



The Appeals Committee reloaded: how (not) to implement CA/D 18/16

“The composition of the Appeals Committee is fundamental, considering its quasi-judicial functions. Changing it changes the body itself.”
ILOAT Judgments Nos. 3694 and 3785

The story (so far)

As mentioned in a [previous report](#), the ILOAT adjudged the composition of the internal Appeals Committee (ApC) to be illegal for the years 2014 (partly), 2015 and 2016 in the corresponding cases. With decision [CA/D 18/16](#), the Office and the Administrative Council (AC) reacted by revising Article 36(2) of the Service Regulations in December 2016 to enable an interim workaround until major reforms are introduced in July 2017. We [strongly opposed](#) this emergency law.

At the end of January 2017, the President invited all individual elected Staff Representatives to consider volunteering to serve on the ApC, all in accordance with new Article 36(2)(a) ServRegs, last sentence, first alternative. However, only one staff representative, Mr Christophe Poizat (LSC Munich), responded positively.

On 13 February, the Administration proceeded to complete the composition of the ApC through the “*drawing lots from among eligible staff members*” in accordance with new Article 36(2)(a), last sentence, second alternative. In essence, the names of all remaining elected Staff Representatives were put into a pot for the draw. It should be noted that in advance of the draw many members of the various Staff Committees (CSC and LSCs) had sent a letters to the President explaining the reasons why they did not consider themselves eligible for the drawing of lots. Nevertheless, all names (with the exception of the volunteer) were put into the pot and three names were drawn, in this specific order:

- 1) Stephan C. Fritz (LSC Berlin)
- 2) Mathieu Guillaume (CSC Munich)
- 3) Thomas Franchitti (CSC Munich)

When asked during the drawing, the Administration was not in a position to indicate who would consequently be a full member and who would be an alternate member.

On 23 February, the President informed the Staff Committees (CSC, LSCs) of the appointment of the following members, who would “*represent the staff pursuant to Art.36(2)(a) ServRegs.*”

- Mr C. Poizat
- Mr S. Fritz
- Mr M. Guillaume
- Mr T. Franchitti

On the same day, the Chair of the ApC independently sent an email to the four individuals asking them to inform her at the latest by 28 February which two of them would be able to sit in the forthcoming ApC session. Apparently, no two members could be determined via this self-determination method.

Therefore, on 1 March, the Chair informed the four members that she had decided to proceed as follows: “*The Secretariat will ask the members representing the staff pursuant to Article 36 (2) a) ServRegs in the order of [the publication updated on 23 February 2017](#) whether they will be available or not to participate in the next session. Should one member decline, the next member will be asked by us.*”

The issues with the “applicable rules”

New Article 36(2)(a) ServRegs lists two alternative methods (i.e. call for volunteers or the drawing of lots) for appointment. In the AC meeting¹, some delegations warned against maintaining the call to volunteers as an alternative option. However, the President of the Office has always favoured this alternative, as shown by his stern refusal to delete it in the December AC meeting and his former initiative to amend Article 2(6) ServRegs to allow him to extend the terms of office of all members of statutory bodies (including the ApC composed with self-nominated volunteers) at the end of 2015. PD43, who organised the drawing of lots, also officially declared in GCC meetings that the ApC never functioned better than when manned with such volunteers in 2015 and 2016. It is unclear whether a composition resulting from the combination of both methods is in itself in accordance with the applicable rules. As a result, gathering one volunteer and one individual drawn by lots in one committee may be perceived as an unbalanced composition², not totally unbiased and free of presidential preferences.

According to Articles 111 and 112 ServRegs, the ApC is primarily composed of (full) members complemented by their alternates. The distinction between the two is made clearer in the Implementing Rules for Articles 106 to 113 (IR), which provide in Article 5(3) a rule for appointment to the ApC of two full members and two alternate members as staff representatives.

Article 5(6) IR defines a rule for the composition in particular cases or sessions. This rule has not been changed by the Administrative Council and should thus remain applicable. It provides that “...*alternate members shall take part in the proceedings of the Committee if ... full members are not able to act.*” This reasonably objective criterion aims at a consistency in the composition which cannot be changed arbitrarily or according to opaque deals or purely personal decisions. In truly judicial systems this would correspond to the concept of “*legal judge*” (“*gesetzlicher Richter*”³, “*juge naturel*”), which is a fundamental guarantee of due process.

¹ See the minutes of the AC meeting [CA/101/16](#), points 189 to 199

² See consideration 6 of judgment No. 3785: “*The balance sought to be achieved... is a fundamental guarantee of its impartiality.*”

³ See for instance [Art. 101\(1\) Grundgesetz](#) and [§21g\(4\) Gerichtsverfassungsgesetz](#)

To express it like the ILOAT in the above-mentioned judgments Nos. 3694 and 3785, we consider that the lack of distinction between full and alternate members does not comply “with the applicable rules”, *inter alia* with Article 5 IR. Therefore, this could render void any decision by the President of the Office relying on the ApC opinions given in the first half of 2017⁴.

The independence of the staff representatives

We also see other problems in the current solution. Although the composition as expected by the Chair of the ApC clearly seems illegal, the members may nonetheless feel obliged to abide by her request, all the more so in view of the past disciplinary measures inflicted on former members of the internal Appeals Committee when they declared that they were not able to act in a particular ApC session in 2014. The matter is further complicated by the fact that two of the members drawn by lots officially have previously declared that they were not in a position to properly represent staff on the ApC.

Appellants will unavoidably question whether any such member can be “his” judge (“*suus iudex*”), adding to the legal imbroglio.

It should also be clear that such members won’t be in a position to give independent and impartial opinions, which would require the absence of inappropriate outside pressure and threats⁵. Needless to say, we will try to protect them and avoid any harm to their health or their career in the Office.

We further regret that the Chair of the ApC, after having consistently condoned in 2014 (partly), 2015 and 2016 an ApC composition declared illegal by the ILOAT, now launches a third experiment in 2017 which in our view is equally doomed. This may only reinforce the feeling of Staff that justice is not intended to be done in the Office.

We will continue, despite the limits set to us by the Administration, to pay heed to any “conflict of interest” issues that might harm staff members, add unnecessary and undue workload and further harm the sense of justice in our Office.

Sincerely,

The Central Staff Committee

⁴ The regulation is temporary and should expire on 30 June 2017.

⁵ Inappropriate pressure from the President prevented the Enlarged Board of Appeal from serenely adjudicating a high-profile disciplinary case (see [decision Art.23 1/16](#)), although it was composed by Judges not under the President’s disciplinary authority.