

CA/53/17

Orig.: en

Munich, 09.06.2017

SUBJECT: Procedure for designating the deputy of the President of the Boards of Appeal

SUBMITTED BY: Chairman of the Administrative Council

ADDRESSEES: Administrative Council (for decision)

SUMMARY

According to Rule 12a(1), fourth sentence, EPC, it is for the Administrative Council to lay down the procedure establishing who is to take the place of the President of the Boards of Appeal if he is absent or indisposed.

The procedure proposed in this document draws on the existing procedure for the replacement of the President of the Office under Article 10(3) EPC, on which Rule 12a(1), fourth sentence, EPC was modelled.

The President of the Boards of Appeal may designate his deputy/-ies from among the group of members of the Enlarged Board of Appeal. If the designated deputy is also absent or indisposed, the member of the Enlarged Board of Appeal with the longest service on the Enlarged Board of Appeal is to be the deputy.

TABLE OF CONTENTS

Subject	Page
PART I	1
I. STRATEGIC/OPERATIONAL	1
II. RECOMMENDATION	1
III. MAJORITY NEEDED	1
IV. CONTEXT	2
A. RULE 12A(1), FOURTH SENTENCE, EPC	2
B. MODEL: ARTICLE 10(3), SECOND SENTENCE, EPC AND THE PROCEDURE LAID DOWN BY THE ADMINISTRATIVE COUNCIL	2
V. ARGUMENTS	3
VI. ALTERNATIVES	4
VII. FINANCIAL IMPLICATIONS	5
VIII. LEGAL BASIS	5
IX. DOCUMENTS CITED	5
X. RECOMMENDATION FOR PUBLICATION	5
PART II	6

PART I

I. STRATEGIC/OPERATIONAL

1. Operational.

II. RECOMMENDATION

2. The Administrative Council is requested to lay down the procedure for designating the deputy of the President of the Boards of Appeal if he is absent or indisposed.

It is recommended that the following procedure be established:

3. "Article 1

The President of the Boards of Appeal shall designate the member(s) of the Enlarged Board of Appeal who is (are) to replace him in individual matters or series of matters while he is absent or indisposed. As concerns the exercise of the functions and powers which are the subject of the Act of Delegation signed by the President of the Office, such replacement shall require the agreement of the President of the Office. The designation of the deputy (deputies) should be made as soon as possible after the President of the Boards of Appeal takes up office. The name(s) of the designated deputy (deputies) shall be published.

Article 2

If a member of the Enlarged Board of Appeal designated under Article 1 is also absent or indisposed, the member of the Enlarged Board of Appeal with the longest service on the Enlarged Board of Appeal shall deputise as President of the Boards of Appeal or, where members of the Enlarged Board of Appeal have the same length of service on the Enlarged Board of Appeal, the eldest member. If that deputy is also absent or indisposed, the member of the Enlarged Board of Appeal with the next longest service as member of the Enlarged Board of Appeal shall deputise."

III. MAJORITY NEEDED

4. Simple majority, Article 35(1) EPC.

IV. CONTEXT

A. RULE 12A(1), FOURTH SENTENCE, EPC

5. As part of the reform of the Boards of Appeal, Rule 12a EPC was inserted in the Implementing Regulations by decision of the Administrative Council CA/D 6/16 of 30.06.2016 (OJ EPO 2016, A100) and entered into force on 01.07.2016.

Rule 12a(1), fourth sentence, EPC reads:

"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."

6. It is, therefore, for the Administrative Council to lay down the procedure by which the deputy of the President of the Boards of Appeal is designated.
7. The only requirement laid down under Rule 12a(1), fourth sentence, EPC is that the deputy must be a member of the Enlarged Board of Appeal.

B. MODEL: ARTICLE 10(3), SECOND SENTENCE, EPC AND THE PROCEDURE LAID DOWN BY THE ADMINISTRATIVE COUNCIL

8. For the designation of the deputy of the President of the Office, Article 10(3), second sentence, EPC, provides the following:

"If the President is absent or indisposed, one of the Vice-Presidents shall take his place in accordance with the procedure laid down by the Administrative Council".

This is similar to what is provided in Rule 12a(1), fourth sentence, EPC for the President of the Boards of Appeal.

9. The Administrative Council laid down the procedure for designating the deputy of the President of the Office in the "Decision of the Administrative Council of 6 July 1978 on substitution for the President of the European Patent Office under Article 10, paragraph 3, second sentence, of the European Patent Convention", published in OJ EPO 1978, 326.

10. Article 1 of the Decision of the Administrative Council of 6 July 1978 reads:

"The President of the European Patent Office shall designate the Vice-President [or] Vice-Presidents who is/are to replace him in individual matters or series of matters while he is absent or indisposed. As a general rule, the President shall designate each Vice-President for matters which fall within the sphere of operations of the latter."

V. ARGUMENTS

11. According to the relevant document on the reform of the Boards of Appeal, Rule 12a(1), fourth sentence, EPC was modelled on Article 10(3), second sentence, EPC, see CA/43/16 Rev.1, Annex 1, Part I, Explanatory notes, point 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."

12. Therefore, the procedure for replacing the President of the Boards of Appeal should draw on the procedure established by the Administrative Council for the replacement of the President of the Office.

13. As with the procedure laid down for the President of the Office, the President of the Boards of Appeal should designate one or more deputies for the time he is absent or indisposed. The President of the Boards of Appeal should be able to designate deputies for individual matters or a series of matters.

The functions and powers, which are the subject of the Act of Delegation signed by the President of the Office, can be exercised by the deputy only with the agreement of the President of the Office. As explained in Annex 1, point 10 of CA/43/16 Rev.1 a delegation of powers is by its very nature highly intuitu personae in character. Consequently, the President of the Boards of Appeal cannot sub-delegate these functions and powers without the agreement of the President of the Office.

14. According to Rule 12a(1), fourth sentence, EPC, the deputy of the President of the Boards of Appeal can only be a member of the Enlarged Board of Appeal. This limitation should be explicitly mentioned in the procedure laid down by the Administrative Council.
15. The President of the Boards of Appeal exercises at the same time both the powers delegated to him by the President of the European Patent Office (as described, for example, in Rule 12a(2), (3) and Rule 12d(2), (3) EPC) and the judicial function of the Chairman of the Enlarged Board of Appeal. If the President of the Boards of Appeal decides to designate one deputy to replace him in all his functions, the designation automatically encompasses the function of Chairman of the Enlarged Board of Appeal. In such a case, the deputy must also be qualified to fulfil this function, meaning in particular that the deputy must have been appointed as a legally qualified member of the Enlarged Board of Appeal (see Article 22(2), third sentence, EPC, Rule 12d(1) EPC).
16. The deputy should be designated as soon as possible after the President of the Boards of Appeal takes up his office. In this way, it will at all times be clear who the designated deputy is. In the event that the designated deputy is no longer a member of the Enlarged Board of Appeal, a new deputy should be designated as soon as possible.
17. For the sake of transparency, the name of the deputy of the President of the Boards of Appeal should be published.
18. The procedure to be laid down should also provide for the situation in which the person designated by the President of the Boards of Appeal is him/herself absent or indisposed. In such a case, the member of the Enlarged Board of Appeal with the longest service on the Enlarged Board of Appeal should be the deputy.

VI. **ALTERNATIVES**

19. -

VII. FINANCIAL IMPLICATIONS

20. No.

VIII. LEGAL BASIS

21. Rule 12a(1), fourth sentence, EPC

IX. DOCUMENTS CITED

22. CA/43/16 Rev.1; CA/D 6/16

X. RECOMMENDATION FOR PUBLICATION

23. Yes.

PART II

Draft

DECISION OF THE ADMINISTRATIVE COUNCIL
of [date of decision]
laying down the procedure for designating the
deputy of the President of the Boards of Appeal if
absent or indisposed

THE ADMINISTRATIVE COUNCIL OF THE EUROPEAN PATENT ORGANISATION,

Having regard to the European Patent Convention and in particular Rule 12a(1), fourth sentence, thereof,

HAS DECIDED AS FOLLOWS:

Article 1

The President of the Boards of Appeal shall designate the member(s) of the Enlarged Board of Appeal who is (are) to replace him in individual matters or series of matters while he is absent or indisposed. As concerns the exercise of the functions and powers which are the subject of the Act of Delegation signed by the President of the Office, such replacement shall require the agreement of the President of the Office. The designation of the deputy (deputies) should be made as soon as possible after the President of the Boards of Appeal takes up office. The name(s) of the designated deputy (deputies) shall be published.

Article 2

If a member of the Enlarged Board of Appeal designated under Article 1 is also absent or indisposed, the member of the Enlarged Board of Appeal with the longest service on the Enlarged Board of Appeal shall deputise as President of the Boards of Appeal or, where members of the Enlarged Board of Appeal have the same length of service on the Enlarged Board of Appeal, the eldest member. If that deputy is also absent or indisposed, the member of the Enlarged Board of Appeal with the next longest service as member of the Enlarged Board of Appeal shall deputise.

Article 3

This decision shall enter into force on [date of decision].

Done at The Hague, [date of decision]

For the Administrative Council
The Chairman

Jesper KONGSTAD