119th Session **Judgment No. 3427**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr I. H. T. (his seventeenth), Mr H. G. (his second), Mr A. C. K. (his fifth), Mr P. O. A. T. (his sixth) and others – whose names are listed in the annex appended to the Judgment – against the European Patent Organisation (EPO) on 7 March 2011 and corrected up to 1 September 2011, the EPO's reply of 16 December 2011, the complainants' rejoinder of 10 April 2012 and the EPO's surrejoinder dated 17 July 2012;

Considering the complaints filed by Mr D. d. l. T. (his third) and Mr W. M. (his third) on 7 March 2011, the EPO's reply of 16 December 2011, supplemented on 18 January 2012, the complainants' rejoinder dated 17 April 2012 and the EPO's surrejoinder of 24 July 2012;

Considering the complaints filed by Mr J. A. S. (his ninth), Mr E. C. D. (his seventh), Mr P. De M. (his second), Mr G. D. (his third), Mr R. W. G. (his third), Ms E. H. (her seventeenth), Ms A. D. E. H. (her second), Mr P. M., Mr L. P. (his seventh), Ms O. S. (her second) and Mr D. A. W. against the EPO on 16 February 2011 and corrected on 28 March, the EPO's reply of 16 December 2011, the complainants' rejoinder of 13 April 2012, the EPO's surrejoinder of 20 July, the complainants' additional submissions of 19 August 2012 and the EPO's letter of 16 January 2013 informing the Registrar that it did not wish to submit comments on the additional submissions;

Considering the applications to intervene in T. (No. 17), G. (No. 2), Ka. (No. 5), T. (No. 6) and others, filed by Ms S. A.-M., Mr E. A., Mr F. A., Mr K. B., Mr M. B., Mr C. B., Mr S. F. B., Ms R. B., Ms C. C., Ms N. C., Mr M. C., Mr F. D., Ms C. de la T., Ms N. D., Mr C. F., Mr R. G., Mr D. G., Ms H. G., Mr P. G., Mr W. B. H., Mr I. M. H., Mr D. H., Mr S. H., Mr J. J., Mr N. C. J., Mr A. K., Mr E. K., Mr G. K., Mr D. K., Mr L. L., Mr I. M. M., Mr A. M., Ms J. M., Ms U. M.-Mr T. M., Mr M. Ö., Ms G. P., Mr N. P., Mr W. P., Mr G. P., Mr R. P., Mr M. P., Mr X. R., Mr M. R., Ms S. R., Ms Y. R., Ms M. R., Mr B. R., Mr G. S., Ms B. S., Mr M. S., Mr S. S., Mr P. T., Mr G. v. d. S., Mr S.-U. v. W., Mr J. W. and Mr W. W. in mid-2011, and the EPO's comments thereon of 26 November 2013;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the cases and the pleadings may be summed up as follows:

A. These complaints stem from a series of decisions taken by the Administrative Council concerning pension issues. The complainants are serving or retired employees of the European Patent Office – the secretariat of the EPO – who joined prior to 1 January 2009. One complainant is the widow of a deceased employee.

On 29 June 2007 the Administrative Council adopted decision CA/D 25/07 which deleted, with effect from 1 January 2009, Implementing Rule 42/6 to the Pension Scheme Regulations and thus put an end to the Member States' obligation to reimburse the tax adjustment paid to EPO pensioners. Also on 29 June 2007, the Administrative Council adopted decision CA/D 18/07, according to which Article 42 of the Pension Scheme Regulations and its Implementing Rules would not apply to employees joining the EPO on or after 1 January 2009. The decision did not affect the rights of pensioners or employees who served within the EPO before 1 January 2009.

On 21 October 2008 the Administrative Council adopted several other decisions concerning the pension of EPO's employees, all of which entered into force on 1 January 2009. Decision CA/D 12/08 introduced the new Pension Scheme Regulations and its Implementing Rules thereto applicable to employees taking up their duties on or after 1 January 2009. Decision CA/D 13/08 modified Article 65 of the Service Regulations for Permanent Employees of the Office by providing that employees shall participate in a salary savings plan. Decision CA/D 14/08 superseded Article 42 of the Pension Scheme Regulations and Implementing Rules 42/1 to 42/7 concerning tax adjustment. It provided that pensioners who had taken up their duties with the EPO before 1 January 2009 would be entitled to lump-sum payments as partial compensation for the national tax levied on their pensions in the Member States of the EPO under national tax legislation in force there. Decision CA/D 17/08 amended the provisions of the Service Regulations and Implementing Rules and the Pension Scheme Regulations to reflect the establishment of the new pension scheme and the salary savings plan. By decision CA/D 18/08 the Administrative Council amended the specimen contract concerning the appointment and terms of employment of Vice-Presidents, and that concerning Principal Directors and amended the conditions of employment of contract staff. Approximately 3,600 employees challenged all or some of these decisions between December 2008 and March 2009 with the President of the Office and/or the Chairman of the Administrative Council. In February 2009 they were informed that the President considered that the Administrative Council was competent to deal with the appeals against the Council's decision and that the President would therefore propose to the Administrative Council, at its next session in March, that it refer the appeals to its Appeals Committee. The Administrative Council decided to refer the appeals to its Appeals Committee except insofar as the appeals concerned decision CA/D 14/08. In that respect the Administrative Council accepted to modify the wording of the contested Article 1 of decision CA/D 14/08 as requested by the appellants. Consequently, in June 2009, the Administrative Council adopted decision CA/D 15/09 which revised decision CA/D 14/08, in

particular its Article 1, so as to allow survivors of beneficiaries to be entitled to the lump-sum payment.

In its opinion of 6 October 2010 the Appeals Committee of the Administrative Council examined the appeals (IA/1/09) filed against decisions CA/D 12/08, 13/08, 14/08, 17/08 and 18/08. It recommended that the appeals relating to decision CA/D 18/08 be dismissed, but that the appeals be allowed insofar as they concerned decisions CA/D 12/08, CA/D 13/08, CA/D 14/08 and CA/D 17/08.

On 26 October 2010 the Administrative Council adopted decision CA/D 15/10, which amended the specimen contract concerning the appointment and terms of employment of Vice-Presidents of the EPO with respect to their pension rights and the introduction of the new pension scheme. On 11 November 2010 Mr d. l. T. filed an internal appeal with the Chairman of the Administrative Council contesting decision CA/D 15/10. Having received no decision in that respect, Mr d. l. T. considers that his appeal was implicitly rejected and he impugns the implied rejection before the Tribunal. Mr M. also impugns decision CA/D 15/10.

On 14 December 2010, the Administrative Council decided to reject appeals IA/1/09 as inadmissible and unfounded on substantive grounds, except for the claim relating to a flawed consultation procedure. In its view, the appeals were irreceivable given that the appellants challenged decisions of a general nature, which did not adversely affect them as individuals. It drew attention to Judgment 2953 in which the Tribunal held that the complaint filed by a staff representative against the new pension scheme and the salary savings plan was manifestly irreceivable because the complainant impugned a decision of general application and not an individual decision. The Administrative Council considered that the General Advisory Committee (GAC) was not properly consulted with respect to decisions CA/D 12/08, CA/D 13/08, CA/D 14/08 and CA/D 17/08 and therefore mandated the President of the Office to come back to the Administrative Council as soon as possible with a new set of documents after proper consultation of the GAC. However, it authorised the President to continue to apply these decisions until the final decisions were

adopted. That decision is impugned by all the complainants. Messrs d. l. T. and M. also impugn decision CA/D 25/07 which the Administrative Council adopted on 29 June 2007.

B. Some of the complainants indicate that they are staff representatives and that they filed their complaints in their individual capacity and/or in their capacity as staff representatives. Mr T. indicates that he is chairman of the Staff Committee and that he is acting on behalf of "all affected employees, both new employees and old employees", as well as on his own behalf.

On the merits, the complainants make numerous allegations. In particular they claim that the new pension scheme and the salary savings plan violate their employment contracts and acquired rights. They also allege unequal treatment and violation of the Noblemaire principle. Some complainants argue that decision CA/D 18/08 introduced more favourable pension provisions for Vice-Presidents and Principal Directors. They allege conflict of interests on the part of a consultant that was hired by the President of the EPO to advise on the pension reform.

According to the complainants, the contested administrative decisions are procedurally flawed as the GAC was not properly consulted as required under Article 38 of the Service Regulations. They contest the Administrative Council's decision of 14 December 2010 to mandate the President of the Office to organise a proper consultation of the GAC without suspending the contested decisions, which excluded de facto that the consultation procedure could make any difference as to the content of the contested decisions. They submit that there is no point in having a consultation procedure if the outcome of the consultation is a foregone conclusion.

The complainants allege procedural flaws in the internal appeal proceedings, arguing that the Administrative Council failed to "respect or properly consider" the recommendations of the Appeals Committee when making its final decision on the appeal. They explain that they have received only a summary of the decision of the Administrative Council of 14 December 2010, which did not indicate in detail the

reasons for its decision. They were not heard by the Administrative Council before it decided to reject the Appeals Committee's recommendation, which constitutes breach of due process. They also allege violation of the European Union (EU) Directive 41/2003/EC.

Mr T. contends that he suffered health problems as a result of pursuing the internal appeal, in particular because he was not allowed time off by his supervisor to prepare the submissions in relation to the appeal he filed as a leading appellant for thousands of other employees, and he therefore claims additional moral damages.

The complainants in the A. S. case submit that decisions CA/D 12/08, 13/08, and 17/08 were taken on the basis of decisions CA/D 18/07 and 25/07 and they therefore also contest these earlier decisions. In their view, decisions CA/D 18/07 and 25/07 are flawed because they were taken ultra vires, for an improper motive and because relevant information was not taken into consideration. They also submit that the GAC was not properly consulted prior to the adoption of the decisions. Messrs de la T. and M. also contest the validity of decision CA/D 25/07. In addition, they contest the validity of decision CA/D 15/10, explaining that it "re-enacted" a provision that was in decision CA/D 18/08 concerning the pension of Vice-Presidents. Decision CA/D 15/10 was adopted pursuant to a flaw in the procedure of the GAC and the request to remedy it.

In the T. case the complainants ask the Tribunal to annul decisions CA/D 12/08, 13/08, 14/08, 17/08 and 18/08. Alternatively, they ask the Tribunal to send back the "impugned decisions" to the EPO for reconsideration in light of the Tribunal's rulings upon the legal issues raised in this case, in which case staff employed on or after 1 January 2009 should be placed back in the old pension scheme until a new pension system is introduced "by consent with staff and their representatives". They also ask the Tribunal to award them moral damages and costs. Ms B.-F. makes an additional claim alleging that she suffered further losses pursuant to the administrative decisions as she has been in receipt of a widow's pension from the EPO since 2002 when her husband died.

Messrs d. l. T. and M. ask the Tribunal to annul decisions CA/D12/08, CA/D 13/08, CA/D 14/08, CA/D 17/08 and CA/D 18/08, CA/D 25/07 and CA/D 15/10. Alternatively, they ask the Tribunal to order the EPO to send back the impugned decisions to the Administrative Council for reconsideration in light of the Tribunal's rulings. The also seek moral and punitive damages and costs. In addition, they claim that if there is any doubt as to the applicability of EU Directive 41/2003/EC, the Appeals Committee of the Administrative Council should recommend to the Council that the Tribunal be urged to submit the matter to the European Court of Justice (ECJ).

In the A. S. case, the complainants ask the Tribunal to quash the impugned decision of 14 December 2012, to abolish the new Pension Scheme and to order that employees who have taken up or will take up their duties on or after 1 January 2009 be assigned to the "old pension scheme" (100 per cent defined benefits). Subsidiarily, they ask the Tribunal to quash the impugned decision and abolish the new Pension Scheme until a "lawful and equitable new pension scheme is introduced", in which case the new system would apply only to staff recruited after its introduction or only until such time as the "tender for the provision of service is rerun", in which case such new Pension Scheme shall be applicable only to staff recruited after the result and implementation of the procurement exercise. They also seek moral and/or punitive damages together with costs. They further request that the scope of Article 10 of the new Pension Scheme Regulations be clarified to make it clear that the most favourable reading should apply to staff. In addition, they claim that if there is any doubt about the applicability of EU Directive 41/2003/EC, the Appeals Committee of the Administrative Council should recommend to the Council that the Tribunal be urged to submit the matter to the ECJ.

C. In its reply on the T. case, the EPO submits that some 434 complaints are manifestly irreceivable for failure to exhaust internal means of redress as the complainants did not file an internal appeal. Other complaints are partially irreceivable because the complainants filed an internal appeal only against decision CA/D 14/08, and with respect to that decision their complaints are time-barred as they did

not contest the Administrative Council's decision of March 2009 to partially allow their initial appeals and modify the wording of decision CA/D 14/08; in any event decision CA/D 15/09 modified the contested Article of decision CA/D 14/08.

The EPO submits that the complainants challenge decisions of a general nature that are subject to individual implementation, which are not appealable decisions within the meaning of Article 107(1) of the Service Regulations and Article VII(1) of the Tribunal's Statute. Indeed, according to the Tribunal's case law, a complainant cannot challenge a rule of general application unless and until it is applied in a manner prejudicial to her or him. The EPO adds that only employees recruited as of 1 January 2009 are affiliated to the new pension scheme and the salary savings plan. Since that is not the case of the complainants, they have no cause of action with respect to decisions CA/D 12/08, 13/08, 17/08 and 18/08.

With respect to decisions CA/D 25/07 and CA/D 15/10, it submits that the complaints filed by Messrs d. l. T. and M. are irreceivable as they have failed to exhaust internal means of redress. The EPO also submits that the claim put forward by the complainants in the A. S. case in relation to Article 10 of the new Pension Scheme Regulations is irreceivable for failure to exhaust internal remedies, given that it is raised for the first time before the Tribunal. Moreover, the Tribunal is not competent to refer the matter to the ECJ.

The EPO contends that Mr T., in his capacity as staff representative cannot act on behalf of all employees, whether recruited before or after 1 January 2009, because the right to appeal is an individual right.

On the merits the EPO denies any breach of acquired rights, explaining that employees and pensioners will continue to receive compensation for the national taxation of their pensions, except for those affiliated to the new pension scheme and salary savings plan. Pensioners continue to receive the same amount of compensation, net of internal tax. In the EPO's view, the complainants have no right with respect to the financing of the partial compensation by the Member States instead of the EPO. The conditions of employment of permanent

employees are governed by the Service Regulations and Pension Regulations and implementing rules, not by a contract and contract law. The recruitment of employees derives from the unilateral decision of the EPO to appoint a candidate as an employee, and not from the acceptance of the job offer by the selected candidate. Employees have acquired rights only with respect to the terms of employment that can objectively be identified as essential.

With respect to the allegation of unequal treatment, it indicates that the principle of equal treatment does not mean that all staff should be subject to identical rules. In light of the principle of acquired rights, a distinction was made between employees depending on their date of recruitment. Concerning decision CA/D 18/08, the EPO indicates that particular terms of employment are justified for Vice-Presidents and Principal Directors because it is necessary to have attractive conditions for the most senior positions at the EPO in view of the limited duration of their contracts. Thus, there is no violation of the first rule of the Noblemaire principle, which is to ensure equal pay for work of equal value.

The EPO submits that the complainant had not provided evidence of the alleged conflict of interest on the part of the consultant. The direct placement was justified by the time line available to set up the new system. Comparisons with other firms were made. The EPO specifies that the consultant merely provided consultancy services, it was not in charge of running the tender procedure and selecting the bidders in relation to the provision of services for the salary savings plan.

Concerning the alleged failure to properly consult the GAC, the EPO asserts that the new pension scheme and the salary savings plan were elaborated following the applicable procedures. In its view, the Administrative Council took a prudent approach in asking the President to initiate a new consultation procedure. Such flaw cannot be considered as a fundamental flaw that warranted quashing the decisions establishing the pension scheme and the savings plan. A retroactive annulment of the new pension scheme and salary savings plan applicable to hundreds employees having joined the EPO after 1 January 2009 would have been excessive.

The EPO denies any procedural flaw in the internal appeal proceedings IA/1/09. The procedure before the Appeals Committee is adversarial and the parties had opportunities to express their views in writing and orally. The principle of due process does not require a two-tier court procedure. The Administrative Council carefully examined the Appeals Committee's report and motivated its decision by indicating in the impugned decision of 14 December 2010 that the Administrative Council endorsed the argumentation developed by its Chairman in a statement on the case which was reproduced as an annex to the decision.

According to the EPO, Mr T. has not demonstrated a serious injury which would justify awarding him additional moral damages.

With respect to the T. case, the EPO asks the Tribunal to order the complainants to bear their costs and it makes a counterclaim for costs (50 euros per manifestly irreceivable complaint) in view of the manifest irreceivability of 534 complaints, which seem to originate in the desire of the complainants' lawyer to exert "political pressure". Such action created an enormous amount of unnecessary work for the EPO.

Regarding the relief claimed by the complainants in the A. S. case, the EPO submits that the Tribunal, in light of its Statute, is not competent to refer the matter to the ECJ, nor is it competent to order the EPO to clarify Article 10 of the new Pension Scheme Regulations.

D. In their rejoinder the complainants in the T. case submit that they have a cause of action because they contest general decisions that apply to them and there is a clear risk that the decisions will cause them injury. In fact they are already prejudiced because of the insecurity they face with respect to their pension entitlements and the unequal treatment they have incurred. They assert that they have a direct interest in challenging decision CA/D 14/08, which concerns tax adjustments of employees who are not members of the new pension scheme and the salary savings plan, which is their case as they were recruited prior to 1 January 2009.

The complainants in the T. and d. l. T. cases request a "declaration from the Tribunal that the Impugned Decisions are of no

effect as regards either them or any other employees in their situation who entered into service with the EPO prior to the date of the Impugned Decisions". They also ask the Tribunal to refer the issue of the possible violation of the EU Directive to the ECJ.

The complainants in the A. S. case indicate that the EPO's objection to receivability on the grounds that the contested decisions are of a general nature is not pertinent in respect of complainants who are staff representatives. They specify that the claim they made with respect to Article 10 of the new Pension Scheme Regulations is "a request for clarification for guidance on the interpretation of Article 10" more than a "formal claim for relief"; in their view, the Tribunal is competent to do so. They also argue that the EPO errs in law with respect to their claim to have EU Directive 2003/41/EC referred to the ECJ, arguing that such possibility depends on the prerogatives of the ECJ and not on the prerogatives of the Tribunal as stated in its Statute.

E. In its surrejoinder concerning the T. case and the d. l. T. case, the EPO submits that the claim for a "declaration from the Tribunal that the Impugned Decisions are of no effect as regards either them or any other employees in their situation who entered the service of the EPO prior to the date of the Impugned Decisions" is a new claim for which internal means of redress were not exhausted.

In the A. S. case, the EPO maintains that the complainants are not receivable to challenge decisions of a general nature stressing that the Tribunal in its Judgment 2953, considered that the Circular of the President that gave effect to the 2008 Administrative Council's decision was of a general application and not an individual decision. The Tribunal considered that the complaint was manifestly irreceivable.

F. In their additional submissions the complainants in the A. S. case acknowledge that a general decision cannot be challenged unless and until a specific right is directly infringed. But, in their view, the "Circular" can be challenged if the complainants can show that their rights as staff representatives were directly breached.

CONSIDERATIONS

1. On 21 October 2008, the Administrative Council adopted a number of decisions: CA/D 12/08, CA/D 13/08, CA/D 14/08, CA/D 17/08 and CA/D 18/08 (collectively referred to as the October 2008 decisions). These decisions implemented a New Pension Scheme (NPS) with a corresponding Salary Savings Plan (SSP) applicable to new employees taking up their duties with the EPO on or after 1 January 2009 and provided for lump-sum payments as partial compensation for the national taxation of pensions.

2. The October 2008 decisions spawned a multitude of internal appeals to the Administrative Council and the President. As all of these appeals concerned decisions of the Administrative Council, they were referred to the Appeals Committee of the Administrative Council (Appeals Committee) for an opinion. In its 6 October 2010 opinion, the Appeals Committee recommended that the appeals be allowed in part. The Appeals Committee found that the appeals in relation to each of the decisions were admissible. It recommended that the appeals against decisions CA/D 12/08, CA/D 13/08, CA/D 14/08 and CA/D 17/08 be allowed to the extent specified in its opinion and that the appeals against decision CA/D 18/08 be dismissed.

3. On 14 December 2010, the Administrative Council dismissed the appeals as irreceivable and unfounded with the exception of a claim in relation to a flawed consultation with the General Advisory Committee (GAC). The Administrative Council mandated the President to return to the Council with a new set of proposals following a new consultation with the GAC. As well, the Administrative Council authorized the President, in the interim, to continue to apply the decisions. This is the impugned decision.

4. Subsequently, numerous complaints were filed with the Tribunal that, in turn, gave rise to applications for the joinder of a number of the complaints, applications to intervene and the filing of an *amicus curiae* brief. These complaints include those submitted in

Tribunal files AT 5-2825 (the "Ka. case"); AT 5-2826 (the "Ke. case"); AT 5-3093 (the "A. S. case"); AT 5-3132 (the "T. case"); and AT 5-3133 (the "d. l. T. case").

5. At this point, a summary of the Administrative Council decisions relevant to the present discussion together with an overview of the above complaints will help situate the positions taken by the parties. For the purpose of providing additional context, the following summary includes decisions that are not contested in the above noted files:

- Decision CA/D 10/01 – The Administrative Council adopted a new specimen contract for Principal Directors. Article 5(a) of the new specimen contract reduced the vesting period for pensions under Article 7 of the Pension Scheme Regulations from ten to five years.
- Decision CA/D 2/06 – The Administrative Council amended the specimen contract for Vice-Presidents. Article 6 of the new specimen contract increased the maximum rate of the pension provided under Article 10(2) of the Pension Scheme Regulations to 80 per cent.
- Decision CA/D 18/07 – The Administrative Council eliminated the tax adjustment provided under Article 42 of the Pension Scheme Regulations for employees taking up their duties with the EPO on or after 1 January 2009. The decision also specified that the rights of persons receiving EPO pensions or in the EPO's service before 1 January 2009 were not affected by the decision.
- Decision CA/D 25/07 – The Administrative Council eliminated the Member States' obligation to fund the tax adjustment provided under Article 42 of the Pension Scheme Regulations by deleting Implementing Rule 42/6.
- Decision CA/D 12/08 – The Administrative Council adopted the New Pension Scheme Regulations and the Implementing Rules to the New Pension Scheme Regulations applicable to employees taking up their duties on or after 1 January 2009.

- Decision CA/D 13/08 – The Administrative Council amended Article 65 of the Service Regulations by adding paragraph 3 and adopted an implementing rule to paragraph 3 requiring employees taking up their duties on or after 1 January 2009 to participate in the SSP.
- Decision CA/D 14/08 – The Administrative Council adopted a Regulation on lump-sum payments as partial compensation for the national taxation of pensions applicable to recipients of pensions under the Pension Scheme Regulations who took up their duties before 1 January 2009. The Regulation superseded Article 42 of the Pension Scheme Regulations and its implementing rules.
- Decision CA/D 17/08 – The Administrative Council adopted corresponding amendments to the Service Regulations and implementing rules to reflect the adoption of the NPS and SSP. The decision also amended Article 3(1) of the Pension Scheme Regulations and adopted a transitional provision governing the rate of contributions for employees recruited before 1 January 2009.
- Decision CA/D 18/08 – The Administrative Council adopted corresponding amendments to the specimen contracts for Vice-Presidents, Principal Directors and contract staff to reflect the adoption of the NPS and SSP.
- Decision CA/D 32/08 – The Administrative Council amended Article 3 of the Regulation on Internal Tax for the Benefit of the EPO to provide that the partial compensation for national taxation received from the EPO would be subject to internal tax.
- Decision CA/D 15/10 – The Administrative Council reenacted Article 6 to the specimen contract for Vice-Presidents after its decision in CA/D 2/06 was set aside by the Tribunal. Article 6 increased the maximum rate of pension under Article 10(2) of the applicable Pension Scheme Regulations for Vice-Presidents. The Administrative Council also amended the Annex to the specimen contract to stipulate that the cost of pensions above the limits set by Article 10(2) of the applicable Pension Scheme Regulations would be borne by the EPO and not charged to the Reserve Fund for Pensions and Social Security.

- Decision CA/D 9/11 – The Administrative Council eliminated the provision in the specimen contract for Vice-Presidents that raised the maximum rate of pension under Article 10(2) of the applicable Pension Scheme Regulations.

6. Turning to the complaints, Mr Ka. and Mr Ke. joined the EPO prior to January 2009. At the time they filed their respective internal appeals, Mr Ka. was a serving official and Mr Ke. was a retiree and pension recipient. In their respective complaints, they contest the validity of decisions CA/D 18/07 and CA/D 25/07. As an aside, it is noted that Mr Ka. is also a complainant in the T. case.

7. The eleven complainants in the A. S. case are staff representatives in either The Hague or Munich and bring their complaints in that capacity. They challenge the lawfulness of four of the five October 2008 decisions, they do not contest decision CA/D 14/08. Although the complainants signed and filed individual complaint forms with the Tribunal, only one brief together with the supporting evidence was filed for these eleven complaints.

8. In the T. case, the named complainants (referred to as the "lead complainants" in the brief) together with 853 additional complainants are employees and former employees of the EPO hired prior to 1 January 2009. Mr T. was the Chairman of the EPO Staff Committee and brings his complaint in his personal capacity and in his capacity as a staff representative. Mr Ka. and Mr T. are serving employees hired before January 2009. Mr G. retired in 2006 and is a pension recipient. These complainants challenge the lawfulness of the five October 2008 decisions. One of the 853 additional complainants appears to be the recipient of a survivor's pension. As in the A. S. case, all of the complainants signed and filed individual complaint forms, however, only one brief together with the supporting evidence was filed for all of the complaints.

9. In the d. l. T. case, Mr M. is also a complainant. The two complainants were hired prior to January 2009 and filed their

complaints in both their personal and staff representative capacities. In their brief, they claim that a "group of 850 other complainants have formally joined this Complaint". This assertion is incorrect as evidenced by the applications for joinder in the T. case that will be dealt with below. According to their respective complaint forms they challenge the October 2008 decisions. However, within their brief they state that they also contest decisions CA/D 25/07 and CA/D 15/10. This will be discussed below. As in the T. and A. S. cases only one brief and supporting evidence was filed for the two complaints.

10. Turning to the applications for joinder, it is well settled that complaints may be joined if they raise the same issues of law and the material facts upon which the claims rest are the same such that the Tribunal can deliver a single ruling (see Judgments 657, under 1, and 1541, under 3). The parties agree that the complaints in the T., A. S. and de la T. cases should be joined. While there are procedural irregularities in these case files that will be the subject of comment below, as the above conditions for joinder are met, they are joined. The complainants in the T. and d. l. T. cases also apply for joinder with the complaints filed by Mr Ka. and Mr Ke. They submit that the two decisions at issue in the complaints filed by Mr Ka. and Mr Ke. are closely related to the decisions being challenged in their complaints and that it would be impossible to consider them separately from the October 2008 decisions. This application is rejected. Despite the fact that the complaints filed by Mr Ka. and Mr Ke. share a contextual background with the other complaints, they impugn different decisions and raise distinct issues of fact and law. Accordingly, they are not joined.

11. As a result of the joinder of the complaints in the T., A. S. and d. l. T. cases, the decisions at issue in this Judgment are the October 2008 decisions (CA/D 12/08, CA/D 13/08, CA/D 14/08, CA/D 17/08, CA/D 18/08) and decisions CA/D 25/07 and CA/D 15/10. The complaints against these decisions filed by complainants in their respective personal capacities will be dealt with first. It appears that

there are 859 complaints, 857 in the T. case and two in d. l. T. case, in this category.

12. In the T. case, the EPO claims that 434 of the complainants did not file internal appeals against any of the above decisions and, therefore, their complaints are entirely irrecevable for the failure to exhaust the internal means of redress as required by Article VII of the Tribunal's Statute. According to the EPO, an additional 100 complainants only filed internal appeals against decision CA/D 14/08 and 19 complainants only filed internal appeals against decision CA/D 18/08. The EPO submits that the complaints of these complainants in relation to the other four October 2008 decisions are irreceivable for the failure to exhaust the internal means of redress.

13. In the d. l. T. case, the EPO submits that as the two complainants have not exhausted the internal means of redress with respect to decisions CA/D 25/07 and CA/D 15/10 their complaints challenging these two decisions are irreceivable.

14. The EPO also identifies a number of complainants who now advance claims for relief before the Tribunal that were not put forward during their respective internal appeals. It is argued that those claims are irreceivable. It is convenient to deal with this last point at this juncture. The claims for relief in a complaint are the remedies sought in the event the complainant is successful or partially successful in the prosecution of the complaint. Given the evolution of a case over time, some remedies initially sought in the internal appeal might not be pursued in a complaint and other claims for relief may arise, for example, from the final decision itself that could not have been contemplated at the time the internal appeal was filed. For the purpose of the present judgment a consideration of the circumstances under which the Tribunal will consider a claim for relief not advanced in the internal appeal process is unnecessary. Suffice it to say that it is not a matter of receivability in relation to the complaint itself.

15. The complainants acknowledge that the internal appeals process must be exhausted before a complaint may be filed with the Tribunal and add that in the present case "the internal appeals have in fact been exhausted". They point out that some 3,600 staff members filed internal appeals against the contested decisions – decisions that affect all staff members. As well, they note that it only requires one complaint out of the more than 850 complaints that have been filed for the appeal to succeed. In these circumstances they question the EPO's purpose in raising the question of receivability based on the failure to exhaust the internal means of redress. The complainants request, that "[i]n this unique situation the Tribunal […] waive the requirement to exhaust the internal appeals procedure for those Complainants who did not exhaust it (most did), because it is clear that the procedure would not have yielded any results".

16. Regarding this request, it is observed that the Tribunal has, in certain circumstances, "deemed" that the internal means of resisting a decision have been exhausted. However, as the exhaustion of the internal means of resisting a decision is a statutorily mandated requirement of receivability, it is beyond the Tribunal's competence to waive it. It follows, in the present case, that to the extent a complaint involves a decision in relation to which the complainant has not exhausted the internal means of redress (identified by the EPO in its brief and set out above) the claim against that decision is irreceivable.

17. In the d. l. T. case, the complaints against decisions CA/D 25/07 and CA/D 15/10 are problematic for a number of reasons. In their respective complaint forms, the complainants only impugn the Council's 14 December 2010 decision regarding the October 2008 Administrative Council decisions and it is only in their brief that they also challenge these two decisions. In addition to the fact that these are not properly filed complaints, as neither of the complainants brought internal appeals against decision CA/D 25/07 they have not exhausted their internal means of redress and their complaints against this decision are irreceivable. As to decision CA/D 15/10, only Mr d. l. T. filed an internal appeal against this decision. As Mr M. did not bring an

internal appeal, his complaint against this decision is irreceivable for failure to exhaust the internal means of redress.

18. Returning to Mr d. l. T.'s internal appeal, this was by way of an 11 November 2010 letter to the Chairman of the Administrative Council that he claims was for consideration at the Administrative Council's 14 December 2010 meeting. At this point, it is convenient to note that Mr de la T. filed his complaint with the Tribunal on 7 March 2011. He takes the position that since he had not received any communication from the Administrative Council as of 14 February 2011 his appeal was deemed to be rejected pursuant to Article 109(2) of the Service Regulations and accordingly he had the right to file his complaint with the Tribunal. As the EPO points out, Mr d. l. T. filed his appeal after the deadline for the Administrative Council's 14 December 2010 meeting. In fact, at its next meeting on 29 and 30 March 2011, the Administrative Council decided that since a number of appeals filed against decision CA/D 15/10 could not be given a favourable reply they were referred to the Appeals Committee for an opinion. Thus it can be seen that the complaint was filed before it was properly before the Administrative Council for consideration. Clearly the deemed rejection upon which the complainant relies was not engaged in these circumstances and the complaint is irreceivable as the internal means of redress have not been exhausted. It is also observed that the decision in CA/D 15/10 increasing the maximum rate of pension for Vice-Presidents was subsequently eliminated by decision CA/D 9/11. Accordingly, the challenge to decision CA/D 15/10 would be moot in any event. Decision CA/D 15/10 will be the subject of further comment below.

19. One further observation is necessary regarding decision CA/D 14/08. Some of the complainants in the T. case only lodged internal appeals against this decision and only challenged the wording of the modification to Article 42 of the Pension Scheme Regulations. Those appellants believed that the new text abolished the payment of the tax adjustment to the survivors and dependents of a pensioner. When these internal appeals were placed before the Administrative

Council, the Council acknowledged that the problem was due to faulty drafting, allowed the appeals without a referral to the Appeals Committee and amended the text in decision CA/D 15/09. These complaints are without object and thus irreceivable.

20. The EPO submits that the remaining complaints against the October 2008 decisions are also irreceivable for two reasons. First, the EPO contends that these decisions are decisions of a general nature that have not been subject to individual implementation. Therefore, they are not appealable decisions within the meaning of Articles 106(1) and 107(1) of the Service Regulations and Article VII, paragraph 1, of the Tribunal's Statute. Second, the EPO claims that only staff members who took up their duties as of 1 January 2009 are affected by decisions CA/D 12/08, CA/D 13/08, CA/D 17/08 and CA/D 18/08. As all of the complainants were recruited before 1 January 2009, they have no cause of action as regards these decisions.

21. The complainants dispute the "distinct doctrine of receivability" they claim the EPO tries to create. They contend that under Article VII of the Tribunal's Statute, questions of receivability are limited to whether the internal means of redress have been exhausted, the impugned decision is a final decision and the complaint was filed within the statutory time limit. They submit that the authority on this issue is Judgment 1330, where the Tribunal held that receivability does not depend on proving actual and certain injury, but merely that a decision may impair a staff person's rights and safeguards under staff regulations or contract of employment. They also point out that in Judgment 1660 the Tribunal held that the complainants had a cause of action and could challenge the lawfulness of the pension rules introduced by the organization even though the complainants could not show any immediate and direct injury from the new rules. They argue that the fact a loss cannot be quantified does not mean it is not real and tangible.

22. The Tribunal considered the same receivability argument in Judgment 3426, under 16, and rejected it for the following reasons:

> "The complainants' position that cause of action is not a question of receivability is rejected. As the Tribunal stated in Judgment 1756, under 5, '[t]o be receivable a complaint must disclose a cause of action'. There are two aspects to receivability – the procedural aspect found in Article VII of the Statute and the substantive aspect found in Article II. That is, whether the Tribunal is competent to hear the case *ratione personae* and *ratione materiae*. Framed another way, Article II requires that a complaint must reveal a cause of action and that the impugned decision is one which is subject to challenge. Under Article II, two thresholds must be met for there to be a cause of action. First, the complainant must be an official of the defendant organization or other person described in Article II, paragraph 6. Second, Article II, paragraph 5, requires that a complaint 'must relate to [a] decision involving the terms of a staff member's appointment or the provisions of the Staff Regulations' (Judgment 3136, under 11)."

23. The four decisions against which the EPO argues that the complainants have no cause of action will be considered first. As detailed earlier, in decision CA/D 12/08 the Administrative Council adopted the New Pension Scheme Regulations and implementing rules and in decision CA/D 13/08 the Administrative Council adopted amendments to the Service Regulations requiring certain staff members to participate in the SSP. Both decisions are clear that they only apply to staff members taking up their duties as of 1 January 2009. Given that the complainants were hired before the applicable date, these decisions do not in any way impact the terms and conditions of their employment. It is also observed that Judgment 1660 does not assist the complainants. In that case, the organization made changes to the pension scheme applicable to the complainants and notified them of changes to the system of determining and paying their pensions. The Tribunal found the notification to be an individual application of the decision. In the present case, the pension scheme at issue does not apply to the complainants. Moreover, the allegations of harm caused by the new pension scheme decisions, for example, through the effects of "de-mixing" and the use of the SSP funds should the EPO become bankrupt are purely speculative and do not support a cause of action.

24. Decision CA/D 17/08 also does not affect the terms and conditions of the complainants' employment insofar as it amends the Service Regulations and Pension Scheme Regulations to reflect the introduction of the NPS and SSP. The complainants' contention that this decision contains provisions that relate to the implementation of decision CA/D 14/08 or somehow implicates the lump-sum payment as partial compensation for national taxation is without foundation. Although Article 18 of the decision implemented a transitional provision regarding the rate for contributions to the pension scheme for employees recruited before 1 January 2009, the complainants have not alleged any harm or adverse effect arising from this provision. It follows that they have no cause of action against this decision.

25. Decision CA/D 18/08 amended the specimen contracts for Vice-Presidents, Principal Directors and Contract Staff to take into account the provisions of the NPS and SSP. The complainants submit that decision CA/D 18/08 introduced more favourable pensions for the Vice-Presidents and Principal Directors by increasing the maximum rate of pension for Vice-Presidents to 80 per cent and reducing the vesting period for pensions of Principal Directors to five years. They claim that as the maximum rate of pension for staff members is 70 per cent and the vesting period for pensions is ten years, these provisions are discriminatory and result in the unequal treatment of EPO employees. As a result, the complainants maintain that they are adversely affected by these provisions and that they have standing to challenge the decision.

26. At the outset, it is observed that none of the complainants claim to be Vice-Presidents or Principal Directors. Accordingly, their claims of unequal treatment must fail as they have not met the threshold requirement to advance this plea, namely, that they are similarly situated in fact and in law. As well, it cannot be said that this decision affects the terms and conditions of their contracts of employment.

27. It must also be added that the five-year vesting period for pensions of Principal Directors was adopted in 2001 in decision CA/D 10/01 and not in decision CA/D 18/08 as the complainants maintain. Therefore, decision CA/D 18/08 cannot be impugned on this ground. As to the increase in the rate of pension for Vice-Presidents, this decision was overtaken by decision CA/D 15/10, a decision taken after the Tribunal's Judgments 2875, 2876 and 2877. More importantly for the purpose of this discussion, the Administrative Council subsequently abolished the 80 per cent maximum rate of pension for Vice-Presidents in decision CA/D 9/11, thus rendering this ground of attack against decision CA/D 18/08 moot.

28. As noted earlier, the EPO claims that the complaints against the October 2008 decisions are irreceivable for two reasons. The second reason is that the impugned decisions are decisions of a general nature that have not been subject to individual implementation. Therefore, they are not appealable decisions within the meaning of Articles 106(1) and 107(1) of the Service Regulations and Article VII, paragraph 1, of the Tribunal's Statute.

29. In summary, the complainants submit that the impugned decisions are not of a general nature because they were applied to all the complainants. Citing Judgment 2129, they argue that when impugning an individual decision that concerns a staff member directly, the latter may challenge the lawfulness of any general measure. They point to the absurdity of having to challenge each pension payment as it is received and having to wait until sometime in the future to challenge the decisions. They also contend that when a general decision taking the form of a rule is challenged it is only necessary to show that there is a risk that the implementation of the rule would cause injury for the complainant to have a cause of action (see Judgment 1618, under 7).

30. In light of the earlier analysis, it is only necessary to consider these submissions in relation to the adoption in decision CA/D 14/08 of

the lump-sum payments as partial compensation for the national taxation of pensions for those employees hired before 1 January 2009.

31. The Tribunal's case law is clear that "a complainant cannot attack a rule of general application unless and until it is applied in a manner prejudicial to [the complainant]" (see Judgment 2953, under 2). And, it is equally clear that a complainant may challenge the lawfulness of a general decision forming the legal basis of the individual decision which the complainant is seeking to have quashed (see Judgment 2793, under 13, and Judgment 3428, under 11, and the judgments cited therein).

32. The complainants contend that they have a direct interest in decision CA/D 14/08 because it concerns the tax adjustments of employees recruited before 1 January 2009. It does not follow from the fact that a complainant has an interest either direct or otherwise in a decision that the decision has been applied to the complainant and that it has been applied in a manner prejudicial to the complainant. The fundamental flaw in the complainants' respective positions is that none of them claim as a fact to be in receipt of the lump-sum compensation. In these circumstances, it cannot be said that decision CA/D 14/08 has been applied to any of the complainants.

33. The complainants nonetheless maintain that they have a cause of action. This appears to stem, in large measure, by reference to one of the decisions at issue in complaints filed by Mr Ka. and Mr Ke., namely, decision CA/D 25/07. The complainants submit that for employees hired before 1 January 2009, decision CA/D 25/07 abolished "the pre-existing liability of the member states to make the payments referred to in CA/D 18/07". They claim that this creates an enormous extra financial liability that prior to the decision was borne by the Member States and increases the financial risk for EPO employees. They maintain that decision CA/D 14/08 does the same thing and provides for the amount of the taxation compensation to be calculated and paid by the EPO. This assertion is without merit. As set out above, decision CA/D 14/08 established the lump-sum payment as partial compensation for the national taxation of pensions for

employees recruited before 1 January 2009 and superseded Article 42 of the Pension Scheme Regulations. This decision is not in any way related to the earlier decision to transfer the financial burden for the payment of the tax adjustment from the Member States to the EPO. And, the negative consequences flowing from it, if any, cannot be attributed to decision CA/D 14/08. As to the alleged injury flowing from the double taxation on the lump-sum payments, this amounts to no more than conjecture at this time. The Tribunal explained in Judgment 3168, under 9, where a "complainant has failed to demonstrate that the contested administrative actions have caused him any injury to his health, financially or otherwise, or that it is liable to cause him injury, the complainant does not have a cause of action". The complainants have not shown that the decision at issue has or is liable to cause them injury, therefore, they have not established a cause of action. It must also be observed that the complainants' reliance on the alleged unlawfulness of decision CA/D 25/07 is equally without merit. As the complaints in the Ka. case against this decision have been dismissed and the attempted complaints in the d. l. T. case will be dismissed for failure to exhaust the internal means of redress, the decision remains unchallenged.

34. The Tribunal concludes that as decision CA/D 14/08 has not been individually implemented and the complainants have not shown a cause of action, the complaints against this decision will be dismissed.

35. As concerns the complaints brought by staff members in their respective staff representative capacities, the determinative issue centres on the nature of the contested decisions. In Judgment 1451, under 20, and later in Judgment 1618, under 5, the Tribunal drew a distinction between "a general decision setting out the arrangements governing pay or other conditions of service" that "take the form of individual implementing decisions" that each employee may later challenge and those decisions that do not give rise to implementing decisions and involve matters of common concern to all staff. In the latter case a challenge to the general decision by a staff representative may be receivable.

36. However, in the present case, it is clear that the contested decisions are decisions of general application subject to individual implementation. Until a decision of general application is implemented it cannot be said to have been applied in a prejudicial manner to a staff member and, consequently, as has been consistently held, cannot be attacked (see Judgment 2822, under 6, citing Judgment 1852). The fact of filing their complaints in their staff representative capacities does not overcome the fact of the nature of the contested decisions being ones of general application that at the material time had not been implemented. Accordingly, the complaints filed by the staff members in their representative capacities are irreceivable.

37. The complainants request oral hearings. The complainants submit that a hearing would be appropriate because the issues are very complex, that interest on the part of the EPO staff is significant, and there is a real need to defuse staff anger over this matter. The complainants submit that they are aware that a request for a hearing is exceptional, but given the magnitude of the interest in this case, an exceptional course of action is warranted. The parties' briefs reflect the enormous interest in the subject matter of the complaints and the upheaval surrounding the introduction of the NPS. However, despite the complexity of the case, the parties have had ample opportunity to state their respective cases and to respond to the arguments of the opposing party. Given that the complaints largely turn on questions of law that have been fully addressed in the pleadings, and that the complainants have not identified any additional evidence or witnesses that could assist in the resolution of the issues, the request for oral hearings is rejected.

38. Numerous applications to intervene were filed with the Tribunal. As all the complaints will be dismissed, the applications to intervene will also be dismissed.

39. The EPO seeks an award of double costs. In light of the subject matter of the case and the importance to the parties of having

certain issues litigated to provide some certainty as the parties move forward, no costs are awarded.

DECISION

For the above reasons,

1. The complaints are dismissed in their entirety.
2. The applications to intervene are dismissed.
3. The EPO’s counterclaim for costs is dismissed.

In witness of this judgment, adopted on 6 November 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

PATRICK FRYDMAN

DRAŽEN PETROVIĆ

ANNEX: List of the 853 other complainants in alphabetical order (*omitted here, but available in the original*)