

**Initial observations of the Presidium and the AMBA committee on  
CA/aa/16 of 10.5.2016 - Reform of the Boards of Appeal  
and CA/29/16 – Post-service integrity**

The aims of the structural reform are to increase the organisational and managerial autonomy of the Boards, the perception of their independence and their efficiency. The Presidium and the AMBA committee consider that many aspects of the above proposals do not achieve these aims and, in many aspects, even decrease the level of autonomy and independence. Nor do they follow the main internationally recognised principles of judicial independence.

Our main concerns on the structural reform are:

- The delegation of powers is insecure in that it may be revoked by the President of the Office (PresOff) on his own initiative, without any safeguards, and in that the consequences of any revocation on the new structure are unspecified. Furthermore, there are important omissions (appointment and promotion of support staff, Art 10(g) EPC and BoA budget proposal, Art 10(d) EPC) and broad caveats (provisions (3)(a), (3)(d) and (4) of the Act of Delegation). How can the President of the BoA (PresBoA) be accountable to the AC for his management of the boards when his powers are reduced or placed under such conditions?
- Separation of powers is incomplete: the PresOff retains the power to propose and the right to be consulted on the (re)appointment of the Chairman of the Enlarged Board of Appeal and hence the PresBoA, even though the PresBoA is under the authority and supervision of the AC (Act of Delegation, provision (3)(c)).
- A loss of autonomy results from shifting the authority for adopting the Rules of Procedure (RoP for BoA and EBoA) away from the Boards (Presidium and EBoA) to the BoAC (an external body) via the PresBoA. The BoAC can even make changes in substance. The RoP are an important instrument of independence under Art 23 EPC, cf. international courts such as the ECHR, CJEU and the UPC.
- Security of tenure is lost and independence reduced by expressly linking reappointment to a performance evaluation carried out by the PresBoA under guidance from the BoAC. This will be perceived as a risk of undue internal and external influence. Also, it will be difficult to attract experienced external candidates if it is not clear that they remain employees of the office if they are not re-appointed and if the post-service rules (CA/29/16) make it uncertain whether they will be permitted to return to their old profession.
- Independence and autonomy are eroded because the responsibilities of the BoAC, as defined in the draft decision setting it up, appear to go beyond advising the AC (Art 14 RPAC). In addition to adoption of the RoP, this concerns objective setting for members, guidance on management and recruitment, performance and case distribution criteria. This is compounded by the presence of the PresOff in any BoAC meetings.
- There is a lack of internal independence in that too much authority is vested in the PresBoA, with no involvement of the Presidium in key judicial functions (RoP, appointment, reappointment, discipline, performance evaluation).

In these aspects the proposals fall well short of international recommendations for judicial independence (security of tenure, autonomy). They also depart from the generally high standards adopted for international judicial institutions, which do not benefit from the checks and balances and electoral legitimacy inherent in national systems.

At its March 2016 meeting the AC requested the PresOff to submit proposals for structural reform of the BoA on the lines of the 5 points agreed by the AC at its December 2015 meeting (see CA/PV 146, point 1.7) and taking into account comments from the Presidium of the BoA. In many aspects (new career system, relocation, new fee policy, conflict of interest) the proposals go beyond this remit. Furthermore, the career proposals pre-empt the dialogue foreseen between the Boards and the BoAC on the arrangements for linkage to performance and seem to be inappropriate and inequitable for the following reasons:

- The distinction between “junior” and “senior” members is unwarranted, as all members do the same work, and may lead to arbitrary changes in seniority upon transition.
- Members and Chairmen can never reach end of grade. This subjects them to unequal treatment compared to the rest of the Office (pension is determined by final salary) making it difficult to attract the best internal candidates.

The Boards have been given little or no opportunity to comment on central aspects of the current proposal. Many of them have not been presented to the Boards at all (Act of delegation, decision setting up BoAC, new career structure, relocation and fee policy). On aspects that have been discussed the vast majority of our proposals, comments and concerns have not been taken into account in the proposed rules and are not reflected in any other way, for example in the explanatory notes or in the “Alternatives” section, which is conspicuous by its absence. Furthermore, the Office’s proposals appear to draw on material (benchmarking study on judges’ careers; the practice in most contracting states concerning RoP, and link between career development, pay structure and professional evaluation from judicial systems in contracting states) which have not been shared with us. In short, the Boards have not been properly consulted.

Finally, these proposals come at a time when a conference has just been held in Sofia, attended by justice ministers from the Council of Europe’s 47 member states and representatives of the judiciary, at which they agreed to take steps to implement an [action plan](#) on strengthening judicial independence and impartiality. The actions listed (see pages 9 to 11) are directly applicable to Boards of Appeal as the judiciary on the EPO.

The Presidium of the Boards of Appeal and the AMBA committee

18 May 2016