Zentraler Personalausschuss
Central Staff Committee
Le Comité Central du Personnel

Munich, 01/06/2023
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Report on the GCC meeting of 3 May 2023

Dear Colleagues,

As is now regrettably normal, the meeting took place by videoconference, with Vice-President Legal / International Affairs (C.Ernst) chairing.

The agenda was as follows:

Amendments to Circular 364 – Implementation of the New Career System – Functional Allowance & Recruitment-related amendments	GCC/DOC 07/2023
Amendments to Circular 411 – Application of Articles 70a and 71 ServRegs concerning young child and education allowances	GCC/DOC 08/2023
Further development of the career system for members and chairs of the Boards of Appeal (CA/23/23)	GCC/DOC 09/2023
Update to Staff Changes List	GCC/DOC 10/2023

The first three documents were "for consultation", the last one "for information". We wrote reasoned opinions on all four documents. They are appended to this report.

The legal route

More often than not, improvements to legal provisions seem to be forced on management by litigation. In this meeting, amendments to Circular 364 (GCC/DOC 07/2023) were prompted by a recent opinion of the Appeals Committee, which concluded that the Office breached its duty of care in its practice of recognising prior work experience. We can speculate that the further development of the career system for the Boards of Appeal (GCC/DOC 09/2023) has also some link with the complaints pending as the Administrative Tribunal of the ILO, although the document carefully avoids any reference to pending litigation, of course.

Red tape

Circular 411 contains practical modalities for implementing the young child and education allowances. The current and manifestly impractical solution caused many problems. We welcome the improvement regarding the proof of payment, but regret that staff once again had to serve as testers for an ill-conceived solution. The road to a fair and balanced solution remains arduous.

For once, multiple consultation

Document GCC/DOC 09/2023 relating to the Boards of Appeal (BoA) had already passed in the Presidium of the BoA “for advice” and in the Boards of Appeal Committee “for opinion”. The President of the BoA was convened in the GCC meeting to present the document in front of senior managers of the Office, whose President (absent in the meeting) repeatedly stresses the independence and autonomy of the BoA.

We for our part consider that a submission to the GCC seems out of place, although it is strictly speaking compulsory according to the legal provisions. There is still some institutional work to be done in order to clarify the respective competences in order to finally make the BoA autonomous and independent from the Office.

A new “New Career System” for everyone?

Document GCC/DOC 09/2023 is also notable in that it creates new individual career opportunities (in the form of additional steps) in view of the collective outstanding performance in the BoA. All Office staff has recently been performing outstandingly and we suggest that that the same possibility should be open to all staff hitting the ceiling of their respective job group 4, 5 or 6, not just to members of the BoA. The administration did not react to this suggestion.

Transparency

In the future, the monthly publication of staff changes will be much less informative, according to document GCC/DOC 10/2023. In 2019, a similar attempt to obfuscate the personnel policy and staff changes had been justified with enhancing the “*clarity and readability of the staff change list*”. The President had withdrawn the document in 2019. In 2023, once again data protection is being misused as a new pretext for a worst result. In the meantime, the Data Protection Officer has been promoted to principal director and moved to the department Procurement and Vendor Management.

Conclusion

At present, the only way for mitigating the negative trends in our conditions of employments seems to be through legal litigation or individual resistance of many staff. This reveals the President's unpreparedness and lack of interest in a real dialogue with the staff and its representation, despite various publicity stunts and announcements to the contrary.

The Central Staff Committee

Annexes:

- Opinions on documents GCC/DOC 07/2023, GCC/DOC 08/2023, GCC/DOC 09/2023 and GCC/DOC 10/2023

Annex 1

Opinion of the CSC members in the GCC on GCC/DOC 07/2023:

Amendments to Circular 364 – Implementation of the New Career System Functional Allowance & Recruitment related amendments (GCC/DOC 07/2023)

This is the opinion of the CSC members in the GCC on the proposed changes as outlined in GCC/DOC 07/2023 on Circular 364. The changes have been discussed in a technical meeting on 28.03.2023 and the administration provided more details in a letter (see Annex 1) in reply to questions raised by staff representatives.

We note that the administration proposes amendments regarding recruitment aspects and functional allowances.

Recruitment aspects

Amendments in Part II (4)(c)

(4) Professional experience prior to recruitment to an EPO post is considered for grade assignment and career development purposes, subject to the conditions below:

(a) It must correspond to that of an employee holding an EPO post in the same job group as regards the type of work and level of responsibility.

(b) It must occur after acquisition of the level of education required under the minimum qualifications for the post in question.

(c) It must be the result of a formal working relationship documented through a contract of employment ~~and~~ or salary slips or any other document from the list set out by the recruitment department. Freelance activities must be documented through tax declarations.

Regarding the proposed amendments in Part II(4)(c), the administration explained that there is a need for a more precise definition of documents (beyond contracts, salary payslips and tax declarations) which can be used as a basis for recognizing prior work experience. The administration proposes to include a reference to a list of accepted documents that would be shared with candidates during the recruitment process.

We appreciate that the administration now accepts that there has been a problem in this part of Circular 364 and with its implementation. We have pointed to the deficiencies of Circular 364 for quite some time. We also noticed that in its implementation, the Office interpreted the term "contract of employment" in a narrow or inconsistent way.

We note that the amendments were motivated by a recent opinion of the Appeals Committee (ApC), which concluded in a case that the Office breached its duty of care in its practice of recognizing prior work experience. This case provides further evidence that in order to encourage the Office to improve or correct current practice or legislation litigation seems necessary. This case adds to a long

list of legal cases that the Office lost (on Freedom of Association, Right to Strike, Mass Emails, etc.), and which could have been avoided through genuine social dialogue. Today social dialogue seems to a large extent triggered by proceedings in front of the Internal Appeals Committee or the Administrative Tribunal of the ILO.

To the matter at hand, we would like to note that a detailed list of documents is necessary so that the many different scenarios of work relationships worldwide can be covered, and applicants are sufficiently informed prior to accepting a job offer by the EPO. Only a transparent and fair recruitment process can guarantee that the Office can satisfy the requirements of Article 5 ServRegs:

> *Recruitment shall be directed to securing for the Office the services of employees of the highest standard of ability, efficiency and integrity (…)*

For the sake of **transparency**, we urge the Office to not only provide the list of documents to the new recruits but to publish and annex the list to Circular 364. Everybody in the Office shall be able to access the list and be informed of any changes. Any change shall be consulted in the GCC as it concerns the conditions of employment according to Article 38(2) ServRegs. This would also allow that the recommendation of the ApC in the aforementioned opinion is satisfied, namely that the "comprehensive list of the types of acceptable documents" is communicated "to all employees".

The administration stated that it would be too cumbersome and time-consuming to consult the list in the GCC every time a change would be applied. We would like to remark that also other documents return on a regular basis for consultation in the GCC, such as the Guide to Cover and the document on the closing days of the Office. If staff representation is involved in the amendment of the list of documents beforehand, we would assume that the consultation in the GCC can be carried out in an efficient manner and would not be cumbersome. The involvement of staff representation would also contribute to rendering the list more complete and clear. This might avoid further future litigation.

Further to the rejection by the administration of the proposal to annex the list to Circular 364, the administration has also refused to share the list with staff representation or staff *at all*, i.e. via publication on the intranet, and stated that only potential candidates would be provided with the list on an individual basis. With this procedure, we reiterate that this does not fulfil the recommendation of the ApC to communicate the list to "all employees". It also does not fulfil the requirement to treat potential candidates in a consistent and equal manner, since there would be no way to verify if the list was being amended over time, or whether the same list was being provided to each candidate, a point also noted by the ApC as a failure of the Office in its previous practice. The administration also failed to provide any reasoning as to why they felt it not necessary to share the list with staff representation and current staff.

On **fairness,** we would like to remark that the current practice is that a majority of postdoctoral research positions are accepted as previous reckonable experience, whereas a minority are not on the sole ground that the documentation provided indicated a source of funding of the term of work experience. This led to a bizarre situation. Some colleagues accumulated the same periods of professional experience which satisfy the requirements of (4)(a):

> *It must correspond to that of an employee holding an EPO post in the same job group as regards the type of work and level of responsibility.*

However, based on a restrictive interpretation of the term “contract of employment” (Part 2(4)(c)), parts of the periods of professional experience have not been recognised. Hence, colleagues with exactly the same professional experience were assigned different entry grades. For example, research activities financed by a fellowship program were not recognised. In this way, these colleagues have been penalised since their post-doctoral work at prestigious research institutions has been disregarded.

This creates a paradoxical situation. On one hand, the EPO claims in its recruitment campaigns that it seeks to attract talents at the “*forefront*” of technology. On the other hand, it does not recognise the work experience of post-doctoral work, which for its very nature, is located at the forefront of technology. This practice also contravenes Article 5 ServRegs as cited above. Some employees of the highest standard of ability and efficiency will not accept offers by the EPO because their work has been evaluated not on its substance but rather by some arbitrary and purely bureaucratic factor. Candidates sought after by the industry because of their high value scientific publications are ignored by the Office for lack of what was deemed the “right” paperwork.

The administration has also stated that its goal is to deal consistently with differing educational and employment frameworks worldwide when determining previous professional experience (see Annex 1). To this end, improvements were previously made to the regulations in order to improve uniformity of recognition of PhDs, such that recognition no longer depends on the funding framework and country in which the PhD was obtained, which staff representation acknowledges as a significant step towards the goal. The creation of the list creates an opportunity to achieve the same unification of recognition of post-doctoral positions. Yet thus far the administration has rejected the position from the staff representation, suggesting that it would be “too complicated”.

However, staff representation has provided a very simple solution. We propose that the arbitrary notion that post-doctoral positions funded by fellowship awards or other tax-free stipends do not constitute a “formal working relationship”, as is the current stance of the Office, be abandoned. It is evident that whether previous experience is recognised or not should not depend on irrelevant details such as the funding framework, as has already been acknowledged by the Office when correcting the treatment of PhD experience. To this aim, we would like to request that the following appears in the list of documents: “post-doctoral position agreements with a university or research institute”.

Amendments in Part II (4)(e)

(d) Part-time work will be considered pro rata~~, provided that the time worked is at least 20 hours a week~~. In the absence of a documented part-time percentage, the professional experience will be calculated against a 40-hour working week.

On the amendments on Part II(4)(e), the administration argues that setting a minimum of 20 hours of part-time would no longer align with modern working time arrangements and diversity and inclusion considerations.

On the amendments of the first sentence, the administration remarked that this concerns a change in the current practice. From now on all relevant part-time work is considered, not only those with at least 20 hours per week. This is especially important for recruits from countries with a standard working week of less than 40 hours (for example, France, which has a 35-hour week), since a 50% part-time work in these countries is disregarded under the regulations currently in place. The amendments would also be part of the efforts of the Office regarding diversity and inclusion. After the birth of a child, colleagues often work part-time. This part-time work is now considered fully and pro-rata as working experience. For these reasons, we welcome and agree with this amendment.

On the second sentence, the administration confirmed that it would accept any documentation that certifies relevant standard working times in a country at a particular time. Examples would be a certification by the employer or documentation on national legislation. The burden of proof is on the side of the newcomer as it is not practicable that HR checks every situation. The second sentence is considered a fall-back option in case a part-time percentage is unavailable.

Amendments in Part II (5)

(5) If a doctoral degree (PhD) was earned within the framework of or concurrently with a formal working relationship, then the period of time leading to that degree is considered for grade assignment and career development purposes~~:~~

~~(a)~~ for any part of that period in which the requirements of paragraph 4 are met.~~; and~~

~~(b)~~ in any event, ~~for an the amount of no~~ the period recognised will not be less than three years.

(6) If a doctoral degree was earned outside and not concurrently with a formal working relationship, only a flat rate of three years' professional experience is considered for grade assignment and career development purposes for the period of time leading to that degree.

As a reason for the amendment in Part II (5), the administration mentioned a need to clarify the wording for PhD recognition. The amendment would strengthen the wording for the PhD flat-rate approach.

We appreciate that the administration agrees with us that the wording of Part II (5) and (6) is unclear and provides different interpretations.

Regarding Part II (5) and (6), staff representation consistently asked that the PhD period be fully recognised. The activities performed in a PhD program fulfil the requirements of (4)(a) as PhD candidates have to actively contribute to research at the forefront of technology. As a fallback position, the periods of activities performed parallel to a PhD program, and which fulfil the requirements of paragraph 4 should be added to the three years flat-rate up to a maximum of the total length of the PhD program. In this way, Article 5 ServRegs would be fulfilled, and the Office would be able to attract a wider pool of highly qualified talents.

The administration stated that it wants to clarify the wording in order to disregard any professional experience from periods of relevant paid work (e.g., university-level teaching or research for industry) that were undertaken within the period between registering as a PhD candidate and completing the program.

We would like to note that extending a PhD period beyond three years is often necessary for researchers with financial responsibilities (such as raising a child) and those from less financially advantaged backgrounds (no parental financial support). These researchers often choose to take on paid work in the period between registering as a PhD candidate and completing the program in order to be able to provide for their family. Hence, in our view, our proposal on how to handle PhD periods with overlapping periods of part-time employment would constitute an important contribution to the Diversity and Inclusion effort of the EPO.

Functional allowances

Amendments in Circular 364, Part III (6) and Annex I

(6) The maximum amount of the functional allowance is defined in Article 12(2) ServRegs. The exact amount of the functional allowance awarded to an employee is defined by the~~ir~~ ~~line manager~~ President, considering inter alia the nature of the tasks, their complexity and strategic priorities.

ANNEX I

Non-exhaustive list of duties involving specific constraints or demands or tasks and responsibilities that may justify the award of a functional allowance:

1. Advisers to areas of high responsibility (e.g. President, vice-presidents, ~~principal directors~~).
2. Management assistants to areas of high responsibility (e.g. President, vice-presidents, principal directors).
3. Management duties that are not reflected in the new grading system and that involve reporting responsibilities.
4. Others: additional tasks or duties such as functions with very high responsibility (*inter alia* political contacts with external stakeholders such as NPOs), risk management in the RFPSS, etc.

The administration provided three reasons for the amendments on Part III (6) and Annex I:

- Administrative developments since the introduction of functional allowances have been mentioned. In the past, functional allowances were calculated depending on grade. Today the amount of the functional allowance depends on the work or task which has been performed and not on an individual's grade.
- The administration mentioned an effort to harmonise posts with functions across the Office. PD advisor's function is no longer in the scope of functional allowances.
- The administration mentioned that since, up to now the President decided on all functional allowances as last instance, the direct involvement of the President would be formalised in Part III(6).

We cannot identify a link between the change to a more direct empowerment of the President and the intended purpose of an alignment of allowances to a given function when the function itself is set by the President.

Regarding the number of recipients of functional allowances, the administration added that approximately 500 staff members per year receive a functional allowance. Out of these 500 staff members, about 80% to 85% are team managers and heads of department who receive a functional allowance of 360€ per month. 98% of functional allowance recipients are in job groups 4 to 6 (see Annex 1). Some managers in high positions also receive a functional allowance but constitute a low percentage of recipients.

Staff representation consistently voiced concerns about the lack of transparency and consultation on the handling of functional allowances. In a letter of 26 November 2021, the CSC wrote to the Heads of Delegation of the Administrative Council (AC) to call the delegations to exercise their supervisory role over the Office to bring it to the proper standards of consultation and transparency.

The letter provides a brief historical overview of functional allowances at the EPO:

- At its introduction in 2014, functional allowances were limited to a maximum of two steps per month of the relevant grade and applicable to employees in job groups 4, 5 and 6 for rewarding managerial responsibilities not otherwise rewarded (e.g., heads of department, team leaders) and temporary extension of duties. From 2015 to 2016, the budget envelope increased from 400.000€ to 900.000€.
- In 2017, the Office introduced functional allowances to job groups 1, 2 and 3 in order to open entitlement to managers. Delegations in the AC expressed concerns that this extension corresponds to 17% of yearly salary, i.e., up to 35.000 € - 40.000 € for the higher job groups. From 2017 to 2021, the budget envelope increased from 1.400.000€ to 2.370.000 €. The last budget for functional allowances was published in an intranet announcement in 2021.
- In 2020 the Office submitted the budget for functional allowances for the last time to the GCC for consultation with the President's Instructions on Rewards 2020. The President's Instructions on Rewards 2021 no longer include the budget for functional allowances. The GCC is neither consulted nor informed on how functional allowances are handled at the EPO. The budget for function allowances is published as one number the annual budget report and in the yearly EPO Social Report.

Given the lack of transparency in the process of distribution of functional allowances and the lack of consultation, staff representation is not in a position to provide an informed opinion on the proposed changes. We asked for the following data for the years 2020, 2021 and 2022 in preparation of the GCC meeting. Unfortunately, the GCC has not been provided with this data.

1. What is the total budget for functional allowances?
2. How many employees received a functional allowance?
3. How many employees receive a functional allowance in each job group and function?
4. How many MAC members receive a functional allowance?
5. What are the minimum, average and maximum amounts of the functional allowances for each job group, function, members of the MAC?
6. How many employees received functional allowances in successive years in each job group, function, members of the MAC?

ANNEX 1 – Letter by the administration in reply to questions by staff representation

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Your comments on proposed changes to Circular 364

Dear CSC members,

Following the technical exchange meeting on 29 March 2023, you raised some comments and questions regarding the four proposed changes to Circular 364, which focus on recruitment-related aspects and the functional allowance. It is important to recall that most questions and comments have been answered during the exchange meeting.

In general, the amendments aim to provide further clarity and transparency to our staff and future recruits. Our goal is to ensure that the Office deals consistently with differing educational and employment frameworks worldwide in recruitment and specifically when determining previous professional experience.

The first amendment concerns a list indicating which type of documents can be presented for documenting a formal working relationship. In view of its practical nature, the list represents a clarification of an administrative step in the recruitment process and will provide transparent information to our future colleagues. Therefore, the list will be shared with them in advance of their entry into service.

It is also important to clarify that a general discussion of types of experience recognised, such as the post-doctoral fellowships as you propose, is not in the scope of the present review.

The second amendment deals with the recognition of part-time work in terms of previous professional experience, without a minimum threshold of 20 hours per week. The change follows our Diversity and Inclusion strategy, and in the future, to the benefit of our staff, any proportion of part-time will be recognised.

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Your suggestion to add a further sentence that reads '*unless additional documentation provides evidence for a different length of working week*' has been analyzed by the services. It was considered that such amendment would represent a duplication of wording and render the understanding unnecessarily complicated. For reasons of clarity, it has thus been decided to maintain the current wording.

The third amendment is related to the recognition of PhDs. The general improvement introduced in 2021 foreseeing a flat rate recognition of 3 years for PhDs, remains in place. However, the application of this scheme over the last years showed that in certain cases, especially where PhD studies were combined with a formal working relationship, the provision could lead to different interpetations. For the sake of clarity, with the proposed change staff who had worked while following a PhD will receive either their work experience recognised or the 3 years flat-rate, whichever is higher.

On the fourth and last amendment regarding functional allowance, the present review is targeted at aligning the phrasing in the circular with the harmonisation approach established between all DGs. As before, the final decision on functional allowance remains with the President. The GCC was informed in 2021 about the harmonised approach, which made the entire scheme fairer.

As already explained in the GCC and in prior communications with staff representation, the functional allowance budget is no longer included as element of the annual rewards instructions but published as part of the annual budget document; hence the same level of transparency is given as before.

Lastly, on your request to have more data on the functional allowance, I note that some figures have been already shared during the technical exchange meeting. Overall, around 500 employees receive a functional allowance. The vast majority is for our team managers in DG 1 and head of departments and over 98% of functional allowance recipients are in job groups 4 to 6.

To recap, the four proposed amendments in Circular 364 aim to bring more clarity and transparency and the Office is committed to continuous improvement

Yours sincerely,

Andreas Sattler

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Annex 2

Opinion of the CSC members in the GCC on GCC/DOC 08/2023

Amendments to Circular 411 - Application of Articles 70a and 71 ServRegs concerning young child and education allowances

The CSC members in the GCC give the following opinion on the amendments to Circular 411 proposed in the document GCC/DOC 08/2023 presented to the GCC for consultation.

The amendments made to Circular 411 only relate to Article 9(2). They do not modify the document in any of its essential aspects and have primarily an administrative effect.

The CSC members in the GCC cannot agree with the document taken as a whole for the same reasons as those originally set out in the opinion of the CSC members of the GCC on GCC/DOC 6/2021 when Circular 411 was first tabled to the GCC in its meeting of 6 July 2021**.** All comments and remarks made then still apply *mutatis mutandis* to the new text, except for Article 9(2).

Regarding the amendment made in Article 9(2) as to the proof of payment, the CSC members in the GCC appreciate and acknowledge that it may reduce the administrative burden on the side of the administration and may have a positive repercussion for the colleagues concerned by eliminating the proof of payment when requesting a reimbursement.

Concerning the practicalities on the application of the circular: two years have elapsed since it entered into force and we have gathered experience as to its concrete implementation. Further to our points made in the above-mentioned opinion on GCC/DOC 6/2021, at least the following drawbacks derived from the implementation of Circular 411 need to be addressed:

1. Due to the external deadlines imposed by the educational establishments, there is too short a time window for the staff member to file the requested documents. This is of particular importance when requesting an advance payment of the school fees. Not meeting such deadline has very negative consequences for the staff member concerned.

2. The unclear distinction between direct and indirect costs has created an unnecessary workload for the colleagues as well as for the administration. We are of the opinion that mandatory fees should remain reimbursable / advanceable, and therefore be treated as such. Additionally, we request that the Office should immediately stop interfering with some schools in the definition of the school fees.

We therefore request that, instead of successive “on-the-go” amendments, an assessment of the full content of the circular be carried out and recommend to draft a revised Circular 411 in close collaboration with the staff representation.

Annex 3

Opinion of the CSC members in the GCC on GCC/DOC 9/2023:

Further development of the career system for members and chairs of the Boards of Appeal (CA/23/23)

Introduction

The document comprises a draft proposal (CA/23/23) to the Administrative Council to modify the career developments possible for members and chairs of the Boards of Appeal (BoA).

With decision CA/D 8/16 of 30 June 2016 and following the introduction of the new career system for the employees of the Office in 2015, the Administrative Council introduced a new career system for the members of the BoA. It was considered that an undifferentiated application of the principles underlying the career system introduced in 2015 to BoA members might cause issues with regard to the independence of the BoA members enshrined in Article 23 EPC. Making an advancement in step or grade dependent on performance could be perceived as conflicting with the independence of the members and chairs of the BoA.[1]

The new career system for BoA members and chairs nevertheless links career progression and individual performance to a certain extent. BoA members and chairs are, upon their first appointment assigned to grade 14 step 1 and grade 16, step 1, respectively. BoA members, but not chairs, can be assigned to grade 15, step 1, provided they had completed at least a term of five years and been recommended for promotion to this higher grade and step by the President of the Boards of Appeal. In the absence of such a recommendation for promotion on re-appointment, they remain at their grade and step. Henceforth, the Administrative Council during its meetings decides on promotions and non-promotions of members of the BoA[2].

The consultation process in the Presidium of the Boards of Appeal (the advice)

The current proposal was submitted for advice to the Presidium, which was consulted on 23 January 2023. In the discussion, several Presidium members expressed their support for the proposal, stating that it would be a clear improvement. Reference was also made to exchanges with members and chairs who were not Presidium members and who were generally in favour of the proposal.

As to the proposal as presented, Presidium members pointed out that:

- not all members of the Board may stand to benefit equally from the proposal in its current form, particularly those members reappointed within five years of the introduction of the current career system[3]. Some members suggested that exceptions be considered where possible.
- the proposal would further link career and performance and could thus have an impact on the members' and chairs' independence. It was suggested to submit an alternative text to

[1] See CA/43/16 Rev. 1, points 34 and 35
[2] See e.g. the Communiqué of the President of the BoA of 22-03-2023 on appointments and reappointments, last paragraph.
[3] No retroactive advancements or promotions will be possible: see point 14 in the GCC document.

the BOAC for consultation. The Presidium Chair (i.e. the President of the Boards of Appeal) stated that he would not submit any alternative text to the BOAC.

The Association of the Members of the Boards of Appeal (AMBA) also commented on the proposal, welcoming the introduction of additional possibilities for (step) advancement in the grade scales. However, AMBA noted that step advancement is dependent only on the performance evaluation of the members concerned. AMBA and the elected members of the Presidium had expressed their concerns in the past that career advancement is based only on performance evaluation and that the President of the Boards of Appeal has absolute discretion to decide on the evaluation of that performance as well as to whether a member or a chair is proposed for promotion or advancement, may influence their individual independence.

AMBA explained its concerns in a letter sent to the BOAC during the discussion of the adoption of the Performance Evaluation Guidelines in June 2020. In May 2020, the elected members of the Presidium also expressed to the BOAC their concerns about document BOAC/5/20 and concluded that the career system and its guidelines are not suitable for the promotion and re-appointment of members of the Boards of Appeal with judicial, in particular final instance judicial functions, Both position papers are appended to the present opinion. In 2023, AMBA is of the opinion that those concerns are still valid

In the vote in the Presidium in January 2023, ten members, including the Presidium Chair, voted in favour and one member against the proposal, with one abstention.

The consultation process in the GCC (the opinion)

Article 38(8) has been added to the Service Regulations in order to "*clarify the respective scopes of competence of the General Consultative Committee on the one hand, and of the Presidium on the other*"[4], by excluding from GCC consultation "*any proposal which concerns the conditions of employment of the members of the Boards within the meaning of Article 1, paragraph 4 and is made by the President of the Boards of Appeal in the exercise of the functions and powers delegated to him by the President of the Office. In such cases the President of the Boards of Appeal shall consult the Presidium of the Boards of Appeal within the terms of Rule 12b(3) of the Implementing Regulations to the Convention.*" However, changes to the Service Regulations (submitted by the President of the Office) do not fall under this exclusion.

The current proposal undeniably relates to essential conditions of employment specific for the BoA, here the career system of its chairs and members, for which the Presidium has already given its advice. In the opinion of its CSC members, the GCC is confronted with an illogical situation:

- A majority of participants in the GCC are senior managers of the Office, who should vote on the proposal.
- The outcome of the consultation flows into the decision-making process of the President of the Office, to present a proposal to the Administrative Council. However, and hopefully, the President of the Office should be neither at the initiative of the current piece of legislation nor involved in any way in its implementation.

[4] See point 10 in document CA/11/19.

Finally, the Office has already expressed support for the proposal and referred to achieving considerable efficiencies in aligning the timeline of the BoA's and Office's career cycle, in the BOAC meeting of 28 February 2023[5]. Consultation in the GCC seems therefore superfluous.

The current constellation clearly evidences that there is still institutional work to be done in order to clarify the respective competences and make the BoA autonomous and independent from the Office. Although they are also elected by the chairs and members of the BoA, as are Presidium members, the CSC members in the GCC will comment on conditions of employment specific to the BoA only with the utmost caution.

The proposal in GCC/DOC 09/2023

The proposal is actually an extension of the new career system for the BoA. It is allegedly put in context with a review of the reform and its effects[6]. The document states that, since the structural reform of the BoA and the introduction of a specific career and performance evaluation system for members and chairs of the BoA, this system has been implemented smoothly and with consistency. However, as of August 2022 and since the entry into force of the new career system for BoA members, the President of the BoA has made 95 recommendations for promotion and 19 recommendations for non-promotion, resulting in a non-promotion rate of 17%. All recommendations for non-promotion concerned technically qualified members. Therefore, there seems to be a consistent bias in performance, or at least the assessment thereof, with technically qualified members performing consistently worse. The CSC members in the GCC are of the opinion that this counter-intuitive effect of the reform would call for a specific explanation and for corrective measures.

The scales for chairs and members have been shortened with an amendment of Article 49 ServRegs following decision of the Administrative Council CA/D 8/16, i.e. with no possibility of step advancement for BoA members and chairs in their respective job group 3 and 2. Currently, members and chairs cannot advance in step throughout their career.

The proposal is twofold:

- With amended Article 11 ServRegs: assignment to grade and step will take place only once, at the first appointment by the appointing authority (i.e. the Administrative Council);
- With new Article 49a ServRegs: any subsequent career progression after the assignment according to Article 11 will take place by "professional development" entailing promotion, advancement, move and assignment, but not with the provisions of current Articles 48 and 49 ServRegs ("step advancement" and "promotion", respectively).

The reasons for the changes – applicable to the whole Office

The proposal argues that the gains achieved in efficiency, productivity and production since the structural reform of the BoA, which are described as being largely due to the extraordinary performance of the BoA members and chairs, would highlight the need to further develop the career system. The proposal also mentions the increasing legal and technical complexity of cases, which will demand even more expertise and flexibility from members and chairs of the BoA[7].

[5] See point 11 in document BOAC/6/23.
[6] See point 6 in the GCC document, referring to point 69 in document CA/PV 148.
[7] See point 7 in the GCC document.

The CSC members in the GCC note that these reasons are used to justify an extension of the salary scales available in higher job groups 2 and 3 for the BoA. The Office management and the Administrative Council have equally praised the outstanding performance of all staff in the past years and the above reasons also apply to other EPO staff, for instance in DG1. The CSC members in the GCC suggest that similar positive developments, actually additional pensionable rewards, should be envisaged for staff appointed by the President of the Office, especially starting from lower job groups.

The proposal has a detrimental impact on independence

Like a majority of the members of the Presidium, the CSC members in the GCC welcome the proposal by which BoA members and chairs are offered enhanced possibilities for professional development.

The personal independence of the members and chairs of the BoA is enshrined in Article 23 EPC; they may not be removed from office during their term of office (Article 23(1) EPC) and they shall not be bound by any instructions in their decisions (Article 23(3) EPC). It is clear that a career system for BoA members and chairs must avoid any possibility of interference with this independence, or the perception thereof.

This was recognised in 2016, when the new career system for BoA members was introduced: In document CA/43/16 Rev.1, point 35, the warning was stated that "*[m]aking an annual or biennial advancement in step or grade dependent on performance may be perceived to conflict with the independence of the members and Chairmen of the BOA.*" Accordingly, it was expressly sought to demarcate the career system for the BoA members and chairs from the career system applicable to other Office employees (see CA/43/16 Rev. 1, point 37) by making step advancement, bonus payments and promotions unavailable to BoA members and chairs (see current Article 48(3), 48a(3) and 49(6) ServRegs).

In all cases professional development was and still is in the current proposal conditioned upon "*a recommendation by the President of the Boards of Appeal based on proven performance and demonstration of the expected competencies over a period of time.*"

In 2020, the AMBA Committee joined the elected members of the Presidium in their conclusion that the career system and its associated Performance Evaluation Guidelines were not suitable for the promotion (and reappointment) of members of the Boards of Appeal, given their final-instance judicial functions. However, the current proposal does not engage in any reflection on possible conflicts with the independence of the members and chairs, but apodictically assures that it "*will continue to fully respect the judicial independence of members and chairs of the BoA and the institutional specificities of the BoA.*[8]"

When objectively compared with the system currently in place, the proposal introduces additional possibilities for career development in the form of step advancement, increasing the role of the President of the BoA by giving him, to an increased extent, the sole authority and absolute discretion in deciding upon each member's performance evaluation and in proposing their career development.

[8] See point 12 in the GCC document.

In conclusion, the proposal does nothing to address the judicial independence of members and chairs of the BoA and the institutional specificities of the BoA.

Finally, the current proposal does not identify any alternatives to address the issue and the CSC members in the GCC regret that the President of the BoA rejected the proposal of members of the Presidium to submit an alternative text to the BOAC for consultation.

Compliance with the provisions in the EPC?

The EPC mentions (re-)appointment of members of the BoA in its Article 11 but it is silent on their career progression. Promotion is expressly mentioned as a power for the President of the Office in Article 10(2)(g) EPC. This probably arises out of the history of the EPC, whose drafters likely did not foresee any other career progression than automatic step advancement for members and chairs of the BoA.

This raises the question of the conformity of the changes in the Service Regulations with the EPC, where professional development is codified independently of appointment (and the associated possible assignment to a grade and step) in the former.

In the GCC meeting of 3 May 2023, the President of the BoA qualified the changes in the ServRegs relating to assignment and promotion as of a non-substantial editorial nature. On the other hand, he confirmed that the changes aim to decouple the entry grade and step (i.e. assignment) upon the first appointment to the BoA from any option for future advancement in grade and step[9]. The question remains as to whether the addition of an article on professional development, i.e. new Article 49a ServRegs, combining the notions of assignment, promotion and step advancement would comply with the word and the spirit of the EPC.

Aspects of this question are currently part of the ongoing litigation at ILOAT.

On financial implications

The CSC members in the GCC had requested in vain that all GCC members be provided before the GCC meeting with the relevant information about how the figures under point 17 of the document have been arrived at, in order to be able to formulate a fully informed opinion on the proposal. In particular, they requested information on the financial assumptions that have been used to arrive at the estimated figure of EUR 22m of immediate impact on the Office's long-term liabilities (essentially pensions). No additional information was given in the GCC meeting.

The responsibility of the President of the Office for employees in all job groups

As already mentioned above, the CSC members in the GCC welcome in general proposals by the President of the Office that will allow employees to make further progress on the salary scale, e.g. in the BoA with an advancement up to grade G15 step 4 for members and up to grade G16, step 4 for chairs. This is particularly the case if there had been no other such options to date.

[9] See also point 10 in the GCC document.

The fact that the Act of Delegation of functions and powers from the President of the EPO to the President of the Boards of Appeal left the power to make such proposals for members, including Chairs, of the Boards of Appeal with the President of the EPO, places a special obligation on him to make fair and balanced proposals for further developments of the career system that also take into account the employees for whom he is the appointing authority.

It is with the greatest regret that the CSC members in the GCC have to note that there is nothing in the proposal that hints to further possibilities for:

- staff in job group 6 who have reached grade G9, step 5,
- staff in job group 5 who have reached grade G10, step 5,
- staff in job group 4 who have reached grade G13, step 5.

These staff have also achieved considerable gains in efficiency and long-term sustainability for the Office (see section 7 of the GCC document). These achievements are also largely due to the extraordinary performance of the colleagues in job groups 4 to 6 (see section 8 of the proposal). For reasons of fairness, it would be deplorable if the President were to neglect lower job groups and only consider senior employees.

This social inequality is particularly striking because the President seems to see room for manoeuvre in the EPC, which in Article 11(3) actually does not provide for promotion opportunities for members and chairs of the BoA, contrary to Article 10(2)(g). Accordingly, the CSC members in the GCC expect improved career opportunities for job groups 4 to 6 as soon as possible.

Final remarks

The proposal cannot be looked at in isolation, independently of the ongoing litigation at ILOAT. The CSC members in the GCC wonder whether the proposal could be a partial reaction to a probable outcome of the pending complaints as regards the crude cutting in the career prospects in the BoA.

The AMBA Committee and the elected members of the Presidium requested in 2020 that the career system be reviewed by an internationally recognised independent body such as the European Network of Councils for the Judiciary (ENCJ), especially as regards its compliance with the requirement of independence. This opportunity has been missed until now.

As already noted in the meeting of the Presidium, the current proposal could not serve to repair decisions taken in the past as parts of the new career reform. It is unclear whether the proposal is a suitable repair for the future.

The CSC members in the GCC

Annexes:

- Presidium's opinion on the Performance Evaluation Guidelines and the Career System of 4 May 2020, as annexed to document BOAC/5/20
- AMBA letter of 24 June 2020 to the BOAC

4 May 2020

Presidium's Opinion on the Performance Evaluation Guidelines and the Career System

Dear Members of the BoAC,

The President of the Boards of Appeal asked the elected members of the Presidium to provide you with advice on the amended performance evaluation guidelines. While the elected members do not have major problems with the few editorial changes with respect to the previous version, they find it appropriate to provide their opinion on the whole document in the broader context of a discussion on amendments to the career system and to the performance evaluation guidelines. We note that Article 9 of the proposed guidelines provides a link between evaluation reports and the career system. In our view, the issues are also so inextricably linked that our main comments belong in a single document.

Summary

We generally welcome a fair and transparent Performance Evaluation System for certain purposes, however we think that the current career system in combination with its Performance Evaluation Guidelines are not suitable for the career development and re-appointment of members of the Boards of Appeal with judicial, in particular final instance judicial functions.

Career System

Although it is hard to explain all the principles, history, issues and problems in a short text, in the following, we try to give a comprehensible summary.

Before the introduction of the new career system, board members were in the A5 grade scale and chairs (then called chairmen) in the A6 grade scale. Step advancement within the grades was automatic (i.e. based on experience), yearly or two-yearly. There was some overlap between the grades. Moving from the post of member (A5) to chair (A6) required a new appointment based on a selection procedure that included a performance assessment and an assessment of the candidate's suitability for the new post. The functions of members and chairs were clearly separated.

The new Office career system introduced "technical" and a "managerial" career paths, each with a hierarchy of job groups and a corresponding range of non-overlapping grades. Step progression is performance-based, and grade advancement is via a promotion.

Job group	**Technical path**	**Managerial path**	**Grade range**	**Old grade**
Job group 2	Principal advisor **Board of appeal chairman**	Principal director	G15, step1 – G16, step 4	A6
Job group 3	Senior expert **Board of appeal member**	Director	G13, step 3 – G15, step 4	A5

All members of the Boards are in the “technical” career path. Members are in job group 3 and chairs in group 2. The previous grades (A5/A6) corresponded to these job groups, but the relevant new grades (G13-G16) are more fine-grained. As a result, there was more than one new grade in each job group and hence a possible **promotion within each job group**. This still applies to members (see below).

In its December 2014 meeting, the Council approved the new system “on the understanding that the provisions regarding appraisal, performance, step advancement, bonus, promotion and all career-related elements for Council appointees as members of the boards of appeal will not apply until specific provisions have been included in documents concerning the organisation and functioning of DG 3...” (OJ 2015, page 4)

In May 2015, the Presidium and the committee of the Association of the Members of the Boards of Appeal (AMBA) noted this in a letter to the joint DG3/Office Task Force responsible for the institutional reform of the Boards of Appeal. They also offered their view that the provisions presented to the Council should be appropriate for persons exercising a judicial function and should have *inter alia*:

- *No performance-related pay (Nr. 55 of CM/Rec(2010)12), which implies:*
    - *A third career path “Boards of Appeal” with a single grade per function;*
    - *Job profiles with core competencies which are specific to the BoA;*
    - *Seniority based step in grade advancement;*
    - *No bonuses;*
    - *A salary package which will allow the BOA to recruit competent members both from inside and outside the Office.*

In September 2015, the Presidium/AMBA met with the Task Force and presented further considerations for an appropriate career system (see Annex 1).

The Office subsequently submitted an orientation paper CA/98/15 on the structural reform. AMBA commented on it in a position paper in December 2015 *inter alia* as follows:

> *7. The proposal puts the Boards back in the Office’s “technical” career path (as defined in Art. 47 ServRegs) [24]. The Council recognised this as inappropriate for the Boards, which is why a transitional system was adopted. Not mentioned is the Boards’ paper regarding a career system. The main points were that the principles of judicial independence and security of tenure require that re-appointment should not be based on performance and that all board members (or chairs) do the same job so that proficiency levels and promotion within a job level make no sense and would give a strange impression to the parties. The paper also proposed various scenarios to address these problems, by having grade advancement at re-appointment.*

In June 2016, the Council approved the reform of the Boards of Appeal (CA/43/16 Rev.1), which put the members and chairs in the same “technical” career system as examiners, but with a modified progression (paragraphs [31-42] and the changes to the ServRegs in CA/D 8/16). Essentially, members and chairs were assigned the fixed grades G14 step 1 and G16 step 1, respectively. There was no possibility of step advancement and the promotion of members from G14/1 to G15/1 (there is no corresponding provision for chairs) was dependent on a

recommendation by the President of the BoA at the same time as reappointment (i.e. once every five years).

This structure was favourable for new members, who would start in the Boards on the grade of G14/1, which corresponded to the old grade of around A5/9, i.e. up to nine years ahead of where they would have been previously. However, it was not so good for experienced members who, being at the same grade, effectively lost around nine years in comparison to new colleagues. Moreover, the only available further advancement was the "promotion" to G15/1, which was conditional on a recommendation determined solely by the President of the BoA.

In July 2016, AMBA commented on this as follows:

> *Instead of a providing a career system appropriate to a judicial body, the link between grade and performance evaluation for the Technical and Legal members may result in substantial differences in remuneration for members doing essentially the same work. This sort of substantial monetary reward for productivity is unknown in Member States (two or three do have a very small fraction of judges' salary dependent on appraisal, and they are strongly criticised for it by the CCEJ).*

Recently, Germany's Federal Constitutional Court held, in their decision BVerfG, 2 BvR 780/16, Rdnr. 59 (unofficial translation from the German original) that:

> *Measures concerning the status of the judge may also be indirect influences on the judicial decision. By limiting such possibilities of influence, the danger of "rewarding" or "punishing" for a certain decision-making behaviour is to be countered….*
>
> *For this reason, the advancement of judges in the pay grades must be standardised by law and must not be left to the discretion of the executive.*
>
> *It would be unconstitutional for the administration of justice to have discretion to assign judges with the same office and the same judicial function to posts of different grades.*
>
> *Furthermore, in order to protect the independence of judges, Article 97 paragraph 1 German constitution (Grundgesetz) contains the fundamental obligation to avoid a hierarchical structuring of the judiciary by creating "Beförderungsämter" (loosely: promotion positions) along the lines of the career development principle under civil service law and to provide for as few promotion positions as possible.*

It is our view that the present career system does not respect these basic principles; the advancement is not standardised by law, but is at the sole discretion of the President of the BoA based on his evaluation of performance, there is assignment of members with the same functions to different grades (G14/1 and G15/1), which is a hierarchical structure that follows the Office's "technical" career path.

The fact that, unlike others in the same job group, members and chairs have no possibility of reaching the final grade and step is a further cause for concern, but is left aside for the purposes of this paper.

Evaluation Guidelines

The President of the BoA has drafted guidelines for the evaluation of the performance of members and chairs (chairmen) of the Boards of Appeal.

However, these do not remove the "discretion on the part of the judicial administration to appoint [Board members] with the same office and the same judicial function to posts of different grades" as objected to in the above noted German constitutional court decision. Rather, they retain the President of the BoA's sole authority over such discretion. This amounts to what is often referred to as a lack of "internal" independence.

Although the Presidium objects to this lack of internal independence as such, the current system would already be improved if the Guidelines specified <u>how</u> the discretion was to be exercised. This would go some way towards the "standardis[ation] by law" of the advancement in grade. It is regrettable that the Guidelines give no guidance at all, but only refer to the evaluation reports in Article 9(1) and need for at least one assessment of *very good* in Article 9(3).

The evaluation report templates in the Annex to the Guidelines, in turn, give no guidance in this respect, since, in the definition of the overall grades 1 and 2, there is no explanation of what is meant by *contributes greatly* or *significantly to the performance and functioning of the* board (see the explanations under "Overall grade", Grade 1 and Grade 2 in item 4 of the Annex), or how any objective judgment of this can be made; moreover, in plain English, they are synonymous. As will be recognised, it is the overall grade, and that alone, which is of importance and which determines possible advancement, and this is entirely at the discretion of the President of the BoA.

Further, it will be noted that, in the Annex to the Guidelines, before point 1 (Objectives), the introduction states that the "focus of the performance evaluation shall lie on quality", and indeed many of the competencies refer to aspects attributable to quality. However, the overall grade which "shall depend on how the individual competencies have been evaluated", is not based on this, but on unstated criteria concerning the contribution to the performance and functioning of the Board, leading to an unpredictable result. An example of this is the inexplicable discrepancy in the promotion rate of legally and technically qualified members.

It should also be understood that the President of the BoA, who exercises discretion on the overall grade, is faced with input from chairs who each evaluate their own Board members without knowing what standard other chairs are using in their evaluations. Simply put, one chair might evaluate their members as "very good" while another chair might evaluate their members as "sufficient", although performance is essentially equal. Thus, even the evaluations provided by the individual chairs will not provide the President of the BoA with the information needed to exercise discretion in an objective manner.

Conclusion

The elected members of the Presidium, the autonomous authority within the Boards of Appeal Unit under R. 12(b)(1) EPC, welcome the opportunity of presenting our view on the career system and its application.

In our view, the present career system and its guidelines are not suitable for the promotion and re-appointment of members of the Boards of Appeal with judicial, in particular final instance judicial functions.

We would respectfully ask that you recognise this and consider initiating improvements.

Alternatively, and as a preliminary step, we would invite you, as the Administrative Council's advisory body in respect of its supervisory duties relating to the BoA (CA/D 7/16, Article 4, paragraph 1), to advise the AC to have an independent review of the system carried out by an appropriate internationally recognised body such as the European Network of Councils for the Judiciary (ENCJ).

Finally, in analogy with the Administrative Council's rules for staff representatives at council meetings, we would request that two members of the Presidium be present at BoAC meetings to discuss this matter (see Rules of Procedure of the AC, Article 7, paragraph 4.1 and Article 14, paragraph 5, which also applies to the meetings of the BoAC, see CA/D 7/16, Article 3, paragraph 4).

Yours sincerely,

The elected members of the Presidium.

AMBA
ARS ET IUS

24 June 2020

Dear Members of the BOAC,

The Committee of the Association of the Members of the Boards of Appeal (AMBA), joining the elected members of the Presidium of the Boards of Appeal, addresses you regarding the career system and its application for the members and chairs of the Boards of Appeal (BoA).

According to Article 1 of the AMBA Statute[1], the purpose of the Association is to monitor issues of relevance for the judicial functions of the members of the boards of appeal, especially with a view to safeguarding their independence and promoting their self-government as members of a judiciary. In this context, the AMBA Committee has expressed opinions and made proposals regarding the reform of the career system of members and chairs of the BoA several times in the past, as is also mentioned in the letter of the elected members of the Presidium (annexed to BOAC/5/20). We believe that the current system and its implementation leave significant room for improvement in respect of safeguarding the judicial independence of the members and chairs of the BoA and note that, when the structural reform of the BoA was adopted in 2016, certain Contracting States and epi considered a review in a few years' time as appropriate[2].

We endorse the views of the elected members of the Presidium in their entirety.

The five-year tenure with possibility of reappointment had already been recognised in the past as being unsuitable for members of a judiciary[3], since security of tenure is a major factor of the required independence of those carrying out judicial functions[4]. The previous career system at the BoA, with one grade per function (A5 for members, A6 for chairs), salary step advancement based only on seniority and reappointment by default[5] had some elements that sought to alleviate this problem. The current career system, however, does not have any of these elements. It introduced, for members, the possibility of promotion within the same judicial function and tied this promotion as well as the reappointment to a performance evaluation. Moreover, as the elected members of the Presidium point out in their letter, the current system and its guidelines do not provide clear, objective and transparent criteria for the evaluation of the members and chairs but give the President of the BoA the sole authority and absolute discretion in deciding upon each member's performance evaluation and in proposing their reappointment and promotion.

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[1] http://www.amba-epo.org/page/get/amba-statute
[2] Minutes of the Administrative Council Meeting of June 2016, CA/PV 148, points 56 et seqq.
[3] Report "Sedemund-Treiber", annex of document CA/84/97, point 33.
[4] Recommendation on judges: independence, efficiency and responsibilities, CM/Rec(2010)12, point 49; ECNJ Report 2014, Independence and Accountability of the Judiciary, page 58 .
[5] see Document CA/81/08, point II, setting out the legal basis for and the practice with regard to the re-appointment of members of the boards before the structural reform in 2016

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As an additional point, the AMBA Committee draws attention to the objection procedure as laid down in Article 11 of the Guidelines for the Evaluation of the Performance of Members and Chairs of the Boards of Appeal ("Guidelines")[6]. Members and chairs who disagree with their evaluation report can lodge an objection against it through an appraisal committee (Article 11(1)). This committee shall examine the objection and review the challenged evaluation report to determine whether it was arbitrary or discriminatory (Article 11(8)). We see two problems in the objection procedure. Firstly, the members of the appraisal committee are appointed by the President of the BoA from among the members and chairs of the BoA (Article 11(4)). Thus they are selected by the President of the BoA and, in addition, they depend on the President of the BoA for their own evaluation and career advancement. It seems that their task as members of this committee will be taken into account in their evaluation report (see point 3 "Additional Tasks" in the evaluation report). Even if their independence in carrying out their task is explicitly mentioned in Article 11(10), this constellation appears to give rise to a conflict of interests. Secondly, the committee, after examining the objection, submits a reasoned opinion on the objection to the President of the BoA, who "shall take the final decision on it, either confirming or amending the challenged evaluation report" (Article 11(9)). The appraisal committee's opinion is not binding, and it is again the President of the BoA who has sole authority and discretion to take a final decision on the objection, without even the requirement to provide any reasoning. In other words, a member or a chair challenging their evaluation report because they consider it arbitrary or discriminatory will have to accept a final decision taken on their challenge by the President of the BoA alone, who had also taken the decision on the contested evaluation report. In our view, the objection procedure as laid down in the Guidelines does not fulfil its expected purpose, i.e. to provide a possibility of a real review of an evaluation report, and is a further risk for the internal independence of members and chairs of the BoA.

The AMBA Committee joins the elected members of the Presidium in their conclusion that the present career system and its Guidelines are not suitable for the promotion and reappointment of members of the Boards of Appeal, given their final-instance judicial functions.

We are also joining them in requesting the members of the BOAC to recognise this fact and consider initiating improvements or alternatively, and as a preliminary step, to advise the Administrative Council to have an independent review of the system carried out by an appropriate internationally recognised body such as the European Network of Councils for the Judiciary (ENCJ).

Yours sincerely,

The AMBA Committee
(Martina Blasi, Georges Zucka, David Rogers, Regina Hauss, Manolis Papastefanou)

.cc to the President of the BoA and the elected members of the Presidium

[6] see document BOAC/5/20, Annex 1

Annex 4

Opinion of the CSC members in the GCC on GCC/DOC 10/2023:

Update to Staff Change list

This is the opinion of the CSC members in the GCC on the proposed changes as outlined in GCC/DOC 10/2023 to the procedure of publishing the staff change list according to Article 31 ServRegs. The changes have been discussed in a technical meeting and the administration provided more details in a letter (see Annex 1) in reply to questions raised by staff representatives.

We note that the administration proposes to discontinue publishing the following pieces of information with the monthly staff changes publication:

a) entry grade of newcomers,
b) reasons for change of administrative status from active to non-active,
c) reasons for termination of service, and
d) nationality.

Furthermore, the administration plans to publish staff changes on a 6-month rolling basis.

Legal considerations

Article 31 ServRegs states that:

> *"All specific decisions regarding appointment and confirmation thereof at the end of the probationary period, promotion, transfer, determination of administrative status and termination of service of an employee shall be communicated to the staff."*

Hence, all information about a decision must be communicated to staff – not only parts of a decision. Data a) to d) are an essential part of the decisions referred to in Article 31 ServRegs. For example, the entry grade is a part of the decision regarding appointment and the associated assignment in accordance with Article 11(1) ServRegs, which provides that:

> *"The appointing authority shall, acting solely in the interests of the service and without regard to nationality, assign to each employee the grade corresponding to the specific post to which he has been appointed pursuant to Article 4, paragraph 1. The President of the Office may lay down further terms and conditions for assignment."*

Even if one were to argue that the decision on whether a candidate is recruited and the decision on the entry grade are two different decisions, it would have to be noted that Article 31 ServRegs specifies "*All specific* decisions *regarding*". A decision on the assignment to the entry grade without a doubt *regards* appointments.

The administration argues that the proposal to discontinue publishing data a) to d) is based on the "data minimisation" principle. At the EPO this principle is enshrined in the EPO Data Protection rules (DPR). Article 4(2)(c) DPR states that:

> *"Personal data shall be:(…)*

c. be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (Article 4(2)c DPR)"

We believe that the "data minimisation" principle and with that the requirements of Article 4(2)(c) DPR are at present fulfilled. The data that are being published are adequate and only data relevant to the decision and no other data are published. For example, information such as marital status, allowances, home address is not published – they are neither part of the decision nor necessary to accomplish a specific purpose.

Further, Article 5 DPR on the lawfulness of processing states that:

"Processing of personal data is lawful only if and to the extent that at least one of the following applies: (…)
a. processing is necessary for the performance of a task carried out in the exercise of the official activities of the European Patent Organisation or in the legitimate exercise of the official authority vested in the controller, which includes the processing necessary for the Office's management and functioning, or
b. processing is necessary for compliance with a legal obligation to which the controller is subject, (…)"

Article 31 ServRegs is a legal obligation as referred to in Article 5(b) DPR. Hence, we believe that the EPO acts lawfully when it communicates the data under a) to d). If the data under a) to d) would not be communicated, then Article 31 ServRegs would be breached. Consequently, staff at the EPO would be adversely affected as their right to be informed would not be fulfilled.

Further, processing of the data a) to d) is necessary for the performance of the tasks of Staff Representation as defined in Article 34(1) ServRegs and of the tasks of the Appeals Committee. Hence, publishing data a) to d) is lawful because Article 5(a) DPR applies.

Further, Article 4 DPR on principles relating to processing of personal data state that:

"Personal data shall be: (…)

e. kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data were collected or for which they are further processed ("storage limitation")"

Article 31 ServRegs does not define an end date of the publication of the data in the staff change list. To set the retention period to, for example, 6 months would therefore constitute a breach of Article 31 ServRegs.

Other considerations

The staff change list as we know it today has existed at least since 2009 (staff change lists since 2011 are available here) and at least since then the data in a) to d) has been published. Since then and even before 2019, the "data minimisation" principle was well established in data protection rules or guidelines at the EPO. To our knowledge, in that period of over 14 years, no Data Protection Officer ever identified any problem or breach of data protection rules or guidelines in the

implementation of Article 31 ServRegs. Moreover, we are not aware of any data subject having challenged the implementation of this article.

In 2019, the administration proposed similar amendments with document GCC/DOC 9/2019, but which did not go as far as the amendments currently proposed. Back then, data protection issues had not even been raised. The proposal aimed to "enhance the clarity and readability of the staff changes list". In any case, the normally highly professional legal experts of the EPO seemed not to have identified any breach of law and finally GCC/DOC 9/2019 has been withdrawn. We observe that since 2019 the principles of data protection at the EPO have stayed the same. Also, Article 31 ServRegs has not changed. Hence, we cannot identify any further reasons to change the implementation of Article 31 ServRegs in the period from when GCC/DOC 9/2019 was withdrawn and today.

It is generally known that sometimes a balancing is to be found between conflicting fundamental rights. For example, the right to be informed might be in conflict with the right to the protection of personal data. We submit that the current practice of how the staff change list is published provides the right balance and that the EPO legal experts and data protection officers did not overlook any breach of data protection over the past 14 years. Thus, the justification by the administration seems pretextual.

In general, transparency is crucial for international organisations for several reasons. It fosters organisational alignment because it empowers members of the organisation to become more aware of and gain a broader and deeper understanding of what is happening. Transparency also helps to build trust, which is critical for efficient collaboration. It establishes an organisation's reliability and trustworthiness and improves internal and external relationships. It is also a barrier against favouritism. This is especially important in international organisations.

The yearly EPO Social Reports provide high-level statistics on recruitment, reasons for changes in administrative status and nationality of employees. However, this information is insufficient to comply with the requirements of Article 31 ServRegs. What is essential is that colleagues know about what is happening in their vicinity and their department. Further, they should be enabled to compare the dynamics of different departments. In this way they can make informed judgements and decisions about their work, job mobility and life at the EPO.

Knowing the reasons for an administrative change from active to non-active status empowers our colleagues at the EPO. These decisions significantly impact their daily work, as when colleagues are inactive and leave for a certain time, the workload increases for the other colleagues in the same department. Knowing whether a colleague is on unpaid, family, or parental leave is crucial as the line management has a certain discretion in deciding on unpaid and family leave. The knowledge of this kind of decisions is also important as a colleagues can better evaluate decisions by the management in regard of rejections and approvals of their own requests they filed for this kind of leaves.

The calculation of the entry grade of newcomers is regulated by Circular 364 and the administration has some discretion in this matter. In addition, the President may, in exceptional cases, decide on a higher grade or step than calculated (Part II(7) of Circular 364). It is important that colleagues know of the entry grade of new colleagues in order to understand what to expect of the new colleagues and how their work environment changes. It is also needed to provide a certain oversight on the

management's decision when recruiting. Colleagues need to know, for example, if in another department new colleagues with a certain professional experience and grade are recruited but not in their own department. In case the workload in their department cannot be managed by the present workforce, by knowing recruitment dynamics the colleagues can react to this in an informed way.

The EPO currently has 39 member states and the dynamics between nationals from different countries sometimes produces challenges. Colleagues should know their colleagues' countries of origin and observe whether there is a bias towards only recruiting nationals from certain countries in their department. Further, Article 11(1) ServRegs states that:

> *"The appointing authority shall, acting solely in the interests of the service and without regard to nationality, assign to each employee the grade corresponding to the specific post to which he has been appointed pursuant to Article 4, paragraph 1. The President of the Office may lay down further terms and conditions for assignment."*

Furthermore, Article 5 ServRegs stipulates that:

> *"(1) Recruitment shall be directed to securing for the Office the services of employees (…) recruited on the broadest possible geographical basis from among nationals of the Contracting States. (…)*
>
> *(3) No particular post shall be reserved for nationals of any specific Contracting State."*

Further, publishing nationality allows colleagues to connect to newcomers of the same nationality. This fosters rapid integration of newcomers and support for settling in a new city and working in a new environment. For these reasons, the (now discontinued) staff magazine *Gazette* published not only nationality but also other information on newcomers, on a voluntary basis.

Hence, we believe that publishing nationality is necessary for the good functioning of the Office.

A similar argumentation applies to the publication of the reasons for termination. Colleagues should have a right to know for what reason colleagues in certain departments are leaving the Office. The fact that colleagues leave the Office because their contract is not prolonged depends on a management decision, and that decision has an impact on the workload and dynamics on the remaining colleagues in a department. This is of particular importance now that *all* new colleagues are subject to a contract renewal decision twice in their careers, and therefore the decisions impact the workload in all DGs and for all staff. There is also a difference between retirement and resignation. Both can depend on phenomena like too much work pressure, a poor work atmosphere, and bad management in a department. Publishing the reasons for termination empowers colleagues at the EPO to make better decisions on their work, job mobility and life at the EPO.

Article 31 ServRegs does not define an end data of the publication of the data in the staff change list. This is in line with what we think is the intention of this article. Colleagues should be able to trace back the career of their colleagues. In this way they are empowered to react in an informed way to management decisions on their own career and can better judge the dynamics in their work environment.

It also has to be noted that the information a) to d) is also essential for staff representation to be able to carry out their statutory function of contributing to the smooth functioning of the Office. The Central Staff Committee is *inter alia* responsible for examining any difficulties of a general nature relating to the ServRegs or any Implementing Rules thereto. The data in a) to d) is also crucial for that staff representation can carry out their task of oversight of the working conditions of staff.

Furthermore, the information a) to d) is essential for the Appeals Committee to carry out its function. As chairs, vice-chairs and members of the Appeals Committee act independently and impartially in the execution of their task, it is important for each of them to have access to such information, for example in the assessment of equal treatment in cases of dispute.

In conclusion, we would like to note that employee empowerment is one of the visions and transparency is one of the key initiatives of the Strategic Plan 2023. Article 31 ServRegs enhances the services of the EPO. It is especially important as the EPO is an international organisation with the mission to serve the public of the 39 member states. It has been part of the Service Regulations ever since they have been adopted 45 years ago in 1977 by CA/D 9/77. The reason was to give transparency to a newly born international organisation.

What should be avoided at all costs is to give the impression that the EPO Data Protection Rules are used as a pretext to render the internal working at the EPO less transparent. On the contrary, it is important in our view that the EPO becomes more transparent and accountable. This is essential for the trustworthiness and reputation of the EPO towards its staff and the public. For example, the publication of step assignments and functional allowances would contribute to that goal.

On the consultation procedure

We consider that the consultation process has been flawed for the reasons listed below.

The document GCC/DOC 10/2023 has been presented to the GCC “for information”. However, as outlined above, the proposed changes directly impact working conditions. Indeed, it regards the implementation of Article 31 ServRegs. Article 31 ServRegs empowers employees of the Office in that it provides a broad overview of what is happening at the Office and in particular in once department. This enables employees to take informed decisions about their work: whether to resign, transfer, file a request for review, etc. For this reason, we consider the consultation to be flawed.

Furthermore, we submitted that information on the following question would be essential for a proper consultation of the General Consultative Committee. Unfortunately, these documents have not been provided to the GCC. For this reason, we consider the consultation to be flawed.

1. Historic considerations on the staff change list as it exists today. The staff change list as we know it today exists at least since 2009. We asked for more information on when the staff change list in its current form has been introduced and on any documentation which can explain why the past/current form of the change list was chosen.
2. Retention policy today. Article 31 ServRegs states that the staff change lists should be published. The staff change lists today are accessible via this link on the new intranet. However, the staff change lists published prior to 2021 are not available. We asked for the retention policy on the staff change lists currently applied.

3. Position by the DPO. The GCC document GCC/DOC 10/2023 is very laconic and expressly based on a "*position… confirmed by the DPO*". The GCC document does not explain which aspect of data protection were weighted against the necessity of publication enshrined in Article 31 ServRegs, in order to justify the departure from the long-lasting current practice, which was never considered problematic under data protection aspects. The position / opinion of the DPO mentioned in the GCC document has not been made available to the GCC members.

Conclusion

For the reasons above, we asked the administration to withdraw document GCC/DOC 10/2023.

ANNEX 1 – Letter by the administration in reply to questions by staff representation

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Date: 02.05.2023

Via email to :centralSTCOM@epo.org

Your letter dated 6 April 2023 with reference sc23038cl

Dear Chair,

Reference is made to your letter dated 6 April 2023 regarding the proposed changes to the publication of the staff changes list. Further thereto, and in addition to what was mentioned in the technical meeting on 24 March 2023 on the proposed changes, we would like to share with you the following.

In your letter, you maintain that the wording of Article 31 ServRegs is to be interpreted in the sense that all details and reasons for certain changes must be communicated to staff. However, Article 31 ServRegs does not indicate which information nor the level of detail thereof is to be communicated.

It is within the remit of the delegated controller to analyse and decide which data needs to appear in the monthly publication to fulfil the purpose of Art. 31 ServRegs. This by balancing the requirement to communicate staff changes to EPO employees on the one hand, with the rights and freedoms of concerned individuals on the other, while observing the data protection principles - notably those of data minimisation (Article 4(2)c. DPR) and purpose limitation (Article 4(2)b. DPR).

Concerning your request that the Office keeps publishing the “reasons” for change of administrative status from active to non-active status and for the termination of service, it is noted that Article 31 ServRegs refers solely to “decisions” (i.e. not to “reasons”).

You also state that Article 31 ServRegs is a legal obligation under Article 5(b) DPR and, therefore, should the personal data not be communicated, it would result in a breach of the communication obligation. Staff would be “adversely affected” as allegedly “the right to be informed would not be fulfilled”.

To this the Office would like to stress that the obligation set forth in Article 31 ServRegs does not fall under Article 5(b) DPR, but under Article 5(a) DPR as Article 31 ServRegs does not explicitly and specifically describe the personal data that needs to be processed to achieve its purposes.

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You further indicate that the processing of personal data would be "necessary for the performance of the tasks of Staff Representation as defined in Article 34(1) ServRegs and of the tasks of the Appeals Committee", and, therefore, communicating said personal data is lawful as it is based on Article 5(a) DPR.

The administration notes that sharing personal data with the CSC and the Appeals Committee may be necessary under certain circumstances and according to specific purposes. However, this does not mean that said personal data must be shared with all EPO employees by the means of the staff changes list set forth in Article 31 ServRegs.

You also point out that Article 31 ServRegs does not define a retention period for the publication of the personal data in the staff changes list, therefore, setting a retention period for such would constitute a breach of Article 31 ServRegs. As for all data protection principles, the storage limitation principle must be observed in all processing of personal data. Since Article 31 ServRegs does not set forth a specific retention period, one must be established by the controller.

The purpose and rationale of the transparency principle (Article 4(2)a. DPR) is not to provide EPO employees with extensive types of information regarding third parties under the assumption of potential usability for their own purposes. The level of detail of the information that will be made available to staff needs to balance always well the right to be informed with the right to the protection of personal data.

Accordingly, since nationality is not mentioned expressly in Article 31 ServRegs and aggregated data on the nationality of EPO staff is published on a yearly basis in the Social Report, it is proposed to remove this data from the staff changes list.

Lastly, on your remark that in 2019 the EPO administration proposed amendments to the staff changes list through GCC/DOC/9/2019 which were not carried through, it is emphasised that in 2019 the Office had a different Data Protection framework, which is no longer applicable. The amendment which took place in the meantime leads to a different interpretation and implementation of the existing provisions, hence the present proposal.

In light of the above and of the clarifications provided already at the technical meeting on 24 March, it is considered that the administration has provided sufficient explanations on the principles underlying the proposed changes.

Yours sincerely,

Andreas Sattler