

The IPKat

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By Juve! The EPO responds to Professor Broß

Yesterday, in "Former judge says actions of AC and Battistelli "devoid of any legal basis", this moggy [posted an English translation](#) of some [strong criticism](#) of the legal basis of certain decisions taken by the Administrative Council of the European Patent Organisation and the President of the European Patent Office (EPO). She also noted that the respected German law publication *Juve* had just published a [rebuttal](#), by EPO Vice-President [Raimund Lutz](#).



Raimund Lutz

The Kats have now received from the EPO an English-language translation of the Lutz rebuttal. It reads like this:

EPA disciplinary proceedings: administration rejects criticism from ex-Constitutional Court judge

Mathieu Klos
17.11.2015

The European Patent Office (EPO) has defended itself against attacks by the former Federal Constitutional Court judge Prof. Dr. Siegfried Broß. At the end of October, in an interview with JUVE, the administration cited a structural problem regarding the Boards of Appeal, as the judicial branch of the EPO is known. He called into question the legitimacy of the court because of "an obvious personal connection between the President of the Office and the supervision (of the Boards)".

Raimund Lutz, EPO Vice-President for Legal and International Affairs, contradicted this, saying: "The Board of Directors and President are acting on the legal basis of the European Patent Convention, the Constitution of the European Patent Organisation (EPO)." The statements made by Professor Broß appeared therefore "completely unfounded". Moreover Broß has made this assessment in the light of the "ongoing disciplinary proceedings before the Board, obviously without knowledge of the facts alleged and even without reading the available information".

The former judge at the Federal Constitutional Court and previously the Patent Division of the Federal Court had, however, in an interview with JUVE, called into question the legal Working Guidelines of the EPO. Broß holds that the EPO structure is incompatible with the European Convention on Human Rights (ECHR), the European Charter of Fundamental Rights and the rule of law and democratic principles. The Administrative Council and the 38 EPO member states had therefore requested the complete separation of the EPO-Court from

the Office.

In the JUVE interview, the constitutionalist had also been critical of the impeachment proceedings against a member of the Boards of Appeal, which the Board had initiated at the beginning of October. The governing body had asked the competent Enlarged Board to recommend the dismissal of the judge. "This method lacks a constitutional basis," said Broß.

He also described the behaviour of the Head of the Office, Battistelli, as unacceptable, because he had published an internal e-mail, to all EPO employees, personally discrediting accusations against the judge. Previously, the Board had published the main accusations.

"EPC will not be changed"

EPO Vice-President Lutz now contradicted the view of the constitutional lawyer. "Of course there are several ways to build a legal system that meets the requirements of the ECHR. A wide variety of models are represented in our 38 Member States. The founding fathers of the EPO have opted for the model of the Boards of Appeal. "The Board of Directors currently see no reason to change the provisions of the European Patent Convention".

Lutz refers to a number of high court judgments from Member States in which courts of final instance of the Board of Appeal to grant a patent has been challenged in the national courts. "The fact is that the national courts have rejected these complaints in all cases as inadmissible or unfounded, arguing that the rule of law offering substantive and personal independence of the Boards of Appeal and their members is guaranteed in its entirety."

Lutz refers inter alia to decisions of the German Constitutional Court. The Court of Justice of the European Union (CJEU) has also, in the context of its decision on the European unitary patent, indirectly dealt with the legal system of the EPO. "The judgement adopted in the light of an action brought by Spain alleging a lack of independence of the European patent system was completely disregarded. This illustrates that the CJEU does not share the view of Professor Broß".

"No influence on the substance of cases"

Broß reproaches the Board of Directors and the President as having acted illegally, which Lutz also rejects. "The EPC is the Constitution of the EPO. The Board and the EPO President are bound by this Convention, and not by national rules". According to Lutz, various provisions in the EPC and in the relevant staff rules also guarantee the independence of the Boards of Appeal and their members. "This clearly shows that the President has no influence on the substance of the cases pending before the Boards."

Lutz also sharply attacks the remarks of Broß on the conduct of Battistelli and the Administrative Council in the context of the disciplinary proceedings. These were conducted on the basis of EPC provisions with the Board as the competent disciplinary authority, and not as claimed by Broß, led by the EPO President. Vice Chairman Lutz also points out that the disciplinary committee appointed by the Board of Directors meets under the chairmanship of a British high judge and with the involvement of Board of Appeal members. "This committee came to the clear conclusion that the entire procedure, including

the investigation carried out under the responsibility of the Board, was carried out in a legally correct manner."

This moggy is no constitutional law expert, and bows (miaows?) to the superior knowledge of those readers and comment-posters who are. She will however content herself with one observation which seems to her to be of considerable significance. The arrival of this English translation marks the first item of communication received by her from the EPO in over a year -- and, in defending the position it has taken, the EPO is at last beginning to engage with this part of the social media rather than sitting sullenly behind a wall of silence. Merpel welcomes this. Every long journey begins with a single step and, if transparency is ever to be achieved and trust restored, active (and, ideally, interactive) communication may be that first step.

Reminder for commenters: As has been true with Merpel's EPO posts for some time, and as is now the general IPKat policy, comment-posters are required to identify themselves via a pseudonym if they don't want to use their own names, since there are far too many people called "Anonymous" and it can be difficult-to-impossible to work out which Anonymous is which [if any anonymous posts get through, it's by accident -- not a change of policy]. Also, Merpel moderates EPO-related comments quite heavily, knowing that some readers get so exercised that they forget the normal standards of comment etiquette (or even of libel laws).

Further posts from Merpel on staff suspensions and health and welfare issues are still in the pipeline ...