of delegation of powers from the President of the Office to a newly created President of the Boards of Appeal. Approval of this document by voting of the Administrative Council is not necessary.

5. The Administrative Council is requested to take note of CA/54/16 containing the legal study drawn up by Professor Sarooshi regarding the feasibility of the delegation of powers by the President of the Office to the President of the BOA and its compliance with the EPC.

III. MAJORITY NEEDED

6. Three quarters majority. As the package of measures covers several decisions with different rules regarding their adoption, it is proposed to apply the highest requirement (3/4 majority).

IV. CONTEXT

7. The President of the Office informed the Administrative Council of decision R 19/12 of the Enlarged Board of Appeal (EBA) of 25.04.2014. The Council subsequently decided in June 2014 to ask the President of the Office to submit a proposal for a structural review of the BOA within the current legal framework of the EPC.

8. The President of the Office set out a document CA/16/15 with the following major elements:

- the transformation of the BOA from a Directorate-General into a separate organisational unit headed by a newly-created President of the BOA;
- the delegation of functions and powers of the President of the Office in respect of the BOA to the President of the BOA, including the right to propose the appointment of BOA members and to be consulted in cases of re-appointments;
- the creation of a specific subsidiary body of the Administrative Council, the BOAC, with advisory and preparatory functions regarding BOA matters, in particular concerning the independence and efficiency of the BOA;
- changes to the procedure for amending the Rules of Procedure of the BOA and of the EBA (RP or RPBA/RPEBA);
- the adaptation of the Service Regulations to the special status and independence of BOA members;
- the introduction of specific conflict of interest rules for BOA members; and
- the relocation of the BOA to a separate building.

9. At its 143rd meeting in March 2015 the Administrative Council gave its support to the ideas as outlined in document CA/16/15 and asked the President of the Office to draw up specific proposals after consultation of stakeholders. In April 2015 the Office launched an online user consultation on the EPO website. The consultation received considerable attention and triggered a representative number of comments. A reform of the BOA was welcomed by the users and considered to be able to bring about a significant improvement over the current situation in many respects. From the submissions it clearly emerged that issues related to efficiency and consistency of proceedings before the BOA were of great importance to users. The results of the user consultation were presented to the Administrative Council at its 145th meeting in October 2015 in CA/82/15 and were subsequently published on the EPO website.
10. In parallel to the user consultation the Office held a series of consultation meetings with representatives of the BOA on the various reform elements.
11. During its meetings from March 2015 onwards, the Administrative Council regularly addressed this important issue and provided its feedback and guidance.
12. In order to assess the legal feasibility of a delegation of powers from the President of the Office to a newly created President of the BOA as proposed in CA/16/15, the Office mandated Professor Sarooshi, an expert on the institutional law of international organisations, to draw up an independent legal study.

V. ARGUMENTS

13. The goals of the reform are to increase the organisational and managerial autonomy of the BOA, the perception of their independence enshrined in Article 23 EPC as well as their efficiency, in order to respect the principle of effective legal protection. In the light of developments in the European patent system, improvements in the structure and functioning are vital for the long-term sustainability of the EPO's appeal system. The different elements proposed are in line with national, European and international developments in the judiciary and will, by their combination, reinforce the BOA, their status and efficiency.

A. STRUCTURAL REFORM OF THE BOA (ANNEXES 1, 2)

1) Reorganisation of the BOA as a separate unit headed by a President, delegation of powers and budgetary and disciplinary procedure

14. Although considered part of the Office under Articles 4(2) and 15 EPC, the BOA have from the very start assumed the role of an independent judiciary, in accordance with Articles 21 to 23 EPC. In more than 35 years of judicial decision-making the BOA have consolidated their status as an independent judiciary, which has been recognised by highest national and European courts.
15. Thus, their current organisation in the same form as the other parts of the Office, i.e. as a Directorate-General directed by a Vice-President who is on a normative level hierarchically subordinate to the President of the Office can raise concerns in relation to their status as an independent judiciary. It is therefore proposed to separate the BOA at the organisational level from the other parts of the Office, to the extent possible within the current framework of the EPC.
16. The increased organisational independence requires a separation in the administrative structure from the departments whose decisions are reviewed by the BOA as well as a hierarchical separation of the administrative head of the BOA from the President of the Office. For this purpose it is proposed to reorganise the BOA, including their registries and support services, as a separate organisational unit referred to as the "Boards of Appeal Unit". The term "Boards of Appeal Unit" is introduced not only to separate the BOA from the other parts of the Office organised as Directorates-General but also to allow a notional distinction between the BOA as an organisational unit and the BOA in the sense of the different Boards of Appeal (Legal, Technical and Disciplinary Boards of Appeal). Reference to the "Boards of Appeal Unit" thus captures the Legal Board of Appeal, the Technical Boards of Appeal, the Enlarged Board of Appeal and the Disciplinary Board of Appeal, together with the corresponding registries and support services.
17. In order to further increase the managerial autonomy and independence of the BOA, the Boards of Appeal Unit shall not be directed by a Vice-President assisting the President of the Office (Article 10(3) EPC) but rather by a newly created President of the BOA who is hierarchically independent of the President of the Office and responsible to the Administrative Council for his activities in managing the Boards of Appeal Unit. In accordance with the function of the President of the BOA, this new position will be occupied by the Chairman of the EBA, to whom administrative and managerial tasks will be delegated.

18. In order to enable the President of the BOA to manage the Boards of Appeal Unit, the President of the Office will delegate to him certain functions and powers under Article 10(2)(a), (e), (f) and (h) EPC and Article 48 EPC (managerial powers) and under Article 11(3) and (5) EPC (appointment and re-appointment of BOA members) as far as the management of the Boards of Appeal Unit is concerned. As confirmed in the independent legal study by Professor Sarooshi (see CA/54/16) the envisaged delegation is compatible with the EPC. The delegation of powers is the subject of Annex 3.
19. In addition, the autonomy of the BOA in budgetary matters will be increased to the extent possible under Articles 10(2)(d) and 40 et seq. EPC, which confer on the President of the Office the power to prepare the budget for the Office as a whole and to ensure a balanced budget. It is proposed to follow *mutatis mutandis* the same procedure as approved by the Administrative Council for the Reserve Fund for Pensions and Social Security (see Art. 10 RFPSS Regs). The President of the BOA will prepare a substantiated budget request for the Boards of Appeal Unit, discuss it with the Office's services and then submit it to the BOAC for opinion. The final budget request together with the BOAC's opinion will be forwarded to the President of the Office for consideration for the yearly draft budget. The President of the BOA will be responsible for implementing the budget adopted by the Administrative Council as far as the Boards of Appeal Unit is concerned.
20. In addition and within the limits of the Office's general budget, the President of the Office will make the general Office services mentioned in Rule 9(1) EPC (i.e. the services set up to deal with legal matters and the internal administration of the Office) available to the President of the BOA as far as necessary. For this purpose service-level agreements will be drawn up in order to provide the Boards of Appeal Unit with agreed packages of services in line with the adopted budget, such as for IT and HR services, including payments, leave, administrative support for recruitment procedures, etc.
21. Changes to the disciplinary procedure are also provided for. By delegation under Article 10(2)(h) EPC the President of the BOA will be responsible for exercising disciplinary authority over the support staff of the Boards of Appeal Unit and for proposing disciplinary action to the Administrative Council with regard to the members, including the Chairmen, of the BOA and the members of the EBA.

2) BOAC, procedure for adoption of the RP and re-appointments

22. In order to assist the Administrative Council with regard to matters concerning the boards and for the adoption of the RPBA/RPEBA, it is proposed to establish a Boards of Appeal Committee (BOAC) as a subsidiary body of the Administrative Council. Apart from the adoption of the RPBA/RPEBA the function of the BOAC is to advise the Administrative Council and the President of the BOA with regard to matters concerning the Boards of Appeal Unit in general.
23. The BOAC shall be composed of six members appointed by the Administrative Council, three, including the Chairman of the BOAC, from among the delegations of the Contracting States within the meaning of Article 26 EPC (including advisers or experts) and three from among serving or former judges of international or European courts or of national courts of the Contracting States. The President of the Office and the President of the BOA shall have the right to attend BOAC meetings, without voting rights.
24. The BOAC will create a link between the Administrative Council and the Boards of Appeal Unit, will report to the Administrative Council and will provide guidance to the Boards of Appeal Unit and its President on its management and organisation in general, in particular with regard to the issue of efficiency and independence. The BOAC will consider proposals on general EPO administrative and managerial issues which affect the BOA and will raise relevant matters with the Administrative Council. The advisory and supervisory functions of the BOAC will be clearly limited to a general level and not concern individual cases or the day-to-day functioning of the BOA. The current Presidium of the BOA (Rule 12(1) of the Implementing Regulations) will remain in place and continue to be in charge of internal issues such as the allocation of duties to the BOA (Rule 12(4) of the Implementing Regulations).

25. As also expressed in the user consultation, the RPBA have a major impact on the predictability and consistency of appeal proceedings as well as on their efficiency and duration. Under the current procedure set forth in Article 23(4) in conjunction with Rule 12(3) EPC, only the Presidium of the BOA is competent to initiate and adopt changes to the RP. While the RP are subject to the approval of the Administrative Council, the latter does not have a formal right to propose amendments to the RP of its own motion. The same applies *mutatis mutandis* to the RPEBA adopted under Rule 13(2) EPC. The President of the Office or users of the appeals system are not formally involved in the procedure. At times this has created concern that important and necessary proposals for amendment could not be taken up.
26. Nowadays the RP not only regulate internal procedural matters preparatory to or otherwise related to the decision-making of the BOA but also concern the parties' procedural rights and obligations (see, for example, Articles 12 and 13 RPBA). There is a need to ensure a clear separation of roles and responsibilities as is the practice in most Contracting States: procedural rules are normally proposed by the government, voted on by the parliament and implemented by the judiciary. A similar logic should apply to the RPBA/RPEBA, with due regard to Article 23 EPC and to the fact that under Article 33(1)(c) EPC the Administrative Council is competent to amend the provisions of the Implementing Regulations to the EPC governing certain aspects of the appeals procedure. Against this background it is proposed to entrust the newly created BOAC with the task of adopting amendments to the RP, on a proposal from the President of the BOA and after the President of the Office has been given the opportunity to comment. Approval of the new RP will remain the competence of the Administrative Council.
27. In view of its competence with regard to the RPBA/RPEBA, the creation of the BOAC requires a legal basis in the Implementing Regulations to the EPC. The additionally required draft Decision of the Administrative Council under Article 14 of its Rules of Procedure is dealt with in Annex 2.

28. Under Articles 11(3) and 23(1) EPC the members, including the Chairmen, of the BOA and of the EBA are appointed for a term of five years and may be re-appointed. The conditions for granting or refusing re-appointment are not specified by the EPC or its Implementing Regulations. The new career system for BOA members is the subject of Annex 4. The current practice with regard to the appointment and re-appointment of BOA members is described in CA/81/08. In case of re-appointments the current Vice-President Appeals, on behalf of the Chairman of the Administrative Council, draws up a CA document proposing re-appointment and sends it via the President of the Office to the Council Secretariat. In order to formalise the role and involvement of the future President of the BOA with regard to re-appointments, the following procedure is proposed: In exercising the right of consultation under Article 11(3) EPC, delegated to him by the President of the Office, the President of the BOA shall draw up a reasoned opinion for an individual re-appointment which shall include a performance evaluation. The reasoned opinion shall serve as a basis for the Administrative Council's decision on the re-appointment.

3) Delegation of powers by the President of the Office to the President of the Boards of Appeal

29. The President of the Office already announced his intention to delegate his powers as defined in Articles 10(2)(a), (e), (f) and (h) and 48 and Article 11(3) and (5) EPC to a large extent to the President of the BOA. In view of the importance and complexity of the matter, a legal study was commissioned by the Office, which has been shared with the Administrative Council and is contained in CA/54/16. From the legal study of Professor Sarooshi, the Office comes to the conclusion that a delegation:
- is possible;
 - must indicate unequivocally what is delegated;
 - cannot delegate more powers than the President of the Office has;
 - must be given to a person/entity without creating a gap in accountability;
 - must indicate that the President of the Office, delegating the powers, shall respect the decisions of the person to whom powers have been delegated; and
 - must be revocable by the President of the Office on his own initiative.

30. In view of the above, the President of the Office intends to sign the attached act of delegation (Annex 3), once the Administrative Council has approved the creation of the position of President of the BOA and the creation of a BOAC.

B. CAREER OF MEMBERS AND CHAIRMEN OF THE BOA (ANNEX 4)

31. In December 2014 the Administrative Council introduced a new career system for the employees of the Office characterised by the shift from a seniority-based to a performance-related system (see CA/D 10/14, CA/84/14 Rev. 1). In view of the special institutional role of the employees appointed under Article 11(3) and their independence enshrined in Article 23 EPC, it was acknowledged when CA/D 10/14 was adopted that certain elements of the new career system would not apply to the members and Chairmen of the BOA and that specific provisions would be drawn up for these Administrative Council appointees (see CA/PV 142, point 78 et seq.).

32. The Office implemented the reformed career system for all employees. Pending finalisation of special career provisions for the members and Chairmen of the BOA, the Administrative Council adopted clarifications and transitional measures for the application of the new career system to those employees appointed in accordance with Article 11(3) EPC (see CA/D 4/15, CA/49/15). As from 1 July 2015, members and Chairmen of the BOA were transposed to the new career system in terms of step and grade.

33. In the meantime the Office further considered suitable specific career provisions for the members and Chairmen of the BOA. A benchmarking study on the career provisions applicable to judges at selected international and European courts and in some of the EPO Contracting States was also conducted. On this basis amendments to the Service Regulations are necessary to introduce special career provisions for the members and Chairmen of the BOA and to codify the non-applicability of certain general career provisions to these Administrative Council appointees.

General lines of the new career system

34. The new career system for the employees of the Office has been redesigned with a strong emphasis on performance as well as more flexibility and diversification in the means to reward performance. In particular, career advancement is based only on performance and applied competencies.

35. As emphasised by the representatives of the BOA during the consultation, the undifferentiated application of these principles also to employees appointed under Article 11(3) EPC may raise issues with regard to Article 23 EPC. Making an annual or biennial advancement in step or grade dependent on performance may be perceived to conflict with the independence of the members and Chairmen of the BOA.
36. The Administrative Council agreed in December 2015 that a linkage between career, or salary, and performance should be laid down as a general principle for a career system applicable to members and Chairmen of the BOA (see CA/PV 146, point 39, together with CA/26/16). Such a link between career development, pay-structure and professional evaluation is also known in one form or another from judicial systems in the EPO Contracting States. A similar practice is also followed for members of the Boards of Appeal of the EU Intellectual Property Office (formerly Office for Harmonization in the Internal Market - OHIM), whose term of office may be extended for additional five-year periods after a prior positive evaluation of their performance (see Article 136(5) EU Trademark Regulation).
37. Against this background the proposed amendments to the Service Regulations provide that Article 48 ServRegs on step advancement and Article 49 ServRegs on promotion shall not apply to employees appointed under Article 11(3) EPC. This means the members and Chairmen of the BOA still benefit from the general yearly salary adjustment when decided by the AC but that no advancement in step or grade is possible during a five-year term of office under Article 23(1) EPC.
38. For the members of the BOA, it is proposed to distinguish between newly appointed members and those who have served already at least one term. Upon their first appointment, the assignment for a new member shall be to grade 14 step 1 (corresponding to EUR 12 196.93 net basic salary¹). It represents a substantial effort from the Office as, according to the current general rule of Article 11(2) ServRegs, new members should be appointed at the lowest grade and step in job group 3 (grade 13 step 3).

¹ "Net basic salary" means the gross basic salary with the deduction of the internal tax, but not taking into account the deduction of the social contributions and the addition of allowances and benefits.

39. Moreover, after having concluded a term of five years, his/her re-appointment being proposed by the President of the BOA, a member of the BOA could be assigned to grade 15 step 1 (corresponding to EUR 13 227.65 net basic salary) – this would reflect the fact that he has already served at least one full term. In order to enable the AC to take a reasoned decision, the President of the BOA will have to provide elements of evaluation of the performance for any re-appointment of a member, with or without promotion. The President of the BOA will be responsible for setting, in consultation with the BOAC, the criteria which will be the basis for evaluating performance.
40. For the Chairmen of the BOA, it is proposed to assign them to grade 16 step 1 (corresponding to EUR 14 260.80 net basic salary). It also represents a substantial effort from the Office as, according to the current general rule of Article 11(2) ServRegs, new chairmen should be appointed at the lowest grade and step in job group 2 (grade 15 step 1). Their re-appointment will also be subject to an evaluation of the performance to be provided to the AC by the President of the BOA.
41. For the President of the Boards of Appeals, it is proposed to assign him the grade 17 step 1 (corresponding to EUR 15 276.46 net basic salary), which is higher than the entry point to job group 1 for Vice-Presidents (grade 16 step 3).
42. Finally in the context of CA/D 4/15 the Administrative Council already clarified that neither Article 13 ServRegs with respect to a probationary period nor Article 48a ServRegs with respect to bonuses apply to the members and Chairmen of the BOA. Articles 2 and 5 of the draft decision set out in Annex 4 codify the non-applicability of these provisions in the Service Regulations.

Entry into force of the new career system and transitional measures

43. On the basis of the above, the current career assignment shall continue to apply to all current staff as well as to all appointments which enter into effect by 31 December 2016. The new career assignment shall apply directly to all new appointments / re-appointments which enter into effect as from 1 January 2017 to coincide with the other amendments regarding the status and employment of the members and Chairmen of the BOA.
44. The new career assignments (G14 step 1 for members, G16 step 1 for Chairmen) shall also apply to current staff as from 1 January 2017. Should the net basic salary of a current member or Chairman be higher than these entry reference points, a nominal guarantee will apply and he shall maintain his current net basic salary until the end of his term.

45. For the purpose of this comparison the Office shall take into account the member's or Chairman's net basic salary including any salary difference guaranteed under the new career system for all staff (Article 56 (4) of CA/D 10/14) and any full salary advancement acquired by the 31 December 2016 under the transitional measures adopted with CA/D 4/15. Salary advancement shall be taken into account only if it has been concluded by the date of entry into force under the applicable conditions. No proportions thereof shall be recognised.
46. This means that 38% of the current members of the BOA, who are below G14 step 1, and 50% of the current Chairmen, who are below G16 step 1, will benefit from the new assignments. This effort from the Office appears justified, in order to facilitate the transition to a single and specific career path for the members and Chairmen of the BOA.

C. LOCATION OF THE BOARDS OF APPEAL

47. Following the objective of improving the perception of independence of the BOA, a specific building with the necessary accommodations will reinforce among the parties to appeal procedures the feeling that they are appearing before an independent body as opposed to EPO examining and opposition divisions. This is in line with the recommendations in the Final report of the Working Party on Directorate-General 3 of the European Patent Office.² There is a similar case at national level: in Germany, it was decided to separate the former boards of appeal administratively and physically from the German Patent and Trademark Office, as the new Federal Patent Court, in order to reinforce their independence.
48. The current specific use of space by DG3 (nearly 230 employees) is around 11 000m² in the Isar building. In CA/98/15, several options concerning possible locations of the BOA were presented. After consultation of the internal and external stakeholders, it appears that the most appropriate solution is to keep the BOA in Munich. As a main precondition, criteria like good traffic links and appropriate accommodation standards were taken into account. The search then concentrated on the south-eastern area of Munich, mainly due to the proximity to where a large number of EPO staff live and to the European School, as well as the proximity to the Federal Patent Court.
49. In addition, good connections to the airport and to the centre of Munich have also been taken into account. All shortlisted buildings provide enough flexibility to accommodate the requirements for offices, the conference area as well as social areas like the canteen and cafeterias. Compared to the Isar building, more efficient usage of space per workplace will be achieved and the situation in the conference area could be improved by providing consultation rooms for judges and waiting rooms for external parties with necessary facilities in the vicinity.

² See CA/84/97, points 69 and 70.

50. Based on preliminary calculations, the total space to be rented will amount to approx. 11 000 m², which leads to rental costs between EUR 2 and 2.5m. In addition some measures with respect to the fitting-out of the buildings need to be planned for as a one-off investment to fully cover all requirements of the Boards of Appeal Unit. These investments will be written off over the rental period. As a point of comparison, in 2014, the Office stopped renting the "Capitellum" building in Munich, which used to cost EUR 3.8m per year for a gross floor area of approx. 25 000 m² for 380 workplaces.
51. Once the principle of the removal presented in this document is approved by the Administrative Council, the Office will submit a precise proposal for the renting of a building in Munich to the Budget and Finance Committee (BFC).
52. Furthermore the Office has already given thought to the cost-efficient use of the three floors currently occupied by DG 3 in the Isar building which will become vacant. Firstly it will be an opportunity to centralise some departments which are spread between the Isar and PschorrHöfe buildings. This will provide rooms for DG 1, for which it is planned to continue the recruitment of patent examiners in the coming years. Finally, the PschorrHöfe complex offers several possibilities of segmentation, incl. separate entrances, allowing the EPO to collect a yearly rent.

D. ~~NEW FEE POLICY~~BETTER COST COVERAGE FOR APPEALS

53. An important element in increasing the autonomy of an institution is to improve its cost coverage, in order to limit potential influence through external funding. It is also a good principle to foster the most efficient management of a public institution whose budget is basically financed by the fees paid by all the applicants.
54. In this regard, the BOA, as a way of increasing their autonomy, have to improve their cost coverage. In 2015 the total income of Directorate General 3, based on IFRS calculations, amounted to EUR 2 884 679. The total costs of Directorate General 3 amounted to EUR 68 683 282, which leads to a cost coverage of 4.2% (CA/45/16).
55. For the present purposes the non-inflation adjusted unit cost of an appeal provides a better basis for further calculations. In 2015 the non-inflation adjusted unit cost of an appeal amounted to EUR 29 415. Considering an appeal fee of EUR 1 860 the cost coverage for an appeal in 2015 was 6.3%. This means, that 93.7% of the unit costs were financed by other activities of the Office. In contrast, the EU Member States decided that the Unified Patent Court should be 100% self-financed. At national level, there are also examples of better cost coverage: for example the Federal Court for Patents in Switzerland reached 51% cost coverage in 2015.

56. The low unit cost coverage of the EPO's appeal procedure has been discussed also in the past, for example in the context of the introduction of the partial fee refund (CA/87/12). The accessibility of the appeal system and its maintenance has been pointed out. Thus, it is accepted that total cost coverage for the system of appeals against administrative decisions taken by the Office cannot be achieved, and that the improvement in the cost coverage can only gradually impact the fee for appeal. On the other hand, any cost savings in the system would also improve the cost coverage.
57. Therefore, it proposed the aim is to increase the cost coverage of the BOA within the next five years to 20 to 25%. The first means of reaching this objective should be to increase the efficiency of the BOA in order to reduce the unit costs. There are multiple examples of judicial systems, at both national and international level, which have successfully reformed their procedures and workflows so as to increase their efficiency, without thereby impairing their independence or access to justice.
58. This could be achieved by The second means would be to gradually increasing the appeal fee. Although proceedings are not fully equivalent and comparable, the EPO appeal fee of EUR 1 860 (in 2015) compares as follows to procedural fees before the Unified Patent Court and the USPTO:
- The proposed fee at the Unified Patent Court for a revocation action against a patent granted by the EPO is EUR 20 000.
 - The fee for *inter partes* review proceedings at the USPTO amounts to USD 9 000 (request fee, plus USD 200 for each claim in excess of 20) and USD 14 000 (post-institution fee, plus USD 400 for each claim in excess of 15).
59. A first increase of the appeal fee could take effect as of 1 April 2017/2018, after the institutional reform of the BOA has become operational. Following subsequent yearly increases over a five-year period, the appeal fee could cover 20 to 25% of the current unit cost of an appeal. combined with the reduction of the unit costs as a result of efficiency gains, a cost coverage of 20 to 25% could be reached. It could also be decided to set two different levels of appeal fees: one for *ex-parte* procedures, and the other for *inter partes* procedures, which usually generate higher costs for the system.

60. To ensure that such an increase will not make access to the appeal system more difficult for SMEs, universities and individual inventors, a 25% fee reduction for such entities could be envisaged.
61. The proposed appeal fees policy appears very reasonable for procedures whose effects apply to a very large territory and market in Europe. Before being asked to decide on specific proposals, the Administrative Council will be provided with a more detailed analysis and all the necessary information, in particular concerning access to the EPO's appeal system for SMEs, universities and individuals. In addition, before making any specific proposals, the Office will carry out detailed user consultations.
62. The Administrative Council is requested to approve the principles of this new fee better cost coverage policy for appeals. For its implementation, the Office will present yearly the subsequent documents to the BFC and to the Administrative Council.

E. CONFLICT OF INTEREST RULES

63. As an institution exercising a regulatory mission, granting rights to parties which can represent an important economic asset and affect the competition between actors on the market, the EPO must ensure that it exercises its role and missions in full neutrality and must prevent potential conflicts of interest. While the Service Regulations already include a number of provisions dealing with this issue, there is no specific mechanism addressing conflicts of interest with regard to post-service activities, as is the case for other international organisations.
64. In order to foster the public's trust in the integrity of the services provided by the EPO, it is proposed to introduce a system for monitoring and preventing potential conflicts of interest after termination of service with regard to ~~all employees of the Office, including the members, Chairmen and the President of the BOA.~~
65. The BOA themselves addressed this issue in their case law. In decision G 2/94, the EBA held that it would be desirable in the interest of legal certainty for the Administrative Council to specify an exact period of time following termination of a person's appointment as a member of the BOA during which that person may not appear in or conduct oral proceedings before the EPO.

66. ~~As the~~ The regulation of potential conflicts of interest in post-service activities ~~is not limited to the BOA, which is the scope of the current document,~~ it is submitted in a separate document (CA/29/16), although its adoption is part of the current package of measures.

VI. FINANCIAL IMPLICATIONS

67. No.

VII. LEGAL BASIS

68. Article 33(1)(c) EPC, Article 33(2)(b) and (d) EPC.

VIII. ENTRY INTO FORCE

69. The reformed system for the BOA shall be operational and the new procedures shall apply as from 1 January 2017. For those measures which are necessary to set up the new institutional framework (such as the creation of the new function of the President of the BOA and of the BOAC) the amendments will enter into force on 1 July 2016. Further details concerning the entry into force of the different elements of the reform package are addressed in Annexes 1, 2, 3 and 4, as well as document CA/29/16 respectively.

IX. DOCUMENTS CITED

70. CA/16/15; CA/82/15; CA/26/16; CA/87/12; CA/54/16; CA/45/16; CA/84/14 Rev. 1; CA/49/15; CA/D 10/14; CA/D 4/15; CA/PV 142; CA/PV 146, CA/D 21/07, CA/6/16, CA/D 2/12, CA/29/16.

X. RECOMMENDATION FOR PUBLICATION

71. Yes.

**ANNEX 1 STRUCTURAL REFORM OF THE EPO BOARDS OF APPEAL -
AMENDMENTS TO THE IMPLEMENTING REGULATIONS TO THE EPC**

PART I

Explanatory notes

**I. REORGANISATION OF THE BOA AS A "BOARDS OF APPEAL UNIT"
HEADED BY A PRESIDENT OF THE BOA**

1. Under Article 15(f) and (g) EPC the BOA and the EBA are parts of the Office. However, their organisation as a Directorate-General directed by a Vice-President is only regulated in the Implementing Regulations to the EPC (Rule 9) and not prescribed by the EPC itself. The Administrative Council thus has the power under Article 33(1)(c) EPC to change the current organisation of the BOA. Under the proposed amendment the BOA and the EBA are removed from the ambit of Rule 9 EPC, which deals with the administrative structure of the Office, by limiting the departments organised as Directorate-Generals to those specified in Article 15(a) to (e) EPC.
2. To further highlight their organisational independence also at the normative level, the organisation of the BOA and the EBA is regulated in a separate new Rule 12a, entitled "Organisation and management of the Boards of Appeal Unit and President of the Boards of Appeal", in Section 2 of Chapter II of the Implementing Regulations to the EPC, which deals with the organisation of the BOA and the EBA. Paragraph 1 of proposed new Rule 12a EPC prescribes their organisation as a separate unit called the "Boards of Appeal Unit". The term "unit" has been chosen in view of current Rule 12(1) EPC, in which the term "organisational unit" is already used.
3. The support services of the BOA and the EBA as well as their registries – which were established on the basis of current Article 6(1) RPBA/RPEBA – are explicitly mentioned as part of the Boards of Appeal Unit. This does not alter the fact that the employees responsible for the discharge of the functions of the registries and support services remain subject to Article 10(2)(g) EPC and to the general Service Regulations for permanent employees (Article 33(2)(b) EPC).

4. Under Articles 10(2), (3) and 11(2) EPC the Office is managed by the President of the Office, who shall be assisted by Vice-Presidents appointed by the Administrative Council. The function of a President of the BOA is not provided for in the EPC, and accordingly there is no appointment procedure. However, as confirmed in the independent legal study by Professor Sarooshi, the Administrative Council, as the principal organ with legislative and supervisory functions, has the power under international institutional law to create subsidiary bodies by amending the Implementing Regulations to the EPC.
5. For this purpose paragraph 1 of new Rule 12a EPC prescribes that the Boards of Appeal Unit shall be directed by the President of the BOA. That the administrative head of the BOA also acts as Chairman of the EBA is a long and successful tradition. In particular, the involvement of the administrative head also in judicial activities reinforces his expertise and standing. For this reason the dual role of administrative head of the new Boards of Appeal Unit and Chairman of the EBA is to be maintained. Paragraph 1 of new Rule 12a EPC ~~thus provides further that the President of the BOA shall be appointed by the Administrative Council on a joint proposal made by the BOAC and the President of the Office. *ex lege* the Chairman of the EBA shall act as President of the BOA. Since the Administrative Council appoints the Chairman of the EBA under Article 11(3) EPC, it retains its powers concerning the appointment of the administrative head of the BOA.~~
6. By analogy with Article 10(3) EPC, the Administrative Council is empowered to lay down a procedure for replacing the President of the BOA in case he is absent or indisposed.
7. According to the legal study by Professor Sarooshi (see CA/54/16), the creation of the President of the BOA as a subsidiary body in the sense of international institutional law entails that he is hierarchically independent from the President of the Office and directly responsible only to the Administrative Council. This circumstance is acknowledged in paragraph 2, sentence 2, of new Rule 12a EPC.
8. Furthermore, since Article 11(4) EPC does not cover the new function of President of the BOA, the Administrative Council's disciplinary authority over the latter must be addressed in the Implementing Regulations to the EPC together with the creation of the new function. The same paragraph 2, sentence 2, of new Rule 12a EPC thus prescribes that the President of the BOA is subject to the disciplinary authority of the Administrative Council.

II. DELEGATION OF MANAGEMENT OF THE BOARDS OF APPEAL UNIT; DISCIPLINARY AND BUDGETARY MATTERS

9. Although under the EPC the President of the Office may delegate his functions and powers, an obligation to delegate would not be compatible with Article 10 EPC.
10. Moreover, a delegation of powers is by its very nature highly *intuitu personae* in character. Indeed, considering that the President of the Office will remain ultimately responsible for the proper functioning of the entire Office, he must be confident that the person to whom he intends to delegate his managerial powers under the EPC will exercise these powers in an appropriate way. For example, as the BOA will remain part of the Office and will not acquire any legal personality of their own, the Office will continue to bear full legal and financial liability for any damage caused in the course of their activities. Consequently the President cannot delegate his power enshrined in the EPC to propose the candidate for Chairman of the EBA, who will become the President of the BOA.
11. The President of the Office can nevertheless seek to facilitate a consensus with the Administrative Council by prior consultation of the BOAC. As the Chairman of the EBA will at the same time exercise the functions of the President of the BOA, the procedure for the appointment of the latter has to mirror the procedure for the appointment of the former. Consequently, the President of the BOA shall be appointed by the Administrative Council on a joint proposal made by the BOAC and the President of the Office. In any event, the Administrative Council will keep its full powers to accept or reject the candidate proposed for appointment as President of the BOA and Chairman of the EBA.
12. At the same time, the creation of the new function of the President of the BOA in the Implementing Regulation to the EPC must go hand in hand with an indication of his functions and powers in managing the Boards of Appeal Unit. Paragraph 2 of new Rule 12a EPC thus sets out that the President of the BOA shall have the functions and powers delegated to him by the President of the Office and shall, in exercising the delegated functions and powers, manage the Boards of Appeal Unit. This acknowledges both the intention to delegate by the President of the Office and the fact that the creation of the new function of the President of the BOA is contingent and predicated on the delegation of those functions and powers required to manage the Boards of Appeal Unit. It does not alter, though, the legal basis for the delegation, which remains the act of delegation by the President of the Office defining the precise extent and conditions of the delegation.

13. Paragraph 3 of new Rule 12a EPC sets out the procedure relating to the preparation and implementation of the budget for the Boards of Appeal Unit. Paragraph 4 creates the basis for the use of general Office services within the meaning of Rule 9, paragraph 1, EPC (i.e. the services set up to deal with legal matters and the internal administration of the Office) by the President of the BOA as far as necessary and within the limits of budgetary restrictions.

III. PRESIDIUM

14. The text of current Rule 12 EPC is, with amendments, transformed into new Rule 12b EPC, entitled "Presidium of the Boards of Appeal and business distribution scheme for the Boards of Appeal". Under paragraph 1 the Presidium of the BOA remains in place as an autonomous authority; only consequential amendments are introduced regarding the new terminology of "President of the Boards of Appeal" and "Boards of Appeal Unit".
15. In paragraph 3 the functions of the Presidium are now listed as items (a) to (d) and extended by the formal competence to adopt a Code of Conduct for the members and Chairmen of the BOA and of the EBA (item (b)). Item (b) specifies that the Code of Conduct must be approved by the Administrative Council and that, in case of conflict with provisions adopted by the Administrative Council under Article 33(2) EPC and regarding, for example, possible conflicts of interest for members of the BOA and the EBA (see CA/29/16), the latter shall prevail over the Code of Conduct.
16. In view of the new procedure for adopting the RPBA/RPEBA, item (c) confers on the Presidium a role in advising the President of the BOA in this matter. Paragraph 5 again only contains consequential amendments in the terminology. The remaining paragraphs remain unchanged.

IV. BOAC AND PROCEDURE FOR ADOPTION OF THE RP

17. Under the EPC the Administrative Council has the power to establish subsidiary bodies such as committees (see Articles 28, 32 and 145 EPC). Article 14(1) of the Administrative Council's Rules of Procedure implements this right but does not alter the aforementioned legal basis in the EPC.

18. Under normal practice committees of the Administrative Council are established by a decision of the Administrative Council but not by amendment of the Implementing Regulations of the EPC. However, in view of the special status of the BOAC with regard to its composition and functions, notably the competence to adopt the RPBA/RPEBA, it is necessary from a legal point of view to anchor the BOAC in the Implementing Regulations to the EPC. For this purpose paragraph 1 of new Rule 12c EPC prescribes that the Administrative Council shall set up a committee referred to as the "Boards of Appeal Committee" to advise it and the President of the BOA on the Boards of Appeal Unit in general and to adopt the RPBA/RPEBA.
19. Sentence 2 lays down that the BOAC shall be composed of six members appointed by the Administrative Council. Three, including the Chairman of the BOAC, shall be appointed from among the delegations of the Contracting States within the meaning of Article 26 EPC and may include advisers or experts under paragraph 2 of said Article. The other three members shall be serving or former judges of international or European courts or of national courts of the Contracting States. They should normally be senior judges experienced in patent matters and/or in the management of a court. The President of the Office and the President of the BOA are given the right to attend BOAC meetings, without voting rights. The President of the Office's right to attend meetings of the Administrative Council and its subsidiary bodies is enshrined in Article 29(2) EPC.
20. In the user consultation carried out by the Office, users said they would like to be granted observer status on the BOAC. Given that the BOAC will deal with a variety of issues which are of no direct interest to users, this is not deemed appropriate. However, where necessary, the BOAC should carry out broad user consultations, in particular on proposals to amend the RPBA/RPEBA.
21. With these specifications regarding the main functions and composition new Rule 12c(1) EPC regulates the essential elements of the BOAC. The details are left to be defined in the decision of the Administrative Council setting up the BOAC (see Annex 2)
22. Paragraph 2 of new Rule 12c EPC regulates the procedure for adopting the RPBA/RPEBA. Under Article 23(4) EPC, the RPBA/RPEBA shall be adopted in accordance with the Implementing Regulations and shall be subject to the approval of the Administrative Council. Except for the requirement of approval by the Administrative Council, the EPC leaves the procedure for amending the RPBA/RPEBA to be defined by the Administrative Council under Article 33(1)(c) EPC. The procedure must not affect the principle of judicial independence enshrined in Article 23 EPC.

23. In view of its creation as a subsidiary body on the basis of the Implementing Regulations and its composition with three external judicial members, the BOAC can, for the purpose of Article 23(4) EPC, be distinguished from the Administrative Council. In addition, the membership of serving or former judges of international or European courts or of national courts of the Contracting States ensures not only a high level of judicial expertise but also that, where affected, the principle of judicial independence is respected, in accordance with Article 23 EPC.
24. On this basis paragraph 2 of new Rule 12c provides that the RPBA/RPEBA are adopted by the BOAC. To ensure the involvement of the BOA, the President of the BOA is given the right to make a proposal for amending the RP. In view of his responsibility for the Office as a whole and since the conduct of appeal proceedings under the RP may also have a bearing on first-instance proceedings, the President of the Office must be consulted by the BOAC before adoption of any changes to the RP. The power of the BOAC to adopt the RP includes the right to scrutinise, with due regard to the opinion of the President of the Office, the amendments proposed by the President of the BOA and to make both substantive and editorial changes to the proposal. In this context the BOAC should also consider any comments submitted by users in consultation procedures.
25. In view of the new procedure for adopting the RPEBA, paragraph 2 of Rule 13 EPC is deleted and paragraphs 1 and 3 are merged.

V. APPOINTMENTS AND RE-APPOINTMENTS

26. New Rule 12d EPC deals with issues relating to the appointment and re-appointment of the Chairman and members of the EBA and of the members and Chairmen of the BOA.
27. Paragraph 1 prescribes that the Chairman of the EBA shall at the same time be appointed as a legally qualified member of the BOA. This is intended to ensure that the Chairman of the EBA is fully integrated not only in the EBA but also in the BOA and that he holds the qualifications necessary to act as a legally qualified BOA member.

28. Paragraph 2 provides that, subject to the delegation by the President of the Office under Articles 11(3) and (5) EPC, the President of the BOA shall exercise the right to propose the members, including the Chairmen, of the BOA and the members of the EBA for appointment by the Administrative Council, and the right to be consulted on their re-appointment and in cases of appointment and re-appointment of external legally qualified members. The exercise of the powers delegated in relation to appointments and re-appointments of the members, including the Chairmen, of the BOA and of the EBA must remain within the limits of the budgetary framework approved by the Administrative Council.
29. Paragraph 3 prescribes that the President of the BOA shall exercise the right to be consulted on re-appointments under paragraph 2 by submitting a reasoned opinion, including an evaluation of the member's or Chairman's performance, to the Administrative Council. Subject to a positive opinion and performance evaluation and the number of posts under Article 11(3) EPC in the adopted budget for the Boards of Appeal Unit, the members, including the Chairmen, of the BOA and of the EBA shall be re-appointed at the end of their five-year term under Article 23(1) EPC.

VI. ENTRY INTO FORCE AND TRANSITIONAL REGIME

30. The amended and new provisions shall enter into force on 1 July 2016 and shall be applicable as from this date as far as necessary to allow for the reorganisation of the BOA as a separate unit, the creation of the function of President of the BOA and the setting-up of the BOAC. The procedures envisaged under the amended and new provisions for the appointment and re-appointment of members or Chairmen and for amendments to the RPBA/RPEBA shall apply as from 1 January 2017.

PART II

Draft

DECISION OF THE ADMINISTRATIVE COUNCIL
of [date of decision]
amending the Implementing Regulations to the
European Patent Convention

THE ADMINISTRATIVE COUNCIL OF THE EUROPEAN PATENT ORGANISATION,

Having regard to the European Patent Convention (hereinafter referred to as "EPC") and
in particular Article 33(1)(c) thereof,

On a proposal from the President of the European Patent Office,

HAS DECIDED AS FOLLOWS:

Article 1

The Implementing Regulations to the EPC shall be amended as follows:

1. Rule 9(1) shall read as follows:

"The European Patent Office shall be divided administratively into Directorates-General, to which the departments specified in Article 15(a) to (e), and the services set up to deal with legal matters and the internal administration of the Office, shall be assigned."

2. Rule 12 shall be replaced by the following new Rules 12a, b, c and d:

"Rule 12a

Organisation and management of the Boards of Appeal Unit and President of the Boards of Appeal

(1) The Boards of Appeal and the Enlarged Board of Appeal, including their registries and support services, shall be organised as a separate unit (the "Boards of Appeal Unit") and be directed by the President of the Boards of Appeal. The Chairman of the Enlarged Board of Appeal shall act as President of the Boards of Appeal. The President of the Boards of Appeal shall be appointed by the Administrative Council on a joint proposal made by the Committee established under Rule 12c, paragraph 1, and the President of the European Patent Office. If the President of the Boards of Appeal is absent or indisposed, one of the members of the Enlarged Board of Appeal shall take his place in accordance with the procedure laid down by the Administrative Council.

(2) The President of the Boards of Appeal shall manage the Boards of Appeal Unit and, to this end, have the functions and powers delegated to him by the President of the European Patent Office. In exercising the delegated functions and powers, the President of the Boards of Appeal shall be responsible solely to the Administrative Council and shall be subject to ~~the~~ its hierarchical and disciplinary authority ~~of the Administrative Council~~.

(3) Without prejudice to Article 10, paragraph 2(d), and Article 45, the President of the Boards of Appeal shall prepare a substantiated budget request for the Boards of Appeal Unit. This request shall be examined and discussed with the relevant departments of the European Patent Office, and be presented by the President of the Boards of Appeal to the Committee established under Rule 12c, paragraph 1, for opinion, before being forwarded to the President of the European Patent Office for consideration for the yearly draft budget. The President of the European Patent Office shall provide the President of the Boards of Appeal with the necessary resources, as set out in the adopted budget.

(4) The President of the European Patent Office shall make the services mentioned in Rule 9, paragraph 1, available to the President of the Boards of Appeal as far as necessary and within the limits of the adopted budget.

Rule 12b

Presidium of the Boards of Appeal and business distribution scheme for the Boards of Appeal

(1) The autonomous authority within the Boards of Appeal Unit (the "Presidium of the Boards of Appeal") shall consist of the President of the Boards of Appeal, who shall act as chairman, and twelve members of the Boards of Appeal, six being Chairmen and six being other members.

(2) All members of the Presidium shall be elected by the Chairmen and members of the Boards of Appeal for two working years. If the full composition of the Presidium cannot be reached, the vacancies shall be filled by designating the most senior Chairmen and members.

(3) The Presidium shall:

(a) adopt the Rules of Procedure for the election and designation of its members;

(b) adopt, without prejudice to regulations adopted in accordance with Article 10, paragraph 2(c), and Article 33, paragraph 2(b), a Code of Conduct for the members and Chairmen of the Boards of Appeal and of the Enlarged Board of Appeal, which shall be subject to the approval of the Administrative Council;

(c) advise the President of the Boards of Appeal on proposals for amendments to the Rules of Procedure of the Boards of Appeal and of the Enlarged Board of Appeal;

(d) advise the President of the Boards of Appeal on matters concerning the functioning of the Boards of Appeal Unit in general.

(4) Before the beginning of each working year, the Presidium, extended to include all Chairmen, shall allocate duties to the Boards of Appeal. In the same composition, it shall decide on conflicts regarding the allocation of duties between two or more Boards of Appeal. The extended Presidium shall designate the regular and alternate members of the various Boards of Appeal. Any member of a Board of Appeal may be designated as a member of more than one Board of Appeal. These measures may, where necessary, be amended during the course of the working year in question.

(5) The Presidium may only take a decision if at least five of its members are present; these must include the President of the Boards of Appeal or his deputy, and the Chairmen of two Boards of Appeal. Where the tasks mentioned in paragraph 4 are concerned, nine members must be present, including the President of the Boards of Appeal or his deputy, and the Chairmen of three Boards of Appeal. Decisions shall be taken by a majority vote; in the event of parity of votes, the Chairman or his deputy shall have the casting vote. Abstentions shall not be considered as votes.

(6) The Administrative Council may allocate duties under Article 134a, paragraph 1(c), to the Boards of Appeal.

Rule 12c

Boards of Appeal Committee and procedure for adoption of the Rules of Procedure of the Boards of Appeal and of the Enlarged Board of Appeal

(1) The Administrative Council shall set up a committee (the "Boards of Appeal Committee") to advise it and the President of the Boards of Appeal on the Boards of Appeal Unit in general and to adopt the Rules of Procedure of the Boards of Appeal and of the Enlarged Board of Appeal. The Committee shall be composed of six members appointed by the Administrative Council, three from among the delegations of the Contracting States within the meaning of Article 26, and three from among serving or former judges of international or European courts or of national courts of the Contracting States. The President of the European Patent Office and the President of the Boards of Appeal shall have the right to attend the Committee's meetings. Further details, in particular as to the Committee's composition, alternate members, working arrangements and functions in advising the Boards of Appeal Unit, shall be determined by the Administrative Council in the decision setting up the Committee.

(2) On a proposal from the President of the Boards of Appeal and after the President of the European Patent Office has been given the opportunity to comment, the Committee set up under paragraph 1 shall adopt the Rules of Procedure of the Boards of Appeal and of the Enlarged Board of Appeal.

Rule 12d

Appointment and re-appointment of the members, including the Chairmen, of the Boards of Appeal and of the Enlarged Board of Appeal

- (1) The Chairman of the Enlarged Board of Appeal shall, on his appointment, also be appointed as a legally qualified member of the Boards of Appeal.
- (2) Upon delegation from the President of the European Patent Office, the President of the Boards of Appeal shall exercise the right to propose the members, including the Chairmen, of the Boards of Appeal and the members of the Enlarged Board of Appeal for appointment by the Administrative Council, and the right to be consulted on their re-appointment (Article 11, paragraph 3) and on the appointment and re-appointment of external legally qualified members (Article 11, paragraph 5).
- (3) The President of the Boards of Appeal shall exercise the right under paragraph 2 to be consulted on re-appointments by submitting a reasoned opinion, including an evaluation of the member's or Chairman's performance, to the Administrative Council. The criteria for evaluating performance shall be set by the President of the Boards of Appeal in consultation with the Committee established under Rule 12c, paragraph 1. Subject to a positive opinion and performance evaluation and the number of posts under Article 11, paragraph 3, available in the adopted budget for the Boards of Appeal Unit, the members, including the Chairmen, of the Boards of Appeal and the members of the Enlarged Board of Appeal shall be re-appointed at the end of their five-year term under Article 23, paragraph 1."

3. Rule 13 shall read as follows:

"Rule 13

Business distribution scheme for the Enlarged Board of Appeal

Before the beginning of each working year, the members of the Enlarged Board of Appeal appointed under Article 11, paragraph 3, shall designate the regular and alternate members of the Enlarged Board of Appeal in proceedings under Article 22, paragraph 1(a) and (b), and the regular and alternate members in proceedings under Article 22, paragraph 1(c). Decisions may only be taken if at least five members are present, including the Chairman of the Enlarged Board of Appeal or his deputy; in the event of parity of votes, the Chairman or his deputy shall have the casting vote. Abstentions shall not be considered as votes."

Article 2

References in legal texts to Rules 12 and 13 of the Implementing Regulations to the EPC as in force on 30 June 2016 shall be replaced by a reference to the corresponding amended provision.

Article 3

The provisions set out in Article 1 of this decision enter into force on 1 July 2016.

Done at Munich, [date of decision]

For the Administrative Council
The Chairman

Jesper KONGSTAD

ANNEX 2 DECISION SETTING UP A BOARDS OF APPEAL COMMITTEE

PART I

Explanatory notes

1. The first recital in the preamble refers explicitly to Article 4(3) EPC, which confers a supervisory role on the Administrative Council, and to Article 23 EPC, which confers judicial independence on the Boards of Appeal. The second recital refers to the amended Implementing Regulations and the fifth to the Act of Delegation.
2. Article 1 contains the definitions and the scope. The function of President of the Boards of Appeal will be defined in the new Implementing Rule to the EPC.
3. Article 2 deals with the composition of the Boards of Appeal Committee. Article 2, paragraph 1, dealing with the number of members from the Administrative Council's delegations and the members coming from the judiciary, likewise appointed by the Administrative Council, is in line with what the Administrative Council expressed in CA/PV 146, item 1.7, point 39 (fourth of the five guiding principles mentioned there). The text of Article 2, paragraph 1(a), is also in line with the text the Administrative Council adopted for the RFPSS Supervisory Board at its earlier meeting in 2016 (CA/6/16, CA/D 2/16).
4. Article 2, paragraph 2, is a standard provision dealing with alternates.
5. Article 2, paragraph 3, provides that the Chairman and the Deputy Chairman are both members from the Administrative Council; this was also envisaged in CA/16/15, point 31.
6. Article 2, paragraph 4, provides that the President of the Boards of Appeal, representing the Boards of Appeal Unit, shall be entitled to participate in the meetings: in order for the Boards of Appeal Committee to be able to properly fulfil its duties, and for the Boards of Appeal Unit to be able to make any contribution they deem appropriate, such attendance is of importance. It is in line with the principles set out in CA/PV 146, item 1.7, point 39 (fourth principle). It furthermore corresponds to standard practice; see for example Article 5(5) RFPSS Regulations (on composition of the Supervisory Board), although, also in view of Article 23 EPC, it is thought here that it would not be in line with respect for judicial independence to oblige the President of the Boards of Appeal to participate.

7. Article 2, paragraph 4, also provides that the President of the Office shall be entitled to participate; this is in compliance with Article 29, paragraph 2, EPC and Article 14(3) Rules of Procedure of the Administrative Council. The President can, of course, delegate this right, for example to the CFO if budget matters are being discussed. This too was set out in CA/PV 146, item 1.7, point 39 (fourth principle).
8. Article 2, paragraph 5, lays down a term of three years; this term can be renewed or extended. The possibility of an extension for a term of less than the renewal term of three years has been provided for to ensure that the members of the Boards of Appeal Committee, including the Chairman and Deputy Chairman, do not all leave at the same time. A similar provision can be found, for the Auditors, in Article 49(1) EPC.
9. Article 3 deals with the practical arrangements for the meetings; it is standard procedure. See, for example, Article 6 RFPSS Regulations.
10. Article 4 deals with the responsibilities of the Boards of Appeal Committee. Its first paragraph unequivocally makes clear that the Committee's task is to advise and assist the Administrative Council, with the latter retaining its full powers. This advisory task includes the Boards of Appeal Committee's role in advising the Administrative Council on issues of possible conflict of interest (see CA/29/16). This is a logical consequence of the Boards of Appeal Committee being a subsidiary body of the Administrative Council and was also envisaged in CA/16/15 and in CA/PV 146, item 1.7, point 39 (second and fourth principles).
11. Article 4, paragraph 2(a) to (h), is based on CA/16/15, points 25 to 29, and is in line with the principles set out in CA/PV 146, item 1.7, point 39. From the wording, the merely advisory function of the Boards of Appeal Committee is clear. In view of the judicial nature of the BOA and their associated independence, in addition to the merely advisory and supporting functions it performs for the Administrative Council, the Boards of Appeal Committee can likewise only advise and support the BOA; it cannot take any binding decisions or issue any binding instructions.
12. Article 4, paragraph 2(g), deals with the budget procedure. This was also envisaged in CA/16/15 and specifically mentioned as the third principle set out in CA/PV 146/16, item 1.7, point 39. This procedure follows the same approach as in Article 10, paragraph 2, RFPSS Regulations.
13. Article 4, paragraph 2(i), prescribes that the Boards of Appeal Committee shall carry out user consultations where necessary.

14. Article 4, paragraph 3, contains a provision dealing with the procedure for the approval of the RPBA/RPEBA. A proposal will be drawn up and tabled by the President of the Boards of Appeal, with competence to adopt it lying with the Boards of Appeal Committee and the right of approval remaining with the Administrative Council. It reflects what is proposed in the amended Implementing Rules to the EPC relating to Article 23(4) EPC.
15. Article 4, paragraph 4, reflects the content of Rule 12a EPC.
16. Article 4, paragraph 45, clarifies the reporting task. It is of importance that the Administrative Council, in order to perform its statutory functions, be adequately informed by the Chairman of the Boards of Appeal Committee about the activities of said Committee. A similar provision can be found in Article 7, paragraph 2, RFPSS Regulations. Unless otherwise explicitly stated, the word "Chairman" refers to the function.
17. The provisions in Article 4, paragraphs 56 and 67, are inspired by the similar ones in Article 7, paragraphs 3 and 5, RFPSS Regulations. Even though there is no identifiable need at present, these provisions are designed to give the subsidiary body of the Administrative Council the flexibility it requires to act, should the need arise.
18. Article 5 sets the date of entry into force as 1 July 2016, i.e. when the revised Implementing Rules to the European Patent Convention also enter into force. This date of entry into force will enable the Administrative Council to already start the necessary proceedings for the nominations of the Chairman, Deputy Chairman and the members of the Boards of Appeal Committee and to complete the process in 2016. The Regulations can then become operational in January 2017.

LEGAL BASIS

Articles 4(3) and 33(2)(e) EPC; Article 14 Rules of Procedure of the Administrative Council.

PART II

Draft

DECISION OF THE ADMINISTRATIVE COUNCIL
of [date of decision]
setting up a Boards of Appeal Committee
and adopting its Regulations

THE ADMINISTRATIVE COUNCIL OF THE EUROPEAN PATENT ORGANISATION,

Having regard to the European Patent Convention (hereinafter referred to as "EPC") and
in particular Articles 4(3), 23 and 33(2)(e) thereof,

Having regard to Rules 12a and 12c of the Implementing Regulations to the EPC,

Having regard to Article 14 of the Rules of Procedure of the Administrative Council of the
European Patent Organisation,

Having regard to the Act of Delegation by the President of the European Patent Office,

In agreement with the President of the European Patent Office,

HEREBY SETS UP A BOARDS OF APPEAL COMMITTEE AND ADOPTS THE
FOLLOWING REGULATIONS:

Article 1

Definitions and scope

(1)(a) "President of the Boards of Appeal" shall have the meaning defined in Rule 12a(1) of the Implementing Regulations to the EPC;

(b) "Boards of Appeal Unit" shall have the meaning defined in Rule 12a(1) of the Implementing Regulations to the EPC.

(2) These Regulations shall govern the composition and tasks of the Boards of Appeal Committee.

Article 2

Composition of the Boards of Appeal Committee

(1) The Boards of Appeal Committee shall be composed of:

(a) three members appointed by the Administrative Council from among the delegations of the Contracting States within the meaning of Article 26 EPC and Article 2 of its Rules of Procedure,

(b) three members proposed by the delegations and appointed by the Administrative Council from among serving or former judges of international or European courts or of national courts of the Contracting States.

(2) Each member shall have an alternate appointed by the same procedure.

(3) The Boards of Appeal Committee shall elect a Chairman and a Deputy Chairman from among the members referred to in paragraph (1)(a) above.

(4) The President of the Office and the President of the Boards of Appeal, the latter representing the Boards of Appeal Unit, shall be entitled to participate in all meetings of the Boards of Appeal Committee.

(5) The term of the members and the alternate members shall be three years. It shall be renewable or extendable.

Article 3

Meetings

- (1) Meetings of the Boards of Appeal Committee shall be summoned by the Chairman.
- (2) Each member of the Boards of Appeal Committee shall have a vote. The Chairman shall have a casting vote.
- (3) The Boards of Appeal Committee shall hold ordinary meetings twice a year; an extraordinary meeting may be called by the Chairman or half of its members.
- (4) The procedural rules of the Administrative Council shall also apply to the Boards of Appeal Committee. However, the present Regulations or the Boards of Appeal Committee may stipulate otherwise, except where the Rules of Procedure of the Administrative Council expressly apply to subsidiary bodies.

Article 4

Tasks of the Boards of Appeal Committee

- (1) As a subsidiary body of the Administrative Council, the Boards of Appeal Committee shall advise and assist the Administrative Council in its supervisory duties under Article 4(3) EPC in so far as these relate to the Boards of Appeal Unit.
- (2) To this end, the Boards of Appeal Committee shall
 - (a) monitor the independence of the Boards of Appeal Unit, make recommendations and advise the President of the Boards of Appeal on measures to enhance its organisational and managerial autonomy;
 - (b) monitor the efficiency of the Boards of Appeal Unit, make recommendations and advise the President of the Boards of Appeal on setting general objectives for the members and Chairmen of the Boards of Appeal and the members of the Enlarged Board of Appeal in handling the caseload and reducing the length of proceedings;
 - (c) provide general guidance on the management of the Boards of Appeal Unit, including on recruitment issues and on criteria for performance evaluation;

(d) assess the Boards of Appeal Unit's general performance, make recommendations and advise the President of the Boards of Appeal on principles for setting performance criteria and general criteria for case distribution;

(e) give an opinion on the draft annual report of the Boards of Appeal drawn up by the President of the Boards of Appeal, before it is submitted to the Administrative Council together with the comments of the President of the Office;

(f) give an opinion on any request by the President of the Office concerning the Boards of Appeal Unit;

(g) give an opinion on the substantiated budget request for staff, equipment and other resources needed to meet the Boards of Appeal Unit's objectives, drawn up by the President of the Boards of Appeal and finalised by him after examination by and discussion with the relevant Office departments, before it is forwarded to the President of the Office for consideration for the yearly draft budget;

(h) give an opinion on the President of the Boards of Appeal's implementation of the yearly budget allocated to the Boards of Appeal Unit;

(i) carry out, where necessary, user consultations on matters of direct concern to users, such as proposals to amend the Rules of Procedure of the Boards of Appeal and of the Enlarged Board of Appeal.

(3) The Boards of Appeal Committee shall adopt, on a proposal by the President of the Boards of Appeal, the Rules of Procedure of the Boards of Appeal and of the Enlarged Board of Appeal, before they are submitted to the Administrative Council for approval.

(4) A joint proposal for appointment of the President of the Boards of Appeal shall be made by the Boards of Appeal Committee and the President of the Office.

(45) The Chairman of the Boards of Appeal Committee shall ensure that the Administrative Council receives all necessary information.

(56) The Boards of Appeal Committee may entrust certain tasks to a smaller group, subject to authorisation by the Administrative Council.

(67) The Boards of Appeal Committee may call upon experts or advisers either on an ongoing or an ad hoc basis, as the circumstances require.

Article 5

Entry into force

These Regulations shall enter into force on 1 July 2016.

Done at Munich, [date of decision]

For the Administrative Council
The Chairman

Jesper KONGSTAD

ANNEX 3 DELEGATION OF POWERS BY THE PRESIDENT OF THE OFFICE TO THE PRESIDENT OF THE BOARDS OF APPEAL

PART I

Explanatory notes

1. Article 1 provides that some of the specific functions and powers of the President of the Office will be delegated to the President of the Boards of Appeal, as far as these relate to Boards of Appeal Unit issues. The delegation covers the management of the Boards of Appeal Unit, the yearly management report for the Administrative Council and supervisory authority over the staff of the Boards of Appeal Unit. Staff in this context means, on the one hand, all the staff of the Boards of Appeal Unit appointed by the President of the Office and, on the other hand, the members and Chairmen of the Boards of Appeal and the Enlarged Board of Appeal appointed by the Administrative Council. In addition to supervisory authority, the delegation covers the right to exercise disciplinary authority or the right to propose disciplinary action. A similar provision, for staff appointed by the President to carry out duties for the RFPSS, can be found in Article 10(3) RFPSS Regulations.
2. Article 1 furthermore provides for the delegation of the right of proposal and consultation laid down in Article 11(3) and (5) EPC.
3. Article 2 provides that the President of the Boards of Appeal is bound to observe the EPC and the independence of the Boards of Appeal as enshrined in Article 23 EPC, respect the interests of the European Patent Office and its regulatory framework (e.g. the Implementing Rules to the EPC, the Service Regulations and their Implementing Rules and the Financial Regulations) and strictly observe the adopted budget when implementing it for the Boards of Appeal Unit.
4. Article 3 contains some conditions to be observed: a duty of co-operation is imposed to guarantee a uniform approach towards the public (Article 3(a)), and the right of the EPO's President to comment on documents before these are submitted to the Administrative Council (Article 3(b)) conforms to good governance practice.
5. Article 3(c) is needed because, since the Chairman of the Enlarged Board of Appeal is also the President of the Boards of Appeal, any action to be taken concerning his own appointment or re-appointment cannot be delegated to him.

- ~~6. Article 4 describes that the President of the EPO will respect all the decisions taken by the President of the Boards of Appeal within the scope of the Act of Delegation.~~
7. Article 54 refers to the revocability of the Act of Delegation. By nature any delegation has to be revocable, as was also confirmed in the legal study (CA/54/16), but it can be assumed that given the political context, it will only be revoked as a last resort, in exceptional circumstances, especially as this Act of Delegation is an integral part of the proposals concerning the structural reform of the Boards of Appeal and in close co-operation with the Administrative Council.
- ~~8. As already pointed out above, since the Chairman of the Enlarged Board of Appeal is also the President of the Boards of Appeal, once the Chairman of the Enlarged Board of Appeal has been appointed, the President of the Boards of Appeal also takes up his duties. This Act of Delegation then enters into force.~~

PART II
ACT OF DELEGATION

THE PRESIDENT OF THE EUROPEAN PATENT OFFICE,

HAVING REGARD to the European Patent Convention (hereinafter referred to as "EPC") and in particular Articles 10(2)(i), 11(3) and (5), 48(1) and 23 thereof,

HAVING REGARD to Rule 12a of the Implementing Regulations to the EPC,

HAVING REGARD to the Decision setting up a Boards of Appeal Committee,

HAS DECIDED AS FOLLOWS:

Article 1

The President of the European Patent Office delegates to the President of the Boards of Appeal his functions and powers under Articles 10(2)(a), (e), (f) and (h), 11(3) and (5) and 48(1) EPC in so far as they relate to the Boards of Appeal Unit and its staff, including the members and Chairmen of the Boards of Appeal and of the Enlarged Board of Appeal.

Article 2

In exercising these delegated functions and powers, the President of the Boards of Appeal shall observe the EPC, in particular Article 23, have regard to the interests of the European Patent Office and its regulatory framework and comply with the budget as adopted by the Administrative Council.

Article 3

The delegation under Article 1 above is subject to the following conditions and exceptions:

- (a) information to the public within the meaning of Article 10(2)(a) EPC which relates to the Boards of Appeal and the Enlarged Board of Appeal shall be provided in close co-operation with the President of the European Patent Office;
- (b) the President of the European Patent Office shall be given the opportunity to comment on the management report drawn up on the Boards of Appeal Unit under Article 10(2)(e) EPC, before it is submitted to the Administrative Council;

(c) the delegation does not cover the right of proposal or consultation laid down in Article 11(3) EPC in so far as it relates to the appointment or re-appointment of the Chairman of the Enlarged Board of Appeal.

~~(d) the President of the European Patent Office shall retain his functions and powers where there is or could be an impact on the European Patent Office or the European Patent Organisation or their reputation as a whole.~~

Article 4

~~The President of the European Patent Office shall respect the decisions of the President of the Boards of Appeal, provided they are taken within the bounds of and in accordance with this Act of Delegation.~~

Article 54

~~As a last resort, in exceptional circumstances and based on detailed reasons, this This Act of Delegation may be revoked by the President of the European Patent Office on his own initiative in close co-operation with the Administrative Council.~~

Article 65

This Act of Delegation enters into force when the President of the Boards of Appeal takes up his duties. It shall be published in the Official Journal of the European Patent Office.

Done at Munich, [date of decision]

Benoît BATTISTELLI
President
of the European Patent Office

**ANNEX 4 CAREER REFORM FOR MEMBERS AND CHAIRMEN OF THE
BOARDS OF APPEAL**

PART I

Explanatory notes

1. Article 1 includes the new position of President of the BOA in the scope of Article 1(4) ServRegs.
2. Article 2 regulates the assignment of members, Chairmen and the President of the BOA to specific grades and steps (reference points) upon first appointment and after having completed a term of five years.
3. Article 3 codifies the non-applicability of the probationary period (Article 13 ServRegs) to BOA members and Chairmen and the President of the BOA.
4. By virtue of Article 4 the application of Article 47a ServRegs to BOA members and Chairmen and the President of the BOA is suspended.
5. Article 5, 6 and 7 codify the non-applicability of the provisions regarding step advancement (Article 48 ServRegs), bonuses (Article 48a ServRegs) and promotion (Article 49 ServRegs) to BOA members and Chairmen and the President of the BOA.
6. Article 8 abolishes the transitional measures adopted in 2015 and introduces a nominal guarantee for the current members and Chairmen of the BOA.
7. Articles 9 and 10 concern the position of the President of the BOA. On the entry into force of amended Rule 12a(1) EPC on 1 July 2016, the new position of President of the BOA will be created, replacing the current Vice-President Appeals. Article 9 provides for the corresponding amendment of Annex I ServRegs, which is required for the new position of "President of the BOA" to fall, like Vice-Presidents of the Office, under job group 1. The specific static job description for Vice-President DG 3 also needs to be abolished as a consequence of the institutional reform.

PART II

Draft

DECISION OF THE ADMINISTRATIVE COUNCIL
of [date of decision]
amending Articles 1, 11, 13, 48, 48a and 49 of and
Annex I to the Service Regulations for permanent
employees of the European Patent Office

THE ADMINISTRATIVE COUNCIL OF THE EUROPEAN PATENT ORGANISATION,

Having regard to the European Patent Convention (hereinafter referred to as "EPC") and
in particular Articles 10(2)(c) and 33(2)(b) thereof,

Having regard to the Service Regulations for permanent employees of the European
Patent Office (hereinafter referred to as "ServRegs") and in particular Articles 1, 11, 13,
41, 47a, 48, 48a and 49 thereof,

On a proposal from the President of the European Patent Office, submitted after consulting
the General Consultative Committee

HAS DECIDED AS FOLLOWS:

Article 1

Article 1, paragraph 4, ServRegs shall read as follows:

"(4) These Service Regulations shall apply to the members, including the chairmen, of the
Boards of Appeal and of the Enlarged Board of Appeal and to the President of the Boards
of Appeal (hereinafter referred to as "members of the Boards") in so far as they are not
prejudicial to their independence."

Article 2

Article 11 ServRegs shall read as follows:

"Article 11 Assignment

(1) (unchanged)

(2) Without prejudice to paragraph 3, the assignment shall be to:

- the lowest grade in each job group, except where the need to fill a vacant post within a
higher grade so requires according to the vacancy notice;

- the lowest step within the assigned grade.

Any assignment to a different grade and step shall be duly substantiated.

(3) Members of the Boards within the meaning of Article 1, paragraph 4, shall be assigned as follows:

(a) on their first appointment, grade G 14, step 1, for members, and grade G 16, step 1, for chairmen;

(b) grade G 15, step 1, for members who have completed at least a term of five years, provided they have been recommended for promotion to this higher grade and step by the President of the Boards of Appeal. In the absence of such a recommendation for promotion on re-appointment, they shall remain at their grade and step and continue to receive the net basic salary they were paid during their previous term.

(c) grade G 17, step 1, for the President of the Boards of Appeal on his first appointment."

Article 3

The following new paragraph 8 shall be added to Article 13 ServRegs:

"(8) This Article shall not apply to members of the Boards within the meaning of Article 1, paragraph 4."

Article 4

The application of the provisions on appraisal reports in Article 47a ServRegs to members of the Boards within the meaning of Article 1, paragraph 4, ServRegs shall be suspended pending a further decision on this matter by the Administrative Council.

Article 5

The following new paragraph 3 shall be added to Article 48 ServRegs:

"(3) This Article shall not apply to members of the Boards within the meaning of Article 1, paragraph 4."

Article 6

The following new paragraph 3 shall be added to Article 48a ServRegs:

"(3) This Article shall not apply to members of the Boards within the meaning of Article 1, paragraph 4."

Article 7

The following new paragraph 6 shall be added to Article 49 ServRegs:

"(6) Paragraphs 2 and 4 of this Article shall not apply to members of the Boards within the meaning of Article 1, paragraph 4."

Article 8

(1) The transitional provisions introduced by CA/D 4/15 are abolished.

(2) A member of the Boards within the meaning of Article 1, paragraph 4, ServRegs already in service on 31 December 2016 shall be assigned to the grade and step specified for his job group in Article 11(3)(a) of the ServRegs. If, however, his net basic salary as at 31 December 2016, including any salary difference guaranteed under the new career system for all staff (Article 56(4) of CA/D 10/14) and any full advancement of salary acquired by that date, is higher than that payable for that grade and step, he shall continue to receive the higher salary until the end of his term. This higher salary shall also be taken into account for pension purposes.

(3) The same shall apply *mutatis mutandis* if an employee of the Office from job group 3, 2 or 1 is appointed, respectively, as a member, chairman or President of the Boards of Appeal.

(4) If, after expiry of his term, a member of the Boards in job group 3 already in service on 31 December 2016 is re-appointed in the same job group, he shall be assigned to a grade and step in accordance with Article 11(3)(b) ServRegs. If, however, the net basic salary within the meaning of paragraph 2 above which he was paid during his previous term is higher than that payable for that grade and step, he shall continue to receive the higher salary until the end of his new term. This higher salary shall also be taken into account for pension purposes.

Article 9

Annex I ServRegs shall read as follows:

ANNEX I JOB GROUPS AND CORRESPONDING RANGES OF GRADES

Job group	Technical career path	Managerial career path	Range of grades
Job group 1:	n. a.	Vice-president / President of the Boards of Appeal	G16 step 3 – G17 step 3
Job group 2:	Principal advisor/ Board of appeal chairman	Principal director	G15 step1 – G16 step 4
Job group 3:	Senior expert/ Board of appeal member	Director	G13 step 3 – G15 step 4
Job group 4:	Examiner/Administrator/ Lawyer	Head of department/ Team manager	G7 step 1 – G13 step 5
Job group 5:	Expert	Head of section	G7 step 1 – G10 step 5
Job group 6:	Administrative employee	n.a.	G1 step 1 – G9 step 5

Article 10

The enlarged static job description for the Vice-President DG 3 (CA/D 21/07) is abolished.

Article 11

The new assignment will be effective as from 1 January 2017. All members and chairmen of the Boards of Appeal already in service on 31 December 2016 shall be informed of their grade and step by that date at the latest.

Article 12

The President of the Office shall take appropriate measures to ensure a smooth transition to the new system.

Article 13

This decision shall enter into force on 1 January 2017.

Done at Munich, [date of decision]

For the Administrative Council
The Chairman

Jesper KONGSTAD