

# Quality-focused decision making

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This paper outlines the most important factors which contribute to the quality of appeal decisions, describes the most important elements which a Board should consider in its procedures and in the drafting of its written decisions, and discusses approaches for ensuring quality. It was drafted by an internal Boards of Appeal working group and was finalised by the President of the Boards of Appeal after discussions with epi and Business Europe and after considering the advice received from both the Presidium of the Boards of Appeal and the Boards of Appeal Committee.

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## I. **INTRODUCTION**

1. The legal and technical quality of the decisions taken by the Boards of Appeal has been a central priority since the beginning of their activity. This quality has been recognised by users of the European patent system over the years. It is a central concern of the Boards of Appeal to maintain this high quality while implementing the changes necessary to reduce their backlog and improve their efficiency.
2. This paper outlines the most important internal factors contributing to the quality of appeal decisions. In particular, it describes the most important elements which a Board should consider in its procedures and in drafting decisions. It is intended both as a guide for new members and as an aid in harmonising the Boards' practices. Mechanisms for ensuring quality are also discussed. The paper is primarily directed to the Chairs and members of the Boards of Appeal, as it contains guiding principles for their judicial work. At the same time, it is a means of informing the public, in particular the users of the European patent system, about this important matter. This paper is not binding. No rights or obligations may be derived from it.
3. The Boards of Appeal are the only judicial body within the European Patent Organisation. Thus, each decision by a Board is a final one, subject only to Art. 112a EPC. It is of the utmost importance to keep this in mind. Finality is particularly evident when a Board rejects an application, revokes a patent or limits its scope. In these cases, no further judicial instance (national or European) has jurisdiction to remedy any error in such a decision.
4. This paper has taken as its starting point the elements set out in Opinion No. 11 on the quality of judicial decisions,<sup>1</sup> issued by the Consultative Council of European Judges (CCJE), a body of the European Council. As highlighted in this Opinion, the quality of a judicial decision depends not only on the individual judges involved, but also on a number of external factors, such as the quality of legislation, the quality of legal training provided to all actors in the proceedings, and the adequacy of the resources provided to the judicial system.<sup>2</sup> That latter, in particular, is a prerequisite for the thorough preparation of cases. While these external points are very important, this paper – having been drafted by actors of the judicial system concerned rather than by an international consulting body such as the CCJE – deals only with those aspects in respect of which the Boards of Appeal can play an active role. It focuses, therefore, on internal elements that impact the quality of appeal proceedings, on the important elements for a high-quality written decision, and on mechanisms for ensuring quality.

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<sup>1</sup> See Opinion No. 11 (2008) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the quality of judicial decisions, Strasbourg, 18 December 2008, available at <https://rm.coe.int/16807482bf>. In the body of this paper this Opinion will be referred to as the "CCJE Opinion".

<sup>2</sup> See CCJE Opinion No. 11, Part I.A, para. 10.

5. It is of utmost importance for the European patent system that the way the Boards of Appeal work takes account of parties' rights to a fair hearing, these being enshrined in Art. 6(1) of the European Convention on Human Rights (ECHR). Clear reasoning and analysis are recognised basic requirements for a judicial decision and important to this right as to others.<sup>3</sup>

6. The quality of decisions of the Boards of Appeal may be judged by reference to the following elements:

(a) in the proceedings leading up to the decision (including any oral proceedings): transparency; respect of fair trial; timeliness; completeness of examination of relevant factual and legal issues while paying regard to the respective purposes of ex parte and inter partes appeal proceedings;

(b) for the written reasoned decision itself: clarity; clear reasoning; succinctness; responsiveness to the relevant arguments of the parties, particularly those of the losing party; proper analysis of the factual and legal issues; compliance with the right to be heard; consideration of diverging lines of case law.

These elements contribute to the reaching of high-quality judicial decisions, and help ensure a just result so far as the material available to the deciding board within the procedural framework allows. They are to be understood by reference to the following points in this paper.

## **II. INTERNAL QUALITY FACTORS**

7. The quality of judicial decisions depends in particular on the following internal factors: the judges' professionalism, adequate procedures and case management, fair hearings and appropriate elements making up a high quality written decision.<sup>4</sup>

### **A. THE PROFESSIONALISM OF THE JUDGE**

8. As noted in the CCJE Opinion, the judges' professionalism is the primary guarantee of a high quality decision.<sup>5</sup> Independence and impartiality are core concerns which are fundamental to the Board of Appeal members' understanding of their role, the way they interact within the Board and with the parties, and the training of new members. A Code of Conduct addressing issues of independence and ethics is currently under discussion (R. 12b(3)(b) EPC).

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<sup>3</sup> See also CCJE Opinion No. 11, General Introduction, para. 3.

<sup>4</sup> See also CCJE Opinion No. 11, Part I.B.1, para. 20.

<sup>5</sup> See CCJE Opinion No. 11, Part I.B.1, para. 21.

9. As may be seen from the documents referred to in the CCJE Opinion,<sup>6</sup> important issues to be addressed in the context of judges' professionalism relate to the institutional framework, which is however not a topic for this paper.<sup>7</sup>

## **B. THE OVERALL PROCEDURE, CASE MANAGEMENT, AND ORAL PROCEEDINGS**

10. As emphasised in the CCJE Opinion, if the outcome is to be a high-quality decision that will be accepted both by the parties and by society at large, the procedure must be clear, transparent, and satisfy the right to a fair hearing.<sup>8</sup> Although the European Patent Organisation is not a party to the ECHR, Art. 6(1), first sentence, ECHR has been recognised as binding for proceedings before the Boards of Appeal, because it relies on principles of law common to all member states.<sup>9</sup>
11. The quality of decisions is influenced by the quality of the preparatory steps that precede them. Besides the quality of the actual decision, attention must also be paid to such aspects as affording each member sufficient preparation time to acquire proper knowledge of the case, the transparency and conduct of the proceedings, and the way in which the Board communicates with the parties.<sup>10</sup> An important case management instrument that contributes to transparency and efficiency is the communication issued by the Boards in preparation for the oral proceedings (Art. 15(1) RPBA 2020).<sup>11</sup> The communication should help concentrate proceedings on the essential points and ensure that oral proceedings are conducted efficiently; it should be based on a thorough analysis of the case, and draw attention to matters that seem to be of particular significance for the decision to be taken.<sup>12</sup> In most cases, a Board will give a preliminary opinion in its communication.

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<sup>6</sup> See CCJE Opinion No. 11, Part I.B.1, para. 21, referring to CCJE Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges, available at <https://rm.coe.int/1680747830>, and CCJE Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, available at <https://rm.coe.int/16807475bb>.

<sup>7</sup> See above Introduction, para. 4.

<sup>8</sup> See CCJE Opinion No. 11, Part I.B.2, para. 24.

<sup>9</sup> See G 1/05, interlocutory decision, OJ EPO 2007, 362, point 22 of the Reasons; G 2/08, interlocutory decision of 15 June 2009, point 3.3 of the Reasons; R 19/12, interlocutory decision of 25 April 2014, point 9 of the Reasons; R 8/13, interlocutory decision of 20 March 2015, point 2.2 of the Reasons.

<sup>10</sup> See also CCJE Opinion No. 11, Part II.A., para. 58, referring to the two latter aspects.

<sup>11</sup> The revised Rules of Procedure of the Boards of Appeal 2020 (RPBA 2020) were adopted by the Administrative Council in June 2019 (see CA/D 5/19 Corr. 1; published e.g. in [Supplementary publication 2, OJ EPO 2020](#)) and entered into force on 1 January 2020 (see Art. 24(1) RPBA 2020). Before their entry into force, issuing a communication under Art. 15(1) RPBA 2007 was at the discretion of the Board, but these communications were already regularly issued. Since 1 January 2020, Art. 15(1) RPBA 2020 provides that such a communication is to be issued in all cases (see Art. 24, 25 RPBA 2020).

<sup>12</sup> See explanatory notes to Art. 15(1) RPBA 2020, [Supplementary publication 2, OJ EPO 2020](#), p. 62.

12. The right to be heard (Art. 113(1) EPC) is fundamental and must be safeguarded throughout the appeal procedure, including in oral proceedings. Its importance is also underlined by Art. 112a(2)(c) EPC. Parties must have the opportunity to comment on relevant issues so that they are not taken by surprise by a negative decision. Art. 113(1) EPC has also been interpreted by the Boards as a basis for the principle of equal treatment of parties<sup>13</sup> and, more generally, the right to a fair hearing.<sup>14</sup>
13. The course of oral proceedings will have a direct impact on the parties' and the public's understanding and acceptance of the final decision. The hearing therefore needs to be transparent and open, and respect the right to be heard. Inter partes proceedings must also comply with the adversarial principle.<sup>15</sup> A hearing should give a Board the elements necessary for proper assessment of the case,<sup>16</sup> having regard to the respective purposes of ex parte and inter partes appeal proceedings.<sup>17</sup>
14. Reaching a decision in reasonable time is also an important element of quality, in accordance with Art. 6 ECHR.<sup>18</sup> While the CCJE's Opinion underlines that "quality" of justice cannot simply be equated with "productivity",<sup>19</sup> a higher degree of efficiency may enhance quality. For example, focusing on the essentials and taking care to avoid getting lost in issues which are irrelevant to the decision increases the quality of judicial proceedings and decisions.

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<sup>13</sup> See e.g. T 678/06, points 1.5 and 1.6 of the Reasons; for further decisions applying the principle of equal treatment without explicitly referring to Art. 113(1) EPC, see e.g. T 1936/07, point 1.2 of the Reasons; T 1799/08, point 11 of the Reasons; T 1942/08, point 2 of the Reasons; T 1677/13, point 7 of the Reasons; see also R 21/10, point 2.3 of the Reasons, referring to the "devoir de neutralité"; in G 1/05, OJ EPO 2007, 362, point 22 of the Reasons, the Enlarged Board or Appeal refers to "[t]he principle of equal treatment and the right of parties to a fair trial as e.g. enshrined in Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)".

<sup>14</sup> See e.g. T 892/92, OJ EPO 1994, 664, points 2.1 and 4 of the Reasons, referring to the "right to a fair hearing" and to "the parties' right to a fair procedure"; see also T 377/95, OJ EPO 1999, 11, point 33 of the Reasons, deriving "fundamental principles of procedure guaranteeing the parties the right to a fair and public trial", recognised by the Boards, from Art. 6(1) ECHR.

<sup>15</sup> See also CCJE Opinion No. 11, Part I.B.3, para. 30. The adversarial principle is recognised in the Boards of Appeal case law for inter partes appeal proceedings, see e.g. T 1676/08, point 9.4.7 of the Reasons, and T 2541/11, point 4.3 of the Reasons.

<sup>16</sup> See also CCJE Opinion No. 11, Part I.B.3, para. 29.

<sup>17</sup> See in particular G 9/91 and G 10/91, OJ EPO 1993, 408, 419, point 18 of the Reasons, and G 10/93, OJ EPO 1995, 172, point 3 of the Reasons.

<sup>18</sup> See also CCJE Opinion No. 11, Part I.B.2, para. 26.

<sup>19</sup> See CCJE Opinion No. 11, Part I.B.2, para. 26.

## **C. THE ELEMENTS IMPACTING QUALITY IN THE WRITTEN DECISION**

15. As highlighted by the CCJE Opinion, to be of high quality, a written decision must be perceived by the parties and by the public in general as being the result of a fair procedure, a proper factual evaluation, and a correct application of the law.<sup>20</sup> Only then are the parties likely to be persuaded that their case has been properly considered and justly dealt with, and are the public likely to perceive the decision as being fair and just. To achieve this, a number of requirements need to be met.

### **a) Formal requirements**

16. A Board of Appeal decision must comply with the formal requirements of R. 102 EPC, which enumerates certain necessary elements of a decision (in particular, the date on which the decision was taken, the names of the Chair and the other members, a summary of facts, the requests of the parties, the reasons and the order).

### **b) Clarity and style**

17. A written decision should be intelligible and drafted in clear and understandable language. This requires that it be coherently organised, with reasoning in a clear and concise style which is accessible to everyone.<sup>21</sup> Technical terms and concepts used in the relevant technical field need not be specifically explained for the general public, unless there is a recognisable special interest of the public in the particular decision.

18. The decisions of the Boards should be structured in a harmonised way, to aid readability and make them more easily understandable to parties and the public. Where they exist, standardised models should be used, leaving appropriate room for personal styles of writing. The CCJE's recommendation, in its Opinion, that a compendium of good practices be compiled in order to facilitate the drafting of decisions<sup>22</sup> has been taken up. Internal recommendations are currently being prepared.

19. An additional difficulty with which the Boards are confronted in this respect is that decisions have to be written in one of three official languages (French, German, English), depending on the language of the proceedings in the case. Where appropriate, the text should be edited by a native speaker to ensure that the vocabulary and the language structure of the decision are both kept accessible.

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<sup>20</sup> See CCJE Opinion No. 11, Part I.B.4, para. 31. See also e.g. T 892/92, point 4 of the Reasons, referring to the party's right to a fair procedure.

<sup>21</sup> See also CCJE Opinion No. 11, Part I.B.4a, para. 32.

<sup>22</sup> See CCJE Opinion No. 11, Part I.B.4a, para. 33.

20. The Boards of Appeal are an international court which has jurisdiction affecting 38 Contracting States. Not only this, but individual parties can be from anywhere in the world. Thus it may often be the case that the readers of the decision, in particular the affected parties, will not be reading in their native language. This should be remembered when writing the decision. Colloquialisms and Latinisms should normally be avoided.
21. The reasoning should be free of insulting or unflattering remarks.<sup>23</sup>

**c) Reasoning**

22. A written decision must be adequately reasoned. Indeed, the quality of a judicial decision depends principally on the quality of its reasoning. It should be designed to help the parties and the public at large to understand and accept the decision. Proper reasoning requires a Board to take proper time to prepare its decision.
23. The following elements are crucial to the quality of a reasoned decision:
- (i) the quality of the reasons of the decision, in particular completeness of the evaluation of the central arguments and documents;
  - (ii) the respect of the right to be heard;
  - (iii) if applicable, explanation of deviations from earlier decisions of other boards and from the Guidelines for examination at the EPO.

**(i) Completeness of evaluation and logical chain of reasoning**

24. The decision should include an examination of the factual and legal issues at the heart of the dispute. The reasons should be consistent, clear, unambiguous, and free from contradiction. They should allow the reader to understand what the case is about and to follow the chain of reasoning which led the Board to its decision.<sup>24</sup>
25. A Board may need to act on its own motion in certain events.<sup>25</sup> If it does, the reasons for doing so should be made clear.

**(ii) Respect of the right to be heard**

26. This requirement overlaps with the requirement of completeness of evaluation of the central arguments outlined in paragraphs 24 and 25, but goes a step further.

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<sup>23</sup> See also CCJE Opinion No. 11, Part I.B.4b, para. 38.

<sup>24</sup> See also CCJE Opinion No. 11, Part I.B.4b, para. 36. Or, as phrased by the Boards of Appeal in their case law regarding R. 111(2) EPC relating to first instance decisions, the "decision should discuss the facts, evidence and arguments which are essential to the decision in detail, and it has to contain the logical chain of reasoning which led to the relevant conclusion". See T 1966/12, point 5.1 of the Reasons, with reference to Case Law of the Boards of Appeal of the European Patent Office (CLB), 8<sup>th</sup> ed. 2016, III.K.4.2.1; see also e.g. T 278/00, OJ EPO 2003, 546, point 2 of the Reasons.

<sup>25</sup> For instance, certain procedural issues are assessed ex officio, see e.g. CLB, 9<sup>th</sup> ed. 2019, III.O.2.1, for the assessment of the status of the opponent.



27. The decision must only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments (Art. 113(1) EPC). The decision itself should reflect the fact that the parties' right to be heard has been respected, i.e. that the parties' submissions have been considered.<sup>26</sup>
28. This requirement, that the decision respond to the parties' submissions which are relevant to the decision, is an essential safeguard, particularly against arbitrariness, because it allows the parties to see that their submissions have been examined and, therefore, that the Board has taken them into account.
29. The statement of reasons need not necessarily be long; a proper balance should be found between conciseness and enabling a proper understanding of the decision.<sup>27</sup>
30. The obligation on a Board to give reasons for its decision does not mean that it need reply to every argument raised by a party.<sup>28</sup> The scope of the duty will vary according to the nature of the decision, and the necessary extent of the reasons will depend on the various arguments advanced. The reasoning should demonstrate that the Board has properly examined the issues which might affect the outcome of the case.
31. The primary purpose of appeal proceedings is to review the decision under appeal.<sup>29</sup> Therefore, not every submission – irrespective of when it is submitted – has to be considered at a substantive level. This may be the case where a submission has not been admitted on purely procedural grounds. As proceedings progress, the possibilities for parties to amend their case become increasingly limited. A balance needs to be found between the interests of the parties, procedural economy and legal certainty, taking into account procedural fairness.

**(iii) Endeavour to reach consistency of case law**

32. Examining the legal issues entails applying the rules of the EPC as well as, where relevant, national and international law. The reasons should refer to the relevant provisions. Where appropriate, a Board should make reference to national, European or international case law, as well as legal literature.<sup>30</sup>
33. The Boards should properly apply the interpretative principles applicable to the EPC as well as, where applicable, those of national and international law, with the aim of promoting legal certainty and uniformity, and the predictability of their decisions.<sup>31</sup>

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<sup>26</sup> See e.g. R 8/15, headnote and point 2.2.2 of the Reasons, with reference to case law of the European Court of Human Rights.

<sup>27</sup> See also CCJE Opinion No. 11, Part I.B.4.b, para. 40.

<sup>28</sup> See also CCJE Opinion No. 11, Part I.B.4.b, para. 41.

<sup>29</sup> See e.g. G 1/99, OJ EPO 2001, 381, point 12 of the Reasons; T 534/89, OJ EPO 1994, 464, point 3.1 of the Reasons; T 715/95, point 1 of the Reasons; T 63/99, point 1.1 of the Reasons; T 611/00, point 1 of the Reasons; T 292/05, point 3.8 of the Reasons; T 2268/08, point 3.4 of the Reasons; T 65/11, point 2.4 of the Reasons; T 332/12, point 3 of the Reasons.

<sup>30</sup> See also CCJE Opinion No. 11, Part I.B.4.b, para. 44.

<sup>31</sup> See also CCJE Opinion No. 11, Part I.B.4.b, para. 48.

34. With this aim in mind, Boards should endeavour to apply the law consistently. However, when a Board decides to deviate from an interpretation or explanation of the EPC given in an earlier decision of any Board, the grounds for this deviation need to be given, unless they are in accordance with an earlier opinion or decision of the Enlarged Board of Appeal (see Art. 20(1) RPBA 2020). Likewise, if, in its decision, a Board gives a different interpretation of the Convention from that provided for in the Guidelines, it should state the grounds for its action, if it considers that the decision will be more readily understood in the light of such grounds (see Art. 20(2) RPBA 2020).

### **III. MECHANISMS FOR ENSURING QUALITY OF DECISIONS**

35. The quality of judicial decisions is influenced by the quality of all the preparatory steps that precede them. Besides the quality of the actual decision, attention should also be paid to aspects such as the length, transparency, and conduct of proceedings, and to the way in which the Board communicates with the parties.<sup>32</sup> These aspects should also be considered when discussing mechanisms for ensuring quality of decisions.
36. Important mechanisms for ensuring quality are already in place:
- 36.1. One mechanism is the collegial composition of the Boards. Three or, in some cases, five Board members hear arguments, form their individual opinions on the issues, discuss these issues, and reach a decision. While the rapporteur has a crucial role in case management and drafting the written decision, each board member takes part in developing the line of reasoning and reaching the conclusion that decides the case. The Chair and, by virtue of working in several boards, the legal member also play important roles in harmonisation of case law.
- 36.2. Since 2007, a limited review of individual Board of Appeal decisions by the Enlarged Board of Appeal is available under Art. 112a EPC. While Art. 112a EPC provides only an exceptional means of redress, and its provisions have to be applied strictly,<sup>33</sup> one of the most important elements determining the quality of a decision, namely the respect of the right to be heard, is subject to this review procedure. A fundamental violation of Art. 113 EPC is a ground on which a petition for review may be based (Art. 112a(2)(c) EPC).

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<sup>32</sup> See CCJE Opinion No. 11, Part II.A., para. 58.

<sup>33</sup> See e.g. R 1/08, point 2.1 of the Reasons.

- 36.3. According to the CCJE, the evaluation of judges should not be based solely on the number of cases decided by them but should focus primarily on the quality of a judge's decisions and his or her judicial work overall.<sup>34</sup> In 2018, a comprehensive performance-evaluation system was introduced in the Boards of Appeal, the focus of which is on quality.<sup>35</sup> Inter alia, the ability to draft well-structured, coherent, and concise communications and decisions is evaluated.<sup>36</sup> The aim of the evaluation is not only to assess achievements and skills, but also to provide feedback and identify areas for further professional development. As "any method of evaluating the quality of judicial decisions should not interfere with the independence of the judiciary either as a whole or on an individual basis",<sup>37</sup> the merits of a decision are not part of this evaluation.<sup>38</sup>
- 36.4. As outlined above, consistency and predictability of jurisprudence are recognised as an important aim for the Boards of Appeal.<sup>39</sup> Different fora within the Boards (e.g. the Boards of Appeal Professional Development Committee) take up current topics and organise discussion events. Regular information to all Board members about important recent Board of Appeal decisions and important national decisions, as well as on discussions in the patent law literature and blogs, contribute to the awareness of different approaches and facilitate discussions which enhance harmonisation (where appropriate through a referral to the Enlarged Board of Appeal under Art. 112(1) EPC).
- 36.5. New members follow training courses (which cover procedure, substantive law, and judicial ethics) and are coached by their Chair, at least during their first year. Within a continuous learning environment, ongoing training is also available to members and Chairs in general.
37. When monitoring the overall quality of Board of Appeal decisions, user feedback is an important element. Regular meetings with user representatives (in particular epi and BusinessEurope) and the annual conferences on the case law of the Boards of Appeal provide opportunities for receiving general feedback on quality and trigger internal discussions on substantive and procedural issues.

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<sup>34</sup> See Opinion No. 17 (2014) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the evaluation of judges' work, the quality of justice and respect for judicial independence, Strasbourg, 24 October 2014, available at <https://rm.coe.int/16807481ea>, Part III.I., para. 47.

<sup>35</sup> See BOAC/9/20, Guidelines for the evaluation of the performance of members and chairs of the Boards of Appeal, 19 June 2020.

<sup>36</sup> See BOAC/9/20, p. 11.

<sup>37</sup> See CCJE Opinion No. 11, Part II.A., para. 59.

<sup>38</sup> See BOAC/9/20, p.2.

<sup>39</sup> See above in this paper, para. 32-34.