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### **FURTHER SUBMISSION FROM BUSINESSEUROPE ON THE LEVEL OF FEES FOR THE EUROPEAN PATENT WITH UNITARY EFFECT**

After presenting a proposal for the determination of the level of fees for the Unitary Patent (UP) (document SC/25/14), BUSINESSEUROPE now wishes to offer comments on the simulations presented by the EPO. These comments take as a basis the TOP 4 simulations and will focus on the 3-validation and 4-validation classes as these two classes together currently represent more than 50% of all granted European patents with the 3-validation class representing alone close to 40% (see document SC/27/13, page 10/23). It is clearly in these two validation classes that the battle for the UP will be won or lost. It is also worth noting that, according to the same slide, the patents in the 1- to 4-validation classes represent close to 80% of the total number of granted European patents.

The EPO has presented two different kinds of simulations, one emanating from the Finance PD (document SC/16/14 relating to TOP 3, 5, 7 and 10 and document SC/19/14 relating to TOP 4 and 6) and the other from DG5 (document SC/17/14 relating to TOP 3, 5, 7 and 10 and document SC/20/14 relating to TOP 4 and 6).

#### **The simulations in documents SC/16/14 and SC/19/14**

These documents relate to simulations of different UP fee levels and their impact on EPO income on the basis of Pure Financial Behaviour and Sensitivity Analyses.

On the slide concerning TOP 4 in SC/19/14 (slide 8), the Model finds that, under the Pure Financial Behaviour hypothesis, no patent (0%) in the 4-validation class will move to the UP. From discussions with several members of the EPO, we understand that the reason for this rather surprising finding is that, in that case, the external costs would always be higher for the UP than for the EP, leading all relevant patent holders to stay with the EP. This is, of course, totally unrealistic. Even if in some cases the external costs for the single UP validation may happen to be higher than for the four national EP validations, the impact of the difference as assessed by the Model is out of proportion with the amounts involved.

The “what if” scenarios might have been able to correct the unrealistic assumption in the Pure Financial Behaviour scenario. Unfortunately, they are themselves based on unrealistic assumptions (variations of 10%, 20%, 30% respectively where 70%, 80%, 90% would have been closer to reality).

The problem resulting from these TOP 4 findings is compounded by the assessment of the behaviour of patent holders in the 3-validation class. The Model finds that none (0%) of these patent holders will move to the UP under any behaviour assumptions. This again is unrealistic. While it makes sense to assess at 0% the percentage under the Pure Financial Behaviour scenario, the “what if” scenarios should take into account the possible interest for patent holders in the 3-validation class in obtaining a broad



coverage for a slightly higher cost. Here, the 10%, 20%, 30% variations would have been more appropriate, although probably conservative.

As a result, we find that the simulations for TOP 4 (as well as for TOP 3, which suffer from the same unrealistic Model assumptions) do not provide a sufficiently realistic basis for a reliable determination of the appropriate level of fees. It is all the more so that, as already mentioned above, the 3-validation and 4-validation classes represent more than 50 % of all granted patents and have therefore a large swinging effect on the assessment of the variations in EPO income.

### **The simulations in documents SC/17/14 and SC/20/14**

These documents relate to simulations of different UP fee levels and their impact on EPO income on the basis of Assumed Penetration Rates for the UP. It is not completely clear if the figures regarding the impact of the various penetration rate scenarios on the EPO revenue for TOP 4 (SC/20/14, page 4) were arrived at independently of the corresponding Pure Financial Behaviour figures given by the Model and discussed above or if they were computed as variations from the Pure Financial Behaviour figures. In the latter case, they might suffer from the same deficiency as the simulations in document SC/19/14.

Regarding the penetration rates taken into consideration for the TOP 4 fee scenario on page 3 of document SC/20/14, some figures would seem at the lower end of realistic assumptions. For the Base UP Penetration, for example, assuming 0% penetration for 1- and 2-validation classes and 30% for the 3-validation class looks rather conservative and the same applies to the 50% penetration rate retained for the 4- and 5-validation classes where the UP versus EP cost deviations are favourable to the patent holders. At the other end of the scale, it could be considered that the more important patents, for which patent holders will not want to use the UP route for fear of a central attack before the UPC, will probably be found in the higher classes, thus making the 65% penetration rate for those classes perhaps too high despite the financial advantages. All in all, however, the simulations in documents SC/17/14 and SC/20/14 seem to offer a much better starting point for the determination of the appropriate level of fees.

### **Additional considerations**

There are two factors that will play a major role in the overall quest for a level of fees that would (1) allow for a balanced budget at the EPO and (2) ensure the highest possible market share for the UP (with its positive consequences on the revenue of most Member States).

The first factor is a proper consideration of the weight of each validation class in the total number of patents involved. The Model was built to do that. Unfortunately, certain assumptions have made it impossible to rely on results produced by the Model, as discussed above. But it is possible to make a rough analysis of the major aspects of the issue. The table on page 10/23 of document SC/27/13 shows that 65% of the patents fall in the 1-3 validation classes and are therefore, under the TOP4 scenario,



potential money earners for the EPO and the Member States in the UP vs EP contest. On the other hand, the 22% of the patents that fall in 5-20 validation classes are potential money losers. Given that the number of patents in the 5-20 validation classes that will move to the UP is likely to be largely independent of the level of fees around the TOP 4 level, it would seem essential to try and maximize the number of patents in the 1-3 validation classes that will move to the UP in the TOP 4 scenario. BUSINESSEUROPE believes that the EPO TOP 4 or even the pure TOP4, are unlikely to achieve that result. This is why it has proposed the flattened TOP 4 approach in document SC/25/14, which at least offers a more attractive perspective after OY 10. To make the scheme even more attractive for patents in the 1-3 validation classes, it could be envisaged to flatten the curve even further so that over time it gets closer to the curve for Germany and crosses earlier the TOP 3 curve.

The second factor is the maintenance rate of UPs over the years. The evolution of the maintenance rate for the UP is extremely difficult to predict. It is hardly disputable, however, that the duration of the maintenance period will be influenced by the rate of increase of the fee from one year to the next. Compared to the pure TOP 4 approach, the flattened TOP 4 curve proposed by BUSINESSEUROPE may cause at least some UPs to be maintained one or more years longer, with a strongly positive effect on the revenue of the EPO and Member States.

BUSINESSEUROPE looks forward to discussing the above comments and considerations in the Select Committee as part of the work on the determination of the schedule of maintenance fees for the European patent with unitary effect.