



Report of the 221st meeting of the GAC on 13-14.04.2010 in Munich

Summary

The 221st meeting of the GAC (General Advisory Committee) was the second GAC meeting of 2010. The agenda was unduly long for a two day meeting, and comprised a number of complex and unusual items such as a proposal for redesigning procurement, which was linked to a document on changes to the financial regulations. Controversial topics included a document related to the introduction of a funded system to finance health insurance, a document concerning re-allocation of staff in patent administration and amendments to circulars 253 (B/C career) and 271 (A career). Items returning to the GAC for renewed consultation included a response to ILOAT judgment 2857, the sickness insurance premium for 2010, amendment to the ServRegs relating to removal expenses and further modification to circular 284. Additional items on the agenda included the (final) 2009 sickness insurance figures and the annual president's notes to the chairmen of the promotion boards.

Introduction

As can be seen from the summary above, the agenda was unduly long for a two day meeting. Immediately upon receiving the agenda, we protested to the administration and suggested that some items be taken off it, if possible. Unfortunately, this was apparently not the case, so the Chairman, with the secretariat, then did their best to arrange the agenda items as best they could. The result was ambitious, but made sense. We were thus dismayed to learn, during adoption of the agenda, that the administration had informed the Chairman *the day before the meeting* that the proposed timetable would not be possible owing to the non-availability on the first day of certain "experts" required by the members nominated by the President. Several lengthy topics were therefore moved from the first day to the second, with no topics moving in the opposite direction. As a result, on the second day, the GAC was required to discuss the funded health insurance system, lump sum compensation

for removal expenses, re-allocation of staff in PatAdmin, changes to the FinRegs and redesigning of procurement!

After the meeting, we sent a letter of protest to the President concerning this treatment of the GAC. In this, we regretted that the input she would receive following the GAC would be tainted because of the lack of time for proper deliberations. We insisted that it would be wrong for her to consider the consultation as complete, and we recommended that she ask the Chairman to reconvene the GAC in order to take the time it would need to arrive at properly reasoned opinions.

At the time of writing, we have not yet received a response to this letter.

At the start of the meeting, we repeated that, owing to the constitution of the GAC this year, we were attending the meeting under the caveat that, should the constitution of the GAC indeed prove to be irregular, then the whole consultation process is flawed.

Re-allocation of staff in PatAdmin

The administration submitted a document on re-allocating staff in PatAdmin. The stated aims were to match manpower with workload in the units. Staff would be re-allocated according to "the principle of the longest serving staff member in a unit", but what this principle was is not explained in the document. Detachment would be temporary, and for this period PatAdmin would be permitted to derogate from the usual reporting guidelines set out in Circular 246. This topic has been the subject of numerous articles to staff from both the staff representation and the administration, so won't be discussed in further detail.

In the GAC, we raised a number of concerns.

The most serious of these is the negative perception of staff concerned. The expert who attended the GAC meeting (the Principal Director of PatAdmin) recognised that staff in Patent Administration were unhappy with the proposal. However, to our surprise, he attributed this unhappiness to provocative remarks made by SUEPO! This exaggerated claim is worrying in that it demonstrates disregard for staff's feelings and does not allow for the possibility that they may be capable of drawing their own conclusions. Be that as it may, we expressed concern that there is apparently agreement that staff are unhappy. We hoped that the President would take this fact into account when deciding on the proposal.

We also noted that the document was unclear in both scope and terminology. The proposal says that it addresses capacity problems within Patent Administration, yet it mixes arguments. It also mentions issues that go beyond the capacity problems, such as staff development and mobility. The proposal also introduces terms which can be found nowhere in Codex, yet no effort is made to define them, for example: "re-allocation", "detachment", "rebalancing", "longest-serving principle", "right to be heard". The draft decision is not in the usual

style of staff-related decisions. It is vague, open to wide interpretation and is thus, in our opinion, certain to lead to disputes if implemented in its current form.

The proposal also represents fundamental changes to working conditions for staff in PatAdmin. The ServRegs are very clear that the Office is at liberty to transfer staff if the need arises. Staff know and accept this when they join the Office. The proposal, however, goes beyond the notion of transferring staff, if necessary. Instead, it creates a situation where staff in Patent Administration have to reckon with being moved as their period in post increases. This likelihood changes the nature of employment in Patent Administration and it is possible that many staff would not have applied for work there if they had known this.

The proposal is very clear in stating that it derogates from Circular 246 (Staff Reporting) in that it would allow staff to work for six months with a different line manager without the need for a separate staff report (Circular 246 limits such periods to three months). It thus contradicts existing rules and regulations which apply Office wide. We have serious doubts that it is legally sound to allow such a derogation in a single principal directorate, especially in the middle of a reporting period. Furthermore, the proposal will lead to inconsistencies in reporting office-wide and pose a problem for the promotion boards.

For the above reasons, we noted that the proposal cannot be implemented in its current form due to critical drafting issues (lack of clarity in terms of scope and terminology) and conflicts with Circular 246. Accordingly, we gave a negative opinion on the proposal. Additionally, we suggested that some of the problems cited by the representatives of the administration in the GAC meeting could be solved through an Office-wide policy on staff mobility, developed in co-operation with the Central Staff Committee.

The members nominated by the President

gave a positive opinion on the proposal. However, they gave a page long bullet point list of comments which basically showed that they too were against the proposal as it stood and recognised that it is not currently ripe for implementation.

Response to ILOAT Judgment 2857 / Circular 283

This item concerns Circular 283, issued in 2004, concerning death and invalidity insurance (DII). Following judgment 2857, the Office was ordered to re-submit the topic to the GAC, with all the necessary information for it to be able to give a reasoned opinion "in accordance with the established procedure". Originally, the administration submitted a draft circular to the 119th meeting of the GAC (for details on this topic, see our report of said meeting of the GAC). In that meeting, we pointed out that at the time in question, the correct procedure was a CA document! Obviously, on reflection the administration agreed with this, and submitted a draft CA document to this meeting.

On the substance, nothing had changed since the 119th meeting. Accordingly, on the substance we basically gave the same negative opinion as following that meeting.

Sickness insurance premium 2010

For details of this topic, see our report of the 119th meeting of the GAC. In brief, to that meeting of the GAC the administration submitted two totally different documents, one in English and one in French, comprising the calculation of the sickness insurance premium for 2010. The English language document was submitted in time. The French language document late. The administration informed us that our opinion was required on the French language document. Worse, at the time that the GAC's opinion was formulated, the meeting was not quorate. As a result of this, in Circular 322 dated 22.12.2009 VP4 announced that the 2010 contribution rates would be resubmitted to the GAC for opinion. It should be noted that, in the mean

time, a staff contribution rate of 2.4% has been set.

To this meeting of the GAC the administration thus submitted a third version of the documents originally submitted in 2009. In effect, it was an English language version of the French language document submitted to the 119th meeting of the GAC.

Calculation of the sickness insurance premium involves two steps. The first is to calculate the premium which the Office pays to the insurers per insured family per month. The second is to calculate how much of basic salary expressed as a percentage this corresponds to. Since 2003, the amount paid to the insurers has been calculated using a formula with parameters such as reimbursements and medical inflation. Profits made by the insurers are capped at 3.25% of reimbursements. Any excess is held in an (according to the contract) interest free "fund" and taken into account to calculate future premiums.

Since the formula was introduced, several changes have been made to the EPO sickness insurance system, either to take costs out of the system or to increase revenue into the system. These include the introduction of:

- the "Delta Lloyd" arrangement in The Hague;
- an obligation on spouses to use other insurances as primary insurances, and the EPO insurance as a secondary insurance;
- additional contributions for working spouses without alternative primary sickness insurance.

Despite these significant changes, the formula has not yet been adopted to the changed reality. The result is that the calculated premium is now far too high, which has resulted in excessive profits for the insurers, which now means that a sum of about 6 million euros (over 10% of current annual reimbursements) is being held in the fund.

In the document sent to the GAC, the formula was maintained unchanged. Worse, the Office only proposed to use an amount of the fund necessary for keeping unchanged the premium paid to the insurers from 2009, rather than using it to reduce the premium.

Accordingly, we gave a negative opinion on the proposal. Clearly, a new formula is required. Moreover, in our opinion, the whole of the fund should be taken into account when calculating the premium. This is especially so given that it is unclear what would happen to this money should the Office either move to a system of internal insurance or change the funding basis of the sickness insurance system totally (see the proposal to introduce a funded system discussed below).

The members nominated by the President gave a positive opinion on the proposal. They did, however, add a couple of observations, including that, in view of the changes made to the system, changes to the formula should be considered.

Sickness insurance figures 2009

The figures presented to the GAC towards the end of each year for calculating the premium for the following year are provisional, since they are based on extrapolations for the first 10 months of the year. At our request, the administration has recently presented the final figures for each year to the GAC, when they become available in spring of the following year. These figures are important for checking if the data and assumptions upon which the premium is based are solid. However, the administration (currently) only presents these figures for information, and not for discussion or opinion. Accordingly, the GAC (formally) merely noted the document.

Introduction of a funded system to finance the health insurance scheme

The administration presented a discussion document on this topic to the 219th meeting of the GAC (see our report of said meeting).

This topic has also been the subject of various publications, both by the administration and the staff representation. It was also the subject of the recent podium discussions. Accordingly, we assume that the reader knows the background of this topic.

To this meeting of the GAC, the administration presented a draft CA document for opinion, setting out the necessary changes to Article 84 ServRegs (the article which deals with sickness insurance). This is because such changes have to go to the Administrative Council for decision. The other changes which will be necessary to actually implement the system, and which have not yet been fully worked out, can be implemented internally (probably) without further Council decisions.

These changes were basically to remove the 2.4% cap on staff contributions and to say that the contribution rate would be set as a result of an actuarial study. This would (almost certainly) result in an increase of staff contributions, stepwise to about 3.0% of basic salary.

The administration's justification for the proposed changes is that they are necessary for the long term sustainability of the Office's sickness insurance system. That is to say, not to meet current financing issues (see elsewhere in this report), but to meet the financing needs of the coming decades, without cutting service (i.e. reimbursement) levels.

In our opinion, to ensure sustainability of a healthcare insurance scheme, consideration must be given not only to a sound financing but also to the question of cost-containment, which must be addressed in an ongoing manner. We fear that merely increasing (again) in the short term the amount of money staff are asked to pay for sickness insurance, i.e. increasing the amount of money in the system, without addressing costs, will have the psychological effect of making staff less cost aware, leading to increasing costs.

Moreover, concerning the consultation process, on a topic as important as healthcare, the Office should not merely carry out the minimum statutory consultation under Article 38(3) ServRegs. Rather, there should be a broad consultation with staff, setting out the different options and consequences. Only in this way will it be possible to introduce any changes necessary for the long term sustainability of the system without the risk of industrial action.

The proposal submitted to the GAC comprised none of the above elements. Worse, the proposal was incomplete in that it lacked the accompanying measures necessary to make it function. Rather, as set out above, it comprised only the initial changes necessary to set in place the system. Moreover, the GAC was not provided with enough information necessary for it to be able to give a reasoned opinion. For example, costings, estimations and extrapolations of the results of remaining with a PayGo system and equivalent full data for funded system were lacking in the documents submitted to the GAC for opinion. For these reasons, we gave a negative opinion on the proposal.

Rather, we suggested that, for at least the moment, the current system should remain in place, but that, in order to save costs, the Office should move to a system of self insurance. At the same time, cost containment measures proposed by a working group in 2008 should progressively be introduced. Moreover, a working group should be set up to study long term changes necessary. Staff as a whole should be fully informed and consulted.

The members nominated by the President gave a positive opinion, with a number of observations to justify this.

Notes to the chairmen of the promotion boards

Every year, the President sends to the GAC his notes to the chairmen of the promotion boards. Over time, the content of the notes

has evolved as the administration slowly takes our observations into account. This year, the notes were unchanged from those used previously.

Our information from members of the promotion boards, both those nominated by the CSC and those nominated by the President is that the boards generally function well, without problems.

Accordingly, the GAC gave a positive opinion to the notes. We did, however, note that:

- §13 of the note the Chairman of the A-grade Promotion Board and §11 of the note to the Chairman of the B/C-grade Promotion Board (which allow the boards, in exceptional cases, to make promotion recommendations which derogate from Circulars 253 and 271) remain a concern for us, as in previous years; in our view, they provide an opportunity for abuse and preferential treatment.
- One of the fundamental ideas behind the EPO's reporting and promotion system is continuity. For example, in the higher grade of the career bands, staff are expected to demonstrate a consistent level of performance over three reporting periods. It is essential for the good functioning of the promotion system that changes taking place at the office (e.g. job mobility, etc) are coherent with this need for continuity.
- In years when staff reports are written, it has been the practice to hold two meetings of the promotion boards, one in early summer to deal with the majority of cases and one in autumn for cases where the staff report was delayed. We strongly recommended continuing this practice in 2010 in order to avoid unnecessarily long waits for promotion of staff whose staff reports come late.
- especially if an improvement in performance has been noted, the criteria for promotion for staff members who have received overall or partial markings of 4 or 5 should be reviewed.

Procurement and financial regulations

On this topic, the administration submitted two documents to the GAC. One concerned redesigning procurement, and essentially set out a restructuring of the procurement areas of the Office. The other concerned modification of the financial regulations, in particular redefining the concept of "authorising officer". The proposals followed studies by consultants and comments made in audit reports.

Currently, there are three procurement departments, two in DG4, one each in Munich and The Hague for general procurement, and one in DG2 for IT related procurement. It is intended to combine these into a single department in DG4. It is also intended to introduce into the financial regulations two new roles. On the one hand, that of budget holders, who are accountable for the purpose of the expenditure. They will be, for example, the line managers in functional units. This is part of the "new budget dynamic" of decentralised budget responsibility. On the other hand, that of procurement officer who is accountable for ensuring compliance with the procurement procedures, regulations and policies. This will usually be someone in the procurement department with knowledge of the EPO's procurement procedures and regulations. These two roles are both defined in the proposed new financial regulations as "authorising officer by sub-delegation", since authorising officer is the term used in Article 50 EPC, and is also generally used in other international organisations. The two duties are, according to the proposed financial regulations, incompatible, that is to say, no one person can be both at the same time.

It is hoped that the new structure and regulations will provide an efficient service to users on the one hand whilst providing the oversight and controls necessary for good governance on the other hand.

Naturally, no one can be against the above, and indeed, the CSC has consistently suggested that the Office should move to a

central procurement department. The GAC also gave a positive opinion on this concept.

However, in any reorganisation our first concern is how staff are affected. The document concerning procurement proposes that the reorganisation should proceed in two "tasks". As a first task, staff in the three existing procurement departments should be consolidated into a central procurement department. To the GAC, and on the basis of feedback received from the areas, this also seems relatively unproblematic. The GAC saw more of a problem in the "task 2". This concerns staff who are *not* full time in one of the procurement departments, but who have, as at least part of their duties at the Office, procurement responsibilities. The GAC considered that this part of the reorganisation required more consideration so as to ensure that staff concerned are not negatively affected and that the services that they currently provide will not suffer.

The GAC had more problems with the document concerning the financial regulations. First, despite the deadline having passed, it turned out that the proposed changes had not even been submitted to the BFC yet! Worse, the proposal had not yet been turned into a CA document! This is, of course, a problem for the finance department, not for the GAC.

Turning to the content, in the GAC it was stated that the aim of the proposal was one of delegation of authority. However, it was not proposed to modify the articles of the FinRegs concerning delegation of authority. Rather, only articles concerning the authorising officer were modified. Thus it seemed to the GAC that the modifications suggested did not meet the stated aim. Moreover, it seemed to the GAC that delegation of authority did not require a change of the FinRegs. Rather, a signed decision of delegation from the President would suffice.

Concerning the proposed modifications of the FinRegs the GAC gave an opinion reflecting the above.

Modification of Communiqué 284

For further details of this topic, see our report of the 220th meeting of the GAC. To our surprise, the document was resubmitted to the 221st meeting of the GAC. Since the 220th meeting, the Office has discovered that Sweden should be added to the list of countries recognising same sex marriages, with retroactive effect from 01.05.2009. We reiterated our suggestion, originally made in the 212th meeting, that it would be better to present the rules as to when marriages or partnerships in a particular country are recognised by the EPO to the GAC for opinion and publication, rather than to present the document to the GAC each time a country is added to the list. This would have the further advantage of improving transparency. Unfortunately, the DG5 nominee to the GAC does not consider this to be feasible.

The GAC gave a positive opinion on the proposal to add Sweden to the list of countries where same sex marriages are recognised. Additionally, the GAC kept to its earlier opinion, given in the previous meeting, that the question of recognition of different sex registered relationships should be considered by the Office.

Lump sum compensation for removal expenses

A document on this topic was submitted to the 219th meeting of the GAC for discussion. Thus for more details, see our report of that meeting of the GAC. To this meeting, a revised version of the document was submitted for opinion. One major problem with the original proposal was that staff were treated the same upon joining or upon leaving the Office. That is to say, the same lump sum would be payable in both situations. However, it is likely that a staff member, especially if joining directly from university, will, after 20 or 30 years of service, have accumulated significant belongings! The revised document submitted for opinion had at least recognised and corrected this problem.

However, in our opinion, the fundamental problem remained that the costs of removals vary to such a huge extent, as confirmed by the analysis provided by the administration, that lump sum reimbursements cannot be considered appropriate. In some cases, they will lead to considerable cash gains for staff members and in some cases to considerable cash losses. For this reason, lump-sum payment will be perceived as unfair. We thus considered it inevitable that members of staff disadvantaged by lump sum compensation will take their case to appeal.

Moreover, currently all staff have a right to reimbursement of removal expenses on leaving the Office. According to the proposal, this will be limited to those who received reimbursement on joining the Office. This represents a loss of rights for staff - consider for example the case of a Belgian staff member recruited to the Hague, but already in Holland. Under the current regulations, should (s)he chose to retire to, say, Belgium, removal expenses would be payable. Under the proposed new regulations, this would not be the case.

As in the 219th GAC, we suggested an alternative solution, whereby the Office agrees prices (e.g. by means of framework contracts) with a limited number of removals companies. This would solve the problems cited in the proposal and avoid any of the above-mentioned objections occasioned by a lump sum compensation. Unfortunately, this was ruled out by the administration.

For the above reasons, we gave a negative opinion. The members nominated by the President gave a positive opinion, in which they also noted the problem of linking payment at the end of service to the question of whether or not payment had been made at the start of service.

Amendment to circulars 253 and 271

Circular 253 sets out the B/C career system at the Office. Circular 271 does the same for A-grade staff.

The administration presented a proposal to modify and harmonise aspects of the reckonable previous experience parts of these circulars. The most significant change was to remove the possibility for the Office, in exceptional cases, to credit at 100% (rather than the more usual 75%) periods considered particularly relevant and useful to the Office (e.g. for work at national patent offices or as a patent attorney).

We considered that this is in contradiction to the Office's aim of "securing for the Office the services of permanent employees of the highest standard of ability, efficiency and integrity" (Article 5 ServRegs). It is also obviously unfair to potential staff members who have worked at the Office for outside contractors to only have said experience validated at 75%. As a result, some very attractive candidates for employment at the EPO will inevitably perceive the Office as being less attractive as previously and thus not apply for vacancies. Accordingly, we gave a negative opinion on the proposal.

The members of the GAC nominated by the CSC.