

CA/106/19

Orig.: en

Munich, 22.11.2019

SUBJECT: MoU between the Administrative Council and the Office on the reinforced support to the Council

SUBMITTED BY: 1. Chairman of the Administrative Council
2. President of the European Patent Office

ADDRESSEES: Administrative Council (for opinion)

SUMMARY

The Council is requested to give a positive opinion on the draft memorandum of understanding (MoU) between the Administrative Council and the European Patent Office of the European Patent Organisation, included as Annex 1.

The MoU shall further enhance the support of the Administrative Council by the European Patent Office as may be necessary for the performance of the duties of the Administrative Council as provided for in Article 32 of the European Patent Convention.

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I. STRATEGIC/OPERATIONAL

1. Strategic

II. RECOMMENDATION

2. To give a positive opinion on the proposed Memorandum of Understanding (MoU) between the Administrative Council and the European Patent Office of the European Patent Organisation, as included in Annex 1.

III. MAJORITY NEEDED

3. N.A.

IV. CONTEXT

4. Reinforcing the governance of the Organisation is an important aspect of the Office's Strategic Plan 2023 (CA/65/19). Furthermore, it has been underlined by the AC delegations on several occasions that the support provided by the Council Secretariat to the Council and achieving clarification on its positioning, can play an important role in achieving this goal.

5. A Memorandum of Understanding (MoU) concerning the enhanced support of the Council by the Office has therefore been prepared between the Chairman of the Council and the President of the Office (see Annex 1). It takes into consideration the responsibilities and different roles of the Council and the President of the Office, as enshrined in the European Patent Convention.

6. A particular attention was given to the situation of the Boards of Appeal. The President of the Boards of Appeal was consulted and provided his input on the draft. Moreover the MoU integrates a proposal of the BOAC related to the Council Secretariat and expressed during its last session on 12 September 2019 (see BOAC 11/19, Summary of the Conclusions of the BOAC, §18).

V. ARGUMENTS

7. The proposed MoU aims at addressing several elements which will concretely provide a reinforced support to the Administrative Council for the performance of its duties.
8. Firstly, as announced in the SP2023 under Goal 5 Key initiative 1, the Council Secretariat shall be relocated from the Presidential Area to Directorate General 5 Legal and International affairs, where it will benefit from the reinforced support of the services of the Office, particularly on legal matters (Article 2 §1 and §3 of the MoU). The specific situation of the Boards of Appeal is addressed in relation with the instructions the Council Secretariat can receive in related matters (Article 2 §2).
9. Secondly, in particularly sensitive cases, the Council will be provided with different options from the services of the Office (Article 3 §1 of the MoU). It will have also the possibility to request additional external advice when such support is deemed necessary for the fulfilment of its tasks (Article 3 §2 of the MoU). The costs incurred for the external advice will be covered by the Office. The Council, through its Chairman and Secretariat, will select the external expert, after consulting the President of the Office.
10. Thirdly, not only the Chairman of the Council will be consulted by the President of the Office concerning the number and qualifications of staff of the Secretariat (Article 5 §1 of the MoU), but he will also participate directly in their recruitment procedures and be consulted on the objective setting and performance evaluation of said staff (Article 5 §2 of the MoU).
11. Finally, as a matter of principle, any other costs necessary for the operation of the Administrative Council, its bodies and its secretariat, including meetings, will be covered by the European Patent Office (Article 4 of the MoU).

VI. ALTERNATIVES

12. The implementation of the MoU will be subject to a report in three years and further adjustments will be proposed if necessary.

VII. FINANCIAL IMPLICATIONS

13. The expenses generated by the Council Secretariat in terms of staff, premises, tools, general operating expenditure and further support from a number of Office services such as interpreting are already budgeted, and future requests for external advices would be paid by the Office from the existing budget line 3521 dedicated to external experts and studies.

VIII. LEGAL BASIS

14. Articles 10, 32 EPC

IX. DOCUMENTS CITED

15. CA/65/19

X. RECOMMENDATION FOR PUBLICATION

16. Yes

**ANNEX 1 MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN THE
ADMINISTRATIVE COUNCIL AND THE EUROPEAN PATENT OFFICE
OF THE EUROPEAN PATENT ORGANISATION**

**THE ADMINISTRATIVE COUNCIL AND THE EUROPEAN PATENT OFFICE
OF THE EUROPEAN PATENT ORGANISATION,**

Having regard to the European Patent Convention, and in particular Articles 4, 10 and 32 thereof,

Having regard to the role of the Administrative Council as an organ of the European Patent Organisation and to the Rules of Procedure of the Administrative Council of the European Patent Organisation (hereinafter referred to as the "Rules of Procedure"), and in particular Article 6 thereof,

Acknowledging the primacy of the European Patent Convention and of the Rules of Procedure over the below Memorandum of Understanding and that the legal framework of the European Patent Organisation shall at all times be observed,

Considering the importance of respecting the separation of powers as well as the judicial independence and organisational autonomy of the Boards of Appeal, as enshrined in Article 23 of the European Patent Convention, and *having regard* to the structural reform of the Boards of Appeal (CA/43/16 Rev. 1), to the delegation of functions and powers from the President of the European Patent Office to the President of the Boards of Appeal under Rule 12a(2) EPC and the Act of Delegation (OJ EPO 2018, A63) and to the Memorandum of Understanding of 27 June 2019 concluded between the President of the Office and the President of the Boards of Appeal,

Acknowledging the responsibilities, powers and functions of the President of the Office over the staff of the Office, as enshrined in Article 10 of the European Patent Convention and EPO Service Regulations, with the limitation linked to the organisational autonomy of the Boards of Appeal as reminded above,

Recognising the need for establishing basic principles between the European Patent Office and the Administrative Council to ensure a proper operational functioning of the Administrative Council with its legislative and supervisory functions as conferred to it by the European Patent Convention by way of placing at the disposal of the Administrative Council sufficient resources as may be necessary for the performance of its duties,

HEREBY CONCLUDE THE FOLLOWING

MEMORANDUM OF UNDERSTANDING

Article 1

Purpose of the Memorandum of Understanding

The purpose of the present Memorandum of Understanding (hereinafter referred to as "MoU") shall be to further enhance the support of the Administrative Council by the European Patent Office as may be necessary for the performance of the duties of the Administrative Council as provided for in Article 32 of the European Patent Convention. It shall also serve to define the modalities of the Council Secretariat's functioning.

Article 2

Support of the Administrative Council

- (1) The Chairperson of the Administrative Council (hereinafter referred to as the "Chairperson") and the Council Secretariat (hereinafter referred to as the "Secretariat") shall be supported by the Directorate General in charge of legal and international affairs in line with best practices. Other Services of the European Patent Office shall be involved where needed.
- (2) Considering the importance of respecting the separation of powers as well as the judicial independence and organisational autonomy of the BOA, in matters concerning (i) the Administrative Council as the appointing and disciplinary authority of the Chairpersons and members of the BOA, (ii) the Committee or (iii) the exercise of delegated powers and functions by the PBOA, the Council Secretariat shall only be subject to instructions by the Chairpersons of the Administrative Council and the Committee respectively.
- (3) The Council Secretariat shall be located in the Directorate General in charge of legal and international affairs.

Article 3
Support in sensitive cases
– external expert advice and consultancy –

- (1) In cases of a sensitive nature to be dealt with by the Administrative Council in accordance with its legislative and supervisory functions as conferred to it by the European Patent Convention, the Administrative Council shall receive from the European Patent Office's services a set of possible options for their resolution outlining for each option an impact assessment. This support shall be impartial and objective based on the EPO's legal framework and institutional best practices and involving external advice, if necessary.
- (2) In such cases the Administrative Council may obtain additional external advice when such support is deemed necessary by the Administrative Council for the fulfilment of its tasks. The costs for the external advice shall be covered by the European Patent Office.
- (3) The Administrative Council, through its Chairperson and its Secretariat, shall select the external expert deemed adequate, after consultation of the President of Office.

Article 4
Other costs

Any other costs necessary for the operation of the Administrative Council, its bodies and its secretariat, including meetings, shall be covered by the European Patent Office. Travel expenses and reimbursement thereof are subject to the provisions laid down in the Rules of Procedure.

Article 5
Staff of the Council Secretariat

- (1) The Chairperson shall be consulted by the President of the Office on the number and qualification of staff to be placed at the disposal of the Administrative Council through its Secretariat, in order to enable the Administrative Council to perform its duties.
- (2) Within the framework of the European Patent Office's recruitment procedures, the Chairperson shall be consulted on the selection of the Head of the Council Secretariat and of the staff of the Council Secretariat. The Chairperson shall further be consulted on the objective setting and on the performance evaluation of said staff.

Article 6
Entry into Force

This MoU shall enter into force following the positive opinion of the Council on this MoU and its signature by the Chairperson of the Council and the President of the Office.

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For the European Patent Office

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For the Administrative Council