



## UPDATE ON PENSIONS

### Summary

*After a series of unlawful and inappropriate decisions in 2007-2008, the EPO is still in the middle of a big mess with regard to its pension schemes. In 2011, Mr Battistelli presented to Staff and Administrative Council the main lines of a global reform aiming at, on the one hand creating a unified DB pension scheme for all Staff, with transitional measures for Staff in place, and on the other hand implementing an internal tax on pensions in order to get rid of the burden of the tax adjustment, which the EPO has to pay since 2008. In order to introduce an internal tax on pensions at the EPO, the President announced to Staff that he intends to link the change of the EPO-PPI to the introduction of the Unitary patent and thereby to organise the necessary diplomatic conference of the EPO in parallel with the conference at the EU. Where are we now?*

### On the timing for the creation of the internal tax

The first part of the new pension reform and an essential element of it is the creation of an internal tax. Since the President has linked his proposal to the introduction of the Unified patent, it is worth stating that the Unified Patent is progressing quickly. The two Regulations, on the Unitary Patent and the translation-regime, have been adopted in December 2013 and a diplomatic conference will likely be organised in February 2013<sup>1</sup> by the EU in order to decide on the Unified Patent Court. It is expected that after ratification, the first Unified Patent could be granted by the EPO some time in 2014.

This means that all the conditions are met for the President to organise his own EPO diplomatic conference as soon as possible. Indeed the process in the EPO is somewhat longer than in the EU. The earliest timing is for the Administrative Council (AC) to decide in March (i.e. next month) to organise a working group, on the conclusions of which the AC could decide in June to organise a diplomatic conference to be held during the October 2013 session of the AC.

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<sup>1</sup> COUNCIL OF THE EUROPEAN UNION, document 18072/12, page 46  
Provisional agendas for Council meetings, during the first semester of 2013  
MEETING ON TUESDAY 19 FEBRUARY 2013  
IN THE MARGINS OF THE COUNCIL  
- International Agreement on the establishment of the Unified Patent Court  
= Signing

## **On the legal framework for the creation of the internal tax**

With the introduction of the Unified patent, all legal conditions should be met to align our PPI with the EU-PPI. Indeed, all EU institutions benefit from the EU-PPI or will make a reference to it. This includes all organisations dealing with intellectual property, being:

### The Organisation for Harmonising the internal market (in Alicante)

Pensioners of the OHIM are subject to the internal tax of the European Communities. This results from article 117 of the Council Regulation on the Community Trade Mark<sup>2</sup>.

### The Community Plant Variety Office in Angers (France)

The procedure was the same as for the OHIM, simply an addition to the Staff regulations and a small article<sup>3</sup> in the Council Regulation 2100/94 creating the CPVO, and the trick was done.

### and the Unified Patent Court (in France, Germany and the UK)

which will also have a reference to it in article 8 of its Statute<sup>4</sup>.

Without an alignment of our PPI with the PPI of the EU, the EPO would remain the only European Organisation in the field of Intellectual Property not benefiting from it and therefore could be considered as a second class organisation in Europe.

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<sup>2</sup> COUNCIL REGULATION (EC) No 207/2009 of 26 February 2009 on the Community trade mark  
<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:078:0001:0042:EN:PDF>  
Article 117  
Privileges and immunities  
The Protocol on the Privileges and Immunities of the European Communities shall apply to the Office.

<sup>3</sup> [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=126825](http://www.wipo.int/wipolex/en/text.jsp?file_id=126825)  
Council Regulation (EC) No 2100/94 of 27 July 1994  
Article 32  
Privileges and immunities  
The Protocol on the Privileges and Immunities of the European Communities shall apply to the Office.

<sup>4</sup> <http://register.consilium.europa.eu/pdf/en/12/st16/st16351.en12.pdf>  
COUNCIL OF THE EUROPEAN UNION  
Brussels, 11 January 2013, document 16351/12  
Subject: Agreement on a Unified Patent Court  
Annex 1 STATUTE OF THE UNIFIED PATENT COURT  
Article 8 (4) The Protocol on the privileges and immunities of the European Union shall apply to the judges of the Court, without prejudice to the provisions relating to immunity from legal proceedings of judges which are set out in this Statute.

It is important to remember that in 2003, both the Netherlands and Austria were in favour of an alignment and Germany accepted to discuss it, if as will now be the case, the EPO was in charge of the Community patent. With the introduction of the Unitary Patent, there should therefore be no reason for these countries to block the President's initiative.

Otherwise it means that the word of the German State is not worth the paper<sup>5</sup> it is written on.

## **The need to adapt quickly our primary law**

The EPO is currently in an absolute legal mess.

The EPO has reformed its invalidity and pension regulations. However these reforms are currently legally challenged in particular by the two major Host Countries. This imposes on the weakest Staff a severe legal uncertainty.

Our current Protocol on Privileges and Immunities does not provide a means for the EPO to directly challenge the Host countries in front of an international Court. The only solution is that the EPO helps Staff members bring cases in front of German or Dutch national Courts.

The transfer of the burden of the tax adjustment to the EPO initiated<sup>6</sup> by Germany is against the principles of International Law, which provides for equal treatment of all Member States.

Furthermore, it has created an inequality of treatment amongst staff due to the lack of a proper Protocol on Privileges and Immunities and a comparable treatment with EU institutions and not only for pensioners.

For example, transfers of pension rights are only allowed by a handful of countries. The Long term Care Insurance is threatened to be taxed in 14 EPO countries. France is now threatening EPO pensioners with a 7% levy on their pensions under certain conditions. Germany does not recognize internal tax on Salary Saving Plans.

The Staff of the EPO itself is deprived of a legal route to challenge these illegal reforms, due to the excessive delays at the ILO-AT.

There is no way out of the current deadlock, other than a change in the EPO-PPI by aligning it with the PPI of the EU.

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<sup>5</sup> CA/124/03, drawn up by Austrian, German and Netherlands delegations  
Austria and the Netherlands are positive about the proposal.....

- l) All three host countries nevertheless are willing to enter into discussions on a possible change of the EPO-PPI including EPO's proposal to align it with the EC PPI in a constructive way. This attitude is based on the following three presumptions to be met:
- The presumption that EPO will be charged to implement the community patent and that the Regulation on the Community patent (RCP) will enter into force (page 12, doc. CA/7/03)
  - The presumption that EPO will be regarded as a non-Treaty EC institution, performing tasks necessary to achieve the EC's goals,
  - And that consequently the EPO will have the same or comparable legal status\* as an EC body performing tasks under Community law; this does not mean that (part of) EPO should become an European Agency.
  - Based on these presumptions it seems appropriate to discuss if EPO staff should receive as much as possible equal treatment with EC staff, whose privileges and immunities are governed by the EC Protocol on privileges and immunities (hereafter: EC-PPI). An effective way of achieving this would be to align the EPO-PPI with the EC PPI.

<sup>6</sup> CA/161/06 leading to CA/D 18/07 and CA/D 25/07

## The need to stop the draining of EPO resources by Germany

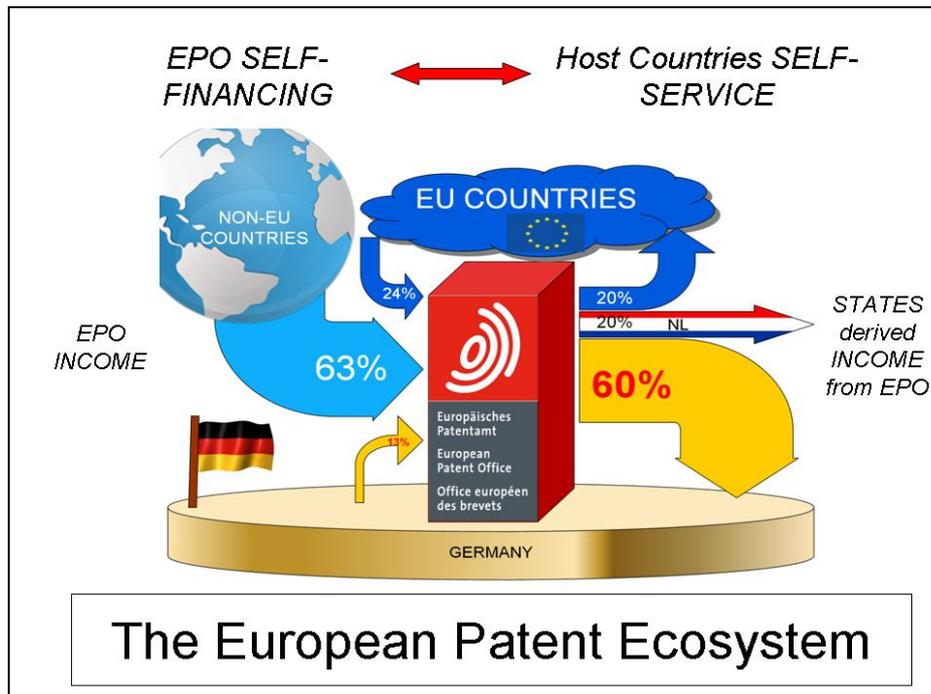


Figure 1 - The European Patent Ecosystem

The transfer of the burden of the tax adjustment to the EPO, however, unduly benefits two Host countries<sup>7</sup> (with 40% of our pensioners residing in Germany and 25% in the Netherlands).

The EPO commissioned a study<sup>8</sup> showing that Germany is hugely benefiting from the EPO presence on it soil.

The recent history has shown exhaustively that the current provisions are by far insufficient to protect the independent functioning of the EPO against the greed of its biggest Host Country, which is currently getting more than 60% of the total income created by the EPO, although the share of German applicants has now fallen to a further decreasing 13%. Already, 63% of the applications come from outside Europe.

The lack of respecting the decisions of the administrative Council also bring a lot of undue income to Germany, be it in the form of the taxation of the invalidity allowance, or taxation of the tax adjustment, or will bring undue income if the threat to tax the Salary Saving Plan is put in practice.

As if all of this was not enough, Germany will also get a part of the new Unified Patent Court in Munich.

<sup>7</sup> CA/12/07 (see table, page 15 for impact in 2006). Unfortunately, we do not have the updated figures from 2008 to 2012, ie since the Member States no longer reimburse it.

<sup>8</sup> [Economic Impact of EPO Presence on the Economy in Germany](#) (extract of the summary)

In Spring 2011, the President of the European Patent Office commissioned an independent economic study from the respected ifo Institut für Wirtschaftsforschung in Munich. The study's main aim was to estimate the overall effects of the two EPO sites (Munich and Berlin) on the German economy, in terms of additional revenue and employment...

4) All in all, ifo estimates that the existence of EPO in Germany generates some EUR 2 700m extra revenue in the German economy, the equivalent of 16 - 17000 jobs (paragraphs 1 and 2). Adding to this the additional items explored in paragraph 3, it can be clearly stated that the presence of the EPO in Munich and Berlin generates some EUR 3 000m extra revenue and over 18 000 jobs in the German economy.

## Latest developments - What will the President do?

In a meeting in January, the President reported to us that talks with some national Governments were difficult, especially (surprise, surprise) with the German Government.

We are convinced that in view of the very big unequal treatment amongst Member States of the EPO, essentially to the benefit of Germany, "doing nothing (or giving up) is not an option for the current President of the EPO".

We are not aware whether he intends to put the subject on the agenda of the March session of the Administrative Council. If he does not, it would be a very worrying signal.

We therefore expect from the President that he will push quickly the steps needed to initiate the change of the PPI to strengthen the independence of the EPO.

However, in Communiqué n°19, the President states:

*For the time being, the political and economic situation in Europe is not favourable to a positive outcome on the issue of **pensions** and the tax situation of our colleagues on retirement in certain member states. However, we should prepare ourselves to present a balanced package for a unified pension scheme to the Administrative Council. As has been extensively discussed and explained, in order to stand any chance of success, such a balanced package would have to take account of universal demographic trends which apply also to the EPO.*

The only positive element of this declaration is that the President could still have in mind a unified pension scheme. This could be good news for the newcomers, **if it is really unified**.

However, unifying the pension schemes can only mean that either **an internal tax is introduced for everybody as promised by the President until now, or** -if the President can no longer implement it as he suggests above- **the tax adjustment is re-instated for the newcomers.**

Under the current unfair conditions imposed by Germany, this would mean an even bigger financial burden for the EPO again to the benefit of mainly Germany<sup>9</sup>!

We consider that in order to stand any chance, such balanced package would have to take account of the fact that the organised creaming off of EPO money by the biggest Host country cannot be increased (if it can't be stopped) and certainly should not be doubled! **There are ways of achieving this, while re-establishing fairness for the other Member States, not increasing the burden on the EPO and preserving staff interests.** These should then be considered.

Except of course if the unified pension system is the next promise to be broken by the President!

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<sup>9</sup> Even with the EPO currently paying for the tax adjustment as a result of CA/D25/07, Germany does not apply the decision of the Administrative Council CA/D 14/08 and taxes the tax adjustment, in violation of article 4 of the PPI of the EPO. It is noticeable that Germany has in 2012 accepted that [EUMETSAT](#), an international organisation located in Germany, become a coordinated organisation and therefore accepted that the pensioners of EUMETSAT will enjoy a tax adjustment paid for by Germany and not by EUMETSAT. One can safely state that the EPO is therefore treated as a third class organisation in Germany (first class is the EU with an internal tax fully recognised, second class is the normal coordinated organisations, third class is the EPO whereby the tax adjustment is taxed by Germany although it is paid by the EPO).

## **What can you do?**

Should the President get cold feet on his program to push for the alignment of the PPI, a vital step, proposed by the President and needed to repair the damage done to the pensions system, will be put into question. We maintain that the current situation is not tenable and seriously disadvantages staff under the NPS or those receiving an invalidity allowance. Since access to legal remedies is currently denied, Staff will have no choice but to consider other means of defending their rights.

Newcomers have been promised a unified Defined Benefit Pension system by Mr Battistelli. They had also been promised, at the time of its introduction, some guarantees on the SSP by Ms Brimelow.

What they currently get is an absolutely unsuitable pension system, with no single guarantee and on top of that Germany threatening to tax the SSP.

SUEPO will keep you informed on developments on this important topic in the coming weeks. You should be ready for strong actions if the Host Country of the EPO is not fulfilling its duties as the Seat of this organisation and if the President is giving in to the organised creaming off of EPO resources by this country.

The Central Bureau of SUEPO