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EPLIT position paper
on the User Consultation on the revision of the Rules of Procedure
of the Boards of Appeal of the EPO

1. EPLIT was founded in 2013 as the association of European Patent Attorneys who are qualified to represent and litigate before the Unified Patent Court (UPC) and other patent practitioners qualified according to Article 48 (1) or (4) of the Unified Patent Court Agreement (UPCA).
EPLIT's main objectives are to promote user-friendly, fair, efficient and cost-effective patent litigation in Europe, in particular litigation before the UPC, to promote any measures for improving patent litigation, in particular before the UPC, and to increase and strengthen the relationships between practitioners entitled to represent parties in patent disputes in Europe.

2. This position paper is in reaction to the proposal for revision of the Rules of Procedure of the Boards of Appeal of the EPO (RPBA) by the Boards of Appeal Committee (BOAC) and the President of the Boards of Appeal. We welcome the opportunity given to stakeholders to provide their comments.

3. EPLIT is an association with a diverse membership. As a result, we are unable to express a common opinion on all the proposed revisions. If no opinion is expressed on a particular provision, this does not indicate that EPLIT is in agreement with the proposal.

   EPLIT recognizes that the proposed revisions are to some degree a codification of the current practice and case law of the Boards of Appeal. EPLIT would like to emphasize, however, that it is of fundamental importance to strike a balance between, on the one hand, procedural efficiency and predictability and, on the other, the right of the parties to be heard.

4. One aspect of proceedings before the EPO is that for applicants and patentees, the Boards of Appeal (BoA) are the instance or last resort if they lose. This is not the case for opponents as they can initiate revocation actions before national courts or, hopefully, before the UPC in the near future. Another aspect of proceedings before the EPO, if they are inter partes proceedings, is that a patentee may have to defend his patent against opposition filed by multiple parties. This calls for a delicate balance in, for instance, the setting of time limits. EPLIT urges that this is taken into account in the consideration of, for instance, the proposed new Article 12(7) RPBA and revisions to Article 15(2) RPBA.

   Yet another aspect of proceedings before the EPO is that there always is a public interest involved. This calls for a timely completion of appeal proceedings in both ex parte and inter partes situations.

5. EPLIT recognizes that the proposed revisions seek to strike a balance that takes all these aspects into account. EPLIT, however, would like to point out that the RPBA cannot grant procedural powers to the BoA that go beyond the basis of the EPC, in particular Articles 113 and 114 EPC, and that the general requirements for a fair trial, as set out in the European Convention of Human Rights, are also applicable to appeals against decisions of a patent office (ECHR, British American Tobacco v. the Netherlands, Appl. No. 19589/92, 20 November 1995).

   From that perspective, EPLIT considers the introduction of the term “judicial review” in the proposed revision of Article 12(2) RPBA to go too far as this term may be interpreted as restricting the rights of parties to introduce new facts, arguments or evidence at the appeal stage too much. EPLIT is of the opinion that the scope of appeal proceedings should not be limited only those arguments and facts that are mentioned in the decision under appeal. EPLIT would be in favour of a clarification of Article 12(2) RPBA to reflect that, in any case, all facts, evidence and arguments submitted during the first instance proceedings can be relied on by the parties in the appeal proceedings.

   Accordingly, while an abuse of procedure must not be permitted or condoned, EPLIT stresses that the RPBA should assist the BoA to come to a substantive assessment of a case before them, such as the validity of a patent in opposition proceedings, and that the adjudication of a case on the basis of procedural rules only should be avoided where reasonably possible.

6. With its letter of 30 June 2015 to the Chairman of the Administrative Council of the EPO (J. Kongstad), EPLIT has commented on a proposal by the EPO in document CA/16/15 of 6 March 2015 regarding a planned reform of the BoA.

   EPLIT welcomed the initiative of the EPO to improve the independence of the BoA and pointed out that the focus on "objectives of efficiency to be reached" may be a possible source for a conflict of interest for the Chairman of the Enlarged Board of Appeal (EBoA) (cf. Interlocutory decision R 19/12 , points 17.2 and 17.3).

   EPLIT further stated that efficiency is only one of the aspects to be considered regarding the internal organisation of the BoA. It should be the main objective of a judiciary to issue well-founded decisions on the basis of a fair trial, as it is required by Article 113(1) EPC and Article 6(1) of the European Convention of Human Rights, as stated in decision R 19/12 (point 9), G 1/05 (point 22), and G 2/08 (point 3.3).

   EPLIT hereby reiterates this position.

7. EPLIT welcomes the introduction of a requirement for the BoA to send a communication in advance of oral proceedings as set out in Article 15(1) RPBA. In addition, EPLIT welcomes the inclusion of a time limit for issuing a written decision after oral proceedings in Article 15(9) RPBA. Both revisions enhance the predictability of the proceedings for both the parties and the public, as well their efficiency.

8. With regard to the transitional provisions of Article 25 RPBA, EPLIT considers that legal certainty is served by stipulating that the new RPBA only apply to appeals filed from decisions that are issued after their entry into force. That way, parties have sufficient time to adopt their procedural strategy to any changes in the procedural practice of the BoA.

Yours sincerely,

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