

**CA/98/15**

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SUBJECT: Orientations for the structural reform of the EPO Boards of Appeal

SUBMITTED BY: President of the European Patent Office

ADDRESSEES: Administrative Council (for opinion)

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#### SUMMARY

The Administrative Council is asked to provide its opinion on the orientations on the structural reform of the EPO Boards of Appeal. These orientations concern the envisaged changes to the institutional framework, the implementation of the new career system and the introduction of conflict of interest rules for members of the Boards of Appeal and the Enlarged Board of Appeal, as well as the location of the Boards of Appeal.

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## **I. STRATEGIC/OPERATIONAL**

1. Strategic.

## **II. RECOMMENDATION**

2. The Administrative Council (AC) is requested to provide its opinion on the orientations for the structural reform of the EPO's Boards of Appeal (BOA).

## **III. CONTEXT**

3. At its 143rd meeting in March 2015 the President of the EPO proposed a structural reform of the EPO Boards of Appeal to increase the organisational and managerial autonomy of the BOA, the perception of their independence and their efficiency. The AC gave its general support to the reform proposal, which involves changes concerning the institutional framework, the area of human resources as well as the premises of the BOA, as outlined in document CA/16/15.
4. As one of the first follow-up measures the Office launched an online user consultation inviting users to express their views on the different reform elements. The consultation received considerable attention and triggered a representative number of comments. In general, the reform of the BOA was welcomed by the users and CA/16/15 was seen as a sound proposal and good basis for further work. The result of the user consultation was presented to the AC at its 145<sup>th</sup> meeting in October 2015 within CA/82/15 and subsequently published on the official EPO website. In parallel to the user consultation the Office held a series of consultation meetings with representatives of the BOA dedicated to the different elements of the reform.
5. These different elements constitute a package of measures which will strongly contribute, by their combination, to the reinforcement of the Boards of Appeal, their status and efficiency. In order to continue with the implementation of the proposed reform elements, the AC is requested to provide its opinion on the orientations outlined below.

#### **IV. ORIENTATIONS**

##### **A. INSTITUTIONAL FRAMEWORK**

6. Document CA/16/15 identifies three main elements of the institutional reform:
  - a) the re-organisation of the BOA as a separate unit headed by the President of the BOA, a newly- to be created function;
  - b) the attribution of powers and functions under Article 10(2)(a) and (f) EPC as well as Article 11(3) and (5) EPC to the President of the BOA;
  - c) the creation of a subsidiary body of the AC with responsibilities in relation to matters concerning the BOA.
7. In addition, changes are also foreseen with regard to the composition of the Enlarged Board of Appeal (EBA) in petition for review proceedings under Article 112a EPC: it is recommended to introduce the participation of external legal members under Article 11(5) EPC in petition for review proceedings, which was supported in the consultations, via an amendment of Rule 109 of the Implementing Regulations.
  - a) **A separate unit headed by the President of the BOA**
8. It is proposed to make the BOA's organisational and managerial autonomy from the administrative part of the Office more visible. The appropriate regulatory means to achieve this within the current legal framework of the EPC would be to remove the BOA and the EBA from Rule 9 of the Implementing Regulations (dealing with the administrative organisation of the Office in Directorate-Generals headed by Vice-Presidents) and to regulate their organisation as a separate unit in a new Rule in Chapter II Section 2 of the Implementing Regulations (dealing with the organisation of the BOA and the EBA).
9. This new Rule should also stipulate that the BOA/EBA are directed by the Chairman of the EBA as President of the BOA. Via the appointment of the Chairman of the EBA the AC retains the power to appoint the administrative head of the BOA.

**b) The transfer of powers and functions to the President of the BOA**

10. The further proposal is to place the *de facto* exercise of managerial powers and functions in relation to the BOA by their administrative head (currently Vice-President DG3, in the future the President of the BOA) on a stronger *de jure* basis. The legal instrument or construct to be chosen (delegation, waiver, statement or “concordat”, etc.) must achieve the desired effect with regard to the attribution of responsibility, while respecting the framework set by the EPC. This applies in particular to the issue of appointment and re-appointment of BOA members under Article 11(3) and (5) EPC.
11. For this reason the Office, before making a concrete legal proposal, has asked for independent legal advice from an external expert. Other issues with regard to the appointment and re-appointment procedure for BOA members and chairmen may be addressed at a different regulatory level (see *infra* part B. Human Resources) but are not considered to require changes to the institutional framework.

**c) The Boards of Appeals Committee**

12. The BOA Committee (BOAC) will play an important role in supporting the AC to fulfil its responsibilities in accordance with the EPC.
13. As a subsidiary body of the AC, the BOAC will on the one hand advise the AC on any matters relating to the BOA and on the other hand, within the framework of the powers and the ultimate responsibility of the AC in accordance with Articles 4(3) and 23 EPC, assist the AC in supervising the activities of the BOA *on a general level and as an organisational unit*. It will also advise the President of the BOA on matters relating to the management and organisation of the BOA *in general*.
14. The advisory and supervisory functions of the BOAC will be clearly limited to a general level and not concern individual cases or the day to day functioning of the BOA. The current Presidium of the BOA (Rule 12(1) of the Implementing Regulations) will remain in place and continue to be in charge of internal issues such as the allocation of duties to the BOA (Rule 12(4) of the Implementing Regulations).

15. Concerning the adoption of the Rules of Procedure, there is a need to ensure a clear separation of roles and responsibilities as is the practice in most Member States: the Rules of Procedure are normally proposed by the government, voted by the parliament and implemented by the judiciary. A similar logic should apply to the Rules of Procedure of the BOA/EBA, to be adapted, however, to the fact that they concern the procedure of a quasi-judicial body of an international organisation. From the user consultation it also results that there is a need for changes in the Rules of Procedure which ensure better predictability and consistency of proceedings and which increase efficiency and reduce the pendency of appeals. This is vital for the long-term sustainability of the EPO appeals system and a major challenge.
16. Under Article 23(4) EPC the Rules of Procedure shall be adopted in accordance with the Implementing Regulations and shall be subject to the approval of the AC. This allows to amend the Implementing Regulations and to foresee a different procedure for the adoption of the Rules of Procedure than is currently the case.
17. It is envisaged that in the future the Rules of Procedure of the BOA and the EBA shall be proposed by the Office and adopted by the BOAC before their submission to the AC for approval. Rule 12(3) of the Implementing Regulations would be amended accordingly.
18. The BOAC is to be set up through a decision by the AC in accordance with Article 14 of its Rules of Procedure. The decision could be taken in agreement with the President of the EPO or as a joint decision. Reference to the BOAC as a Committee established by the AC could be made in the Implementing Regulations in order to reinforce the legal basis for creation of the BOAC. The decision of the AC needs to regulate all details relating to the BOAC, in particular membership (see *infra*), duration of and conditions for appointment, responsibilities and, if applicable, the possibility to meet in “judges-only composition”.

19. Taking into account the specific duties of the BOAC, the suggested composition is as follows:
- (i) 5 members appointed by the AC from among its own members with one of them acting as chairman of the BOAC;
  - (ii) 5 members proposed by delegations and appointed by the AC from among serving or former judges of international, European or national courts of the Contracting States; one of these members to act as deputy chairman of the BOAC;
  - (iii) the President of the BOA, with no voting right;
  - (iv) the President of the Office, or his/her representative, with no voting right;
  - (v) 2 user representatives chosen from epi and BusinessEurope, in an observer capacity.

## **B. HUMAN RESOURCES**

20. The management of the career path for members of judicial or quasi-judicial bodies is a well-known sensitive issue. On the one hand, it must ensure that it affects in no way the independence of the decision-making process. On the other hand, it must guarantee a fair and efficient system.
21. It is fully acknowledged that the members of the BOA are in a special situation due to the independence enshrined in Article 23 EPC. However respecting the principle of independence shall not be seen as an obstacle to the improvement of the efficiency of the Boards, as it is advocated by the users of the system.
22. Nowadays many Member States have implemented a policy aiming at ensuring an efficient judicial system with specific performance and quality indicators for their judiciary. At European level also, precise yearly targets are defined for each board of the OHIM's BOA. For the EPO, when the system was set up in 1978 (CA/27/78), it was calculated that a technical board member should deal with 40 cases on average per year and that a chairman could process 100 cases per year, provided that he does not act as a rapporteur.

23. The proposed reform of the EPO BOA, in particular the career path of the members, should follow the general European trend which requires a better management of the judicial systems, fully respecting the principles of independence and separation of powers.
24. The Office has already shifted from a mainly seniority-based system to a performance-related career system, following the decision taken in December 2014 by the AC (CA/D 10/14). Chairmen and members of the BOA were transposed as of 1 July 2015 in the new salary grid (job group 2 for BOA chairmen and job group 3 for BOA members, technical path). These job groups defined in the new salary grid guarantee a higher grade and step upon entry for the members of the BOA than in the previous career system and the same end grade and step.
25. Moreover, before a specific management system could be put in place following the implementation of the structural reform of the BOA, some transitional measures were adopted by the AC in June 2015 (CA/49/15). To take into consideration the specificity of the BOA, it was also decided that bonuses and probations are not applicable to BOA members and chairmen.
26. For the implementation of the career system, the following general principles are thus proposed:
  - the President of the BOA will submit each year to the AC his proposal for the general objectives concerning the BOA, after consultation of the BOAC;
  - the President of the BOA, who will have the full managerial responsibilities, will evaluate the performance of the members and chairmen of the BOA. On the basis of such an evaluation, the step advancement and promotions of the members and chairmen of the BOA will be awarded by the President of the BOA, following the general principles of Article 47 of the ServRegs to the extent applicable to the members and chairmen and in accordance with the budgetary constraints.
27. The AC, after consultation of the BOAC and in close cooperation with the President of the BOA, may lay down further terms and conditions for the evaluation system and the award of step advancement and promotions to the members and chairmen of BOA.



28. It could be also considered that the members and chairmen of the BOA will not be subject to a yearly evaluation and that, in case of reappointment, a report will be drafted by the President of the BOA to support the proposals submitted to the AC. In the past, some AC delegations already requested to receive more information, in particular regarding the performance, when the proposals for reappointments were submitted (e.g. CA/89/08, points 234 to 236). The step advancement and the promotion would be then considered at the time of the reappointment.

### **C. CONFLICT OF INTEREST**

29. The reflections on the independence of the BOA were the trigger for considering introducing post-service restrictions, including cooling-off periods, as a recognised means to avoid conflict of interests (points 41-44 of CA/16/15).
30. By temporarily restricting certain activities after termination of service, cooling-off periods put into concrete terms the civil servants' ethical duty to minimize the possibility of real, apparent or potential conflict of interest between their responsibilities within public service and subsequent employment.
31. Such periods help avoiding that because of a new employment, doubts may emerge in the public eye as to the ethical behaviour of a civil servant while still in service, as to the possible misuse of information gained in service, or as to whether a former civil servant interacting with former subordinates or colleagues might impact the objectivity of the service rendered by an Administration. Cooling-off periods allow for a period of adjustment between the former civil servant, his Administration and his colleagues. They also provide clarity in helping civil servants recognise situations in which concerns for real or apparent conflict of interest may arise.
32. At the European Patent Organisation, the need to avoid real or apparent conflict of interest situations, including in post-service employment, is particularly noticeable for BOA members in view of the BOA's special status and role within the European Patent Organisation and considering their comparatively higher flow of personnel between public and private sector. It has furthermore become apparent that the extension of post-service restrictions to all staff, in adjusted forms, would generally help fostering trust in the civil servants' integrity and in the Organisation's independence in the world of patents.

33. With the purpose of devising post-service restrictions' regulations at the European Patent Organisation, comparisons were made with systems in place in different OECD and EU countries, for the private sector and the public service, including the judiciary, and international courts. Account was also taken of the need to find a balanced and proportionate approach that allays legitimate public concerns without creating impediments to bringing knowledgeable and experienced people into the service of the European Patent Organisation and whilst ensuring that individuals' freedom of work be respected. As a result, some key elements were identified which need to be addressed for introducing a post-service restrictions scheme:

**a) Scope of application**

34. It is proposed to introduce the principle of post-service restrictions for all staff, but to adapt it in form and extent, depending essentially on the position the staff member had within the Organisation and his seniority.

**b) Form**

35. A distinction would be drawn between staff members appointed by the Council, i.e. President of the Office, Vice-Presidents and members of BOA, and those appointed by the President, especially because of the greater visibility and prominence of the former.

36. Members of the first group would be a priori and generally subject to a cooling-off period, i.e. they would be automatically prohibited from engaging in certain activities that might constitute a conflict of interest during a certain period after leaving office. As is known in some national systems compared with, a total or partial waiver could be granted on a case-by-case basis. A general exception would be foreseen for staff members returning to the public employment they had before joining the Office (e.g. judges).

37. Conversely, members of the second group would be generally obliged to declare any offer to take up employment for a limited time and exceptionally subject to such cooling-off period on a case-by-case basis.

**c) Extent**

**(i) Prohibited activities**

38. The scope of prohibited activities should be so defined as to ensure that knowledge gained while in service may not be used to the advantage of private interests, considering notably the risk of impairing equality among users of the public service rendered by the Office.
39. The activities covered by the cooling-off period would be thus primarily those closely related to the Organisation's core mandate, e.g. patent granting activities or lobbying in the field of European and Unitary Patent. With regard to the specific case of BOA members, comparisons have for example shown that at the ECHR and at the ICJ, former judges are temporarily prevented from representing parties before their respective courts. When deciding on the exceptional application of a cooling-off period for President's appointees, the prohibition should take into account the functions performed while in service, such as area of work, level and nature of responsibilities, access to significant or sensitive information, visibility, influence and interaction with the public. Another aspect is whether the former staff member intends to work in the private sector or in the public service.

**(ii) Duration**

40. It is envisaged to limit the cooling-off period to one-year for civil servants having served 5 years or less and to two years above. For comparison, cooling-off periods are applied in some EU countries with a length varying between 6 months and 5 years.

**(iii) Geographical scope**

41. Another aspect to consider is whether or not the identification of a geographical scope for the post-service restrictions appears appropriate in view of the European Patent Organisation's mandate.

**d) Financial compensation**

42. The application of a cooling-off period would be in principle linked to payment of a financial compensation. Such compensation would take the form of a monthly lump-sum amounting to up to 70% of an official's last basic salary, taking into account any other income from a gainful employment or other means of subsistence already paid by the Office, e.g. pension benefits. Responsibility for taxation, pension and social security coverage would entirely lie with the former staff member. For comparison, the situation in EU countries ranges from no award of compensation to a compensation amounting to 100% of the salary.

**e) Compliance mechanisms**

43. Compliance mechanisms start with ensuring that leaving staff members are aware of post-service restrictions that apply to them. Monitoring procedures would be necessary to check on the respect of post-service restrictions, albeit the corresponding administrative burden should remain limited considering the few cases of in which a cooling-off period is expected to be applied for President's appointees. In case of non-compliance, while enforcement actions are not always easily practicable, certain actions are conceivable, such as stopping payment of the financial compensation and requiring reimbursement of payments already made. Resorting to arbitration could also be an option to consider.

**f) Choice of appropriate regulatory basis**

44. Several provisions in the EPC and the ServRegs deal presently with issues related to the integrity expected of staff members while in service (Art. 1(4), 14(2), 15-18 ServRegs). These provisions are seconded by Circular no. 135, Communiqué No. 22, the Code of conduct for the EPO and the Code of Conduct concerning outside activities for the BOA (CA/105/95). Some provisions also deal with obligations lasting after termination of service (Art. 12 EPC, Art. 19 and 20(3) ServRegs). However Art. 12 EPC and 20(3) ServRegs foresee only the specific obligation not to disclose professional information after termination of service. Art. 19 ServRegs concerning obligations after termination of service is not so restrictive but mainly calls on the ethical conscience of the former staff members when accepting certain post-service appointments and it is considered to be too vague in its current wording for achieving the purpose here considered.

45. It is thus envisaged to build primarily upon existing Article 19 ServRegs, and to complement it by implementing provisions with further explanatory purpose.
46. For the specific purpose of introducing post-service restrictions, it is not envisaged to rely on codes of conduct, which often have a less deterrent effect than regulations, especially in cases like the present where what is at stake is less generally fostering right-doing than concretely preventing wrongdoings.

#### **D. PREMISES**

47. Following the objective of improving the perception of independence of the Boards of Appeal, they should be separated from the other services of the EPO, and benefit from a specific building with the necessary accommodation. This element will undoubtedly reinforce among the parties to BOA proceedings the feeling that they are appearing before an independent body as opposed to EPO examining and opposition divisions. This follows the recommendations in the Final report of the Working Party on Directorate-General 3 of the European Patent Office, CA/84/97 (see points 69 and 70).
48. The location of the Boards of Appeal is not defined by any Article of the EPC. The relocation of the BOA in another European city where the EPO currently has no presence, if decided by the Administrative Council, could presuppose a lengthy process of negotiations, with the finalisation of a seat agreement, which could delay the quick implementation of the proposed structural reform.
49. In this regard, a more suitable option would be to use the existing EPO sites for which seat agreements are already in place. In CA/16/15 (see point 51), two options were to be explored: a) the existing building in Berlin, currently under renovation; b) a new building in Munich. The perception of independence could be further improved by re-allocating the BOA to a place of employment where there is vicinity neither to technical nor to legal departments of the Office. This is also why a third option, Vienna, was finally considered (c).
50. The current specific use of space by DG3 (nearly 220 employees) is around 10.000m<sup>2</sup> in the Isar building. In the analysis of the three remaining options, different aspects must be taken into consideration (financial, technical, organisational and social).

**a) Option 1: Existing Building in Berlin**

51. The setting-up of the Berlin sub-office of the European Patent Office is defined by the Agreement between the European Patent Organisation and the Federal Republic of Germany of 19 October 1977. The existing building in Berlin where the 270 EPO employees are located belongs to the Institute for Federal Real Estate (BlmA), a government agency in Germany that provides federal government entities with real estate services.
52. In June 2014, the Administrative Council approved a new additional agreement between the Organisation and the Federal Republic of Germany (CA/19/14), confirming that a total investment of around EUR 49 million is foreseen for the renovation and the modernisation of this building. Of this amount, the Office would pay up to EUR 6 million. All works were planned to be finished mid-2018. For the renovated premises, the EPO will pay an annual rent of EUR 2.1 million for approximately 20.000 m2 total space, including all facilities.
53. This building would provide enough space for the relocation of the Boards of Appeal. The current renovation of the building could represent a good opportunity to integrate the technical requirements necessary for the future installation and functioning of the BOA. In parallel the EPO employees in Berlin are almost solely patent examiners, with the necessary support services. The nature of the activities performed by the Berlin sub-office, which operates under the direction of the branch at The Hague, is defined by the Administrative Council (Section I, Article 3(b) of the Protocol on Centralisation).
54. If so decided, the parallel move of DG3 to Berlin and the one of DG1 Berlin cluster to Munich and The Hague could have solved a long-standing managerial issue. However from the contacts with the German authorities which are conducting the renovation work, it appears that there is no support for this option.
55. The Office has then examined the second option.

**b) Option 2: New building in Munich**

56. The relocation of DG3 in another building in Munich is the most conservative one and could present some advantages, particularly from a social perspective in the short term.

57. However, from the contacts with the local authorities in Bavaria, their support was limited to the identification of a list of potential buildings to be bought or rented in Munich or close to the city. As no financial support is envisaged by the local authorities, it means that the Office will have to devote additional resources for the rent of the new building (around EUR 22 to 30/m<sup>2</sup> depending on the offers available on the market), while no staff will occupy the free space in the Isar building after the departure of DG3, contrary to the Berlin and Vienna options. This option appears the most expensive one in the long run and does not help to solve any managerial issue.
58. Moreover, for the Boards of Appeal to stay in the same city where a large part of the EPO patent examiners and all its lawyers dealing with patent law issues are located, is not the best signal to reinforce the appearance of independence of the BOA, especially as another interesting option deserves to be considered.

**c) Option 3: A new building in Vienna**

59. Since 1st January 1991, the former INPADOC centre has been integrated in the EPO following an agreement between the Organisation and the Republic of Austria. The Seat Agreement does not mention the nature of the activities to be performed by the EPO in Vienna. In 1997 the Office bought a new building in the city where all activities in relation with patent information are located. This building has a gross floor area of 12.285 m<sup>2</sup> and could in principle accommodate all DG3 staff. However it would necessitate some fundamental changes and a major renovation programme which do not appear suitable.
60. Other options would be either to buy or to rent a new building in Vienna and to sell in the meantime the building belonging to the EPO. Considering its location in the centre of Vienna, its proximity with the Belvedere Garden and its recent renovation by the Office including an access via the Botanic Garden, its sale could represent a very positive real estate operation.

The Office has already made some enquiries on the real estate market in Vienna, with a first preference for the rent option. There is office space to be rented in sufficient sizes and adequate standards so that a meaningful choice can be expected, also at a very attractive price (around EURO 13 to 17/m<sup>2</sup>). The main part of the costs will come from the removal of employees from Vienna to Munich and vice versa but they are one-time costs, which are not impacting the general positive balance of this operation.

61. Moreover, the Vienna option would present a number of important advantages:

- **Managerial issues:** Patent Information is an integral part of DG5 and its services to the general public. The challenges of the on-going developments of the patent system clearly lie in DG5-areas like Patent Law and Multilateral Affairs (PD 5.2) and in European and International Cooperation (PD 5.1) with whom closest daily work relations are essential for Patent Information. Bringing both parts of the Principal Directorate 5.4 (Patent information in Vienna, Academy in Munich) together in one place will no doubt help increase the efficiency of workflows and the realisation of synergies between both units. Managerial difficulties that arise from the geographical split will end, resources can be used more economically and a closer involvement of Patent Information in diverse activities and decision making processes will be easier with this unit being present in the Isar building.
- **Maintaining Vienna as an important site for the Office and the Organisation:** the recent and forthcoming evolutions in the data management show a rapid increase in the automation of different processes, which will rely on much less human capacity in the near future. This general trend will impact all patent information activities. It means that in the mid-term, a sharp decrease of the EPO staff presence will affect the Vienna site, potentially putting at risk its sustainability. Through the relocation of DG3 in Vienna, the Organisation would undoubtedly reinforce its presence and visibility in Austria. Vienna is an important European city with direct flight connections with numerous European capitals, making it easily accessible for the users all over Europe. Its central geographical location in Europe will also represent an important signal for an Organisation which has mainly developed itself by integrating Eastern European Member States these last fifteen years.
- **Reinforcing the autonomy of the BOA:** the combination of a specific building for DG3 in the Austrian capital, where no other EPO services will be maintained, with the creation of a new important function, the President of the Boards of Appeal, will certainly reinforce the confidence of the users in the total independence of the Boards. It will also raise the status of the BOA as an important pillar of the European Patent system, instead of currently being integrated as an administrative unit among many other services in Munich (DG3 represents less than 8% of EPO staff in Munich).



- Developing synergies: the Austrian capital is quite close to Budapest where the training centre of the Unified Patent Court is located, which could facilitate potential synergies. It could be envisaged for example to develop common training activities which would even increase the positive effects on the system in general.

62. The main issues are related to the social aspects of this project. While civil servants of international organisations are supposed to be quite flexible in relation to their place of work, every effort must be undertaken to minimize the potential negative impact on individuals and their families. A comprehensive programme of measures would have to be developed with the support of HR services and in close consultation with the staff.
63. For example, it could be envisaged to maintain as far as possible the administrative staff in each site: EPO employees in DG3 and Patent Information who are mainly engaged in the administrative support to these activities could be proposed to stay in their sites, subject to a re-skilling programme. A case by case approach depending on the situation of individuals or groups of employees (e.g. employees close to retirement) would be implemented, with the support of HR.
64. However this reform could also be seen as an opportunity to improve the diversity within the BOA members by the integration of more external members.
65. All measures ensuring the business continuity would also have to be prepared, so that the users of the system will not be negatively impacted. The removal would take place only when all facilities are ready.

## **E. CONCLUSIONS**

66. Above proposed solutions allow a structural reform of the BOA within the legal framework of the EPC. These measures contribute to the increase of perceived independence and efficiency of the BOA as set as the goal of the reform. The necessary legal and practical changes could be prepared and decided during the first half of 2016.

**V. FINANCIAL IMPLICATIONS**

67. N/A

**VI. LEGAL BASIS**

68. Article 10(1) EPC

**VII. DOCUMENTS CITED**

69. CA/16/15; CA/82/15 ; CA/D 10/14; CA/D 4/15; CA/105/95, CA/84/97; CA/19/14;  
CA/27/78; CA/89/08; CA/49/15

**VIII. RECOMMENDATION FOR PUBLICATION**

70. Yes.