

The Office's reply

EXECUTIVE SUMMARY

II. The EUIPO effectively implemented the EU trade mark and design regulation and provides strong trade mark and design titles valid throughout the whole European Union. Demand has been steadily increasing (46% in the last 5 years for EUTM) and the Office has been dealing with these high volumes ensuring optimal service levels and a high level of customer satisfaction (88% satisfaction rate according to the last customer satisfaction survey), while keeping costs under control. The EUIPO has obtained and maintained all relevant ISO certificates¹ and its excellence in various areas has also been recognised internationally through several awards².

VI. With regard to trade marks, the legislator opted for including the fees in the basic regulation and has laid down the criteria on which the fees are set in its preamble. The fees are determined according to these criteria and they fulfil their objectives. The sustained increase in demand indicates, in EUIPO's opinion, that their level and structure do not constitute any obstacle. Regarding designs, the evaluation of the *acquis* by the European Commission included an analysis of the structure and level of the fees.

VII. The legislator has set a different budgetary and discharge procedure for all the EU agencies that are fully self-financed and therefore not implementing the EU Budget. The general discharge procedure applied to subsidised agencies is to hold the relevant body accountable for the implementation of the EU budget before the European Parliament and the Council, i.e. the two authorities responsible for the EU budget. If no funds from the EU budget are involved, there is no legal justification to have the European Parliament and the Council responsible for the discharge.

The EUIPO is a fully self-financed agency, which is not imposing any burden to EU tax payers. The EUIPO counts on financial autonomy, financing all its activities with the revenue obtained from the fees paid by customers, mainly industries.

The governance model of the EUIPO is generally aligned with the Common Approach on Decentralised Agencies, it takes into account its specific context and its financial regulation is generally aligned with the framework financial regulation applicable to EU agencies and bodies.

¹ Quality (ISO9001), Customer management (ISO10002), Information Security Management (ISO 27001) and Health and Safety (ISO45001)

² Most innovative IP Office in the world according to the prestigious World Trade Mark Review, Silver Award from the European Contact Centre and Customer Service Awards for the "best use of customer insight", Digital Communication Awards and shortlisted for 2 achievements at the European Ombudsman Award for Good Administration

In this context, the EUIPO does not consider that the discharge mechanism confirmed by the legislator during the last legislative reform entails weaknesses in terms of accountability while it is indeed addressed to the Office's specific context. Several articles of the revised EUTMR even strengthened the EUIPO's accountability framework (see in particular Articles 153(1) (a) to (c), 157(4) (c) and (e), 172 (9) and 176 (1)).

OBSERVATIONS

19. The EU financial regulation recognises that the discharge mechanism shall take into account the financing structure of agencies.

The EUIPO is a fully self-financed agency, which is not imposing any burden to EU tax payers. The EUIPO counts on financial autonomy, financing all its activities with the revenue obtained from the fees paid by customers, mainly industries.

In this context, EUIPO considers that the logic underlying the legislator's decision of different models of discharge is manifest. Indeed, the objective of the general discharge procedure applied to subsidised agencies is to hold the relevant body accountable for the implementation of the EU budget before the European Parliament and the Council, i.e. the two authorities responsible for the EU budget. If no funds from the EU budget are involved, there is no legal justification to have the European Parliament responsible for the discharge.

The EUIPO's discharge procedure follows the provisions of the current financial framework and it takes into account the European Court of Auditor's reports.

According to the provisions of the EUIPO's founding regulation, discharge is granted by the Budget Committee which is composed by 1 representative of each Member State, 2 representatives of the Commission and 1 representative of the European Parliament. In addition, various stakeholders, including representatives of the users' associations, participate as observers in the governing bodies, ensuring more transparency.

The EUIPO has always received clean audit opinions from the European Court of Auditors and discharge has always been granted unanimously to the EUIPO's Executive Director, including the positive votes of the European Commission and the European Parliament representatives in EUIPO's budget committee.

21. Controlling influence for any delegation represented in the EUIPO's governing bodies would be expressly against the voting structure for both the Office's Management Board (MB) and Budget Committee (BC) defined in Articles 156(5) and 171(3) EUTMR and which were adopted according to the ordinary legislative procedure (formerly known as "Codecision") in which the European Commission and the European Parliament were actively involved. Furthermore, the structure of the EUIPO governing bodies reflects the main principle in administering EU IPRs that is co-existence and complementarity of national and EU systems.

These provisions moreover comply with the levels of participation agreed upon by the Institutions themselves in the Common Approach on Decentralised Agencies.

Since the Legal Reform in March 2016, out of 304 decisions taken by the MB and BC during the referred MBBC meetings, the Commission voted against 2 decisions (0.66%), one of

which is the example given by the Court, and the European Parliament abstained on 3 of them (1%).

With respect to the example of the Financial Regulation, it is important to highlight that the text was subject to formal consultation with both the ECA and the Commission, in accordance with the provisions of the Office's founding regulation.

The ECA in its opinion 1/2019 noted that the proposed Financial Regulation was largely based on the Framework Financial Regulation. The Court also raised special considerations, amongst which the accountability framework (see paragraph 22).

22. The Court's concern about EUIPO's discharge procedure had been reported on prior occasions, including before the last legislative reform. The inter-institutional agreement concluded, however, that the budgetary and discharge procedure should be before the Office's Budget Committee that is composed of representatives of the European Commission, the European Parliament and the Member States, which is generally aligned with the Common Approach on Decentralised Agencies and the regulatory framework.

As far as EUIPO is concerned, it provides to the European Parliament its work programmes, annual reports, financial accounts and biannual reports on its financial situation.

23. The division of responsibilities between MB and BC is set out in the EUTMR as their respective roles are distinct and described in detail in the law.

Regarding other relationships that would interfere, members of the MB and BC are obliged to declare any real or perceived conflict on an annual basis.

24. The Office has no influence on the nominations of the members and alternates of its governing bodies. The nomination is set out according to the rules of procedures of the Management Board and Budget Committee which both state that "each Member State, the Commission and the European Parliament shall appoint the persons who will represent them as representative and alternate".

Therefore, Member States, Commission and Parliament are the ones in charge of selecting their representatives that are entrusted with the decision-making process and are able to cast their votes within the prerogatives clearly set by the EUTMR. On the aspect of discharge procedure, as it has already been explained above, the financial independence of the Office whose revenue comes principally from fees paid by the users of the system warrants a different discharge procedure than for agencies financed by the EU budget. In fact, coexistence of national and EU IP systems requires MS to be able to check that the Office remains within the limits of its mandate. Moreover, as further specified by the Recital 37 and Article 175 EUTMR, the auditing of accounts is undertaken by the Court of Auditors to ensure proper financial control of the Office.

31

(b) National fees structures fall within national financial sovereignty and there is therefore limited potential to converge.

37. The situation of the EUIPO is different than the one of the agencies referred to as the legislators decided that the fees should be set at the level of the Office's founding regulation given their essential importance for the functioning of the EU trade mark system and its complementary relationship as regards national trade mark systems.

With respect to the budgetary surplus by 2020, the balance carried forward (chapter 10.1 of the budget) amounts to EUR 165.5 million and corresponds to the financial reserves that can be made available in support of EU policies in the field of IP. The net accumulated surplus prior to the entry into force of the EUTM Regulation amounted to EUR 185.2 million and has been reducing since then to EUR 153.9 million according to the 2022 budget. Planned initiatives as well as new ones currently under discussion are expected to contribute to significantly decrease this surplus in the coming years.

For the surplus generated starting 2016, the EUTMR provides mechanisms to prevent the accumulation of significant new surplus, namely the offsetting and the possible transfer of a significant surplus to the EU budget.

As far as the surplus existing prior to the entry into force of the revised EUTMR is concerned, it is being mobilised since 2020, following the entry into force of the Office's new financial regulation, in support of Union Policies in the field of IP.

With respect to the efficiency of EUIPO's operations they are monitored and reported through various means such as activity-based budget and unit cost. The results actually show increasing efficiency, partly because EUTM filings grew by 46% in the last five years, a percentage significantly above the evolution of realised annual expenditure.

39. The EUTMR formally recognises that the fees should ensure coexistence and complementarity between the EU trade mark and the national trade mark systems, also taking into account the size of the market covered by the EU trade mark. In this context, the size of the protection offered by an EUTMR in comparison with national protection justifies a higher level of fees.

41. With regard to trade marks fees, the legislator opted for the inclusion of fees in the basic regulation and has laid down the criteria on which the fees are set in its preamble, thus responding to the need for transparency. EUIPO considers that the criteria are clear, and the fees are determined according to them.

On the principle of sufficient revenue for the budget to be balanced, the objective is achieved in that the revenue derived from fees has prevented the EUIPO from having to call on a balancing subsidy from the EU Budget.

With respect to the surplus, as previously mentioned, the question has been addressed by the legislator through the revised EUTMR. New mechanisms such as the offsetting and the possible transfer of a substantive surplus to the EU budget should in principle prevent the accumulation of significant surplus.

On the other hand, part of the surplus generated prior to the legal reform is mobilised in support of Union policies in the field of IP.

43 The offsetting mechanism was established by the legislator as a mechanism to offset part of the costs incurred by Member States for the role they play in ensuring the smooth functioning of the EU trade mark system. The overall amount corresponds to 5% of the yearly revenue of the EUIPO provided that it would not cause a budgetary deficit and is not linked to national application fees.

44. According to Article 172(5) EUTMR, second subparagraph, Member States, for the purpose of substantiating their costs, must submit to the Office by 31 March of each year statistical data demonstrating the figures to which the four indicators refer for the preceding year; such data will then be included in the proposal made to the Management Board. Member States' Central Points will be responsible for submitting the above-mentioned statistical data each year to the Office, as well as for verifying and certifying its validity. Member States' Central Points will also be responsible for identifying and nominating any other relevant national authorities whose costs are eligible under this scheme, as set out in Article 172(4) EUTMR.

This data has no influence on the overall offsetting amount which corresponds to 5% of the yearly revenue but is used to distribute the funds between Member States.

45. In EUIPO's opinion, it is clear from recital 36 of the preamble to the EUTMR that the offsetting mechanism was introduced by the legislator with the intention to cover part of the costs incurred by the MS authorities and not establish a system of full compensation based on exact criteria. Moreover, the authorities whose costs are meant to be offset (NIPOs, police, customs, judiciary) may or may not have their own budget, since most or, in some cases, all of these authorities are part of the central state administration and have no separate budget of their own.

Box 2

- (1) The annual number of EU trade mark applications in each MS is one of the indicators used for the calculation, whereas the provision of information on the functioning of the EUTM system through helpdesks and information centres is one of the services that are offset. The two are not related. Moreover, the information referred to in Article 172 EUTMR does not overlap with any promotional or awareness raising activities financed through European Cooperation Projects to the extent that the latter refer to outreach activities beyond those offered through info centres. Besides, Article 152 EUTMR refers to cooperation in the form of sharing of information to support the activities of info centres (paragraph 1(e)) or to educational and training activities (paragraph 6) neither of which is covered by the offsetting mechanism of Article 172 EUTMR.

50 The positive reception of these services by the customers will feed into the Creation of the Mediation Centre, as described in the BoA Action Plan 2021-2026 (Focus Area 4), which will expand the ADR services offered to reach all inter partes proceedings in all the instances of the Office.

51. Articles 119 and 120 EUTMR lay down mechanisms aimed at containing those differences: lawyers are entitled to represent across the EU, with minor exceptions, professional representatives are accepted in the vast majority of MS, whereas in MS where

representation is open to non-qualified persons, a uniform rule of 5 years of practice has been introduced to reduce disparities.

52 The Office has taken rapid action to correct the errors identified by the Court and to confirm that the number of potential errors was not significant.

Since the establishment of the Office, the EUIPO received a total of 2 397 000 EUTM applications, of which over 2 000 000 have been successfully registered as trade marks.

The Office has performed a comprehensive quality check of the Register and has established an error rate of only 0.018%.

Concerning the 5 cases presenting omissions, those are related to legacy entries, as clearly displayed in the tool³.

For the RCD Register, concerning the completeness for the second language, a bug in the system, associated with designs with legal status 'surrendered', has been identified and solved⁴.

53. Taking into account the appeal rate to the General Court (between 8 and 12 % historically), it can be noted that the efficiency of the system is already high. The quality and the consistency are a high priority for the Boards of Appeal in their Action Plan 2021/2026. Several initiatives, in particular the creation of the Consistency Circles within the Boards, whose primary tasks will be to perform research and analyse case-law, both at BoA and GC/CJEU levels, aim to allow a greater harmonisation, while fully respecting the independence of the Boards, and work on further improving consistency of the decision-making.

55. The main cooperation between NIPOs and the EUIPO is performed via the ECPs under the framework of annual Cooperation Agreements. Since 2020, simplified cost option of financing (lumpsums) have been introduced for all types of ECP activities except project implementations. As 2020 was considered a pilot, this method will be revised.

57. In the absence of guidance in the financial regulation, the EUIPO implemented a lumpsum model from 2020 based on the information available.

(a) The verified historical data of individual beneficiaries only covered the previous year in order to represent and reflect the most updated financial information from the beneficiaries.

(b) The promotional activities, as pilot, are subjected to lumpsums. The grouping and classification of the promotional activities to calculate the lumpsums was based on the following criteria:

³ Upon the release of the system, by ED Decision No EX-21-4, the customers were informed about the limited availability of data for legacy entries.

⁴ The Office registers over 100 000 designs per year, and on average 120 are surrendered, i.e. 0.01%. The second language is available via eSearch Plus for all IP rights.

- Provision of information/advice
- Dissemination events
- Observatory activities

When establishing lumpsums and grouping activities together based on any criteria, certain standardisation is a logical outcome of the process, where similar lump sums are awarded to dissimilar activities.

(c) In calculating the average daily rate, the NIPOs included the salaries of all internal staff profiles participating in the 2019 ECP projects in order to establish one average rate per NIPO, these average rates were used to calculate the lumpsum based on the estimated effort required in man-days based derived from the historical data.

The Office will revise the methodology for calculating lump sums taking into consideration the observations of the Court of auditors.

58. The cooperation agreement clearly states under Article 28 that the calculation of the total allowance shall rely on different service values (SV). In 2007 when the TM view database was discussed by the ABBC (now MBBC) before its launch, the methodology and the amounts were discussed and approved by all the representatives. It was clearly stated during these meetings on 6 November 2007 (CA/08/S36/C2/EN under item “Euroregister Project”) and in the Cooperation Agreements Article 28.9 , that the running costs will have no link to the real costs required for the maintenance of the database at the individual offices (“.....the running costs, shall not take into account the resources needed for the construction, deployment and support of the applications.“). In other words, contribution is not linked to costs but to the quality of the service (performance of the service values).

The control and evaluation of the three indexes SP3, SP4 and SP5 is the responsibility of the EUIPO in collaboration with the IPOs and internally at the EUIPO the different index values are monitored on a daily basis and a detailed report of the performance of the IPOs is sent out to each IPO every three months for control and approval.

59 As previously indicated, contribution is not linked to costs. The calculation of the average running cost and the amount paid to National IPOs is only dependent on the performance of the service values defined.

CONCLUSIONS AND RECOMMENDATIONS

Recommendation 1 – Complete and update the EU IPR regulatory frameworks

97. With regard to trade marks fees, the legislator opted for the inclusion of fees in the basic regulation and has laid down the criteria on which they are set in its preamble. EUIPO considers that the fee level allows to fulfil the objectives set for them by the legislator and the sustained growth in demand for EUTMR demonstrates that there is no issue perceived by stakeholders on the fees’ levels.

The EUIPO’s governance and accountability framework was confirmed and reinforced by the legislator through the last legislative reform which took place five years ago. It is generally aligned with the Common Approach on Decentralised agencies and with the provisions of the EU Financial Regulation which warrant that the financing structure of agencies has an impact on their discharge mechanisms. The EUIPO is a fully self-financed agency, which is

not imposing any burden to EU taxpayers and counts on financial autonomy, financing all its activities with the revenue obtained from the fees paid by customers, mainly industries. Besides, the EUIPO has always received clean audit opinions from the European Court of Auditors and discharge has always been granted unanimously to the EUIPO's Executive Director, including the positive votes of the European Commission's and the European Parliament's representatives to EUIPO's Budget Committee.

99. Simplified cost options (lump sums) were applied as a pilot for the first time in 2020 and concern a part of the cooperation activities such as Working groups, promotional activities, while the more complex implementation projects at the NIPOs (Back Office, Front Office, Capture and Store Historical Files etc.) are based on actual costs incurred and the running costs are based on the quality of the service provided.

Prior to the implementation phase, National IPOs were consulted, involved and informed on the methodology for calculating lump sums as well as on the question running costs.

The EUIPO will however revise the methodology for calculating the lumpsums referred to taking into account the observation of the Court.

Recommendation 3 – Improve financing, control and evaluation systems

(a) The EUIPO accepts the recommendation. The EUIPO will revise its methodology for calculating lumpsums used for some of the European Cooperation activities taking into account the observations of the Court.

(b) The EUIPO accepts the recommendation. The Office will explore additional elements related to the quality of data in relation with the implementation of new technologies such as blockchain which may bring additional elements justifying the continuity of revised running cost model.

(c) The EUIPO accepts the recommendation and will further improve its evaluation system.