

Deutsche Vereinigung
für gewerblichen Rechtsschutz
und Urheberrecht e.V.

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Sitz Berlin
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European Commission
z.Hd. Herrn Giuseppe Bertoli
z.Hd. Frau Perez-Ferrerras
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**Opinion on the Proposal for a Council Regulation amending Regulation (EC)
No . 40/94 on the Community trade mark, KOM (2002) 767 final 2002/0308 (CNS)**

Dear Mr. Bertoli,

Dear Mrs. Perez-Ferrerras,

the German Association for Intellectual Property and Copyright Law (Deutsche Vereinigung für Gewerblichen Rechtsschutz und Urheberrecht e.V.) is a nonprofit academic association of practising professionals and scholars in the area of intellectual property and copyright law as well as competition law. The purpose of this organization according to its charter is to provide continuing professional education in the area of intellectual property law and to aid law-making bodies as well as competent ministries and institutions in the area of intellectual property rights.

Its opinion on the above-mentioned Commission Proposal is as follows.

A special mention must be given first of all to the heterogeneous character of the Proposal which contains "technical", "material" and "political" points.

Various associations concerned by the CTMR had, as mentioned in the Explanatory Memorandum of the Commission's proposal, already the opportunity to express in advance their opinions on individual amendments. However, the exact wording of the Commission's Proposal was not communicated prior to publication and certain "political" changes which, for example, concern the independence of the Boards of Appeal (Nos. 34-35) were not discussed in advance.

The introduction of the possibility of interlocutory revision in *inter-partes* proceedings (19) is welcomed, in principle, but the actual arrangement, however, is unlikely to represent any procedural relief. With regard to the revocation of decisions and the deletion of entries in the Register we suggest a completely new wording (21). There are particular doubts with respect to the changes which concern the Boards of Appeal, especially insofar as they intrude on their independence (34-35). Here again, concrete, new suggestions based on already existing models are made, for example, to the enlarged Boards, the individual members and the assignment of decisions.

The work with the Commission Proposal is made considerably more difficult by the fact that it contains numerous linguistic faults or gross, obvious discrepancies between the different language versions. This opinion will only refer to such faults in passing and only with respect to the German language. It is also regretted, in this connection, that the Commission has not seized the opportunity to correct the numerous existing editorial and translation errors in the Community Trade Mark Regulation (CTMR).

The opinion follows the construction of the CTMR and only considers the Explanatory Memorandum in passing.

On 1. Proprietors of Community trade marks (Art. 5 CTMR)

With respect to content, the abridgement of Art. 5 CTMR, similar to German law, is welcomed. From a legal policy point of view, however, it is regretted that those regulations in Art. 3 and 5, which are important for the German conception of partnerships, CTMR were not summarized in one article following the amendment. It is also noticeable that the Regulation on the Community Design does not contain provisions, as still foreseen in Art. 3 and 5 CTMR.

On. 2. Absolute grounds for refusal, Art. 7 CTMR

There are doubts, among other things, with respect to the wording "a registered name, if subsequently registered" ("une dénomination déposée, si ultérieurement enregistrée"). Furthermore, from a legal policy point of view, the double regulation in Art. 7 Par. 1 letter k, Art. 8 Par. 4, Art. 52 Par. 2, Art. 143 CTMR seem problematic.

On. 3. Relative grounds for refusal: Art. 8 CTMR

No comments.

On. 4. Insolvency proceedings, Art. 21 CTMR

Paragraph 2 should read:

"2. Wird die Gemeinschaftsmarke von einem Insolvenzverfahren erfasst, so wird dies auf Ersuchen des zuständigen Liquidators oder der zuständigen nationalen Stellen in das Register eingetragen und veröffentlicht". (2. Where a Community trade mark is involved in an insolvency proceeding, on request of the competent receiver or the competent national authority, an entry to this effect shall be made in the Register and published.)

On. 5. Registration, Art. 25 Par. 3 CTMR

To correct the wording it should read:

"Anmeldungen nach Absatz 2, die beim Amt nach Ablauf einer Frist von zwei Monaten nach ihrer Einreichung eingehen, gelten als zu dem Datum zugegangen, an dem die Anmeldung beim Amt eingegangen ist." (3. Applications referred to in Par. 2 which reach the Office more than two months after filing shall be deemed to have been submitted on the date on which the application arrived at the Office.)

or:

Anmeldungen nach Absatz 2, die beim Amt nach Ablauf einer Frist von zwei Monaten nach ihrer Einreichung eingehen, gelten zu diesem Zeitpunkt als zugegangen." (Applications referred to in Par. 2 which reach the Office more than two months after filing shall be deemed to have been submitted on this date.)

On. 6. Seniority, article 35 CTMR

For the adaptation to other language versions it should read:

“Der Inhaber einer Gemeinschaftsmarke, der Inhaber einer in einem Mitgliedstaat, einschließlich des Benelux-Gebiets, oder einer mit Wirkung für einen Mitgliedstaat registrierten älteren identischen Marke (1. The proprietor of a Community trade mark who is the proprietor of an earlier identical trade mark registered in a Member State, including a trade mark registered in the territory of the Benelux, or of an earlier identical trade mark with an international registration effective in a Member State,”

On. 7. – 8. and 10. Checking of Application (Art. 36, 37, 40 CTMR)

No comments.

On. 9. Search (Art. 39 CTMR)

The abolition of the Search Reports is welcomed.

On. 11. – 14. Division of the Application and the Registration

It is pointed out that the division is not permitted at every stage of proceedings, a partial transfer (Art. 17 CTMR), however, is possible at any time. This leads to a certain inconsistency in the result.

Furthermore, the division should only then be subject to a fee if the transfer of rights also remains subject to a fee. The obligation to pay a fee for the transfer of rights, however, does not arise from the CTMR itself, but only from rule 31 Par. 4 of the Implementing Regulation (IR). It is, therefore, proposed to restrict consideration to the creation of a legal basis in Art. 140 CTMR (and in doing so, at the same time, to create the missing legal basis for the fee for the registration of the transfer).

In addition, the following translation errors, which distort the meaning, should be corrected:

Art. 44a Par. 2 letter (a): “wenn gegen die ursprüngliche Anmeldung Widerspruch eingelegt wurde, und die Teilungserklärung Waren und Dienstleistungen betrifft, gegen die sich der Widerspruch richtet, bis die Entscheidung der Widerspruchsabteilung unanfechtbar geworden ist oder das Widerspruchsverfahren eingestellt wurde.” (if an opposition has been entered against the original application, and the divisional application concerns the goods and services against which the opposition is directed, until the decision of the Opposition Division has become final or until the opposition proceedings are finally terminated otherwise).

Article 48 a Par. 2 letter (a): “wenn beim Amt ein Antrag auf Erklärung des Verfalls oder der Nichtigkeit gegen die ursprüngliche Eintragung vorliegt, und wenn die Teilungserklärung Waren und Dienstleistungen betrifft, gegen die sich der Antrag richtet, bis die Entscheidung der Nichtigkeitsabteilung unanfechtbar geworden ist oder das Verfahren anderweitig abgeschlossen wurde (if an application for revocation of rights or for a declaration of invalidity against the original registration has been received by the Office, and the divisional registration concerns the goods and services against which the application is directed, until the decision of the Cancellation Division has become final or the proceedings are finally terminated otherwise;)

On. 15. – 18. Grounds for invalidity

The deletion of the reference to Art 5 in Art. 50 Par. 12 letter d and Art. 51 Par. 1 letter a CTMR is rejected. It must continue to be possible to cancel a trade mark, whose ‘proprietor’ does not have the legal capacity to be a proprietor.

It is suggested that the following editorial modification is made to Art. 52 Par. 2:

“Die Gemeinschaftsmarke wird auf Antrag beim Amt oder auf Widerklage im Verletzungsverfahren ebenfalls für nichtig erklärt, wenn ihre Benutzung aufgrund eines älteren Rechts, insbesondere eines:...” (2. The Community trade mark shall also be declared invalid on application to the Office or on the basis of a counterclaim in infringement proceedings where the use of such trade mark may be prohibited pursuant to another earlier right, in particular:...)

On. 19. – 20. Interlocutory Revision (Art. 60 and 60 a)

The possibility of interlocutory revision even in proceedings involving several parties aimed at providing relief for the Boards of Appeal and to accelerate the proceedings is welcomed on principle. The Proposal by the Commission does not yet seem perfected.

In view of the few cases in which interlocutory revision is currently granted in examination procedure and the planned dependence on the consent of the other party involved in the proceedings there are, however, doubts as to whether the Regulation will be practically effective and whether the general delay in the appeal proceedings associated with it of

one to two months is justified. In this connection, it is pointed out that up to now it has already been open to appellants to accelerate the proceedings, following fast submission of the statement of grounds, by expressly foregoing the right to submit further additional grounds within the still running period for lodging statements of grounds for the appeal.

The wording in Art. 60 a CTMR is regarded as too complicated and unclear. This even leads to the specification of an apparently incorrect period in Art. 60 a Par. 3 Clause 2 CTMR in which apparently reference was made to the two months period in Par. 2.

Should the interlocutory revision depend on the consent of the prevailing party in the opposition proceedings, it must be feared that this consent will be systematically refused. As a result, the interlocutory revision in inter partes proceedings would practically run into a void. It is also not apparent from the current Proposal whether the complaint must already have been notified to the respondent prior to the interlocutory revision and whether he is given the opportunity to file observations in knowledge of the grounds of appeal.

It also seems questionable whether the positive decision to grant interlocutory revision or the changed decision of the first instance can itself be challenged with an appeal. Since in the present version, the consent of the opponent to an appeal is required, the latter would probably lack the legitimate interest to take legal action.

At all events, the following wording faults should be corrected:

"Article 60, "Abhilfe in Ex-parte-Verfahren" (Interlocutory Revision in ex parte proceedings)

Art. 60 Par. 3 Clause 2: "Kommt die Stelle, deren Entscheidung angefochten wird, zu dem Schluss, dass sie der Beschwerde abhelfen muss, stimmt der andere Verfahrensbeteiligte der Abhilfeentscheidung aber nicht binnen zwei Monaten zu, ist die Beschwerde unverzüglich ohne sachliche Stellungnahme der Beschwerdekammer vorzulegen, und zwar nach Eingang der entsprechenden Erklärung des anderen Verfahrensbeteiligten." (If the department whose decision is contested comes to the conclusion that the appeal should be accepted, but the appellant does not accept this within two months, the appeal shall be remitted to the Board of Appeal without delay, and

without comment as to its merit, after receipt of the appellant's declaration that he does not accept it ...".

On the Ancillary Appeal, Art. 59 CTMR

It is regretted that the Commission has not presented any Proposal for the introduction of an Ancillary Appeal within an additional period. For the respondent to the appeal this often means not being able to challenge observations of the first instance which are negative for him, if the general period of appeal has expired. In addition, there are evaluation contradictions to Art. 134 Par. 3 of the Rules of Proceeding of the Court of First Instance (CFI) in the special proceedings against decisions of the Boards of Appeal.

On. 21. Revocation Art. 77a CTMR

The idea of creating a legal basis for the revocation of unlawful acts (in the German translation, the term "Rücknahme" appears preferable to "Widerruf"), is welcomed. The aim was the solution of such differing cases as

- the faulty entry despite non-payment of the entry fee,
- the faulty entry despite restriction/rejection of specific goods,
- decision before taking notice of a document previously received by the Office etc...

A legal basis should be created in order to abbreviate the alternative way via the appeals procedure which incidentally is not always open.

For the better legibility of the regulation it is suggested that a differentiation is made between the deletion of a trade mark which was registered in the Register for Community trade marks due to procedural errors and the revocation of a decision.

The case of faulty entry (Art. 47 CTMR) should be treated as equivalent to the case of faulty extension (Art 45 CTMR).

Unlike what is suggested by the German, French or English wording ("sachliche Fehler", "erreur matérielle", "material error", in contrast, the Spanish wording says: "error procesal" as well as the Explanatory Memorandum, point g referring to procedural decisions), the

revocation should only be confined to cases in which the illegality is based on a procedural error.

Furthermore, a differentiation must be made as to whether the act results in a benefit or involves a burden, and if the act is unilateral or bilateral. Thereby the interests in the compliance with the proceedings (and the material and administrative interests hereby pursued) must be weighed up against the interests in legal security of the decision's addressee, other participants in the proceedings or rightholders or the general public).

The reliability of the Register is particularly important, so that a specific absolute period seems justified, after the expiry of which a revocation is no longer permitted. The period which is 6 months in the Proposal should, however, be extended to at least 12 months.

Not affected should be the possibility to correct errors in publications prior to the registration (Rule 13 IR) and of other records in the Register and their publication (Rule 27 IR), as well as the possibility of interlocutory revision in Art. 60 and 60 a CTMR and cancellation due to material error on application of third parties in accordance with Art. 51-52 CTMR.

The regulation could, therefore, be reformulated as follows:

Article 77 a Revocation

(1) If, in proceedings with only one party, the Office has made an illegal decision to the detriment of this party, and the illegality is based on a procedural fault, the Office can revoke the decision. If the decision favours the party involved, the decision can only then be revoked if the illegality was obvious to the party involved.

(2) If, in proceedings with several parties, the Office has made an illegal decision, and if the illegality is based on a procedural fault, the Office can only then revoke the decision if the illegality was obvious to the beneficiary.

(3) If the Office has registered a Community trade mark in the Register for Community trade marks in accordance with Art. 45 or renewed it in accordance with Art. 47, and if the entry or renewal is based on a procedural fault which was obvious to the parties, it may delete it from the Register.

(4) The revocation of a decision or the deletion from the Register for Community trade marks is only to be undertaken, if the parties, as well as the registered holders of rights to the Community trade mark, have had an opportunity to present their observations. The

revocation is excluded if individual interests worthy of protection outweigh those of the Office or the public. The correction in the Register or the revocation of a decision must be carried out within 12 months after notification of the decision or publication of the entry.

Also questionable, is the relationship between Art. 77 a to Art. 60-60a (Interlocutory Revision), as the revocation in accordance with Art. 77a can also be effected *ex officio*.

On. 22. Restitutio in integrum, Art. 78 CTMR

The facilitating of restitutio in integrum in cases of claims on priority does not appear problematic, in principle. The exclusion in Art. 42 Par. 3 CTMR in addition to Par. 1 is a cause for concern, however.

On. 23. Continuation of proceedings, Art. 78a CTMR

On the basis of positive experiences in the EPO system, the possibility of the continuation of proceedings has been taken up. If the parties have not observed a time limit, in the interest of a decision on the substance they should be given the opportunity, following payment of a fee, to be reinstated in the previous stand. Less weight is attached, therefore, to the interest in legal security than to the interest in material justice. The educational effect, to meet deadlines, in order to shorten proceedings, should be guaranteed through the raising of a fee.

On a closer examination of the time limits, in which this reinstatement is not possible, it is noticeable that the Commission neither restricts itself to the time limits of Art. 78 Par. 5 CTMR, nor to such in which an application for extension of the time limit is not possible prior to expiry of the time limit (Rule 71 IR).

The inclusion of Art. 25 Par. 3 and 63 Par. 5 CTMR in this list appears superfluous, as it is not a matter of a time limit of the applicant which must be adhered to towards the OHIM.

It appears worth considering whether the time limit for the filing of an appeal or the statement of grounds should be included here.

It is also questionable that the continuation of proceedings is not made dependent on the consent of the other party. Here there are contradictory evaluations, for example, with the consent requirement in Art. 60a CTMR (Interlocutory Revision) and Rule 71 Par. 2 IR.

The following translation errors should be corrected due to the parallel nature of the wording of Art. 78 Par.2 and 3 CTMR:

“1. Der Anmelder, der Inhaber einer Gemeinschaftsmarke oder jeder andere an einem Verfahren vor dem Amt Beteiligte, der eine gegenüber dem Amt einzuhaltende Frist nicht eingehalten hat, wird – sofern es sich dabei nicht um die Fristen des Artikels 25 Absatz 3, des Artikels 27, des Artikels 29 Absatz 1, des Artikels 33 Absatz 1, des Artikels 36 Absatz 2, des Artikels 42 Absätze 1 und 3, des Artikels 63 Absatz 5, des Artikels 78 sowie dieses Artikels handelt – auf Antrag eine Verfahrensverlängerung erhalten, wenn die versäumte Handlung inzwischen nachgeholt worden ist. Der Antrag auf Verfahrensverlängerung ist nur innerhalb einer Frist von zwei Monaten nach Ablauf der versäumten Frist zulässig, Der Antrag gilt erst als gestellt, wenn die entsprechende Gebühr entrichtet worden ist. (An applicant for or proprietor of a Community trade mark or any other party to proceedings before the Office who has been unable to observe a time limit vis-à-vis the Office may, upon application, obtain the continuation of proceedings in cases other than those set out in Art. 25 Par.3, Art. 27, Art. 29 Par. 1, Art. 33 Par. 1, Art. 36 Par. 2, Art. 42 Par. 1 and 3, Art. 63 Par. 5, Art. 78 and that set out in this Article, provided that, at the time the application is made, the omitted act has been carried out. The application for continuation of proceedings shall only be admissible within two months following the expiry of the unobserved time limit. The application shall not be deemed to be filed until the fee for continuation of the proceedings has been paid.

2. Über den Antrag entscheidet die Dienststelle, die über die versäumte Handlung zu entscheiden hat. (The department competent to decide on the omitted act shall decide upon the application).”

On. 24. Refund of fees, Art. 81

With respect to the fixing of the fees by the division which makes the decision (and no longer the Registry), there was agreement that the examination by the Registry is correct, if the amount of representation costs must still be demonstrated. It is suggested that this proof be abolished or replaced by an assumption, as due to the severe restriction in the level, costs are in reality always to be reimbursed, the fixing by the Registry can be very complicated and the evidence is only prepared as a matter of form by many lawyers.

On. 25. – 26. Representation and power of attorney, Art. 88-89

Experience shows that in the majority of cases in which a representative appears as such towards the OHIM, he also has a power of attorney. The requirement of an authorisation should, therefore, remain restricted to doubtful cases.

On. 27. – 30. Conversion, Art. 108-110

The changes within the scope of conversion are welcomed, however, they do not yet go far enough, as they still fail to sufficiently clarify the relations to repeated examination of absolute and relative grounds for refusal in national proceedings. Here, there are different national approaches which are not cleared up by the proceedings rearrangement.

With respect to the amendment in Art. 108 Par. 4 and 6 CTMR, in addition a three-month transitional period is suggested in order to defuse the “time bomb” of dormant trade marks, for which the OHIM (systematically) in the past set no time limits for the submission of the conversion application, for which in other words, up to now there was no time limit for conversion.

On. 32. – 33. Opposition Division and Cancellation Division, Art. 126-128

No comments

Preliminary note to 34-35 – Boards of Appeal, Art. 130-131

The independence of the Boards of Appeal is its quality seal and should not be touched. It is of vital importance for the credibility of the Community trade mark system as a whole and for the confidence of the users in a legal and uniform practice.

The proposals reduce the independent controlling function of the Boards in essential areas with the consequence that an effective legal protection can only be carried out before the courts of the European Community in Luxembourg. It is not comprehensible why the restriction of the independence of the Boards of Appeal "is crucial for the credibility, particularly outside the EU, of the Community system)", or why this point is a "crucial point for the users" (see the Explanatory Memorandum for the proposal for the amendment of the structure of the Boards of Appeal).

It is regretted that the conversion of the Boards of Appeal into judicial panels (Art. 225a EC Treaty) as already considered in Nice, has not already been taken up in this amendment to the CTMR. The possibility of realizing this at a later point in time should, in view of increasing numbers of proceedings being brought before the CFI (currently about

ten new petitions with an increasing trend) be kept open and not be undermined by amendments to the structure of the Boards of Appeal.

With respect to organizational questions of the Boards of Appeal, it should be remembered that the legislation proceedings provided for by the EC Treaty be adhered to and that amendments should not be anticipated by resolutions of the Administrative Board:

a) although the CTMR in Art. 131 in connection with 120 CTMR assumes that the members of the Boards of Appeal for reasons of their qualification, professional experience and independence are senior officials, the Administrative Board of OHIM has decided on downgrading in the event of new appointments from A3 to A5 in the future. Thus, in terms of their rank, the members correspond to heads of group (A7-A5) within the OHIM, are thus two grades lower than directors of departments as well as three or four grades lower than the vice-presidents and the President who, according to the current legal situation, must be determined by the same procedure as the members of the Boards of Appeal. The position as a member of the Boards of Appeal should not be regarded as merely a step on the career ladder for the personnel of the Office but also be open and interesting for external applicants with appropriately high qualifications (see, for example, the practice at the German Federal Patent Court (BPatG) in which the positions of the legal judges are predominantly filled with experienced judges from the area of the regional judicial system, on the one hand, and specialist competence among the colleagues from the German Patent and Trade Mark Office (DPMA), on the other, which leads to a good mixture of judicial experience).

b) The President of the Boards has already been determined previously by the Council (see as well further below), but however only through the reform proposal will the legal basis provided and his task description created.

On. 34. Amendment to Art. 130 - Organization of the Boards of Appeal

The introduction of an Enlarged Board which can contribute to an increase in coherence of the decisions of the Boards, as well as the possibility of assigning certain simple cases to an individual member for decision, is to be welcomed.

There are doubts however, about the necessity for restructuring, taking into consideration that the control of all Boards of Appeal (also those of the Enlarged Board) is guaranteed by the CFI and the ECJ. There is further a risk of a delays and complications arising in the proceedings. In substantive fundamental questions there are practically no differences in the practice of the Boards, problems of a procedural type are essentially based on the extremely rudimentary legal basis which should rather be solved by way of amendment of the regulations and the development of the CFI and ECJ case law. On the other hand, the decision by individual members threatens to lead to an increase in national influences of the decision-making practice and to threaten the harmonization successes achieved through the supranational composition of the Boards during the initial years. Incidentally, as a result of appointments of new members and improvements in the working conditions, a balance has been achieved between incoming and decided cases in 2002. Thus, with 1,016 incoming cases, a total of 1,147 appeal proceedings were settled.

The binding effect of a decision of an Enlarged Board beyond the individual case is rejected, for example, in the sense of "guidelines to be followed by the Boards of Appeal for similar cases" ("Leitlinien, die die Kohärenz späterer Entscheidungen der Beschwerdekammern in analogen Fällen gewährleistet, Par. 3), as well as the responsibility of the individual member on cases which "raise only issues which have already been clarified by an established tenet of the Office" ("Fragen, die bereits durch eine herrschende Doktrin des Amtes geklärt wurden", Par. 4). Both are not compatible with the independence of the members of the Boards of Appeal (see above). If the decisions of the Enlarged Board are convincing, they will not fail to have their effect just like decisions of the Court of First Instance (CFI) and the European Court of Justice (ECJ).

The CTMR should already indicate on what occasion and according to which procedures cases can be passed on to the enlarged Board and how this is composed. Both questions are of particular importance due to their possible influence on the independence of the Boards and require a regulation in the CTMR itself and not, for example, only in the Implementing Regulation or the Rules of Procedure of the Boards of Appeal.

There is much to be said for the fact that the Enlarged Board of Appeal (Große Beschwerdekammer) of the European Patent Office (EPO) cannot serve as a model according to Art 112 EPC, since this, similar to the ECJ in cases of preliminary rulings, as the final instance mainly decides on questions of law while the legal actions against decisions taken by an Enlarged Board of the OHIM goes to the CFI and ECJ.

Even the variation of such a model to one Enlarged Board with a structure which is largely fixed and which, for example, should comprise of the President and the chairmen of the Boards of Appeal, extended, as the case may be, to include the respective Rapporteur, is regarded sceptically. While the Enlarged Board of Appeal of the EPO replaces the ECJ, so to speak, the position of the Enlarged Board of the OHIM would remain unclear in the appeal system between CFI/ECJ and the Boards of Appeal. Furthermore, the chairmen of the Boards of Appeal would receive decision-making powers and voting rights to which they are not entitled on the basis of the existing regulations. Internal Board hierarchies would be created which would be in conflict with the independence of the members. In addition, the involvement of the President of the Boards in decision-making is a problem as long as he has a 'political' post being subject to instructions of the hierarchy and as long as he does not enjoy the complete independence of a member (see comment on Art. 131 below).

A system, according to which, the enlarged Board should be competent each time, where two Boards have given different decisions on similar questions, is also declined as impractical.

It would therefore seem preferable to stick to a parallel treatment with the system of the chambers with extended composition of the CFI, which has proved itself and corresponds to the claim to independence and freedom from instructions. The Commission's proposal

already follows in large sections, the Rules of Procedure of the CFI (RP-CFI). The following regulations should be included in Art. 130:

In Art. 130 Par. 2, the following sentence is added:

"Specific cases shall be decided by a single member, in the enlarged Board with five members or by plenary sittings."

In the addition, the following paragraph 3 which is based particularly on Art. 14 § 1 RP-CFI is added. Enlarged Boards can be helpful particularly for the clarification of certain questions within over-manned Boards of Appeal.

"(3) Whenever the legal difficulty or the importance of the case or special circumstances so justify, a case may be referred to an enlarged Board of Appeal or to the Boards of Appeal sitting in plenary session. Such a referral may be made by the Board hearing the case at any stage in the proceedings either on its own initiative or at the request of one of the parties, to an enlarged Board or to the Boards sitting in plenary session. The Boards of Appeal sitting in plenary session decides whether or not to refer a case."

The following paragraph 4 which is based on articles 14 § 2 and 3 as well as articles 51 § 2 RP-CFI is added:

"(4) The following cases assigned to a Board composed of three members may be heard and determined by the Rapporteur sitting as a single member where, having regard to the lack of difficulty of the questions of law or fact raised, to the limited importance of those cases and to the absence of other special circumstances:

- a) Admissibility of the appeal*
- b) Decision on cost and fixing the amount of costs*
- c) Cases with an established case law of higher courts .*

The single member shall refer the case back to the Board if he finds that the conditions justifying its delegation are no longer satisfied."

For reasons of procedural economy, contrary to Art. 51 § 2 RP-CFI, the hearing of the parties involved should, however, be foregone.

The decision to delegate a case to a single member shall be taken without hearing the parties unanimously by the Board composed of three members before which the case is pending. This decision can only be appealed within the context of the final decision.

Doubts were raised in the past about the distribution of business for which a legal basis in the CTMR is urgently required. The following way of allocation of cases is proposed in accordance with Art. 10, 11 as well as 118 § 1 and § 2a RP-CFI as well as the principles of the Rules of Procedure of the Boards of Appeal (RP-BoA). It would appear that the anchorage of the responsibility of the Authority of the Boards and the assignment according to objective criteria which guarantee the independence of the decision-makers in stable Boards and the preservation of an objective controlling function is important (see also under Art. 131).

(5) The Authority of the Boards of Appeal sets up Boards composed of three, or enlarged Boards with five members and shall decide which members shall be attached to them. The Authority shall lay down criteria by which cases are to be allocated to the Boards. The composition of the Boards and the criteria for allocation of cases shall be published in the Official Journal of the Office. The allocation follows objective criteria.

(6) Where the Court of Justice in accordance with Article 63 sets aside a decision of a Board, the Authority of the Boards of Appeal may assign the case to another Board composed of the same number of members. If the Court of Justice sets aside a decision made by the Boards of Appeal sitting in plenary session, the case shall be assigned to the Boards as so constituted . If the Court of Justice sets aside a decision delivered by a single member, the Authority of the Board shall assign the case to a Board composed of three members which that member does not belong to.

On. 35. – Amendment of Art. 131

The necessity to amend this article is questioned in principle, since the system successfully and effectively provides objective control through independent Boards on a high legal standard, handling a high number of cases and also enjoying great respect among all parties involved in proceedings.

It must also be stated that certain ideas are not compatible with a system of independent Boards of Appeal. According to the Explanatory Memorandum for the Commission's proposal, for example, in the section referring to the Boards, item 2, it is initially to be understood that it is the responsibility of the President of the Office, "to guarantee that decisions made by the Boards are consistent". The execution of this task should be effected by the President of the Boards as head of the "Appeals Department". This is fundamentally contrary to a system of independent Boards of Appeal as a control instance not bound by instructions.

In particular, in the light of the Explanatory Memorandum for this reform proposal, it appears doubtful whether the President of the Boards when he decides as a Chairman of a Board of Appeal, enjoys the same independence as the other members of the decision-making body. Even if, depending on the function he exercises, he would be considered independent as a member of a Board of Appeal, but as the person responsible for administrative matters nevertheless subordinate to the President of the Office, it appears relatively meaningless to provide for two different removal from office proceedings for the same person depending on the field of activity. In addition, the current proposal is not coherent, since although the Board President is appointed by the Council, he can be relieved of his function by the Administrative Board. This regulation should be deleted without replacement.

The President of the Boards should - comparable with the German justice system - be exclusively responsible for administrative questions of the Boards - his power must not intrude on the independence of the members. The powers which are listed in Par. 1, are extremely problematic, especially the possibility of allocating cases and thus, ultimately influencing the result of the decision, without being bound to objective criteria, as is currently prescribed on the basis of the allocation of duties decided by the Authority of the

Boards of Appeal. In future, cases could be effected solely on the basis of (the Office's) political considerations by the President of the Boards under the instructions of the President of the Office (see Explanatory Memorandum point (2) at the end of the section on the "Boards of Appeal"), in order, for example, to allow a doctrine of the Office to be confirmed. Work of the Boards independent of the Office management and its doctrine would thus no longer be guaranteed.

The allocation of the cases and particularly the definition of the criteria must be effected by the Authority (see above on Art. 130 Par. 6). Par. 1 could therefore be formulated as follows:

(1) One of the chairmen of the Boards of Appeal will be appointed as the President of the Boards according to the procedure called for in Art. 120. The President of the Board is responsible for administrative matters. In addition, he is the Chairman of the Boards of Appeal sitting in plenary session.

The appointment of the members by the Administrative Board instead of the Council is generally regretted. The appointment of senior officials as members of the Boards of Appeal by the Council was regarded by the legislator as a guarantee of their independence. The corresponding proposal to amend the CTMR became possible only through the downgrading of members from A3 to A5 (see preliminary note to Art. 130/131 above). The amendment of Par. 2 to include the retirement regulation finally does not appear really necessary.

Paragraph 3 (removal from office) should be adapted to the wording of Art. 6 EC-Statutes, in order to avoid interpretation problems with respect to the unspecific legal concept of "serious grounds". No amendment, however, is made to the content. Par. 3 could therefore read as follows:

(3) During their term of office, the members of the Boards of Appeal can only then be deprived of their office, if they no longer fulfil the requisite conditions or meets the obligations arising from their office. The process must be initiated on request of the Administrative Board.

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Dr. Loschelder
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