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MITTEILUNG DER PRÜFUNGSKOMMISSION
FÜR DIE EUROPÄISCHE EIGNUNGSPRÜFUNG


Außerdem wird die Prüfung an einem oder mehreren der Orte abgehalten werden, die Sitz der nationalen Zentralbehörde für den gewerblichen Rechtsschutz eines Vertragsstaates des Europäischen Patentübereinkommens sind, sofern für den jeweiligen Ort sich mindestens fünf Bewerber anmelden, und der Leiter der betreffenden nationalen Zentralbehörde bereit ist, die Prüfung zu dem genannten Termin am Sitz seiner Behörde durchzuführen.

Anmeldungen zur Prüfung, die die Erfordernisse des Artikels 16 der Vorschriften über die europäische Eignungsprüfung zu erfüllen haben (ABl. 7/1983, Seite 287), können ab sofort beim Sekretariat der Prüfungskommission (Europäisches Patentamt München) eingereicht werden; sie müssen spätestens am 20. Januar 1986 beim Europäischen Patentamt eingehen. Es wird empfohlen, für die Anmeldung das Formblatt zu verwenden, das beim Sekretariat der Prüfungskommission angefordert werden kann.

Eine möglichst frühzeitige Anmeldung wird empfohlen, um der Prüfungskommission hinreichend Zeit zur Prüfung der Zulassung zu geben.


EPI Information 3-1985

MITTEILUNG ÜBER DIE VORBEREITUNG AUF DIE EUROPÄISCHE EIGNUNGSPRÜFUNG


In mehreren Ländern werden bereits Vorbereitungskurse in verschiedenen Form angeboten. Es fehlen jedoch solche Möglichkeiten in den meisten anderen Vertragsstaaten, und es findet bis jetzt keine Koordination dieser Anstrengungen statt. Außerdem sind die bisherigen Angebote meistens auf das unmittelbare Prüfungstraining beschränkt. Das EPI erachtet es als seine Aufgabe, für eine Möglichkeit zur langfristigen Vorbereitung in allen Vertragsstaaten zu sorgen und eine Koordination auf internationaler Ebene sicherzustellen. Das Konzept dieses Vorbereitungsprogramms sieht in groben Zügen wie folgt aus:

1. Wegen der großen Entfernungen und der mit Reisen verbundenen Kosten wird die Vorbereitung im wesentlichen auf dem Korrespondenzweg und in dezentralisierten Veranstaltungen durchgeführt. Die Teilnahmegebühren sollten auf diese Weise in einem vernünftigen Rahmen bleiben.

2. Als Drehscheibe dient ein beratender Ausschuß, bestehend aus erfahrenen Fachleuten von verschiedenen
Vertragsstaaten, der für die einheitliche Durchführung von Vorbereitungskursen sorgt. Über das EPI-Generalsekretariat steht er für Auskünfte und Ratschläge zur Verfügung. Er veranlasst jedes Jahr den Versand von Unterlagen aus früheren Prüfungen durch das EPI-Sekretariat an alle Interessenten, die sich für einen Vorbereitungskurs angemeldet haben.


5. Die einzelnen Vorbereitungszyklen werden so langfristig geplant, daß die gesamten Erfahrungen noch zu einer Korrektur der individuellen Vorbereitung dienen können.


NOTICE FROM THE EXAMINATION BOARD FOR THE EUROPEAN QUALIFYING EXAMINATION

The seventh European Qualifying Examination will be held from 16 to 18 April 1986 at the European Patent Office, Munich, and at its branch in The Hague.

In addition, the examination will be held in one or more centres where the national central industrial property offices of Contracting States to the European Patent Convention are located if at least five candidates opt for a given centre and the Head of the national central office in question agrees to holding the examination on the above-mentioned date at his Office.

Applications for enrolment, which must meet the requirements of Article 16 of the Regulation on the European Qualifying Examination (OJ 7/1983, page 287), may be submitted as of now to the Secretariat of the Examination Board (European Patent Office, Munich), they must be received at the European Patent Office not later than 14 January 1986. It is recommended that the application form obtainable from the Secretariat of the Examination Board be used.

Applications should be submitted as early as possible to give the Examination Board sufficient time to check whether the conditions for enrolment have been fulfilled.

The fee for sitting the examination is DM 500. The application for enrolment will not be deemed to have been received until the date on which the payment of the fee is considered to have been made (Article 8 of the Rules relating to Fees). If that date is later than 14 January 1986, the application will be refused.

For further details please see the EPO Official Journal 7/1985, page 217.
execution of preparatory courses. Through the EPI Secretariat the committee is available for information and advice. Each year it will instigate, through the EPI Secretariat, the distribution of question papers from earlier examinations to all interested parties who have applied for a preparatory course.

3. At a regional level local groups of tutors will be formed by the EPI according to need, and they will consider the written answers sent in by the participants and will then invite them to a discussion of the results. These tutorial groups will also organise regional seminars and can, for this purpose, call upon experts from the above-mentioned advisory committee.

4. Tape-recordings from the seminars will be made available through the EPI Secretariat to interested parties who cannot attend the seminars.

5. The individual preparation cycles will be planned sufficiently far ahead so that the collected experiences can serve for correcting the individual preparation.

With the aim of carrying out such a training programme at least experimentally in time for the 1986 European Qualifying Examination, those who are interested in participating are requested to get in touch before 15th November 1985 with the Secretariat of the EPI, at PO Box 26 D-12, D-8000 Munich 26, from whom they can find out further details.
COMMUNICATION DU JURY D’EXAMEN POUR L’EXAMEN EUROPÉEN DE QUALIFICATION

Le septième examen européen de qualification aura lieu du 16 au 18 avril 1986 à l’Office européen des brevets à Munich ainsi qu’à son département de La Haye.

En outre, les épreuves se dérouleront dans un ou plusieurs des lieux où se trouve le siège du service central national de la propriété industrielle d’un Etat partie à la Convention sur le brevet européen pour autant qu’au moins cinq candidats s’inscrivent pour un même lieu et que le directeur du service central national concerné soit disposé à organiser l’examen à la date prévue, au lieu du siège de son administration.


Les demandes d’inscription gagneront à être présentées le plus tôt possible en vue de laisser au jury d’examen suffisamment de temps pour vérifier les conditions d’inscription.

Le droit d’examen s’élève à 600 DM. La demande d’inscription ne sera réputée reçue qu’à la date à laquelle le paiement du droit d’examen sera réputé effectué conformément à l’article 8 du règlement relatif aux taxes. Si cette date est postérieure au 14 janvier 1986, la demande sera rejetée.


COMMUNICATION CONCERNANT LA PRÉPARATION À L’EXAMEN EUROPÉEN DE QUALIFICATION

Depuis 1979 ont été organisés six examens européens de qualification, auxquels ont pris part, ces dernières années, un nombre croissant de candidats. Le fait que le taux d’échecs soit relativement élevé montre que l’examen est d’un niveau élevé. D’une part, l’EPI se réjouit de cette évolution car les exigences élevées conduisent à un standard de qualité pour la profession de mandataire agréé auprès de l’Office européen des brevets mais, par ailleurs, les personnalités dirigeantes de l’OEB et de l’EPI en sont préoccupées, car le taux élevé d’échecs est à mettre au compte d’un manque de préparation.

Dans plusieurs pays sont déjà proposés des cours de préparation sous différentes formes. Cependant, de telles possibilités font défaut dans la plupart des autres Etats contractants, et jusqu’à présent il n’existe aucune coordination de ces efforts. Par ailleurs, les propositions existantes se limitent pour la plupart à l’entraînement direct à l’examen. L’EPI considère qu’il est de son devoir de proposer une possibilité de préparation à long terme dans tous les Etats contractants et d’assurer une coordination au niveau international. Les grandes lignes de ce programme de préparation sont les suivantes :

1. Compte tenu des grandes distances et des coûts liés aux voyages, la préparation se fait essentiellement par correspondance et dans des organisations décentralisées. Le montant de la participation aux frais devrait de ce fait rester dans un cadre raisonnable.

2. La "plaque tournante" est constituée par une commission consultative composée de praticiens expérimentés des différents Etats contractants, et s’occupant de la mise en place homogène des cours de préparation. Cette
commission peut donner des informations et des conseils via le Secrétariat général de l'EPI. Chaque année elle prépare, via ce Secrétariat, l'envoi des documents des examens précédents à tous les intéressés qui se seront faits connaître.

3. Au niveau régional, et selon les besoins, sont constituées des cellules d'examen locales, qui jugent les réponses écrites des participants et invitent ces derniers à une discussion des résultats. Ces cellules d'examen organisent également des séances de cours et peuvent demander la participation de membres de la commission consultative mentionnée ci-dessus.

4. Les enregistrements des bandes magnétiques de ces séances peuvent être fournis sur demande, adressée au Secrétariat de l'EPI, aux candidats intéressés isolés.

5. Les cycles de préparation sont planifiés assez long-temps à l'avance pour que l'ensemble des expériences puisse encore servir à corriger la préparation individuelle.

Le but étant de mettre en place un tel programme de préparation, à titre d'expérience, en vue de l'examen européen de qualification de 1986, les personnes intéressées sont priées de se manifester avant le 15 novembre 1985 auprès du Secrétariat général de l'EPI, Postfach 26 01 12, D-8000 München 26, où elles peuvent prendre connaissance d'autres points particuliers relatifs à la réalisation de la préparation.

NOTICE CONCERNING SEMINARS ON THE EUROPEAN PATENT

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CEIPI

UNIVERSITAT STRASBURG

Die jährlichen Kurse über das europäische Patent finden zu folgenden Zeitpunkten statt:


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CEIPI

UNIVERSITY OF STRASBOURG

The annual seminars dealing with the European patent will take place on the following dates:

The first seminar concerning the practical drafting of claims and of oppositions from 2nd to 6th December 1985.

The second seminar concerning legal problems from 27th to 31st January 1986.

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CEIPI

UNIVERSITE DE STRASBOURG

Les séminaires annuels sur le brevet européen auront lieu aux dates suivantes :

Le premier séminaire concernant la rédaction de revendications et d'actes d'opposition, du 2 au 6 décembre 1985.

Le deuxième séminaire concernant les problèmes juridiques, du 27 au 31 janvier 1986.
Pour tous renseignements et inscriptions, prière de s'adresser à:

Mme Pouwatchy
CEIPI
Université Strasbourg III
Place d'Athènes
F - 67000 STRASBOURG
Tel. 88 - 61 56 04 ou
61 18 18

NOTE ON EPPC MEETING
20 June 1985

The Practice Committee (EPPC) discussed and/or acted on the following matters for confirmation by the Council:

- Rule 90(4) gives different answers for the period for requesting examination. From the English text it is two months from the date of interruption of the proceedings whereas in the French and German texts it is two months from the date of resumption. The English text is clearly wrong and the Administrative Council may be requested to put this right.

- Problems have arisen with national registration of assignments filed in the EPO shortly before grant but not registered by the EPO until after grant. Some national patent offices refuse to be bound by post-grant registrations by the EPO. Problems occur particularly in Germany, Italy, Sweden, Switzerland and the United Kingdom. Steps will be taken to see if the EPO can solve this problem by negotiation with the national patent offices concerned.

- It was decided to continue to support the EPO's present "self prepared receipt" procedure which is valuable and could come into question.

- It has been suggested to the EPO that they should supply computer generated lists of renewal fees that are due - as does the Dutch Office. EPO are studying this. In the meantime, the majority of EPPC members were against it.

- A proposal to provide central funds for payment of appeal fees in cases of general interest received no support.
- The procedure of the Boards of Appeal in relation to late amendment to claims and also the mechanism for considering alternative claims were discussed. It was felt that there should be more latitude for applicants or proprietors to amend down during an appeal compared with the position of the Boards as indicated in the EPO Official Journal at 8/1984, 376, 10/1984, 491 and 3/1985, 75. This matter is being studied further.

- The EPFC has been asked by the Council to supply a list of items for study under the heading of trilateral co-operation between the EPO, JPO and USPTO. A list has been prepared which concentrates on those technical matters that will facilitate the obtaining of patents rather than substantive law matters. In general the Committee wished to see harmonisation tend towards the EPC which should not be amended.

- A number of items were discussed for the Liaison Committee to take up with the EPO informally.
  a) wrongly completed form of the search report e.g. using a form saying all claims were searched when this was not so,
  b) earlier publication of name indexes (which are a year late),
  c) incompletely cited Derwent and other secondary publications,
  d) practice regarding translations of titles,
  e) forecasting the date of the search report,
  f) citations in search report not in language of the proceedings,
  g) possible indications on communication of date of publication whether it will be an A1 or A2 publication,
  h) wrong dating of applications received at The Hague.

- There have been cases in which it appeared that applications had not been transmitted to The Hague because receipts were obtained very late. The applicant needs quicker proof that his application has been transmitted. This will be studied further and discussed in the Liaison Committee.

- There have been some difficulties in obtaining postponements of opposition hearings. One proposal was to suggest to the EPO that if by a prescribed date the parties both put forward an agreed alternative date the EPO should accept it, however, the matter requires further study.

- The new Italian procedure for filing translations of European patents designating Italy up to three months after grant was noted. It was also noted that it is still possible to file from the date of the Communication under Rule 51(4) (Form 2005) but it is convenient to file later as the Italian Office requests a copy of the first page of the printed patent.

European Patent Practices Committee
ITALY

NEW TERMS FOR FILING TRANSLATIONS OF EUROPEAN PATENTS

The Italian Parliament has passed a new law (No. 197 of 13 May 1985) which amends the EPC implementing regulations as to the term for filing the Italian translation of the text of European patents as granted, or as maintained in an amended form, as a consequence of oppositions.

As of 4 June 1985, date of enforcement of the above law, the ultimate term for filing the Italian translation will be:

- for European granted patents: **three months** from the date on which the European Patent Bulletin publishes the mention of the grant of the patent,
- for European patents maintained in an amended form: **three months** from the date on which the decision on the opposition is published.

This new law thus removes, upon pressure of Italian interested circles, what was considered a burdensome aspect of the national phase in Italy of European patent cases, in that the term for filing the Italian translation of European patents was the shortest as compared with the other member countries to EPC (three months from the date of the communications issued by the European Patent Office pursuant to Rules 51(4) or 58(5) EPC).

The new law also includes a transitory provision according to which those translations which had been belatedly filed under the former deadline, but for which a request of "restitutio in integrum" had been applied for and not yet finally rejected, are considered as validly submitted, provided their filing occurred within the newly established three months term and prior to the entry into force of the new law. Possible third parties' rights, however, are guaranteed in such a case.

REPORT ON CEFIC CONFERENCE
"SAFEGUARDS TO INNOVATION"
Brussels, 22 to 24 November 1984
by Gérard Tasset, member of the EPI from Belgium

The central theme of the Conference was the promotion of industrial property as an essential factor of progress for the European industry. The Conference was organised by the European Council of Chemical Manufacturers Federations (CEFIC).

Its objective was to explain not only to the public, to the press and to the political authorities but also to officials of the industry and to officials of international organisations, the importance of protection and adequate promotion, and hence of sufficient legal security, for industrial property.

The Conference was attended by senior executives and heads of international organisations including Commissioner K.H. Warjes of the Commission of the European Communities, Dr. A. Bogsch, Mr. J.B. van Benthem and Dr. h.c. A. Krieger, Chairman of the Interim Committee for the Community Patent.

Senior officials of national authorities and representatives of the European Parliament also took part.

From the outset of the conference, it was made clear by the CEFIC Director General, Drs. H.H. Lever, that progress could be achieved not only through an open dialogue between public and private bodies, but also through constant exchanges between national and international authorities.
Spain and the EEC

The need to enlarge the geographical scope of application of the European patent system was affirmed in the context of the future accession of Spain and Portugal to the Community and Dr. Schwab, Deputy Head of Division-DG III - International Market and Industrial Affairs of the Commission of the European Communities presented a paper on the agreement on patents reached in April 1984 between Spain and the Community. Dr. Schwab explained that, in the negotiation for the entry of Spain in the Common Market, the patent dossier was one of the most important because of the non satisfactory situation of the Spanish patent legislation and because, from the beginning of the negotiation in 1979, the Spanish delegates had accepted the principle of the 'acquis communautaire' but, later on, they took the view that the Luxembourg Convention was not included in the 'acquis communautaire' because CPC was not ratified by all member States.

In this agreement, Spain undertakes:

- To render its patent legislation compatible with the free circulation of goods and with industrial property protection level existing in the Community. This must be done from the accession date and relates to licences, including compulsory exclusive licence, obligation of working and patent of importation.

- For the process patents filed from the accession date, to introduce the reversal of burden of proof from that date (for the patents filed before that date, this will apply on 7 October 1992 at the latest and, in some cases, the reversal of burden of proof will be replaced by a seizure procedure).

- To adhere to the Munich Convention on 7 October 1986 at the latest for being able to take advantage of Article 167 EPC. (The member states, on their side, will develop best efforts in order to extend the term of this reservation beyond 7 October 1987 and for the longest possible period provided by EPC (Article 167(3)), i.e. up to 7 October 1992. In this context, we have to keep in mind that the member states alone do not dispose of a 75 percent majority at the Administrative Council of the EPO. So, at least one among the four member states of the EPC who are not members of the EEC should vote for this prolongation. If this would not be the case, Spain could denounce the EPC (on the basis of Article 174) but then, anyway, Spain should accede to the EPC on 7 October 1992 at the latest).

- At the same date (i.e. in 1992), to adhere to the CPC (eventually, Spain could then take advantage of Article 95, paragraph 4 of the CPC for affording the necessary technical adaptation resulting from its accession).

The agreement further provides a derogation to the provisions of the Treaty of Rome on the free circulation of goods. This derogation is in favour of those who have patents for chemical and pharmaceutical products in a member state and when these patents have been filed at a time when product claims were not accepted in Spain.

This derogation will come to an end at the end of the third year after introduction of product patentability in Spain, i.e. on 7 October 1995.

Dr. Schwab stated that this agreement is a reasonable compromise and that what is important now is that it does not remain a dead letter.

Community Patent Convention

Dr. Krieger stated that the entry into force of the CPC is not only a matter of greatest political importance for the
future development of the Community but it will as well be most beneficial to interested circles and users of the European patent system.

A member of the assembly pointed out that he was not sharing this view and he expressed a personal opinion.

Anyway, this is apparently not an urgent point to debate.

Patentability of New Technology

Regarding patentability in the field of new technology related to the chemical industry, several papers were presented on problems stemming from the development of modern biotechnology.

Representatives of the industry explained the main problems facing the applicants for a patent in this field.

These problems result from:

1. the unclear wording of Article 53(b) EPC (what is a biological process and what is a microbiological process?);

2. the unclear distinction between discovery and patentable invention in the case of products obtained from a natural source;

3. the provisions of Rule 28 EPC (the strain is released with the first publication, at a time there is no real protection; the strain remains accessible even if the application is rejected and the compliance with the undertakings by the requester is very difficult to police);

4. divergent opinions on the validity of the so-called expert solution of Rule 28 EPC;

5. the fact that some patentable processes or products have not to be repeated for producing a final product and therefore these patents are difficult to police;

6. the importance of basic research involving a number of agreements with academia which are not patent minded.

It was also explained that in Europe the applicants for a patent in the field of biotechnology are put at a disadvantage by comparison to the situation in the USA and in Japan.

Mr. Coleman, Head of Division DG III - Internal Market and Industrial Affairs EEC, presented a remarkable paper on the Commission initiative concerning the legal protection of biotechnology, pointing out that it is time to introduce serious changes in Europe.

Mr. Coleman explained as follows how the Commission examines the question.

Having compiled an inventory of the problems, the Commission has proceeded to their examination and possible solutions. The Commission also completed a preliminary round of consultation with interested circles, government experts, WIPO, UPOV and OECD and is now in the process of drawing some preliminary conclusions but this process is not complete. There is no Commission position yet established.

At this point, Mr. Coleman made a brief remark concerning the initial reactions of the member states. He said that these have been universally unenthusiastic about a Community initiative in this area and that, if some criticisms of the existing patent system have been welcomed as "provocative contributions to the debate", as recently in
the OECD, national officials have indicated that they are not of the same view, emphasising the need to solve these problems "at the appropriate level", the Community level being not considered "appropriate".

The Commission is of the opinion that there are issues where a Community initiative might have a useful contribution and, on the other hand, where it seems less appropriate.

Problems which do not seem to be appropriate for an early Commission initiative are: the exclusion of plants and animals from patentability, the grace period and the patent restoration (this does not mean, however, that real problems are not posed in these areas, but that an immediate Community initiative, in particular in the biotechnology context, would probably not be appropriate).

Regarding the grace period, Mr. Coleman stated that it seems likely that the discussion of this problem will be pursued and that it may not be too naive or ambitious at least to think in terms of a future convergence of the European and US patent systems: one side of the operation could be European acceptance of a grace period, the other would be some limitation of the difficulties flowing from the US first to invent principle and interference procedures.

The problems which are the object of the Community initiative are:

1. The question of the rules applicable to disclosure by the deposit of micro-organisms in culture collections to which third parties have access. Here, there are two main legal problems: the validity of such disclosure and the safeguards which should be applied to protect the patent applicant/holder from abuse.

As to validity, the danger exists that, at least in one member state (FRG), disclosure by deposit may not be considered adequate in the case of an European patent granted for a micro-organism as such. A European patent might therefore be declared invalid in one member state while retaining its validity elsewhere. As Mr. Coleman clearly stated, this is the antithesis of an internal "intellectual property" market.

As to safeguards, the member states and the EPU have adopted divergent solutions. Once again doubts appear to exist as to the acceptability of the independent expert solution in some national jurisdictions. Again then a European Patent might be declared invalid in some jurisdictions but not elsewhere.

One important question arises: to what extent can a solution be found which does not necessitate an amendment to the Munich Convention? As to the validity of disclosure by deposit, the view of the Commission is that the answer is that an amendment to the Convention is not necessary but only demands to define a concept left relatively undefined by the Convention, namely the concept of "description". As to the independent expert solution the problem is less clear.

2. The second area in which real problems are arising as to which a Community initiative should at least be seriously considered concerns the problems of applying existing patent concepts to, first, the frontier between "micro-biology" (micro-biological processes and the products thereof) and "biology" (plant and animal varieties and essentially biological methods for the production thereof) and, second, the invention/discovery distinction and the problem of defining what kinds of intervention (procedures of isolation and purification) are sufficient to characterise a sub-
stance existing in some form in nature, as a patentable invention.

3. Finally, and in some ways closely linked with the deposit issues, are the problems of proof of infringement.

For the Commission, the next step seems to be, at the technical level, the preparation of a draft directive on deposit, application of certain criteria and proof. This would involve also an examination of the extent to which amendment of the Munich Convention can be avoided or may be necessary. On the basis of this exercise, including of course consultation of interested groups, the Commission should be able to decide whether to launch a formal proposal or not, and if so what to propose.

On the political level, the negative reaction of the member states to date to any Community initiative in the area indicates that in addition to the technical preparation of a draft, attention will also have to be given to preparing the political conditions under which the Commission may make a formal proposal with a real chance of success.

Further to an observation made by Mr. van Benthem, Mr. Coleman stated that a Community initiative clearly raises a more general issue of the future relationship between the Community and the European Patent Organisation.

Confidentiality of data

Another topic of the Conference was the confidentiality of data and its impact on the economy.

This point is not related to patent but more particularly to confidential treatment of data which are required by authorities for safety purposes.

It was stated that only information having real effect on health and safety aspects should be communicated to authorities.

The agreed rules of OECD in this area were recognised as the basis of any sound international system of transfer of data.

One of the main conclusions of the Conference was that there was a growing need to foster co-operation between undertakings, particularly in view of the high degree of competition in R & D with other major industrialised parts of the world.

In this regard, the future EEC regulation exempting R & D agreements from the prohibition of Article 85 (§1) of the Treaty of Rome was outlined. Though not definitively adopted, the new regulation would appear to be a flexible instrument.

The importance of considering industrial property questions in the wider context of the general industrial policy was stressed by Commissioner K.H. Nahrjes, and Dr. A. Bosch emphasised the need to maintain active international co-operation in this area in order to preserve the tools of innovation.
THE PAYMENT REMINDER FOR EUROPEAN RENEWAL FEES
IN THE PERIOD OF GRACE SPECIFIED IN ARTICLE 86(2) EPC
By Günter Gall, Legal Affairs Directorate,
European Patent Office *

1. Introduction

For the applicant, monitoring the time limit for payment of renewal fees is of considerable importance. After all, the penalty for non-observance is that the European patent application is deemed to be withdrawn. The purpose of the following analysis is to determine whether and how far the applicant can rely on the EPO’s reminder to pay the European renewal fee and additional fee within the period laid down in Article 86(2) EPC.

The due date for European renewal fees is predetermined right from the date of filing of the European patent application (Rule 37(1), first sentence, EPC). This not only makes it easier to monitor these fees, but is also the reason why the EPC contains no provision for renewal fee reminders. However, the EPO does in fact issue reminders in the period of grace as a courtesy service.

2. Obligation to notify the applicant in the event of insufficient payment

Incomplete payment is equivalent to non-payment. Where this occurs it is only right and proper that the EPO should give the person making the payment the opportunity to pay the amount owing and any additional fee and should draw his attention to these possibilities (Article 9(1), third sentence, of the Rules relating to Fees). However, Article 9(1), third sentence, of the Rules relating to Fees does not con-

fer any legal entitlement to notification in good time. The person making the payment cannot invoke the omission of such notification.

3. Bona fide right to notification

(Exceptionally the question of bona fide rights may arise, although this will of course only be the case in special circumstances. The fact that the EPO has not given notice does not alone suffice to excuse failure to observe a time limit for payment. However, special circumstances may impose upon the EPO a qualified obligation to give notice. If, for example, the applicant effected payment of a renewal fee before the due date by transfer through a bank to an EPO account, but the account was not credited in time (for instance, one day late), the EPO alone is privy to the effective date of payment as it alone receives the bank statement showing when the account was credited. The applicant can do no more than guess the probable time at which the account will be credited. It would be unreasonable in these circumstances to find fault with the applicant for not having ensured that he was covered by the ten-day fail-safe arrangement in Article 8(3) of the Rules relating to Fees if payment was effected early enough for him to be able, in normal circumstances, to expect the account to be credited on time. If in such a case the EPO failed to request the applicant to pay the additional fee within the six-month period of grace, this would not accord with the principles of good faith. Since a qualified bona fide situation would have been created, the EPO could reasonably be expected to inform the applicant in good time that payment had been effected late, a fact known only to the Office. In these circumstances the applicant must be able to rely on his attention being brought to the need to pay the additional fee within the six-month period of grace.

* This article reflects the author’s personal view

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If this obligation to notify the applicant is not complied with, he has to be given the opportunity to make good his payment of the additional fee within a reasonable period to be laid down in each individual case.

4. The payment reminder - a courtesy service

In addition to such notifications in individual cases, the EPO decided in the build-up phase that it would notify the applicant, as a courtesy service, if the renewal fee had not been paid (or had not been paid in full) by the due date.

Despite the limited status of the EPO's payment reminder the service has turned out valuable in practice.

Responsibility for observing the period of grace rests with the applicant even if the notice is not served or if its service is rendered invalid by a mistake (Legal Board of Appeal Decision J 12/84, 0J of the EPU 4/1985, p. 108). Incorrect information in the notice, whether it refers to the time limit for payment or to the amount due, does not release the applicant from the obligation to check the situation himself and to pay the correct amount at least within the period of grace. At the same time, incorrect information in the notice which is not clearly recognisable as such may justify a request for restitution in integrum. The entry of a later time limit than the correct one, however, does not extend the time limit for payment in the same way as Rule 20(2) provides for an extension to the time limit for filing the request for examination under comparable circumstances.

In practice, the risk of incorrect information is reduced by the use of EDP in the dispatch of payment reminders.

5. Exceptional situation as covered by Rule 85(4) (new)

A special provision adopted in February 1985 provides against loss of rights, if no reminder is sent, only in exceptional situations where the issuing of payment reminders is generally disrupted. In the case of a strike in the EPO or other exceptional interruptions to its proper functioning, the notice must be sent on the resumption of normal operations (even if the period of grace specified in Article 86(2) EPC has expired). The period of grace is then extended and does not expire until one month after service of the delayed payment reminder. The reason for this special extension of the time limit under Rule 85(4) EPC (see 0J of the EPO 1985, 33) is to be found in the qualified risk created by general non-performance of the EPO's courtesy service. The new provision in fact recognises the practical importance of services not specifically provided by the EPC, but developed in practice.

6. Responsibility for monitoring time limits

The fact that the applicant cannot rely on the issuing of the payment reminder and must monitor the payment of renewal fees on his own responsibility diminishes the value of the notice. Such pre-set time limits like those for renewal fees (i.e. time limits which are not determined by reference to service of a communication) were introduced in the EPC for reasons of administrative efficiency. The purpose was to reduce the number of office communications. The fact is that such time limits lead to undue procedural severity, which then has to be mitigated by devices such as courtesy reminders involving administrative work without affording complete legal safeguards.

Here again the idea of a period of grace against a
7. Legal consequences of non-observance of time limits

If the renewal fee has still not been paid within the period of grace (with additional fee), the European patent application is deemed to be withdrawn (Article 86(3), first sentence). The EPO is alone competent to decide whether payment has been made in due time. The question of whether renewal fees for European patent applications have been paid in due time cannot be brought up in opposition proceedings. Neither does the non-payment of renewal fees constitute admissible grounds for national revocation proceedings. Both grounds for revocation (Articles 138, 139 EPC) and grounds for opposition (Article 100 EPC) are listed exhaustively.

The legal consequence of withdrawal must first of all be notified by the EPO in a communication (Rule 69(1) EPC). The applicant can contest this communication within a period of two months from its notification by applying for a decision (Rule 69(2) EPC). He can, for example, assert that payment was effected ten days before the expiry of the period, but owing to delays in processing by the bank was only credited to the EPO's account after the period had expired (Article 8(3) of the Rules relating to Fees).

8. Restitutio in integrum

Time limits for payment of renewal fees are eligible for restitution in integrum (but not for further processing). The application for restitution in integrum is subject to both a "subjective" time limit (two months from the removal of the cause of non-compliance - Article 122(2), first sentence EPC) and an "objective" time limit (one year following the expiry of the unobserved time limit) (Article 122(2), third sentence, EPC). Moreover, a feature peculiar to renewal fees is that the period specified in Article 86(2) EPC has to be deducted from the "objective" one-year time bar, i.e. the period of grace is itself part of the one-year time bar, which is hence calculated from the last day on which it was still possible to pay the renewal fee without an additional fee (= the due date according to Rule 39(1) EPC).
The patentability of software-related inventions

Norman Wallace
Vice-President of the European Patent Office DG 2

The EPO has now published amendments to the "Guidelines for Examination in the EPO" dealing more fully with inventions involving computer programs. These amendments were the result of extensive discussions between the EPO and the interested circles including the EPI.

The Working Group

A Working Group was set up by the President of the EPO to study the basic problem of what is patentable and what is not in the area of software-related inventions. This Working Group, which met twice in 1984 under my Chairmanship, was itself to some extent an innovation. It was the first attempt to get together both representatives of the national patent offices in Europe and experts from industry and the patent profession, in order to discuss an important question of patent practice. The reason for involving the national patent offices was to try to harmonise practice at least in Europe; this obviously makes sense since European patent law and the national patent laws in the EPO member States are in substance practically the same. The amendments to the EPO Guidelines, while taking full account of the discussions in the Working Group, are the responsibility of the EPO alone and do not bind any national office. Nevertheless there was a surprising and welcome measure of agreement among the experts in the Working Group, and I believe that, even though the approach of different offices is likely to differ in detail, the majority of national offices of the EPO member States will follow the general line indicated in the new EPO Guidelines. On the other hand, we do not yet know what position the national courts might take in this difficult area. Also, there has so far been no pertinent decision from an EPO Board of Appeal, although there are some interesting pending cases on which a Board of Appeal decision is expected fairly soon.

The basic problem

The problem of patentability of software-related inventions is centred on Article 52(1) to (3) EPC.

Article 52(2) contains a non-exhaustive list of subject-matter or activities which shall not be regarded as "inventions", i.e. as items for which patents may be granted. This list includes "programs for computers" and it is relevant to note that it also includes, inter alia, "mathematical methods" and "presentations of information".

The conclusion of this legal study was that the list in Article 52(2) is merely of a declaratory nature, i.e. it merely affirms something which could already be deduced from Article 52(1). This is because Article 52(1), when interpreted in its context and in the light of the "travaux préparatoires" relating to the European Patent Convention, excludes from patentability any subject-matter which is not of a "technical" nature; this interpretation is supported by Rule 29(1) which requires the claims to define the matter for which protection is sought in terms of the "technical features of the invention".

The legal study concluded that inventions involving computer programs should not be subject to special rules but should be subject to exactly the same rules for patentability as inventions in all other fields.

Patentability of software-related inventions according to the new guidelines

The relevant amendments occur in the Guidelines at C IV, 2.1 to 2.3. This part of the Guidelines has been extensively revised, but we have deliberately avoided going into too much detail but have instead attempted to indicate the principles which an examiner should apply in order to determine the question of patentability. Guidelines are guidelines and not precise rules; indeed if it were possible to determine patentability by precise and detailed rules, then thinking would not be necessary and we would no longer need examiners. Another reason for not being too detailed is that we consider that we must be free to develop our practice in the light of experience and in the light of decisions of our Boards of Appeal.

When I refer to "patentability" I am referring to the basic question of whether there is an "invention" within the meaning of Article 52(1). The questions whether the subject-matter of the invention is susceptible of industrial application, is now and involves an inventive step are of course also part of the enquiry as to patentability, but it is
important to keep these questions quite distinct from the basic one. In particular, it is important to keep the question of whether there is an “invention” quite distinct from the question of whether there is an inventive step within the meaning of Article 56. In what way do the new Guidelines differ from the previous version on the basic question of patentability?

The main difference is that we have accepted the argument, forcefully put to us by interested circles, that the question should not depend merely on whether hardware or software is chosen to carry out a particular data-processing operation. As we state in the new Guidelines, this choice may have nothing to do with the inventive concept but may be determined purely by factors of economy or practicality. Therefore we now say that, if the subject-matter as claimed makes a technical contribution to the known art, patentability should not be denied merely on the ground that a computer program is involved. Thus, in particular, a known computer having a novel program loaded into it could be patentable if the program caused the computer to operate in a different way from a technical point of view. This represents a very significant change in the Guidelines since our original position was that, if the novelty lies only in the program, there can be no invention in the sense of Article 52 because computer programs as such are excluded from patentability. The change can be justified by arguing that, if the novel program controls the known computer so as to produce a different technical effect, then the invention is not merely a program as such but comprises a new functional combination. The underlying principle is that the subject-matter claimed must be considered as a whole. I might add that this change is theoretical in the sense that no case has actually been refused under the old Guidelines which would be accepted now. This however was merely accidental.

The meaning of “technical”
The criterion for determining whether any particular subject-matter is excluded from patentability or not is whether the subject-matter is of a “technical” character and I have used the term “technical” several times in this article without defining it. Actually, as we state in the new Guidelines at C IV, 2.1, there are two necessary conditions for something to be regarded as an “invention” within the meaning of Article 52(1) – the subject-matter must be “technical”, but it must also be concrete as distinct from abstract. Thus, for instance, a scientific theory or a mathematical formula such as Einstein’s famous $E = mc^2$ could be said to be of a technical character but one could never get a patent for it since it does not define any concrete technical features.

Returning however to the word “technical”, I have to confess that we are still unable to provide a precise definition, although we have given careful thought to the question. This is somewhat unsatisfactory although, in practice, I am told that examiners do not have too much difficulty in determining whether an “invention” is technical or not. In fact a “technical invention” seems to be rather like a camel; it is more easily recognised than described. I believe in any case that the positive examples given in the Guidelines plus the negative examples contained in the list in Article 52(2) EPC make the meaning reasonably clear; and, as practice develops, the decided cases will help to clarify the matter further.

One further point to note is that the “technical” nature of an invention can reside in its effect or in its structure. As an example of the latter, a new chemical compound passes the tests of Article 52(2) and (3) merely because it is a new structure and regardless of whether the compound is described as having any useful effects. However, in the case of inventions involving computer programs, it is the question of technical effect which is normally relevant.

Kinds of claim which may be allowed
Given that patentability depends on a technical effect, then we say in the new Guidelines that the claims must be so drafted as to include all the technical features of the invention which are essential for producing this technical effect. That is the basic principle. Provided this condition is satisfied then, generally speaking, the applicant can claim his invention in any way he wishes – e.g. product, process and use claims would all be allowable. Thus, where the invention is concerned with the program-controlled internal working of a computer, the claims could be for the computer in combination with the program loaded in it or for the method of operating the computer according to the program. The same applies where the invention is concerned with a program-controlled machine. Even where a claim in a particular category seems more appropriate for the invention, as for example for a program-controlled manufacturing or regulating process, the applicant should in our view not be refused claims in other categories provided that such claims are clear and satisfy all other requirements of the EPC. However, the requirement that a claim should be clear means inter alia that the category of the claim must be clear, e.g. whether it is for a machine or for a process. Claims of ambiguous or mixed category are not allowed.

Because the claims must include all the technical features essential for producing the technical effect, the EPO will continue to refuse claims directed to a computer program...
by itself or as a record on a carrier. Such a claim is in our view directed to no more than a computer program as such or a presentation of information. The program becomes technically meaningful only in combination with the computer it is intended to control. We will also refuse claims of the form “A computer program X for use with a computer Y”, since such claims are interpreted as being directed to the computer program as such, the only limitation imposed by the words “for use etc.” being that the program must be suitable for the stated use.

The description: programming language

There are two other points which I wish to mention in connection with software based inventions.

Firstly, in a new paragraph C II, 4.9a in the Guidelines it is stated that, in order that the requirements of sufficiency of description may be fully satisfied, it is necessary that the invention is described not only in terms of its structure but also in terms of its function, unless the function is immediately apparent. This requirement applies to all inventions but it is particularly relevant in fields like computers where the invention, in the sense of the contribution to the known art, may be hidden in an over-detailed description of structure. I should like to add that nowadays, in the computer field, a detailed structural description is usually time-wasting and quite unnecessary since the components employed are normally well known in themselves. What is needed is a clear description of how the computer functions and this can often best be given in the form of a flow diagram.

The second point concerns programming languages. This is dealt with in the Guidelines in a new paragraph C II, 4.14a. Here we have modified our position somewhat as the result of discussions in the Working Group. Whereas the original EPO view was that neither the claims nor the description should contain special programming languages or program listings at all, we have now adopted a compromise position. This position is that, in the description only, short excerpts from programs written in commonly used programming languages may be accepted, but they cannot be relied on for sufficiency of disclosure.

I believe that the EPO has arrived at a general approach which, while respecting the terms of the EPC, is better adapted to present technological developments and will thus better serve the needs of industry. I believe also that the new practice will provide a workable (even if not precisely defined) borderline between what is patentable and what is not; this is important because applicants should be able to assess in advance their chances of getting patent protection.

As I mentioned at the beginning of this article, we must all wait and see what our Boards of Appeal have to say on the subject. Our position may have to be modified in the light of their decisions and also in the light of further experience and of developments in EPO Contracting States. In the meantime the EPO has, through the amended Guidelines, given a clearer explanation of the extent to which software-related “inventions” may be protected through patents.
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### AD-HOC AUSSCHUSS
BERUFELICHE HAFTUNG
DER MITGLIEDER

**AD HOC COMMITTEE ON QUESTION OF MEMBERS' PROFESSIONAL LIABILITY**

**COMMISSION AD-HOC RESPONSIBILITE PROFESSIONNELLE**

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**AD-HOC AUSSCHUSS**

**BERUFELICHE HAFTUNG**

**DER MITGLIEDER**

**AD HOC COMMITTEE ON QUESTION OF MEMBERS' PROFESSIONAL LIABILITY**

**COMMISSION AD-HOC RESPONSIBILITÉ PROFESSIONNELLE**

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**SCHRIFTLEITUNG**

**DATAMETEX**

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**ARTICLE 25**

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