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Conseil d'administration

BOAC/18/23

Orig.: en

Munich, 21.11.2023

SUBJECT: Adoption of amendments to the Rules of Procedure of the Boards of Appeal – further enhancing the timeliness of appeal proceedings

SUBMITTED BY: President of the Boards of Appeal

ADDRESSEES: Boards of Appeal Committee (for decision)

SUMMARY

The President of the Boards of Appeal proposes that the Boards of Appeal Committee adopts the amendments to the Rules of Procedure of the Boards of Appeal (RPBA) set out in Part II of this document. To further enhance the timeliness of appeal proceedings, it is proposed to amend Articles 13(2), 15(1) and 15(9)(b) RPBA.

TABLE OF CONTENTS

Subject	Page
PART I	1
I. STRATEGIC/OPERATIONAL	1
II. RECOMMENDATION	1
III. MAJORITY NEEDED	1
IV. CONTEXT	1
V. PROPOSED AMENDMENTS	2
VI. TABLE SETTING OUT THE AMENDMENTS TO THE RPBA AND THE EXPLANATORY REMARKS	4
VII. ALTERNATIVES	10
VIII. FINANCIAL IMPLICATIONS	10
IX. LEGAL BASIS	10
X. DOCUMENTS CITED	10
XI. RECOMMENDATION FOR PUBLICATION	10
PART II	11

PART I

I. STRATEGIC/OPERATIONAL

1. Operational.

II. RECOMMENDATION

2. It is proposed that the Boards of Appeal Committee (BOAC) adopt the amendments to the Rules of Procedure of the Boards of Appeal (RPBA) set out in Part II of this document.

III. MAJORITY NEEDED

3. Simple.

IV. CONTEXT

4. One of the general objectives of the Boards of Appeal (BoA) is to settle 90% of cases within 30 months of receipt and to reduce the number of pending cases to below 7 000 by 2023. Significant progress has been made (see CA/29/23). It is forecast that by the end of 2024, nearly all cases pending for longer than 30 months will have been settled.
5. These developments will enable the BoA to gradually start dealing with appeals as soon as they are transferred to the BoA. This, in turn, will have two consequences.
6. First, the BoA will be able to pursue more ambitious timeliness objectives. A proposal on general objectives to the BoA has been discussed with and received a unanimous positive opinion from the BOAC (see BOAC/7/23 and BOAC/16/23, para. 10). The objective for the BoA, thus, will be to settle 90% of cases within 24 months (from the filing of the notice of appeal) until the end of 2025. In 2025, it is envisaged that an assessment of the experience under the 24-month objective will take place and even more ambitious timelines will be considered.
7. Second, the new circumstances also require a few amendments to the RPBA. In particular, amendments are needed to increase flexibility in case management, while ensuring that the rights of the parties are duly safeguarded.

8. At its 15th meeting, the BOAC endorsed the proposal of the President of the Boards of Appeal (PBoA) to work on amendments to some provisions of the RPBA, including the proposal to hold a related user consultation. It was also agreed that the proposed amendments would be presented informally to the BOAC for its opinion (see BOAC/6/23, para. 8).
9. An initial proposal has been presented to the BOAC, which agreed to it being the subject of a user consultation. An online user consultation on the initial English version of the proposed amendments was held from 16 June to 11 September 2023. Users submitted a total of 60 responses, 19 thereof by user associations.
10. A first discussion of the feedback provided by users took place at the 16th meeting of the BOAC (see BOAC/16/23, para. 14-18). The PBoA made preliminary comments on the feedback received from users. In particular, for the time being, no shortening of the default time limit for replies to the statement of grounds of appeal (Article 12(1)(c) RPBA) will be pursued. This proposal will, however, be reconsidered once experience under the 24-month timeliness objective is evaluated in 2025.
11. The proposed amendments were discussed in further exchanges with users, including in a meeting on 11 October 2023 chaired by the PBoA and attended by members of **epi** and **BUSINESSEUROPE**, the chairperson and members of the BOAC as well as representatives of the President of the European Patent Office and of the Presidium of the BoA.
12. In further meetings and in written procedure, the Presidium of the BoA provided its advice to the proposed amendments (see Rule 12b(3)(c) EPC). Finally, in accordance with Rule 12c(2) EPC, the President of the European Patent Office was given the opportunity to comment.
13. With the present document, the PBoA submits the proposed amendments (see part II of this document) formally, for adoption by the BOAC according to Rule 12c(2) EPC.

V. PROPOSED AMENDMENTS

14. It is proposed that
 - Article 13(2),
 - Article 15(1) and

- Article 15(9)(b)

be amended to read as follows:

Article 13(2): "Any amendment to a party's appeal case made after the expiry of a period specified by the Board in a communication under Rule 100, paragraph 2, EPC or, where such a communication is not issued, after notification of a communication under Article 15, paragraph 1, shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned."

Article 15(1): "Without prejudice to Rule 115, paragraph 1, EPC, the Board shall, if oral proceedings are to take place, endeavour to give at least four months' notice of the summons. A single date is fixed for the oral proceedings.

In order to help concentration on essentials during the oral proceedings, the Board shall issue a communication drawing attention to matters that seem to be of particular significance for the decision to be taken. The Board may also provide a preliminary opinion. The Board shall endeavour to issue the communication at least four months in advance of the date of the oral proceedings. In cases where there is more than one party, the Board shall issue the communication no earlier than one month after receipt of the written reply or replies referred to in Article 12, paragraph 1(c)."

Article 15(9)(b): "When a case is ready for decision at the conclusion of the oral proceedings but the Chair does not announce the decision on the appeal orally in accordance with paragraph 6, the Chair shall indicate the date on which the decision on the appeal is to be despatched, which shall not be later than three months after the closure of the oral proceedings. If the Board is unable to despatch the decision on the appeal by that date, it shall inform the parties and the President of the Boards of Appeal of a new date or, in exceptional circumstances, shall issue a communication specifying the further procedural steps that will be taken."

15. A comparative table showing the proposed changes is provided in the next section. The table in question also contains explanatory notes on the proposed new provisions.

VI. TABLE SETTING OUT THE AMENDMENTS TO THE RPBA AND THE EXPLANATORY REMARKS

16. Amendments to the provisions are shown in bold. Deletions are struck through; additions are highlighted in grey.

RPBA – current provisions (...)	RPBA – proposed provisions (...)	Explanatory remarks
Article 13 Amendment to a party's appeal case (...)	Article 13 Amendment to a party's appeal case (...)	
(2) Any amendment to a party's appeal case made after the expiry of a period specified by the Board in a communication under Rule 100, paragraph 2, EPC or, where such a communication is not issued, after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.	(2) Any amendment to a party's appeal case made after the expiry of a period specified by the Board in a communication under Rule 100, paragraph 2, EPC or, where such a communication is not issued, after notification of a summons to oral proceedings communication under Article 15, paragraph 1 , shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.	<p>Currently, the third level of the convergent approach applicable in appeal proceedings may be triggered before a Board sends a substantive communication under Rule 100(2) EPC or under Article 15(1). This is because it may be triggered by notification of a summons to oral proceedings, which may be despatched without a communication under Article 15(1). At times, in particular when the communication under Article 15(1) has been notified considerably later than the summons to oral proceedings, this has been perceived as not being ideal.</p> <p>It is thus proposed to replace notification of a summons to oral proceedings with notification of a communication under Article 15(1) as a trigger for the third level of the convergent approach. The expiry of a period specified by the Board in a communication under Rule 100(2) EPC would remain as a trigger for the third level of the convergent approach.</p>

		<p>Under the proposed new provision, users of the patent system would benefit from the less strict approach under Article 13(1) until a later stage in the proceedings. This amounts to an extension of the second level of the convergent approach applicable in appeal proceedings.</p> <p>The proposed new Article 13(2) will apply from the date of entry into force of the new provisions. In pending appeals where the third level of the convergent approach set out in Article 13(2) as currently in force applies solely due to the notification of a summons to oral proceedings, but neither the period specified in a communication under Rule 100(2) EPC has expired nor a communication under Article 15(1) was notified to the parties, the conditions of the second level of the convergent approach will, upon the entry into force of the proposed new provisions, by operation of law, be applicable until the third level is triggered by the proposed new Article 13(2). In such cases, any amendment to a party's appeal case</p> <ul style="list-style-type: none">(1) after it has filed its<ul style="list-style-type: none">(a) grounds of appeal or(b) reply(2) and before<ul style="list-style-type: none">(a) the expiry of a period specified
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		<p>by the Board in a communication under Rule 100(2) EPC or (b) notification of a communication under Article 15(1)</p> <p>will be treated under the second level of the convergent approach governed by Article 13(1), irrespective of the amendment being made before or after the entry into force of the new provisions.</p>
(...)	(...)	
<p>Article 15 Oral proceedings and issuing decisions</p> <p>(1) Without prejudice to Rule 115, paragraph 1, EPC, the Board shall, if oral proceedings are to take place, endeavour to give at least four months' notice of the summons. In cases where there is more than one party, the Board shall endeavour to issue the summons no earlier than two months after receipt of the written reply or replies referred to in Article 12, paragraph 1(c). A single date is fixed for the oral proceedings.</p> <p>In order to help concentration on essentials during the oral proceedings, the Board shall issue a communication drawing attention to matters that seem to be of particular significance for the decision to be taken. The Board may also provide a preliminary opinion. The Board shall</p>	<p>Article 15 Oral proceedings and issuing decisions</p> <p>(1) Without prejudice to Rule 115, paragraph 1, EPC, the Board shall, if oral proceedings are to take place, endeavour to give at least four months' notice of the summons. In cases where there is more than one party, the Board shall endeavour to issue the summons no earlier than two months after receipt of the written reply or replies referred to in Article 12, paragraph 1(c). A single date is fixed for the oral proceedings.</p> <p>In order to help concentration on essentials during the oral proceedings, the Board shall issue a communication drawing attention to matters that seem to be of particular significance for the decision to be taken. The Board may also provide a preliminary opinion. The Board shall</p>	<p>Under the proposed new Article 13(2), notification of the summons to oral proceedings does not mean that a stricter approach will apply to the parties' submissions. When fixing the date for oral proceedings, the Board will consider the circumstances of the case, including its complexity and the envisaged length of the proceedings. Under the proposed new Article 13(2), early notification of a summons to oral proceedings is purely beneficial for parties and representatives, who can make the necessary arrangements. This increases the chances of the participants being available on the scheduled date, in particular in cases involving a high number of parties.</p> <p>Having this in mind, it is proposed to delete the second sentence of Article 15(1): "In</p>

<p>endeavour to issue the communication at least four months in advance of the date of the oral proceedings.</p>	<p>endeavour to issue the communication at least four months in advance of the date of the oral proceedings. In cases where there is more than one party, the Board shall issue the communication no earlier than one month after receipt of the written reply or replies referred to in Article 12, paragraph 1(c).</p>	<p>cases where there is more than one party, the Board shall endeavour to issue the summons no earlier than two months after receipt of the written reply or replies referred to in Article 12, paragraph 1(c)." This sentence currently provides parties with an enhanced possibility to provide comments on the reply or replies to the statement of grounds at the second level of the convergent approach.</p> <p>To continue enabling this under the proposed new Article 13(2), it is proposed to add a sentence to the end of Article 15(1).</p> <p>The proposed new provision strengthens the position of parties to proceedings. The current provision lays down that "the Board shall endeavour", which enables the Board to set a shorter timescale based on the circumstances of the case (e.g. in the case of accelerated proceedings). The proposed new Article 15(1) guarantees ("the Board shall issue") that the third level of convergence will not be triggered before the expiry of one month after receipt of the written reply.</p> <p>Under the proposed new provision, where there is more than one party the Board may therefore only issue the communication less than one month after receipt of the</p>
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		<p>written reply or replies referred to in Article 12(1)(c) with all appellants' prior approval.</p> <p>The proposed one-month timescale after receipt of the written reply or replies gives the parties an adequate opportunity to respond to such reply or replies in standard cases and allows the Board to preliminarily assess the case on the basis of parties' written submissions in preparation of a communication pursuant to Article 15(1).</p> <p>A longer timescale remains at the discretion of the Board, considering all the circumstances of the case. For instance, in cases where the Board considers it appropriate to enable additional exchanges between the parties within the second stage of the convergent approach for a longer time, it may inform the parties that it does not envisage issuing the communication under Article 15(1) before a certain date.</p> <p>Likewise, parties may inform the Board of their intention to file an additional submission in a specified reasonable time and at the same time request that the Board refrain from issuing the communication under Article 15(1) before a certain date. The Board has discretion in deciding on said request.</p>
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(...)	(...)	
<p>(9) The Board shall issue the decision on the appeal in a timely manner.</p> <p>(a) Where the Chair announces the decision on the appeal orally in accordance with paragraph 6, the Board shall put the decision in writing and despatch it within three months of the date of the oral proceedings. If the Board is unable to do so, it shall inform the parties when the decision is to be despatched. The President of the Boards of Appeal shall also be informed thereof.</p> <p>(b) When a case is ready for decision at the conclusion of the oral proceedings but the Chair does not announce the decision on the appeal orally in accordance with paragraph 6, the Chair shall indicate the date on which the decision on the appeal is to be despatched, which shall not be later than three months after the closure of the oral proceedings. If the Board is unable to despatch the decision on the appeal by that date, it shall inform the parties of a new date or, in exceptional circumstances, shall issue a communication specifying the further procedural steps that will be taken.</p>	<p>(9) The Board shall issue the decision on the appeal in a timely manner.</p> <p>(a) Where the Chair announces the decision on the appeal orally in accordance with paragraph 6, the Board shall put the decision in writing and despatch it within three months of the date of the oral proceedings. If the Board is unable to do so, it shall inform the parties when the decision is to be despatched. The President of the Boards of Appeal shall also be informed thereof.</p> <p>(b) When a case is ready for decision at the conclusion of the oral proceedings but the Chair does not announce the decision on the appeal orally in accordance with paragraph 6, the Chair shall indicate the date on which the decision on the appeal is to be despatched, which shall not be later than three months after the closure of the oral proceedings. If the Board is unable to despatch the decision on the appeal by that date, it shall inform the parties and the President of the Boards of Appeal of a new date or, in exceptional circumstances, shall issue a communication specifying the further procedural steps that will be taken.</p>	<p>The context of pursuing more ambitious timeliness objectives speaks in favour of harmonising Article 15(9)(a) and (b).</p> <p>It is thus proposed to add a reference to the President of the Boards of Appeal in Article 15(9)(b). If the Chair does not announce the decision on the appeal at the oral proceedings even though the case is ready for decision, and the decision is not despatched within three months of the closure of the oral proceedings, the attention of the President of the Boards of Appeal will be drawn to this delay in despatching the decision.</p> <p>In the exceptional situation that the Board decides to continue the proceedings, the Board must also inform the President of the Boards of Appeal that further procedural steps will be taken.</p>
(...)	(...)	

VII. ALTERNATIVES

17. NA

VIII. FINANCIAL IMPLICATIONS

18. NA

IX. LEGAL BASIS

19. Article 23(4), first sentence, EPC; Rule 12c(2) EPC.

X. DOCUMENTS CITED

20. BOAC/6/23, BOAC/7/23, BOAC/16/23, CA/29/23.

XI. RECOMMENDATION FOR PUBLICATION

21. Yes.

PART II

Draft

DECISION OF THE BOARDS OF APPEAL COMMITTEE of [date of decision] adopting amendments to the Rules of Procedure of the Boards of Appeal of the European Patent Office

THE BOARDS OF APPEAL COMMITTEE,

Having regard to Article 23, paragraph 4, first sentence, of the European Patent Convention,

Having regard to Rule 12c, paragraph 2, of the Implementing Regulations to the European Patent Convention,

Having regard to the Rules of Procedure of the Boards of Appeal as approved by decision of the Administrative Council CA/D 5/19 Corr. 1 of 26 June 2019 (OJ EPO 2019, A63) and in force from 1 January 2020, as amended by decision of the Administrative Council CA/D 3/21 of 23 March 2021 (OJ EPO 2021, A19) as of 1 April 2021,

On a proposal from the President of the Boards of Appeal,

Submitted after users have been consulted, in particular in the framework of the online user consultation which ran from 16 June 2023 until 11 September 2023 and a meeting with user representatives held on 11 October 2023,

Submitted after the Presidium of the Boards of Appeal has provided its advice according to Rule 12b, paragraph 3(c), of the Implementing Regulations to the European Patent Convention,

Submitted after the President of the European Patent Office has been given the opportunity to comment according to Rule 12c, paragraph 2, of the Implementing Regulations to the European Patent Convention,

HAS DECIDED AS FOLLOWS:

Article 1

With effect from 1 January 2024, the Boards of Appeal Committee adopts the following amendments to the Rules of Procedure of the Boards of Appeal:

1. Article 13, paragraph 2, of the Rules of Procedure of the Boards of Appeal shall read as follows:

"(2) Any amendment to a party's appeal case made after the expiry of a period specified by the Board in a communication under Rule 100, paragraph 2, EPC or, where such a communication is not issued, after notification of a communication under Article 15, paragraph 1, shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned."

2. Article 15, paragraph 1, of the Rules of Procedure of the Boards of Appeal shall read as follows:

"(1) Without prejudice to Rule 115, paragraph 1, EPC, the Board shall, if oral proceedings are to take place, endeavour to give at least four months' notice of the summons. A single date is fixed for the oral proceedings.

In order to help concentration on essentials during the oral proceedings, the Board shall issue a communication drawing attention to matters that seem to be of particular significance for the decision to be taken. The Board may also provide a preliminary opinion. The Board shall endeavour to issue the communication at least four months in advance of the date of the oral proceedings. In cases where there is more than one party, the Board shall issue the communication no earlier than one month after receipt of the written reply or replies referred to in Article 12, paragraph 1(c)."

3. Article 15, paragraph 9(b), of the Rules of Procedure of the Boards of Appeal shall read as follows:

"(b) When a case is ready for decision at the conclusion of the oral proceedings but the Chair does not announce the decision on the appeal orally in accordance with paragraph 6, the Chair shall indicate the date on which the decision on the appeal is to be despatched, which shall not be later than three months after the closure of the oral proceedings. If the Board is unable to despatch the decision on the appeal by that date, it shall inform the parties and the President of the Boards of Appeal of a new date or, in exceptional circumstances, shall issue a communication specifying the further procedural steps that will be taken."

Article 2

The amended provisions shall apply to all appeal proceedings pending on or after 1 January 2024.

Done at Munich, [date of decision]

For the Boards of Appeal Committee
The Chairperson

Jorma HANSKI