Kluwer Patent Blog

EPO Propaganda Master Class – or: How to Justify Higher Fees for Lower Quality Work

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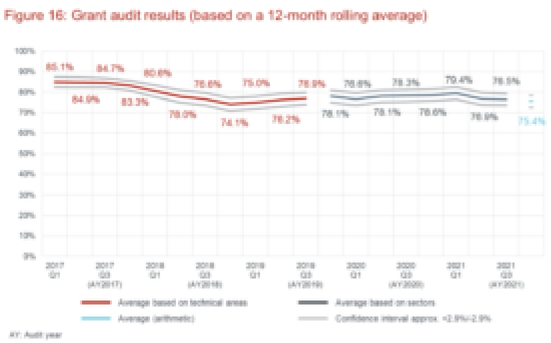
It will be nothing new for regular readers of this blog that I and many others have long been advocating for more well-qualified examiners at the EPO, e.g. here. Obviously, these examiners also need to be given adequate time to scrutinize the ever-increasing number of new patent applications per year thoroughly.

Alas, it will also be no secret that the policy of the EPO upper management, unfortunately endorsed by the Administrative Council, has been exactly the opposite for the last ten years. While the number of new European Patent Applications per year **increased** by about 10%, i.e from 174.500 to 193.500, during the time period from 2018 to end of 2022, the number of examiners actually **decreased** by about 10%, i.e. from 4315 to less than 4000.

On top of this, there has been pressure on the EPO by the Administrative Council (AC) to grant as many patents per year as possible. For example, when the number of grants suddenly decreased in 2022, some AC members got quite nervous. The EPO management was urged to do something to bring the numbers up again. The result was a strong uptick of grants in the first half of 2023 at the expense of searches and communications under Art. 94(3) EPC. In other words, the EPO got in yo-yo mode.

Before this backdrop, it is utterly unsurprising that the quality of European patents has suffered. Even according to the EPO's own metrics, the grant audit results decreased from about 85% to about 75%, as is shown on the following EPO slide:



The complaints by the Industry Patent Quality Charter (IPQC) and others therefore seem to be well-founded and deserve being taken seriously.

This post, however, will deal with some (perhaps unintended and certainly undesired) side effects of the EPO management's policy on the monetary side. Due to the fact that patents are now granted faster than in the past, the EPO meanwhile sees one of its main income streams deteriorating, i.e. the internal renewal fees due before grant. In the EPO's own words:

> For a European patent application, internal renewal fees (IRF) are due by the applicant to the EPO in respect of the third and each subsequent year, calculated from the date of filing. After grant of the European patent, and in order to maintain it, national renewal fees (NRF) are payable to the respective offices of the designated states in which the patent owner has validated the European patent. Each contracting state is competent for determining the respective level of NRFs and the EPO receives 50% of the NRF amounts.
>
> The implementation of Early Certainty since 2014 and efficiency gains from SP2023 have led to a shift in revenue streams, as the EPO has moved away from a backlog situation to an office operating at "cruising speed".

In other words, the EPO now earns less money than before due to its questionable staffing and quality policy.

There are two types of managers in this world. One type recognizes that a policy resulting in both less revenues and criticism by important users perhaps deserves reconsideration and reversal. The other type "doubles down" and goes full cruising speed ahead (aka the "Titanic approach"). I leave it to readers where they would position the EPO management.

In any case, there is now a (real) gap in the EPO's revenues that must be filled up. How do you accomplish this? Very simple – just raise the renewal fees, and in particular those due in patent year 3 and 4, when the patent has not yet been granted, i.e. the EPO's Internal Renewal Fees. Let's assume the EPO accountants told their management that these fees should be raised by a whopping 20-25%, for example from 530 € (now) to 690 € for ordinal year 3, or from 660 € (now) to 845 € for ordinal year 4.

It is predictable that such a massive fee rise will not exactly be very popular with those who will ultimately have to pay them, i.e. the applicants. Thus, the utmost effort must be put in propaganda to make this fee rise palatable to those having to decide on it, i.e. the EPO's Administrative Council. Let's not rock the boat too much.

With that, you now have the appropriate background for the most innocent paper ever published by the EPO, i.e. the *Non-paper on fee-related support measures for micro-entities and fee policy* Non_paper_on_fee_policy_May_2023_1694250623. Would you, as a member of the AC, even bother reading it? Can anyone ever be against *"fee-related support measures for micro-entities"*? Surely not. Let's go for it. Bring it on.

But let's assume, as our fallback position no. 1, that the members of the Administrative Council (and the public) at least bother reading the Introduction of this "Non-paper" to find out what it is exactly about, although they are quite busy people. In this case, paragraph 1 of the introduction will educate them how great and how important SMEs are for the European economy. Well and good. Readers will further understand from paragraph 2 that times are difficult, particularly for

SMEs, due to the past pandemic, supply chain issues, the Russian aggression war against Ukraine, and inflation. Probably heard that before, but certainly true or at least plausible.

The third paragraph then starts with

> Against this background, the EPO is committed to further enhancing the attractiveness of the European patent system by making it even more accessible for innovative smaller entities.

Yes, great. Who would ever expect a fee rise lurking behind such noble intentions? The thing is, though, that micro entities (i.e. companies having <10 employees and ? EUR 2m turnover or balance sheet sum, no subsidiary or owned by larger enterprise) only file a very small percentage of all European patent applications, which is understandable when considering how expensive patents still are and that you should better have made a patentable invention to begin with. Thus, the proposed measures will fortunately not be overly costly for the EPO. Nonetheless, a good idea, which deserves being explained in more detail:

> To achieve this goal, this paper considers new fee-related measures well beyond those already in place. More specifically, the EPO intends to provide further support for these entities by means of dedicated fee reductions, targeting in particular innovative companies with little experience of the European patent system. **It is intended to increase the current financial support by a factor of four.**
>
> Furthermore, in line with the overall objective, a **simplification of the fee structure** is proposed in order to reduce bureaucracy and complexity, while at the same time seizing the opportunity to create incentives for the digitalisation of processes.
>
> Also, the inflation adjustment step of 5% in 2024 as provisionally foreseen in CA/50/22, equivalent to EUR 75m of further income, will not be realised. Instead, it is proposed to have a **targeted increase of certain procedural fees and the internal renewal fees (IRFs)**, which would also fund the proposed support measures, while at the same time addressing recent trends and developments, which are mainly due to the improvement of timeliness at the EPO

Thus, just a “targeted increase” of “certain” procedural and internal renewal fees is proposed to “also fund the proposed support measures”.

You have to melt this on your tongue.

Yet this targeted increase of certain fees is not even the highlight of this master piece of introduction. The highlight is the table at the end of this chapter, reproduced here.

In a nutshell, the EPO proposes four options as a basis for discussion that can be summarised in simplified terms as follows:

Option	Micro Entity support	Procedural fee adjustment	Simplification of the fee structure
Option 1	**20%** reduction on filing, search, examination, designation, grant and internal renewal fees	**5%** increase on search, examination, designation and grant	Elimination of 7 rarely used fees
Option 2	**20%** reduction on filing, search, examination, designation, grant and internal renewal fees	**4%** increase on search, examination, designation and grant	Elimination of 7 rarely used fees
Option 3	**30%** reduction on filing, search, examination, designation, grant and internal renewal fees	**4%** increase on search, examination, designation and grant	Elimination of 7 rarely used fees
Option 4	**30%** reduction on filing, search, examination, designation, grant and internal renewal fees	**0%** increase on search, examination, designation and grant	Elimination of 7 rarely used fees

Looks great, does it not? Micro-entities profit a lot, certain procedural fees are increased (but only by 4-5%, which is well within the range of the current inflation rate), and the fee structure is simplified by elimination of 7 rarely used fees. Fantastic proposal. You can stop here and vote in favour.

Or you read further – which would be fallback position no. 2 – assuming you are a more thorough reader. In this case, you would still have to dig through pages 5-8, which basically tell you the same story again in even greater detail, until you reach Chapter 5 “Financing measure”. And even this chapter starts with a proposal *not to pursue a general inflation adjustment for 2024*. It gets ever better for applicants. Who can be against that?

Only on page 9 of this non-paper an account is given on the EPO’s losses by its “Speed über alles” policy. A typical case is presented, assuming that the patent is now granted in year 5 rather than in year 6 as in the past. This results in a decrease of income of EUR 970 per patent for the EPO. Hmm. Poor EPO. So, what to do about it?

Chapter 5.2 does of course not call it “Fee increase”; it rather proposes a “Linear progression of IRF annuities”. Splendid idea, for who on earth would ever support an quadratic or even exponential progression of such fees? That would sound so greedy. But linear is good, and thus the non-paper is a prime example of modesty and altruism. Here we go:

> It is therefore proposed to adopt a linear progression of IRFs. The proposed IRF fees (see ANNEX 4) reach the same amount for ordinal years 10-20 as today and follow a linear progression until year 10.
>
> The strongest change compared to the IRF of 1 April 2023 would be for ordinal years three to five.

Thus, readers are politely referred to the annexes (our fallback position no. 3), of which only the very last one contains the actual figures proposed. The figures (reflecting a 20-25% fee increase, if you do the maths) are indeed there, but carefully embedded between the words “Option”, “Discount” and a graph that on the face of it suggests that everything stays more or less within the present ranges. You really have to look very closely to the actual figures and the text (fallback position 4) until you realize what this non-paper is actually about: a massive increase of the EPO’s Internal Renewal Fees.

At the end of the day, the EPO has been so "successful" in examining patent applications with "cruising speed" that it now wants more money for lower quality work. This should be a no brainer.

I have occasionally compared the European Patent Organisation with the Holy Roman Empire of German Nation, and the EPO President with Emperor Maximilian I. Another highly interesting parallel between the two is the skillful and abundant use of *propaganda*. Maximilian I. lived at a time when Guttenberg had just invented the printing press and was one of the first rulers who had recognised the propagandistic possibilities of printing, which was expanding with new forms of design; he promoted woodcut and typography and employed the finest woodcutters of his time for that (source: wikipedia). He wrote (or had written) two books, *Theuerdank* (literally: expensive thanks) and *Weißkunig* (white king), reporting on his heroic deeds in the form of a high medieval epic, which was illustrated lavishly.

In particular, *Theuerdank* presented a legend of his own person, who masters all dangers prudently, wisely and bravely. His adversaries *Fürwitz*, *Unfall* and *Neidhard* represent allegories of three vices: wantonness, greed for glory and envy. With them as adversaries, Maximilian succeeded in establishing a myth, a melange of fiction and reality that illustrated his position as victor. It is worth reading the Wikipedia entries on Maximilian and Theuerdank in detail – you may discover even more parallels. Then, re-read the EPO's glossy reports on how heroically the President has improved or is about to improve quality, and you know what I mean. The current non-paper on fee-related support measures for micro-entities and fee policy, a masterpiece of deflection and spin, certainly stands out among these propagandistic measures. The myth of President Robin giving to the poor and taking from the rich (applicants) is all over the place, whereas you need a while before you realize who is actually taking the money from your company and why.

Just to be clear: your money will mainly go to a quasi-autonomous international organisation that is so wealthy that it had no apparent problems to absorb "2.1 billion EUR losses in assets following the deterioration of the financial markets in 2022" (because it is heavily invested in these markets) and a "1.2 billion EUR increase in liabilities" last year (source: EPO Annual Report 2022). Or, perhaps, it did or does have problems and the proposed fee increase is part of the solution. Honi soit qui mal y pense.