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**Datasheet for the decision
of 14 June 2016**

Case Number: Art. 23 1/16

Language of the proceedings: EN

Petitioner:

Administrative Council of the European Patent Organisation

Respondent:

...

Headword:

Request for a proposal for removal from office

Relevant legal provisions:

EPC Art. 23(1), 23(3)

RPEBA Art. 12a(9), 12a(10), 18(3)

Keyword:

Decision on the request of the Administrative Council under Article 23(1) EPC to make a proposal to remove the respondent from office: The Enlarged Board decides to make no proposal"
"Petitioner party to adversarial proceedings (yes)"
"Publication (yes)"
"Reimbursement of all the respondent's procedural costs proposed"
"Violation of Article 23(3) EPC, judicial independence, by Office President's letter of 10 June 2016 (yes)"

Catchword:

For the Enlarged Board to be able to continue with these proceedings the position of the Petitioner would have to be that it did not agree with the Office President and acknowledged that, from an institutional point of view, the pressure exercised by the Office President in the present case

was incompatible with the judicial independence of the Enlarged Board guaranteed by the EPC. As the Petitioner did not clearly distance itself from the Office President's position, there is the threat of disciplinary measures against the members of the Enlarged Board. It is then the Enlarged Board's judicial independence in deciding on this case which is fundamentally denied.



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Case Number: Art. 23 1/16

D E C I S I O N
of 14 June 2016

Petitioner: Administrative Council of the
European Patent Organisation
Bob-van-Benthem-Platz 1
D-80469 Munich

Representatives: ...

Respondent: ...

Representative: Şenay Okayay
Rechtsanwältin
Sonnenstrasse 6
D-80331 Munich

Composition of the Board:

Chairman: M.-B. Tardo-Dino

Members: E. Liiv
A. Dimitrova
I. Beckedorf
D. Rogers
U. Oswald
H. Meinders

Summary of Facts and Submissions

- I. These proceedings began on 11 February 2016 and concern the request of 11 January 2016, confirmed on 27 January 2016 (hereafter AC Request 3), from the Administrative Council of the European Patent Organisation (hereafter the Petitioner or AC) asking for a proposal from the Enlarged Board of Appeal that Mr X (hereafter the Respondent) be removed from office as a member of the Boards of Appeal, such a request being made under Article 23(1) EPC and Article 12a of the Rules of Procedure of the Enlarged Board of Appeal (RPEBA).
- II. The request in these proceedings is the third such request made by the Petitioner. The first request was found to be inadmissible because it failed to fulfil the formal requirements of factual substantiation prescribed by Article 12a(5) RPEBA (decision in case Art. 23 1/15 of 17 September 2015). The Petitioner itself withdrew its second request at the oral proceedings in case Art. 23 2/15 on 11 February 2016. Following said withdrawal, the proceedings were terminated by the decision in case Art. 23 2/15 of 11 February 2016.
- III. The orders of the Enlarged Board of Appeal (hereafter the EBA or Enlarged Board) that both the above mentioned decisions were to be published have not yet been executed by the competent authorities of the Office.
- IV. The filing of these three requests by the Petitioner in this matter, and in this fashion, led not only to delays in the treatment of this matter, but forced

various changes in the composition of the Enlarged Board due to the non-availability of some of its members, thus adding further delay.

- V. In order to understand the current proceedings a review of the background and history of these requests is required. Only the most relevant facts will be set out below.
- VI. On 3 December 2014 the President of the EPO (hereafter the Office President) ordered a house ban and the suspension of the Respondent.
- VII. On 11 December 2014 (CA/D 12/14) the AC, on a proposal from the Office President (CA/C 8/14), decided to confirm the suspension of the Respondent, considering that this was the most appropriate measure to take and was in line with the house ban decided on by the Office President. It also decided that the Office investigative unit (hereafter IU) was the competent body to pursue this investigation and to deliver its report to the AC and to the Office President.
- VIII. On 5 March 2015, the IU delivered its report (hereafter IU Report).
- IX. On 26 March 2015 the AC initiated disciplinary proceedings against the Respondent (CA/28/15, Summary of decisions item 10.1, page 5). It also mandated its Chairman to take all necessary follow-up actions.
- X. The AC set up a Disciplinary Committee, (hereafter DC), which upon the basis of the IU Report delivered a report on 23 June 2015, (hereafter DC's opinion), to

the Chairman of the AC. The DC found that the Respondent had carried out several acts and that these acts constituted misconduct, for which the appropriate sanction was dismissal.

XI. In the present proceedings, based on AC Request 3, the Petitioner relies on the IU Report and on the DC's opinion and has redrafted its request.

XII. AC Request 3 contains two allegations:

Allegation 1: Unauthorised disclosure of non-public information and critical opinions related to Board of Appeal activities outside the EPO while using pseudonyms.

Allegation 2: Spreading of false accusations and unjustified attacks or threats against the EPO and its members either directly or indirectly using anonymous statements and pseudonyms.

XIII. The parties were summoned to a first non-public oral proceedings on 10, 11 and 12 May 2016. The purpose of these oral proceedings was to discuss the competence of the Enlarged Board, the admissibility of AC Request 3 and the Respondent's request for summary termination of the proceedings.

XIV. By a letter dated 2 May 2016 the Petitioner stated that it did not consider itself a party to the proceedings, it represented only the institutional interest of the AC. It initiated the proceedings, pursuant to Article 23(1) EPC, in its capacity as the competent appointing authority.

XV. The written and oral submissions of the Respondent can be summarised as follows:

1. Procedural status of the AC in the proceedings.
The Respondent requested in the May 2016 oral proceedings that the position of the Petitioner as a party to the proceedings be confirmed, or, if not, that it be excluded.
2. Competence of the Enlarged Board, its independence and its legitimacy to deal with the case on the following grounds:
 - (a) The conflict between Article 12a RPEBA and the higher ranking legal norm of Article 23(1) EPC.
 - (b) Perversion of the procedure foreseen under Article 23(1) EPC: AC usurps the provisions of the EPC and their spirit.
 - (c) The failure to comply with the fundamental principles of judicial independence set forth in the "European Charter on the statute for judges" and the "Magna Charta of Judges" in the composition of the Enlarged Board in proceedings under Article 12a RPEBA (lack of elected members).
 - (d) The impermissible attempt on the part of the AC to instruct the Enlarged Board by means of CA/D 14/15, which constitutes a perversion of the procedure foreseen under Article 23(1) EPC.
 - (e) The consequence of the amendment of Article 95(3) of the Service Regulations

(hereafter ServRegs) (CA/D 18/15) on the independence of the Enlarged Board.

3. Admissibility issues on the following grounds:
 - a) The power delegated to the Chairman of the AC in CA/D 14/15 was exhausted upon termination of the proceedings in case Art. 23 2/15, with the withdrawal of the request.
 - b) The principle of *Res judicata* should apply.
 - c) The principle of *Ne bis idem* should apply.
 - d) AC Request 3 fails to heal the deficiencies in the preceding requests and is no more substantiated than in case Art. 23 1/15.
4. Request for summary termination of these proceedings on the following grounds:
 - a) The proceedings should lead the Enlarged Board to immediately terminate or stay the proceedings until the AC adopts appropriate measures to ensure that the independence of the members of the Enlarged Board is guaranteed.
 - b) Lack of lawful basis of the proceedings.
 - c) Attempts to undermine the presumption of innocence.
 - d) Flawed composition of the DC.
 - e) Flawed disciplinary procedure.
 - f) Deficient opinion of the DC.
 - g) Flawed investigative procedure initiated by the EPO administration.
 - h) CA/D 12/14 failed to heal the flaws of the investigative procedure.

- i) Procedural abuses.
- j) Flawed IU Report.

5. Relating to the substantive subject-matter on the following grounds:

- a) Failure to consider the circumstances in which the alleged misconduct occurred.
- b) Failure on the part of the AC to address the issue that the IU Report is neither neutral nor objective in its presentation of facts; observations on the DC's opinion.
- c) Inconsistencies in the DC's opinion.
- d) Suppression and/or deliberate omission of evidence.
- e) Unresolved issues concerning exhibits B43 to B45.
- f) Attempts to reintroduce previously abandoned allegations.
- g) Failure to respond to issues previously raised by the Respondent.
- h) Observations about the events of 3 December 2014.

XVI. During the non-public oral proceedings of 10 to 12 May 2016 the aforementioned issues under numbers 1-4 were discussed with the parties. A discussion of the issues raised under number 5 above was postponed to the June 2016 oral proceedings on the merits. The Enlarged Board concluded that the AC Request 3 was admissible. It also decided not to summarily terminate the proceedings.

XVII. The Enlarged Board gave case management directions for the oral proceedings foreseen for June 2016 to discuss

the merits of the case, in particular as regards the notion of serious grounds and probative and formal aspects of the evidence.

XVIII. Upon the request of the Respondent, and after discussing with the parties, the Enlarged Board decided that the oral proceedings on the merits in June 2016 would be held in public unless the Enlarged Board would decide to exclude the public, which it would do whenever the nature of the debate made this necessary.

XIX. The oral proceedings on the merits of the case were arranged for 14 to 16 June 2016. The parties were invited to prepare their submissions for that debate. The Chair informed the parties that the Enlarged Board had decided that three members of the IU would be called as witnesses.

XX. Both parties filed their submissions with letters of 6 June 2016. Thus the parties and the Enlarged Board were in a position to discuss the merits of the case at the public oral proceedings on 14 to 16 June 2016, and the Enlarged Board considered that it would then be in a position to issue a final decision on the merits.

XXI. The Vice-President Appeals was given, and took, the opportunity to submit his observations in the proceedings in accordance with Article 12a(2) RPEBA.

XXII. In addition to the submissions of the Petitioner, on 6 June 2016, the Chairman of the AC sent a letter directly to the Chair of the Enlarged Board expressing general reservations in respect of the decision to hold the oral proceedings of June 2016 in public. Further,

he asked for confirmation that the file would not be made available to anyone other than the members of the Enlarged Board in its present composition.

XXIII. The Chair of the Enlarged Board replied to the Chairman of the AC on 7 June 2016, confirming that there had been no disclosure of the file by the Enlarged Board other than to the members of the Enlarged Board in its present composition. In addition to this the Chair repeated the wording of the decision on the holding of public oral proceedings on the merits, as taken in the oral proceedings of May 2016. In addition to that, the Chair confirmed that the Enlarged Board was fully aware that the proceedings should not jeopardise the interests or honour of any person, in particular persons whose names might arise during the proceedings.

XXIV. On 14 June 2016 the Petitioner confirmed, during the *in camera* conference, that this letter by the Chair of the Enlarged Board addressed the general reservations raised in the earlier letter of the Chairman of the AC.

XXV. By a letter of 10 June 2016 the Office President, who is not foreseen as a party to these proceedings under Article 23(1) EPC and Article 12a RPEBA, wrote directly to the Chair of the Enlarged Board with copies to the other members of the Enlarged Board in its present composition.

The letter is titled "Office representation in the case Art. 23 1/16". This letter stated:

"With due respect to the principle of independence of the Board of Appeals enshrined in Art. 23 EPC, by virtue of the powers under Art. 5(3) and 10(1)(2)(h)(i) EPC, I would like to bring to your attention certain concerns expressed in the attached position prepared by my legal counsels."

XXVI. The attached document, an English QC's opinion, is entitled: "In the matter of a procedure in front of the Enlarged Board of Appeals", "Position Statement for the President of the European Patent Office". The following passages appear to be relevant for the proceedings:

"19. It will be recalled that the role of the EBOA under Article 23 EPC is to make a proposal on the removal from office, having regard to the fact that this sanction has been recommended by the DC and endorsed by the AC. This article does not confer an appellate or investigative power, let alone a free standing and further fact finding mandate. The nature and extent of the evidence already available to the EBOA means that the attendance of these witnesses is not necessary for the Article 23(1) EPC proceedings to be conducted fairly and effectively."

"21. It is quite inappropriate that a full re-hearing of the facts take place on 14-16 June; there are no vires in this forum to conduct an appeal process nor indeed to recommence an investigation; accordingly, the personal presence of any witnesses from the Office will not be required or authorised by the President."

"23. With that in mind, the President will not, we are also instructed, hesitate to take any appropriate steps available to him to ensure the orderly running of the Office and the safety of its employees."

"27. In view, in particular, of the gravity of the reputational, security, welfare and public order risks identified, there is a strong case for saying that any decision to conduct this hearing in public would be unlawful because it could not be defended as either proportionate or reasonable."

"28. For all these reasons, the President deems it necessary in the interests of the whole Organisation that there is an assurance that this matter will proceed in camera and that no witnesses will be called from the Office."

XXVII. Although it was foreseen to open the public oral proceedings on the merits of this case at 9:00 hours on 14 June 2016, the Enlarged Board decided to hold a preliminary *in camera* conference with the parties in order that the Petitioner could clarify its position as regards the Office President's letter of 10 June 2016. This conference was adjourned from 11:40 to 14:30 hours to permit the Petitioner's representatives to take instructions on this matter.

XXVIII. At 14:30 hours, the Petitioner's representatives were finally in a position to submit a statement from the Chairman of the AC relating to the Office President's letter of 10 June 2016.

XXIX. At 17:15 hours, the *in camera* conference ended and the public oral proceedings began. The Chair of the Enlarged Board then made the following statement:

"The Enlarged Board of Appeal has received a letter of an authority not party to the proceedings, in which it expressed the opinion that the Enlarged Board, in deciding to hold public oral proceedings, took an unlawful decision. It was discussed with the parties, whether this letter could be considered, from an objective point of view, as a threat to the independence of the Enlarged Board in this case. The petitioner was requested to express clearly whether it endorsed this position or not, since the petitioner is the appointing and the disciplinary authority for all members of the Enlarged Board. The petitioner made a declaration which did not distance it from this opinion and which does not remove the threat. Under these conditions, the Enlarged Board cannot legally continue with the present proceedings, and therefore terminates them with the decision that it does not propose the removal from office of the respondent."

XXX. The public was then excluded and the oral proceedings continued without the public in order to deal with the remaining requests of the parties.

XXXI. The final request of the Petitioner was

that the Enlarged Board of Appeal make a proposal that the Respondent be removed from office as a member of the Boards of Appeal.

XXXII. The final requests of the Respondent were that:

1. The Petitioner's request be dismissed, subsidiarily that the proceedings be terminated; and
2. The reimbursement of all of the costs incurred by the Respondent in these proceedings be proposed; and
3. The decision in case Art. 23 1/16 be published; and
4. The Enlarged Board includes in the reasoning of its decision *obiter dicta* in respect of the Respondent's requests set out in its letter of 24 November 2015.

XXXIII. At the end of the non-public oral proceedings the present decision was announced.

Reasons for the decision

Nature of these proceedings

1. The present proceedings are in respect of the Petitioner's request for a proposal for the removal from office of the Respondent. They are governed by Article 23(1), first sentence, EPC. They are conducted independently of any disciplinary proceedings (Article 12a(8) RPEBA).
2. A proposal to this effect has to emanate from the Enlarged Board of Appeal, and the Enlarged Board comes to such a proposal exclusively by way of a decision, as evidenced by Article 18(3) RPEBA. As it concerns a

member of the judicial body of the EPO, who enjoys the guarantee of judicial independence pursuant to Article 23(3) EPC, this decision must itself also be arrived at in accordance with the principle of judicial independence pursuant to Article 23(3) EPC.

3. Neither the European Patent Convention nor the Rules of Procedure of the Enlarged Board of Appeal foresee these proceedings as an appeal from a decision or opinion in the disciplinary proceedings or establish these proceedings as a legal or factual part of the disciplinary proceedings governed by Article 11(4) EPC and the ServRegs. It is rather for the Enlarged Board to establish, to its own satisfaction, by an examination of the facts, evidence and arguments, whether it is in a position to make the requested proposal for removal from office.

***INADMISSIBILITY OF THE PETITIONER'S REQUEST AND SUMMARY
TERMINATION OF THE PROCEEDINGS***

Procedural status of the Petitioner in the proceedings

4. The procedure as adopted in CA/D 3/15 establishing the Rules of Procedure of the Enlarged Board of Appeal in this respect, is an adversarial judicial procedure (see the Enlarged Board's decision in case Art. 23 1/15, point 5.7 of the Reasons). Filing the request, representing the Petitioner's interests and supporting allegations against the Respondent, corresponds to the role of a party in such proceedings. The Board merely underlines that the adversarial nature of the proceedings aims, as is usual under the rule of law in democratic countries, at guaranteeing the Respondent a

fair trial and not at undermining the power of the disciplinary authority to take a final decision.

Competence of the Enlarged Board, its independence and legitimacy to deal with the case

5. The Respondent insisted that Article 23(1) EPC was at the core of the case, and the independence of the members of Boards of Appeal was at stake. According to this article the members of the Enlarged Board of Appeal and of the Boards of Appeal shall be appointed for a term of five years and may not be removed from office during this term, except if there are serious grounds for such removal and if the AC, on a proposal from the Enlarged Board of Appeal, takes a decision to this effect.
6. The Respondent argued that the procedure foreseen under Article 23(1) EPC must be carried out entirely by the Enlarged Board, in the sense that it was incompatible with the wording of Article 23(1) EPC for the AC to be able to initiate such proceedings by itself making a request for a proposal.
7. In its decision in case Art. 23 1/15, point 5.7 of the Reasons, the Enlarged Board already determined that the procedure under Article 23(1) EPC is further specified by Article 12a RPEBA. The AC as legislative power under the EPC has endorsed these supplementary regulations by its approval of them.
8. Neither Article 23(1) EPC nor Article 12a RPEBA requires that the Enlarged Board and the Enlarged Board alone has the power to initiate such a procedure.

9. The Respondent has raised the issue that the amendment of Article 95(3) ServRegs affects the independence of the members of the Enlarged Board because it permits any board member to be indefinitely suspended by a mere decision of the AC. This amounts to a *de facto* removal from office, since the suspension can be extended until the member's five year term expires. Upon expiry of the five year term, re-appointment of the member in question can then simply be denied, without a proper Article 23(1) EPC proposal of the Enlarged Board. The Respondent has not, however, raised this issue as part of an objection under Article 24(3) EPC that is that the members of the Enlarged Board might be suspected of partiality by a party.
10. In the light of this the Enlarged Board considers that it has to address the issue under Article 4(1) RPEBA, that is whether any members of the Enlarged Board in its current composition consider that because of the amendments made to Article 95(3) ServRegs, they should not take part in this procedure as they no longer consider themselves to be impartial and independent in their decision making.
11. The Enlarged Board notes that the amendment to Article 95(3) ServRegs was decided upon by the AC in its December 2015 meeting, during the course of this series of proceedings. With this amendment it cannot be excluded that the suspension of the Respondent will continue to the end of his present five year term. The Enlarged Board further notes that this is possible because the period of suspension has been raised from 4 to 24 months specifically for board members, and it can

now be extended by the AC in "exceptional cases". A limit to this extension is not given, and no guidance as to what may constitute exceptional circumstances is provided.

12. This amendment of Article 95(3) ServRegs therefore gives the possibility, *de facto*, to the AC to remove a member of the Boards of Appeal from office without following the procedure in Article 23(1) EPC.
13. At the time this issue was raised in these proceedings, during the May 2016 oral proceedings, the members of the Enlarged Board, making their own individual assessment of their situation, considered that the threat to their judicial independence was a general, abstract threat that would be present in all cases before the boards, not just the present case. In fact, taking it as a reason to exclude oneself would necessarily imply that one could neither sit on any normal Board of Appeal case, nor on referrals, including petitions for review, to the Enlarged Board.
14. This situation has now changed as a consequence of the Office President's letter of 10 June 2016, (see para XXV above, and para 36 to 47 below).
15. The Respondent has also objected to the Enlarged Board of Appeal being composed of members none of whom is elected, (see facts and submissions, para XV, 2(c)). Neither the European Patent Convention, nor the Rules of Procedure of the Enlarged Board in Article 23(1) EPC cases have constituted the Enlarged Board with elected members. The Enlarged Board has already decided upon this point in its decision in case Art. 23 1/15,

point 5.6 of the reasons. The Enlarged Board remains of the same opinion in the present proceedings and adopts the reasoning of that decision, without seeing any necessity to repeat it here *verbatim*.

Admissibility issues

16. The Respondent has argued that the power delegated by the AC to the Chairman of the AC to pursue this series of proceedings was exhausted upon termination of the proceedings in case Art. 23 2/15, when the Petitioner withdrew its second request.
17. The Enlarged Board is of the view that the present proceedings fall within the scope of the mandate of the Chairman of the AC, which authorises him to act for the AC until the AC's final decision (see CA/D 14/15, point 2).

Res judicata

18. The Respondent raised this issue in view of the decision in case Art. 23 1/15. The Enlarged Board considers that this case concerned procedural issues rather than the actual "legal cause of action". Hence the doctrine of *res judicata* finds no application to the present case.

Ne bis idem

19. The Respondent has raised this issue under two aspects. The first aspect is that in the present case the Respondent was the subject of the same allegations, which were already decided upon in the earlier case

Art. 23 1/15 and which were withdrawn in case
Art. 23 2/15.

20. The Enlarged Board considers that the first decision is a procedural decision not on the merits of the case. The second proceedings did not even get to the stage of the merits, as the Petitioner withdrew its request. These circumstances cannot be assimilated to an "acquittal" or "conviction". In this respect, the Enlarged Board concludes that the present case is not hindered by the existence of these earlier proceedings.
21. The second aspect raised by the Respondent concerns the question of further disciplinary sanctions based upon the same facts as were considered sufficient by the Enlarged Board for a removal from office, such as the proposed dismissal. This is only of relevance if the Enlarged Board were to make a request for removal from office. As this is not the case, (see Order, point 1, below), there is no need to deal with this second aspect.

Article 12a(5) RPEBA

22. Article 12a(5) RPEBA provides that a request to the Enlarged Board shall set out all the facts, arguments and evidence relied on. The Respondent's objections to the admissibility of AC Request 3 are that this request is still not sufficiently substantiated so that the Respondent is not in a position to know which allegations, facts and evidence it has to respond to.
23. In AC Request 3, the five allegations maintained by the Petitioner in the first request and by the Petitioner's

declaration at the oral proceedings in case Art. 23 1/15, have been reduced to two.

24. In comparison to the first request, which was found insufficiently substantiated, the Petitioner has made in AC Request 3 a clearer distinction between facts, evidence and arguments/conclusions, and has sought to structure its request in a more logical manner. The Enlarged Board is of the view that from AC Request 3 it can discern what case the Petitioner is attempting to make for the purposes of Article 12a(5) RPEBA.
25. The Petitioner stated in the oral proceedings held on 10 May 2016 (point 12 of the Minutes) that it did not wish to pursue a request based on allegations 3, 4 and 5 that were present in its earlier requests. The Petitioner has adopted the position that it is seeking to remove the Respondent from office only upon the basis of the two allegations that it has sought to substantiate in these proceedings.

Request for summary termination

26. A summary termination of proceedings is only possible in the light of manifest and substantial procedural violations of such a nature as to lead to a serious prejudice to the legal and procedural position of a party.
27. The Respondent has argued that such violations are present in this case due to the lack of a lawful basis for the proceedings, the flawed composition of the DC, its deficient opinion, the flawed disciplinary

procedure and the flawed investigative procedure as initiated by the AC.

28. The Enlarged Board is of the view that these issues rather go to the quality and reliability of the evidence gathered against the Respondent. Hence they do not lead the Enlarged Board to the conclusion that it should summarily terminate the proceedings.
29. The Respondent has also argued that no fair procedure is possible given the undermining of the presumption of innocence in his favour due to the public airing of what can be described as the "Nazi" allegations, both in the statement of the Office President (CA/C 19/15) to the AC (in direct contradiction with the findings of the DC's opinion at para 131 and 142), and the press campaign of October 2015. This was aggravated by the alleged influence improperly exerted on the Enlarged Board (meetings of 5 and 8 December 2014 with respectively the Principal Director of the IU and the Office President) and the clear prior endorsement by the AC of the flawed DC's opinion.
30. As regards summary termination of the proceedings due to the undermining of the presumption of innocence, the Enlarged Board does not consider itself to be prejudiced against the Respondent by these events. These public disclosures and statements by high-ranking EPO officials constitute part of the factual background to this case. For the Enlarged Board, what counts is the reliability of the evidence gathered against the Respondent and of the credibility of the investigation carried out by the IU. These issues fall to be dealt with under the merits of this case and are not such as

to lead the Enlarged Board summarily to terminate these proceedings.

Oral proceedings open to the public

31. According to Article 12a(9) RPEBA, unless and to the extent that the Enlarged Board decides otherwise, the proceedings shall not be public and shall be confidential.
32. The Respondent himself requested that the oral proceedings relating to the substantive merits of the case be public.
33. The reason why the Respondent requests to have the oral proceedings open to the public is because the confidentiality of the proceedings has already been breached by the Office. Public oral proceedings give him the opportunity to explain his case and defend his reputation.
34. The confidentiality of proceedings tends to protect the interest of the persons concerned as well as the Office's interest. The Enlarged Board therefore also has to consider whether it would be contrary to the interest of the Office and the Organisation and the employees in question to have the oral proceedings in this matter open to the public.
35. Given the history of the case, in particular the fact that the Office sought publicity for its point of view on the matter, the Enlarged Board is of the opinion that it is also in the interests of the Office and the Organisation to have transparent proceedings. It should

be avoided that the proceedings are perceived by objective observers as expedited proceedings based on questionable or suspect evidence, in particular as these proceedings involve the removal of a member of the Boards of Appeal from judicial office. In any case, the Enlarged Board reserved to itself the power to exclude the public from the oral proceedings, whenever the nature of the debate made it necessary, which corresponds to the "extent that the Enlarged Board decides otherwise" provision of Article 12a(9) RPEBA.

**THE INDEPENDENCE OF THE ENLARGED BOARD AND THE OFFICE
PRESIDENT'S LETTER OF 10 JUNE 2016**

36. In his letter of 10 June 2016 (see quotations in point XXVI. above), the Office President expressed his view that the Enlarged Board's decision to hold public oral proceedings was unlawful. He further elaborated that the Enlarged Board does not have the competence to determine the facts in these proceedings. Finally, he indicated that he would not hesitate to take any appropriate steps available to him to ensure the orderly running of the Office and the safety of its employees in respect of the present case.
37. The making of an unlawful decision is clearly misconduct. Hence the general, abstract threat to the independence of the Enlarged Board resulting from the amendment of Article 95(3) ServRegs (see para 8 to 13 above) has now crystallised as a result of the Office President's procedurally irregular intervention in these proceedings.

38. As the present case has shown, the Office President assumes the power to investigate and to suspend members of the Boards of Appeal and bar them from the Office.
39. In addition, he may also propose any other disciplinary measures to the AC, pursuant to Article 10(2)(h)EPC.
40. Thus, in the presence of these facts, ascertainable by any objective observer, all present members of the Enlarged Board find themselves threatened with disciplinary measures if they continue with these proceedings in the presence of the public, and seek to determine the facts of this case. This undermines the fundamental principle of judicial independence as set out in Article 23(3) EPC. Thus the conditions of Article 23(3) EPC are not fulfilled, unless the AC as appointing and disciplinary authority for all members of the Enlarged Board, including its external members, distances itself from this position of the Office President.
41. After having been given time during the *in camera* conference held on 14 June 2016 to reflect upon this situation, the Chairman of the AC made the following remarks in writing concerning the Office President's letter and enclosure of 10 June 2016:

"...

Such a communication does not emanate from a party to the proceedings. In view of the fact that the Administrative Council is only represented in the proceedings pursuant to Article 12a(2) of the rules of procedure of the EBA, it cannot take position on a communication from the Executive Head of the Office.

...

In this respect, and as per Article 23(3) EPC, the EBA members are not bound by any instruction but must abide by the provisions of the EPC. This cannot be prejudicial to them, bearing in mind that the Council is the sole competent disciplinary authority for them..."

42. The Petitioner in this case is the AC. The AC is the appointing and disciplinary authority for the Office President (the highest ranking appointee of the AC), as well as for the members of the Enlarged Board, (the highest judicial authority of the EPO). The Petitioner thus has an institutional obligation to clarify whether it endorses or not the Office President's position as set out in his letter of 10 June 2016 and referred to above.
43. For the Enlarged Board to be able to continue with these proceedings the position of the Petitioner would have to be that it did not agree with the Office President and acknowledged that, from an institutional point of view, the pressure exercised by the Office President in the present case was incompatible with the judicial independence of the Enlarged Board guaranteed by the EPC. As the Petitioner did not clearly distance itself from the Office President's position, there is the threat of disciplinary measures against the members of the Enlarged Board. It is then the Enlarged Board's judicial independence in deciding on this case which is fundamentally denied.
44. As can be derived from the statement of the Chairman of the AC, there was no clear and unequivocal declaration

that the AC distanced itself from (or did not share) the Office President's position. In such a situation, the Enlarged Board cannot legally continue with these proceedings. As a consequence it cannot make a proposal to the Petitioner to remove the Respondent from office.

45. Thus to summarise, the Enlarged Board was reduced to the following alternatives:

- either,
to take an "unlawful decision";
- or,
to take a "lawful decision" according to the demands of the Office President, i.e. setting aside its decision on the public oral proceedings and taking as granted the facts established in the IU Report and/or the DC's opinion.

46. In either case, the respective decision would be inherently vitiated because it would have been made under pressure from the executive and without the serenity and independence needed for a fair trial.

47. The intervention of the Office President, and this intervention alone, prevented the Enlarged Board from continuing the proceedings as had been planned, (see above points XVI to XXI), from examining the case on its substantive merits as put forward by the Petitioner, and from establishing whether serious grounds for the removal from office of the Respondent existed in accordance with Article 23(1) EPC.

Respondent's request that this decision deal with certain issues by way of obiter comments

48. In its letter of 24 November 2015 the Respondent set out nine requests which it has repeated *mutatis mutandis* in the present proceedings.

49. These requests may be divided into four categories.

Category 1: Requests that are now without purpose

Request II, that the request that initiated the current proceedings be withdrawn.

As the Enlarged Board will not make a proposal to the AC for the removal from office of the Respondent, this request is now without purpose.

Category 2: Requests that fall outside of the competence of the Enlarged Board in these proceedings

Request IV, that the house ban be rescinded.

The Office President, who decided upon the house ban, is not a party to these proceedings. The Enlarged Board does not have a respective jurisdiction over him, nor is the house ban itself a subject of these proceedings.

Request VI, that the Respondent be reinstated with immediate effect as a member of the Boards of Appeal; and

Request VII, that the Enlarged Board make a legally binding order to the effect that the investigation and disciplinary procedures, and the procedures before the

Enlarged Board with reference numbers Art. 23 1/15 and 2/15 shall constitute no obstacle for reappointment following the current appointment period which expires on 31 December 2017. Further that all documents associated with the aforementioned procedures shall be removed from the Respondent's personnel file.

The Petitioner is the appointing authority for the members and chairmen of the Boards of Appeal. Its exercise of this authority is outside the competence of the Enlarged Board and is beyond the scope of these proceedings.

Request IX, that an award of moral and or exemplary damages shall be made, in the amount of at least one gross annual salary.

The Enlarged Board does not have the power to order such an award.

Category 3: Independence of Enlarged Board proceedings from disciplinary proceedings

The Enlarged Board cannot grant the following requests of the Respondent because of the present proceedings being independent from any disciplinary proceedings (Article 12a(8) RPEBA):

Request I, that the disciplinary procedure D 1/15 before the AC is to be terminated without prejudice to the Respondent; and

Request III, that the suspension be lifted; and

Request V, that all withheld components of remuneration are to be repaid with interest.

Category 4: Requests that the Enlarged Board may deal with

Request VIII, that all costs of the proceedings, in particular the cost of legal representation shall be borne by the EPO. For this request, see below.

Request for reimbursement of costs

50. The Petitioner referred to Article 12a(10) RPEBA and stated that it would leave it to the Enlarged Board to decide on this matter.
51. Pursuant to Article 12a(10) RPEBA, the Enlarged Board may on request propose the reimbursement of some or all of the costs incurred in the proceedings by the Respondent if the request to make a proposal for removal from office has been rejected.
52. The Enlarged Board has decided not to make a proposal for removal from office of the Respondent; therefore reimbursement is proposed.

Request for publication

53. The Respondent contended that public declarations have been made in the press that are detrimental to him. In order to offset that, he requested the publication of the present decision.

54. According to Article 18(3) RPEBA, the final decision of the Enlarged Board in proceedings under Article 23(1), first sentence, EPC, may be published, due regard being taken of the confidentiality of the proceedings.
55. In the present case the Enlarged Board has made a final decision that it does not make a proposal for removal from office of the respondent.
56. The decision is to be published.

Order

For these reasons it is decided that:

1. The Enlarged Board of Appeal does not make a proposal for removal from office of the Respondent.
2. Reimbursement of all costs incurred by the Respondent in the present proceedings before the Enlarged Board of Appeal is proposed.
3. The decision in case Art. 23 1/16 is to be published.

The Registrar:


W. Crasborn

The Chairman:


M.-B. Tardo-Dino



