

Zentraler Vorstand . Central Executive Committee . Bureau Central

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EPO Pension taxation and the Council Chairman *- a conflict of interest -*

Introduction

In the recent Administrative Council meeting the taxations of the pensions (CA/12/07) were discussed controversially. The Administrative Council, actively led in this direction by its Swiss Chairman (Mr. Grossenbacher), instructed the Office to make a proposal for the abolition of the refund by the Member States and ultimately by the Office for the June 2007 Council. The Council maintained its position despite protests by the Office that this was socially and legally unjust, and that the deadline set left very little time to prepare and submit any detailed proposal, including the necessary financial information for the Budget and Finance Committee. This event is another demonstration that there is an inherent conflict of interest of the Council delegations who must at the same time represent their governments (and/or national offices) and safeguard the interests of the Office.

Mr. Grossenbacher's incentives

In this context the "Finanzbericht 06/07" of the Swiss patent office¹ ("Eidgenössisches Institut für Geistiges Eigentum" or IGE) provides interesting background information. On page 20 you will find that the refund of the pension taxation for EPO pensioners is paid from the budget of the Swiss Patent Office.

On page 24, bottom, you can find that the salaries of IGE managers are strongly performance dependent. Thus it is clear that at least the Swiss office, but possibly also its President, have an interest in abolishing the refund on the EPO pension taxation. In other words: Mr. Grossenbacher's double function as the President of the Swiss Office and Chairman of the EPO Council puts him in a conflict of interest - and we have seen which interest prevails.

Who pays for whom?

The amount that the Swiss office receives from renewal fees on patents granted by the EPO (44,3% of its gross income and 28.9% of its net income) is also booked as negative for the Swiss Office, i.e. not as money received from the EPO but as *money that must be paid to the EPO*. The paragraph spanning pages 13-14 treats the issue of the financial risks for the Swiss Office. The financial risk of strikes at the EPO is calculated at CHF 5.6 million over two years. The risk due to changes in the distribution key for payment of renewal fees received on EPO granted patents at CHF 22.6 million. With Mr. Grossenbacher acting as he does this risk (strike at the EPO) seems very real.

¹ <http://www.ige.ch/D/institut/documents/102fb06d.pdf>

But maybe we should call for more targeted actions: we invite all staff to send us their suggestions on how to make it clear to the Chairman of the Administrative Council that it is unwise to kick and starve the Council's favourite cash cow ...

A more general conflict of interest

From the financial report, one can also understand that the Swiss patent office fears the introduction of a Community patent since this could lead to Switzerland being designated less and therefore (again) to a loss of income for the Swiss patent office. This prompts the question whether it is appropriate to have as Chairman of the EPO's Administrative Council a person who may be more concerned with the interests of a small national (non-EU) office than with the European patent system as a whole. Can we expect to have Mr Grossenbacher make efforts to try and find solutions for the Community patent if he fears the consequences for his own small office?

A recent and eagerly awaited report commissioned by the British government² pointed at an inherent conflict of interest if the head of a national patent office is to decide on general policy matters, including matters relating to the EPO. The same observation has been made by Mr. Braendli³ (previous President of the EPO), Mr. Bossung⁴ (one of the founding fathers of the EPO, Mr. Sueur⁵ (intellectual property expert of UNICE, now known as BusinessEurope) and, more recently, in the report of the French government's "Commission de l'économie de l'immatériel"⁶. This situation probably explains why most delegations in the EPO administrative council remained silent when Mr Grossenbacher abused his power as a Chairman of the Administrative Council in the question of pensions.

It is high time that the question of the governance of the EPO is asked not only to other delegations of our Administrative Council but to the European Commission.

SUEPO will investigate all means to denounce this abnormal situation in our supreme supervisory body.

The SUEPO Committee

² See http://www.hm-treasury.gov.uk/media/583/91/pbr06_gowers_report_755.pdf

³ See <http://www.suepo.org/archive/ex07029cp.pdf>

⁴ See http://www.suepo.org/public/bossung_en.htm#3

⁵ See http://president.internal.epo.org/documents/AP12_Book_of_Interviews_000.pdf, bottom of page 344: "I am convinced that the way the EPO is managed today (by the Administrative Council) is such that it will mean either the death of the EPO or its transformation into a cash machine"

⁶ See http://www.finances.gouv.fr/directions_services/sircom/technologies_info/immateriel/immateriel.pdf

Annex 1

Eidgenössisches Institut für Geistiges Eigentum Finanzbericht (extract)

Finanzielle Risiken aufgrund der Abhängigkeit von Europäischen Patentjahresgebühren

44.3 % (brutto) resp. 28.9 % (netto) der Einnahmen stammen aus Europäischen Patentjahresgebühren. Abgesehen von den Risiken Patentanmeldung (d.h. ob überhaupt Patente angemeldet werden) und Benennung Schweiz (d.h. ob für ein erteiltes Patent überhaupt Schutz in der Schweiz beantragt wird) ist das IGE davon abhängig, dass das EPA überhaupt Patente erteilt und einen bestimmten Anteil an den Jahresgebühren für erteilte Europäische Patente ans EPA abzuliefern hat. Aus dieser Abhängigkeit ergeben sich folgende finanzielle Risiken:

Wenn das Europäische Patentamt (EPA) plötzlich keine Patente mehr erteilt (z.B. aufgrund eines Streiks des Personals, wie die sog. B84/85-Aktion des Jahres 2000) oder die Schweiz nicht mehr benannt wird (z.B. aufgrund des Gemeinschaftspatents) so würden gelöschte resp. auslaufende Patente nicht mehr ersetzt werden. Das Risiko ist für eine Dauer von zwei Jahren gerechnet worden.

CHF 5.6 Mio.

Gemäss Art. 39(1) EPÜ muss das IGE für jede bezahlte Jahresgebühr für ein Europäisches Patent einen Anteil an das EPA überweisen. Dieser Anteil liegt heute bei 50 % und kann max. 75 % betragen. Die Direktion rechnet damit, dass drei Jahre notwendig sind, um sich an eine solche veränderte Situation anzupassen.

CHF 22.6 Mio.

Annex 2:

Gowers report (extract)

Strengthening Patent Office policy making

6.12 In addition to providing a strong independent board to improve strategic policy making, the Review believes that the Patent Office's internal policy making function should be strengthened to provide a stronger strategic focus and link more effectively with wider themes and other Government objectives.

6.13 The Patent Office's policy function is not clearly distinct from its operational work. While IPID is nominally the lead on policy development, the CEO, the Patents Directorate, the Trade Marks and Designs Directorate and the Finance Directorate all undertake additional policy analysis and provide advice. This creates a potential conflict of interest. The optimal policy for the Patent Office, functioning as a Trading Fund, may not be the optimal policy for Government, particularly in international negotiations. *For instance, national offices may not want international rights to be cheaper to register than national rights, as this would reduce demand for their services. In order to remove the potential for conflicts of interest, a clear distinction between policy and operational functions is necessary. The policy directorate should take the lead on issues of policy, including at the European Patent Office (EPO), Office of Harmonisation for the Internal Market (OHIM) and World Intellectual Property Organization (WIPO), with support from operational colleagues as necessary. It is important that policy officials report through a different management structure to their operational colleagues, and that IP policy takes full account of wider Government objectives.*