

19 March 2015

AMBA Position on CA/16/15

Dear Mr Kongstad, Members of the Administrative Council and Mr Battistelli,

We have had the benefit of seeing a draft of the Presidium's letter to you. We fully endorse the views expressed therein, and it is needless to repeat points so cogently made. We therefore restrict ourselves to some general observations, before presenting some further points which are of concern.

This reform is in response to the problem, highlighted in decision R 19/12, that the BoA could be perceived as lacking independence. We thus welcome the following elements of the proposal as improving the separation of the BoA from the Office, both as a matter of fact and law, and as a matter of perception:

The creation of the position of President of the BoA with corresponding managerial and organisational powers (point 15 of CA/16/15).

The delegation of the President of the Office's powers of proposing appointments and of being heard regarding re-appointments (point 19).

However, we consider that the following aspects of the proposal negate that improvement to an extent that undermines not only the perception of independence, but also its factual and legal foundations:

The composition of the BoA Committee (BoAC). Although the proposal mentions councils for the judiciary (point 24), it is clear that the BoAC is not one; it does not have the necessary composition to meet internationally recognised standards¹ and it is described as a subsidiary body of the Administrative Council (point 25).

The administrative functions of the BoAC. Although not specified in detail, these functions are numerous and sufficiently clear to give rise to severe reservations as to their compatibility with the principle of self-governance which is a pre-requisite for independence. The functions include giving directions to the President of the BoA (points 17 and 22), organisation of the BoA's work, setting a code of conduct and issuing internal instructions (point 26), establishing performance and quality criteria (point 27), and tasks taken over from the Presidium, e.g. proposing the Rules of Procedure and setting criteria for case distribution (point 27).

The proposal discusses increasing independence in connection with increasing efficiency. We agree that efficiency plays a role in accountability and may always be questioned², but not to the extent implied by the proposal. In this respect, the unclear

¹ see enclosed letter to Board 28, pt. 2.c

² see enclosed letter, penultimate paragraph

presentation of statistics purporting to compare the efficiency of the BoA to other courts (Annex II of CA/16/15) does not establish that efficiency is a problem. They do not give a reasoned comparison between the courts mentioned and appear to be neither complete nor correct. For example, for the BoA, it is overlooked that about 40% of withdrawals incur significant prior work by the boards. The staff numbers for the CJEU do not include the Référendaires (three or four per judge) and the case numbers for the BPatG appear to include trade mark cases, which are dealt with by fewer judges. A correct appraisal of the statistics gives no indication of any lack of efficiency. Moreover, the problem of timeliness mentioned in the proposal (point 10) is mainly the result of a number of factors outside the control of the BoA. We note that despite recent improvements on our part, timeliness is currently being made worse by disruption to succession planning, which currently affects over 10% of the posts in the BoA and which will have consequences for some considerable time in the future.

Linking independence with efficiency results in what, to our mind, is the most problematic part of the proposal, namely the setting of criteria for re-appointment based on the “quality and efficiency” of members’ work (point 29). The present system of customary re-appointment has worked well for thirty years and been recognised as evidence of the judicial independence of the BoA. However, it has provided only the weakest, least acceptable safeguard of independence. Its removal, and replacement by efficiency and quality criteria, tips the balance against both independence and security of tenure. This proposal would allow the suspicion of extraneous factors affecting decisions, which ought to be taken solely on the basis of the facts in each case. Moreover, security of tenure is a hallmark of independence³, which the Burgh House Principles, cited in the proposal, also seek to guarantee. Re-appointment should be the norm except in severe and exceptional circumstances. Disciplinary proceedings are the appropriate sanction, if judges fail to carry out their duties in an efficient and proper manner⁴.

The following points are seen as detrimental for other reasons and in need of reconsideration:

Circumstances at the end of appointment (point 41). Exacerbating the above problems, it seems no longer to be foreseen that a member who is not re-appointed is guaranteed an equivalent post in the Office. Worse still, there appears to be a general ban on professional activity after serving in the BoA, essentially leaving a member unemployed. This is highly detrimental to the recruitment of members with the requisite professional qualifications and experience.

Lack of staff representation (point 46). The majority of the Service Regulations will continue to apply to BoA members, so that we would need some representation when they are discussed.

The removal of the BoA (points 49-51). The proposal disregards the effects of a move on members and their families. Moreover, contrary to the impression given in

³ see enclosed letter, pt. 2.d

⁴ Recommendation CM/rec(2010)12, para. 69

paragraph 50, the previous reform plans recommended that the Court's headquarters remain in Munich to avoid the duplication of structures, higher costs and the disruption caused by the inevitable staffing shortfalls⁵. Certainly, we see no reason to rush into an expensive decision, and remaining in the Isar building while waiting for a suitable alternative in Munich would be an option.

Finally, we are concerned that we have not been consulted before the proposal got this far, despite our letters to Board 28 pointing out the recognised principles of reform of the judiciary⁶. Considering the importance of this reform for the European Patent system and given that the factual situation considered in R 19/12 has already changed somewhat (see e.g. R 2/14) there seems to be no need to sacrifice adequate consultation and reflection in an attempt to stick to an ambitious timescale.

As we have intimate knowledge of the system and its problems, we are in a position to advise on possible solutions. For example, one direction would be to modify the existing statutory body for governance in the BoA, namely the Presidium, possibly with some external representation, and to give it the functions that would be problematic if the BoAC alone had responsibility. This would additionally include setting rules for selecting members and chairmen, and rules governing the composition of a disciplinary committee⁷. Also, the rather cumbersome section on regulating conflicts of interests (point 41) could be rendered more coherent by simply assigning these tasks to the Presidium, which already adopts the Code of Conduct concerning outside activities. In our view, the existing practice that members are normally re-appointed by the AC unless there are very severe and exceptional reasons should be enshrined in the regulations⁸.

In conclusion, we consider that this proposal mixes the role of an advisory and supervisory body with powers reserved to the judiciary itself. It cannot thus solve the problem of independence of the BoA, but gives rise to a real likelihood of further objections of partiality against all members of the BoA. Although presented as a "policy paper", its hasty adoption without substantial modification would set the reform off in the wrong direction by including fundamental flaws that would be difficult to rectify. We therefore urge you not to support it in its present form.

Yours sincerely,

The AMBA Committee

Enclosure: Letter to Board 28, dated 20 January 2015

⁵ CA/103/03, para 83 and CA/46/04, new Art. 6

⁶ see enclosed letter, pt. 2.a

⁷ CA/46/04 new Art. 21g(2), alternative B and Art. 21f(5)

⁸ CA/46/04 new Art. 21g(3), alternative B