

07.01.2014
Sc14001cpe – 0.2.1/6.2.1

Report of the 255th meeting of the GAC on 17.12.13 in The Hague

Summary

The 255th meeting of the GAC (General Advisory Committee) was the ninth and final GAC meeting of 2013. This is exactly the same number as last year, and is a relatively high number. The highest number of meetings was in 2007, when there were twelve. According to the Rules of Procedure, generally the GAC should meet every other month. That is to say, generally there should be (around) six meetings a year. The agenda of the 255th meeting comprised a proposal to amend Circular 262 (the Guidelines on personal files), a document setting out a replacement for CL-OQC and a document showing the kilometric allowances for 2014.

Circular 262

Article 32 ServRegs and Circular 262 regulate the contents and treatment (e.g. access rights) of staff members' personal files. These days, the personal file is stored electronically. Staff members may access their own personal file from "any work station located within the EPO". Other staff who may require access to someone else's personal file (e.g. promotion board members, managers or HR) must use work stations "located within the Personal Department area". For this, workstation kiosks are provided - two in Munich, one at each other site.

The HR department feel that maintaining a schedule for use of the kiosks is a problem during reporting periods, where line managers (may) need to consult previous staff reports in order to draft the staff report for the current period. Accordingly, they presented a proposal to the GAC to create new access rights. The GAC was informed that currently the access is restricted to reporting and counter signing officers who have to write a report, for a particular data or time span, for a particular work station and for particular content (presumably the staff reports).

For data protection and privacy reasons, access to a staff member's personal file should be as restrictive as possible whilst nevertheless allowing proper functioning of the service. However, as the document submitted to the GAC itself admits, the phrasing chosen for the amendment is broader than necessary for the stated purpose. As the document itself puts it, the document is "general in its terms and does not only focus on the newly created access". Indeed, currently the additional text is to allow access "to other work stations as authorized for a limited period of time by the Personnel Department".

Whilst it is true that any other accesses granted would have to be registered with the Data Protection Officer and would have to meet the other requirements of the Service Regulations and Circular 262, we were concerned that the administration would nevertheless be able to grant these additional accesses with limited or no oversight for example by the GAC or other body under the Service Regulations.

In our opinion, the seemingly minor modification to Circular 262 opens the door to provide certain staff members with far greater access to personal data, without the GAC

knowing what for, what parts of the personal file will be given access to, and without any further oversight.

Moreover, we pointed out that, unlike in the previous sentence in the Circular, the additional text is silent on where the authorised work station may be. This leaves open that the work station may not necessarily be "located within the EPO". It seems to us that it is (correctly) not possible for a staff member to access his personal file via VPN. Since the rest of MyFIPS can be used via VPN, this is probably just a setting, which can be changed without staff knowing.

For the above reasons, we gave a negative opinion on the proposal. We also made a number of recommendations.

Firstly, we recommended that the proposed text be replaced with text specifying precisely what access it is currently desired to give. That is to say, reporting officers (only) should be given access to the staff reports (only, not the whole personal file) of those staff members whom they report upon for a precisely defined and limited period of time.

Secondly, we also suggested that it be made clear that reporting officers (or indeed any staff, including HR officers) may only access personal files from within the EPO.

Finally, whilst not directly related to the current document, we noted that completed electronic staff reports are stored in both pdf format within the personal file (and thus not accessible from outside the EPO) and separately in HTML format. In this format, the staff report is accessible from outside the Office using VPN. We said that this is not correct. There should only be one copy of staff reports, which should be kept in the personal file. Thus after completion, when the pdf version is placed in the personal file, the HTML version should be deleted.

The members nominated by the President gave a positive opinion on the proposal.

Replacement of CL-OQC

Since 2007, CL-OQC (Cluster Level Operational Quality Control) has been used for collecting statistical data on quality

performance in DG1. ISO 9001 has been adopted by the Office as the quality management standard for the patent granting process. That is to say, the Office aims to get the patent grant process certified as being ISO 9001 compliant. However, the Office has decided that the current CL-OQC process is not fully ISO 9001 compliant. The reasons for this are mainly that for different kinds of review, no systematic records are kept.

Instead of for example modifying CL-OQC to make it ISO 9001 compliant, the Office presented a proposal to replace it with a new so called NCP Procedure. This will involve checks performed by both the Examining Division and the Director.

Concretely, all applications proposed for grant and searches with a positive written opinion will be checked by both the Chairperson and the Director. Additionally, all searches will be checked by the Director. Finally, an additional random sample of searches will be checked by the future Chairperson of the (at that stage non-existent) Examining Division.

All non conformities will be recorded using electronic report forms.

The document foresees a time budget for a search check of 90 minutes per file and for a grant check 15 minutes per file. If the average directorate produces 1800 searches and 1200 grants a year, this would correspond to the Director having to spend 375 working days a year on this task alone. In the meeting, we pointed this out to VP1, who refused to see that there was a problem! Moreover, we pointed out that the procedure would also cost more examiner time than CL-OQC and asked if VP1 had informed the Council of this and reduced the Office's production targets appropriately. This would seem not to be the case.

There are nevertheless some good points with the procedure. For example, we stated that we support the efforts that the Office is currently doing to formalise its Quality Management System. We considered that certification is a positive element in this process which will encourage the Office to maintain and improve its quality system. We also agreed that as a mandatory step in the formalisation of the Quality Management System of the work done

in DG1, it is necessary to check search reports and proposals for grant for compliance with the requirements of the EPC. It is also necessary to keep a written record of non-compliances found and of the corrective action that was taken.

However, these tasks have been fulfilled by the CL-OCQ system since 2007. Since the introduction of this system we have criticised that the so-called Quality Nominee checked the work done by the 1st examiner of an Examining Division, and not the work of the Division as a whole. We also never considered it a good idea that the work of the Quality Nominee was superimposed to the work of the Division. The Quality Nominee has no authority under the EPC to intervene in the work of the Division. For these reasons, we stated that we have no principle problems with either the modification of CL-OQC or the replacement of CL-OCQ with a different system.

However, these conceptual mistakes of CL-OCQ remain in the new system.

Firstly, the system empowers a person external to the Search Division, the prospective Chairman of a future Examining Division that will only be legally constituted if and when the request for examination is formalised pursuant to Article 94(1) and Rule 70 EPC, to check the work done by the Search Division and present comments on its quality.

Secondly, any alleged deficiency found in a check to be carried out by the Chairman of the Examining Division on proposals for grant prepared by the first examiner will have to be recorded even if the subsequent work within the Division leads to a final communication pursuant to Rule 71(3) EPC on which all members of the Division agree. Thus, the work of the 1st examiner is checked, not the work of the Division.

In addition to these principle objections, we also raised a number of others. These included:

- The proposed system obliges a large majority of examiners (all those who act as Chairmen of Examining Divisions, roughly 75% of the total) to express a judgement on the quality of the work done by their colleagues. According to the document, this judgement will be used by the Directors in reporting;

- The system even obliges examiners to report on their own quality, since the Chairman will have to record his preliminary findings and any corrections or changes of mind that followed an exchange of views with the 1st examiner, i.e. the Chairman has to inform the Director of any error of judgement he himself committed;
- Directors are asked to perform a check of the technical content of each search and proposal for grant prepared in his directorate. Leaving aside the fact that not all Directors are technically qualified in the fields treated in their directorates, as explained above, this constitutes an absurdly large amount of work with which nobody can cope;
- The division does the work and the quality check. We were informed that this double role is not excluded by ISO 9001. However, it is not necessarily the best option to place quality checks in the hands of those who do the work. In contrast to this, CL-OQC is independent from the Divisions.

For all the above reasons, we gave a negative opinion on the proposal.

We also suggested a number of alternatives that could have been considered. These included:

- to introduce Search Divisions of more than one examiner, and empowering the Search Division to check the quality of the searches and written opinions;
- to use the systems currently in place and described in the Internal Instructions, whereby only discrepancies amongst the members of the Examination Division and the action taken following such disagreement are recorded;
- to re-design the CL-OCQ system as a check on the final result of the work of the Divisions on a statistical basis providing systematic information on an anonymous form;
- all these measures together.

In our opinion, we also regretted that the only opportunity given by the administration to the Staff Committee to be involved in the design of the proposed procedure and to present comments was in the GAC. Such proposals

should first be discussed by the Vice-Presidents DG1 and DG2 with the CSC, with the aim of designing a quality control system both fit for purpose and acceptable for examiners. Only then should such proposals be sent to the GAC.

Moreover, we were amazed to learn in the meeting of the GAC that no proper evaluation of results achieved under CL-OCQ, or of the pros and cons of the system has been carried out. At least, not in a manner which has resulted in a written report. We were also informed that the new system has already been tested in a number of directorates in DG1. However, again there is no evaluation report available of this test.

That is to say, the administration is proposing to replace CL-OQC without an analysis of its strengths and weaknesses, by a system which has been piloted but the results of the pilot have not been analysed. Particularly in the context of ISO 9001 certification, which is a system that requires exhaustive documentation of all processes, we stated that we found this amazing. We also noted that the document submitted to the GAC did not contain as a problem statement anything other than the (arguably wrong) blank statement that CL-OCQ "is not ISO conform as no record is kept of action taken nor verification of the success of the action". Moreover, the document does not present any possible alternative to the proposal. It includes a section entitled "Benefits of the new NCP procedure" but is completely silent as to the associated risks.

The members nominated by the President gave a positive opinion on the proposal.

Kilometric allowances

In accordance with Article 1 of our salary method, for the kilometric allowance the EPO merely uses the figures recommended by the Coordinating Committee on Remunerations (CCR) of the Coordinated Organisations (COs). Since, to the best of our knowledge, this was correctly reflected in the figures presented, the GAC gave a positive opinion on the two documents.

It should be noted that usually the daily subsistence allowance is also discussed in the GAC at the same time. Indeed, both these

items were on the agenda of the 254th meeting. However, for neither document were the figures available on time. The kilometric allowance was thus added to the agenda of the current, 255th meeting. However, unlike the kilometric allowance, the adoption of which is by Presidential decision, the DSA has to be sent to the Council for decision. The final Council meeting in 2013, however, lay between the 254th and 255th meetings of the GAC. Since the figures are used from 01.01.2014, the figures were presented to the GAC for opinion in written procedure. A written procedure is foreseen for items which are **both urgent and** on which a consensus can be achieved. Since this was the case, the GAC in written proceedings gave a positive opinion on the figures for the daily subsistence allowance.

That was 2013

The General Advisory Committee (GAC in English, ABA in German, CCG in French) is firmly anchored in Article 38 of the Service Regulations. This states that the GAC shall "be responsible for giving a reasoned opinion on any proposal to amend the(se) Service Regulations or the Pension Scheme Regulations, any proposal to make implementing rules and, in general, except in cases of obvious urgency, any proposal which concerns the whole or part of the staff to whom the(se) Service Regulations apply or the recipients of pensions".

The President is accordingly obliged to consult the GAC before taking a decision on any proposal affecting all or part of the staff. As a result of this, the main duty of the GAC is to help the smooth running of the Office by giving the President the best possible advice on any proposal, before said proposal is implemented. It goes without saying that the President should be interested in receiving and considering such advice. However, although, the President is obliged to consult the GAC, there is no obligation to follow any recommendations the GAC makes. Because consultation in the GAC is the minimum involvement to which staff have a statutory right, the CSC takes consultation in the GAC extremely seriously.

The GAC has six members appointed by the President and six appointed by the Central Staff Committee. The Chairman alternates.

One year the President appoints, the next the CSC. In 2013, it was the CSC's turn to appoint the Chairman. The CSC appointed Mr Ed Daintith (an examiner in Munich) to this function.

As last year (for more details see our reports of the 237th, 238th and 246th meetings of the GAC), the President "put the MAC in the GAC". That is to say, all five Vice-Presidents were appointed as members of the GAC. The sixth full member nominated by the President was PD Patent Information.

In our opinion, as set out in the above cited papers, the President is not free to appoint whoever he wishes to the GAC. For the reasons set out in those papers, when we learned of the President's appointments, we again appealed against them. However, because we cannot be sure that our appeal will be successful, we attended the meetings and, as usual, gave reasoned opinions. At the start of each meeting we stated our position that we disagreed with the constitution and stated that, should the constitution of the GAC indeed prove to be irregular, then the whole consultation process was flawed.

In the meantime, the Internal Appeals Committee has, in a joint hearing in early December 2013, heard the appeals filed against the 2012 and 2013 constitutions of the GAC. We thus presume that the IAC's opinion will be submitted to the President in early 2014. This timing is unfortunate since the nominations for 2014 have already been made. As the reader will no doubt know, also for 2014 the exercise of "putting the MAC in the GAC" will be repeated.

Of course, we do not know what their opinion will be or what action the President will take with regard to the opinion. A model could be provided by the action taken in 2006 by President Pompidou¹.

When informing the CSC in 2011 of his intention to "put the MAC in the GAC", the President made clear that the mandate of his members was to defend the proposals submitted to the GAC. As last year, this was what they did through the year. Indeed, as last year, it seemed as though they had even less

authority to propose changes than the A5s previously appointed. The purpose of the GAC, however, is to provide advice, not to deliver courtesy opinions or "Gefälligkeitgutachten". In the past there were always a number of joint opinions where the President was jointly advised by all members of the GAC on a line of action. However, in its current constitution, the members nominated by the President always give a positive opinion on every proposal, no matter what the arguments. They are closed to any suggestions. The result of this is that the number of common opinions has reduced to those on proposals which were unobjectionable. These were limited to uncontroversial items such as the salary adjustment, the kilometric allowance or similar.

As stated in the summary, 2013 again saw a relatively high number of meetings (nine). The Rules of Procedure foresee that generally the GAC should meet every other month, that is to say six times a year, depending on the matters to be discussed. Despite this, the number of documents actually discussed was again smaller than usual. In total, 31 documents were submitted. This includes recurring items such as the kilometric allowance, salary, daily subsistence allowance and spouses contributions to the healthcare scheme.

The members of the GAC appointed by the CSC.

¹ see Presidential Communiqué No. 19 dated 22.12.2006.