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Report of the 243rd meeting of the GAC on 24-25.09.2012 in The Hague

Summary

The 243rd meeting of the GAC (General Advisory Committee) was the sixth GAC meeting of 2012. The agenda comprised documents on the official holidays in 2013, a remedy to procedural errors made in a transitional measure concerning the invalidity allowance, re-organisation of external client services, revision of the regulations for the RFPSS and a proposal relating to outsourcing of pension administration.

Introduction

In our report of the 242nd meeting we commented concerning the non-replacement (following his departure from the Office) of the former VP2, Mr Vermeij as full member of the GAC. In the meantime, as foreseen by the GAC Implementing Rules, the President has decided that he should indeed be replaced as full GAC member by a deputy, namely the Principal Director of Patent Administration. This should help ensure that the quorum of full members is achieved in future meetings. However, no new deputy member has yet been nominated.

Official holidays in 2013

The administration's proposal concerning public holidays for the following year is sent to the GAC each year for opinion - see for example our report of the 231st meeting of the GAC.

Unusually, in 2013 Munich will have the most public holidays (usually, it is Vienna). Thus the proposal foresees that Vienna will be allowed one further day and The Hague and Berlin three further days which will be added automatically to the staff member's annual leave for 2013.

As set out in our report of the 238th meeting of

the GAC, earlier this year the President amended Circular 22 (the staff circular governing the administration of the various forms of leave at the Office) so as to allow the President to close the Office on specific, compulsory days, e.g. between Christmas and New Year. Staff have to take some type of authorised leave (e.g. annual leave, compensation hours or flexi-hours) on these days of compulsory closure.

For 2013, the proposal thus foresees, in addition to the public holidays, closing the Office on the 23rd, 27th and 30th of December. That is to say, on an additional three days. As stated above, on these days, staff will have to take some type of authorised leave.

At that time the possibility for the President to impose compulsory extra days of closure on staff was imposed, we pointed out that other International Organisations, for example the institutions of the European Union, in addition to the other official holidays, close all the Office sites between Christmas and New Year. Similarly, the ILO was closed between 22 December 2011 and 2 January 2012. The extra days were a gift to staff from the ILO management.

In the earlier meeting, we stated that we failed to see any benefit for the majority of staff in the proposal. Rather, the majority of staff will

merely have less flexibility as to when to take leave.

In the current meeting, we considered that our earlier comments still applied. Although we had no objections to the official holidays or the compensation days in themselves, we accordingly gave a negative opinion on the proposal in as far as it concerned the three compulsory closure days.

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

Invalidity allowance

Council decision CA/D 30/07, effective from 01.01.2008, introduced an invalidity allowance which replaced the previous invalidity pension. This was done both for new invalids and also for former staff who had already gone on invalidity. That is to say, previous recipients of an invalidity pension were, from the above date, no longer paid this, but were paid the invalidity allowance instead. The basis for calculating the amount of the invalidity allowance is different from the basis used to calculate the previous invalidity pension. In some cases, when taxation is taken into account, the benefit to invalids is higher, in other cases lower. Thus the regulations included a transitional measure, the intention of which was that staff should not be worse off financially as a result of the change.

As required by Article 38(3) ServRegs, the changes were discussed in the GAC in 2007. However, after the discussions in the GAC, but before being sent to the Council for adoption, the transitional measure was substantially changed. According to the case law, when a proposal is substantially changed, it must be re-submitted to the GAC. However, this was not done. A number of staff members who felt disadvantaged by the change thus appealed. Some of the appeals committee recommendations have now been issued. The recommendations differ depending on the precise situation of the appellant. However, the basic tenor of the opinions is that the appeals should be allowed.

The administration presented to the GAC a draft CA document setting a proposal for remedying the procedural flaw. This essentially consists of retroactively confirming the text as

previously adopted by the Council. That is to say, as a remedy to the appeals, the administration is merely retroactively carrying out a formally correct GAC consultation!

We had a number of problems with the proposal.

Concerning the form, the document gives the impression that only one appeal was filed. However (as set out above), we are aware of a number of appeals. The document is thus misleading the Council concerning the scope of the problem.

Concerning the remedy, it seems to us that the Office has deliberately chosen the appeal with the smallest scope and (in part) attended to it. Moreover, following a faulty consultation process, limiting the remedy to retroactively putting back in place a proposal harming to staff makes a mockery of the consultation process. This is particularly so given that the document gives the impression that the transitional measure adopted by the Council in 2007 meets the aim that it was intended to achieve. In actual fact, the intention was that staff should not be worse off as a result of the reform. This is obvious from the intention set out in the introductory part of the document submitted to the Council in 2007. In short, the proposal does nothing to compensate staff who were disadvantaged as a result of a measure which was incorrectly introduced.

Moreover, it is now clear that the administration withheld information from the GAC in 2007. This concerns in particular the effect of the reform on B/C grade staff who enter invalidity. Additionally, in 2007 we were informed that the effect of the change would be that the majority of invalids would (after tax) be marginally better off. The transitional measure would look after that no staff member would be worse off. However, the data now provided shows that the majority of existing pensioners "benefit" from what is clearly an inadequate transitional measure. The majority of new invalids will be worse off than previously. This is even not taking into account the fact that a number of member states do not recognise the invalidity allowance as a tax free emolument and hence in actual fact do tax it. If the administration had fully and correctly informed us of these effects in 2007, our position at that time would have been different.

Accordingly, we gave a negative opinion on the proposal. Instead, we proposed an alternative. The reform claimed to be modelled on that at the EU. However, at the EU invalids have the possibility to choose whether the previous or the new regulation should apply to them. We suggested that a measure along these lines would be a better way forward for the Office.

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

Reorganisation of external client services

The Office currently has a number of "external client support services". The administration presented to the GAC a paper proposing to move one of them, namely the Information Office currently in Directorate Patent Law to PD Patent Administration.

Currently, "1st line Customer Service" in Patent Administration in DG2 receives questions from clients. These are then routed to the department which is in a position to deal with them. This includes routing them to the Information Office, where appropriate. Moreover, the Office currently has more than 35 phone numbers and 40 web-forms for contacting the EPO. It thus seems reasonable, from a management point of view, to want to simplify the current situation, and to move a unit capable of dealing with queries closer to the unit which is the first point of contact for clients.

Nevertheless, there did seem to us to be a number of problems with the proposal. These included a lack of role clarity concerning the boundary to Patent Information (in DG5). Moreover, currently the Information Office is responsible for the bureau open to the public where e.g. patent attorneys can walk in and buy new versions of the EPC, Guidelines etc. It seems that the intention of Patent Administration management is to close this and limit all public contact points to internet contact such as webforms and phone lines. It is not clear to us how this will improve the service offered by the Office, which is after all a public international service organisation.

In addition to this, as usual our main concern when considering any reorganisation are the effects on the staff concerned. In the current

case, management had made efforts to explain the proposal beforehand to the staff concerned. This included the need to transfer three out of five posts from DG5 to DG2 - the other two posts will remain in DG5, but with slightly different functions. However, not all the functions currently performed by the Information Office will be transferred to DG2. The result of this is that the staff to be transferred were concerned about their job enrichment and the training they will be provided. This situation has been exacerbated by the fact that they have not yet been provided with written job descriptions for their posts in DG2.

In the GAC, we thus said that we hoped and expected that management would take steps to address these concerns. We also gave an opinion reflecting the above.

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

Regulations for the Reserve Funds for Pensions and Social Security

A study on the governance of the RFPSS was carried out for the Office by an external consultant (AON/Hewitt). This was part of the "Strategic Renewal Project". As a result of this study, the Office considered that it was necessary to make changes to the regulations of the RFPSS (which can be found in Part 10 of the EPO Codex). These were then sent to the GAC for opinion, before being submitted to the BFC and the Council for decision.

The fundamental problem identified by the current governance concerns risk management. The fund is administered by a Fund Administrator. A Supervisory Board (comprising representatives of the Office, the Council and staff) is responsible for supervising the management of the funds and assessing the performance of the Fund Administrator. They do this on the basis of regular reports. That means that it is essential that the reports they receive are timely and accurate. However, currently, the Risk Manager only reports to the Fund Administrator. The Fund Administrator then reports to the Supervisory Board. The problem with this construction is that in effect the Risk Manager is reporting on the risks of actions taken by a person - the Fund Administrator - who is his line manager and

thus his reporting officer!

In essence, the proposal suggests to add to the risk management function an additional function, namely risk assurance. The risk management function would remain under the Fund Administrator and would provide day to day risk assessment. In order to provide risk assurance, an additional unit will be set up inside Internal Audit (which will require amendment of the Internal Audit charter).

The proposed structure is unusual, and we are not aware of any other organisation that employs a similar one. In particular, complete independence of the risk assurance from the fund administration is still not guaranteed, since ultimately both are under a hierarchical authority of the President. Indeed, both Internal Audit and the Fund Administration are part of DG0, the Presidential area. On the other hand, the Office's structure is unusual in that it is unusual to carry out fund administration "in house". That is to say, it is more difficult to guarantee complete independence than in organisations which have completely outsourced their fund administration (which we suspect staff would not want).

It thus seemed to us that the proposal provided sufficient independence for the risk assurance function. Thus we had no objection *per se* to the concept of setting up a risk assurance function within Internal Audit.

However, we had some problems with how the proposal might work in practice. As stated above, currently the Risk Officer of the funds reports to the Fund Administrator, who, in turn, reports to the Supervisory Board. In turn, the Compliance Officer of the Funds reports directly both to the Fund Administrator and to the Supervisory Board. In contrast to this, the proposal introduces a new reporting line in that the new assurance reports will go from the "Risk Assurance Service" to the Head of Internal Audit, to the Fund Administrator, back to the Head of Internal Audit and, finally, to the Supervisory Board. There is an obvious risk that the content of the reports as produced by the auditors may be altered, lost or outdated due to the delay before they reach the Supervisory Board. The members and Chairman of the Supervisory Board are thus moved further away from the source of the reports. This may interfere in or even hamper

the exercise of the responsibilities of the Supervisory Board.

Accordingly, we gave an opinion setting out that, whilst we agreed that there was indeed a governance problem to be solved, and that we agreed that providing a risk assurance unit in Internal Audit could go some of the way towards alleviating the problem. However, despite this we had concerns with regard to how the proposal foresees the reporting lines to the Supervisory Board.

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

Outsourcing of pension administration

Starting from 2007, the files of new EPO pensioners are administered by a sub-department of the OECD, namely JAPAS (since renamed ISRP). Existing pensioners continued to have their files administered internally by PD HR.

The administration presented a proposal to the GAC to move the files of all pensioners, with effect from 01.01.2013, to the ISRP. On a general note, it is regrettable that the EPO seems to have decided to outsource completely what should be a core activity, namely pension administration. It is likely that, if current trends continue, in future at least two third of our pensioners be in the Netherlands and Germany. Indeed, there will soon be over a thousand in each country. Rather than reducing the functions of the HR department, it seems to us that, in order to meet its duty of care for staff and former staff, the Office should retain an HR department of a size worth the name. A department capable of providing services such as those provided by the "Relations Dutch Authorities" bureau in The Hague. This proposal is a move in the opposite direction.

The proposal itself was rather strange in that it gave lots of details concerning the costs of the proposal, but was short on details on the benefits. Moreover, since the Office (or rather pensioners) by now have five years of experience with ISRP, we would also have expected an analysis of the experiences made up until now to have been presented to the GAC for information.

Moreover, it is one thing to have former staff members administered from day one (i.e. the day they go into retirement) by the ISRP. It is another to move former staff members, who might have retired ten years ago, to another administrator. Given that the ISRP and the Office have different systems, it is quite possible that the handover will cause problems. At the very least, the former staff members will have to be informed that their point of contact has changed. In the GAC, the administration was unable to inform us of any analysis that they had performed as to the sort of problems that might arise, let alone how they would be dealt with. In this respect we pointed out that whilst the Office might want to pass the day to day administration to the ISRP, ultimately the Office remained responsible and liable for the payment of benefits to former staff members. It is clear that not much thought has gone into this. Indeed, it is not even clear when or how former staff members will be informed about the changes.

It is well settled case law (for example ILOAT Judgment 2857) that the administration has to provide the GAC with sufficient information in order to enable it to arrive at a reasoned opinion.

Without information concerning experience of the 2007 outsourcing, let alone information concerning the implementation of the currently proposed outsourcing, we stated that we did not consider ourselves to be in a position to give a reasoned opinion. Instead, we presented the President with a list of the missing information which we considered essential in order to be able to give a reasoned opinion.

The members nominated by the President had no such problems! Rather, they gave a positive opinion on the proposal.

The members of the GAC nominated by the CSC.