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SUBJECT: Fee Reform and Sustainable Financing
Document 1: "Support for evidence based policy"

SUBMITTED BY: President of the European Patent Office

ADDRESSEES: 1. Administrative Council (for opinion)
2. Budget and Finance Committee (for information)

SUMMARY

In autumn 2009, four workshops on fee reform and sustainable financing were organized by the Office to explore some alternative policy options and to help the Office to review the possibilities for action regarding the roadmap (CA/100/09). At the workshops six principles emerged for the further discussion (CA/160/09).

This document explains the overall principle 'support for evidence based policy making' under which the discussion on fee reform and sustainable finance and on the remaining five emerging principles should evolve.

The document prepares the route of discussion towards a set of general fee policy guidelines. Policy guidelines and any concrete structural changes or changes to individual fees should build on solid empirical evidence. Evidence based policy making should help the Office to move away from ad hoc decisions on individual fees towards a coherent fee policy.

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I. STRATEGIC/OPERATIONAL

1. Strategic.

II. RECOMMENDATION

2. The Administrative Council is requested to give its opinion on this document.

III. MAJORITY NEEDED

3. Not applicable.

IV. CONTEXT

4. In autumn 2009, four workshops on 'fee reform and sustainable financing' were organized by the Office together with Contracting States and stakeholders to explore some alternative policy options and to help the Office to review the possibilities for action regarding the roadmap (CA/100/09).
5. There was a general understanding at the workshops that the current fee system was probably not sustainable, but that the political case for change was problematic, both from a financial and an economic viewpoint. All workshops concluded that the debate was, above all, a policy matter. Fee policy would have to drive finance and the patent fee system would have to be effective in supporting economic development, in particular innovation.
6. As a focus for the further discussion on 'fee reform and sustainable financing' the following principles crystallised at the workshops (CA/160/09):
1. Support for evidence based policy
 2. Cost coverage, yes but not everything
 3. Targeted help for the 'inexperienced'
 4. Continue enhancing certainty in the patenting process
 5. Reward the successful
 6. Predictability of national renewal fee policies
7. There was a general feeling that for most of these principles more empirical data would have to be collected in order to inform a sound political debate. Policy guidelines and concrete decisions on the structure of patent fees as well as on the level of individual fees should build on solid empirical evidence.

8. The process of evidence based policy making has to be seen within the context of the general role of patent offices. Patent offices provide a service to the economy. The discussion of fees must be shaped by the rationale for the patent system itself.
9. This document reiterates the overall principles under which the discussion on fee reform, sustainable finance and the remaining five emerging principles should evolve. It prepares the route of discussion towards a set of general fee policy guidelines.

V. ARGUMENTS

A. MAIN MESSAGES

10. EPO embarked on the discussion on 'Fee Reform and Sustainable Financing' with the aim of launching a transparent process of consultation with multiple stakeholders while considering all relevant empirical material available. The Office committed itself to transparency in the process of the discussion and supports evidence based policy making as a general principle. Evidence based policy making should help the Office to move away from ad hoc decisions on individual fees towards a coherent fee policy.
11. The Office has shown its commitment to this principle already by the way it has organized the discussion. It started with a broad policy debate at the March 2009 meeting of the Administrative Council. Encouraged by Contracting States the Office has in autumn 2009 put further effort into gathering opinions on the issue of fee reform and sustainable financing. Four workshops with relevant stakeholders were organized.
12. The Office is committed to transparency in this important debate. There should be no surprises for policy makers. Relevant stakeholders will need to be part of the development of fee policy. European and national policies need to be integrated.
13. The Office's objective is to move from the discussion to a set of general fee policy guidelines, agreed between Contracting States and the EPO.
14. The development of policy guidelines will be fuelled by the results deriving from the work on the individual principles mentioned earlier (see paragraph. 6). In order to reach a common agreement on the more detailed principles that should be covered by the guidelines, intensive exchange with Contracting States and other stakeholders is required (cf. roadmap CA/100/09).

B. PRINCIPLES DERIVED FROM THE WORKSHOPS

15. A starting point for the development of fee policy guidelines is the discussion around the five other principles that evolved from the workshops in 2009.
16. *On cost coverage:* At the workshops there was a general recognition that cost coverage alone would not provide a sustainable financial basis for the system. There was also a general understanding that additional elements of cost coverage in patent fees combined with complementary measures would move the patent system towards more sustainability though this represented a major change in policy thinking. The Office will explore these elements more in detail.
17. *On the inexperienced:* The expression 'inexperienced' was felt to be more accurate than 'small and medium sized enterprises (SMEs)'. At the workshops in 2009 it was realized that targeted help for the 'inexperienced' was required. The Office committed itself to carry out its own study (CA/100/09). It will focus in the analysis on the definition of the 'inexperienced' and it will provide additional qualitative and quantitative empirical evidence.
18. *On certainty in the patenting process:* The emerging view from the workshops was that the 'gaming' behaviour for applications that do not lead to grant must be a policy priority. Fees and rules should be more clearly related to measurable behaviour. The patent fee structure should encourage filing behaviour that supports certainty and predictability. The Office will provide analysis on the constitution of the 60% workload cases that are not expected to proceed to grant.
19. *On rewarding the successful:* Today successful patents subsidize new entrants into the system. At the EPO and with most existing patent systems around the world a fee structure supporting this effect was put in place by intention. Changes in the way patent applications are filed, together with the growing number of patent filings that never lead to grant, have contributed to destabilizing the current model. The Office will explore different pricing models and consider their advantages and disadvantages. It will also look into ways that successful applicants could be encouraged and how they might be rewarded.

20. *On national renewal fees*: National renewal fees are an expression of corporate responsibility of contracting states towards the Organisation but in recent years 19 Contracting States have frozen or reduced renewal fees. At the workshops there were many concrete suggestions for improving predictability of national renewal fee policies. The Office will prepare the discussion on national renewal fees by providing an overview of existing national policies. But the fact remains that with fewer patents proceeding to grant, the successful are being asked to pay more for the system. This is a tax on innovation that is increasingly challenged.
21. The five principles will be the focus of ongoing work on fee reform and sustainable financing. The commitment to evidence based policy making may make it necessary to look into additional issues in the course of the debate. Some of these potential areas of inquiry were already mentioned during the workshops in 2009:
- Total cost of opposition and appeals
 - Applications expiring through lack of time
 - Identification of applicants who are interested in progressing their application
 - Patent life times across different industrial sectors
 - Patent withdrawals as a function of pendency and of EPO acting as ISA for search
 - Validation rates for EP-direct versus EURO-PCT type dossiers
 - Interests of companies from non-Contracting States

VI. **ALTERNATIVES**

22. The Office would like to move towards a sustainable fee policy. Ad hoc decisions on individual fees following the necessities created by temporary circumstances do not support this objective.

VII. FINANCIAL IMPLICATIONS

23. Not applicable.

VIII. LEGAL BASIS

24. Not applicable.

IX. DOCUMENTS CITED

25. CA/100/09 (Roadmap), CA/72/09 Add.1-CA/72/09 Add.8, CA/160/09.