The role of the BOAC in the future institutional framework for the Boards of Appeal

Requested by

Status

The Presidium has endorsed the analysis and the conclusions of this paper at its meeting on 20 April 2015

Summary

The Boards of Appeal Committee (BOAC) is foreseen as a subsidiary body of the Administrative Council (AC). It is an advisory body to the AC. It cannot have competences which concern the management of the boards of appeal, nor competences to make proposals to the AC for amendments to certain texts such as the Implementing Regulations or the Service Regulations - these competences do not lie with the AC.

The BOAC should also not have competences with regard to the internal administration of the boards of appeal or anything as regards the judicial processes, including the allocation of cases. Applying the Burgh House Principles, the boards should be free from any interference from another organ of the EPO in these matters.

The main role of the BOAC would be an advisory function to the AC with regard to the following matters: Rules of Procedure of the EBA and the boards of appeal; proposed amendments to the Implementing Regulations, Service Regulations and other texts; budget for the boards of appeal; appointment of board members (incl. chairmen); report by the President of the boards of appeal to the AC; disciplinary matters.
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1. Introduction

CA/16/15 foresees that a Board of Appeals Committee (“BOAC”) be established. The BOAC is foreseen as a “subsidiary body” of the AC (CA/16/15, point 25). It is constituted of members of the AC and external members who are presidents and/or senior judges of national, European and international courts. It is not foreseen that any of the BOAC members is a chairman or member of the boards of appeal.

The choice of the BOAC as a subsidiary body of the AC has consequences on the competencies of the BOAC and the limits of these competencies are explored in this paper.

The alternative concept would have been to form a Council of the Judiciary, where at least 50% of the members should be judges selected from within the judiciary and thus be board of appeal chairmen or members. This would allow such a Council to concern itself with matters that lie within the competence of the judiciary.

2. Institutional framework in the EPC: the competences of the President of the EPO and of the AC

The Convention draws a clear separation between the competences of the executive, the President of the EPO, and the legislative, the Administrative Council (AC).

2.1. Competences of the AC

The AC has a number of specific competences with regards to the boards of appeal:

- the appointment and reappointment of board members (Art. 11(3) EPC),
- disciplinary authority over board members (Art. 11(4) EPC),
- approval of the Rules of Procedure of the boards and the Enlarged Board (Art. 23(4) EPC), and
- decision on removal from Office on a proposal of the Enlarged Board (Art. 23(1) EPC).

More generally, the AC has the competence to amend certain parts of the Convention (those parts play no role with regard to the proposed structural reform), to amend the Implementing Regulations, and to adopt/amend the

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2 This concerns time limits (Art. 33(1)(a) EPC) as well as other parts of the Convention within a very strict legal framework (e.g. for alignment with an international patent law treaty – Art. 33(1)(b) EPC).
3 Art. 33(1)(c) EPC.
Financial Regulations, Service Regulations, Pension Scheme Regulations and the Rules relating to Fees. It is also competent to authorise the President to negotiate and, subject to its approval, conclude certain agreements between the Organisation and States/intergovernmental organisations/documentation centres.

The AC adopts the budget of the Organisation as well as any amending or supplementary budget (Art. 46(2) EPC).

► The competences of the AC do not include any managerial functions or competences beyond the specific ones mentioned above.

2.2. Competences of the President of the EPO

The competence to propose amendments to the Convention, for general regulations and for decisions which come within the competence of the AC lies with the President of the EPO (Art. 10(2)(c) EPC). An exception are decisions of the AC to approve the RPBA and RPEBA (see point 5.1 below).

The management of the EPO lies with the President of the EPO and the President’s competences are defined in Art. 10 EPC. These include: the adoption of internal administrative instructions and information to the public (Art. 10(2)(a) EPC), budget preparation and implementation (Art. 10(2)(d) EPC), submitting a management report to the AC (Art. 10(2)(e) EPC) and supervisory authority over staff (Art. 10(2)(f) EPC).

► To comply with the EPO system the managerial functions concerning the boards of appeal should lie with the President of the Boards of Appeal. They cannot lie with the AC as there is no basis for this in the Convention.

3. Legal basis for the BOAC

Pursuant to Art. 33(2)(e) EPC the Administrative Council (AC) is competent to adopt or amend its Rules of Procedure. The AC’s Rules of Procedure (ACRP) provide in Article 14(1) that

\[^4\] Art. 33(2)(a) to (d) EPC.

\[^5\] For an overview about who is accorded the right of legislative initiative in Europe, please see the “Report on legislative initiative” by the European Commission for democracy through law (Venice Commission) of 17 December 2008. As a common feature of the constitutions, government and Parliament are vested with a right of legislative initiative (para 142). In several constitutions the government has the sole or prime responsibility for legislative initiative (para 147).

“The Council may establish committees, working parties or other subsidiary bodies to advise it on particular questions.”

If established under Art. 14(1) ACRP, the BOAC is a subsidiary body and thus a part of the AC. By definition, it is a body advising the AC.

It follows that:
► the BOAC cannot, as a subsidiary body of the AC, have more competences than the AC itself;
► the BOAC cannot, as a mere subsidiary body, have competences that are, according to the EPC, reserved for the AC as such;
► the BOAC cannot, according to Art. 14(1) RPAC, have competences other than advising the AC.

4. Judicial independence and freedom from interference

The separation of powers underlies all judicial systems. This separation is also reflected in the Burgh House Principles on the Independence of the International Judiciary. Thus, an international court established as an organ of an international organisation must be free from interference by other organs of that organisation:

“1.2 Where a court is established as an organ or under the auspices of an international organisation, the court and judges shall exercise their judicial functions free from interference from other organs or authorities of that organisation. This freedom shall apply both to the judicial process in pending cases, including the assignment of cases to particular judges, and to the operation of the court and its registry.

1.3 The court shall be free to determine the conditions for its internal administration, including staff recruitment policy, information systems and allocation of budgetary expenditure.” (emphasis added)

► Matters concerning the judicial process, including the assignment of cases, must remain within the exclusive competence of the boards of appeal.
► The management of the boards of appeal should lie with the boards of appeal and their President. There should be no interference from the AC or any of its subsidiary bodies.

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7 Document CA/16/15 suggests that it is proposed to create a Boards of Appeal Committee (BOAC), set up by the AC as a subsidiary body under Art. 14 of the AC’s Rules of Procedure (see point 25 of CA/16/15).
8 The Burgh House Principles On The Independence Of The International Judiciary (2005); issued on the authority of the Co-Chairs and members of the International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals. Document CA/16/15 states in point 7 that the Burgh House Principles have been duly considered.
5. Competences of the BOAC proposed in CA/16/15

5.1. Make proposals for amendments to the Rules of Procedure

It is suggested in CA/16/15 (point 27) that the “BOAC will be also able to make proposals for necessary amendments to the RPBOA and the Rules of Procedure of the EBOA...for approval by the Administrative Council.”

Under Art. 23(4) EPC, the RPBA and the RPEBA are adopted in accordance with the Implementing Regulations and subject to the approval of the AC. According to R. 12(3) EPC, the Presidium of the Boards of Appeal adopts the RPBA. Pursuant to R. 13(2) EPC, the members of the Enlarged Board of Appeal adopt the RPEBA. Although the AC is competent to amend the Implementing Regulations, it cannot change Art. 23(4) EPC. Such a change would require a diplomatic conference.

“Subject to the approval” of the AC means that the AC may reject the proposal made by the Presidium, respectively by the members of the EBA. The AC is, however, not competent itself to make a proposal to amend the RPBA or the RPEBA. In fact, it may not even amend such a proposal. The AC can express its dissatisfaction only by rejecting such a proposal, thereby forcing the competent bodies to provide a new draft (or to abandon the proposal).

As established above, the BOAC, as a subsidiary body of the AC, cannot have more competences than the AC itself. Making the BOAC competent to propose amendments to the RPBA and the RPEBA would infringe this principle, and would therefore be in direct conflict with the institutional framework of the EPC (in particular, it would not comply with Art. 23(4) EPC).

► Adopting amendments to the RPBA and the RPEBA should therefore remain within the respective competences of the Presidium and the members of the EBA.
► Potential role of the BOAC: it could be asked by the AC for its opinion or recommendation on proposed amendments to the RPEBA and RPEBA prior to the AC’s decision on whether or not to approve the amendments.

5.2. Make proposals for general criteria for case distribution

It is suggested in CA/16/15 (point 27) that the BOAC makes proposals on general criteria for case distribution.

At present the Enlarged Board of Appeal and the extended Presidium allocate duties to the EBA and the boards of appeal respectively (Rules 13(1) and 12(4) EPC; see also Art. 2 RPEBA and Art. 1 RPBA).

The distribution of cases is clearly a matter of the “judicial process in pending cases”, as described in the Burgh House principles and the boards of appeal should be free from any interference from another organ of the EPO.
The role of the BOAC

► The AC, and thus the BOAC, has no competence with regard to management (see point 2 above).
► The business distribution should be a matter that lies within the exclusive competence of the Enlarged Board of Appeal and the extended Presidium to give effect to one of the Burgh House Principles (see point 4 above).

5.3. Propose appointment of external members to hear review cases

In CA/16/15 it is suggested that the composition of the EBA will be reviewed and that the BOAC will be given the task of making proposals for the appointment of external members to hear review cases.

► The designation of legally qualified external members is regulated in Art. 7(3) of the Business Distribution Scheme of the EBA which is decided by the EBA (R. 13(1) EPC). There is no need for an AC decision in this respect.
► An amendment to the Implementing Regulations cannot be proposed by the AC or the BOAC as it has no competence to make a proposal in this respect (point 2 above).

5.4. Make proposals to the AC for approval (other than the Rules of Procedure)

It is suggested in CA/16/15 (point 26) that the BOAC should make proposals for approval by the AC to enhance the independence of the boards of appeal, in particular:
- rules necessary for the organisation of the work of the boards of appeal
- proposals concerning a code of conduct
- proposals concerning internal instructions.

► The matters mentioned here all concern the internal administration of the boards of appeal or judicial process (part of the code of conduct). Contrary to what is suggested in CA/16/15, they do not require AC approval. These are matters that need to remain, if the Burgh House principles are applied, free from interference from another organ of the EPO (see point 4 above).
► The AC, and thus the BOAC, has no competence with regard to management nor to making proposals to the AC (see point 2 above).
► Potential role of the BOAC: it could be asked by the AC for its opinion or recommendation on an annual report of the President of the boards of appeal to the AC outlining matters concerning the internal administration and on a proposal concerning the Code of Conduct.

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9 The Code of Conduct concerning outside activities of the members of the Boards of Appeal was adopted by the Presidium and presented to the Administrative Council for information (CA/105/95).
5.5. **Improving efficiency of the boards of appeal and guidance on recruitment issues**

CA/16/15 refers to a number of management competences which the BOAC is proposed to have (point 27): setting general objectives to the boards of appeal and their President, providing guidance on management of the boards of appeal, assessing the performance of the board against the targets set, making proposals for establishing performance criteria, setting general criteria for a quality assurance system for the internal administration of the boards of appeal, approval of measures foreseen by the President of the boards of appeal aimed at implementing targets and global objectives. It also suggests that the BOAC would be responsible for making proposals concerning general criteria for the selection, recruitment and appointment of board of appeal members and chairmen as well as defining criteria for reappointment of board members (CA/16/15, point 29).

- The AC, and thus the BOAC, has no competence with regard to management (see point 2 above).
- The management of the boards of appeal should lie with the boards of appeal and their President. There should be no interference from the AC or any of its subsidiary bodies (see point 4 above). Note that staff recruitment policy is one of the points specifically mentioned as a matter of internal administration in the Burgh House principles, which a court should be free to determine itself.
- Potential role of the BOAC: it could be asked by the AC for its opinion or recommendation on an annual report of the President of the boards of appeal to the AC outlining matters concerning management of the Boards of Appeal.

5.6. **Survey of users**

It is proposed that the BOAC could consider launching a survey to users (CA/16/15, point 52). It should rather be the President of the boards of appeal who conducts such surveys, with possible input from the BOAC.

6. **Potential role of the BOAC**

Bearing in mind that the BOAC would be a subsidiary body of the AC, it could be entrusted with the functions set out below.

Apart from these formal functions the BOAC could function as a liaison between the boards of appeal and the AC.

6.1. **Rules of Procedure**

The BOAC could be asked by the AC for its opinion or recommendation on proposed amendments to the RPEBA and RPEBA prior to the AC’s decision on whether or not to approve the amendments.
6.2. Proposed amendments to the Implementing Regulations, Service Regulations and other texts

The BOAC could be asked by the AC for its opinion or recommendation on proposed amendments to the Implementing Regulations, Financial Regulations, Service Regulations, Pension Scheme Regulations which concern the boards of appeal prior to the AC's decisions on these matters. The BOAC should exercise this function having particular regard to the independence of the boards of appeal, so that no amendments are adopted which could impede on the independence of the boards.

Matters which concern the judicial process or the internal administration of the boards of appeal are to be decided by the boards and their President. These should not feature in the above-mentioned texts if the Burgh House Principles are to be observed.

6.3. Budget

CA/16/15 foresees that the budget request for the boards of appeal is prepared by their President. The President of the EPO is to include the budget request for the boards of appeal in the draft budget he submits to the AC for approval (CA/16/15, point 21).

The BOAC could be asked by the AC for its opinion or recommendation concerning the budgetary allocation to the boards of appeal.

6.4. Appointment/reappointment

The AC appoints and reappoints members of the boards of appeal (incl. chairmen). Whilst staff recruitment policy is a matter of internal administration, the AC could ask the BOAC for its recommendation or opinion on the appointment of the candidates proposed by the President of the boards of appeal (see CA 16/15, point 19, as regards the role of the Presidents of the boards of appeal in the appointment/reappointment procedures). As regards reappointments, the consultation of the President of the boards of appeal (via delegation from the President of the Office) should carry considerable weight.

6.5. Report by the President of the boards of appeal to the AC

The President of the boards of appeal should report to the AC (see CA/16/15, point 22) on his managerial and organisational tasks.

The BOAC could be asked by the AC for its opinion on the report of the President of the boards of appeal to the AC outlining matters concerning management of the Boards of Appeal.
6.6. Disciplinary matters

The AC has disciplinary authority over the members of the boards (Art. 11(4) EPC) and may decide, on a proposal from the EBA, that a member be removed from Office during his term (Art. 23(1) EPC).

The BOAC could be asked by the AC for its opinion or recommendation concerning any such matters.