

Report of the By-Laws Committee (BLC)

P. Moutard (FR), Chair

We present in this report the main topics discussed by the BLC since the Council meeting of Barcelona (C 78).

A BLC meeting took place on October 15 at the **epi** in Munich.

Some of the proposed amendments to the provisions discussed in this report are attached herewith (**see Annex I and Annex II**). These proposed amendments were discussed at the next Council meeting in Köln (November 14) and some of them are subject to further discussions and amendments.

I. **epi 4.2.2.3 (former epi 4.2.2.2)**

In November 2014 one member of the Polish delegation had expressed the need for a Polish version of "European Patent Attorney". Such a version was missing not only in Polish, but also in many other national languages of member states of the **epi**.

We took the initiative to ask their wish to the corresponding delegations.

The work has been conducted by Paolo Gerli of the BLC who presented anew decision **epi 4.2.2.3** during the Cologne Council meeting, in order to replace the current Decision 4.2.2.2.

The new national titles have been freely chosen by the respective **epi** Council Members, who were consulted in representation of their national groups. They were provided with a copy of Decision 4.2.2.2 and requested to provide a translation or designation of the European Patent Attorney's title (EPA).

The national groups having already a designation in 4.2.2.2 were also contacted, to verify if they were still satisfied with the standing one.

It will be noted that Decision 4.2.2.2 does not impose a literal translation of the EPA title but leaves a liberty of using the term "European" in connection with a patent title used in the relative Member State, thus also respecting national practices (in fact even the GB, FR and DE versions are not a literal translation of each other).

Amendments to the presented proposition are needed further to some concerns raised by several delegations during the Cologne Council meeting.

II. Double signature

This part of the Report has been drafted by Amparo Coll, legal advisor with the Secretariat. Her legal skills were essential during the discussions on this difficult topic. Many thanks to her.

⇒ Background

The **epi** Council, at its 78th meeting held in Barcelona on 25th April 2015, approved:

"that the By-Laws Committee shall present an amendment of Articles 13 to 16 of the By-Laws at the Council meeting in Cologne, according to which a double signature requirement would be mandatory for all activities with a financial impact above a threshold value to be defined by and depending on whether a budget position is foreseen for that activity".

The approved proposal was presented by the Internal Auditors with the aim to improve the control of the commitments entered into by representatives of the **epi**.

The Treasurer, together with the Internal Auditors, drafted new § (4) – (6) to be included in Art. 10B By-Laws and sent the text to the By-Laws Committee and the Legal Advisors for their revision, **see Annex I**.

The implementation of a double signature requirement as proposed by the Internal Auditors raises complex concerns that need further consideration and prevent the By-Laws Committee to present a definitive proposal at this stage. In any case, the By-Laws Committee has prepared this section to keep the **epi** updated about the work that is being performed concerning this topic.

⇒ Amendments to the Proposal (see Annex II)

After a careful revision, several amendments have been introduced to the text received from the Internal Auditors. These amendments are shown in **Annex II**.

The By-Laws Committee considers it preferable to introduce the proposed text in an independent Article, rather than as part of the existing Article 10 B which defines the duties of the Presidium with respect to the Board. Besides, introducing the new text as part of the existing Article 10 B might create confusion because not all the members of the Presidium can sign contracts on behalf of the **epi**.

The By-Laws Committee also:

- believes that amendments and/or termination of the contracts should be also concerned by the double signature requirement;
- recommends the deletion of the proposed Article 10B (5) (see **Annex I**); there is no need to define when the substitute of the SG and the T. can sign: this is already defined in the BL (Art. 15.8 and 16.6 BL).
- believes that the proposed Article 10B (6) (see **Annex I**) extends beyond the decision of the Council and is therefore not justified. Council agreed to have a mandatory double signature for activities with a financial impact, not for any kind of activities.

⇒ Further comments

As indicated above, the analysis of the proposal prepared by the Internal Auditors has generated several concerns

regarding the implementation of a new double signature system that have prevented the preparation of a definitive proposal at this stage.

The most relevant ones are described below:

- The initial proposal by the internal auditors is inconsistent with the current system of representation provided by the By-Laws. Pursuant to the By-Laws, the competences of the Secretary General (SG) and the Treasurer (T) are limited to certain areas (SG = administrative matters, T = financial matters). Notwithstanding, according to the proposed system, any of them could represent the **epi** in matters that fall outside their respective areas of competences. In order to solve these inconsistencies, the Internal Auditors propose that the new Article shall supersede and prevail over any provision of the By-Laws contrary to it.
- During the analysis of the proposed system, concerns were raised about who shall assume the financial responsibility for these kinds of contracts. Actually the By-Laws does not explicitly regulate who shall assume the financial responsibility for commitments entered into by the representatives of the **epi**. For the assessment of this issue, it is first necessary to clarify the legal status of the **epi**.
- The management of the assets of the **epi** (where implying the signature of contracts as those described in the new Article) will be covered by the double signature requirement.
- The double signature is only required for contracts with financial impact but a given budget could still be exceeded without the control of the T. where, for instance, several contracts of 15.000 EUR would be signed.

⇒ **Alternative solution and proposed way of action**

One alternative solution to implement the double signature system respecting the existing areas of responsibilities could be to simply include the requirement in the concrete Articles regulating the competences of the President, the SG and the T (Articles 13.1 BL, 15 BL and 16 BL, respectively).

If agreed by Council, the By-Laws Committee together with the Treasurer, the Internal Auditors and the Legal Advisors will carefully study this alternative as well as the rest of the arisen concerns and try to present a definitive proposal at the next Council meeting.

III. Rules for election to Council(epi 3.1.3).

Markus Müller (electoral committee) has proposed amendments to the Rules for elections to Council in order to allow for an electronic nomination phase.

According to the current rules the nomination phase, as defined in R.5 of the rules for election, is carried out either on paper or by email.

It is therefore proposed to amend these rules to include the possibility of carrying out the nomination phase via a web site.

There is no provision, neither in the Founding Regulation nor in the By Laws, which would be against the proposed amendments.

IV. Art. 16.3 By-Laws(No amendment):

The **epi** Council, at its 78th meeting held in Barcelona on 25th April 2015, approved that the Internal Auditors and the By-Laws Committee study the need for a new Art. 16.3 BL. Proposed amended Art. 16.3 BL was:

In the matter of controlling the budget, the Treasurer shall have the duty to report to the Council any substantial departure from the budget. It is in the competence of the Council to decide on an amendment of the Budget.

Further to discussions with the Internal Auditors, it appears that current Art. 16.3 BL is satisfactory because it allows a quick reaction from the Presidium or the Board in case a deviation from the budget appears unavoidable.

More precisely:

According to Art. 3.2 of the By Laws, budgetary and financial affairs belong to the retained powers of the Council.

It is therefore already within the powers of the Council – and only of Council – to decide the budget and to amend it.

According to Art. 10.5 BL, if, in an exceptional case it was necessary for the Board to take urgent action in the area of retained powers of the Council, the Board shall report to the Council on the action at the next Council meeting. The Council may if it so desires, express its approval or disapproval.

Therefore, these 2 articles 3.2 and 10.5 BL, in combination with current art.16.3 BL, give:

- The Council, and only the Council, the power to decide on the budget;
- the Treasurer the duty of informing the President and the Board of any departure from the budget as soon as he foresees it;
- The Board the power to take an urgent action and then the obligation to report to Council, which remains the only body authorized to decide on the budget (because budget belongs to the retained powers).

According to these provisions, in budget matters, the Board may therefore take any urgent action, for example based on an information from the Treasurer concerning a departure from the budget. This must then be reported to Council, which may, or may not, approve this action. In no case can the Council be by-passed.

Current Art. 16.3 gives the Board the possibility to react rapidly (see “as soon as”, 2 times in Art. 16.3 BL) to an unexpected change. For example, in a situation where the Treasurer sees a departure from the budget in May, he must not wait until the next Council Meeting (usually in November) to submit an amendment to the Board. This seems no longer possible under proposed amended A.16.3 BL.

According to the amendment proposed by the Internal Auditors:

- the Treasurer must report to Council. This means that the possibility for the Board to take any urgent action no longer exists.
- the Treasurer must wait until the next Council Meeting to propose a departure from the budget. The Board may be aware of the situation, but has no possibility to

react; this seems rather strange because this situation will impact other aspects (educational activities, for example) on which the Board may (or must) still decide.

It therefore seems that, in view of the present powers of the various bodies, no amendment is necessary to the present A.16.3 BL.

Report of the European Patent Practice Committee (EPPC)

F. Leyder (BE), Chair

This short report completed on 22.11.2015 covers the period since my previous report dated 12.08.2015.

The EPPC is the largest committee of the **epi**, but also the one with the broadest remit: it has to consider and discuss all questions pertaining to, or connected with, practice under (1) the EPC, (2) the PCT, and (3) “the future EU Patent Regulation”, including any revision thereof, except all questions reserved for other committees: Biotech, OCC, PDC, LitCom, and EPO Finances.

The EPPC is presently organised with six permanent sub-committees (EPC, Guidelines, MSBA, PCT, Trilateral & IP5, and Unitary Patent). Additionally, *ad hoc* working groups are set up when the need arises. Thematic groups are also being set up.

1. Independence of the Boards of Appeal

The EPO organised an online user consultation inviting users to express their views on the different reform elements. The consultation triggered a representative number of comments, including those of **epi**. The EPO has now summarised all submissions in a document that will be discussed at the December meeting of the Administrative Council of the European Patent Organisation. The summary can be downloaded from the EPO website:

<http://www.epo.org/law-practice/consultation/completed.html>

2. European patent with unitary effect in the participating Member States

The 16th SC meeting was planned in September, but has been postponed to 13.–14.10.2015 to take into account the request of Italy to join the enhanced cooperation. Although some progress was reportedly made on the distribution key, no agreement was reached.

The 17th SC meeting has now been set on 15 December 2015. It is again expected that the whole package,

comprising the level of renewal fees and the distribution key, can be finalised and adopted in 2015.

3. Committee on Patent Law

The 45th meeting of the Committee on Patent Law (CPL45) took place on 15.9.2015.

As expected, the CPL dealt with amendments to the Implementing Regulations to the EPC regarding handwritten amendments in opposition (Rule 82 EPC) and regarding constitution, maintenance and preservation of files (Rule 147 EPC). These have since been published.

4. SACEPO/WPR 13

The 13th meeting of the SACEPO Working Party on Rules was held on 17.11.2015.

The main item on the agenda was the presentation of ideas to simplify the procedures. As mentioned in the supporting document, “The need for a revision of the complexity of the procedures in place at the EPO was seen by EPO management in order to ensure a harmonised and sustainable practice under both the EPC and the PCT while fostering efficiency for users and examiners.” Some proposals having a direct impact on users have been presented during the meeting, and will be evaluated in the EPPC.

5. MSBA 22

The meeting planned on 7.10.2015 unfortunately had to be cancelled. We hope that a new date can soon be set for the next (22nd) consultative meeting of user representatives with the Boards of Appeal (MSBA i.e. Meeting of SACEPO with the Boards of Appeal). In the meantime, suggestions of topics for discussion are still welcome.