



Report of the 241st meeting of the GAC on 25.06.2012 in Munich

Summary

The 241st meeting of the GAC (General Advisory Committee) was the fourth GAC meeting of 2012. The agenda again comprised a single document concerning EPO outsourcing policy.

Introduction

At the start of the meeting, we recalled that at the beginning of the year we had provided the administration with a long list of items which we expected to see on the agenda at some time in 2012. Given how few of these points had up until now been submitted to the GAC, we were concerned that the GAC in the second half of the year would be overloaded. The Chairman suggested that, for the next meeting, a time plan for when documents could be expected to be submitted to the GAC should be produced. This would allow the meetings to be better planned and coordinated. We could only agree with this. This is particularly so since it is often the calendars of managers that fill up quickly, which makes planning meetings difficult.

Turning to the 241st meeting, as with the previous three meetings this year, the current meeting only lasted for one day. It was called to discuss a single document, concerning outsourcing policy.

In 2006, two then members of the Munich Staff Committee complained to the Vice-President DG 2 about the Office's outsourcing policy. In particular they argued that it undermined the rights of the Staff Committee to be represented in

selection boards. This led to an internal appeal. In 2008, the Internal Appeals Committee (IAC) unanimously recommended that an Office-wide regulation regarding the employment of external contractors be submitted to the GAC in order for the EPO to fulfil its duty to consult in accordance with Article 38(3) of the Service Regulations.

Rather than following this unanimous recommendation, the then President (Ms Brimelow) rejected the appeal. Accordingly, a complaint was filed with the ATILO.

In a judgment delivered on 08.07.2010, the Tribunal basically completely agreed with the findings of the IAC. The Tribunal thus gave the Office 60 days (from the above date) to "consult the General Advisory Committee on the practice of 'outsourcing' in accordance with the recommendations of the Internal Appeals Committee".

By letter dated 04.08.2010 the current President sent a letter to the GAC. In the letter, he wrote that this was a complex topic and informed the GAC that he would "submit an analysis of the use of external contractors at the EPO as soon as possible". As soon as possible did not, however, mean within the time limit set by

the Tribunal. Accordingly, one of the complainants filed an application for execution with the Tribunal. The written proceedings in this case are now closed. That means that, theoretically, the Tribunal could pronounce on the case anytime. In parallel to the application for execution, a joint Staff Committee / administration working group was set up to consider the matter. After almost two years' consideration, the work has now been completed and sent to the GAC for opinion.

The policy

If you strip away the explanatory note, preamble and memorandum sent to the GAC, the part of the document claiming to be an outsourcing policy actually comprises four short paragraphs. Thus rather than summarising it, we will simply reproduce it. The Office's policy is:

1. Permanent tasks of the European Patent Office are normally to be executed by employees of the Office.
2. In line with the applicable rules, the Office may buy in work and services or services from external suppliers (outsource) on condition that there is either no in-house expertise available with staff already in employment or the task is not, or no longer considered to be, of a permanent nature, or the outsourcing ensures substantive economic benefits for the EPO, taking into account the related risks and costs.
3. Outsourcing may further not lead to the loss of internal expertise and competencies to an extent that the continuity of the mission of the European Patent Office is put at risk.
4. A decision in line with point 2 above shall be an operative decision to be taken by the unit responsible for the performance of the respective tasks or services at the appropriate hierarchical level, taking into account the impact of the decision, the need to co-operate and co-ordinate with other areas within the Office and the need to ensure consistency.

At a first reading, it is a bit surprising that it has taken the Office almost two years in order to come up with such a policy. This is particularly so given that it does not seem to comprise anything new!

Consultation process

The explanatory note sent to the GAC with the document makes it clear that the reason for the GAC submission was ILOAT Judgment 2919. As stated above, this judgment ordered the President of the Office to consult the GAC "on the practice of 'outsourcing' in accordance with the recommendations of the Internal Appeals Committee". That is to say, it makes a clear reference to the recommendations of the Internal Appeals Committee.

Moreover, the judgment hints at information requested by the appellants, in particular during the internal appeals procedure that preceded the appeal before the ILOAT. Additionally, as set out above, a working group studied the Office's outsourcing practice over a period of more than a year prior to submission of the present document to the GAC.

ILO judgment 2857 makes it clear that it is the administration's duty actively to provide the GAC with sufficient information for it to be able to give a reasoned opinion. That is to say, it should not be for the GAC members to have to dig information out of the administration. This notwithstanding, in an attempt to avoid the problems experienced in previous meetings (e.g. the 240th meeting), we requested the Administration well in advance of the meeting to provide the documents mentioned above. Most notably, we requested the text - or at least an excerpt - of the recommendation of the Internal Appeals Committee on outsourcing. We also requested that this be done sufficiently before the GAC meeting for the members to have time to consider the extra information.

We were extremely surprised when this

request for information was turned down. The explanation given was that the members of the GAC nominated by the Administration failed to see the relevance of the documents we requested. This misses the point: the ILO case law makes it clear that if GAC members consider information relevant, then they generally have a right to receive it. We informed the administration that, in refusing to send us it, they were unnecessarily risking another appeal and another loss in front of the ILOAT.

The content of the proposal

As stated above, the Office was ordered to consult the GAC on its practice of outsourcing.

Furthermore, in a note to the GAC, it was explained that the President had "requested to have a consistent pattern of regulatory levels with the following logic: 1) [HR] roadmap, 2) policy, 3) rules, 4) implementation".

In the meeting, we explained that in our opinion, the "practice" ordered by the ILOAT would best correspond to the "rules" (and to an extent implementation) in this sequence of levels. The document submitted could at best be categorised as "policy". However, the members of the GAC nominated by the President confirmed that no further "rules" were in planning. We thus explained that the proposal fails to satisfy the ILOAT's requirements. This is even before one considers that the Tribunal instructed the Office to execute the judgment within 60 days of its publication!

Moreover, according to the HR roadmap, the aims of the outsourcing policy would be to:

- define the criteria to resort to non-permanent or external employees;
- increase flexibility to meet the needs of the business while respecting the legal framework;
- ensure transparency of these rules;

- ensure harmonisation and full application of the defined rules.
- The roadmap also talks of including "social and human impacts for the interested staff".

We explained that none of these points is dealt with in the document submitted to the GAC.

That is to say, in our opinion the document neither meets the requirements set out by the ILOAT in its Judgment 2919 nor does it meet the requirements the Office set for itself in the HR Roadmap. For these reasons, we gave a negative opinion on the proposal.

In addition to setting out why we gave a negative opinion on the document submitted to the GAC, we also set out what we consider an outsourcing policy adapted to the needs of the EPO should comprise. These points fell into four main categories:

1. Applicable law

The policy has to clarify to contractors bidding for outsourced work, their employees, to EPO staff administrating the contracts and to the staff representation what the applicable law is in each case. This must explain the rights and obligations of the Office, the service provider, the external staff and of the staff representation. Moreover, the means of redress (legal or other), lines of responsibility and the consequences in case of errors must also be clear. We also set out that in our opinion, the applicable law should be the national law of the relevant duty station. Moreover, the Office has to ensure not only that national law applies, but that it can be enforced e.g. by agreeing to waive its immunity or accepting to be bound by arbitration.

2. Political considerations

It is necessary to clarify if there are any boundaries as to what may or may not be outsourced. For example, is it acceptable

to outsource to non-member states or to have such work performed by citizens of non-member states? If so, are there limits? We suggested that this may need discussions in both the Council and other interested (patent) circles. In our opinion, it needs to be clarified if patent applicants in Europe would appreciate outsourcing of particular activities. Indeed, the document deals very much with outsourcing as an operational activity and does not provide any guidance on these political issues. We thus stressed that, in our opinion, whether or not to outsource a function is a strategic and not an operational decision.

3. HR aspects

In our opinion, HR issues should be a part of the outsourcing policy (or the practice). Indeed, we set out that this fact is surely the main reason for the ILOAT ordering the Office to consult the GAC on outsourcing. After all, Article 38(3) ServRegs gives the GAC the duty of giving reasoned opinions on proposals which affect staff. However, these issues are insufficiently considered in the document submitted to the GAC. Indeed, to the best of our knowledge no analysis of the impact on the age structure or competence of departments has been made and the impact of non-permanent or external staff presently in the EPO on permanent staff and the interactions amongst these different groups of staff has also not, to the best of our knowledge, been considered.

4. Economic aspects

This fourth item is, in fact, the only aspect really dealt with by the document, but even this is dealt with superficially.

In contrast to our negative opinion and our suggestion as to what a policy should contain, the members nominated by the President gave a positive opinion on the proposal. In their opinion, they made clear that they considered the document sufficient to meet the requirements set by the Tribunal. Moreover, they confirmed that

they saw no need for any further rules or document e.g. to address the points set out by ourselves. They did, however, suggest a few editorial changes to the proposal's preamble.

The members of the GAC nominated by the CSC.