

To: Chairman Administrative Council
President of the EPO
Member States Delegations

***epi*'s initial comments on the “sustainable financing of the EPO”**

Following the “Workshops on Fee Reform and Sustainable Financing of the European Patent System”, EPO published paper AC 160/09. This paper indicates that the related issues will be raised during the next March AC.

How the subject will be considered is not yet fully determined nevertheless, *epi*, conscious of its importance is willing to participate in the debate from its outset.

The paper identifies what are called “Six emerging principles” that are the basis for further considerations. These principles are not limited to mere financial questions but definitely intend to encompass more general policy.

epi would like to give some initial comments on the questions that are raised in connection with these “principles”.

Through “cost coverage”, the fee policy seems the most urgent subject on which EPO may concentrate its first efforts. So *epi* is willing notably to restate some of its most general views relating to fees, being understood that depending on what will be submitted by the EPO and others as the discussion develops, more detailed comments will be needed.

Preliminary remarks

The whole process was initiated in consideration of possible lack of financing for EPO. At least part of this analysis followed IFRS introduction. This change turned surpluses into deficits and assets into liabilities. Apparently the fear at the EPO is clearly that EPO financial situation is too sensitive to factors that are not or not fully under its control. Among these factors the number of applications may change notably due to the present crisis. But other factors seem also generate

possible negative effects such as the changes in applicant's behavior, or the NPO policy regarding maintenance fees. If reasons exist to consider possible future difficulties, this would not justify increasing, or possibly excessively increasing incomes before these are effectively needed.

Besides, *epi* has reservations, as what could be considered as an easy way out to achieve a sound financing situation, i.e., raising systematically the overall fee pressure. Other questions remain such as improvement of the productivity. If not fully ignored in the reference paper, it is only as a marginal point. Certainly *epi* would like to see more ambitious projects/projections based on productivity.

The following comments are dealing succinctly with the six principles. In bold we put the *epi*'s first views.

A/ Cost coverage.

Clearly no patent office is trying to have the procedural fees covering the "expenses" of the examination. Maintenance fees remain for any patent office a large part of its income. It seems that this trend is not to be changed, but that EPO is nevertheless looking to increase somehow procedural fees. Reference is made notably to what is called a decrease of these fees of 30% over the last 15 years.

When having to give an advice on this question it is necessary to have clearly in mind the figures corresponding to the balance of income and expenses for each of the major steps of the examination and opposition. This may give an idea of what could be the result of any modification in the structure of the fees attached to these proceedings. See the table appearing in AC 72/09 Add.1.

1. Whatever the structure of the fees, epi's first idea is not to increase the overall fee pressure.

If nevertheless an increase is considered the following points are those that appears to *epi* of greatest importance.

2. A constant request from applicants, and epi, is to minimize the starting fees in order not to deter applicants from filing.

In AC 72/09 paper accent is also put on these proceedings that are extremely low in cost coverage as opposition and appeal.

3. If any of the procedural fees needed to be increased, those corresponding to opposition and/or appeal would be the "least unacceptable" for epi.

EPO Workshops also questioned the principle of "free access to patent information". As we are used to that situation the thing is somehow shocking.

4. epi is asking for the "status quo" on the information policy.

B/ Help the “inexperienced”.

The meaning “inexperienced” is obscure. Is this connected to the large amount (60%) of applications that never reach grant? Even according to EPO, many other reasons might explain this situation: loss of interest for the invention for any reason; rejection of the application...

No figures are given indicating that a significant part of these applications are from the “inexperienced” applicants. This is most probably a result of a well managed portfolio by those that are perfectly aware and experienced, and are using the system for what it offers.

All the proposals made by the EPO are supposed to lead to a better financial situation. Whatever the meaning of “inexperienced”, help incurs necessarily a decrease in income for the EPO. This seems at the opposite of what is aimed at.

5. At this stage, and, without proper identification of what it means, epi is not in favor of helping the “inexperienced”.

From another view point, if as said elsewhere, EPO is concerned with the benefit of the patent system for everyone, and only to grant patents for inventions providing significant progress, then there is no evidence that the inventions of “inexperienced” applicants are globally better in meeting this requirement than those of the “experienced” ones. If so: “Why would the inexperienced be helped?” If this is only to favor some categories of applicants –those that may have difficulties when faced with IP costs- this is quite a different question. It has nothing to do with improving the overall examination process.

Consequently this question appears not fully relevant to the idea of “how to finance the system”. It may only be considered in the case the role of the EPO is broadened to include part of what appears presently as relying on national policies. It might be connected to (even if not said so) to the national distribution key. If the EPO was to take care of the question notably of favoring SMEs or the like (supposed to be the inexperienced ones), by having reduced, fees another distribution might be justified. Is this the reason of this second “principle”?

Waiting for clarification it remains that:

6. epi does not support the idea of fee reduction for small entities.

7. epi is of the opinion that helping small entities should remain the responsibility of NPO.

C/ Enhancing certainty in the patenting process

The question that is said to be the “highest priority” surprisingly is raised first in consideration of what is called the “gaming” behavior of applicants. This is not clearly defined, but it appears that the EPO is alleging that applicants are abusing the system in filing applications that are not worth a patent and taking advantage of the length of the proceedings to keep third parties uncertain as to their freedom of use.

The EPO is once more identifying this “gaming” as responsible for a large percentage of applications never maturing in a patent. It is supposed by the EPO that the present system is too liberal vis-à-vis the applicants, notably by allowing unnecessary lengthy proceedings.

Assumption is made that shortening the proceedings is to result in less costly examination. This is not illustrated by any examples. It is not obvious that this will have beneficial effects on the work of the examiners and consequently on the costs of examination. This being said:

8. epi is not opposed to the shortening of the examination proceedings.

9. To that effect, introducing measures to oblige applicants to have applications in formal order from the beginning, such as additional fees attached to this part of the proceedings, is accepted by epi.

10. epi is not opposed to fees for extension of time requested by the applicant.

Maintaining the application in a central position as long as possible is an option that is not necessarily “expensive” for EPO. The benefit of the full EPO maintenance fees might even be better than the 50% collected from a limited number of national offices. This is obviously contrary to the speeding up looked for.

11. epi is opposed to an increase of the EPO maintenance fees.

12. epi would like to enter further dialogue with EPO to better understand the idea of “gaming” that is supposed by the EPO to be responsible for bad functioning of the system.

D/ Reward the successful.

This principle is the reverse of the precedent one, i.e. charging the “extra expenses” incurred by applicants that are making the work more complicated

The idea of “reward” is somehow surprising. The reason for not obtaining a patent is not related, or exceptionally, to unsatisfactory behavior of the applicant. Obtaining a patent is sufficient a reward. There is no need for an additional advantage. Besides this might result in making the applicant more eager to get something whatever the effective use of the patent finally secured. Additionally the EPO is probably also wrong when supposing that getting a patent will automatically result in maintenance of the same for a period of time sufficient to be in the positive cost coverage. What is the benefit if immediately after grant the patent is abandoned to spare the following expenses.

13. epi is opposed to the idea of rewarding the successful.

E/ Indexation of national renewal fees.

We are there in what seems the most sensible question as it concerns national policies and probably will raise the same difficulties as the 50/50 distribution key.

Great discrepancies as those appearing in the various fees collected in each member state, and without any relation to the effective importance of the various markets are certainly raising questions. Even if we are not to expect an immediate change in the attitude, it would certainly be of interest that this question is fully considered by the AC.

The time for such a review has never been so appropriate. Besides the study on the present financing of the EPO, a similar study has been carried out with respect to the distribution of the maintenance fees for the “Community patent”. It has not reached a final agreement but the thing was discussed in detail and a proposal made by the experts of the Commission. This may give a sound basis for further discussion regarding the national maintenance fees for European patents.

14. epi is in favor of further investigation of this question.

F/ Support for evidence based policy

We were given already a large amount of figures, and we are grateful to EPO for these information. The thing now is to ask EPO about anything that appears necessary to give us a proper view on some aspect that were not fully illustrative of the situation and thus allowing more reasonable positions.

For example as indicated above among the 60% of applications that are not reaching grant, it would be necessary to have an idea of the various situations that are leading to this very high figure. It could possibly be detailed with the geographical origin of these applications, the causes of rejections when appropriate, the percentage of these applications that are withdrawn or deemed so at each stage etc.

15. epi approves the efforts of EPO in sharing the results of investigations for better understanding of the factors that influence the patenting policy.

epi, 03.03.2010