

**CA/103/03**

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**SUBJECT:** Organisational autonomy of the Boards of Appeal of the European Patent Office within the European Patent Organisation - convening a diplomatic conference

**DRAWN UP BY:** President of the European Patent Office

**ADDRESSEES:** 1. Administrative Council (for information)  
2. Committee on Patent Law (for information)

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#### SUMMARY

At its meeting in June 2003 the Administrative Council debated the proposal in CA/59/03 to give the Boards of Appeal of the European Patent Office organisational autonomy within the European Patent Organisation as its third organ in order to make their judicial nature more readily apparent.

The present document provides further detailed information on the above proposal and has an addendum containing a preliminary draft of the requisite amendments to the EPC together with explanatory notes (see CA/103/03 Add. 1).

The document constitutes a status report on organisational autonomy for the Boards of Appeal.

The aim is to request the Administrative Council at its December meeting, after the General Advisory Committee has given its opinion in accordance with Article 38 of the Service Regulations, to decide whether the matter should be submitted to the appropriate Council bodies (Committee on Patent Law, Budget and Finance Committee) for further examination, so that a basic proposal for amendment of the EPC can be drawn up for submission to a diplomatic conference.

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## **I. INTRODUCTION AND OVERVIEW**

1. Building on preliminary work over recent years (see CA/59/03, points 1 and 2) and on the case law of the Boards of Appeal, the Enlarged Board of Appeal and national courts of the contracting states, a DG 3 working party drew up a plan to give the Boards of Appeal organisational autonomy within the European Patent Organisation and submitted it to the Administrative Council in June 2003 in CA/59/03. The proposal was that the boards and their associated administrative services, in other words DG 3, should be detached from the European Patent Office and established as the third organ of the European Patent Organisation alongside the Council and the Office. The Council was broadly in favour of the proposal and asked for an in-depth document to be prepared.
2. The present document provides further detailed information on the plan outlined in CA/59/03 and puts flesh on it in the form of a preliminary draft for a revision of the EPC, with explanatory notes (see CA/103/03 Add. 1). The key points of this preliminary draft are:
  - The Boards of Appeal are to be established as an organ of the European Patent Organisation designated the "European Court of Patent Appeals" (Article 4 EPC).
  - A chapter entitled "The European Court of Patent Appeals" is to be inserted into EPC Part I concerning general and institutional provisions (Articles 21-24 EPC).
  - The financial provisions are to be harmonised with the proposed new structure of the Organisation (Articles 42 and 46-49 EPC).
  - As the patent grant procedure in all its phases is to remain essentially unchanged, the EPC's procedural provisions will largely require only technical amendment to reflect the proposed new structure of the Organisation.
3. The proposals embody the ongoing evolution of the EPC 2000 on the basis of the administrative practice and case law of the Office, including the Boards of Appeal, and will not have any disadvantages for parties to proceedings.
4. The aim of the proposed EPC revision is to make the boards' status as a judicial body clearly and convincingly apparent to the outside world. This entails accentuating and reinforcing the independence of board members by means of an institutional separation between the Office and the boards. Furthermore, in the interests of transparency, the fundamental organisational structures of the judicial

body (President of the Court, High Chamber, Appeal Chambers, Presidium of the Court, Registry) need to be systematically enshrined in the Convention itself.

5. An expert opinion received on 8 September 2003 from Antje Sedemund-Treiber, former President of the Federal German Patents Court, and Professor Frédérique Ferrand of Lyons University concerning framework rules for a court of appeal within the European Patent Organisation is reproduced in Addendum 2 to this document. This opinion, commissioned by the Association of the Members of the Boards of Appeal (AMBA), is along the same lines as the Office proposal and is firmly in favour of organisational autonomy for the boards.
6. The proposed accentuation and reinforcement of judicial protection will further increase trust in the European patent grant procedure and thereby help to strengthen the European Patent Organisation as a whole.

## **II. STARTING POINT**

7. The current legal position is that the Boards of Appeal, together with their associated administrative services, are integrated into the European Patent Office as Directorate-General 3 (DG 3). They are responsible for ruling on appeals against decisions of the Office's Receiving Section, examining and opposition divisions and Legal Division. They are the final instance in the European patent grant procedure, and their decisions cannot be challenged, except by means of the review mechanism provided for in Article 112a EPC 2000.
8. Article 23(1)-(3) of the current EPC safeguards board members' personal and substantive independence, which is also reflected in the Service Regulations. This independence, the particular stress on impartiality in Article 24 EPC and the judicial pattern of the appeals procedure (Article 106 ff. EPC) give proceedings before the boards a judicial character: on appeal, decisions taken by first-instance departments of the EPO as an administrative authority are reviewed in a judicial procedure. Despite the guarantee of judicial independence, however, the boards are still administratively attached to the authority whose decisions they have to review.
9. This legal situation is a historical legacy. The 1962 preliminary draft for a European Patent Convention envisaged comprehensive legal protection in patent matters, not restricted to the grant procedure, which was to be safeguarded by appeal boards, revocation boards and a European patents court. However, when

work on European patent law resumed in 1969, preference was given to the EFTA states' idea of regulating the European patent grant procedure and the European patent for the Common Market in two different conventions, thus enabling non-EEC states to be part of the European patent system. Work on the EPC was thereafter limited to the grant procedure, though there was still provision for review of first-instance decisions by a judicial body.

10. The 1973 Munich Diplomatic Conference created a second instance with Boards of Appeal and an Enlarged Board of Appeal, administratively part of the EPO but with guaranteed independence for their members. It is quite clear from the *travaux préparatoires* (see for example the proceedings of the 8th and 9th meetings of the EEC Patents Working Party, doc. 4344/IV/63, p. 72; 7669/IV/63, pp. 36, 44 f.) that the boards were intended to exercise judicial functions. The legislator therefore in legal terms organised them to work in a way which satisfied the requirements of a court even though they were integrated into the Office.
11. As a jurisdictional organ of an international organisation, the boards cannot be measured in legal terms against national constitutions and secondary sources of law. Yet it is possible to identify characteristic attributes of judicial procedure that are recognised in all the Organisation's contracting states. This *communis opinio* is expressed in the European Convention on Human Rights (ECHR), Article 6(1) of which sets out legal principles governing the nature of judicial procedure which are generally applicable and are independent of national distinctions. Article 6(1) ECHR demands
  - a fair hearing
  - a public hearing
  - an independent tribunal
  - an impartial tribunal
  - a tribunal established by law, in which the organisational structure and the distribution of cases have been determined beforehand at least in legal framework provisions (the principle of *gesetzlicher Richter* or "lawful judge").
12. All these attributes, as part of the ECHR's supranational system of values, must be interpreted autonomously, ie independently of national legal concepts and notions. They are the subject of numerous decisions of the European Court of Human Rights and the European Human Rights Commission.

13. The Office's Boards of Appeal satisfy the fair hearing, public hearing and impartial tribunal criteria. Article 23(3) of the current EPC, under which board members in their decisions are not bound by any instructions and are subject only to the Convention, and Article 23(2) EPC, under which board members may not be members of the Receiving Section, the examining and opposition divisions or the Legal Division, also guarantee the boards' decision-making independence. It must however be admitted that the existing incompatibility provisions are inadequate to the extent that they do not explicitly rule out employees from other organisational units of the Office, such as DG 4 "Administration" or DG 5 "Legal/International Affairs", also acting as board members.
14. The judicial character of proceedings before the boards has already been acknowledged by national courts. Lord Hoffmann has referred to them as "expert courts" (*Merrell Dow v. H.N. Norton & Co. Ltd.*, House of Lords, [1996] RPC 76, 82). Judge Jacob of the UK High Court has taken the view that their members are "judges in all but name" (*ex parte Lenzing*, High Court (Patents Court), [1997] RPC 245, 277). In a decision dated 8 July 1999, the Bavarian Verwaltungsgericht (Administrative Court), Munich, found that the system of legal protection under the EPC and the composition of the boards met the minimum standard laid down in Article 19(4) of the German Basic Law and that the boards were therefore of a judicial nature (OJ EPO 2000, 205, 210).
15. However, the boards' administrative and organisational attachment to the EPO as an administrative authority obscures their judicial nature and is not fully commensurate with their function as a judicial body.
16. Board decisions are not always perceived by the public to be decisions by an independent judicial body, because they are taken by an organisational unit of the Office (see Article 15 EPC), which is directed by the President. The boards' organisational attachment to the Office is seen as a sign that their members are subject to the Office President's power of direction in their decision-making. The conclusion drawn from this is that the decisions of the Office as an administrative body are not subject to independent judicial review. This criticism particularly concerns patenting in the fields of biotechnology and computing, issues that now attract considerable public interest and are no longer the preserve of established experts.

17. Public debate on the internet highlights the arguments used to question the boards' independence. One argument is that the EPO's appeals body consists of people whose career is controlled by the EPO administration, which in turn is dependent on big industry. With reference to Article 11(3) of the current EPC, providing for reappointment of board members after a five-year term of office, it is alleged that someone who does not "toe the line" will not be reappointed. According to the wording of the Convention, so the argument goes, the Office's President has a determining influence on the career of board members because he has to propose their appointment, which is for a limited period, and he has to be consulted before they can be reappointed.
18. Legal certainty and harmony are primarily dependent upon acceptance of a judge's verdict by the parties and the public. This acceptance is based not only on the conduct of a fair hearing in accordance with the rule of law; a court derives its authority in no small part from the fact that the independence demanded by Article 6(1) ECHR is clearly perceptible.
19. The existence under the rule of law of a body responsible for public administration (executive body) and another body which monitors its actions (supervisory body) gives rise to the demand that the supervisory body should be independent both of the parties to proceedings and of the executive body that it is monitoring. The supervisory body's judicial structure and its organisational separation from the parties and from the executive body should be so obvious that even a legal laymen can perceive it, as the case law of the European Human Rights Commission shows.
20. Trust in a judicial body, however, is based not only on its organisational separation from the executive, but also on the transparency of its internal structures and working methods. It must be readily apparent that the court administration cannot exercise any undue influence on judicial decision-making. The transparency requirement entails the enshrinement in law of framework provisions for the functional arrangement of the judicial authority and for the appointment and removal of judicial staff.
21. The internal structure of the Boards of Appeal as a judicial body has hitherto not been fully apparent from the EPC because essential defining features of a court's structure are referred to only in secondary legal provisions. The Presidium, for example, as an autonomous organ of the boards is defined only in the Implementing Regulations, while the Registry as a judicial executive body is mentioned there, but not in an organisational context. Furthermore, the procedure for appointing board members is at present not evident from any framework provision of the EPC.

22. In the light of this situation, the European patent system should give a yet more convincing response than hitherto to the demand for an independent judicial body.

### **III. PROPOSAL FOR THE FUTURE STATUS OF THE PRESENT EPO DG 3**

#### **A. KEY POINTS**

23. The present proposal meets the above criticisms by giving DG 3 organisational autonomy in relation to the Office and by introducing framework provisions governing the internal structure of the new judicial body. This plan entails only insignificant changes to the procedures established by the Convention.
24. The Boards of Appeal and the Enlarged Board of Appeal, together with their registries and the other support services in the present DG 3, are to be detached from the European Patent Office and established as the third organ of the European Patent Organisation alongside the Administrative Council and the Office. The Organisation would then - at a pinch, as the Council also has political and executive powers - have the three-way separation of powers typical of a state bound by the rule of law, into legislature, executive and judiciary, the latter being the new judicial body. It would be inappropriate to make this body an independent international organisation outside the Organisation, as judicial supervision of the Office must be located in the context of the European patent grant procedure, and any such solution would be far more costly in administrative and financial terms.
25. The separation is to be established in law by identifying the European Court of Patent Appeals as the third organ of the Organisation alongside the Office and the Council in Article 4(2) EPC and by devoting a separate chapter to it in Part I of the EPC, starting at Article 21. This will also involve terminological changes to the organisational provisions concerning the Office and to other provisions of the EPC.
26. To make the Court's structure transparent, provisions governing bodies not directly involved in judicial decision-making, ie the Presidium and the selection committees which prepare judges' appointments, and governing the Registry of the Appeal Chambers and the High Chamber with their respective core duties are to be enshrined in the EPC itself. To make the judges' personal independence more evident to the outside world, a renewable five-year term of office is to be replaced by a lifetime appointment with grounds for termination exhaustively regulated in the EPC.

27. The working methods of the Appeal Chambers and their support services will remain essentially unchanged, as will the appeals procedure, the language arrangements and the Court staff's employment-law status relative to the Organisation. The only legal changes to be made to the EPC and the associated agreements such as the Protocol on Immunities are those needed to establish the Appeal Chambers' institutional autonomy from the European Patent Office and make it apparent to the outside world.
28. The outlined approach will minimise the additional expenditure required to implement organisational autonomy. The overall cost for DG 3 will be around EUR 40m in 2003 and EUR 43m in 2004, with staff costs accounting for about EUR 28m in 2003 and EUR 30m in 2004 and the rest going proportionally on infrastructure costs and overheads. Up to ten new posts are likely to be required, for preparation of the Court's budget, for bookkeeping and for IT support. Once the date of the proposed EPC revision's entry into force is known, in the preparatory phase leading to autonomy (ie in five to ten years' time) costs will be incurred for adapting IT systems, setting up the new financial structures and preparing the requisite amendments to secondary legislation. As at least some of this work can be integrated into the regular updating of tools and processes, such costs too ought to be fairly low. The infrastructure costs and overheads of an autonomous DG 3 will be largely unchanged. Moving to another building would of course increase costs accordingly; but that would be the case even without organisational autonomy.

**B. RELATIONSHIP TO THE COMMUNITY PATENT AND THE EUROPEAN PATENT LITIGATION AGREEMENT (EPLA)**

29. Accentuating the judicial character of proceedings before the boards by organisationally detaching DG 3 from the Office does not conflict with ongoing efforts to create a judicial system for the Community patent or for the European "bundle patent".
30. The Community patent court and the court envisaged in the draft European Patent Litigation Agreement (EPLA) will hear revocation and infringement actions instituted after granting of the Community patent and European patent respectively. These courts will handle the duties hitherto performed by the national courts of those contracting states to which the corresponding regulations apply.

Like the boards, the Appeal Chambers will be responsible only within the framework of the European patent grant procedure. Thus the Community patent court and the EPLA court on the one hand and the Organisation's new judicial body on the other will have different areas of jurisdiction. Timings may occasionally overlap; but that is already the case now, as a national court may be asked to hear a revocation or infringement action concerning a patent whose validity is to be examined in opposition appeal proceedings. National law mostly gives the court discretion over whether or not to stay its proceedings until the appeal board has handed down its decision.

31. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation I) likewise does not debar an organisational measure serving to create an autonomous judicial entity within the Organisation. Its Article 22(4) grants an exception to the Office's jurisdiction under the EPC and thus also to the Boards of Appeal which are currently part of the Office. Moreover, Article 71 stipulates that the Regulation does not affect jurisdiction governed by conventions signed previously.

### **C. STRUCTURE OF THE NEW JUDICIAL BODY**

32. The envisaged judicial organ of the European Patent Organisation, known as the "European Court of Patent Appeals/Cour d'appel européenne en matière de brevets/Europäisches Patentbeschwerdegericht" (hereinafter "the Court"), consists of a President of the Court, the Appeal Chambers/Chambres de recours/Beschwerdekammern, a High Chamber/Grande Chambre/Grosse Kammer, a Presidium of the Court, the Registry and the other support services.

#### **(a) President of the Court**

33. The President of the Court is appointed by the Administrative Council for a renewable term of five years. At the same time as being appointed President, he is appointed judge of the Court (if he does not already hold that position), see the proposed Article 21f(1) EPC. Accordingly, he must possess the qualifications required to become a technically or legally qualified judge. Although the President of the Court is also made a judge, he is not subject to the selection procedure prescribed in the proposed Article 21f(2) EPC for the appointment of other judges. There is however a selection procedure involving judges of the Court (see proposed Article 21f(1), fourth sentence, EPC) to ensure that he possesses the qualifications required to manage a court authority and to exercise judicial functions.

34. Membership of an Appeal Chamber and active participation in its work make the President an integral part of the Court and bolster his authority internally and externally, as well as providing an institutional guarantee of his personal independence. If he is not reappointed as President, he remains a judge of the Court, that appointment being for life as with other judges. His dual status obliges him to remain mindful of the requirements of the chambers as judicial bodies while exercising his administrative functions.
35. If the President of the Court is a legally qualified judge, the Council may as in current practice also appoint him Chairman of the High Chamber (see proposed Article 21f(3), second sentence, EPC).

**(b) Appeal Chambers**

36. The tasks and composition of the Appeal Chambers are the same as those of the present Boards of Appeal (proposed Article 21a EPC).
37. The judges and presiding judges of the Appeal Chambers are appointed by the Council on a proposal from the President of the Court (see proposed Article 21f(2) EPC). Appointments are lifetime appointments, however, the term of office ending with voluntary resignation or retirement (see proposed Article 23(3)(a) EPC) or in exceptional circumstances for one of the reasons given in the proposed Article 23(3)(b) and (4) EPC.
38. The Court President's appointment proposals are drawn up by a selection committee composed of judges and presiding judges and chaired by the Court President. The procedure and the committee's composition are laid down by the Presidium (see proposed Article 21f(2), second and third sentences, EPC).

**(c) High Chamber**

39. The High Chamber like the Enlarged Board of Appeal is responsible for referrals from the Appeal Chambers and the President of the Office under Article 112 and for petitions under Article 112a EPC 2000 and sits in the composition now prescribed in Article 22 EPC 2000 (see proposed Article 21b(1) and (2) EPC).
40. Like the Enlarged Board under Article 23(1) of the current EPC, the High Chamber is responsible for proposals to remove judges from office (see proposed Article 23(4)(b) EPC). In such cases it consists of nine members, including external members; rules determining the High Chamber's composition in these cases are laid down by the Presidium of the Court (see proposed Article 21b(4)(b) in conjunction with Article 21b(3)(c) EPC).

41. The further tasks of the High Chamber are indicated in the proposed Article 21b(3)(a) and (b), its composition in such matters in Article 21b(4)(a) EPC. It is responsible for adopting its own Rules of Procedure and its business distribution scheme. In these cases it comprises all its internal members.
42. The Chairman of the High Chamber, who like the Enlarged Board's chairman must have a legal qualification, is appointed by the Council for a renewable five-year term. Unless he is also the President of the Court, he is appointed on a proposal from the Presidium of the Court (see proposed Article 21f(3), first and second sentences, EPC).
43. The members of the High Chamber are appointed by the Council on a proposal from the Presidium of the Court from among the judges of the Appeal Chambers for a renewable five-year term. Appointment proposals are prepared by the Presidium itself, or it may set up a selection committee if this appears appropriate (see proposed Article 21f(3) EPC).
44. Membership of the High Chamber is also open to national judges or members of quasi-judicial authorities, who may continue their activities at the national level (external members). They are appointed by the Council, after consultation of the Chairman of the High Chamber, for a renewable three-year term (see proposed Article 21f(4) EPC).

**(d) Presidium of the Court**

45. Under the proposed Article 21c EPC, the Presidium that has hitherto only been defined in Rule 10 of the Implementing Regulations is enshrined in the EPC itself. It is composed of judges of the Court who will normally be elected, in accordance with the Implementing Regulations, by the judges of the Court (as in the present arrangement).
46. Article 21c(2)(a)-(c) EPC identifies three principal duties of the Presidium. These entail adopting the Rules of Procedure of the Appeal Chambers (letter a) and their business distribution scheme (letter b) and advising the President of the Court (letter c). Article 21c(2)(d) EPC makes it possible to assign the Presidium further tasks via the EPC or secondary legislation. Further duties proposed at the level of the EPC are: laying down rules governing the composition of the High Chamber in cases of removal from office (see proposed Article 21b(4)(b) EPC), laying down the procedure for deputising for the President of the Court (see proposed Article 21e(3) EPC), designating judges to take part in the Council's procedure for selecting a new President of the Court (see proposed Article 21f(1) EPC), laying down rules governing selection committees for new judges and presiding judges of

the Court (see proposed Article 21f(2) EPC), making proposals for appointments to the High Chamber under the proposed Article 21f(3) EPC, laying down rules governing the composition of the disciplinary committee (see proposed Article 21f(5) EPC) and proposing the judges who are to be affected by cuts in the number of posts (see proposed Article 23(3)(b) EPC).

47. In Article 21c(3) EPC it is proposed that the President of the Court should be obliged to consult the Presidium on the draft budget before it is submitted to the Administrative Council and on any other matters concerning the functioning of the Appeal Chambers in general.

**(e) Registry**

48. The Registry of the Appeal Chambers and the High Chamber is mentioned in the proposed Article 21d EPC in order to make the Court's organisation transparent in respect of its functions in the appeals procedure as well.

**D. APPEALS PROCEDURE BEFORE THE EUROPEAN COURT OF PATENT APPEALS**

49. Detaching the Appeal Chambers from the Office does not entail any changes to the appeals procedure before the new judicial body. In particular, the stipulation that appeals are to be filed with the Office is to be retained. The proposals concerning the EPC's procedural provisions show that to that extent the Organisation's proposed new structure necessitates only technical alterations that scarcely change the substance of the procedural provisions.

**E. STATUS OF COURT PERSONNEL**

**(a) Substantive independence of judges**

50. The judges' substantive independence is guaranteed in particular by the proposed Article 23(1) and (2) EPC. It is qualitatively reinforced and made apparent to the outside world by making DG 3 autonomous as a judicial body.
51. The proposed Article 23(1) EPC is equivalent to the present Article 23(3) EPC, under which the Boards of Appeal in their decisions are not bound by any instructions and are subject only to the EPC; the wording has been brought into line with the new designations.
52. The proposed Article 23(2) EPC governs the incompatibility of the status of judge with any involvement in first-instance departments. This does not mean that Office employees cannot be appointed as judges; but once appointed they can no longer

perform any full-time function in the Office. Article 23(2) EPC also rules out other functions that are incompatible with the office of judge.

**(b) Personal independence of judges**

53. The determining factors in the personal independence of an Appeal Chamber judge are the appointment procedure, the term of office, the conditions for (early) termination of office and the effects of any such termination on a judge's status as employee of the Organisation.
54. The present legal situation is that the members and chairmen of the boards are appointed by the Council on a proposal from the President of the Office (Article 11(3) of the current EPC). The Office President's right of proposal is not appropriate to an autonomous judicial body detached from the Office.
55. It is therefore proposed that the Council should appoint the judges of the Court on a proposal from the President of the Court, and the members of the High Chamber on a proposal from the Presidium of the Court. That will counter criticism over the Office President's role in the appointment of members of the boards (see point 17 above). According to the proposed Article 21f(2), second and third sentences, and 21f(3) EPC, the appointment proposals are prepared within the Court (see points 38 and 43 above).
56. At present, appointments are for a renewable (and usually renewed) term of five years.
57. To strengthen the independence of the judges of the Court and make it clearly apparent, appointment for life is proposed, but with the proviso that the term of office may end (apart from through death) under any of the circumstances exhaustively listed in the proposed Article 23(3) and (4) EPC (in particular, through reaching the age of retirement).
58. Lifetime appointment as a judge with the consequent irremovability reflects the status of national judges in many legal systems in the contracting states, in some of which it is actually enshrined in the constitution. It is a cornerstone of the guarantee of the rule of law, and is viewed as crucial to ensuring judicial independence. Expressly and exhaustively defined grounds for termination of or removal from office do not conflict with this principle, but are a correlative of it.

59. Judges at most other international courts admittedly have a limited term of office; but their situation is not comparable with that of an Appeal Chamber judge. Appointments at such courts often have a political aspect. The judges normally hold public office in their own countries, eg as judges, and remain integrated within their national system. They are only temporarily seconded to the international courts.
60. The Boards of Appeal, as expert courts, are more comparable with national courts, where appointment for life is common, as indicated above. With few exceptions, board members leave their national legal systems or have never held judicial office before. If they are not reappointed after a brief term of five years, they lose their status as judges, and thus they are open to the suspicion of being under some sort of pressure to conform with an eye to reappointment.
61. Lifetime appointment of judges of the Court will safeguard personal independence institutionally and make it convincingly visible to the outside world without the Organisation needing to fear disadvantages compared to existing legal practice. Appointment as a judge in an Appeal Chamber will already demand considerable previous professional experience, which will restrict the actual duration of the appointment. With career prospects in the form of rising to presiding judge, there will also be no need to worry about motivation problems arising from lifetime appointment.
62. As a correlative to lifetime appointment it is proposed that all the circumstances that can lead to termination of or removal from office should be exhaustively specified in the EPC. That reflects the requirement in Article 6 ECHR that a court's organisation should be enshrined in law.
63. The proposed Article 23(3)(a) EPC provides for the term of office to end if a judge retires or resigns on his own initiative, eg in order to take up other duties within the Organisation.
64. The proposed Article 23(3)(b) EPC gives the Council the right to reduce the number of posts due to lack of work. However, it precludes selective elimination of a post in order to rule out actions targeted against a specific judge outside the statutory procedures. Posts can normally be allowed to disappear by normal fluctuation in staff numbers. If that and other action is insufficient, eg if there is a considerable sustained fall in the workload, and terms of office have to be ended, the Council will decide how many posts to cut, but only on a proposal from the Presidium of the Court as to the judges who are affected.

65. The Council may remove from office a judge who ceases to be a national of an EPC contracting state, or if he is unfit to discharge his duties for reasons of behaviour or incapacity (see proposed Article 23(4) EPC). The Council may institute removal proceedings only on a proposal from the High Chamber sitting with nine members including external members (see point 39 above). The involvement of external members ensures that not only court-internal aspects come into play in proceedings that are to be conducted in a judicial manner. The proposal for removal should require a four-fifths majority.
66. A strict legal distinction must be made between the provisions in the EPC for termination of and removal from office and measures provided for in the Organisation's Service Regulations.
67. Lifetime appointment in conjunction with the independence guaranteed in the EPC is a barrier to any action leading to termination of office under the Service Regulations. The grounds now exhaustively listed in the proposed Article 23 EPC are a necessary counterbalance to lifetime appointment. They are the only grounds on which a judge of the Court can lose his office. This safeguards the institutional independence of the judicial body and makes the independence of its judges visible to the outside world.
68. However, the loss of office associated with the above measures is not tantamount to losing the status of permanent employee of the Organisation. That is a separate procedure governed by the rules, guarantees and social security provisions of the Service Regulations. In the case of judges of the Court, the Council is responsible for both - legally distinct - procedures.

**(c) Conditions of service for Court staff**

69. All the new judicial body's staff will continue to be employed by the Organisation, which alone has legal personality. That is why even now the staff of the European Patent Office are employees of the European Patent Organisation.
70. The employment-law and social-law status of the new judicial authority's staff can be left as it is. That applies in particular to the Service Regulations, the Pension Scheme Regulations, the Pension Reserve Fund, the Collective Insurance Contract, long-term care insurance and internal tax. These regulations will be

amended only as far as is technically necessary, for example by replacing "employees of the European Patent Office" with "employees of the European Patent Organisation" so as to cover Court staff as well. Full right of appeal to the ILO Administrative Tribunal will be retained.

71. The Court's non-judicial staff are to be subject to the same reporting and promotion criteria and disciplinary procedure as the Organisation's other employees, with the present powers of the President of the Office being transferred to the President of the Court.
72. The Appeal Chamber judges are to be subject to the Organisation's general service regulations except where special arrangements are required in view of the judicial body's independence or where certain provisions do not apply. No separate service regulations for judges are proposed, as that would entail over-extensive changes to the Organisation's employment law. Appointment to the office of judge will continue to be based on a new or existing employment relationship with the Organisation under the general Service Regulations.
73. Provision is to be made in the Service Regulations for setting up a staff committee for the Court, and the Court's staff is to be represented on the Central Staff Committee in relation to issues affecting all the Organisation's employees.

**(d) Disciplinary law**

74. Under the proposed Article 21f(5) EPC, disciplinary authority over Appeal Chamber judges continues to be exercised by the Administrative Council. Judicial disciplinary proceedings must be based on a disciplinary committee opinion containing a proposal as to whether disciplinary action is to be taken and if so which. Disciplinary committees consist of judges of the Court in a composition governed by rules laid down by the Presidium of the Court.
75. Without prejudice to judicial independence, further details of disciplinary law are to be settled by secondary legislation, which is to stipulate that the right to institute disciplinary proceedings lies with the President of the Court and the Presidium of the Court. The disciplinary committee's proposal for disciplinary action is to require a qualified majority. If the Council rejects this proposal, it should only be allowed to impose a lesser penalty or waive the penalty, but not to increase it.

76. As the members of the High Chamber (apart from the external members, who are not subject to these disciplinary rules) are also Appeal Chamber judges, no special disciplinary arrangements are required for them.
77. The Council also exercises disciplinary authority over the President of the Court, the right to institute proceedings lying with the Council Chairman. However, if his alleged misconduct is connected with his functions as a judge or as Chairman of the High Chamber, the Council may only take disciplinary action on a proposal from the disciplinary committee, as for any other judge.

## **F. ORGANISATIONAL INDEPENDENCE OF THE COURT**

78. One major factor in the Court's organisational independence is having its own budget. Even now, financial expenditure for the boards (see point 28 above) cannot be covered by fees for proceedings before them, but only from the Organisation's general budget. That will not change with organisational autonomy. Lack of internal funding is not peculiar to the boards, but applies to nearly all courts; it is the price that has to be paid for a generally accessible legal system. Hence, as an institutional safeguard on the independence of the Court, the proposed Article 4(4) EPC obliges the Organisation to provide the Court with the resources it needs.
79. Currently, the budget of the Organisation is the budget of the Office. In future there will still be an overall budget for the Organisation, but it will be the sum of two separate budgets, one for the Office and one for the Court. These separate budgets will be prepared by the President of the Office and the President of the Court respectively and submitted to the Council for approval. If adopted, they will be consolidated to form the budget of the Organisation, with each President implementing his own budget and being answerable for it to the Council. If one of the budgets is not adopted, Article 47 EPC concerning provisional budgets will apply to the relevant body. Details are to be settled in the Financial Regulations.
80. The Court and the Office are to co-operate in administrative matters. That will not undermine the Appeal Chambers' independence, and it will make it possible to use the Office's efficient infrastructure and minimise the cost of implementing autonomy. Areas such as automation, salary administration, Language Service, meeting rooms and treasury matters can be covered by agreements between the two bodies. The two Presidents are to be entrusted with appropriate duties and powers (see the proposed Article 21e(2)(b) EPC and its counterpart, the proposed Article 10(2)(d) EPC concerning the powers of the President of the Office).

81. The President of the Court as such is responsible for managing the Court of the European Patent Organisation, but his influence naturally does not extend to judicial activities (see proposed Article 21e(1) EPC). For his administrative activities he has the functions and powers conferred by the proposed Article 21e(2) EPC. In particular, he has to prepare and implement the Court's budget, he may submit proposals concerning the Court to the Council, he is the appointing authority within the meaning of the Service Regulations for non-judicial staff, and in implementing the Court's budget he has the power to conclude contracts on behalf of the Organisation.
82. Without prejudice to its judicial independence, the new judicial body is to be supervised by the Administrative Council. The President of the Court has to account for his activities to the Council, and he is answerable to the Council for his administrative activities in respect of the Court in the same way as the President of the Office in respect of the Office. The Council's supervisory powers mean it will continue to be supplied with information on the Appeal Chambers' workload and performance (basic assumptions, medium-term business plan, production and productivity figures). The Council's budgetary sovereignty constitutes an important instrument of supervision and control.
83. The Court's headquarters are to remain in Munich. That is in the interests of the parties and their representatives, for whom moving the Court to another location would be a major logistical headache; and it also allows optimum use to be made of the Office's facilities and avoids considerable additional costs for the Organisation. At another location it would not be possible to exploit the Office's facilities on the scale envisaged in the present draft. The consequence would be duplication of structures, a far higher number of new posts and far higher expenditure. Moving the Court to another location might also mean that a lot of its staff would not move with it, possibly taking early retirement, or that suitably qualified EPO employees would no longer aspire to work for the Appeal Chambers on the same scale as for today's boards. The resultant staffing shortfalls would be a major obstacle to the prompt settlement of appeals.

#### **G. EXTERNAL MONITORING OF JUDICIAL DECISION-MAKING**

84. The President of the Office may refer points of law to the High Chamber in order to ensure uniform application of the law, thereby retaining the option of having the Chambers' decision-making examined in a formal procedure without undermining their independence. There are also ways to influence judicial decision-making in

general other than through institutional monitoring. Patent law practitioners and legal researchers can comment and criticise in the relevant periodicals, and the contracting states and the Administrative Council under their legislative powers can enact provisions which change the legal framework.

85. Regardless of institutional monitoring, of course, a court should in any case have an eye to the readily comprehensible requirements of parties to its proceedings and keep itself informed of their needs. As is already the case, yearly meetings between the Appeal Chambers and members of SACEPO could serve this purpose.