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Report of the 256th meeting of the GAC on 11.02.2014 in Munich

Summary

The 256th meeting of the GAC (General Advisory Committee) was the first GAC meeting of 2014 and possibly the last but one (in view of the “social democracy” project of the President that will suppress the GAC as you know it). The agenda comprised five proposals for opinion. Code of conduct for the Administration of the Reserve Funds. Modification of DG4 organisational structure. Final PAX figures for 2014. Revision of Data Protection Guidelines. Document on the use of operational data for DG1.

Introduction

The GAC members are appointed in equal numbers by the President and by the Staff Committee.

When the President published in December the names of his nominees for 2014, we learnt that, as for 2012 and 2013, broadly, the composition of the management side of the GAC corresponds to that of the Management Committee (the MAC).

In our opinion, the President is not free to nominate whoever he wishes to the GAC.

Firstly, we consider that it is a requirement of the regulations that GAC members must be permanent members of staff. However, most MAC members are not permanent members of staff. Worse, as short-term political appointees the Vice-Presidents could possibly lack both the knowledge and the independence required by the function.

Secondly, the role of the GAC is to formulate reasoned opinions which the President should then consider with the MAC before deciding on a proposal. For this reason in the past there was a general understanding that GAC and MAC membership should be mutually exclusive. The reason for this is obvious:

putting the MAC in the GAC will, in effect, mean that the MAC will be advising itself, rather than being independently advised. Not only will this likely reduce the quality of the advice being given, but it is also a clear conflict of interest.

For these reasons, when we learned of the President's nominations, as was the case with the 2012 and 2013 nominees, we appealed against them.

We have had similar situations in the past. For a fuller discussion, see our report of the 238th meeting of the GAC.

Because we cannot be sure that our appeal will be successful, we will continue to attend the meetings and, as usual, give reasoned opinions. These will be with the caveat that, should the constitution of the GAC indeed prove to be irregular, then the whole consultation process is flawed. This would mean that any appeal against a decision made after consultation of a wrongly composed GAC would have an extremely good chance of being successful.

Code of conduct for the Administration of the Reserve Funds (GAC/DOC 01/2014)

A code of conduct binding on all members of

the Administration of the Reserve Funds including the Administrator of the Funds was presented to the GAC for opinion. The objective is to ensure appropriate behaviour and thereby to preclude conflicts of interest between the RFPSS and its staff.

The members of the GAC gave a unanimous positive opinion on the document including a joint recommendation to introduce two amendments aiming at clarifying and broadening the scope of the document. We have been informed that our recommendation has been taken up.

Modification of DG4 organisational structure (GAC/DOC 02/2014)

The document presented modifications to the DG4 organisation structure intended to bring to a lower hierarchical level (from VP4 to PD level) a number of services among them three very important services, whose independence is critical for their proper functioning, i.e. the Occupational Health Services, the Safety Officers and the Conflict Resolution Unit.

The CSC, in view of the serious deficiencies of the consultation procedure, i.e. no CSC consultation, no COHSEC consultation and no indication of the result of any possible consultation of the services affected, had asked to the President to consider withdrawing this document from the agenda of the GAC pending the necessary preliminary consultations. This request was turned down. In view of the severe flaws in the consultation process, we could not give an informed opinion in the meaning of article 38 and the jurisprudence of the ATILO.

We however made several comments on the numerous difficulties we see with this project. They lack any legal analysis as to the conformity of the proposals with respect to requirements and standards under national law. In a nutshell, they threaten the independent functioning of three independent services of the EPO for the sole benefit of saving a bit of work for the Vice-President of DG4, e.g. avoiding him the numerous clicks required for approving annual leave of people falling under his direct hierarchy.

We also referred to the GAC/DOC 13/2011 and the unanimous opinion given by the GAC members in 2011, including the members appointed by the President, when the move out

of the operational level was proposed, i.e. the Safety Officers were put under VP4 to increase their independence and avoid conflicts of interests. This same conflict of interest which proved true in the past, might become even more relevant in view of the new building in The Hague and the important role to play of the Safety Officers.

We pointed out that staff would interpret the proposal as a degradation of the respective services and that putting these units, dealing with sensitive issues (e.g. any issue brought to the attention of the confidential counsellors) under PD 4.3 would be perceived as a risk to the independence of these units. It would definitely not contribute in raising the trust, it would rather risk to reduce the level of confidence that staff has started to place in them so far. The GAC members appointed by the President gave a positive opinion.

Final PAX figures 2014 (GAC/DOC 03/2014)

In conformance with recent practice, following discussions in the PAX Implementation Board, the administration presented the final PRED and CRED values for 2014 to the GAC for opinion.

Concerning the actual figures, we were satisfied that the calculations leading to the values presented in the document were performed in accordance with the relevant provisions in the PAX Implementation Handbook. We thus gave an opinion to this effect.

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

Revision of Data Protection Guidelines (GAC/DOC 4/2014 and GAC/DOC 5/2014)

New general guidelines (GAC/DOC 4/2014) for the protection of personal data were presented to the GAC for opinion. These guidelines have an increased scope compared to the current guidelines, since they apply also to all external users whose data are processed by the EPO. We praised the Data Protection Officer for the high quality of the work she did.

In view of the enlarged scope of the new guidelines, we wondered whether such guidelines should not fall under the

competence of the Administrative Council rather than the President and recommended that this be checked before issuing such guidelines.

We also noticed that although heavily referring to the current EU guidelines (EC) 45/2001 from which it borrowed a number of features, the new EPO guidelines were not in line with the EU guidelines and were not compatible with them. They would therefore not be adequate for any EU institution this at a time when the EPO will be asked to grant Unitary Patents for the EU. We therefore recommended that this be checked with the EU before any decision be taken. In particular, they miss an equivalent of a very important function of a Data Protection Supervisor (an EU institution), which is fully independent.

We pointed to a flawed consultation procedure, since the CSC had not been consulted. This is a blatant violation of articles 15(3) and 22(3) of the currently applicable guidelines.

We are extremely worried that several concrete features have been amended in a way that considerably weakens the independence of the structure and reinforces considerably the power of the President¹.

The references to the respect of fundamental rights which existed in the old guidelines and which exist in the EU legal framework (e.g. in Directive 95/46/EC) have been removed in the new guidelines.

The role of the data protection officer has been weakened and the reference to the Staff Committee which existed in the old guidelines has been completely removed.

Last but not least, in EU institutions, personal data can only be processed for purposes other than those for which they have been collected

¹ We are all the more worried when we see that the President seems to consider as a “serious offence” the fact that YOUR representatives have tried to find out what YOUR opinion is on the “social democracy” project of the President. The President has just alleged in [Communique 50](#) a “data protection” issue and threatened YOUR representatives for having used the same provider “Big pulse” as the President himself wanted to use also for finding out what YOUR opinion is on the peaces initiative.

under very strict conditions. At the EPO, the President will be able to decide on a change of purpose, without anybody being in a position to oppose it. For example, in EU institutions, only serious criminal offences trigger some exceptional measures under a strict control of an independent supervisor, in the EPO, “serious offences” to be defined by the President of the EPO can trigger investigations. This is not acceptable in our modern democratic Europe.

A second document called “*Document on the use operational data for DG1*” (GAC/DOC 5/2014) was also presented.

The proposal for introducing internal data protection guidelines (so-called DUOD) presented in GAC/DOC 5/2014 might fall under the competence of the President under Article 10(2)(a), EPC, provided it fell under a general regulation determining the data protection at the EPO, to be decided by the Administrative Council and which met the standards of the European Union. Since none of this is the case, the proposal suffers of the same flaws as the general guidelines. We thus gave a negative opinion on it.

This document is based on the new general guidelines, in particular on a provision which does not exist in the EU guidelines, but which seems to have been Taylor-made for DG1, ie the concept of operational data.

We stressed that these new DG1 internal guidelines only aimed at DG1 examiners will reinforce the already strong feeling that the management wants them under an unacceptable level of control that shows the total lack of confidence that management has on DG 1 staff. Their introduction will lead to further demotivation of examiners. An important element of discomfort for examiners is that the guidelines allow DG 1 management to hold discussions on individual performance without the knowledge of the individual concerned and the possibility for high management to use an exception procedure to access individual data out of context.

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

The members of the GAC nominated by the CSC.