

DECISION OF THE SELECT COMMITTEE
OF THE ADMINISTRATIVE COUNCIL
of 15 December 2015
adopting
the Budgetary and Financial Rules

THE SELECT COMMITTEE OF THE ADMINISTRATIVE COUNCIL OF THE EUROPEAN
PATENT ORGANISATION,

Having regard to the European Patent Convention and in particular Part IX (Special
Agreements) thereof,

Having regard to Regulations (EU) No 1257/2012 and No 1260/2012,

Having regard to Rule 2(1)(c) relating to Unitary Patent Protection,

HAS DECIDED AS FOLLOWS:

Article 1

The Budgetary and Financial Rules as set forth below are adopted.

Article 2

These Rules shall enter into force on the date of application of Regulations (EU)
No 1257/2012 and No 1260/2012 in accordance with Article 18, paragraph 2, of
Regulation (EU) No 1257/2012 and Article 7, paragraph 2, of Regulation (EU)
No 1260/2012.

Done at Munich, 15 December 2015

For the Select Committee of the
Administrative Council
The Chairman



Jérôme DEBRULLE

Budgetary and Financial Rules (BFR)

Article 1 Budgeting and budget implementation

- (1) The income and expenditure with regard to the implementation of the tasks entrusted to the European Patent Office pursuant to Article 143 EPC and Rule 1, paragraph 1, relating to Unitary Patent Protection shall be an integral part of the budget of the European Patent Organisation. The Financial Regulations of the European Patent Organisation and the rules for their implementation, as amended, shall apply except where the present rules otherwise provide.
- (2) The President of the European Patent Office shall submit to the Select Committee of the Administrative Council a draft statement of the income and expenditure referred to in paragraph 1. The Select Committee of the Administrative Council shall give an opinion on this draft statement before the corresponding income and expenditure, along with the necessary explanations, are integrated into the overall draft budget of the European Patent Organisation, which is submitted to the Budget and Finance Committee and the Administrative Council of the European Patent Organisation by the President of the European Patent Office. The Budget and Finance Committee and the Administrative Council of the European Patent Organisation shall be informed of the opinion of the Select Committee of the Administrative Council and of the response of the European Patent Office.
- (3) The President of the European Patent Office shall draw up quarterly and submit to the Select Committee of the Administrative Council a budget implementation statement on the income and expenditure under paragraph 1 during the preceding quarter.
- (4) If the actual expenditure exceeds the budget estimates, the statement under paragraph 3 shall be accompanied by an extraordinary report. This report shall provide detailed explanations as to why the estimated costs have been exceeded and propose, where necessary, possible corrective measures. An extraordinary meeting of the Select Committee of the Administrative Council shall be convened by its Chairman in order to discuss the extraordinary report.

Article 1 – Budgeting and budget implementation

1. The participating Member States entrusted the EPO with the tasks referred to in Article 9(1) of Regulation (EU) No 1257/2012 in accordance with Article 143 EPC and Rule 1(1) relating to Unitary Patent Protection (hereinafter "UPR"). In document SC/30/13, the EPO presented some draft principles on how the income and expenditure with regard to the implementation of these tasks could be integrated into the budget. Accordingly, Article 1(1) of the Budgetary and Financial Rules (hereinafter "BFR") provides for the overarching principle of full integration of said income and expenditure into the budget of the European Patent Organisation.
2. The Financial Regulations of the European Patent Organisation and the rules for their implementation (hereinafter "FinRegs") contain the provisions other than those laid down in the EPC governing the finances and budget of the European Patent Organisation (see Article 50 EPC in conjunction with Article 1(1) FinRegs). The implementing rules of the FinRegs referred to in Article 1(1) BFR encompass for instance the Directive on applying Articles 40 and 40a of the FinRegs and the Instructions for the implementation of certain provisions of the FinRegs, as far as is relevant for the purpose of the present Rules.
3. Pursuant to Article 1(1) BFR, the FinRegs shall apply, as amended, except where the present rules otherwise provide. The legislative technique chosen is that of a dynamic reference.
4. Article 1(2) BFR provides for the procedure to be followed for the purpose of implementing Article 1(1) BFR: the President of the EPO will submit to the Select Committee the income and expenditure referred to in Article 1(1) BFR in the form of a statement which will then be integrated into the annual draft budget of the Organisation. The Select Committee will be invited to give an opinion in due time on this statement before the income and expenditure referred to in Article 1(1) BFR is integrated into the overall draft budget of the Organisation and submitted to the Budget and Finance Committee and the Administrative Council of the European Patent Organisation by the President of the EPO (see document SC/30/13).

5. Article 1(3) BFR provides for a budget implementation statement to be drawn up quarterly by the President of the EPO. It will contain a specific report on the income and expenditure referred to in Article 1(1) BFR during the preceding quarter (see also Article 2 BFR, which provides for an establishment of overall fee income and an estimate of the overall costs incurred by the European Patent Organisation on a quarterly basis, as well as Article 4(1) BFR, which provides for a quarterly payment to the participating Member States).
6. Article 1(4) BFR contains a mechanism on cost control and monitoring. If the actual expenditure, i.e. the actual costs, exceeds the budget estimates, the statement under paragraph 3 will be accompanied by an extraordinary report. This report will provide detailed explanations as to why the budget estimates have been exceeded. These extraordinary reports will provide the participating Member States with the necessary tools for the continuous close monitoring of the costs and will ensure that, where necessary, corrective measures can be taken.

Article 2 Establishment of overall fee income and of overall costs

- (1) The European Patent Office shall, on a quarterly basis, establish the overall income from the fees paid to the European Patent Office under the Rules relating to Fees for Unitary Patent Protection.
- (2) The European Patent Office shall, on a quarterly basis, provide an estimate of the overall actual costs incurred by the European Patent Organisation for the additional tasks referred to in Article 9, paragraph 1, of Regulation (EU) No 1257/2012 and entrusted to the European Patent Office pursuant to Article 143 EPC and Rule 1, paragraph 1, relating to Unitary Patent Protection, including the costs of the compensation for translation costs referred to in Article 4, paragraph 1, of the Rules relating to Fees for Unitary Patent Protection, in accordance with Article 146 EPC.
- (3) The income and costs under paragraphs (1) and (2) respectively shall be accounted for under the relevant articles of the European Patent Organisation's budget.

Article 2 – Establishment of overall fee income and of overall costs

1. Article 2(1) BFR provides that the EPO shall, on a quarterly basis, establish the overall income from the fees paid to the European Patent Office under the Rules relating to Fees for Unitary Patent Protection (hereinafter "RFeesUPP"). The fees laid down in RFeesUPP are the following: renewal fees and any additional fees for their belated payment (Article 2(1), items 1 and 2, RFeesUPP), fee for re-establishment of rights (Article 2(2) RFeesUPP), the additional fee referred to in Rule 10(4) UPR (see also Article 4(2) RFeesUPP) and the administrative fees and expenses and prices under Article 5 RFeesUPP. Article 2(2) BFR provides for the establishment, also on a quarterly basis, of an estimate of the overall costs incurred by the European Patent Organisation. This reflects the fact that payments to be effected to the individual participating Member States will be made on a quarterly basis (see Article 4(1) and (2) BFR).
2. Article 2(2) BFR specifies that the EPO will provide an estimate of the overall costs incurred by the European Patent Organisation for the additional tasks entrusted to the EPO. These overall costs exclusively relate to the administrative tasks referred to in Article 9(1) of Regulation (EU) No 1257/2012, which concern the phase following the grant of a European patent, i.e. the post-grant phase. In accordance with Article 146 EPC, these overall costs include the costs for compensation for translation costs under Article 4(1) RFeesUPP in conjunction with Rule 11 UPR.
3. The EPO will make every effort to permanently keep the costs referred to in Article 2(2) BFR, which are to be borne by the participating Member States, at the lowest possible level. This reflects the general commitment of the EPO to cost efficiency already laid down in Article 2 of the FinRegs (which apply pursuant to Article 1(1) BFR), which reads as follows: "The financial administration of the Organisation shall be conducted in accordance with the principles of economy and sound financial management".
4. Moreover, the provisions ensuring sound budgeting of the costs (see the annual draft statement to be submitted to the Select Committee for opinion under Article 1(2) BFR and the quarterly budget implementation statement under Article 1(3) and (4) BFR, which will enable a comparison of the actual costs with the budget estimates) will allow the participating Member States to continuously monitor the costs.

5. The method of calculating the costs will be provided for in the FinRegs as prescribed under Article 50(e) EPC. This will take place at a later stage, and in any event before the unitary patent becomes operational at the EPO. A draft of the revised FinRegs will then be presented to the Select Committee for opinion, before it is submitted to the BFC and the Administrative Council (see documents SC/30/13 and SC/27/14 for the general approach with regard to costs).
6. Article 2(3) BFR sets out that the income and costs under Article 2(1) and (2) BFR will be accounted for under the relevant articles of the European Patent Organisation's budget. As provided for in Article 1(2) BFR, the required details will be presented in the form of a statement of income and expenditure.

Article 3 Determination of the amounts to be distributed

The European Patent Office shall determine the amounts to be distributed to the participating Member States, in accordance with the distribution key laid down in Article 2 of the Rules relating to the Distribution of Fees amongst the participating Member States, from the overall income referred to in Article 2, paragraph 1, after deducting firstly its 50% share of the renewal fees and of any additional fees for their belated payment, and secondly the overall costs referred to in Article 2, paragraph 2.

Article 3 – Determination of the amounts to be distributed

1. Article 1(2) of Regulation (EU) No 1257/2012 and recitals (6) and (16) of said Regulation stipulate that the Regulation constitutes a special agreement – attributing unitary effect to European patents – within the meaning of Article 142 EPC. Consequently, the provisions of Part IX of the EPC apply to European patents with unitary effect. This has been confirmed by the CJEU in its recent decision C-146/13 (see in particular N 70).
2. As regards the uniform renewal fees payable for unitary patents to the European Patent Organisation under Article 11 of Regulation (EU) No 1257/2012, the EPC in Article 147 in conjunction with Article 39 EPC – to be applied *mutatis mutandis* – prescribes that the proportion thereof to be remitted to the participating Member States shall be 50%. This is duly reflected in Article 13 of Regulation (EU) No 1257/2012, which confirms the principle laid down in Article 147 EPC by stating that the EPO shall retain 50% of these renewal fees.
3. As regards who is to bear the costs of carrying out the additional tasks given to the EPO, Article 146 EPC contains a clear and binding provision. Article 146 EPC provides that where additional tasks have been given to the EPO under Article 143 EPC, the group of EPC Contracting States shall bear the expenses incurred by the European Patent Organisation in carrying out these tasks. This provision ensures the principle of equal treatment between Member States and guarantees that EPC Contracting States not participating in enhanced co-operation concerning unitary patent protection do not have to contribute to the financing of tasks the Office is carrying out on behalf of a group of Contracting States only. If these additional costs coming from post-granting activities were to be borne partially or totally by the EPO, it would mean that the Office would receive less than 50% of the renewal fees from some of the Contracting States, in clear breach of Articles 39(1) and 147 EPC.
4. Part IX of the EPC does not contain any provisions concerning the way the participating Member States have to fulfil their obligations to cover the aforementioned costs, be it through special payments, contributions to the EPO, or by deductions from the participating Member States' 50% share of the renewal fees. With Article 10 of Regulation (EU) No 1257/2012 (principle of expenses), the participating Member States have laid down that the expenses incurred by the EPO shall be covered by the fees generated by unitary patents.

Read in conjunction with Article 146 and Article 39 EPC this can only mean that the costs are borne (instead of special payments of the participating Member States) by deducting them – in addition to the deduction of the EPO's 50% share of the renewal fees and of any additional fees for their late payment – from the overall fee income.

5. On the basis of the above, proposed Article 3 BFR provides that the EPO shall determine the amounts to be distributed to the participating Member States, in accordance with the distribution key laid down in Article 2 of the Rules relating to the Distribution of Fees amongst the participating Member States (hereinafter "RDF"), from the overall income referred to in Article 2(1) BFR, after deducting firstly its 50% share of the renewal fees and of any additional fees for their belated payment, and secondly the overall costs referred to in Article 2(2) BFR.
6. As a result, the EPO will, in a first step, establish the overall fee income pursuant to Article 2(1) BFR (see the list of fees in explanatory remark 1 to Article 2 BFR). This fee income encompasses all fees paid to the EPO under the RFeesUPP and collected on behalf of the participating Member States. From this overall fee income, the EPO will then, in a second step, retain 50% of the renewal fees and 50% of any additional fees for their belated payment (in accordance with Article 147 EPC), as well as the costs referred to in Article 2(2) BFR (in accordance with Article 146 EPC). The remaining amount will then be distributed to the individual participating Member States under the modalities set forth in Article 4 BFR, using the distribution key laid down in Article 2 RDF. In practice, this means that the administrative fees will be netted with the costs for the administration of the unitary patent.

Article 4 Payments

- (1) The payment of the amount referred to in Article 3 to the individual participating Member State shall be made before the end of the month following the quarter in question.
- (2) Where the determination of the amount to be distributed according to Article 3 leads to a negative result which would amount to a payment obligation of the participating Member States under Article 146 EPC in a given quarter, the negative amount shall be withheld from the next quarterly remittance for a period not exceeding twelve consecutive quarters. Article 39, paragraph 4, EPC and Article 17, paragraph 1, of the Financial Regulations of the European Patent Organisation shall apply *mutatis mutandis*.
- (3) A yearly liquidation of the income and expenditure referred to in Article 1, paragraph 1, shall be made upon approval by the Administrative Council of the European Patent Organisation of the annual accounts. Any ensuing final payment to the participating Member States shall be made before the end of the month following the date of this approval. In the case of a negative result, paragraph 2 shall apply.
- (4) If the payment under paragraph 1 is not effected fully by the due date, the European Patent Office shall pay interest from said due date on the amount remaining unpaid. Article 17, paragraph 1, of the Financial Regulations of the European Patent Organisation shall apply *mutatis mutandis*.

Article 4 – Payments

1. Article 4(1) BFR sets out the due date for the payment to be made by the EPO to the individual participating Member State of the amount determined under Article 3 BFR.
2. Where in a given quarter, the estimated costs referred to in Article 2(2) BFR are higher than the income provided for in Article 2(1) BFR, the determination of the amounts to be distributed would in principle result in a payment obligation of the participating Member States in accordance with Article 146 EPC. This could in particular occur in the starting phase. For this reason, Article 4(2) BFR provides that where the determination of the amount to be distributed according to Article 3 BFR leads to a payment obligation of the participating Member States in a given quarter, said amount shall be withheld from the next quarterly remittance, i.e. carried forward to the next quarter. This carrying-forward is however limited to a maximum of twelve consecutive quarters.
3. Article 39(4) EPC applies *mutatis mutandis*, meaning that if a payment by the participating Member States is not remitted fully to the EPO by the due date, said States shall owe interest from the due date on the amount remaining unpaid. Article 17(1) FinRegs also applies *mutatis mutandis*. It sets out the interest rate which is to be calculated in each accounting period at the average rate obtained by the EPO on sums invested in time deposit accounts the previous year.
4. Since the costs referred to in Article 2(2) and Article 3 BFR are based on an estimate, a yearly liquidation, as provided for in SC/30/13, will determine the actual costs incurred by the European Patent Organisation. Therefore, Article 4(3) BFR provides that a yearly liquidation of the income and expenditure referred to in Article 1(1) BFR shall be made upon approval by the Administrative Council of the European Patent Organisation of the annual accounts (usually in June). In the case of a positive balance, any ensuing final payment to the participating Member States is to be made before the end of the month following the date of this approval. If the balance is negative, paragraph 2 applies, i.e. the negative amount will be withheld from the next quarterly remittance for a period which may not exceed twelve consecutive quarters. In such a case, the next quarter within the meaning of paragraph 2 will be the quarter following the date of approval by the Administrative Council of the annual accounts.

5. Article 4(4) BFR lays down the obligation for the EPO to pay interest if the payments under Article 4(1) BFR to be made by it to the participating Member States are not effected fully by the due date. Article 17(1) FinRegs applies *mutatis mutandis*, i.e. the interest rate set out therein (see explanatory remark 2 to Article 1 BFR) applies.

Article 5 Administrative instructions

The President of the European Patent Office may adopt administrative instructions with respect to the implementation of Articles 1 to 4 after consultation of the Select Committee of the Administrative Council.

Article 5 – Administrative instructions

1. Article 5 BFR provides for an enabling clause allowing the President of the EPO to adopt administrative instructions with respect to the implementation of Articles 1 to 4 BFR after consultation of the Select Committee. The purpose of such administrative instructions is to regulate any details required for the implementation of Articles 1 to 4 BFR, in particular with respect to technical issues such as refunds, liquidation procedures or bank payments.