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Institute of Professional Representatives before the European Patent Office

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"The King is dead, long live the King!" So went the traditional cry, if one believes Shakespeare or other playwrights of bygone ages.

Nowadays we use the expression for transition, change, and in our realm we certainly have one. As we write this, the European Patent Organisation, of which this Institute is part, is preparing for the retirement of President Braendli at the end of the year, and the installation of a new President, President Kober from Germany. We wish them both well, that President Braendli has a fruitful and satisfying retirement and that President Kober has a smooth and unflurried hand-over. Let us not forget either that there is a new Chairman of the Administrative Council, Senor Alvarez-Alvarez from Spain who has just replaced Mr. Thoft. No doubt the two new Presidents have a heavy workload, but bearing in mind the successful Hearing on the Four Strategies of the EPO, we hope that they will continue to consult the users in general, and the Institute in particular. We are after all, whether in company or private practice, representatives of the users of the system and so must know what users want. Moreover, in our position as representatives, we, the attorneys, act as ambassadors for the system, and act as a conduit for two-way flow of information between the EPO and its clients, the users. Thus at the Hearing, and elsewhere, the Institute has indicated the dissatisfaction as to the cost, particularly the high front end costs, of using the EPO system, and has been positive in suggesting ways which can address such problems. The cost of translation is one of these problems. The language regime was, like the system itself, a compromise worked out by the Founding Fathers. Any change therefore has to be looked at carefully.

We are sure that all concerned, including our President, are seized of these problems, and we wish them well. We also take this opportunity of wishing all our readers a Happy Christmas and an equally happy New Year.

Jean Brullé · Joachim Herzog · Terry Johnson
Welcome address by the EPO President, Prof. Dr. Paul Braendli, on the occasion of the EPI Council Meeting, Munich, 16 October 1995

Madam President, Ladies and Gentlemen,

It is a great pleasure for me - personally and on behalf of the European Patent Office - to accept your invitation to address you on the occasion of your Council meeting. I see your invitation as a further link in a long chain, each link representing the good co-operation that exists between the patent profession and the EPO. Today more than ever, it is very important for public authorities and the decision-makers in each profession to understand and co-operate with each other. It is only through such initiatives that we can enhance industrial development in Europe. This applies to patents as it does to many other areas.

Representatives from the patent profession in many countries are with us here today. That was also the case last month at Hearing '95, held here in Munich to discuss the future strategies of the European Patent Organisation. Despite belonging to the same profession, you come from two different branches: the patent departments of users of the European patent system and the patent attorney offices assisting patent applicants in obtaining appropriate protection for their inventions. Moreover, you come from different parts of Europe, not all of them equipped with the same facilities for using the patent system.

In view of these differences in background, I was particularly pleased that so many of you participated in the hearing. Nearly all the contracting states were represented by their interested circles.

Your contributions to the strategic debate - at meetings I have had with quite a number of you individually, in writing prior to the hearing and during the two days of the hearing itself - were most welcome. I have the impression that in many respects your views and comments will influence the heads of delegations.

Before the hearing, many of them seemed not to realise that the views and suggestions of your profession on how to improve the patent system are not only a national phenomenon, but reflect widespread European opinions and trends. I believe this "correction" is very healthy for the political decision-making process.

At the heads of delegation meeting 10 days ago we had a preliminary discussion on the outcome of the hearing. The reactions from the various countries represented at the heads of delegation meeting showed that after the hearing a certain broadening of views had taken place.

I ascribe this change in attitude to your contributions at the hearing and the broad range of views and nationalities represented. I am very satisfied with the profession's contribution to the debate, particularly since I have always advocated your involvement as an indispensable element in any realistic strategic planning.

The European patent profession consists of highly educated and well-trained professionals. Some of them work in companies systematically carrying out research and seeking protection for their innovations; others are independent patent attorneys who nevertheless collaborate closely with industry and to a large extent function as partners for industry and the patent authorities at the national and international level.

Tomorrow's role for EPI members is to continue to develop their services to clients together and in competition with other groups of professionals. I certainly hope that you, ladies and gentlemen, in conjunction with the EPO's national counterparts, will understand how to optimise the possibilities of providing services to the public and continuously adapt the patent system to technological developments. Only thereby will it be possible to improve and strengthen the European patent system. It is vital that we work together. We rely on you to tell us which aspects of our operations satisfy your clients' needs and which need to be looked at. Your assistance is called for in this.

Quite often I hear patent attorneys referred to as the ambassadors of the patent system. I personally see your role as much more substantial than that. Your function does not end at the moment when contact is established between the patent system and the inventor or patent applicant. On the contrary, you are true intermediaries and at the same time defenders of the patent applicant's interests vis-à-vis the European Patent Office and any third party. Moreover, in patent licensing and litigation your function is definitely not that of an ambassador, but rather that of a dentist removing the gum boil causing all the pain. In implementing our new approach to existing and potential users of the European patent system, your full support and contribution is needed.

You have a key role to play in the further development of the patent system in Europe - not just by providing a quality service to existing users. A further important aspect of your role is to "spread the patent message", i.e. to persuade a broader range of users - especially SMEs and individual inventors - of the merits of patenting. No one is better placed to increase the industrial and scientific community's awareness of patenting than you, the patent profession, because you have a foothold in the local community. You know the areas which are already well developed from a patent point of view and other areas which might represent untapped potential. Equally important, the local inventor knows where to find you. It is to you that he will turn with his ideas, and it will largely be the impression he forms from that initial encounter that will determine whether he thinks the patent system has anything to offer him. It is this accessibility, I would say, which is your great advantage. Through your guidance, the patent system can be transformed from something which to the uninformed might seem remo-
The EPI's participation in the Examination Board and its examination committees as well as the Disciplinary Board and the Disciplinary Board of Appeal shows the importance attached to maintaining a high professional standard among its members.

Some years ago, the Regulation on the European qualifying examination was changed. This was at the Office's initiative, but it was the result of co-operation between the Office and the profession. It was a very difficult task, since the qualifying examination cannot be separated from the candidates' training prior to their enrolment. The examination system has been modernised and brought more into line with today's concepts.

The results of this year's qualifying examination in March were officially made known today. The first sitters taking all papers achieved the best results, 52% of them having passed the examination. The overall result was a pass rate of 39%, slightly better than the years with the lowest pass rate but still not a remarkable improvement. The results of the sitters were - I apologise for the emotional expression - depressing. When they sat the examination in full, 9% passed. This means we are not far off the pass rate figures for the Japanese examination (which is 3%). Personally, I am very concerned about this development as I see the "European patent idea" endangered thereby. I fear that the full impact of these figures will not be realised until about 8 to 10 years from now.

Many candidates have expressed their satisfaction with today's greater transparency. However, it cannot be denied that further improvements are not only possible but also necessary. In a couple of years from now, when we know the full impact of the changes we have already implemented, I believe it would be useful to reconsider the system once more.

Apart from these formal links between the Office and the EPI, there are other examples of their successful co-operation. Shortly, two pamphlets will be published. One describes how to become a European patent attorney and the other deals with the European qualifying examination as such.

Let me finish my address to you by touching upon a matter which in my opinion is of vital importance to the European patent system and all its partners - the patent applicants, the professional representatives and the European Patent Office. I am thinking here of my suggestion to adopt a medium term fee policy involving a reduction in the official fees to the benefit of the users of the European patent system. I know you are going to discuss this subject later today. At the SACEPO meeting in March this year, the EPI clearly indicated that measures to make the procedure cheaper and more efficient would be welcomed by the profession. Taking into account that the Office's financial situation is sound and there are no signs that this situation will deteriorate, it seems appropriate that operating surpluses should not simply be divided amongst the national offices. They should rather be used to benefit the users of the system to whom the Office and the European Patent Organisation as a whole offer a service.

Especially the "entry level" fees payable at the beginning of the procedure should be lowered. I believe this is essential to encourage small and medium-sized enterprises in particular to make greater use of the system and it is beyond dispute that high costs are hitting precisely this category of inventors the hardest. Our scope for action, however, is limited so long as we receive only 50% of the renewal fee income from the patents we grant. This means that procedural fees have to account for nearly 80% of our running costs. If the distribution key were altered so that the European Patent Office received, say, 75% of the renewal fee income, which is specifically envisaged by the Convention, we could reduce procedural fees by about 40% overall.

As you know, the contracting states have declared themselves unable to decide on such a measure until a full strategic debate has taken place. At the meeting of heads of delegations ten days ago, little progress was made in this direction. However, I feel sure that the last word has not yet been said on this matter. Since you,
ladies and gentlemen, as well as European industry and the FICPI, have all indicated your keen interest in my proposal. I am confident that at some stage in the near future the pressure will become so strong that something will have to be done. I rely on your co-operation in this matter - in the same way that you have always shown me your co-operation over the last ten years.

Indeed, I am proud to say that throughout my professional life, including most of the years before I became President of the European Patent Office, it has been a pleasure and privilege for me to negotiate and work together with the highly qualified and well-trained members of your Institute.

Thank you.
President’s Report to Council
E. Thouret-Lemaître, EPI President

The facts will be presented chronologically.

1. Representation
The first task has been to send a letter relating to representation, prepared with our Manager, to Messrs. Schwab, Jung and Combaldieu.
This letter somewhat modified was also sent in July to the President of the Commission, J. Santer and to the Commissionners Bangemann and Monti.

2. Patentanwaltskammer
On July 20, R. Zellentin, J. Mohr and myself were invited by the President of the Patentanwaltskammer, Dr. Rau, to discuss informally the questions of representation and the strategies of the EPO.

3. The Professional Conduct Committee will present a proposal for an amendment of rules regarding advertisement to Council.

4. The Professional Qualification Committee (PQC) will produce and use real life case studies as a training medium and will promote this medium by encouraging EPAs to volunteer to offer the files to the PQC as case study material.

5. Council approved the PQC’s being responsible for responding to requests for help in arranging for, or liaising with national bodies interested in seminars on professional topics in Member States.


3. La Commission de Conduite Professionnelle présentera au Conseil une proposition d’amendement des règles concernant la publicité.

4. La Commission de Qualification Professionnelle (PQC) proposera et utilisera des études de cas réels comme moyen de formation qu’il développera en encourageant les mandataires à proposer au PQC des dossiers pouvant être utilisés à la préparation des études de cas.

5. Le Conseil est d’accord pour que le PQC soit chargé des demandes d’assistance concernant l’organisation ou la coordination, avec les organismes nationaux intéressés, de séminaires traitant de sujets professionnels dans les Etats Membres.


This meeting agreed that our two bodies should act in the same direction when possible.

4. Meeting with Mr. Kober
On August 9, R. Zellentin and myself were in Bonn to meet Mr. Kober. During the informal discussion, we have presented the EPI and its activities (in particular training of future patent attorneys), discussed the cost of the European patent, and other general topics of interest for the future EPO President.
Mr. Kober has promised us that after his taking office, he will be again in contact with us.
5. Report of the June EPO Administrative Council Meeting

(See the following Report of the June 95 Administrative Council Meeting)
You have already read the official report in the O.J. 7/1995.

6. Hearing of September
A hearing relating to the strategies of the EPO took place on September 11 and 12, 1995, at the EPO, for discussing the document prepared by the EPO and the Administrative Council. The interested circles were invited.

The two Vice-Presidents and myself attended the hearing.

A report has been prepared by the EPO Administrative Council Secretariat (document CA 88/95). This document has been discussed during the EPO Administrative Council meeting of October 5 and 6, 1995. A report will be prepared by the Secretariat of the EPO Administrative Council. These two documents are at your disposal at the EPI Secretariat.

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Report of the June 95 Administrative Council Meeting
E. Thouret-Lemaître, EPI President

1. A general remark
The Heads of Delegations have had several meetings during the two days and a half. The observers are excluded from these meetings. Almost all decisions are taken during these meetings and it is difficult to present remarks or comments when the decisions are presented by the AC chairman as already taken in the plenary session.

The AC Chairman and the national delegations consider that the present time is difficult and they multiply the number of meetings (heads of delegations meetings and plenary sessions).

The EPC does not speak of meetings of Heads of Delegations.

We can understand that political or personal matters may be discussed in a limited circle but not that all the decisions are taken in advance without any presentation in the plenary sessions. It’s time for us, to write to the AC chairman and to the national delegations for presenting our point of view.

Moreover, in 1996 a new President will be at the EPO.

2. Paper CA 42/95 (proposal of reduction of the first fees, filing and designation fees) has been withdrawn from the Agenda by the AC Budget and Finances Committee.

It was said that the figures given by the EPO did not permit to take a decision at this AC meeting. Will it be possible in October or December? I am not convinced thereof.

The AC is prudent (cautious) and does not accept from the EPO any change for the time being.

3. Nominations - Départs à la retraite

- The new Vice-President of the AC is Mr. Fitzpatrick (IE), he replaces Mr. Mota Maia (PT).
- Mr. Toni (CH) has been elected chairman of the AC Statistics Working group.
- Mr. Payraudeau (chairman of a Board of Appeal) will leave in November 95.
- Mr. Schulte, member of the Enlarged Board of Appeal and of the Disciplinary Board of Appeal, will leave the EPO this year.
- It seems that Mr. Gori will leave the EPO next year in July 96.

4. EPO President’s Report

- Presentation of the document “Strategies of the European Patent Organisation Ideas and Topics” and of the hearing in September (where users will be invited).
- The 1995 tendency (up to April) shows that more applications are filed than for the last year same period. (EPO counts on around 75000 applications in 1995; a majority being euro PCT).
- The 30000th European patent was granted (to Asea Brown Boveri).
- The programme PACE (Accelerated Prosecution of European patent applications = seven measures) has seen an increase of 20% over the figures for the corresponding period of 1994.
- 820 candidates (82 EPO Examiners) sat the EQE in March 95.
- 252 requests for Lithuania.
- On 1 May 1995 an extension agreement also entered into force for Latvia.
- Negotiations with Albania and Malta are underway. The agreement with Romania has been delayed.
- The trilateral cooperation (EPO/USPTO/IPO) activity is reduced for the time being.
- In Malaysia it is now possible to use the European patent for accelerating the national granting procedure.
Finland will in principle be a member of the EPC end of 1995 or beginning 1996.

5. Reports of the AC Committees and working groups

5.1 The CBP's (AC Budget and Finances Committee) chairman, Mr. Rafeiner (AT) presented the conclusions of the work and at that time answered the EPI President's question: why paper CA 42/95 was withdrawn from the Agenda (see point 2 of the present report)

During 5 years the inflation rate will not be applicable to the fees.

5.2 The Committee on Patent Law Mr. Sugden made a complete and very interesting report of the April meeting. We had already a report from our members (observers) in the Committee at the Edinburgh Council meeting.

The most important points discussed and mentioned by Mr. Sugden were:
- PLT/WIPO
- Rule 28/28a (extension to all biological materials and of the expert solution)
- Rule 51.6 acceleration of grant
- language issue (to be studied further)
- TRIPS and professional representation
- NL-document: pharmacological experiments during the patent and the SPC
- priority rights
- TRIPS article 87/Paris Convention
A report will be at our disposal in the near future.

6. AC meetings cost

EPO President took the floor for giving figures relating to the cost of the AC meetings (26 in 1994 - 42 days). This figure which I will give you orally is big.

I urged the EPI Committee on EPO Finances to study this point and to give us information.

7. Status of Ratification Procedures

- UK ratified the 1989 ACP
- some countries have ratified or are in the course of ratifying the Art. 63 EPC. Revision text (BE-CH-IT-LI-PT).

8. Spain

A cooperation agreement between the European Patent Organisation and the Spanish Patent and Trademark Office on international searching has been allowed and will be signed.

The Spanish Office as International Searching Authority will be helped during 3 years by the EPO for the necessary harmonisation of search activities under the PCT (see the Agreement with the Swedish Patent Office on July 6, 1978) : art. 157 par. 3 EPC.
Committee Reports

Report of the Committee on Biotechnological Inventions

B. Hammer Jensen (DK)

I Introduction
1. Since the last Council meeting in Edinburgh on May 8 and 9, 1995 the Committee held a meeting on June 28 in Munich.
2. As none among the Chairman, Vice-chairman and Secretary of the Committee had stood for reelection to the Committee, new officers had to be elected. The result was:
   Chairman:
   Mr. Bo Hammer Jensen (DK, other capacity)
   Vice-chairman:
   Mrs Liliane Meyers (BE, other capacity) and
   Secretary:
   Christopher P. Mercer (GB).
3. The Committee was decided to express the Committee’s appreciation of the work of the previous Chairman Arthur Huygens, Vice-chairman Alain Gallochat and Secretary Stephen Crespi by writing to them.
4. For one of the items on the agenda, the EPO had been invited to participate in part of the meeting. The EPO was represented by Mrs. Gruszow and Mr. Guggerei.
5. The following issues were discussed at the meeting:
   A. QUESTION 1 - EU Draft Directive on the legal protection of biotechnological inventions

5. The EU Commission is preparing a new Draft Directive, but it has not yet been decided if this will be proposed to the EU Council and Parliament. It has been indicated that the new draft will resemble the previous one to a large extent, except that Article 3 will be changed and some provision for a “Farmer’s Privilege” for animals will be made. Furthermore, the order in which the Articles are presented will be changed to be more logical. The Committee members agreed to inform each other of any developments they would become aware of.

6. Since one of the causes of the negative reception of the previous Draft Directive is the concept of patenting human genes, a Working Group was set up to produce a position paper on this issue. It is expected that the Group will submit its paper to the Committee and then forward it to Council for approval.

B. QUESTION 12 - Decision T356/93 - Plant Genetic System (PGS)

7. The decision of the Technical Appeal Board in the above case was discussed with Mrs. Gruszow and Mr. Guggerei from the EPO. They indicated that DG2 felt the decision to be in conflict with previous decisions concerning Art. 52(4) EPC, 1st sentence. DG2 intend to ask the President of the EPO to refer a question to the Enlarged Board of Appeal concerning this decision.
8. The Committee agreed with the views expressed and after the departure of the EPO representatives a Working Group was set up to draft a letter to be sent by the President of the EPI to the President of the EPO concerning this matter.
9. Prior to the Group’s completion of this draft it has come to our attention that based upon recommendations from, i.a. UNICE and CEFIC, the President of the EPO has referred the case to the Enlarged Board of Appeal.
10. The Committee will consider filing an Amicus Curia brief with the Enlarged Board of Appeal once the question of the President of the EPO has become known.
11. The Council accepted at the meeting in Munich on October 16 that the Committee drafts an Amicus Curia brief, which after consultation with the EPPC and the Board should be filed with the Enlarged Board of Appeal.

C. QUESTION 5 - Sequence Listings/Patentin Software Program

12. The previous Chairman, Mr. Huygens had been contacted by Mr. van Putten of the EPO concerning a new version of the Patentin software and the establishment of a User Group for testing it before its release. It is expected that this new version will be released for testing by the end of this year. The new version is expected to be integrated with the EASY software, avoiding the typing of the same information concerning applicant, inventors, etc. more than once.

Report of the By-Laws Committee

C.E. Eder (CH)

The Committee has drawn up the “Terms of reference” for the Election Committee in accordance with Rule 12 of the Rules for Election to Council and has presented them to Council for decision.

According to the information received from the committees, the “Terms of reference” for the “EASY” Committee and the “Terms of Reference” for the “Committee on the Utilisation of Patent Protection in Europe” were drafted and presented to Council for decision.

Moreover, the Committee has prepared a collection of the regulations and presented a copy to the Secretary General so that he may take the necessary steps to have the copying and distribution organised, according to the Council decision of 3 October 1994.

Report of the Disciplinary Committee

S.U. Ottevangers (NL)

At its meeting in Edinburgh on 8 and 9 May 1995 the Council of the Institute of Professional Representatives (EPI) elected the members of the Disciplinary Committee. Following the election of the members a meeting of the Disciplinary Committee has been held on July 6, 1995 in Frankfurt am Main. In said meeting the Disciplinary Committee elected as

Chairman
Mr. S.U. Ottevangers (NL)
Deputy Chairman
Mr. G. Leherte (BE)
Secretary
Mr. H.-G. Urbach (DE)
Deputy Secretary
Mr. J. Waxweller (LU)

The Disciplinary Committee has encountered problems with the continuity of Disciplinary Chambers after changes in the composition of the Committee. Important members of a chamber such as the rapporteur might not be re-appointed as members of the Disciplinary Committee after Council elections and very short deadlines might then make it impossible to finish a case in time. The Disciplinary Committee is of the opinion that an amendment of the By-Laws of the European Patent Institute and of certain Regulations might be advisable. The Disciplinary Committee will prepare a proposal for such amendments. Also a general revision of all Disciplinary stipulations is considered to be desirable. The Disciplinary Committee will revert to that in the near future.

Recently a Chamber of the Disciplinary Committee has rendered decisions in so called "advertisements" cases. In said decisions it is recommended that the Institute issues further guidelines and recommendations on the matter of advertising by national professionals who are also representatives before the European Patent Office.

On the date of election of the members of the Disciplinary Committee 17 cases were pending. Since then in 11 cases a decision has been rendered. One new case was received, so that at this moment 7 cases are pending.

2. Other developments in the meantime have much disturbed the Committee, these being principally:
   i. the refusal of the Budget & Finance Committee (an associated body of the Administrative Council) to give the go-ahead for the Office's fee reduction proposals as presented to the SACEPO meeting in March
   ii. the evidence that use of EPO's huge surpluses for early repayment of loans is now becoming less feasible because the loans remaining have fixed repayment dates and that, having reached this stage, the Contracting States are now proposing diversions of EPO money to projects benefiting themselves, eg DEM 5 million per year for programmes to assist individual member states with the development of patent information facilities
   iii. the indications - although possibly exaggerated - that meetings of the Administrative Council and its associated bodies generate an annual cost to EPO of DEM 25 millions of which 80% is on the production of papers, inclusive of translation into 3 languages
   iv. the suggestions that the huge surpluses being made by EPO are contrary to the balanced budget requirement of Art. 40 EPC.

3. Recalling that a letter was sent in May of last year to Mr. Thoft by our President on the subject of EPO procedural fees (see EPI Information 3/1994 at p. 92), the Committee proposes that consideration should be given to writing again to Mr. Thoft in order to underline the concerns felt by EPI not only in relation to the developments mentioned above but, more fundamentally, in relation to the apparent lack of real progress towards the achievement of fee levels meeting the criterion of being no higher than is absolutely necessary.

Report of the Finance Committee
B. Feldmann (DE)

1. At its last meeting (September 12./13.1995) the Committee elected Mr. J.U. Neukom as Secretary and the writer as Chairman.

2. Despite the termination of the link between EPI personnel pay and EPO pay as a result of the Board decision in August last year use is still made of "Monthly Basic Salary Scales for EPI personnel". The Committee has approved an upward revision in these scales by about 3.5% effective 01.01.1996 to match the general trend of pay increases in Germany.

3. The budget figures for the first 6 months of 1995 were reviewed and considered satisfactory.

However, the financial situation might be affected by the Institute's investment in the Global Bond Trust (GBT), although there have recently been signs of a slight improvement in the market value. The original investment in April '94 was DM 500,885.00 plus an entrance fee of DM 10,078.42 with a market value of DM 434,944.59 at the end of 1994. On September 11, 1995 the market value increased to DM 442,479.21. As the GBT is traded in £ and composed of various foreign exchange currency losses occurred (up to now DM 50,534.62), in addition with revenues of DM 22,073.34 on the other side. Although the GBT is still far short of the point, i.e. a level similar to the original market value, which the Committee said should be reached before selling, the advice of the Committee has been, following lengthy discussion with the Treasurer, (a) that, subject to any expert opinions obtainable, the selling of the investment need not be undertaken hastily since continuing improvement remains a realistic expectation, and (b) that, assuming the investment is still held at the end of the year, any shortfall at that time on the original market value should be entered as a loss in the 1995 accounts.

4. A draft budget for 1996 was discussed at length with the Treasurer at the Committee meeting. As a result, the Committee has approved the budget to be presented by the Treasurer. Since this budget is based

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Report of the Committee on EPO Finances (Summary)
J.U. Neukom (GB)

1. Since the last Council meeting, the Committee has provided notes to the President for assisting in the preparation of the EPI response on the document "Strategies of the European Patent Organisation".

Editorial note: see also letter from the EPI President to the Chairman of the Administrative Council under the heading "European Patent Convention" of this edition.
on a subscription for 1996 of DM 300.00, this implies that the Committee recommends no change in the subscription next year.

WIPO and Harmonisation?

R.C. Petersen (GB)

In September 1995 at Geneva, the General Assembly of the Paris Convention and WIPO accepted the recommendation of the Consultative Committee set out on page 49, EPI Information 2/1995. Accordingly, a meeting of a Committee of Experts on the Patent Law Treaty has been called for the week of 11 to 15 December 1995 in Geneva. The EPI Council, at its meeting in Munich on 16 October 1995, approved the attendance of an EPI representative at that Geneva meeting.

The papers have now been received and reveal that the WIPO proposal for a Treaty, Rules and Forms follows closely the list of formalities contained in the Consultative Committee recommendation, namely, signatures, changes in names and addresses, changes in ownership, correction of mistakes, observations in case of intended refusal, representation, address for service, contents of at least the request part of the application, and use of model international forms. These have been drafted in such a manner as to avoid controversy, but are consequently full of possible alternatives and hardly add up to harmonisation, although setting some limits on requirements.

What is lacking is the inclusion of such uncontroversial matters as had already been agreed at the Diplomatic Conference in The Hague in July 1991, for example filing date. It will be in the interests of applicants and representatives alike that as much as possible is included. However, any controversial matters, such as “best mode”, “first-to-file” and “grace period” must be avoided to reach a genuine consensus which could be used to produce an acceptable text for a Treaty to be adopted.

By the time this is published, it will have been made clear to what extent the Committee of Experts can come up with a solution. Further reports are to be expected.

Report of the Professional Conduct Committee

J. Brown (GB)

EPI Council decided that the Code of Conduct is essentially to be maintained, but Rule 2 (Advertising) is to be clarified in order to remove problems encountered by the Disciplinary Committee in CD 5/94-12/94 (published in EPI Information 3/95, page 91). This clarification has been remitted to the EPI Professional Conduct Committee.

Members are reminded of CD 4/91 (EPI Information 3/93, page 170) and CD 1/92 (EPI Information 4/93, page 326) which reprimanded advertisements involving specific reference to the title “European Patent Attorney”.

Report of the Professional Qualifications Committee

K. Weatherald (GB)

Students of the EPI

There were 64 Students as at the end of August, comprising GB 20, NL 14, and DK 10, with other States having between one and five. It is believed that not enough people on the List are sufficiently aware of the advantages of their technical assistants’ becoming enrolled as Students to encourage, and even pay for, their technical assistants to apply. Accordingly a reminder to this effect is being published in this issue of EPI Information.

EPO/EPI Working Group on training

Those members of the EPI who were in the group found it invaluable to work so closely with the EPO, but now that the group has reported to the Presidents of the EPO and the EPI, it is felt that it lies at the door of the PQC to take any initiatives. Accordingly the PQC is proposing to issue to all Students a so-called “Training Manual”. The Manual will set out:

1. A list of recommended reading for those wishing to pass the EQE;
2. A list of training facilities available in various member States;
3. The relevant EQE Rules and provisions;
4. A proposed training timetable to act as a guide for assessing what external help a Student might need to supplement that being given in-house; and
5. Case studies to assist Students and their trainers.

Council approved the PQC’s being responsible for the wording and distribution of the proposed Manual.

Case studies for training

The studies mentioned in point 5 above are being prepared by members of the PQC, with the cooperation of other members of the profession. The studies are to be based on the attorneys’ files of actual applications which have been prosecuted before the EPO, but from which identification data have been removed, and which have been selected and edited to meet a specific training need. The studies are intended to demonstrate various real-life situations in prosecuting EP applications in different technical fields and official languages. They will be devised for the particular benefit of trainees who might need more exposure to EP work than they would necessarily get in their normal work. The studies will be vetted by the actual EPA who prosecuted them, to ensure that any unnecessary information has been deleted from the actual file. This was approved by Council.

Seminars on initial and continuing education

The EPI section of the Joint Working Group on training also perceived there to be a need for some body within the EPI to be responsible for organising seminars on request, or for enabling others to do so with help from practising EPAs. With its direct interest in arranging for, or facilitating, training for the EQE, it was felt to be a logical step for the PQC to act as a focal point for such requests as the EPI might receive for help in arranging educational seminars. This also was approved by Council.
Tutorials for the EPI

This is another training medium in which the EPI is involved through the PQC. For 1995, 56 candidates received tuition from 20 EPAs in eight States. The PQC believes that more candidates would benefit from tuition if they knew that it was available.

The PQC will be thinking about how the program may become more widely known and used.

Students of the EPI

K. Weatherald (GB)

The Professional Qualifications Committee (PQC) would like to remind readers of the benefits, to those wishing to get on the List by way of the European Qualifying Examination (EQE), of applying to become Students of the EPI.

Applying to become a Student involves payment of an entry fee of DEM 300, which provides the benefits to the end of the fourth year from the application date. (Application forms are available from the EPI Secretariat). Each registered Student will receive his/her own copy of “EPI Information”, a list of registered Students, and, in due course, a “Training Manual”. This latter will include a list of recommended reading material; a list of training resources in EPC States; the relevant EQE rules and provisions; training guidelines, and edited case studies. This fee is not intended to raise any profits for the EPI, but only to cover foreseen costs.

Council has also approved a reduction in the costs of EPA tutors. Students wishing to take tutorials in all four papers need only DEM 300 (instead of DEM 450), while for those wanting them for only two papers the fee will be DEM 200 (instead of DEM 350).

The basic motive behind setting up this type of association with the EPI is to persuade and enable would-be EPAs to take responsibility (on a self-help basis) for getting the training and exposure to the work of a patents professional that each needs not only to pass the EQE but to function as a fully-competent patent attorney.

At the last count, there were only 64 Students. This seems to be too small a percentage of those taking the EQE for the scheme to be fully effective, and hence this notice. If you have any concern for the future of our profession, and know of a would-be candidate for the EQE, then please play your part by bringing this notice to his/her attention.

European qualifying examination - Paper D 1995

I. Muir (GB)

By now, the examination statistics will have been published (see e.g. p. 140 of this issue) and, no doubt, the complaints of the unsuccessful against the examination and/or the examiners will be being voiced, with varying degrees of vehemence, as in previous years. Therefore, as chairman of Committee III, which is the committee which sets and marks Paper D, I considered it would be appropriate to make the following points on the examination, additional to the remarks which will be in the Examination Board’s report on the examination, published by the EPO. Although worded by me, the points have the general support of my committee.

From many of the verbal reports that have come to me, the criticism of the examination and the examiners is strong and caustic. It is apparently believed by many candidates that it is not they who need to improve but the examination or the marking of it that requires to be changed. A common misconception of candidates and their principals is that examiners are paid for the work they do and that they are failing to perform adequately in return for this payment. We are, I understand, considered to take too long over the work, to set unrealistic and improbably complex questions and to award marks for largely esoteric and theoretical issues. The candidates on the other hand know they are ready to sit the exam and are well prepared and knowledgeable after their years working in the field. Since, with their fees, they feel they are paying for all the work and expenses involved, the examiners should get their act together and produce a higher percentage of passes in a shorter space of marking time.

Not all have the same view or to such an extreme extent but all those remarks have been made, and apparently to some degree been believed, by a large number.

To set the record straight:
The fees cover only a modest fraction of the cost and all the professional representatives are completely
unpaid for the work they do, although their out-of-pocket expenses are largely covered by the EPO.

After the exams have been taken all the papers have to be copied and returned to the EPO in Munich. Three copies are required for each paper; one for retention by the examination centre and two for the examiners, with the original being held by the examination secretariat. All the copies have to be checked to ensure no pages have been lost in the copying process. The papers then have to be shared out between around twenty examiners taking care that no examiner receives answers of candidates with whom they have any association. Any papers that are not in French, English or German have to be translated into one of these languages by a member of the PQC and then passed to the relevant examiners. This all takes up approximately two months, which then allows examiners around three months to carry out their work before they meet in Munich to settle their recommendations for grades to the Examination Board. A further month is taken to collate the results, for adjudication by the Examination Board and for the Secretariat to prepare and send out the results.

The professional representatives spend the equivalent of at least one month's full time work to set and mark the papers and this has to be fitted in to their office working schedule, so that many can only meet the target deadlines by working in their holidays.

The questions in Paper D - including part II - are usually based on questions that have arisen in practice in examiners' offices but they have often had to be simplified over the real life situation so as to be suitable for the exam.

Part II of the exam is tried out by a test person to check that it can be tackled realistically in the time available.

Papers are each marked by at least two examiners independently. Examiners may make mistakes and be wrong sometimes but we do our best to avoid this or correct for it before the results are issued - in particular the double marking acts as a safeguard and differences between examiners are discussed at length. It is in fact remarkable how little the examiners differ and therefore perhaps, as I believe, their marking really does reflect objective reality.

In view of all this, some of the scripts submitted to be marked really are an insult to the examiners. It is clear from these scripts that some candidates are completely unprepared and uneducated in patent law. These candidates either take in no books or reference material or are incapable of using what they do take in to the exam. With reference material to hand, it really is not possible for any suitable candidate who has put in the requisite preparation to obtain marks as low as those that some achieve - not just one or two but a significant number. This year a number failed to achieve 10% over the whole exam even though 45% of the marks were available in part I for which the answers can be found in the books and for which candidates had more than two hours to write their answers. In fact, the time available this year exceeded that of previous years.

Quite simply, any person who feels they really did put in sufficient preparation, who took into the exam good reference material and who was not ill or had any other problem during the exam, should seriously consider whether they have chosen the correct profession if they then failed to obtain a grade above the lowest grade or, perhaps, even above the lowest two grades.

Examiners are only sustained in their work by the significant number of well prepared, and in some cases brilliant, candidates. They are the ones that make the task worthwhile but there are many whose performance makes me, for one, wonder why I am wasting so many sunny summer hours sitting indoors marking rubbish that would be put to better use lighting a barbecue.

The easy way to increase the pass rate percentage is for only those who have done the necessary work and preparation to enter the exam. That would benefit everyone. This is not an exam where one can expect any success by just "having a go" without being prepared. The professional representatives employing and/or training candidates have a responsibility to advise the candidates properly as to their state of readiness for entering the exam. Firms who pay their candidates fees should, I suggest, check whether the candidate is ready before they enter the exam and, if there is any doubt, persuade the candidate to wait a year. An alternative could be to make the rest fees rise substantially so as to produce more self-control.

Finally, why have I been so direct in my remarks? Firstly, to get them off my chest because I have never been very good at suffering in silence. Secondly, and more importantly, because I think the comments needed to be said in this way so as to bring the message home to those candidates who were deluding themselves that they were fine but the exam or the examiners were wrong.

The plain fact is that the law paper is a hard paper that requires a lot of serious preparation, both by examiners and examinees. Believe it or not, the examiners spend an inordinate amount of time trying to get it right and to give candidates the benefit of the doubt. If a candidate shows he is fit and ready to practice the law, we are only too pleased to give a pass mark - after all it is one less to mark next year.
### RESULTS OF THE EUROPEAN QUALIFYING EXAMINATION 1995

#### FIRST SITTING

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RESITTING – Examination in full

Total number of candidates: 44
Passed: 4 (9.1%)
Failed: 40 (90.9%)

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### Europäische Eignungsprüfung


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### Europäische Eignungsprüfung EPI-Tutorium 1996

Das EPI bietet erneut ein Tutorium vorwiegend für diejenigen an, die die Eignungsprüfung 1997 ablegen werden. Es ist wichtig, daß Sie Ihre Kandidaten auf die Möglichkeit dieses Tutoriums aufmerksam machen, da diese die EPI Information nicht selbst erhalten.


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### European Qualifying Examination

The next European Qualifying Examination will be held from 27 to 29 March 1996. Further information regarding the examination centres and conditions of enrolment have been published in the Official Journal EPO 6/1995.

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### Examen européen de qualification


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### Examen européen de qualification Tutorat EPI 1996

L’EPI propose à nouveau un tutorat destiné principalement aux personnes qui se présenteront à l’Examen de Qualification en 1997. Il est important que vous attiriez l’attention de vos candidats sur l’existence de ce tutorat puisqu’ils ne reçoivent pas EPI Information eux-mêmes.


Die Kandidaten werden wieder den nächstliegenden Tutoren zugeteilt, die soweit möglich, auf dem gleichen technischen Gebiet tätig sind.

Die Kandidaten werden gebeten, ihre Antworten den Tutoren schriftlich bis zum 1. Oktober 1996 zuzusenden. Üblicherweise werden zwei Tutoren mit sechs bis acht Kandidaten ein gemeinsames Treffen arrangieren, um die Antworten zu besprechen.

Das EPI-Tutorium soll, soweit möglich, unter Prüfungsbedingungen stattfinden (Prüfungs unterlagen, Zeitspanne ...).

1995 haben 56 Kandidaten und 20 Tutoren am Tutorium teilgenommen.

Es sei darauf hingewiesen, daß die den Kandidaten in Rechnung gestellte Gebühr ausschließlich zur Deckung der Verwaltungs- und Reisekosten bestimmt ist, die beim EPI entstehen.


EPI-Sekretariat
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D-80058 München
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Fax: +49-89 202 15 48

Candidats will again be allocated to the nearest available tutors who, whenever possible, will work in the same technical field.

The candidates are asked to submit their solutions to these papers to the tutors by 1st October 1996. In general two tutors will arrange for a joint meeting with six to eight candidates to discuss the answers.

The tutorial is a trial examination. The candidates should work, under examination conditions (documents, time...) as far as possible.

In 1995, 20 tutors instructed 56 candi-dates.

The fee charged to the candidates exclusively covers the EPI administrative and travelling costs. The tutors are not paid for their time and work.

Candidates who wish to participate in these tutorials must notify the EPI Secretariat as soon as possible but not later than 1st May 1996. They will be sent a questionnaire which they have to complete and return together with the tuition fee, before the deadline.


Deux tuteurs seront de nouveau attribués à chaque candidat. Ces tuteurs résident géographiquement le plus près possible de leurs candidats et travaillent, autant que possible, dans le même domaine technique.

Les candidats devront envoyer leurs réponses aux tuteurs avant le 1er octobre 1996. Les deux tuteurs organisent généralement au moins une réunion réunissant six à huit candidats afin de commenter les réponses aux épreuves.

Le tutorat EPI est un examen test. Les candidats doivent travailler autant que possible dans les conditions d'examen (temps, documents...).

En 1995, 20 tuteurs ont assuré la préparation de 56 candidats.

Le droit d'inscription demandé aux candidats sert exclusivement à couvrir les frais d'administration de l'EPI et les frais de déplacement des tuteurs. Ceux-ci ne sont pas rémunérés pour leur temps de travail.

Les candidats désirant participer à ce tutorat sont priés d'informer le Secrétariat de l'EPI le plus rapidement possible, au plus tard le 1er mai 1996. Ils recevront ensuite un questionnaire qu'ils devront compléter et retourner avec leur droit d'inscription avant la date indiquée.

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EPO Procedural Fees

Letter from the EPI President, E. Thouret-Lemaître, to the Chairman of the Administrative Council

Dear Chairman,

My predecessor, David Vetier, wrote to you on this subject in May of last year and you kindly arranged the distribution of copies of his letter to the member delegations of your Council.

In that letter he expressed the anxiety of our Institute that fee levels should not be higher than is absolutely necessary.

Developments since then give cause for mounting disquiet: In May of this year, the Office's proposals for the reduction of certain fees - even though modest - did not receive a go-ahead from the Budget & Finance Committee, and subsequently we have seen evidence, in the context of the huge surpluses that the Office is continuing to make, that increasing allocation of Office money for the benefit of member states is being contemplated, e.g. on programmes to assist individual member states with the development of patent information facilities.

That there should take place, in effect, a transfer of Office money to benefit member states must be wrong, especially when provision for their benefit exists in the distribution key under Art. 39(1) EPC. Of relevance also are the suggestions that as much as DEM 25m is spent annually on the Administrative Council and its associated bodies.

At its meeting held recently in Munich, my Council has asked me to convey to yours its deep concern not only in relation to the developments mentioned above but, more fundamentally, in relation to the apparent lack of real progress towards the achievement of fee levels meeting the criterion, already stated, of being no higher than is absolutely necessary.

You will surely, too, pay close attention to the outcome of Hearing 95 at which, as recorded in CA/88/95 on page 11, there was expressed "a lack of understanding why fees have not been reduced, although the financial situation of the EPO would permit this".

Yours sincerely,

E. Thouret-Lemaître

"Utilisation of Patent Protection in Europe" – EPOscript 3

A comment from the EPI

Introduction

EPOscript 3 was published by the European Patent Office (EPO) following a wide-ranging survey conducted by Roland Berger Forschungs Institut. It has been widely reported and discussed, especially in professional circles. Some of its conclusions have been given further publicity by the Institute.

Was it necessary?

The publication of EPOscript 3 follows the earlier document of the EPO, "EPO: Charting a Course", and is part of the investigation being conducted by the EPO, with the approval of the Administrative Council, into (i) what use is made by European Industry of the patent system, with particular reference to the European patent system governed by the EPC; (ii) whether this use is sufficient to maintain the competitiveness of European Industry in the world markets; and (iii) what strategies can the EPO pursue to increase this use?

Many voices have been heard to criticise the involvement of the EPO in such an investigation. After all, does not Article 4(3) EPC state that it is the role of the EPO to grant European patents? Is not the EPO simply a supranational patent office, whose sole task is the receipt and examination of patent applications and the granting of patents? On the other hand, says others, is not the investigation a worthwhile one, and if it is who else is likely to be in a position to undertake it? Whatever the rights and wrongs of the EPO's involvement, the investigation, and particularly the survey reported in EPOscript 3, has thrown up some interesting points for debate.

Broadly speaking, the survey has concluded that European industry makes less use of the patent system than does industry in the United States and Japan; and that this is either because European industry is unaware of the patent system or because it finds it too expensive to take advantage of. This is far too simplistic a view. European industry makes less use of the patent system than does industry in the USA, for example, because European industry is (with some notable exceptions) less innovative than US industry. Promoting the patent system will not boost innovation. What boosts innovation is the generation of useful R & D results; successful R & D leads to more R & D and to more innovation. It is these holding the R & D purse-strings, both in private and in public industry, who have it in their hands to redress the balance. If European industry is to become more innovative, the captains of industry, the national governments and the European Commission must be prepared to support a huge and tax-efficient increase in spending on R & D.
And an effective system must be in place to protect their efforts.
This is not to say that efforts should not be made to make European industry more aware of the patent system and its benefits. US industry is certainly aware of the benefits of the system, no doubt influenced by two factors,
a. CAFC instituted by the Reagan administration which made patents a much more reliable commercial instrument than before;
b. damages awarded are so high that every business man is aware of the risks of patent infringement.

But regardless of the efforts of the EPO, this Institute and others to spread awareness of the existence and benefits of the patent system, it is only by making inventions that industry is able to put itself into a position to use the system to its advantage.

Let us consider the documents "EPO: Charting a Course" and EPOScript 3 in rather more detail.

EPO: Charting a Course
In this document it was pointed out that the EPO intended to create the conditions needed for a more intensive use of patent protection in Europe in order to enhance the innovative strength and competitiveness of European industry through 4 basic strategies:
1. Striving for a coherent synergy-releasing system of appropriate patent protection through Europe that involved observance of:
a. The financial equilibrium of the system's components.
b. Role-sharing between the EPO and National Offices to release synergy.
2. Reducing the costs of patent protection in Europe, that include proposals for reduction of:
a. EPO fees;
b. Professional representatives fees;
c. Translation costs, renewal and legal fees.
4. Enhancing the scope and value of European Patents.

EPOScript 3
This document seeks to establish the causes for the unsatisfactory degree of innovation-mindedness and inadequate patent activity on the part of European industry through a market study and analysis that has been performed by the Roland Berger Forschungs-Institut. The study was conducted with particular reference to those companies having from 1 to 1000 employees.

The EPOscript 3 Study's Findings
1. Applicant potential
a. More than half (53%) of the European companies surveyed do not carry out any R & D and therefore do not form part of the applicant potential.
b. From those companies who declare that they carry out R & D (47%), only one third (15%) make use of patents and two thirds (30%) do not use the patent system.

2. Applicant Potential and Company Size
Not surprisingly, big companies make more use of patents than SMEs.

3. Potential Applicants according to Industrial Section and Country
a. Machine building and vehicle construction is the largest of the eight sectors.
b. The proportion of applicants in chemicals/pharmaceuticals and precision engineering/optics is well below the average.
c. Countries with a large number of industries (Germany, France, United Kingdom and Italy) make more use of patents than countries with a fewer number of industries.

4. Research and Development
a. Non-applicants generally invest less in R & D than applicants.
b. SMEs invest less in R & D than larger enterprises.
c. In the case of both applicants and non-applicants, approximately half of their products/processes were either launched, substantially changed or improved in the past three years. However, this does not reveal how many of them were patentable.

5. Significance of Patent Protection
a. Applicants regard patents as an important instrument for maintaining a competitive lead, but secrecy and getting products to the market ahead of competitors are mentioned as other competitive advantages.
b. Non-applicants bank mainly on secrecy and rate patents as a minor competitive factor.

6. Applicant thinking
a. Big companies patent more of their patentable inventions than small companies.
b. The main reasons given for not protecting patentable inventions are:
   i. cost and time involved
   ii. no direct advantages
   iii. ineffectiveness of patents
   iv. early publication of details of inventions.

7. Commercial Utilisation of Patents
a. SMEs use patents more than big ones.
b. Big companies also use patents defensively to gain greater control of the market.
c. The bigger the company, the more important the patent becomes for licensing purposes: licensing plays a more modest role in SMEs.

8. Non-Applicants knowledge of the Patent System
There is a serious lack of awareness of the patent system, particularly among those that do not use the patent system and among small companies.

9. Reasons for Non-Utilisation of Patents
The main reasons given for non-utilisation of the patent system are:
a. General lack of awareness.
b. Patents are insufficiently effective (when it comes to actions for enforcement).
c. The patent grant procedure is too burdensome and too lengthy.
d. Patent costs (official and attorney service fees) are too high.
10. Awareness of the European Patent System

Although 85% of applicants have heard about the European patent system, 24% know nothing about it. Companies with up to 99 employees tend to know less than bigger companies.

11. Strength and Weakness of the European Patent

a) Applicants generally find that the European Patent system offers more advantages than disadvantages.

b) Cost and length of procedure are cited as the main weaknesses.

c) The almost universal response given by applicants for not using the European route more often is "no need/national application is sufficient".

12. Opinion on costs

a) Procedural fees of EPO are rated expensive by 45% of applicants.

b) Procedural fees of national Offices are rated expensive by 33% of applicants.

c) Patent agent fees are considered expensive by 58% of applicants.

d) The picture is much the same for translation and validation costs.

e) The criticism of both EPO and national Offices’ fees is stronger in the case of small firms.

13. Legal provisions on Translation of European Patents

57% of applicants would welcome a change in the existing translations provisions, e.g. translation of claims only, or only in the event of litigation.

14. Sources of Information and Utilisation of Patent Information

a) Patent information sources are of little or no significance to non-applicants, who rely on other sources of information, e.g. talks with customers, trade and specialized literature, etc.

b) 72% of applicants and 39% of non-applicants are aware of patent literature.

c) Use of patent information literature is restricted due to a lack of shortage of funds or staff. The smaller the firm, the more lack of resources tends to be cited as an obstacle.

EPI Comments on “Charting a Course”

1. Although the concerns of the EPO in Charting a Course are well intentioned the analysis of the problem and some of the strategies devised in the document are either unrealistic or wrongly directed. Increasing competitiveness of European companies in the face of other countries, e.g. U.S.A. and Japan, is a very important objective but concerns a plurality of disciplines and areas of economy. On the other hand, Europe is formed by a plurality of countries and governments that devise with a great degree of freedom the politics of their countries while in the U.S.A. and Japan, each having a single government, it is easier to devise a global policy.

Therefore, it is up to the Commission of the European Union to make proposals directed to multiple areas to create, under a global perspective, the conditions in Europe to help European industry to compete better in the market.

2. The task of the European Patent Organisation, as stated in Article 4(3) of the Munich Convention is to grant patents and not to become involved in global aspects of economy and politics. Furthermore, since European Patents are granted to applicants of all nationalities, any changes in the existing system will not only affect European applicants but applicants of all other countries as well. Therefore, amending the existing system will not serve to create better conditions for European companies to become more competitive in the face of companies from other countries.

For example, a reduction of the cost of patent protection will have no effect on the position of European companies relative to those of other countries.

3. On costs, the official fees are those required to cover the expenses of the EPO and national Offices in the proper performance of their activities, and should not be higher than is absolutely necessary. Any reduction of fees, although naturally to be welcomed, must not be achieved at the expense of a decrease in the quality and speed of the work performed.

The other costs, those of professional representatives, translations, etc. are a consequence of the system devised by the Munich Convention which was itself the result of a compromise, i.e. a 3-language system, with search report, examination, and national validation after grant with the possibility of requiring translations into the official languages of the respective countries.

The system, which resulted in substantial savings compared to national filings, was a compromise reached after substantial and difficult negotiations.

In relation to professional fees, in contrast to official fees they are the result of free competition among European patent attorneys situated throughout the Contracting States. They are governed by the rules of a free market economy. However, given the degree of difficulty of the work to be performed, the high technical and legal qualifications of those performing it, and the responsibility underlying this work, it is not unreasonable that fees should be comparable with those of other similar professions.

EPI Comments on EPOscript 3

Hesitant though we are to criticise the work of the Roland Berger organisation, it nevertheless seems to us that certain points deserve mention. Thus, it is surprising to see that none of the results set forth by ROLAND BERGER stated the number of non-repliers (in fact the sample questions did not even comprise a "do not know/do not want to answer" option). Equally, although the science of statistics is able to set forth an error range, which is important when one has to draw a conclusion, such a range is missing from the results.

Suppose in fact that more than half the subjects interrogated on a certain question gave a "cannot say/no answer" reply: are the results of the answers of the less than 50% of the targeted subjects reliable?
On page 208 of EPOscript it is stated "those answering "cannot say/no answer" were eliminated to improve the comparability of the results". In fact, while comparability may have been improved, significance may have suffered.

As EPOscript states, there were 1114 main interviews with applicants and 1438 with non-applicants. Many questions seem to have been answered by a fraction of those interviewed; for instance, page 151, where n = 764 (out of 1438) or page 149, where n = 191 (out of 1114), etc. What reliability can be ascribed to the results? Suppose furthermore that the range error is ±10% and the results are 50%-50%. This means that both 40%-60% and 60%-40% can be true, which is again to be taken into consideration in the interpretation of the results.

The "no need" answer apparently did not differentiate between those companies which just have a nationwide market and obtain protection through national offices and those larger companies with a correspondingly larger market and more need for European Patents. Obviously, the small and medium sized industries are less inclined to use the European system because they have little interest in spending money for protection in countries where they do not sell.

As far as costs are concerned applicants and potential applicants were asked in question (12c) "what are the disadvantages of the European patent procedure?" and were provided with predefined answers one of which was "too expensive" and which apparently caught the most attention. There was no way to differentiate between the fees and charges and the question did not differentiate between European first filings and second filings.

Finally, the questionnaires were translated into many languages and many different people from different countries conducted the interviews - by telephone. What is the statistical distortion factor due to the fact that so many people of different language cultures and surely having different character personalities conducted the interviews? This distortion factor may be relevant and nothing is said about it.

Whatever our views on the conduct of the survey, it is a clear conclusion that insufficient innovations in Europe and patenting costs are the main reasons for the stagnation of the number of European Patent applications filed by European industry.

However, the survey does not take into consideration questions such as the following:

1. The patenting costs in Europe are the same for European companies as for American and Japanese companies. Therefore, European patent costs have the same influence on Europeans as on non-Europeans, except for the fact that Europe has a larger proportion of SME's.

2. Patent costs are invariably small in comparison with the total costs of R & D and the real problem is to promote European companies investing more in R & D. Without R & D, there are no inventions and therefore no patents, whatever their cost.

3. SMEs, because of their size, have generally less investment capacity and this problem affects not only patents, but other more important areas of investment, as for example R & D.

4. The patent system is an exception to the rule of free competition, granting temporal exclusive rights, and thus added value, to inventors in exchange for disclosing their inventions for the benefit of i.a. further development by third parties.

This means that a balance should be established between the interests of the parties.

Because of that, the European Patent Convention devised a system that provides:

a) For an examination and opposition system to test the novelty and inventive step of inventions and to guarantee that patents and exclusive rights are granted to inventions which deserve them.

These conditions necessarily imply some costs to be borne by the patentee since the system requires the services of a team of highly qualified people both at the European Patent Office side and at the professional side.

b) A possibility for countries having official languages different from the one of the proceedings to require a translation of the patent into those official languages, to be paid for and carried out by the patentee.

Europe is a multilingual reality not only in the patent field. This reality cannot be ignored when comparing Europe with the United States or Japan.

5. The number of patents filed reflects the amount of technology developed by inventors/companies who desire to obtain protective rights, for a period of time, in exchange for disclosing the results of the invention to the public. The decision to apply for a patent is the result of a consideration of several factors, including:

a) The inventiveness of the invention.

b) The possibilities to keep the invention secret.

c) The benefits for the company in having an exclusive right to the invention.

d) The effectiveness of the protection granted by the patent system.

6. Once the decision to file a patent application is taken by an inventor/company, then the decision about the number of jurisdictions where protection should be applied depends on several factors, including:

a) The advantages for the company in having an exclusive right in those jurisdictions.

b) The possibilities of licensing the invention in other countries.

c) The size of the company that will indirectly influence its capacity to take advantage of a protective right in those countries and/or its possibility to negotiate and control a licence.

7. Patents are a reward given to those inventors/companies who decide to disclose the results of their inventions to the public, so that third parties may benefit from the results of their discoveries for the further development of technology. As a reward for this disclosure, patentees receive a compensation that consists in the possibility to have an exclusive right for a specific period of time in a specific territory for the invention. Therefore, patents are an exception,
in free market economies, to the general rule of free competition and should be regarded as such.

8. Therefore, theoretically, those who should be interested in using the patent system are such inventors/companies, and public institutions should not be involved in trying to stimulate the number of patents to be filed because this could be regarded by those companies who are not able to use the patent system as an interference by public institutions in the development of the free market economy.

9. This does not mean that governments and EU institutions should not devise strategies to encourage research and development among their own nationals, and one way of trying to encourage this development could be by explaining to their citizens that, as a reward for their efforts and investment in R & D, they could use the patent system as a way to take advantage of their R & D efforts.

10. It is felt that "EPO: Charting a Course", EPOscript 3 and the strategy of the European Patent Office in this matter is fundamentally flawed, in that the EPO is seeking to attract more work, by considering the granting of patents as a business in itself, to be expanded like any other business, rather than acting as an office for the granting of patents, and rather than using its key position to alert the European Union and national governments on the deplorable lack of R & D and innovations throughout Europe. An increase in the number of patents "per se" should not be the goal of the countries of the European Union, nor that of the European Patent Office.

EPI Proposals

The goal should not be arbitrarily to increase the number of patent applications filed either nationally or at the European Patent Office level, but rather to improve the degree of investment in R & D in the Contracting States and secondarily to make the patent system more attractive and accessible to all. For consideration are the following suggestions:

1. The European Patent Organisation should refrain from investing more work and money in the promotion of R & D and rather invite the European Commission to take the initiative.

2. As regards costs of patenting, any initiative of the European Patent Organisation to make it cheaper is welcomed but should first be discussed with EPI before any publication of the EPO can provoke wrong expectations.

3. The major effort of the European Patent Organisation should go in the direction of increasing the efficiency of the system, e.g. in setting up a European patent court where European patent attorneys can represent.

4. Improving awareness about patents should be the task of the national patent offices and, of course, EPI members should be ready to help in this respect.

The New Hungarian Patents Act

G. Szabo (GB)

Aiming at a harmonisation with the EPC, the Hungarian National Assembly passed a new Act on Patent Protection of Inventions (Act No. XXXIII of 1995) in April this year. This is a further step to bring the law in line with Europe in every relevant respect in preparation for joining the EPC. The application for membership must be filed before the end of 1996.

As far as it can be seen from the original text, conditions for patentability generally follow the conditions of the EPC. Of course, protection for chemical substances was already introduced after a special agreement with the U.S.A. in 1993, which necessitated changes (Act No. VII of 1994) in this respect of the earlier provisions (Act No. II of 1969), in order to comply with the GATT and TRIPS treaties.

Novelty is to be assessed in respect of the state of the art. This is in turn defined as "everything which became available to anyone through written or oral disclosure or use or in any other way before the priority date". The corresponding English terminology in the EPC refers to public availability, i.e. to someone in the public. This has been established by jurisprudence to include also incidental, and temporary availability. The same can be expected to apply to the Hungarian text since the express reference to oral disclosure in both cases require such interpretation. I understand that this will be confirmed by the "official" English translation, using the term "public".

According to the new provisions, the whole content of co-pending applications with an earlier priority date are also citable under novelty but not in respect of the inventive step. The patentability of known substances and compositions for the first therapeutic, surgical or diagnostic use is also recognised. Whilst the protection of drugs for the so called "second indication" is not excluded or expressly approved, the possibility would probably be confirmed by the Courts, as it happened before the Enlarged Board of Appeal in the EPO, since it involves a broadening of the traditional concept of novelty. Claiming medical treatments directly remains prohibited in Hungary, as it is by the EPC.

The inventive step is defined by reference to non-obviousness. The list of exceptions to patentability complies with Art. 52 and 53 EPC, with the same qualifications. Art
53(b)EPC has, however, no corresponding provisions in view of a special protection for plant and animal varieties in the Act (Chapters XIII and XIV).

The former relies on the usual criteria (distinctness, uniformity, stability and novelty) and requires in addition a designation of a variety denomination. Animals, which have been patentable since 1969, require novelty, distinctiveness and a designation of variety denomination. Should the animal not comply with the provisions of the law regulating animal breeding, it must be also reproducible. There are, of course, a number of other specific conditions specified about plant and animal varieties which are different from those relating to ordinary inventions in other fields.

Although the Act requires the deposition of microbiological strains according to the Budapest Treaty, if necessary, it does not have express provisions about the patentability of microbiological processes or of products thereof. As the general provisions about patentability cover all technical areas, and have only specific additional rules about plants and animals, no difficulties should be expected. It is however, uncertain, how plants or animals, which are products of genetic processes, as such, but are not falling under the definition of patentable varieties, will be treated by the Courts. The same problem has also arisen within the EPO in Munich.

As to the extent of protection, the principles of Art. 69 EPC are applied, including an express incorporation of the main features of the Protocol on Interpretation in the Act. There are thus possibilities beyond the literary meaning of a claim. Support and sufficiency of disclosure are also conditions for patentability.

When it comes to amendments, the general principle is that no "new content" is allowed to be introduced which would "broaden the subject-matter disclosed in the application as filed (Sec. 72 (1))", i.e. any time afterwards. This appears at first sight to correspond to Art. 100 (c) and 123 (2) EPC, since any non-compliance could also be a ground for opposition (revocation) proceedings after grant (Sec. 42(1) c). There may, however, be a risk that the reference to "subject-matter" ("targy") may be interpreted in the sense of "as claimed" instead of "contents" on their own, as "the total information content" (cf. T514/88).

This is because other sections consistently use the same term in the latter sense (Sec. 19(2), 21 and 42(1)(a)). In addition, the official expositions given to the Assembly refer to the possibility for amendments until the final decision about the grant i.e. before grant, only at the "same or a restricted level". This echoes the alternative outcomes of the revocation proceedings according to Sec. 81(1), which only allows revocation, restriction, or the refusal of the request, i.e. clearly prohibiting any broadening of scope after grant, perfectly in line with Art. 123(3) EPC.

This could be relevant if this were to mean that no broadening of the scope of a claim as filed will be allowed, in line with practice so far. This would be contrary to what has been established by the Boards in the EPO in specific situations, e.g. when an essential, conjunctively attached feature is dropped from the claim. There are no corresponding provisions to Art. 69(2) EPC either, which would clearly confine, before grant, responsibility for damages only within the published narrow scope. No such excuse applies to the broadened scope after grant.

The very fine distinction between "not going beyond" i.e. "not broadening" of the information content of the filing, on the one hand, and that of the scope of protection, in the other, according to Art. 123(2) and (3) EPC, respectively, was only introduced by the EPC in Europe. Before that, and even afterwards, a number of national patent laws and decisions, including those in Germany, lumped them together, creating logically unduly and confusing situations. England was no exception disallowing broadening before grant, and the same applies to Hungary.

Whilst this widely spread traditional attitude is understandable, and even caused some confusion initially in the EPO, it is hoped that the function of the Courts in Hungary and, in particular, the further provisions to be implemented when the actual entry into the EPO is enacted, would confirm the established interpretation of the principles involved, taking into consideration that a complete harmonisation with the EPC was indeed intended in this respect.

The patents cover any use, sale (commercialisation), offers to that effect, as well as the importation of the invention or, in case of a process, of its direct product. Storing alone is not protected, e.g. merely on transit. It is also relevant that contributory infringement, by selling or offering an essential feature of the invention, is also prohibited, if such purpose is known to the person concerned. This would not apply to established goods, unless the buyer is encouraged to act in this manner.

The monopoly does not extend to private or to non-commercial use, to experiments or trials for the introduction of medicaments, to occasional formulations of prescriptions by the pharmacist and the use of the same. Products are assumed to be prepared by a patented process, if the same is itself new or it is very probable that it was so made, provided the patentee is not in the position to establish with known methods of testing that the actual process of manufacture must have been. The presumption of infringement is particularly strong if the process is the only known one for the purpose. Such provisions considerably strengthen the reversal of burden of proof even if the product is not itself claimable.

Products sold by the patentee or through his licensee also carry an implied licence for further actions. Third party rights apply to those who have at least made serious preparations for the manufacture or use of the invention. In case of infringement, the patentee may obtain the usual orders, including an injunction against the infringer and award of damages.

The Hungarian Patent Office (HPO), replacing the National Office of Inventions, decides applications for revocations and for declarations of non-infringement, in Boards consisting of three members. There are provisions corresponding to Art. 113(1) and 114(1) EPC. Foreign par-


Aus diesem Grund sollte, Artikel 38 PCT mit seiner Überschrift ”Vertraulicher Charakter der Internationales Vorläufigen Prüfung” auch künftig ernst genommen und akzeptiert werden. Es wäre entgegen den aufgetauchten Meinungen eher angedacht, auch künftig sicher zu stellen, daß auch im Zuge des Europäischen Prüfungsverfahrens diese Vertraulichkeit gewahrt bleibt. Die Internationale Prüfung ist unverbindlich, vorläufig und vertraulich!

Es gibt keine Einwände, daß die Prüfungsabteilung des Europäischen Patentamtes während der Prüfung einer Euro-PCT-Anmeldung wortgleich den Inhalt einer früheren Beanstandung während der Internationalen Vorläufigen Prüfung wiedergibt, so wie unter europäischen Bedingungen die gleiche Meinung vertritt und der Anmelder während der Internationalen Phase der Beanstandung noch nicht nachgekommen hat. Einen Zwang zur Offenlegung sämtlicher Vorgänge während der Internationa-
Reaction to “Exam technique and tactics”

S. D. Powell (GB)

I am writing to advise candidates for the European Qualifying Examination that certain points made in M. Herzog’s article (EPI Information 3/1995, 95) are potentially misleading.

In the section concerning Paper B (reply to examining division communication) Mr. Herzog observes: The option you decide to pursue is the key to whether you pass or fail. This does not coincide with experience. For example paper B (Electricity/Mechanics) in 1991, related to a glue gun and there were various possibilities for amendment. The Examiners commented that it was acceptable “to direct a new characterising part to one of several almost equally meritorious further distinctions”. The option selected is not crucial, although it must be reasonable. What is important is demonstrating one’s ability to justify the selected distinction.

Later on Mr. Herzog suggests that a solution to Paper B “which means completely reformulating the problem is almost certainly wrong”. In fact there have been at least two cases in which good answers involved such a reformulation. In the above-mentioned 1991 Paper B one could claim the heating system rather than the entire glue gun since there was a statement justifying this in the original description. Also, in Paper B (Electricity and Mechanics) 1988, which related to a safety control system for a dump truck, there was a similar statement in the description justifying a subsequent shift of the main claim to a particular safety device.

To conclude, the European Qualifying Examination is based on real life situations. Just as in real life, it is dangerous to predict what the answers will be in any particular case, thus the general advice for candidates should be that each question must be approached from first principles to permit a correct analysis.

Spring Exhibition of EPI Artists 1996

K. Hoffmann (DE)

The Spring Exhibition of EPI Artists in the EPO main building in Munich is about to become a tradition in EPO’s cultural life. Held for the first time in 1991 and followed by another one in 1994, it shows paintings, graphical and fine art works. In 1994 the interesting works on display ranged from paintings to ceramic works, sophisticated watches and artistic textile creations. We hope that the forthcoming exhibition which will take place from 11 to 29 March 1996 will be just as successful. Therefore, all creative spirits among the EPI membership are invited to present their pieces of art. A prerequisite for having the exhibition is the participation of at least ten members. Some colleagues have already announced that they would be glad to participate.

If you wish to exhibit your works, please inform the EPI Secretariat by 22 January 1996 (fax ... 89-202 15 48). Our staff will be glad to give you any available information concerning delivery and formalities to be followed under phone number ... 89-201 70 80.


La prochaine exposition des artistes de l’EPI aura lieu du 11 au 29 mars 1996 dans le bâtiment principal de l’OEB à Munich. Une participation d’au moins 10 personnes est requise. Les personnes intéressées sont priées de contacter le Secrétariat de l’EPI avant le 22 janvier 1996 (fax ... 89-202 15 48, phone ... 89-201 70 80, pour plus d’informations voir la notice en anglais).

Personal

With regret we announce the death of Mr. D.G. Lawson (GB).
hiermit bestelle ich · I herewith order · Je commande

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Unterschrift · Signature
### Disziplinarat und Ausschüsse
**Disciplinary and other Committees · Commission de Discipline et autres Commissions**

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**Beschwerdekommission in Disziplinarangelegenheiten (EPA/EPI)**

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**Berufliche Qualifikation · Professional Qualification Qualification Professionnelle**

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**European Patent Practice**
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Die Verwertung von Urheberrechten in Europa
La gestion collective du droit d’auteur en Europe

Reto M. Hilty (Hrsg. / Ed.)

Diese Bestandsaufnahme zum heutigen Verwertungsrecht liefert einen Beitrag zur Diskussion über die Zukunft der kollektiven Verwertung in Europa.

Die Beiträge von Prof. Dr. Ivan Cherpillod, Dr. Paul Katzenberger, Prof. Dr. Eugen Marbach, Prof. Dr. Ferdinand Melichar und Prof. Dr. Enrico Riva liegen in deutscher und französischer Sprache vor.

Behandelt werden die verschiedenen Systeme des Aufsichtsrechts, das übergeordnete europäische Recht sowie die Frage der Höhe der Entschädigung und deren Verteilung. Zusätzlich ist eine Aufstellung der einschlägigen Erlasses zum Verwertungsrecht der meisten europäischen Staaten enthalten.
German Trade Mark Act and Regulation of January 1995
Rainer A. Kuhnen, Paul-Alexander Wacker (Eds./Hrsg.)

On 1st January 1995, the new German Trade Mark Act has come into force, which brings German trade mark law in line with the First Council Directive on the harmonization of trade marks and combines all legal provisions dealing with trade marks and business designations into one single act. Since this caused a substantial change in procedural aspects as well, a new Trade Mark Regulation has been issued by the President of the German Patent Office.

This translation was prepared in order to facilitate study of the new legislation to experienced lawyers, patent attorneys and English-speaking students of law all over the world. Since the various national legal systems and phrases differ and the new Act incorporates the EC Directive, the corresponding English terms of the Directive have been used.


1995. XVI, 175 Seiten. Kartoniert
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ISBN 3-452-23333-2
Münchner Gemeinschaftskommentar

Beier / Haertel / Schricker

Europäisches Patentübereinkommen

Einführung:
Geschichtliche Entwicklung, Europäisches Patentsystem
Haertel, F.-K. Beier
1. Lieferung, 1984, 86 S. Kt.
DM 45,–/ØS 330,–/SFr 42,–
EPÜ Art 5, 6–8
Ballreich, Haertel
DM 24,–/ØS 170,–/SFr 23,–
EPÜ Art 13
Kunz-Hallstein/Ullrich
DM 42,80/ØS 340,–/SFr 43,–
EPÜ Art 14
Haertel
DM 20,–/ØS 150,–/SFr 19,–
EPÜ Art 20, 21–24, 25
Drybaldh Österburg, Gori/Lüder, Bossung
DM 98,–/ØS 770,–/SFr 98,–
EPÜ Art 37–50, 51
Dornow, Gall
DM 98,–/ØS 700,–/SFr 92,–
EPÜ Art 53
Moufang
DM 48,–/ØS 340,–/SFr 45,–
EPÜ Art 55
Loth
DM 38,–/ØS 270,–/SFr 36,–
EPÜ Art 56 und 57
Pagenberg
DM 50,–/ØS 360,–/SFr 47,–

EPÜ Art 75–81
Bossung
DM 140,–/ØS 990,–/SFr 131,–
EPÜ Art 82–84, 85, 86
Teschemacher, Straus, Gall
DM 76,–/ØS 540,–/SFr 71,–
EPÜ Art 90–91, 92–93, 94–98
Strebel, Straus, Singer
DM 95,–/ØS 670,–/SFr 89,–

Anerkennungsprotokoll
Stauder
DM 36,–/ØS 220,–/SFr 26,–

Protokoll über Vorrechte und Immunitäten
Kunz-Hallstein
DM 24,–/ØS 170,–/SFr 23,–

Straus
Bibliographie und Rechtsprechungskartei zum EPÜ
bis 1982:
DM 40,–/ØS 290,–/SFr 38,–

bis 1984:
DM 18,–/ØS 130,–/SFr 17,–

bis 1988:
DM 58,–/ØS 410,–/SFr 54,–

bis 1992:
DM 98,–/ØS 770,–/SFr 98,–

Herausgegeben von
Friedrich-Karl Beier,
Kurt Haertel und
Gerhard Schricker

Gesamt-Werk:
1984/85. 1.–18. Lieferung,
2501 Seiten. Kartoniert
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ISBN 3-452-19412-4

Carl Heymanns Verlag
Arbeitnehmererfinderrecht

Gesetz über Arbeitnehmererfindungen mit Durchführungsverordnungen, Richtlinien, Materialien, Rechtsprechungsübersicht und Bibliographie

Textausgabe mit Verweisungen und Sachregister

Herausgegeben von Kurt Haertel, Albrecht Krieger und Gernot Kaube

Die vorliegende neue Textausgabe wurde vor allem aufgrund zahlreicher Änderungen der im Kontext des Gesetzes über Arbeitnehmererfindungen relevanten Vorschriften notwendig. Zudem wurde der Geltungsbereich des Arbeitnehmererfinderrechts im Zuge der Wiedervereinigung auf ganz Deutschland ausgedehnt.

- Teil 1 enthält die aktuellen Gesetze und Verordnungen unter Einschluß der in den neuen Bundesländern weiter gel tenden Vorschriften der ehemaligen DDR.

- Im Teil 2 sind Materialien abgedruckt, wie etwa zu einzelnen Bestimmungen und Anwendungen, die für Arbeit nehmer im privaten oder öffentlichen Dienst Bedeutung besitzen.

- Besonders wichtig für den Benutzer ist der aktuelle Stand der im Teil 3 (Anhang) enthaltenen Entscheidungen und Einigungsvorschläge zum Gesetz über Arbeitnehmererfindungen sowie die Bibliographie zum Arbeitnehmererfinderrecht.

Das neue Recht des unlauteren Wettbewerbs in Spanien


Von Dr. iur. Andreas Wirth, Rechtsanwalt in München

1996. XIV, 314 Seiten, Kartoniert DM 92,--/ÖS 730,--/Fr 92,--
ISBN 3-452-23417-7


Das Buch ist die erste umfassende Darstellung des neuen Gesetzes in deutscher Sprache. Es richtet sich sowohl an Juristen, die einen praxisbezogenen Einblick in die neue Rechtslage in Spanien gewinnen wollen, als auch an Wissenschaftler, die rechtsvergleichend an den aktuellen Entwicklungen und Tendenzen im europäischen Rechtsraum interessiert sind.

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