



16<sup>th</sup> April 2021

## 1 GENERAL REMARKS

These comments relate to the first draft of the "Towards a new normal" orientation document; They are filed by the Institute of Professional Representatives before the EPO established under Article 134a EPC. The Institute is referred to herein as "epi". epi represents over 12,000 European patent attorneys from all 38 member states. Most of epi's members are in private practice or in industry and represent their clients or companies before the EPO, particularly in oral proceedings before Examining Divisions, Opposition Divisions and Boards of Appeal.

The initiation of the project is highly appreciated. It is most welcome that the essence of the draft seems to be a constant improvement.

epi notes the taking into consideration of the staff's feedback from two comprehensive staff surveys carried out in the course of 2020 in March (Strong together - working during COVID-19, see Annex I) and September ('Shaping the New Normal survey', see Annex II) respectively and will not comment but rather point out concerns and possible issues that may arise when maintaining and improving the quality of European patents.

## 2 DETAILED REMARKS

### 2.1 Teleworking

epi suggests that the EPO should aim to develop advanced teleworking systems that will ensure that the teleworking framework will remain at the highest efficiency and efficacy level. Moreover, quality of the work needs to be appropriately evaluated, and further measures will need to be implemented in case of detecting quality issues. This will ensure that new teleworking frameworks will not impact the quality of the products and services expected by the users.

#### 2.1.1 Security

It is very much appreciated that significant emphasis is put on protection of confidential data and personal data transferred between locations and stored in the cloud.

Although cybersecurity has been addressed in the commented draft, it has not been mentioned how security at remote sites is going to be taken care of. With EPO files accessible by EPO staff from a variety of locations which are outside the control of the EPO, the risk of someone

accidentally accessing unpublished files is higher, as family members or visitors to an unsecured site (the staff member's home) may observe or have relatively easy access to a staff member's computer. While this risk may be small, it must be recognized. The commented draft is silent about encryption of local hardware, screen locking, biometric authorisation and other applicable measures.

### **2.1.2 Efficiency**

The quality of the output depends upon how efficient teleworking is, particularly from home, compared to working in the office. Verifying quality would appear to be sensible.

The Office mentions four categories of preferences with respect to the working place, each apparently having a critical mass; **epi** therefore believes that it is appropriate to conduct a survey of the quality of the products produced and the procedures followed by the members of each group. Such a survey would reflect the impact of teleworking on quality.

### **2.1.3 Flexibility**

The aim for flexibility is commendable and securing workplaces is a key element thereof.

Reliable teleworking schemes should include adequate guidance, clarity and certainty that will maintain and if possible, increase not only quality but also efficiency and efficacy.

Similarly, all necessary activities shall be taken to ensure that teams, and distinctly Examining and Opposition Divisions, are able to maintain close collaboration in a remote working environment with team members working from different locations.

## **2.2 Digital Workplace**

**epi** hopes that the new enhanced digital workspace will support the key elements of quality and timeliness. EPO should ensure that the digital workplace could allow working effectively and more collaboratively from any agreed location, but also to work efficiently in the newly created paperless environment.

Simplification of procedures has to be made very carefully whilst following the legal requirements as well as the ISO 9001:2015 requirements for managing the quality. Accelerated digitalisation may not per se guarantee achieving better results with less efforts unless accompanied by a simplification of procedures.

### **2.2.1 Timeliness and quality**

Improvements in quality and timeliness at reduced effort would be a welcomed effect of the measures taken to secure the transition to teleworking.

### **2.2.2 AI-assisted distribution of workload**

The commented draft is silent on the constraints given to AI-assisted automatic distribution of work. It seems to be a key factor to measure and reasonably control the quality thoroughly. Ignoring or not spending enough time on certain key steps of the procedure can easily result in reduced timeliness and lower quality.

### **2.2.3 Limitations and the three-examiner divisions**

The experience at other offices shows that there is a risk of remote working examiners developing their own way of performing examination, for example implementing an unorthodox way of interpreting documents or evaluating obviousness. It might therefore be worrying that a significant fraction of the examiners expresses a wish to work remotely on a full-time basis. Prima facie, maintaining uniform practice might be challenging if a large number of examiners are working full time remotely on a permanent basis. It applies particularly to recent recruits still being tutored and at the beginning of their professional career.

It seems therefore important to nurture and improve the 3-examiners system, and the “New Normal” project seems to be a perfect environment for that. It should make it easier to involve the two “other examiners” at an earlier stage than previously. This could, for example, include a requirement for the first examiner to present the first communication in a meeting to the two other examiners before it is sent to the applicant/representative. Thereby, the first examiner can have a first feedback on quality at a very early stage, and applicants/representatives can expect less new objections at later stages.

### **2.2.4 Reduction of costs**

It is understood that after initial investment the system is supposed to operate more efficiently, and reduction of costs is definitely expected.

## **2.3 Videoconferencing**

As the pandemic struck in the course of 2020, epi witnessed the provision of e-meetings instead of traditional meetings of the Administrative Council and Council bodies in Munich or The Hague.

Decisions as to the format of their meetings obviously lie in the hands of these bodies; as an observer, **epi** however hopes that at least some of these meetings will return to the traditional format that provided for invaluable interactions on the fringe of the meetings.

**epi** has noted that a new format has also been introduced for the Standing Advisory Committee before the EPO (SACEPO) with regional e-meetings. With regard to the "New Normal", **epi** is of the opinion that the EPO should reconsider holding physical meetings since we believe that virtual co-operation cannot replace the social interactions between participants. It is suggested that a mix of physical and virtual meetings would be appropriate, with at least a physical meeting every second meeting.

Prior to the pandemic, participants of SACEPO WPQ were updated at in-person meetings about quality performance and new initiatives related to the EPO quality management system. Moreover, the format evolved to include deep-dive workshops on aspects relating to both procedural and substantive matters. For example, the physical meeting in October 2019 included active contributions from experts reporting their impressions of the quality of the applications themselves. Unfortunately, such format was not followed for the virtual SACEPO WPQ meeting in June 2020, and **epi** understands it will not be followed either in April 2021. The deep discussions regarding substantive quality matters and moreover experts reporting their impressions of the quality of the applications and user views were not part of that previous virtual meeting. For that reason, EPO should consider returning to physical sessions of the SACEPO WPQ.

### **2.3.1 Infrastructure**

It seems that there is still room for improvement in organisation of teleconferencing, software and instructions to parties.

### **2.3.2 Examiner interviews**

Videoconferencing in *ex parte* proceedings as well as technical means enhancing efficient communication is very much welcomed as an improvement over telephone interviews. Especially, screen sharing in videoconference interviews is to be encouraged, as it often provides the quickest way to understand problems.

### **2.3.3 Ex parte oral proceedings**

Videoconferencing is not always suited to conduct oral proceedings, although it is acceptable during the pandemic. Videoconferencing may be a popular choice for *ex parte* oral proceedings in the new (post-pandemic) normal, but nevertheless it is the *parties' choice* that should determine the format. In particular, the fact that one or more of the *examiners* involved may be teleworking from day-to-day should not be a consideration in deciding the format for any particular oral proceedings.

### **2.3.4 Inter partes oral proceedings**

At its 89<sup>th</sup> meeting, the Council of **epi** adopted a resolution:

*Council considers that, after the Covid-19 pandemic is over, oral proceedings should as a rule be held face-to-face but any party should be free to attend oral proceedings by videoconference, even if the other parties are attending in person.*

## **2.4 Professional certification and training**

### **2.4.1 Online training**

On-line training opens a lot of possibilities, especially for training involving short modules such as in the online training course for the EQE pre-examination paper; it is appreciated that the EPO embraces this opportunity. However face-to-face training and in-person events are significantly more efficient and therefore must be retained. That applies all the more to the highly rated and always overbooked events featuring the activities of the DG Patent Granting Process (Search Matters, Examination Matters, Opposition Matters); for these events, recording sessions and making them available after the event multiplies their impact. The Praktika Intern and Praktika Extern programmes should be re-established as soon as circumstances will allow it.

### **2.4.2 Online examinations**

Nearly 4,000 candidates sat the first ever e-EQE. When the EQE Supervisory Board decided in early March 2020 to cancel the EQE (including the pre-EQE), many wondered whether the EQE could take place in 2021. As early as 13th March 2020 epi encouraged the Supervisory Board and all bodies involved to explore all necessary measures to carry out an EQE as soon as possible. On 23rd July 2020 the Supervisory Board decided that the EQE would be conducted online in 2021. The health crisis, which all European countries have to face left little room for a format other than a virtual one. This was two years ahead of the plans to switch the EQE to a fully digital version in



2023. **epi** is very grateful for the tremendous efforts of all those who made it possible to hold a complex examination such as the EQE, for so many candidates, in a secure environment.

Although the 2021 e-EQE met the requirements set forth by the Supervisory Board for an online examination and was an incredible technical achievement, **epi** is also aware of the difficulties encountered by many when sitting the papers online and recognises that there is room for improvement over the coming years. **epi** is keen to continue working with the EPO to develop the e-EQE into a 21st century examination making full use of digital opportunities for establishing whether candidates are qualified to practise.

**epi** is happy to cooperate with the EPO towards the organisation of a new high quality, high level professional qualification for the administrative staff of its members, the European Patent Administrator Certificate (EPAC). This certificate should be obtained by passing a fully digital examination comprising a mix of multiple choice and open questions, using the tools of the eEQE and building on the experience from the 2021 eEQE. The EPAC needs to add value in that it is only awarded to those who pass a thorough fit-to-practice test so that the potential employers of the EPAC holders can be sure that anyone holding an EPAC can in turn add value to his/her organization, at the interface between the EPO and the attorney and/or at the interface between the EPO and the client.

### **3 SUMMARY**

**epi** is thankful for this opportunity to comment a draft paper of the EPO discussing options for a "New Normal" after the pandemic, and trusts that the issues raised in its comments will be addressed and taken with a great deal of care.