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Patentamt zugelassenen Vertreter

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before the European Patent Office

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l'Office européen des brevets

### **I – Information concerning epi**

118 Editorial

119 Report of the 79<sup>th</sup> Council Meeting

### **II – Contributions from epi Members and other contributions**

149 A new filing strategy for effective Global Patenting: PCT Direct,  
by P. Wierzejewski

150 US software Patents after Alice, by A. Engelfriet

154 T 557/13: a long expected referral, by M. Nollen

156 National Laws on the Patentability of Plants

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## Table of Contents

<b>Editorial</b> . . . . .	118	Comments on the new combined EQE papers A and B for both mechanics and chemistry, by A. Hards . . . . .	142
<b>I – Information concerning epi</b>			
Report of the 79 <sup>th</sup> Council Meeting . . . . .	119		
Position Paper of Union IP . . . . .	120		
<b>Committee Reports</b>			
Report of the By-Laws Committee (BLC), by P. Moutard . . . . .	123		
Report of the European Patent Practice Committee (EPPC), by F. Leyder . . . . .	125		
Report of the Litigation Committee (LitCom), by A. Casalonga . . . . .	126		
Report of the <b>epi</b> -Finances Committee, by M. Maikowski . . . . .	127		
Minutes of the Committee of Biotechnological Inventions (Biotech), by S. Wright . . . . .	128		
Report of the Reporting Group on the Reform of <b>epi</b> , by L.-A. Durán . . . . .	130		
<b>Education and training</b>			
Report on the <b>epi</b> seminar on “Patent eligibility in the US and Europe” in Eindhoven. . . . .	133		
UP/UPC Seminars 2016 . . . . .	134		
Tutors’ report on the EQE 2015 papers, by L. Ferreira (PT), A. Hards (DE), K. Hartvichova (CZ), J. Hoekstra (NL), M. Mackett (BE), H. Marsman (NL), P. Pollard (NL) . . . . .	134		
		<b>Information from the EPO</b>	
		Results of the EQE 2015 . . . . .	144
		List of Professional Representatives as at 31.10.2015 . . . . .	145
		Contact Data of Legal Division . . . . .	145
		<b>Information from the Secretariat</b>	
		Next Board and Council Meetings . . . . .	146
		Deadline 1/2016 . . . . .	168
		<b>epi</b> Disciplinary bodies and Committees . . . . .	169
		<b>epi</b> Board . . . . .	U3
		Annual Subscription 2016 . . . . .	146
		Direct Debiting Mandate . . . . .	148
		<b>II – Contributions from epi Members and other contributions</b>	
		<b>Articles</b>	
		A new filing strategy for effective Global Patenting: PCT Direct, by P. Wierzejewski . . . . .	149
		US software patents after Alice, by A. Engelfriet . . . . .	150
		T557/13: a long expected referral, by M. Nollen . . . . .	154
		Patentability of Plants – A Comparison of National Laws, Biotech Committee . . . . .	156

## Editorial

T. Johnson (GB)

No doubt readers when writing a legal opinion or drafting a set of claims will often have before them a cup of coffee or tea to help the functioning of their grey matter. Many will perhaps not appreciate that when raising the hot cup to their lips they will expend more energy than if the coffee was cold, as a cup of hot coffee weighs more than a cup of cold coffee. This difference in weight may be difficult to measure in the macroscopic world of our daily lives, but is nevertheless a fact. We owe this insight to that great Patent Office Examiner, Einstein, who proved in his special theory of relativity that energy has mass (and vice versa). A hot cup of coffee has heat energy imparted to it, to make it hot by moving its atoms round faster than those in cold coffee, so the hot cup of coffee is heavier than a cold cup of coffee, which has no heat energy imparted to it. QED.

We often talk about a topic metaphorically speaking being 'weighty', the Unitary Patent and UPC being examples. A large amount of energy has been expended on these by the legislature and profession, so by analogy with the hot coffee, they are 'hot', and thus weighty,

topics. We therefore hope that they are about to reach their final weight with not much more energy being expended on them, so that they do not exceed a mass which might prevent them being pushed forward to a satisfactory conclusion. For example, we hope that the necessary Rules of Procedure will be finalised soon, to the benefit of all the stakeholders in the UP and UPC systems.

Consistent with these relativistic themes, the Editorial Committee hopes that our readership considers that **epi** Information is not a lightweight publication. We have expended a considerable amount of energy recently in going to the stage of online publication which will happen for the issues published from next year, subsequent to this last one in 'hard' copy, number 4/2015. We as a committee fervently hope that this new format will not diminish the weight of the publication!

Talking of next year, the Editorial Committee takes this opportunity in the last issue of 2015 of wishing all our readers a healthy, happy and successful New Year.

### Important announcement regarding the **epi** Information

In its 77<sup>th</sup> meeting the **epi** Council decided that **epi** Information should no longer be published in paper form. The Editorial Committee was asked to implement this decision with the help of the Secretariat. We are pleased to announce that as of 2016 **epi** Information will be published in electronic version only.

## Report from the 79<sup>th</sup> Council Meeting (14 November 2015)

M. Névant (FR) (member of the Editorial Committee)

A full complement of members attended the 79<sup>th</sup> meeting of Council in Cologne and a pre-event on Friday, 13<sup>th</sup> November, namely a seminar entitled "Strong patents as a basis for successful patent litigation". The panel of speakers included Dr Peter Kather (lawyer), Dr Dirk Schulz (European patent attorney) and Dr Tilmann Büttner (Judge at the Düsseldorf Court). The panellists addressed various topics, such as assessing the strength of patents and designing defensive or proactive strategies, notably in the context of the German bifurcation system. As was already the case for the first seminar organized in Barcelona (78<sup>th</sup> Council meeting), the event was very successful, instructive, and enjoyable for all participants who gained an insight of how litigation proceedings before the UPC could eventually unfold.

As to the Council meeting itself, President Tangena made an opening statement to express, on behalf of **epi**, its deepest sympathy for the victims of the terrorist attacks in Paris which occurred the day before, and for their families.

Axel Casalonga (chair of the LitComCommittee) gave a brief report on the status of the Unitary Patent and the Unified Patent Court (UPC). The Rules of procedure of the UPC have been finalized in August 2015 but have yet to be adopted by the Preparatory Committee. It is to be noted that representation before the UPC is now open to all European Patent Attorneys. Council was then informed that the Registrar and some local/regional divisions could be operating as soon as June 2016. It was assumed that "opt-out" would be possible once the Registrar is up and working although the legal effect of the opt-out would be the date when the UPC agreement actually enters into force.

Antero Virkkala (chair of the Online Communication Committee) briefed Council on the problems arising from eDRex, i.e. the electronic Druckexemplar generated by the EPO by means of OCR. Further details can be found in the OCC report in issue 3/2015 of **epi** information. In short, although the EPO claims that OCR is error-free, this is not the case and one error every ten pages is to be expected. It is worth noting that when the Examining Division makes amendments in the text proposed for grant, the authentic text is the annotated eDrex, not the clean copy thereof. It also appears that some fonts (e.g. Times, Courier, Arial) can induce OCR errors; on the other hand, Cambria seems to be OCR-friendly.

Pascal Moutard (chair of the By-Laws Committee) presented proposals to amend the By-Laws with respect to (i) the possibility for representatives (other than those from France, Germany and the UK) to have a version of the title "European Patent Attorney" in their own national language, and (ii) the requirement for a double signature (within the Presidium) for all activities with a financial impact above a given threshold value. These

proposals will be taken up further by the Committee with the view of having Council vote thereon during the next meeting.

Luis Alfonso Durán and Chris Mercer, on behalf of the Reporting Group a reform of the **epi**, presented the results of the survey that had been sent out to Council members during the summer. The work of the Reporting Group is discussed later in this issue. Based on their work, the Reporting Group made three proposals to Council.

The first proposal was to reduce the size of the Board to seven members with a voting right, i.e. the President, the two Vice-Presidents, the Secretary General, the Treasurer, the Deputy Secretary General, and the Deputy Treasurer, and invited guests (the chairs of the EPPC, PEC, By-Laws and **epi**-Finances Committees) with no voting right. Other chairs of committees would be invited on an ad hoc basis. The Council adopted this proposal.

The second proposal was to designate Rapporteurs within the Committees to brief the Board and the Council on topics of interest, as they arise. The Council also adopted this proposal.

The third proposal was to reduce the size of the Council as of the next election in 2017; three scenarios were presented for the allocation of seats. After a fruitful discussion, the Council voted in favour of a reduction of the size of the Council; the Reporting Group was asked to make further proposals to implement this decision, the aim being to take a decision during the next meeting.

The Treasurer informed the Council of a deviation of the 2015 budget that had been presented during the last Council meeting. A deficit of about 390 kEUR was now expected. The reasons for the higher than planned deficit includes *inter alia* an increase in the expenses of the Committees, and higher costs for the organization of the Council meetings. The Treasurer pointed out that **epi** would thus be in deficit for consecutive years (2014 & 2015), and suggested that steps be taken to improve the financial situation in 2016. The draft budget for 2016 was then presented with various scenarios depending on the amount of the subscription fee. A discussion followed, at the end of which the Council voted in favour of an increase of the subscription fee by 30 EUR, which should result in a balanced budget for next year. The student fee will also increase by 15 EUR.

Mr Leyder (chair of the EPPC) informed the Council that the EPO was about to launch a public consultation on deferred examination, i.e. the possibility to wait for a certain period of time (a few years) before actually requesting examination. Opinions were mixed amongst the Council members and the EPPC will draft a position paper on behalf of the **epi**. Comments and suggestions in that respect can be sent at [EPPC@patentepi.com](mailto:EPPC@patentepi.com).

## Union IP Position Paper

### Disclaimer:

*Note from the Editorial Committee: It is our intention to seek to inform our members of developments and/or opinions of members and others in the field of IP. We therefore scrutinise rigorously requests for publication in epi Information with we trust transparency and fairness, there being an understood caveat that the views and opinions expressed in documents that are published are solely those of the author(s), and not those of the epi or of the Editorial Committee. Neither the epi nor our Committee accordingly endorses the views and opinions expressed in documents selected for publication.*

With the above statement in mind, we publish below for the information of members a position paper recently submitted to the EPO by UNION IP concerning developments under discussion at the EPO based on paper CA/16/15 and questions in that paper (see [http://www.epo.org/modules/epoweb/acdocument/epoweb2/164/en/CA-16-15\\_en.pdf](http://www.epo.org/modules/epoweb/acdocument/epoweb2/164/en/CA-16-15_en.pdf)).

Dear Mr. Battistelli,

Thank you for your letter of 29 April 2015 to the President of UNION-IP and your kind invitation to comment on the questions raised in connection with the user consultation. The Patents Commission of UNION-IP would like to comment on said questions as follows:

UNION-IP is an Association of practitioners in the field of Intellectual Property, that is of individuals whose principal professional occupation is concerned with Patents, Trade Marks or Designs and related questions and who carry on their profession independently or as employees. UNION-IP is a private, free, international Association which is not dependent on any National or International Authority: it approves its own members, in accordance with its Statutes, in total independence, and likewise decides on its own activities and its own budget. It aims on the one hand to work continuously on current developments in Intellectual Property in Europe, especially by making early submissions during the preparation of proposed laws and treaties with the intention of influencing them; and on the other hand to devote itself to the improvement of professional and personal understanding between European Practitioners in the Intellectual Property field in different countries and different branches of the profession.

We consider the principles summarized in CA/16/15 as being a first step in the right direction. However, we suggest a few additional amendments that will further increase the independence of the Boards of Appeal. In the context of our suggestions we will also comment on your specific questions.

As an introductory note UNION-IP is of the opinion that the user consultation inappropriately mixes issues of independency with an alleged lack of efficiency. The

main focus of our submission will be on the independency of the Boards of Appeal (BoA; section I.). Although we are of the opinion that there are no particular concerns related to efficiency we will also comment on this (section II.).

### I. Independency

- 1) Wherever it is stated in CA/16/15 that the President of the EPO delegates or intends to delegate, it should be made clear that he irrevocably delegates. Likewise: 'intends to waive his rights' should be 'irrevocably waives his right'. It should be made clear that 'delegate' in this context means that the President of the EPO loses his original rights, powers, and/or functions in favour of the BOAC or president of the BOA, whichever is the case.
- 2) Although the President of the EPO intends to transfer some powers and rights to the new bodies of the BoA some power still stays with the President of the EPO according to CA/16/15. UNION-IP considers this to be unacceptable. In an independent BoA system the President of the EPO should not have any influence whatsoever on the BoA anymore. For example, it is not acceptable that the President of the EPO
  - Is involved in the budgeting process of the BoA or has any rights related to the budgeting of the BoA (points 21 and 35 of CA/16/15). Instead, it should be detailed that the President of the EPO will include the BOA budget request as provided by the President of the BOA without making any amendments.
  - Is given the opportunity to comment on the annual reports of the BoA to the Administrative Council (point 22 of CA/16/15)
  - Is involved in the communication and representation of the BoA (point 23 of CA/16/15). It is unnecessary and detrimental that the President of the EPO is involved in communication and representation matters of the BOA. The part 'in close co-ordination with the President of the EPO' should be deleted.
  - Should be given the opportunity to attend meetings of the BoA committee (BOAC; point 32 of CA/16/15)
  - Still has any managerial tasks that affect the BoA as stipulated in point 37 of CA/16/15. Instead this power should stay with the President of the BoA or with the BOAC. UNION-IP proposes that the first sentence should be amended to: "The President of the EPO will have no direct or indirect involvement or managerial powers with respect to the BOA, their members or their President.' Should it still be necessary for organizational reasons that the President of the EPO keeps certain managerial powers for a transitional period he at least should not have the power to decide on the

level of services. Instead, this needs to be defined by the Administrative Council (AC). With respect to point 48 of CA/ 16/ 15, UNION-IP considers Service Level Agreements with the EPO as being a good idea on the short term. After the first year, the BOA should have the authority to agree packages of services of some of the tasks mentioned under 48, such as IT, with providers outside of the EPO. The support staff of the Boards, in particular the Registry as an organ of the judiciary should be fully integrated into the organisational structure of the BoA and should in no case be subject to any Service Level Agreements

- 3) The function of the BOAC should be strictly limited to an advisory function to the AC and neither BOAC nor AC should interfere with the judicial self-governance of the BoA. BOAC also should not take over the function of the present Presidium. Instead, the Presidium should be maintained as an additional body within the new organization of the BoA. It should still be the function of the Presidium to draft and finalize the business distribution plan. In this context, it is also not appropriate that the President of the BoA has the function of allocating cases to the BoA as proposed under point 17 of CA/16/15. This allocation should instead be made on the basis of the business distribution plan.

The Rules of Procedure for the BoA and the Enlarged Board of Appeal should be drafted by the Presidium and be approved by the BOAC and the AC. Should the BOAC and the AC propose amendments they will inform the Presidium accordingly that then may provide an amended version. Neither the BOAC nor the AC should have the power to amend the Rules of Procedure without the approval by the Presidium.

- 4) UNION-IP observes that the system of 5 years reappointments provided by the EPC is as such already barely in line with a juridical independency. Consequently, UNION-IP suggests that the re-appointment remains the standard and that a member or chairman of the BoA should not be re-appointed only in very exceptional cases (see points 40 and 41 of CA/ 16 /15). Care should be taken that any new career system for the BoA is fully in line with the requirements of juridical independency.
- 5) It needs to be clarified that, should a member of the BoA or a Chairmen of the BoA not be re-appointed, he or she is given an adequate permanent position at the EPO (see point 29 of CA/16/15). This is of particular relevance since there might be restrictions after the termination of the appointment. In other words, the current draft does not exclude that a member will not be reappointed, will not be given an adequate position in the office and may also not be allowed to

work as patent attorney or consultant for quite some time. This is not acceptable.

- 6) UNION-IP considers point 42 of CA/16 /15 superfluous since the EPC provides appropriate rules on partiality. Moreover, an obligation to declare relevant professional activities and positions of BoA members' family members (spouses, children) is anyhow incomplete and does not reflect the reality. It does not cover any conflict of interest that arises from unmarried partners, extramarital affairs, children in patchwork families, gay relationships, close friends and so on. Consequently, it is more appropriate to stay with the general principle of exclusion as stipulated in Article 24 EPC.
- 7) It needs to be clarified that the internal Investigation Unit of the EPO has no power and rights on the BoA. If required a completely separate investigation unit for the BoA may be implemented. In this context point 20 of CA/16/15 should be clarified in that ONLY the President of the BoA will have the responsibility over the BoA and their staff as well as the Hausrecht. This is of particular relevance as long as the BoA will still be on the EPO's premises.
- 8) UNION-IP strongly advocates keeping the BoA in Munich. It is expected that moving the BOA to Berlin will have most impact, both financial and for the people involved. Housing the BOA in Munich is considered the best option, either in the current or a new location (option B). For completeness UNION-IP points out that moving the BoA to Berlin might even contravene the European Patent Convention: According to the Protocol on the Centralisation of the European Patent System and on its Introduction of 5 October 1973, section I-3(a) the sub-office in Berlin shall operate under the direction of the branch at The Hague. Moving the BoA to Berlin would mean that the BoA will come under the control of DG1 which would be the opposite of independence.
- 9) Question A: UNION-IP proposes that suitable candidates should be selected by a commission that involves the VP3 (in the future "President of BoA") and other members/chairmen of the BoA. The composition of the commission as well as the Rules of Procedure should be defined by the Presidium. In applying the principles of Art. 11 (3) EPC the members, including the chairmen of the BoA and of the Enlarged BoA shall be appointed by the AC on a proposal of the President of the EPO. Since the President of the EPO will transfer his specific rights to the President of the BoA it will be the President of the BoA who as a speaker of the commission will propose the candidate to the AC. More external members could be attracted by alleviating the language requirements: two out of the three official languages should be enough for external members. Of course if two external technically equal Members are in concurrence to

each other the one with three official languages should prevail.

10) Question C: No comments

11) Question D: UNION-IP supports the idea to have a user representative in the BOAC (as pointed out above BOAC should be strictly limited to an advisory function to the AC and should not interfere with the judicial self-governance of the BoA). In fact, UNION-IP is willing to supply such a representative. Alternatively UNION-IP considers it appropriate to organize an election of a representative from the group of European Patent attorneys. Such an election could be organized via **epi**.

Although UNION-IP currently does not see a need in changing the proceedings before the Boards, UNION-IP supports the idea of non-binding user consultations and proposals. The result of the survey should be forwarded to the Presidium that may consider to propose amendments to the rules of procedures. UNION-IP considers it not in line with the judicial self-governance that BOAC makes proposals for the amendments of the rules of procedure (see above)

12) Question E: UNION-IP suggest to include an external member in the Enlarged Board of Appeal in review proceedings.

## II. Efficiency

1. UNION-IP shares the concerns expressed about the back-log of the Boards of Appeal. However, our primary position is that dealing with the back-log of the Boards is a subject which is very different from the independence. Although dealing with the back-log is an important goal, the independence is much more important. Accordingly, the current reform should only focus on the independence, while other issues could be dealt with separately.

UNION-IP does not have any evidence that there is lack of efficiency of the members of the BoA or of the BoA as a whole. Regarding the data in Annex 2 of CA/16/15 it is remarked that the legal bodies presented there are not comparable to the EPO Boards of

Appeal and therefore do not provide a proper benchmark. For instance: the German Bundespatentgericht deals with trade mark cases too, which are not comparable with patent cases. The 13 technical Boards of Appeal of the Federal patent court have settled 757 cases in 2014, which corresponds to about 58 cases per Board per year. On the other hand the 28 Boards of Appeal of the EPO have settled 2300 cases corresponding to about 82 cases per Board per year. This illustrates that the BoA of the EPO are by no means less efficient than the Federal patent court. The same applies to the average duration: 46.56 months for the Federal patent court and 34.3 months for the BoA of the EPO.

The judges of the CJEU have an extensive legal staff. Looking at the statistics of the EPO Boards of Appeal, it appears that the cases per member is more or less stable. As the number of appeals rises, it is only logical that the backlog increases. Accordingly, it appears that more members /boards should be installed.

If it was aimed at efficiently reducing the back-log this could be achieved by increasing the number of Boards. This would also help to have more technically specialized Boards for different technical topics.

2. In this context, UNION-IP notes that the number of legally qualified members of the BoA has been reduced from 34 in 2014 to 29 in the actual business distribution. Consequently, the BoA cannot work as efficiently as they could have if the EPO had properly replaced the leaving legally qualified members.

III. Question F and Summary:

The proposal of CA/16/15 is an improvement over the current situation. It is recommended to take account of the answers to questions A-F in order to further improve this. However, on the long term a revision of the EPC is most desirable to make the independence stronger.

Patents Commission of UNION-IP

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## 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 16<sup>th</sup> 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 17<sup>th</sup> 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 45<sup>th</sup> 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 13<sup>th</sup> 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 (22<sup>nd</sup>) 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.

## Report of the Litigation Committee (LitCom)

A. Casalonga (FR), Chair

### I) Rules of procedure of UPC

1. The 18<sup>th</sup> draft has been published in August 2015.

The draft was finally accepted by the Preparatory Committee on October, 19 2015.

It seems difficult now to obtain any further change before the Rules of procedure are adopted by the Administrative Committee.

2. The following issues were nevertheless studied by the LitCom:

#### a) **Rule 286 – Certificate that a representative is authorized to practice before the Court**

Rule 286-1 states that representatives according to Article 48 (1) of the UPCA must be lawyers authorized to practice before a court of a Member State of the EU. This provision forbids representation to a lawyer practicing for example in the US.

It was feared that a similar provision could be introduced in this rule also for EPAs authorized to represent according to Article 48 (2) of the UPCA.

The LitCom prepared a paper arguing against such limitation of professional exercise and insisting on the unitary character of the EPAs profession.

3. In view of the final version of Rule 286 and the unofficial comments of the Preparatory Committee, it was decided that filing this paper would be unnecessary and possibly dangerous.

4. The present satisfactory situation is therefore that all EPAs on the EPO list having the appropriate qualification (European patent litigation certificate or equivalent) will have the possibility of entering the List for Representation before the UPC.

#### b) **Rule 292 – Patent attorneys' right of audience**

5. The present wording of this rule limits the right of patent attorneys (national and EPAs) to assist a representative, to persons practicing in a Contracting Member State of the UPC.

6. Since this would violate the principle of a unified profession of EPAs, the LitCom intends to suggest an amendment of this rule, cancelling the limitation of the place of practice for EPAs.

#### c) **Representation by a team comprising lawyers and EPAs**

7. Since Article 48(2) states that "parties may alternatively be represented by EPAs", some voices feared that this could be interpreted in such a way that no EPA could participate to a team comprising already a lawyer.

8. Reassurance was given by the chair of the Preparatory Committee that those fears were unfounded

### II) Representation before the UPC – Draft EPLC Rules

9. The final draft was published in September 2015. The main changes are the followings:

1- Rule 2: The EPLC may be issued by the UPC training center in Budapest (in addition to Universities and non profit educational bodies established in the EU)

2- Rule 10: The Budapest training center will assist educational bodies who would wish to provide courses at the seat of the center (by providing infrastructure and organization)

3- Rule 10: The Budapest training center will facilitate e-learning options

4- Rule 12: the transitional period is now reduced to 1 year (instead of 3)

5- Rule 12: diplomas of additional Universities and law schools situated in Germany, UK, The Netherlands, Hungary, Italy and Poland are now accepted for recognition during the transitional period

6- Rule 12: the other qualifications accepted during the transitional period are:

- representation before a national Court without a lawyer in 3 patent infringement cases within 5 years (instead of 2 cases within 4 years)
- or having acted as a judge before a national court in 3 patent infringement cases within 5 years

7- Rule 14: If a request for recognition of other appropriate qualifications is filed details for identifying the infringement actions and possibly a copy of the power of attorney, must be filed

8- Rules 15 to 20: the requests for recognition are examined by the Registrar. The decisions of the Registrar may be reviewed under the control of the President of the Court of Appeal

### III) Protocol of the UPCA

10. A protocol of the UPC agreement was signed on October 1st 2015 by the Signatory States.

11. It is expected that this protocol could be ratified soon so as to allow a part of the UPCA to enter into force in June 2016.

12. The various committees of the UPC, the Registrar, the pool of judges, the central, local and regional divisions could therefore be organized during a preparatory period before the definitive entry into force of the entire agreement, possibly beginning 2017. The IT system could also be experimented in advance.

13. Applications for opt-out could be filed at the Registry during this preparatory period.

## Report of the **epi** – Finances Committee

M. Maikowski (DE), Chair

### Report to Council in Cologne November 2015

The 75th meeting of the Finance Committee took place in Basel on 5<sup>th</sup> of October 2015.

The Treasurer (Mr P Thomsen) & Deputy Treasurer (Mr M. Sarap), Ms G. Stegemann (Secretariat) and the Internal Auditors (Mr H-J Kley, Mr P. Conan) attended as invited guests.

The Treasurer informed the Committee that the surcharge for electronic payments by PayPal or Credit Card has been implemented on the new website of the **epi** as previously recommended by the Committee. Also the recommendation of the External Auditors to have written contracts with the speakers at educational activities, organized by **epi**, has been implemented.

The Treasurer further informed the Committee of the discussions with the EPO regarding the repartition of the costs in relation to the EQE (early registration for the EQE and reimbursement of the **epi** examiners). The EPO would like to transfer the responsibility for the early registration to **epi** but currently, there is no agreement on the cost compensation for this work. Also the agreement between the EPO and **epi** for reimbursement of **epi** examiners for EQE work has expired. A request for extension of the agreement has been made by the **epi**, but for the time being, it is not sure whether **epi** examiners will be paid for their work at all!

Following the mandate from the C77 Council in Milan to allow "investment of up to 1.5m EUR" into a professionally managed asset management, a first tranche of 300,000 EUR has been transferred to the Swiss company S + P AG. A second tranche of 300,000 EUR will be moved within the next days. A special mandate has been negotiated with the management firm to limit potential risks and losses from the investment.

The education activities of **epi** are continuously increasing. Especially with the expected coming into force of the Unitary Patent and the UPC, the education activities will further substantially increase in the next years. In order to be able to cope with this activity, the **epi** will have to acquire appropriate software for organizing the offered education. It is also foreseen to hire a further person on a part time basis.

Furthermore the Committee discussed the necessity to change the current bookkeeping software. The currently

used SAGE software is not compatible to exchange data with other software in use at the Secretariat and/or the EPO. As SAGE will require a costly mandatory update next year, it is now the time to look for alternatives, which are better suited to be interfaced with other software in use. The Committee is strongly in favor of replacing SAGE with a more compatible software!

The Treasurer indicated that the Board had been informed of a substantial deviation of the current financial situation with respect to the budget 2015. Especially the costs for the Council meetings were substantially above the budgeted amount. This was extensively discussed by the Committee and the Committee seriously regrets that the hiring of a Conference Organizer had not resulted in the Council meeting being less expensive. The Committee agrees with the Treasurer that it should be possible to organize Council meetings for less than 1000 EUR per participant.

For 2016, the currently existing draft budget (which had not yet been distributed) foresees a deficit similar to the one for 2015, i. e. a deficit of between 300.000 and 400.000 EUR. While some of the costs will be reduced with respect to the budget for 2015, the educational budget will be significantly increased (due to the coming into force of the UP and the UPC).

The Committee controversially discussed the fact that, for with two consecutive years **epi** ran a deficit of up to 400,000 EUR and the possible impact on the liquidity of **epi**. After the discussion, the Finance Committee sees the necessity for an increase of the subscription fee in order to balance the expenses and income in the long run. The amount of the increase will depend on the decisions taken on the proposals of the reform group.

Following the agreement of the Council to the principle of implementation of double signatures in the **epi** Secretariat, Mr. Kley presents a proposal of an amended Art. 10B of the By-Laws "Duties and Powers of the Presidium". This proposal, which had been previously discussed between the internal auditors and the Treasurer, was then extensively discussed. In the end, the **epi** Finance Committee agreed that it is in favor of principles discussed between the Treasurer and the Internal Auditors but that it is up to the By-Laws Committee to implement the decision of Council.

# Minutes of the Committee on Biotechnological Inventions Meeting

S. Wright (GB), Secretary

Held on 9 October 2015 in Munich

## In Attendance:

Bernardo Noriega, Francisco (ES)  
 Bogensberger, Burkhard (LI)  
 Brkic, Zeljka (RS)  
 Capasso, Olga (IT)  
 Chlebicka, Lidia (PL)  
 De Clercq, Ann (BE)  
 Desaix, Anne (FR)  
 Gerasimovic, Liudmila (LT)  
 Ildes Erdem, Ayse (TR)  
 Ilievski, Bogoljub (MK)  
 Jaenichen, Hans-Rainer (DE)  
 Jonsson, Thorlakur (IS)  
 Keller, Günter (DE)  
 Knuth-Lehtola, Sisko (FI)  
 Leissler-Gerstl, Gabriele (DE)

Lidén, Camilla (SE)  
 Mattsson, Niklas (SE)  
 Petho, Arpad (HU)  
 Pfössl, Andreas (AT)  
 Popa, Cristina (RO)  
 Primiceri, Vittoria (SM)  
 Sinojmeri, Diana (AL)  
 Speich, Stéphane (LU)  
 Swinkels, Bart Willem (NL)  
 Taravella, Brigitte (FR)  
 Wächter, Dieter (CH)  
 Weinzinger, Philipp (AT)  
 Witek, Rafal (PL)  
 Wright, Simon (GB)

## Apologies:

Bencina, Mojca (SI)  
 Canelas, Alberto (PT)

Dragun, Tihomir (HR)  
 Hak, Roman (CZ)  
 Hally, Anna-Louse (IE)  
 Jensen, Bo Hammer (DK)  
 Makelová, Katarína (SK)  
 McKeown, Yvonne (IE)  
 Oser, Andreas (DE)  
 Pallard, Caroline (NL)  
 Pieraccioli, Daniele (IT)  
 Sansone, Luigi (MT)  
 Schouboe, Anne (DK)  
 Sergejeva, Valentina (LV)  
 Stefanova, Stanislava (BG)  
 Thoresen, Liv-Heidi (NO)  
 Tombling, Adrian (GB)  
 Vogelsang-Wenke, Heike (DE)

## 1. Opening

Ann De Clercq opened the meeting at 10:30.

## 2. Adoption of the Provisional Agenda

The Agenda was adopted. Noted that many of us knew about the Australian Court decision on the Myriad case.

## 3. Matters arising from the minutes of the last Biotech Committee Meeting

None

## 4. Stem cells

It was noted that there appears to have been a change in the EPO policy to stem cells. We are not expecting any formal announcement, but the EPO will make it public. The previous policy had placed the cut-off on which you could rely on stem cell deposits as the Chung paper (published in January 2008). Since the ISCC case decided "parthenotes" are not embryos, the cut-off may be taken back as far as 2003. We are expecting to have more information from the EPO during a forthcoming meeting with the directors (12.10.15).

## 5. Sequence Listings

We had received a further letter from BASF. We agree that the burden on Applicants should be minimised. The BASF letter cites three examples for consideration. Ann De Clercq will draft a written reply. The Committee will review BASF's suggestions, and will agree on a response.

We continue to want EPO Examiner's to give an alignment of prior art sequences with the sequences being claimed. Also, we want a copy of the translation of prior art if the Examiner relies on this.

Most users do not use the BISSAP software, instead using PatentIn. We will also contact the OCC in this regard and take it up with the EPO, perhaps on a different and higher level.

We wonder whether BISSAP requires more information. We do not understand why the EPO developed it. We wonder how many sequences filed at the EPO used BISSAP (perhaps in percentage terms), and if it is not very many we wonder whether the EPO could consider stopping the project.

## 6. Plants

This topic came up at the last CPL (Committee for Patent Law) meeting, and there are some countries who are concerned about the EPO's Tomatoes/Broccoli decision. Indeed, this places some countries' national law (DE, NL) at odds with the EPO's position. It seems as if this topic will be postponed within the CPL for the time being.

A CPL meeting is planned dealing only with this topic. No date has been set until now for this meeting but might be set as soon as the EU group publishes its report. We will be informed when the meeting is scheduled.

It was noted that at the last CPL meeting Heli Pihlajamaa gave a presentation on this topic. Apparently only 125 cases are affected, and 15 have been granted since the Tomatoes/Broccoli Decision.

A discussion is ongoing at certain levels about the need for purpose bound protection of genes. We discussed this at our Committee Meeting and decided to prepare a statement on this for the next **epi** Council Meeting in November.

## 7. National Decisions

It was noted that France (Communication published by the French IPO) does not allow the patentability of plants obtained by essentially biological processes, and this too goes against EPO law. However, it only applies to French national patents, not EP (FR) patents.

We will update the table of our national law regarding plants, and Anne Desaix (FR) will translate the appropriate law from INPI and send this to Ann De Clercq.

#### 8. ARTICLE 123(2) EPC

It was noted that there was a seminar on this topic at the EPO earlier this year. The EPO had changed the Guidelines, to present a more liberal view, in particular, as a result of a decision headed by the Board member Christopher Rennie Smith. Then we had a more strict decision from the Board chaired by Oswald, and so the Guidelines will be changed again (possibly this November).

#### 9. Procedural Matters

The EPO has a new IT system for Examiners, which shows the priority of files that they should work on. One member noticed that if you phoned an Examiner, you did not get given their direct number but got a "ticket" and the Examiner was expected to phone you back. If they picked up the file after you had spoken to the Examiner then they must deal with the matter in a few days, so that is one way of having your file prioritised.

#### 10. Meetings with the EPO

It was noted that this Committee had been leading by having meetings with EPO Directors for many years now, and the **epi** had decided that that format should be adopted in other areas. Indeed, there was a meeting with PAOC earlier this year. The Biotech Committee and EPPC liaise with EPPC on the topics to be brought in these meetings in the future.

#### 11. Non-Unity

In the past years this Committee has addressed several times the applicants concerns concerning the EPO's practice regarding raising non-unity objections. This year Arpad Petho (HU) raised the issue from a somewhat different viewpoint than previously. The issue of non-unity objections was now approached from the viewpoint of the EPO's Examination Guidelines in force. Point 2.2 of Chapter VII of Part B of said Guidelines reads as follows:

"2.2 Complete search despite of lack of unity  
Exceptionally, in cases of lack of unity, especially "a posteriori", the examiner is able to make a complete search and prepare a search opinion (where applicable – see BXI, 7) for all inventions with negligible additional work and cost, in particular when the inventions are conceptually very close. In those cases, the search for the further invention(s) is completed together with that for the invention first mentioned in the claims. All results should then be included in a single search report, which raises the objection of lack of unity and identifies the different inventions. It further indicates that the Search Division did not invite the applicant to pay further search fee(s) because all claims could be searched without effort justifying such

a fee. However, the search opinion (if applicable, see BXI, 7) still raises the issue of unity of invention (see BXI, 5)."

On the basis of this point, the Committee discussed the following questions (which were then also discussed with the EPO biotech directors at the October 12th, 2015 meeting):

- 1) Why does the EPO think the above defined cases being exceptional?
- 2) What is the ratio of applications with non-unity objections where a complete search was still made?
- 3) Is there any guidance for the examiners on how to determine what is "negligible additional work and cost" when considering making a complete search despite a raised non-unity objection?
- 4) As a consequence of the present system used for the evaluation of the examiners work, they are clearly counter-motivated to perform a complete search where a non-unity objection is raised. Could it be possible to change on this (i.e. by giving the examiners extra points if they perform a complete search in spite of a non-unity objection)?

The Committee agreed that a significant change in the EPO's practice with respect to the above point in the Guidelines in favour of the applicants would be very welcome, namely, the EPO should acknowledge that there are a lot more cases where a complete search and a search opinion for all inventions can be prepared with negligible additional work and cost in spite of a duly established a posteriori non-unity objection because in many of such cases the inventions are, in fact, conceptually very close. It was also agreed that giving a clear guidance to the examiners on how to define such cases would also be advisable.

#### 12. SPCs under the Unitary Patent

It is not unusual to amend the claims post-grant in order to make it easier to get an SPC. This had been happening in at least France and the UK, although of course it was possible before the EPO as well under the central limitation procedure. There were proposals from some industry bodies to have a unitary SPC under the unitary patent.

#### 13. Candidate Associate Members

It was agreed to admit both members who had applied for associate status, namely Jan Desomer (Bayer CropScience NV, BE) and Outi Virtaharju (Berggren, FI).

#### 14. Review of Decisions

SMW read out the action points at the meeting.

#### 15. Closing

The meeting closed at 4pm.

# Reporting Group on the Reform of epi

L.-A. Durán (ES), Chair

## Report to Council in Cologne November 14, 2015

Since the last Council Meeting in Barcelona on April 25, 2015, the Reporting Group has met in Munich on June 22, 2015 and in Porto on September 18, 2015 in order to discuss a new set of proposals for reform to be presented to the Council in Cologne.

In the first meeting in Munich, the Reporting Group met with the Editorial Committee, members of the **epi** Secretariat and the company which is responsible for the **epi** website. We reviewed together the changes proposed for the website and made several remarks to implement some of the decisions adopted by Council in Milan.

Afterwards, the Reporting Group discussed the current structure of **epi**, including the Presidium, the Board, the Council, the Secretariat and the several Committees, the current **epi** working methods and the workflow of **epi** decision-making processes.

After considering the current situation, several proposals for improvement were discussed and it was agreed to prepare a questionnaire for obtaining the views of Council members on several proposals.

The questionnaire was prepared and sent to all Council members on August 20, 2015, establishing a deadline for reply of September 14, 2015.

In the second meeting in Porto, the Reporting Group analyzed the replies to that questionnaire with the intention of presenting a new set of proposals for reform to the Council on November 14, 2015 in Cologne.

A presentation of the replies to the questionnaire was made to the Board in Porto on September 15, 2015 and we had an exchange of views with the members of the Board.

In consideration of all that the Reporting Group would like to make the following proposals to Council:

## 1. The Board

### 1.1. Size

Currently the Board consists of 42 members. In addition to the costs that organizing Board meetings imply, most of the work done in Board meetings is duplicated in Council meetings.

It therefore appears, that the resources spent in organizing Board meetings with a large number of members could be dedicated to cover other needs of the Institute.

On the other hand, having a reduced Board would permit managing the Institute more efficiently and organizing meetings more often, mostly in Munich, using the current premises of the Institute and eventually using modern means of communication like teleconferences, videoconferences, etc.

A majority of Council members (66.85 %) who replied the questionnaire were in favour of a reduction of the size of the Board.

### 1.2. Composition of the Board

The composition of the Board is defined in Article 8.2 of the Founding Regulation indicating that it should include the President, two Vice-Presidents, the Secretary-General and the Treasurer. The Board may include a deputy for the Secretary-General, a deputy for the Treasurer and further members. Article 7 of the By-Laws, states that the Board shall comprise, at least the President, two Vice-Presidents, the Secretary General, the Treasurer (members of the Presidium, according to Article 10A By-Laws), a Deputy Secretary General and a deputy for the Treasurer.

Therefore, Council has ample freedom in deciding on the composition of the Board to reduce its size.

A majority (66.6 %) of Council members are in favour of maintaining as members of the Board the Deputy Secretary General and the Deputy Treasurer. Their presence will ensure continuity for the Board when there will be renewed in the positions of Secretary General and Treasurer.

In addition to the 7 members fixed by Article 7 of the By-Laws i. e.:

- President
- Two Vice-Presidents
- Secretary General
- Treasurer
- Deputy Secretary General
- Deputy Treasurer

a majority of Council members who replied to the questionnaire were in favour of adding invited guests (16.07 %) or Chairs of Selected Committees (66.07 %).

The Chairs of the Committees who received most support to be in the Board were:

- EPPC/PEC (84.27 %)
- By-Laws (62.92 %)
- epi**-Finances (60.67 %)

After hearing the members of the Board, our suggestion would be to have a Board composed of:

- a) The 7 members established by Article 7 of the By-Laws, i. e. President, Two Vice-Presidents, Secretary General, Treasurer, Deputy Secretary General, Deputy Treasurer. They will have a right to vote.
- b) Invited guests who would not have voting rights.

The Chairs of the EPPC, PEC, By-Laws and **epi**-Finances would have the right to participate in any Board meeting, irrespectively of whether there are items in the agenda on which they will have to report.

The methodology for inviting other guests could be the following: the President will send a letter to all other Chairs of Committees announcing the intention to convene a meeting of the Board, including a tentative agenda and asking whether any of the Chairs have any item from their respective Committees to be discussed and an interest in participating in the Board meeting. The President would then decide on whether any such request should be allowed.

In light of the replies, the President will adopt the agenda and invite those Chairs who have items to be discussed at that particular meeting.

As at present, the President could also invite to any Board meeting anyone who, due to his/her expertise, could contribute to the discussion of a topic at the Board meeting.

In order to implement any decision taken by Council, there is no need to change the By-Laws. This proposal was approved by Council.

### 1.3. Delegated powers of the Board

In light of the responses of the Council members, we do not propose that further powers of the Council should be delegated to the Board. This will also permit to gain experience under the new composition.

## 2. Designation of a Rapporteur in Committees

Council was consulted about a proposal to establish the position of Rapporteur in Committees when the Committee have to start a discussion on a new topic.

Each Rapporteur would be in charge of preparing a working document (WD) including:

- a summary of the topic;
- the background;
- an explanation of why the topic needs to be studied;
- the main problems and questions; and
- an eventual proposal for decision.

Each rapporteur would:

- attach any related documentation and
- indicate deadlines, if any.

This WD would be distributed among all members of the Council so that they would be alerted as soon as the new topic is under discussion and would ensure that the members of the respective Committee are better informed and able more effectively to conduct the study of the new topic.

The majority of the members of Council (93.98%) were in favour of this proposal and of the early distribution of the WD to the members of Council (91.57%).

The Rapporteurs should preferably be elected from the members of the relevant Committee. In the absence of any candidate, a legal adviser should play this role and eventually, in case of need, the Chair of the Committee may invite and appoint a person, with appropriate experience on the topic, even if, that person is not a member of the Committee.

No change of the By-Laws seems necessary. This proposal was approved by Council.

## 3. The Council

### 3.1 Unitary and non-unitary constituencies

As members of Council will recall, Council decided to request a legal opinion about the non-unitary constituencies in **epi**. This legal opinion has been requested to Prof. Ulrich Battis, a German lawyer expert in these kind of matters. The legal opinion is enclosed in its original German version together with a translation of the summary into English and French.

As it can be seen, the opinion concludes that there is no legal basis for requiring a compulsory establishment of non-unitary jurisdictions in **epi** member states.

Currently there are 8 EPC member states with non-unitary constituencies, i. e.:

Austria  
Belgium  
Switzerland  
Germany  
Denmark  
France  
Italy  
Luxembourg

The remaining 30 EPC member states have unitary constituencies.

Given the fact that those member states who have non-unitary constituencies would have to decide if they wish to change to unitary, and this will require time, this Reporting Group suggests not to make a decision on the reduction of the size of the Council dependent of this fact.

In order to adapt the representation in Council in a more flexible and proportional way, it would be advisable to have uneven number of seats.

This, in the view of the Reporting Group, might be possible under the current reading of Article 7 (4) of the Founding Regulation, since the division of the seats in non-unitary constituencies can be done in two halves, considering together the representatives and the substitutes. The addition of an uneven member of representatives and of an uneven member of substitutes will always give an even total number.

Our proposal would be that when there are X seats for a non-unitary state (where X is an uneven number),  $(X-1)/2$  of those seats would be divided between the two constituencies as at present. The remaining one seat for that state would be taken by the member from that state, apart from the members already elected, receiving the most votes. In a similar manner, the substitute members would be elected except that the remaining substitute position would be taken by a member from the other constituency.

Example I: 1 seat.

Industry: 5 votes – Member  
Private practice: 4 votes – Substitute Member

Example II: 3 seats.

Industry:	1 <sup>st</sup> :	200 – 2 <sup>nd</sup> Member
	2 <sup>nd</sup> :	100 – 1 <sup>st</sup> Substitute Member
	3 <sup>rd</sup> :	50 – 3 <sup>rd</sup> Substitute Member
Private practice:	1 <sup>st</sup> :	300 – 1 <sup>st</sup> Member
	2 <sup>nd</sup> :	150 – 3 <sup>rd</sup> Member
	3 <sup>rd</sup> :	75 – 2 <sup>nd</sup> Substitute Member

### 3.2 Size and Composition of the Council

Currently, the Council has 142 members. The size of the Council is due to the fact that the number of EPC member states has grown considerably over the years. Currently there are 38 EPC member states.

The high number of Council members creates problems of efficiency, since it is difficult to debate and take decisions with such a large number of people and also it consumes a significant amount of the **epi** resources in, for example, organization of the meetings, the reimbursement process, travelling, accommodation and meal expenses, etc.

The resources of the Institute are limited and therefore, it may be more useful for **epi** members if a reduction of the Council meeting expenses could be used for other matters, always provided that with the reduction it is ensured an adequate representation in Council of EPC member states, and that the Council can fulfill its role with a smaller number of people in a more efficient way.

Currently the allocation of seats is the following:

1 to 25 members:	2
26 to 500 members:	4
over 500:	6

This is the result of a reduction that took place 16 years ago, in May 1999.

Any proposal that could be made is necessarily to a certain extent subjective, but it is important to try to find a compromise that is as balanced as possible.

In the questionnaire we asked about a number of principles and the result was the following:

- a majority (60.38 %) are in favour of all EPC members having, at least, one representative.
- a majority of 33 % would be in favour that a minimum number of 50 members should be required to have a second seat. 16 % were in favour of requiring 100 for a second seat and 10.8 % were in favour of requiring 25.

Our first proposal is the following:

#### Proposal I

1 to 25 :	1
26 to 400 :	2
401 to 1000 :	3
1001 to 2000 :	4
2001 to 3000 :	5
over 3001 :	6

With this structure, with the current number of members Council would be of 78 persons instead of the current 142 (45 % reduction).

Our second proposal is the following:

#### Proposal II

1 to 30 :	1
31 to 100 :	2
101 to 300 :	3
301 to 1000 :	4
1001 to 3000 :	5
over 3001 :	6

With this structure, the Council would consist of 85 members (40 % reduction).

Our third proposal is the following:

#### Proposal III

1 to 30 :	1
31 to 50 :	2
51 to 300 :	3
301 to 500 :	4
501 to 3000 :	5
over 3001 :	6

With this structure, the Council would consist of 95 members (33 % reduction).

If Council decides to change the size of the Council, the By-Laws Committee will have to prepare a proposal for changing Article 7 (3) of the Founding Regulation. Such a change must be approved by the Administrative Council of the EPO.

After a discussion, a majority of the members of the Council was in favour to reduce the size of the Council. The Reporting Group will now prepare new proposals for consideration in the next meeting of the Council.

## Specialised **epi** seminar in Eindhoven on 20 November 2015

This year's **epi** seminar in Eindhoven was dedicated to the topic of "Patent eligibility in the US and Europe" which was presented by two attorneys coming from the United States, Ms Amelia Feulner Baur (McNeill/Baur Intellectual Property Law) and Mr Timothy May (Finnegan) as well as two European speakers, Mr Bart Van Wezenbeek and Mr Derk Visser, both members of the **epi**.

The focus was on the United States as there are important recent developments in the area of patent eligibility in this jurisdiction. The US speakers analysed the recent Case Law from the US courts and the USPTO guidance and provided practical advice for claim drafting. The European speakers compared the new US practice with EPO practice. All the four speakers did excellent presentations on the subject which were highly appreciated by the audience.

The seminar was attended by about 114 **epi** – members, from industry as well as private practice. The participants travelled to Eindhoven from a number of European countries, including The Netherlands, Belgium, Luxembourg, Germany and the UK.

Additionally, we would like to thank all **epi** members who participated in our, our tutors, seminar speakers and our PEC members for their constant support and dedication. If you have suggestions for topics or locations, you are very welcome to inform us by email under: [education@patentepi.com](mailto:education@patentepi.com)

PEC and the Education Team wish all our members and students a Merry Christmas and a Prosperous and Happy 2016!



## UP/UPC Seminars 2016

In 2016 **epi** will start a series of one day seminars on the Unitary Patent (UP) and the Unified Patent Court (UPC). The seminars will take place in 2016 and early 2017.

The seminars will provide knowledge of both systems to allow **epi** members to work with the systems and to advise clients on strategic choices, for example on opting out of the UPC, and UP versus classical individual state validation.

A number of the seminars (relating to changes in the EPC to accommodate the UP) will be held jointly with the EPO, with expert speakers from both the **epi** and the EPO.

The fee to attend the one day seminars will be:

380 € for **epi** members, 190€ for **epi** students and 480 € for non-**epi** members/non-**epi** students (for seminars in B-countries there will be a discount of 50%).

The concrete dates and locations will be announced within the next months. Further details of this seminar series will be released in mailings to **epi** members and on our website. For any updates we kindly refer to visit our website [www.patentepi.com](http://www.patentepi.com) or contact the **epi** Education Team by email [education@patentepi.com](mailto:education@patentepi.com).

## Tutors' Report on the EQE 2015 Papers

L. Ferreira (PT), A. Hards (DE), K. Hartvichova (CZ), J. Hoekstra (NL), M. Mackett (BE), H. Marsman (NL), and P. Pollard (NL)

Each year in October, the European Patent Academy and the **epi** arrange a meeting between EQE tutors and the Examination Committees. The goals are to discuss February's papers, to improve future EQE's by openly exchanging ideas and to help tutors prepare candidates for next year's exam.

The Examination Board has kindly given the tutors permission to publish their own report of the important points so that candidates can more easily find this information. In addition, the comments can greatly assist when reading and interpreting the official EQE Compendium.

This year's meeting was held in Munich on October 8, and was attended by more than 100 tutors.

This Tutors' Report appears each year in the end of year edition of **epi Information**, and is posted on the EPO's EQE Forum.

It contains the following sections:

1. Overview of the passing rates in 2015
2. Instructions To Candidates
3. AB CH (1)
4. AB CH (2)
5. AB E/M (1)

6. AB E/M (2)
7. C
8. D
9. Pre-Exam
10. The future of the EQE
11. The combined AB Papers (EQE 2017)

EB refer to the Examination Board, EC to the relevant Examination Committee and ER to the relevant Examiners' Report.

On behalf of the tutors present in Munich, I would like to thank all the members of the Examination Board and Committees for their openness, and for listening to our opinions and comments. This meeting is our yearly opportunity to learn from each other. My thanks also to the tutors who asked questions and contributed to the discussions.

My special thanks to Harrie Marsman, Andrew Hards, Katerina Hartvichova, Jelle Hoekstra, Luis Ferreira and Margaret Mackett for finding time to prepare the individual paper summaries.

We all wish you good luck in 2016,  
Pete Pollard (Editor)

## 1. Overview of the passing rates in 2015

- 587 candidates passed the Main Exam out of 1685

who took at least one paper. The official results for each paper were as follows:

Paper	Nr. candidates	Pass	Compensable Fail	Fail
Pre-Exam	810	76 %	–	24 %
A E/M	555	62 %	8 %	30 %
A CH	320	59 %	11 %	30 %
B E/M	560	61 %	8 %	31 %
B CH	269	84 %	4 %	12 %
C	1084	39 %	9 %	52 %
D	1029	54 %	11 %	35 %

## 2. Instructions To Candidates

- A number of candidates seem unfamiliar with the *Regulations on the EQE (REE)*, and in particular with the *Instructions to candidates concerning the conduct of the EQE*.
- The link to the latest version of the *REE* is found on the EPO's EQE page: <http://www.epo.org/learning-events/eqe.html>
- This year, there were some breaches of the REE with unfortunate consequences:
  - Many candidates add names or initials to their answer paper – this is very disruptive to the EC's because it has to be manually removed before marking to preserve anonymity.
  - A candidate wrote the complete answer on the blank (back) sides of the EQE paper. After copying the sheets, only blank pages were submitted for marking, and the candidate was awarded 0 points. So only write on the lined side of the EQE paper provided.
  - A candidate kept writing after the stop signal was given, even after being warned. The EB decided to subtract 5 points for this breach of the rules. In future, writing after the stop signal may be more strictly enforced.
  - Some candidates were surprised that they were not permitted to have their phones with them. The rules concerning electronic devices are strict – candidates may not take any device, such as a telephone, tablet or smart watch, into the examination hall – even if turned off. They should be left at home or in the hotel. Although some examination centers may provide an envelope or lockers, these can be limited in number and should not be relied on.
- So please read the *Instructions to candidates ... before next year's exam*.

## 3. AB CH (1) – by Harrie Marsman

EC I representatives: Nicolas Favre, Harald Schmidt-Yodlee and Wim van der Poel

- This summary includes the comments of Katerina Hartvichova, who summarized the chemistry papers for the electro-mechanical tutors.

### Paper A

- Harald Schmidt-Yodlee, who drafted the paper, started with an overview of the paper and what was to be expected.
- The general subject of this paper was directed to a skincare product against wrinkles. In the prior art, specialists were needed to inject solutions of botulinum protein a couple of times per year.
- The invention roughly consists of using a specific polyethylene glycol (PEG)-copolymer in a conjugate with the botulinum protein to avoid injection and to avoid the interference of specialists multiple times a year.
- Harald observed that the A Papers in chemistry often provide a hint in the working Examples. So, start with a very close look at these Examples.
- For this paper, the Examples indicate what can be covered: they show that good effects are obtained for PEG; whereas the use of PVP has bad side-effects; and the use of hyaluronic acid has no effect at all on wrinkles.
- As usual, there were two prior art documents:
  - D1 teaches a combination of a botulinum protein and PEG (having a molecular weight of between 2500-15000 Da). This combination is injected in the skin. Candidates had to realise that creams are not injectable.
  - D2 teaches nano-emulsions of botulinum; the use thereof in the treatment of wrinkles; the application to the face; and a same process for making nano-emulsions. It should have been clear that D2 is the closest prior art.
- Expected were claims directed to a nano-emulsion directed to the conjugate, wherein the PEG has an average molecular weight of from 2000 to 15000 Da.
- In addition, creams could be claimed that contained:
  - (i) the nano-emulsion of the previous paragraph, or

- (ii) a botulinum protein- PEG conjugate wherein the average molecular weight is from 2000 to 15000 Da.
- In other words, it is not needed that the conjugate is present in the form of a nano-emulsion.
- Apparently, quite some candidates had problems with such juxtaposed independent claim claims. Marks were frequently lost because:
  - claims were presented with quite some unnecessary limitations. This does not only result in less marks for the independent claim, but also makes it difficult to gain marks for the dependent claims.
  - claims were proposed as product-by-process claims
- Further points were awarded to a kit claim comprising the cream and a pipette.
- Also expected was a claim directed to a method for cosmetic treatment of wrinkles comprising applying the cream to the face, and following a question from one of the tutors even broader to the skin (see the first sentence of paragraph [001]).
- Quite a number of candidates proposed to claim the cosmetic treatment through a second medical use. However, cosmetic treatment does not require a second medical use, and no marks were given for such claims!
- In this respect, it was observed that D2 shows how to claim cosmetic treatments (see the section below on the combined AB Paper).
- Finally, a method of producing the nano-emulsion of claim 1 could be claimed, comprising the exposure of the mixture to a pressure of more than 1000 bar. In the ER (see the paragraph bridging pages 3 and 4) the impression is created that also the time period would be essential. This is not the case as becomes clear from paragraph [013] of the letter of the applicant, saying that known methods can be used such as high pressure homogenization. Subsequently, an embodiment is described using the applicant's microfluidiser, which does have an essential time period associated with it.
- Every independent claim could be claimed in one set of claims. It is not needed to file multiple applications. That is, there is not any problem with unity-of-invention.
- A tutor asked why the claims were not in the two-part form.
- The EC observed that this was uncommon in chemistry, and that this also reflected "real life". It was indicated that you would lose 2 marks for having the terms "characterized in that" at an incorrect spot.
- The EC noted that a description reading like a letter to the Examiner is not intended. If you write a description in this way, you will lose points.
- In addition, candidates do not need to adapt the working examples. You will not gain points. You can only lose marks.
- It was finally observed that the description of the Candidate's Solution had 14 points.

### Paper B

- Wim van der Poel was requested to explain this paper. With a passing rate of more than 80 %, it was well made.
- Paper B was directed to an airbag comprising fuel, oxidant and slag forming agent.
- Several problems are described in the paper, and the solution lies in a secondary slag formation to deal with the formed metal oxides, which are harmful for environment and humans.
- As usual, two prior art documents were cited in the communication of the Examiner. One of these was especially relevant in view of novelty (D2); the other was clearly the closest prior art (D1). Moreover, a clarity objection was raised in that an essential feature, the particle size, was missing.
- In addition, based on the instructions/comments of the applicant, one had to note that only some combinations would solve the problem and/or would lead to an enabling invention.
- Based on the proposed set of claims and comments of the client, you had to realize that quite some amendments needed to be made to said proposal.
  - Hydrotalcites are only described in combination with carbides to give the advantageous effects.
  - The particle sizes are to be introduced (this resulted in overcoming the novelty objection based on D2).
  - The ratio of carbide to hydrotalcite is to be added to deal with the essential feature identified by the Applicant.
- On inventive step argumentation, the EC noted that many candidates did not indicate why the problem is solved, let alone that it is solved over the full range.
- Two interesting questions came up:
  - 1) Was Art. 123(2) not violated by deleting nitride and introducing the carbide/hydrotalcite ratio? The claim uses the term "comprising" meaning that, because of the potential presence of nitride, the ratio that was originally in claim 4 could be outside the 5:1 – 1:5 range.
  - The EC answered honestly that it was not intended to conclude this, but there may be a point! However, the candidates did not see it.
  - 2) It is required to show the solution over the full scope of the claim. Here there is only 1 example with 1 ratio, so how can you argue that the problem is solved over the full scope? The EC answered that you need to rely on the client's instruction/information, but, agreed that it is not in the application.
- The discussions were held in good harmony and a fine atmosphere.

### **4. AB CH (2) – by Andrew Hards**

- This summary also includes the comments of Katerina Hartvichova, who summarized the chemistry papers for the electro-mechanical tutors.

### Paper A

- Paper A2015 related to compositions and creams for the cosmetic treatment of wrinkles by application to skin. The client's letter showed tests for compositions containing botulinum protein and three polymers, but a closer look at the examples revealed that two of the polymers represented non-working embodiments.
- One expected independent claim related to nano-emulsions comprising a conjugate of botulinum protein and the only working polymer PEG. Furthermore, an independent claim directed to a cream containing this conjugate, either as such or in the form of nano-emulsion was expected, and an independent claim to a kit comprising the cream and an application pipette.
- In addition, two independent method claims were expected – one to a method for producing the nano-emulsion, and one to a method of cosmetic treatment.
- Interestingly, D2 provided an exact guidance on claiming the method for producing the nano-emulsion. The EC indicated that this can also be expected in the future combined paper A from EQE 2017 (see the section below on the combined AB paper).
- Some candidates drafted product-by-process claims for the nano-emulsions, but these were not needed here as the nano-emulsion could easily be defined by its composition.
- In addition, the method of cosmetic treatment carried out on a human body (application to the skin) confused some candidates into drafting second medical use claims. They were also not appropriate here, as the client made it fully clear that the treatment was purely cosmetic.
- Drafting two independent claims for the cream comprising either the conjugate or the nano-emulsion violated R. 43 (2) EPC. The second claim was not marked in this case.
- Some candidates had problems grasping the general inventive concept, which was the provision of a topical treatment for wrinkles by botulinum protein, and suggested filing more than one application.
- On drafting the description, candidates tended to present the background art in the form of the problem-solution approach, after which it appeared that the idea of the invention was already known in the prior art. However, a proper background art discussion consists of summarising the content of each prior art document and formulating the technical problem.

### Paper B

- Paper B2015 related to airbag compositions comprising a fuel and an oxidant, and a slag forming agent which was carbide or nitride. In one preferred embodiment, HTC was a secondary slag forming agent, but it was disclosed only in combination with carbides as primary slag forming agent.
- The client proposed amended claims which encompassed this combination of HTC with carbide, but also unfortunately an undisclosed combination of

HTC with nitride. The vast majority of candidates spotted this added-subject matter problem.

- D1 was the closest prior art, being from the same field and directed to the same purpose. The inventive step discussion could rely on one or more of three effects of HTC as the secondary slag former over D1. Spotting and properly arguing one of these effects, with careful consideration of the examples, was sufficient for attracting full marks.
- As in previous years, the candidates often omitted to show that the technical problem is indeed solved by the claimed combination of features, and over the whole claimed range. In B2015, only one example relating to one specific composition within the claimed range was disclosed, nevertheless the broader range could be claimed, because the client had indicated that they were sure the invention works within the claimed range (and not outside this range). A statement indicating this, and suggesting that further examples would be supplied if needed, was expected.
- In Paper B, drafting new claims is generally not expected unless specifically requested by the client.
- Paper B2015 was quite straightforward, and this was reflected in the unusually high pass rate of over 83 %.

### **5. AB E/M (1) – by Margaret Mackett**

EC I representatives: Christophe Chauvet, Martin Kraenzmer and Andreas Böhm-Pélissier

- As usual, the members of EC I fully explained the subject-matter for both papers to supplement the information already provided in the ER. This is the penultimate set of papers to be split in this way with new format papers being set for 2017.

#### Paper A (Christophe Chauvet):

- The invention related to a force sensor which can be used in more than one implementation, and it was essential to cover all the embodiments mentioned in the client's letter in claim 1.
- The example solution in the ER lists the features necessary to impart both novelty and inventive step over the cited prior art documents. Although this solution was not provided in two-part form, two-part form was clearly expected as it better suited the problem-solution approach required for the description.
- Whilst it would have been possible to have a one-part form for claim 1, the candidate would have needed to write more in the description to provide clear distinction over the chosen closest prior art document.
- The example solution was not the only solution – other solutions were possible which were as good, enabling candidates to obtain the marks necessary to pass.
- Only 15 claims were expected, and, in this case, no complex tree structure was required for the dependent claims. Each dependent claim should provide a potential fall-back position.

### Paper B (Martin Kraenzmer):

- The invention related to skis and ski bindings, with the challenge of having to read three prior art documents. The response needed to meet the requirements of the EPC whilst following the instructions provided in the client's letter as far as possible. Two independent claims were expected and would be allowable under Rule 43 (2) EPC.
- A single independent claim would have led to clarity objections. Up to 3 marks were awarded for each amendment, including the deletion of claim 4.
- The candidates were expected to address each objection in the Communication from the Examining Division in the form of a letter. Detailed reasoning addressing Articles 123 (2), 54, 56 and 84 EPC was expected.
- In particular, the basis for the amendments provided by the client was not sufficient, and it was necessary to provide adequate basis using passages from the description.
- For novelty, only one distinguishing feature was required for each of the three prior art documents. For inventive step, detailed reasoning was needed for the selection of the closest prior art document, with a discussion of why the other documents could not be considered to be the closest prior art.

### **6. AB E/M (2) – by Luis Ferreira**

- This summary of the electro-mechanical papers was given to the chemistry tutors by Luis Ferreira. It is focused on the aspects which chemistry candidates may find surprising or unusual. This can help candidates with a chemical background that make the electro-mechanical papers.
- EM papers are different in terms of functional features, essential features, the number of independent claims, the categories of claims and the dependent claims.

### Paper A

- The pass rate was considered to be reasonable
- The ER provides wording for many, many equally good solutions.
- The dependent claims had a practically 'flat' structure
- It was critical to identify the prior art drawbacks – D1 does not identify location, D2 requires as many detectors as locations
- The description required a proper discussion of the prior art drawbacks and of the solution.
- If the two-part form was absent, there was no penalty if the prior art discussion in the description was more complete (see the Guidelines).
- The main challenges were:
  - Avoiding unnecessary limitations – not excluding embodiments, generalising the pulse frequency and the colour, including the embodiment of fibres on a sheet
  - The novelty over Fig. 1 c and D1, and inventive step over Fig. 1 c + D1

- Clarity – defining a single input fibre and the overlapping of input/output fibres
- The main difference with chemistry papers are functional features. These make the paper easier to make because general expressions may be used instead of just specific one. For example:
  - Prior art: when a force is applied at a coupling location (3), an amount of light coupled from the input optical fibre (1 a–1 d) into the output optical fibre (2) changes
- Watch out for the variants:
  - "N inputs x N outputs" and "N inputs x 1 output"
  - Other characteristics than the pulse frequency and the colour
  - Optical fibres can be glued to transparent flexible sheet
  - Optical fibres can be separated by a cavity
  - Measuring the magnitude of the signal
- An important feature in claim 1 is:
  - a light injecting device (5) for injecting into each of the input optical fibres (1 a–1 d) an optical signal having a different characteristic
- The distinguishing feature is:
  - the light receiving device (6) being configured to identify the coupling location (3) at which the received optical signal is coupled into the output optical fibre (2) on the basis of the characteristic of the received optical signal

### Paper B

- Candidates generally did well on the claims.
- Each objection by the Examiner must be addressed.
- The main issues (for chemistry people) were:
  - Independent claims in the same category
  - Intermediate generalisation – mostly the isolation of features from the embodiments
  - Changing the claiming dependency without adding additional subject-matter
  - The term "spring" can be generalized to "elastic element" (having basis in the description)
  - Lots of hints to find – "any elastic means", "it is essential", "must not", "it is important"
- The challenges were:
  - Many amendments were required – both big and small
  - There are two main variants – we keep and argue 2 independent claims in the same category – they are 2 alternative solutions under R43 (2) EPC and A82
  - Only amendments attract marks
  - Intermediate generalisations must be argued
    - "because X is only disclosed in combination with Y"; "because X is always disclosed for Y"; "X always comprises Y"; "X is irrespective of Y"
  - Combining passages needs proper argumentation
- Support for
  - ... the switch (4) comprises an elastic element (4b) arranged for automatically moving the actuator (4a) ...
- was based on paragraphs 8 and 10:
  - the switch (4) comprising an actuator (4a) ...

- the actuator (4a) moves automatically from the first to the second position upon separation of the ski boot (3) from the ski (1)
- ... any other elastic element could be used to automatically move the actuator 4a ...
- The EC does not want candidates to draft additional claims:
  - No further dependent claims are wanted
  - New dependent claims are not considered as new if they claim the originally claimed subject matter, or subject matter claimed in the client's draft claim set in a different way
  - Claim sets not based on the draft set of claims are not considered to be in the interest of the client

## 7. C – by Jelle Hoekstra

EC II representatives: Paolo Provvionato, Olaf Naumann and Celia Martinez Rico

- Starting this year, the marking sheet provided to candidates has been improved – previously, the points were only divided among Use Of Information and Argumentation.
- This year, the points were divided as follows, with the maximum number of points which could be scored:
 

◦ Novelty Use (Of Information)	10
◦ Novelty Argumentation	7
◦ Inventive Step Use (Of Information)	24
◦ Inventive Step Argumentation	42
◦ Other Use (Of Information)	10
◦ Other Argumentation	7
- The EC commented that the argumentation has improved, and keeps improving.
- Olaf, the main drafter, gave a presentation about the paper.
- The patent to be attacked is directed to a snowboard or ski, with a thickness that varies along the longitudinal axis and a piezo-electric damper. Everything is defined in the paper.
- He explained that the paper was based on an invention by the HEAD company a few years ago. However, neither the variable thickness nor the dampers are used in the current range of snowboards or skis.
- There have been many comments from candidates about the amount of material to be absorbed in the C Paper. The EC puts a great deal of effort into checking this – It is a point of attention when making each exam. They use word counts and testers with different backgrounds and nationalities. Many are non-native speakers, and they consider their testing system to be good at keeping the difficulty the same. The English is also often adapted.
- The EC stressed that time management is very important for Paper C, and they estimate that candidates should be able to read everything within 1 hour.
- A tutor commented that many candidates need more than 1 hour.
- The EC replied that this depends on the individual, but the terms provided are simple enough or defined. The EC pointed out that there are fewer attacks and less information than in the papers of the past. The workload for candidates has really been reduced. The EC also noted that successful candidates who pass are clearly structured in answering, and have apparently practiced past papers.
- A tutor announced that the Academy is involved in preparing language training in English, French & German for non-native speakers.
- The effective dates for each claim need to be mentioned in the answer.
- Claim 4 had two parts – a dependence on claim 2 and a dependence on claim 3. The part dependent on claim 3 was added during examination, and was added subject-matter: the fibres were only disclosed with the particular material. So claim 4 dependent on claim 3 has no effective date.
- The blog post (Annex 2) was to be considered solid prior art – the date, the content and the circumstances are given.
- A tutor commented that some candidates may have been looking for a trap. The EC explained that they tried here to inject a real-life situation – blogs are becoming more and more common. The EC further commented that this answer is based on clear statements in the Guidelines, stating that internet disclosures are accepted.
- Another tutor supported this choice by the EC – candidates should realize from a tactical point of view that they should make the best use of the facts given.
- The oral presentation is vague, but the approach for opposition should be:
  - details are known and we will supply more later, including evidence
  - cite T decision (T1219/97) and not use
- A tutor commented that although the details required for points are quite simple, many candidates will have spent time struggling with whether there is enough proof, especially using a witness. The EC commented that this is similar to oral disclosures that have appeared on previous papers.
- In general, candidates did better with the oral disclosure compared to the blog. Those who did use the blog in an attack used it well.
- Claim 1: 3 novelty attacks were possible – A5, A6 and A2 (oral). The idea was to give candidates some quick marks.
- Claim 2: an inventive step attack based on A3 was expected. Some candidates did not use the definitions given in A1.
- Claim 3: an inventive step attack starting from A2 as CPA. Using A6 as CPA is a poor attack.
- Claim 4 via claim 2: a full argumentation was not expected here – only 1 use and 4 argumentation marks were available.
- Claim 5: a second independent claim. This is included to provide an opportunity to recover from any mistake in the other claims.
- An inventive step attack starting from A5 was expected. A ranges attack was not expected – in fact, the paper hints not to do this.

- Claim 6: an inventive step attack starting with A2 was expected. A3 was an inferior Closest Prior Art.
- Many candidates use generic and formulaic argumentation about why another document should be considered, the teachings and combining prior art. The paper gives dedicated hints such as dealing with the same problem, the documents being compatible, the same effect being achieved. When explaining the combination of prior art, candidates should explain what you need to modify to arrive at something in the claim.

## 8. D – by Pete Pollard

EC III representatives: Daniel Closa (EPO) Christian Schmelz (EPO), Magali Degrendel (EPO)

Moderator: Dimitrios Roukounas (**epi**)

### General comments on D

- Some candidates merely repeat part of the question or summarise the facts. This is mainly in DII, and sometimes in DI. There are no points for simply doing this – a complete answer requires a detailed analysis and a clear conclusion without contradictory statements.

### D Paper in 2016

- The EC reported that from EQE 2016, the DII part will begin with the first line: “Today is x/x/xx” to explicitly indicate the actual exam date as the date to use to evaluate the questions. This is something that a number of tutors have been requesting for some time as there are many candidates who do not realize this, and hence miss points.

### D 2015 results: approx. 50 % with 50 or more

- Such a high passing rate was not foreseen, but it is not seen as a problem.
- Last year, many candidates resident in Germany performed poorly on Papers C and D. This year, the scores were improved, but the German candidates still perform worse than their UK and French counterparts.
- From the official D 2015 statistics, the results for candidates taking the exam in their native language:
  - Resident in Germany: approx. 50 % with 50 or more, approx. 61 % with 45 or more
  - Resident in France: approx. 67 % with 50 or more, approx. 75.5 % with 45 or more
  - Resident in UK: approx. 80 % with 50 or more, approx. 88 % with 45 or more

### DI 2015 – General

- A comment was made that the ER does not always contain the full date calculations, with a complete legal basis and an indication when the EPO is open/closed.
- At the exam, R.134 does not need to be cited if there is no extension. However, if there is an extension due to a non-working day, R.134 should always be cited.
- Full calculations are not required where the exact calculation is less important – for example:

- Q.2: the 18 m publication date of EP1 only needs to be estimated approximately
- Q.4: for the priority calculation of JP-D, the main comment to make is that there is still time to make use of it
- There were some questions about whether the EPO Guidelines were accepted as legal basis. The EC confirmed that Articles & Rules are legal basis, followed by G-decisions.
- If additional information not in the EPC or PCT is required to answer the question, a reference to the Guidelines or OJ EPO notices may also be given.
- If T-decisions cited in the Guidelines are needed to answer a question, a reference to either the T-decision or the Guidelines may be given.

### DI Q.1

- In general, this question was very well answered, with many candidates scoring at least 6 points.
- Points were lost by not being specific enough in the answer – for example, requesting that the filing date be retained.

### DI Q.2

- The first part of this question relating to the loss of priority was generally well-answered.
- The second part was poorly answered – many candidates suggested filing an opposition without grounds.

### DI Q.3

- In general, this question was well-answered – in particular, the part about Argentina not being a PCT state.
- Part a) of the question appears to hint that procedural aspects should be covered in the answer, but this is a not true. The phrasing is copied from Art. 8 (1) PCT – “*The international application may contain a declaration, as prescribed in the Regulations, claiming the priority of one or more earlier applications ...*”
- In fact, it is incorrect legally to ask “May PCT-A validly claim priority of application A”. It is the national and regional laws (such as the EPC) determine whether a priority claim accepted under PCT is completely valid.

### DI Q.4

- For this question, only a few candidates suggested re-filing a new application to solve the EP-2 problem.
- Re-filing of EP-1 will also solve the EP-1 problem, but as no candidates suggested it, it is unclear whether this would have received many marks for that part.

### DI Q.5

- The second part, relating to the payment of two Further Processing fees, was not very well answered. Many candidates did not realize that there are two omitted acts.
- The ER appears to indicate a Notice from the EPO as legal basis for Further Processing being available after the refusal of Rule 30 (3). Legally, Further Processing is available because it is not excluded in Art. 121 (4) or

Rule 135 (2). The citation in the ER was included because this confirms the availability – this confirmation can be found in either GL (2014) A-IV, 5 or OJ 2013, 542.

- The ER refers to the Decision and Notice by title – however both EPO Guidelines (GL A-IV, 5) and the OJ references (OJ 2011, 372 & OJ 2013, 542) were also accepted.
- R.126(2) was required as legal basis for the statement “The invitation is deemed to be delivered on 28 February 2015”. It was erroneously left out of the ER.

#### DII 2015 – General

- This year, simple letters were used to indicate the features – this was much appreciated by candidates as it reduced the amount to write, and avoided interpretation problems that can occur when technical terms are used.

#### DII – Q. 1

- In the ER, the publication of EP-Z is determined to have been in Sep 13 “or at most a few months before”. This refers to the possibility that early publication could have been requested.
- The questions do not explicitly indicate the geography (states) to be considered. However, the paper itself indicates the most interesting states because the competitors are based there.

#### DII – Q. 2

- A tutor commented that 4 marks seems very little for a question regarding the client’s main business plans. The EC considered a reasonable number of points. This question was asked to explicitly test whether candidates understand the relationship between Freedom-To-Operate and patent ownership. There are still many candidates who do not understand this – they did not realise that machine M+A+B+C+D falls within the scope of protection of broader claims M+A+B and M+A+C.
- There are often overlapping patent rights (usually a “dependent” patent situation), and every year there are many candidates that advise the client that having a patent to A+B gives the right to produce/sell A+B. This is fundamentally wrong, and is dangerous advice for your client.
- A tutor commented that there appeared to be differences in the marking scheme used to mark Q.2 in the published Candidates Solution’s in English & German. The EC pointed out that there is some discretion of the different markers to award different marks, but the answers should be considered as a whole. It is possible that a candidate answered part of Q.2 under Q.1 or Q.3 – marks are awarded wherever a desired statement appears in your answer.

#### DII – Q. 3

- Very few candidates saw the optimal solution of filing a new PCT application – this was only about 10 % of the candidates.

#### **9. Pre-Exam – by Pete Pollard**

EC IV representatives: Stefan Kastel and Francesco Rinaldi

- The EC strongly recommended that candidates read the Instructions to the candidates, especially the instructions about how to fill in the answer sheet.

#### Legal Questions

- For the first time, two related legal questions were included – Q.7 & Q.8. No issues were detected by the EC regarding this combination.
- There were some comments about a possible ambiguity in Q.9, especially in the German version. However, the EC based Q.9 on passages taken directly from the Guidelines.

#### Claim Analysis

- The case was directed towards a fire door, providing two effects: mitigation of fire propagation and biasing the door closed.
- Q.13 included an “or” claim (I.8). This was handled well by the candidates.
- Q.15 led to some difficulty. The intended interpretation of D1 [0003] was that cardboard generally comprises wood fibres.
- However, it was accepted after the exam that there were good arguments that this was not sufficient to conclude such a general teaching. Following a number of appeals, the EB decided to award marks for both True and False in response to 15.2 and 17.3. The EQE Compendium was updated with an addendum explaining this. The marks were also changed for all candidates who did not appeal.
- It was commented that this was a very fair outcome for candidates, and much appreciated.
- For Q.20, it was decided to award points to both True and False answers for 20.2 because it was accepted that the formulations of the question was unnecessarily complex.
- Q.18.3 asked about the technical effect of the biasing means. Many candidates had difficulty with this question.
- A tutor asked about how the questions are formulated, and whether candidates can expect the phrasing and question forms to remain consistent. The EC replied that it is up to the drafter of the paper.
- A comment was made that “leaf” may not be understandable to non-native speakers. The EC replied that it was taken from a technical dictionary.
- Even if the word was unknown, it should be clear from the exam paper what it is in this context,

## 10. The future of the EQE

- During the day, a number of comments were made about future developments in the EQE.
- Bertrand Gellie, the newly appointed Chairman of the EB, noted that his main tasks in the coming years is to reduce the cost of the EQE examination system, and to manage the changes to the papers, such as the combination of the AB papers. Other changes are being considered, such as the extension of multiple-choice questioning to papers of the Man Exam.
- The electro-mechanical and chemistry AB Papers will be combined starting in EQE 2017 – see below for more details.
- Mihaela Teodorescu, Vice-President of **epi**, stated the desire to raise passing rates and to continue looking at the study level needed to pass.

## 11. The combined AB Papers (EQE 2017)

- It was announced last year that starting with EQE 2017, there will only be a single technical specialization for the A & B Papers. The separate chemical and electro-mechanical disciplines will be replaced into a technical subject that all candidates can understand. At the meeting this year, Nicolas Favre, Chairman of EC I, updated the tutor's on the approach taken and the progress so far.
- The EM and CH committees have been fused together, and the papers will drafted by both technical directions.
- Initially, twenty experienced AB drafters were asked to prepare and present a concept for a combined paper, highlighting the problems they had. The four most suitable were selected, and each was given to a group of three experienced drafters. So drafting has already started on the first four exam papers, including the papers for EQE 2017.
- For the first four papers, the EC themselves will test the paper. The intention is not to make it extremely

difficult – the papers should give candidates a fair chance.

- The papers will be somewhere in the middle between selection and generalization. There will be no extremely functional claims. It will be based on general principles, like novelty, and the task of the candidates is to get the best scope and follow the instructions of the client.
- The approach will be practical, such as using the prior art to provide hints in addition to those in the client's letter. This was already done in this year's Chemistry Paper A.
- So examples of claim forms will be provided to assist in drafting.
- One of the tutors noted the fundamental differences between CH and EM papers – the predictability of the prior art, the number of combinations, the importance of the effect and inventive step argumentation.
- The EC emphasized that the change in paper will not be at the expense of candidates.
- The papers will test the basic principles: basic claim drafting, spotting differences, and argumentation ad not the specialized issues. For example, a basic principle is when "for" in a claim is limiting or not.
- No extreme case law will be tested. Markush claims may be required.
- On the current papers, most candidates who fail do not know the basics. Easy points are currently missed in 75 % of cases. For example, Art. 123(2) is more than just writing "see paragraph xxx". The argumentation is not dependent on the technical field when you know the features.
- The Pre-Exam claims-analysis part and the current C Paper are existing examples of such universal papers.
- Mock AB Papers, based on some modified old C Papers, will be made available at the beginning of 2016. They will be made according to the same process (testing and guinea-pigs) as the actual exams.

# Comments on the new combined EQE papers A and B for both mechanics and chemistry

A. Hards\*, (DE) EQE Tutor

As of 2017, the EQE papers A and B will no longer be held separately for mechanics and chemistry. The intention is apparently to save on examiner costs in the

committees. However, it may be worth considering the following points.

The underlying concepts for patentability in the unpredictable arts (chemistry) differ from those in the predictable arts (mechanics). The nature of mechanics is to combine elements in ways unforeseen. There are countless ways to achieve such combinations, and conse-

\* This article represents the personal opinion of the author. The **epi** is represented in the Examination Board. The new A/B exam will be held in 2017 and will thereafter be evaluated.

quently novelty is more emphasised as the primal test, whereas the technical effects are frequently derivable. In chemistry, on the other hand, chemicals are combined in ways so as to achieve unforeseen effects, the constituents themselves being mostly well known. The focus is on inventiveness due to these surprising effects. As a result hereof, the A/B papers in chemistry and mechanics have been quite different in structure in the past.

It seems that the new combined papers for A/B will essentially be simplified mechanics papers. However, if the principles being tested are those germane to mechanics, such as finding an optimised functional definition of a device, then chemical candidates will surely be at a disadvantage, since their training has an entirely different focus.

In the past, chemical candidates have not been discriminated against, as can be confirmed by the pass rates of either technical field. However, there is a nagging worry that this will no longer be the case. In fact, we see this already in the pre-exam, for which I have been a tutor, and for which the prevalence of mechanical background knowledge has been an issue.

In answer hereto, the committee members explained that the new combined papers will be simple enough for even the chemical candidates to grasp, at least initially for the first couple of years.

Firstly, this does not solve the discrimination issue, because having all mechanics candidates cruising through the exam, while the chemical candidates struggle with passing is not alleviating the delta, only improving the overall pass rate. In any case, this begs the question of whether the candidates at large are being certified as fit-for-practice at all and more pertinently, whether the chemical candidates are being endowed with the tools necessary in every-day practice for drafting chemical applications. What is the point of the exam for chemical candidates if it is disjointed from real life work?

Some tools are common to both fields, such as ranges and maybe even the double lists principle. However, there is a different approach and methodology to chemistry, as compared to mechanics, so chemical candidates are not being tested in the techniques in which they should be versed for practice outside the EQE box.

According to Rule 22 of the IPREE (Implementing Provisions of the Regulation of the EQE), candidates shall not use any special knowledge they may have of the technical field of the invention. In essence this is a non-discrimination norm. Can the EQE, however, tolerate to bias against candidates based on their technical field? If the delta is only 5%, maybe, but what if the results are skewed by 20%? What is the meaning of such a difference for the patent attorney profession and the market regulation achieved thereby?

If the committee was thinking to tackle this problem honestly from the onset, they would introduce a tick box in the exam paper for candidates to indicate their tech-

nical specialisation. A published statistical analysis could scatter all hints of partiality. If we have equality between the arts, all is well and the hounds of dissent will be silenced. If on the other hand, we have a grave inequality, the committee should admit that something is amiss and revert to the specialised treatment of the predictable and unpredictable arts, for sake of fairness and for the sake of a better training of candidates.

In this regard, it is not right that the EPO is shying away from its obligation to invest in teaching the next generation of patent attorneys. This should not be left to the professional representatives alone, but the banner of education should be carried squarely by the EPO through the Patent Academy.

Simply dumbing down the exam is not the solution, especially not for the drafting paper A. Just increasing the pass rate with easy exams could only be tolerated, if the lack of autonomous qualification incentives were compensated for by additional specialised preparatory courses, which should, of course, be adapted to each of the major technical fields, reflecting the reality of the profession.

On the same note, while the EQE papers currently do test crucial skills, often the broader picture is missing. In a way, paper C is now a grand memory and intelligence test, which doesn't account for many of the legal issues and true cornerstone questions occurring in oral hearings. Candidates are not introduced to real cases and the rich source of cutting edge legal discussions in opposition oral hearings. In addition, Paper D should be more than a matrix of puzzled claim object dependencies and priority issues and also include teleological analysis, and the drafting of a legal opinion. The missing skills and methodology should at least be taught in other ways such as at seminars and additional courses.

It cannot be understood, why the German candidate system can support a full 6 months' training course at the German Patent Court with lectures, courtroom participation and courses from seasoned patent judges, while the EPO has nothing comparable. Where are the Board of Appeal members? Where are the EPO legal experts and the veteran examiners? These are the guardians of EPO patent case law and prosecution and as such they are the best sources of knowledge for grassroots training. Of course there are more EQE candidates than German candidates and the task seems large to target them all individually, but the size and clout of the EPO speaks for itself and to speak with the words of the German Chancellor Angela Merkel: "Wir schaffen das".

Downsizing teaching is absolutely the wrong way to go. Instead, with the UPC on the horizon, there is a perfect moment to enrich EQE teaching to include new topics on infringement and civil law, so that the EPO can be a figurehead spearheading along the greater path of a pan-European civil law, so sorely needed in the common market.

## Results of the 2015 European Qualifying Examination

### Statistics on the results of the 2015 EQE

Number of candidates per country and passes pursuant to Article 14 (1) of the Regulation on the European qualifying examination (REE)

Place of residence	Total number of candidates	Pass
AL	0	0
AT	19	8
BE	32	14
BG	2	0
CH	60	18
CY	0	0
CZ	2	1
DE	697	238
DK	46	11
EE	0	0
ES	81	15
FI	45	13
FR	166	67
GB	180	104
GR	1	0
HR	1	0
HU	6	0
IE	3	0
IS	1	1
IT	91	21
LI	0	0
LT	0	0

Place of residence	Total number of candidates	Pass
LU	0	0
LV	0	0
MC	0	0
MK	0	0
MT	1	0
NL	95	42
NO	13	0
PL	24	8
PT	3	2
RO	3	0
RS	0	0
SE	87	22
SI	1	0
SK	0	0
SM	0	0
TR	18	2
CN	11	0
IL	2	0
JP	1	0
US	2	0
Grand Total	1685	587

Information source: <http://www.epo.org/learning-events/eqe/statistics.html>

Candidates are free to choose which paper(s) they wish to sit. Candidates who have only sat a sub-set of papers cannot fulfil the conditions of Article 14 (1) REE (ie have obtained the minimum grades for all four papers) and thus cannot be included in this table.

*Example: A candidate has only sat papers A and B and passed both papers. Nonetheless the conditions of Article 14 (1) REE are not yet fulfilled and this candidate is not included in this table.*

This table includes all candidates who fulfil the conditions of Article 14 (1) REE.

## List of Professional Representatives as at 31.10.2015

by their place of business or employment in the Contracting states

Contr. State	Number Total	% of Total Repr.
AL	17	0,15
AT	138	1,19
BE	223	1,92
BG	63	0,54
CH	542	4,66
CY	11	0,09
CZ	93	0,80
DE	4148	35,68
DK	254	2,18
EE	26	0,22
ES	195	1,68
FI	182	1,57
FR	1086	9,34
GB	2166	18,63
GR	25	0,20
HR	25	0,22
HU	70	0,60
IE	71	0,61
IS	22	0,19
IT	524	4,51

Contr. State	Number Total	% of Total Repr.
LI	21	0,18
LT	26	0,22
LU	21	0,18
LV	19	0,16
MC	6	0,05
MK	27	0,23
MT	5	0,04
NL	499	4,29
NO	99	0,85
PL	303	2,61
PT	43	0,37
RO	52	0,45
RS	51	0,44
SE	410	3,53
SI	28	0,24
SK	31	0,27
SM	19	0,16
TR	86	0,74
<b>Total:</b>	<b>11625</b>	<b>100,00</b>

## Contact Data of Legal Division

Update of the European Patent Attorneys database

Please send any change of contact details using EPO Form 52301 (Request for changes in the list of professional representatives: <http://www.epo.org/applying/online-services/representatives.html>)

to the European Patent Office so that the list of professional representatives can be kept up to date. The list of professional representatives, kept by the EPO, is also the list used by **epi**. Therefore, to make sure that **epi** mailings as well as e-mail correspondence reach you at the correct address, please inform the EPO Directorate 523 of any change in your contact details.

Kindly note the following contact data of the Legal Division of the EPO (Dir. 5.2.3):

European Patent Office

Dir. 5.2.3

Legal Division

80298 Munich

Germany

Tel.: +49 (0)89 2399-5231

Fax: +49 (0)89 2399-5148

legaldivision@epo.org

www.epo.org

Thank you for your cooperation.

## Next Board and Council Meetings

### Board Meetings

94<sup>th</sup> Board meeting on March 12, 2016 in Tallinn (EE)

### Council Meetings

80<sup>th</sup> Council meeting on April 23, 2016 in Athens (GR)

81<sup>st</sup> Council meeting on November 12, 2016 in Berlin (DE)

82<sup>nd</sup> Council meeting on April 24/25, 2017 in Munich (DE)

## Annual Subscription 2016

The invoices regarding the **epi** subscription 2016 will be sent at the beginning of January 2016. Please note that **every member** will receive an invoice, even if a direct debiting mandate is set up with **epi**.

In case of doubt and to avoid double payment, please get in touch with the **epi** Secretariat, to check whether a direct debiting mandate is set up for you.

The 2016 **epi** subscription fee (190 EUR without surcharge) can be settled as follows:

### 1. Direct debiting mandate

- By debiting the EPO deposit account on February 25, 2016 – valid only for payment of the 2016 subscription
- The form to set up/amend/delete a direct debiting mandate can be found on our website ([www.patentepi.com](http://www.patentepi.com)).
- In case a direct debit mandate is set up with **epi**, kindly note the following:

The due membership fee will be debited automatically from the EPO account on February 25, 2016, taking into account that the account holder is entitled to amend the direct debiting mandate before February 15, 2016.

If you have any questions relating to the direct debiting mandate, please get in touch with the **epi** Secretariat. [accounting@patentepi.com](mailto:accounting@patentepi.com)

### 2. Bank transfer

- By bank transfer in Euro (bank charges payable by subscriber)
- Please note that payment should be on **epi**'s account at the latest by March 31, 2016.

If payments are made later than May 1, 2016, the membership fee is increased to an amount of 240 EUR in accordance with our rules governing payment of the annual subscription.

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Bank Name:	Deutsche Bank AG
BIC-SWIFT:	DEUTDEMMXXX
IBAN No:	DE49 7007 0010 0272 5505 00
Address:	Promenadeplatz 15 80333 München

### 3. PayPal

The link to the online payment tool can be found on our website ([www.patentepi.com](http://www.patentepi.com)).

### 4. Creditard

- By credit card (Visa or Mastercard only)
- The link to the online payment tool can be found on our website ([www.patentepi.com](http://www.patentepi.com)).
- For payments with American Express please use PayPal.

### Kindly note: No cheques accepted!

In order to minimise the workload in processing accurately and efficiently subscription payments, and independently of the transmitting way, each payment should be clearly identified indicating invoice number, name and membership number. Obviously unidentifiable payments subsequently cause considerable problems for the Secretariat and in many instances unnecessary protracted correspondence.

João Pereira da Cruz  
Secretary General

## Important information

Dear Member,

The membership fee has been increased by a decision taken at the 79<sup>th</sup> Council meeting held recently in Cologne.

The last fee increase occurred in 2007 and the **epi** Council deemed that the present increase is necessary now in order to keep the financial health of the **epi** and in view of the many services that are to be provided to its members and with the required quality.

João Pereira da Cruz  
Secretary General

Peter Thomsen  
Treasurer



Institut der beim Europäischen Patentamt zugelassenen Vertreter  
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Please return to:

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Att.: <u>Accounting</u>	Authorised Account Proxy:	_____
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Phone: <u>+49 89 242052-0</u>	Phone:	_____
Fax: <u>+49 89 242052-20</u>	Fax:	_____

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Date	Authorised Account Proxy's Signature



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### Einzugsermächtigung

Eingangsfrist im  
epi-Sekretariat:

**15. Februar 2016**

Das Institut der beim Europäischen Patentamt zugelassenen Vertreter (**epi**) wird hiermit ermächtigt, den jeweils gültigen **epi**-Jahresmitgliedsbeitrag für das genannte Mitglied einzuziehen. Der Einzug erfolgt einmalig am 25. Februar des laufenden Jahres von dem nachfolgend anzugebenden Konto beim Europäischen Patentamt (EPA). Die Einzugsermächtigung wird wirksam beginnend mit dem Jahresmitgliedsbetrag **2016** und gilt für künftig fällige Mitgliedsbeiträge bis auf schriftlichen Widerruf. Der Einzug erfolgt auf der Grundlage der zwischen dem EPA und dem **epi** getroffenen Verwaltungsvereinbarung vom 5. April 1993 (ABl. EPA 1993, 367) und der Nr. 9 der Vorschriften über das laufende Konto (ABl. EPA 1993, 366).

Alle an das EPA am Abbuchungstag zu entrichtenden Gebühren und Auslagen werden dem Einzug des **epi**-Beitrags vorgezogen. Bitte stellen Sie sicher, dass im Abbuchungszeitraum Ihr EPA Konto über eine ausreichende Deckung verfügt. Wir weisen Sie darauf hin, dass bei unzureichender Deckung der komplette Abbuchungsauftrag nicht ausgeführt werden kann. Der Kontoinhaber und jedes **epi**-Mitglied werden darüber schriftlich in Kenntnis gesetzt.

Ich stimme den oben genannten Bestimmungen zu.

### Direct debiting mandate

Deadline for receipt by the  
epi Secretariat:

**15 February 2016**

The Institute of Professional Representatives before the European Patent Office (**epi**) is hereby authorised to debit the **epi** annual subscription for the member named below at the appropriate rate. This direct debit occurs once on February 25 of the current year from the deposit account held with the European Patent Office (EPO) as specified below. This direct debiting mandate applies to the membership fee **2016** and the forthcoming subscriptions until it is revoked in writing. Debiting will be done on the basis of the Administrative Agreement dated 5 April 1993 between the EPO and the **epi** (OJ EPO 1993, 367) and point 9 of the Arrangements for deposit accounts (OJ EPO 1993, 366).

All fees and costs payable to the EPO on the debiting date have priority over the **epi** subscription. Please be sure that during the period of time surrounding the time of the debit order there are sufficient funds in your EPO account to cover the entire debit order. Kindly note that a partial coverage will prevent the entire debit order from being carried out. In such cases, the holder of the account as well as each **epi** member involved will be informed in writing.

I agree with the stipulations sited above.

### Autorisation de prélèvement

Date limite de réception au  
Secrétariat de l'**epi**:

**15 février 2016**

L'Institut des mandataires agréés près l'Office européen des brevets (**epi**) est autorisé par la présente à prélever le montant en vigueur de la cotisation annuelle de l'**epi** pour le membre dont le nom figure ci-dessous. La présente autorisation de prélèvement sur le compte ouvert à l'Office européen des brevets (OEB) prend effet une seule fois le 25 février de l'année en cours. Cette autorisation de prélèvement vaut pour la cotisation **2016** ainsi que pour les cotisations suivantes jusqu'à révocation par écrit. Le prélèvement est opéré sur la base des dispositions de l'accord administratif en date du 5 avril 1993 entre l'OEB et l'**epi** (JO OEB 1993, 367) ainsi que de celles du point 9 de la décision modifiant la réglementation applicable aux comptes courants (JO OEB 1993, 366).

Le règlement de toutes les taxes et de tous les frais dûs à l'OEB à la date de débit a priorité sur le prélèvement de la cotisation annuelle de l'**epi**. Veuillez vous assurer que votre compte à l'OEB est suffisamment approvisionné pendant la période de débit. Nous attirons votre attention sur le fait que l'ordre de débit sera refusé dans sa totalité si le compte n'est pas suffisamment approvisionné. Dans ce cas, le titulaire du compte ainsi que chaque membre de l'**epi** seront informés par écrit.

J'accepte les conditions mentionnées ci-dessus.

Date

Authorised Account Proxy's Name in block letters

Signature

# A new filing strategy for effective Global Patenting: PCT Direct

P. Wierzejewski, European Patent Office, Patent Procedures Management, DG1

In November 2014 the EPO introduced the new **PCT Direct (OJ EPO 2015, A51)** procedure, which allows applicants to link any first filing searched by the EPO with a subsequently filed PCT application if the EPO acts as International Searching Authority. The new procedure introduces, when filing the PCT application, an additional opportunity for applicants to react to objections raised in the search of the first filing, thereby increasing the quality and efficiency of the PCT procedure and the likelihood of obtaining a positive IPRP or IPER. Applicants using PCT Direct are a step ahead compared to the conventional PCT route.

## Procedure

Under PCT Direct, an applicant filing an international application claiming priority from an earlier application already searched by the EPO is able to react to any objection raised in the search opinion drawn up for the priority application, in the form of a reply – “PCT Direct letter” – attached to the international application. The PCT Direct letter may include reactions in the form of explanations, new arguments or amendments with their basis in the application. If the claims and/or the description of the international application differ from those of the earlier application, applicants should preferably include a marked-up copy indicating the differences.

In order to use this service, an applicant should prepare a separate document entitled “PCT Direct/informal comments” clearly identifying in the header the application number of the earlier application. The PCT Direct letter and any marked-up copy of the claims and/or the description should be submitted as a single document (in PDF format – if filed electronically) and indicated in the PCT/RO/101 Form by checking Box IX. In particular, the words “PCT Direct/informal comments” should be specified under point 11, “Other”, for filings on paper. When filing electronically, either using EPO electronic filing services or using WIPO’s ePCT portal, any PCT Direct submission should be uploaded as “Other documents” by selecting the box “Applicant letter to ISA concerning earlier search (“PCT Direct”).

If needed, the preliminary examination under PCT Chapter II offers the applicant a further possibility to bring the application to an allowable state before entering the regional phase.

## Extension of PCT Direct service

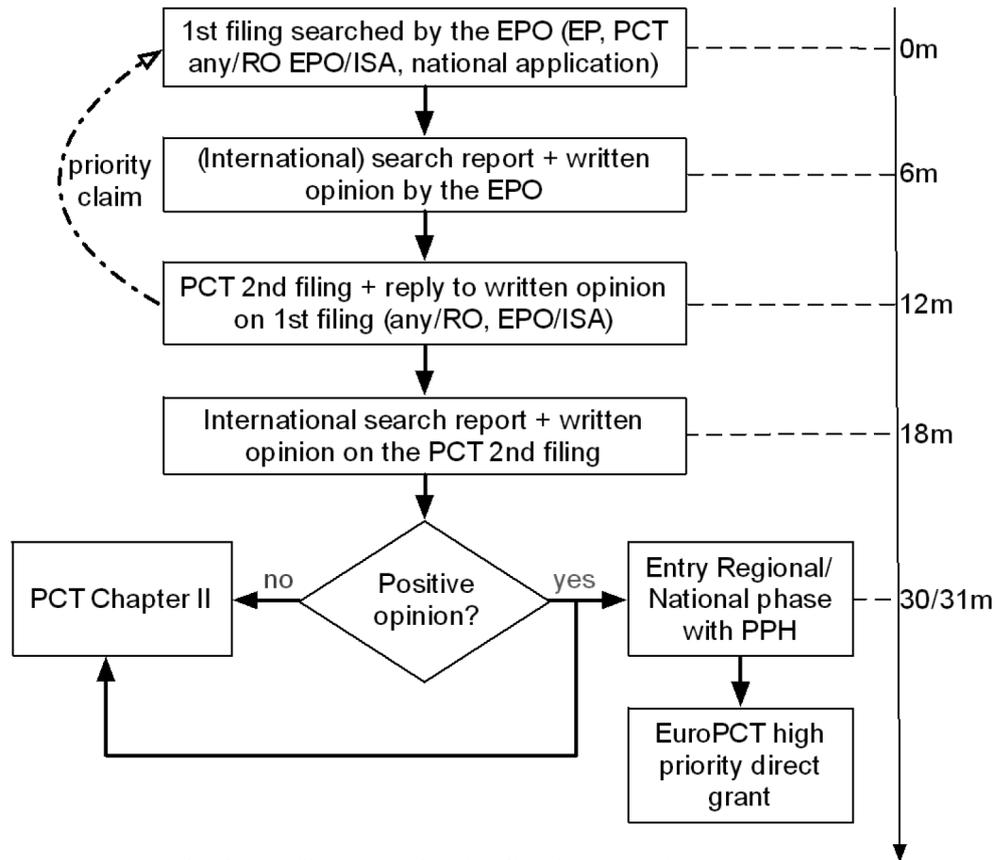
Until 1<sup>st</sup> of July 2015, this service was available only to applicants using the EPO as receiving office. From this date, PCT Direct has been extended to other receiving Offices. Because of the extension, all PCT users who select the EPO as International searching authority, irrespective of the receiving office used, may submit a PCT Direct letter. This is also possible for applicants not following the most common European filing route (i. e. priority 1<sup>st</sup> EP filing followed by a PCT application). Since the PCT Direct procedure is based on any 1<sup>st</sup> filing searched by the EPO, in some cases, it will prove expedient, to file two subsequent PCT applications. In such a case, the 1<sup>st</sup> PCT application serves as the priority application, for which an International search report is established by the EPO, within 6 months. The PCT Direct letter may be filed with a subsequent 2<sup>nd</sup> PCT application, claiming priority from the 1<sup>st</sup> PCT application.

## PCT Direct and the Patent Prosecution Highway

A subsequent positive International preliminary report on patentability IPRP (PCT Chapter I) or a positive International preliminary examination report IPER (PCT Chapter II) in combination with the PCT Patent Prosecution Highway offers a significant benefit for applicants, since it allows to request free fast-track prosecution in other PPH offices, in particular outside of Europe. The Patent Prosecution Highway (PPH) speeds up the examination process for corresponding applications filed in participating patent offices, based on a participating office assessment that at least one claim is allowable (i. e. positive opinion).

PCT Direct also provides benefits to the examination process and in particular to examiners. Under PCT Direct, applicants can provide grounds and basis for any amendments introduced, which will prove helpful for the examiner.

Applicants have welcomed the opportunities offered by PCT Direct, as a service offering better value for money in the international phase. The increased likelihood of obtaining a positive IPRP or IPER established by the EPO, combined with the high quality of EPO products, facilitates the way to an immediate grant of a patent by certain designated offices (DO) and contributes to a faster prosecution at other PPH offices.



The figure illustrates the timeline for PCT Direct scenario.

## US software patents after *Alice*

A. Engelfriet (NL)

While patenting of software and business methods is restricted under the European Patent Convention, US patent law has no such explicit restrictions. In fact, a long line of US case law has seemingly permitted the patenting of anything under the sun. The recent US Supreme Court decision *Alice v. CLS*<sup>1</sup> however has significantly limited the possibility of obtaining US patents on software or business methods. Its approach on the requirement for statutory subject matter has proven to be an extremely high hurdle for many software and business method patents. This article will show how the USPTO and courts treat software inventions under *Alice* and

how European practitioners may draft patent applications that are also suitable for filing in the USA.

### Software patents

A contentious area both in the US and in Europe is when something may be called a “software patent”.<sup>2</sup> It is hard to even agree on the term: some prefer “computer-implemented invention” to stress that software is merely an implementation, an embodiment of the invention. Others use “software patent” for any invention that

<sup>1</sup> Supreme Court of the United States 19 June 2014, *Alice Corp. v. CLS Bank International*, 573 U.S. \_\_\_, 134 S. Ct. 2347.

<sup>2</sup> A. Layne-Farrar, *Defining software patents: a research field guide*, 16 February 2006, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1818025](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1818025), DOI: 10.2139/ssrn.1818025.

involves an algorithmic step or requires standard computer hardware to execute the process of the invention. In scientific analysis of software patents, no formal definition appears to be used. Researchers typically rely on IPC classes and/or lists of keywords to create a dataset for analysis.<sup>3</sup>

Even more contentious is defining the so-called “business method”. This is a subset of the software patent in which software is used for non-technical purposes, such as valuing a stock portfolio or automating an online auction. This category of patent is even more controversial than the general class. While many can accept the idea of a software-implemented automatic braking system with improved performance, few would support patents on one-click shopping or valuing a pension fund. European case law on the subject is clear: if the invention is for a non-technical purpose, it cannot be patented.<sup>4</sup>

### The US software patent

The 1952 US patent law defines in 35 USC 101 four categories of items that are considered statutory subject matter: a process, a machine, a product or a composition of matter. Only those items may be patented – if novel and not obvious to a person skilled in the art. There is no explicit limitation to technical items comparable to article 52 EPC, and the Supreme Court has in fact ruled that “anything under the sun that is made by man” may in principle be patented.<sup>5</sup>

Until 1972 it was unclear whether a software invention would be considered statutory. In the *Gottschalk v. Benson* case of that year, the Supreme Court ruled that software inventions could not be patented, as they were merely algorithms, abstract affairs.<sup>6</sup> An invention was statutory only if it resulted in an improved machine or composition of matter, or if it could transform a product or matter into something else. This “machine or transformation”-test subsequently became the guiding line for software patents. The 1978 *Flook* decision added that a non obvious physical implementation of an algorithm in hardware (e.g. a chip) would be patentable, as that was no longer a patent on the algorithm as such.<sup>7</sup> European practitioners may compare this approach with T 208/84 or T 26/86. Subsequent appeal court decisions formulated the so-called *Freeman-Walter-Abele* test.<sup>8</sup> Under this test, an examiner must first analyse if the claim refers to something abstract, such as a mathemat-

ical algorithm. If this is the case, the next question becomes whether the claim goes beyond the abstract item as such and limits its application to a concrete process or physical apparatus.

The 1980s created more possibilities for software patents. In *Diamond v. Diehr* (1981) the Supreme Court ruled that an invention could be statutory even when software was an important part.<sup>9</sup> The invention in question concerned curing rubber, employing a known formula to determine the best point in time to stop the process. The invention related to the use of sensors to periodically measure certain parameters, with an algorithm that could calculate if the moment to stop the process had arrived. As this process resulted in better rubber, it was statutory. The fact that the software algorithm was a large part of the invention was irrelevant. The approach here thus is the same as the European Patent Office used during the day, see T 26/86 for a representative decision. *Diehr* and subsequent lower decisions made the USPTO lower its bar on statutory subject matter for software-related inventions. Hall and Mac Garvie report a ten percent growth in the number of granted US software patents in the period after *Diehr*.<sup>10</sup>

The *In re Alappat* decision (1994) lowered the bar even further by ruling that software was patentable even when employed on standard hardware such as a personal computer.<sup>11</sup> The new rule was that the invention had to provide “a specific machine to produce a useful, concrete and tangible result”, however without a requirement that the result be technical, as the requirement continued to be in Europe. *In re Beauregard* (1995) permitted patenting of computer programs on carriers such as floppy disks, without limitations on computer hardware (compare T 1173/97, IBM I on computer program products).<sup>12</sup> It has been said that the patentability of software during that era depended more on the quality of the US patent attorney than any real legal criterion.<sup>13</sup>

### The age of e-commerce patents

The 1998 *State Street Bank* decision did away with the “machine or transformation” test. No longer did an applicant need to claim a machine or a transformation of matter. Anything was possible, as long as the claim delivered an effect that could be called “useful, concrete and tangible”.<sup>14</sup> And such an effect could already be

3 B.H. Hall & M. Mac Garvie. ‘The private value of software patents’, *Research Policy*, (39) 2010, issue 7, p. 994-1009, DOI: 10.3386/w12195.

4 European Patent Office, *Case Law of the Boards of Appeal*, Munich: European Patent Office 2013. Also see A.P. Engelfriet, ‘Taking care of business (methods)’. How the EPO today refuses inventions involving non-technical features’, *epi Information* 2006, 2, p. 69-72.

5 Supreme Court of the United States 16 June 1980, *Diamond v. Chakrabarty*, 447 U.S. 303. Compare C. Laub, *International Software Patent Filing: The Problem of Statutory Subject Matter in view of Legal Standards at the EPO-USPTO and Economic Implications* (diss. Munich), 2004.

6 Supreme Court of the United States 20 November 1972, *Gottschalk v. Benson*, 409 U.S. 63.

7 Supreme Court of the United States 22 June 1978, *Parker v. Flook*, 437 U.S. 584.

8 United States Court of Customs and Patent Appeals 30 March 1978, *In re Freeman*; 27 March 1980 *In re Walter*; 5 August 1982, *In re Abele*.

9 Supreme Court of the United States 3 March 1981, *Diamond v. Diehr*, 450 U.S. 175.

10 Hall supra footnote 3.

11 United States Court of Appeals for the Federal Circuit 29 July 1994, *In re Alappat*, 33 F.3d 1526.

12 United States Court of Appeals for the Federal Circuit 12 May 1995, *In re Beauregard*, 53 F.3d 1583.

13 J.R. Thomas, ‘Of Text, Technique, and the Tangible: Drafting Patent Claims Around Patent Rules’, *The John Marshall Journal of Information Technology & Privacy Law*, (17) 1998, issue 1, p. 219-276; G. Quinn, ‘The History of Software Patents in the United States’, *IP Watchdog* 30 November 2014, <http://www.ipwatchdog.com/2014/11/30/the-history-of-software-patents-in-the-united-states/id=52256/>.

14 United States Court of Appeals for the Federal Circuit 23 July 1998, *State Street Bank and Trust Company v. Signature Financial Group, Inc.*, 149 F.3d 1368.

found if an algorithm produce an output that represented a monetary value, such as the value of a stock portfolio or a better price. The court further explicitly confirmed that the “ill-conceived notion” that business methods were unpatentable was incorrect.

This decision represented a strong deviation from European practice. Certain Board of Appeals decisions did seem to suggest some room for business method-related patents (e.g. T 769/92, seemingly requiring no more than ‘technical considerations’ in a claim, and T 38/86, stating that use of technical means for carrying out a method for performing mental acts, partly or entirely without human intervention, may render such a method a technical process or method). However, the doors remained firmly shut on pure business methods after the *Pension Benefits* case (T 931/95) ruling that a feature of a method which concerns the use of technical means for a purely non-technical purpose and/or for processing purely non-technical information does not necessarily confer a technical character to such a method. Later decisions, in particular T 641/00 and T 258/03, clearly drew the line well ahead of what *State Street Bank* permitted.

*State Street* came just in time for the e-commerce boom. With recent breakthroughs in Internet availability and World-Wide-Web technology, an explosion of new firms sought to deliver innovative e-commerce and internet services. Most of these innovations used software and delivered a useful, concrete and tangible result, and thus provided a sufficient basis for a patent. The sudden influx of patent applications and lack of prior art databases in the software field made it hard for the USPTO to properly issue rejections, resulting in an explosive growth of software and business method patents and a severe loss in quality.<sup>15</sup> Many have deplored the low US patent quality,<sup>16</sup> and the rise of the so-called patent troll in particular<sup>17</sup> has made the issue acute for many US businesses.

### Turning the tide

In the past few years, several cases were expected to turn the tide. The first was *Bilski v. Kappos* in 2010.<sup>18</sup> This case centred around a patent on managing energy pricing for consumers. The Supreme Court held that this was an abstract invention and hence not statutory. However, the

Court failed to formulate an explicit test. Two years later the Supreme Court revisited the issue in the context of a medical invention in *Mayo v. Prometheus*.<sup>19</sup> Here the novel step was to warn an operator if a dosage of a medication was too high or too low, based on a software-implemented algorithm to make the decision. The Court called this a “drafting effort” to patent an abstract idea, referring back to the *Flook* decision and noting that there must be more than putting the idea to practice using standard hardware. However, it remained unclear whether this case was specific to medical diagnosis.

The *Alice* case finally presented an answer for the general case. The invention here concerned a more efficient implementation of a known procedure for commercial transactions involving an escrow agent. The Court decided that this invention was non statutory. Declaring the *Mayo*-test the general case, the Court reformulated it as a two-part framework: (1) does the claim refer to an abstract idea, algorithm or general principle? (2) if so, does the claim add something extra that can be regarded as an inventive concept? In step 2, merely adding a computer to the claim is not sufficient, nor is limiting the claim to a specific area of application. There is no explicit mention of what is enough, other than a generic reference to “improving the computer itself” and “an improvement in any other technology or technical field.” European practitioners may recognize the EPO criteria for a technical character.

### Alice in practice

US patent attorney Robert Sachs analysed almost 300.000 prosecution history file wrappers of cases examined after *Alice*. His findings show that the decision presents a significant breach with the past, in particular in areas such as e-commerce, finance and office automation.<sup>20</sup> The number of office actions raising objections on statutory subject matter increased from about 30 percent to over 85. Notices of allowances have dropped to less than ten percent, with some specific areas in software and business methods receiving virtually no grants (<2 %) at all. For business methods the situation looks even bleaker: 58 % of examiners reject *all* applications in this area that come across their desk, and 20 % reject over 90 %. In general, over 70 % of business method patent applications is rejected at the USPTO. Internal appeals prove fruitless: a full one hundred percent is refused in appeal.

Remarkably, the *Alice* decision does not appear to have changed the situation in other areas of technology. Sachs suspects this is due to the fact that software is an accepted aspect of inventions in these other areas. Whether a car or other machine receives a memory chip with software or a dedicated hardware chip is irrelevant to the invention in that area. It would seem that it is

15 M.J. Meurer, ‘Business method patents and patent floods’, *Washington University Journal of Law and Policy*, (8) 2002, p. 309–339; B.H. Hall, *Business method patents, innovation, and policy*, Cambridge, MA: National Bureau of Economic Research 2003.

16 C.D. Quillen & O.H. Webster, ‘Continuing patent applications and performance of the U.S. patent office’, *Federal Circuit Bar Journal* 2011, p. 1–21; J. Park, ‘Has patentable subject matter been expanded? A comparative study on software patent practices in the European Patent Office, the United States Patent and Trademark Office and the Japanese Patent Office’ *International Journal of Law and Information Technology* (13) 2005, issue 3, p. 336–377; M.A. Lemley, ‘Software Patents and the Return of Functional Claiming’, *Wisconsin Law Review* 2013, issue 4, p. 905, 964.

17 M. Risch, ‘Framing the patent troll debate’ *Expert Opinion on Therapeutic Patents* (24) 2014, issue 2, p. 127–130; A. Hagiu, & D.B. Yoffie, ‘The new patent intermediaries: platforms, defensive aggregators, and super-aggregators’, *The Journal of Economic Perspectives* (27) 2013, p. 45–65.

18 Supreme Court of the United States 28 June 2010, *Bilski v. Kappos*, 561 U.S. 593.

19 Supreme Court of the United States 20 March 2012, *Mayo v. Prometheus*, 566 U.S. \_\_\_\_.

20 R.S. Sachs, ‘The One Year Anniversary: The Aftermath of # AliceStorm’, *Bilskiblog* 20 June 2015, <http://www.bilskiblog.com/blog/2015/06/the-one-year-anniversary-the-aftermath-of-alicestorm.html>.

mostly examiners in the area of 'pure' software and of business methods that use *Alice*.

In the same study, Sachs also examined 106 court decisions in which a patent was challenged on statutory subject matter grounds. In over 70 % of the first instance cases, the court accepted the challenge and declared the patent invalid. In appeal, the outcome of invalidation occurred in no less than 92 %. These numbers are confirmed by other research, such as Callahan who found invalidations in some 78 % of cases.<sup>21</sup>

Few cases receive an extensive argument from the court as to why the invention is abstract and non statutory. For example, in *buy Safe v. Google* the court merely recited the computer-implemented claim features and declared them "straightforward".<sup>22</sup> In *Bancorp v. Sun Life* and *Intellectual Ventures v. Symantec* the conclusion was simply that any human could carry out the steps.<sup>23</sup>

A notable counterexample is *DDR v. Hotels.com*, in which a patent on a web technology was declared statutory.<sup>24</sup> The invention concerned showing a user information from multiple sources in a single web page. This invention was "necessarily rooted in computer technology" and solved a problem unique in Internet technology. The case appears to have been an outlier, though. In 30 of 39 cases referring to *DDR* as precedent the court saw differently.

Few other cases have managed to survive an *Alice* challenge. Those that did, could rely on a very specific disclosure of the invention and a clear technical improvement. For example, in *Fairfield v. Seismic* the invention focused on improving the precision of a seismometer, a better machine.<sup>25</sup> In *Intellectual Ventures v. Motorola* a networking switch could allocate bandwidth based on the content of the communication, representing a technical improvement.<sup>26</sup>

One remarkable example is the *Ultramercial* case, which went to the appeals court no less than three times. Where the court declared the invention statutory the first two times, the third time – after *Alice* – it was rejected as being too abstract. In brief, the invention provided for showing videos for free after presenting an advertisement, where the advertisement had not been shown frequently to that user in the past (thus increasing its effectiveness). The court declared this "an abstract idea devoid of a concrete or tangible application", and swept away the technical features in the claim as routine implementation details. This is remarkable, because the features in question were undeniably novel.

The *Ultramercial* approach strongly resonates with the EPO approach, although based on a different ground (statutory subject matter rather than inventive step). In Europe, an invention like *Ultramercial* would not be attacked as lacking technical character, as the claim recited technical features. Rather, the examiner would raise an objection on inventive step. In this context, the non-technical features would be presented as a "non-technical framework", a given from which the skilled person would start. The technical problem then generally becomes "how to implement these features".<sup>27</sup> The outcome would likely be the same.

More generally, US practice in the area of software and business methods appears to be approaching the European criteria quite clearly. The requirements from *Alice* that an invention "improves the computer itself" or provides "an improvement in any other technology or technical field" are closely comparable to the Board of Appeals requirements of a technical character (Guidelines G-II 3.6). Both consider "mere automation" as an insufficient argument (G 3/08). The main difference is that under European law, such arguments would be presented in the context of inventive step, where in the US they are used in the context of the statutory subject matter analysis. The outcome however is very much the same.

## Conclusion

The long-standing idea that "in the US, you can patent anything" has been put to rest by the *Alice* decision of the Supreme Court. An invention must provide significantly more than an abstract idea or algorithm, and in practice it is very hard to show such contribution. *Alice* is used with great enthusiasm to reject patent applications, both at the USPTO and at the courts. These cases resonate with long-standing European practice: the invention must provide a technical improvement and ascend beyond an abstract idea or an algorithm used generically or for a non-technical purpose. It is recommended that European practitioners take this into account when drafting patent applications also intended for filing in the US. If an invention has a clear non obviousness argument in the EPO's problem/solution approach, it is likely to also be statutory under *Alice* in the USA.

21 S. Callahan, 'Alice: The Death of Software-Related Patents?', *Northern District of Texas Blog* 1 May 2015, <http://www.ndtblog.com/?p=3550>.

22 United States Court of Appeals for the Federal Circuit 3 September 2014, *buy SAFE, Inc. v. Google, Inc.*, 964 F. Supp. 2d 331.

23 United States Court of Appeals for the Federal Circuit 26 July 2012, *Bancorp Services, L.L.C. v. Sun Life Assurance Co.*, 687 F.3d 1266 and United States District Court for the Eastern District of Virginia 12 May 2015, *Intellectual Ventures I LLC v Capital One Financial Corp.*

24 United States Court of Appeals for the Federal Circuit 5 December 2014, *DDR Holdings, LLC v. Hotels.com, L.P.*, No. 2013-1505.

25 United States District Court for the Southern District of Texas 23 December 2014, *Fairfield Industries, Inc. v. Wireless Seismic, Inc.*

26 United States District Court for the District of Delaware 24 February 2015, *Intellectual Ventures I, LLC v Motorola Mobility, LLC*.

27 A.P. Engelfriet, 'Taking care of business (methods). How the EPO today refuses inventions involving non-technical features', *epi Information* 2006, issue 2, p. 69-72.

## T557/13: a long expected referral

M. Nollen (NL)

With its decision of 17 July 2015, Board 3.3.06 referred five questions to the Enlarged Board of Appeal in relation to 'partial priority'. This issue has been led to a substantial debate, also in **epi** information. It is a very relevant question, since it can lead to self-destruction of a patent in a manner that cannot be easily understood by a client or business. In this contribution, the decision is summarized and put into context

### Self-destruction of a patent

Self-destruction of a European patent<sup>1</sup> will occur, if the following conditions are met: *first*, the wording of the claim of the European patent has been generalized in one or more respects, relative to its priority application. *Secondly*, there is a colliding second application constituting a prior right (Art. 54(3) EPC), going back to the same priority application. That second application could be the priority application, but also a divisional application. Currently, only published European priority applications are a concern, however under the UPC, any published national priority application suffices to meet this second condition. *Thirdly*, the second application discloses, for instance in an example, an embodiment within the claim of the European patent. Typically, this example will also be present in the European application.<sup>2</sup>

The effect of the added generalization is often that the priority is lost. As decided by the Enlarged Board in its G2/98 opinion, the priority claim will only be valid if all features of a claim can be directly and unambiguously derived from the priority application. While the phrase "directly and unambiguously *derivable*" principally allows some tolerance, the practical implementation is that a literal disclosure of all claimed features within one embodiment of the application is required. For example, when a feature is disclosed as part of a figure description, it is deemed only disclosed in combination with all other features of that particular figure description, unless it is made explicitly clear within the application that this feature can be isolated from the rest of the figure description.

However, the published second application contains the original figure description, and therefore has the right to priority. This validly published second application thus has a disclosure with an earlier date than the claim of the European application, and therefore anticipates the claim of the European application under Art. 54(3) EPC.

### Examples of self-destruction

In chemistry, such a self-destruction may occur in case that a range is changed, from 10-20 to 10-30 ('broadening ranges'). It may further occur, in case of specifying a preferred combination of ranges or lists of subject matters based on one of the examples ("broadening of chemical compositions")<sup>3</sup>. Such new preferred combination, also known as an intermediate generalisation, would not be directly and unambiguously derivable from the priority application. Similarly self-destruction may also occur if a chemical formulae is broadened.<sup>4</sup>

In mechanics, such a self-destruction may result from generalizing the language.<sup>5</sup> For instance, a priority application may show a capsule only in the form of a truncated cone. The truncated cone form of the capsule was not specified in the priority application. In contrast, the subsequent European application referred to an asymmetrical capsule. This broader asymmetrical capsule would not be entitled to the priority date.

### Some observation

The issue is in this respect that such changes may not only be made on request of the inventor or applicant, but also because a patent attorney recognizes that there is a need for emphasizing some combinations, adding some language, particularly in the form of an intermediate generalization. The reason for this addition could be that the wording of the priority application is not perfect, or that the inventor makes a further remark, which leads to a deepened understanding on the side of the patent attorney. In addition, the inventor may develop one or more further embodiments within the priority year. This may lead to the need for a new dependent claim, which is more generic than an example included in the priority application, but less generic than the independent claim of the priority application.

Such a situation tends to occur frequently, particularly because many inventors are less sensitive to wording issues than patent attorneys and are not familiar with the golden standard as set by the EPO in the form of the direct and unambiguous disclosure. An inventor may not grasp the difference between a capsule in the form of a truncated cone, and an asymmetrical capsule. The inventor typically does not have issues with generalizing examples, using his background knowledge, which is more extensive than that of the skilled person.

There is one further observation. G2/10 has emphasized that the European Patent Convention is based on the principle of disclosure. Therefore, the requirements

1 For sake of clarity, reference is made to a European patent. This could also be an application

2 T557/13, reason 6, page 21, three conditions (a)-(c) to be met

3 T557/13, reasons 13.2.3, 15.1.3-15.1.6 and 15.3 (reviewing Case Law)

4 T557/13, paragraph 13.2.1 and 2 (reviewing Case Law), and 15.1.1

5 T557/13, paragraph 13.2.4, 15.1.7 and 15.2

of disclosure set for priority, novelty and added matter would be essentially the same.<sup>6</sup> However, for the extra disclosure of an intermediate generalization during the priority year, the principles work in opposite directions: the priority *is not* valid, but the objection against novelty *is* valid:

### The concept of partial priority and the discussion in T557/13

The G2/98 opinion has mentioned a possible way out for some situations: partial priority. This refers to the situation in which part of the subject-matter of a claim is entitled to the priority date of a single earlier application, whereas the remaining subject-matter is entitled only to the filing date of the subsequent European patent application. As stated in G2/98, “the use of a generic term or formula in a claim for which multiple priorities are claimed (...) is perfectly acceptable (...), provided that it gives rise to the claiming of a limited number of clearly defined alternative subject matters”.<sup>7</sup>

This sentence on the claiming of a limited number of clearly defined alternative subject matters has given rise to interpretation issues, and diverging decisions of Boards of Appeal. The decision T557/13 discusses these situations. It acknowledges therein that G2/98 does not provide an express reference to a so-called ‘generic “OR”-claim’<sup>8</sup> for which partial priority is claimed<sup>9</sup>. Furthermore, G2/98 does not contain any further explanation of the meaning to be given to the criteria “limited number” and “clearly defined alternative subject-matters”. It thereafter identifies a first, literal post-G2/98 approach<sup>10</sup>, wherein partial priority has been refused by the Boards, for instance because further alternatives encompassed by the claim but not disclosed in the priority document, could not be distinguished clearly enough. It also identifies a second, conceptual or notional post G2/98 approach<sup>11</sup>, which does not require the “clearly defined alternative subject-matters” to be spelt out in the claim. Rather, it suffices to be able to conceptually identify a limited number of such alternative subject-matters by comparing the generic “OR”-claim with the priority document. In this way, partial priority may be acknowledged for the alternative subject-matter(s) disclosed in the priority document.

### Further sources of interpretation

In order to put the current practice into its context, the Board refers to the Paris Convention, the EPC and two further sources for interpretation: the pre-G2/98 practice and the *Travaux Préparatoires*.

In the pre-G2/98-practice<sup>12</sup>, partial priority was acknowledged for a generic “OR”-claim, by comparison of the claim with the content of the priority document. Consequently, the same European patent application could be cited against the claim under Art. 54(3) EPC for the claim portion with priority and under art 54(2) EPC for the remaining portion without priority. No analysis was made of the number and the clarity of alternative subject matters.

The *Travaux Préparatoires* contain a Memorandum submitted by FICPI.<sup>13</sup> This Memorandum<sup>14</sup> states that:

*“if a first priority document discloses a feature A, and a second priority document discloses a feature B for use as an alternative to A, then a claim of the application directed to A or B will in fact consist of two distinct parts A and B respectively, each complete in itself, and there seems to be no reason why it should not be possible to claim the first priority for part A of the claim and the second priority for part B of the claim”.* Furthermore, as pointed out in T557/13, the Memorandum points out that “it is of course immaterial whether the word ‘or’ actually occurs in the claim, or is implied through the use of a generic term, or otherwise”.

The Board concludes from the minutes of the conference that this Memorandum was an essential element in the process of the drafting the EPC provision allowing claiming of multiple priorities for one and the same claim<sup>15</sup>. Clearly, this Memorandum favours the second, conceptual approach, allowing intermediate generalizations during the priority year.

### The questions for referral

The questions for referral are worded broadly by the Board. Questions 1 to 4 relate to partial priority, and Question 5 addresses the complementary question of lack of novelty. The questions are (in simplified version<sup>16</sup>):

1. May entitlement to partial priority be refused for a generic claim?
2. If the answer would be yes, subject to certain conditions, is then the proviso in G2/98 to be taken as a legal test?
3. If so, how should the criteria “limited number” and “clearly defined alternative subject-matters” to be interpreted and applied?
4. Otherwise, if the proviso is G2/98 is not a legal test, how then to assess partial priority?
5. If entitlement to partial priority is to be refused, could there be lack of novelty under art 54(3) over the priority document or not?

6 G2/10, par 4.6, page 43: “It is vital that a uniform concept of disclosure is applied in all these respects”, and page 44 under reference to G1/03: “the European patent system must be consistent and the concept of disclosure must be the same for the purposes of Articles 54, 87 and 123 EPC.”

7 G2/98, reason 6.8, cited in T557/13 in 14.1.5

8 T557/13 refers to a “generic “OR” claim”, which is defined in par 8.2.2

9 T557/13, par 17.2.3, ii). The content of G2/98 is discussed in par 14.1.4.

10 T557/13, examples in paragraph 15.1 and 15.2, defined as such in 17.2.3, iii)

11 T557/13, examples in paragraph 15.3, defined as such in 17.2.3, iii)

12 T557/13, chapter 13 and par 17.2.3, i), the latter including the summary.

13 FICPI: the international federation of intellectual property counsels (i.e. patent attorneys).

14 T557/13, chapter 11., specified on page 4 under VIII

15 T557/13, par 11.7

16 T557/13, page 60, Order. The language is simplified by the author

# Patentability of Plants

Committee on Biotechnological Inventions

## A Comparison of National Laws

On 25 March 2015, the Enlarged Board of Appeal of the EPO rendered its decisions in the highly debated Broccoli II (G 2/13) and Tomatoes II (G2/12) cases. The proceedings for these cases had been consolidated.

The decisions concerned the interpretation of Article 53(b) EPC concerning exceptions to patentability, which states that "European patents shall not be granted in respect of plant or animal varieties or essentially biological processes for the production of plants or animals; this provision shall not apply to microbiological processes or the products thereof."

The Enlarged Board of Appeal had previously interpreted the term "essentially biological processes for the production of plants" with regard to plant breeding methods in its decisions of 9 December 2010 in the Broccoli I (G 2/07) and Tomatoes I (G 1/08) cases.<sup>1</sup>

The main question in the present disputes was whether the exception of essentially biological processes for the production of plants in Article 53 (b) EPC extends to product claims, including product-by-process claims<sup>2</sup>

The **epi** Committee on Biotechnological Inventions had argued in an elaborate amicus curiae brief on case G 2/13 that, for various reasons, the exclusion of essentially biological processes for the production of plants in Article 53 (b) EPC cannot have any negative effect on the allowability of a product claim directed to plants or plant material. The amicus curiae brief is available for consultation on the **epi** website.

The **epi**'s view was shared by the Enlarged Board of Appeal, which emphasised the distinction between a product claim, including a product-by-process claim, on the one hand, and a process claim, on the other hand.<sup>3</sup> After applying the relevant methods of interpretation, the Enlarged Board came to the intermediate conclusion that the term "essentially biological processes for the production of plants" does not extend to products defined or obtained by such processes.<sup>4</sup> Interestingly, the Enlarged Board did not stop there, but continued by asking whether secondary considerations necessitate a broader interpretation of the scope of the process exclusion.<sup>5</sup> However, it concluded that a dynamic inter-

pretation is not required in this regard. Nor is a broadening of the process exclusion justified for reasons of threat of legal erosion of the process exclusion.<sup>6</sup> The Enlarged Board made clear that the current issues concern patentability in terms of subject matter, which must be distinguished from the effect of the patent with regard to its scope of protection after grant.<sup>7</sup> Though being aware of the numerous ethical, social and economic aspects at stake, the Enlarged Board stressed its role as a judicial body, which does not interfere in legislative decisions.<sup>8</sup> To the referred questions in case G 2/13 (very similar to those in G 2/12), the Enlarged Board answered that:

*"1. The exclusion of essentially biological processes for the production of plants in Article 53 (b) EPC does not have a negative effect on the allowability of a product claim directed to plants or plant material such as plant parts.*

*2. (a) The fact that the process features of a product-by-process claim directed to plants or plant material other than a plant variety define an essentially biological process for the production of plants does not render the claim unallowable.*

*2. (b) The fact that the only method available at the filing date for generating the claimed subject-matter is an essentially biological process for the production of plants disclosed in the patent application does not render a claim directed to plants or plant material other than a plant variety unallowable.*

*3. In the circumstances, it is of no relevance that the protection conferred by the product claim encompasses the generation of the claimed product by means of an essentially biological process for the production of plants excluded as such under Article 53 (b) EPC."<sup>9</sup>*

Already before the decisions of the Enlarged Board of Appeal, a few countries had adapted their legislation in order to exclude from patentability product claims where the claimed products have been generated by an essentially biological process for the production of plants. The **epi** Committee on Biotechnological Inventions has created the following overview of the national laws of the 38 EPC Contracting States in this regard.<sup>10</sup>

1 See Broccoli I (G 2/07, OJ EPO 2012, 230); and Tomatoes I (G 1/08, OJ EPO 2013, 206).

2 directed to plants or plant material.

3 See G 2/13, IV. Legal nature of the claimed invention, points 2–6.

4 See G 2/13, VII. Application of the rules of interpretation, 6. First intermediate conclusions, point 1.

5 See G 2/13, VIII. Need for secondary considerations, point 1.

6 See G 2/13, VIII. Need for secondary considerations, 3. Second intermediate conclusions.

7 See G 2/13, VIII. Need for secondary considerations, 2. Legal erosion of the exception to patentability, point 6 (b).

8 See G 2/13, VIII. Need for secondary considerations, 2. Legal erosion of the exception to patentability, point 6 (c).

9 See G 2/13, Order.

10 The contributions regarding the national laws have been made by **epi** members of the Committee on Biotechnological Inventions and by **epi** Board members.

## National Laws on the Patentability of Plants

### SUMMARY:

**Art. 53 (b) EPC excludes from patentability plants or animal varieties or essentially biological processes for the production of plants or animals. Some national laws contain a provision excluding from patentability, besides essentially biological processes, the products derived thereof.**

### QUESTION (Q):

**Is there a specific provision in the national law that excludes from patentability the plant products directly obtained by using an essentially biological process?**

No	36
Yes	2

MS	National Law / EN translations	Remarks	Q
AL	<p>Law No. 9947 of 7 July 2008 <b>Art. 6.2</b></p> <p><b>EN Translation</b> <i>Exceptions to patentability</i> Patents shall not be granted in respect of: 2. Plant or animal varieties or essentially biological processes for the production of plants or animals, without prejudice to the patentability of inventions which concern a microbiological or other technical process or a product obtained by means of such a process.</p>	<p><b>Art. 5.5 (c)</b></p> <p><i>Art. 5 Patentable Inventions</i> 5. Biotechnological inventions shall also be patentable if they concern: c) a microbiological or other technical process, or a product obtained by means of such a process other than a plant or animal variety.</p>	No
AT	<p>Patentgesetz 1970 BGBl. 1970/259 idF BGBl. I 2013/126 (Patentgesetz) <b>§ 2(2) Patentgesetz</b> § 2. Patente werden nicht erteilt für: (2) Patente werden nicht erteilt für Pflanzensorten oder Tierrassen sowie für im wesentlichen biologische Verfahren zur Züchtung von Pflanzen oder Tieren. (...)</p> <p><b>EN Translation</b> <i>Patents shall not be granted for plants and animal varieties and for essentially biological processes for breeding plants and animals. [...]</i></p>	<p>Products derived from essentially biological processes can be patented.</p>	No
BE	<p>The Belgian Code of Economic law provides: <b>Art. XI.5.</b> § 1 Ne sont pas brevetables: 1° les variétés végétales et les races animales; 2° les procédés essentiellement biologiques pour l'obtention de végétaux ou d'animaux. § 2. Les inventions portant sur des végétaux ou des animaux sont brevetables si la faisabilité technique de l'invention n'est pas limitée à une variété végétale ou à une race animale déterminée. § 3. Le paragraphe 1 er, 2°, n'affecte pas la brevetabilité d'inventions ayant pour objet un procédé microbiologique, ou d'autres procédés techniques, ou un produit obtenu par ces procédés.</p> <p><b>EN Translation</b> Art. XI.5. § 1. <i>Shall be excluded from patentability:</i> (1) <i>plant and animal varieties;</i> (2) <i>essentially biological processes for the production of plants or animals.</i> § 2. <i>The inventions relating to plants and animals are patentable if the technical feasibility is not limited to a particular plant or animal variety.</i> § 3. <i>The paragraph 1, (2) shall not apply to microbiological processes or to the products obtained by such processes.</i></p>	<p>The patentability of plants is discussed in Art. XI.5. of the new Belgian Code of Economic law of which book XI entered into force on 1 January 2015.</p>	No

MS	National Law / EN translations	Remarks	Q
BG	<p>Bulgarian Patent Law <b>Art. 7 (1)</b></p> <p><b>EN Translation</b> <i>Exceptions to Patentability</i> (1) Patents shall not be granted for: (...) 3. plant varieties or animal varieties; 4. essentially biological processes for obtaining plants and animals.</p>	<p>Patentability of biotechnological inventions is set in Art. 7 a (3): <i>Inventions relating to plants or animals shall be considered patentable, if the technical realisation of the invention is not reduced to a certain plant or animal variety.</i></p>	No
CH	<p>Bundesgesetz über die Erfindungspatente (Patentgesetz, PatG) vom 25. Juni 1954 Art. 2(2)b <b>Art. 2(2)b PatG</b> Von der Patentierung sind ferner ausgeschlossen: [...] b. Pflanzensorten und Tierrassen und im Wesentlichen biologische Verfahren zur Züchtung von Pflanzen und Tieren; unter Vorbehalt von Absatz 1 <b>patentierbar sind jedoch</b> mikrobiologische oder sonstige technische Verfahren und die damit gewonnenen Erzeugnisse sowie <b>Erfindungen, deren Gegenstand Pflanzen oder Tiere sind und deren Ausführung technisch nicht auf eine bestimmte Pflanzensorte oder Tierrasse beschränkt ist.</b></p> <p><b>EN Translation</b> [Excluded from patentability are:] b. Plant and animal varieties and essentially biological processes for the production of plants and animals; however, subject to the provisions of paragraph 1 microbiological or other technical processes and the products obtained thereby are <b>patentable</b> and so <b>are inventions relating to plants or animals provided that the working of said inventions is not technically confined to a specific plant or animal variety.</b></p>	<p>An essentially biological process that comprises at least one non-biological, technical step that is required for arriving at the desired solution (e.g. irradiation, temperature shock), will be patentable and so will be the products obtained by that process.</p> <p>Swiss patent law is clear as to the non-patentability of essentially biological processes but is somewhat silent as to the patentability of products obtained by essentially biological processes. From the wording of Art. 2 (2)b PatG, last half-sentence (emphasized in bold letters), it may be inferred, however, that it was not the legislator's intention to exclude novel and inventive products from protection solely because they have been obtained by essentially biological processes. This view seems to be confirmed by the federal court decision BGE 121 III 125 (1995), <i>Asta Medica vs Lendi</i>, which also emphasizes patentability of plant product inventions as long as they are not confined to specific plant varieties. This understanding is also mirrored by the examination guidelines wherein patentability of products obtained by essentially biological processes is not excluded although not explicitly stated either.</p> <p>In essence, the goal of the Swiss legislator is to avoid double protection of plant inventions by both the plant varieties protection act and the patent law.</p>	No
CY	<p>Patent Act of 1998 (Law 16(I)/98, as amended by Laws 21(I)/99, 153(I)/2000, 163(I)/2002 and 163(I)/2002). <b>Article 5a</b></p> <p><b>EN Translation</b> <i>Essentially biological processes for the production of plants or animals are not patentable. (...) It is understood that the foregoing restriction shall not affect the patentability of patents having as an object a microbiological method or other technical methods or a product that is a result of such methods.</i></p>	<p>The Biotech Directive (98/44) has been implemented in Cyprus law, as an amendment to the Patent Act of 1998.</p>	No
CZ	<p>Law No. 527/1990 Coll. on Inventions and Rationalisation Proposals (Patent Law) <b>Section 4.b</b></p> <p><b>EN Translation</b> <i>Exclusions from patentability</i> <i>Patents shall not be granted in respect of:</i> (...) <i>b) plant or animal varieties or essentially biological processes for the production of plants or animals; this provision shall not apply to microbiological processes and the products thereof.</i></p>	<p>In two relevant Czech Laws (Nos. 527/1990 and 206/2000), there is no provision that explicitly excludes patentability of plants (or animals) obtained by essentially biological process. Consequently, the patentability of plant, wherein the plant is produced by essentially biological processes, would be an issue of official/judicial interpretation of the existing legal provisions. Unfortunately, up to now there is no relevant case law in the Czech Republic.</p> <p>Plant or animal varieties or essentially biological processes for the production of plants or animals are excluded from patentability by the Patent Law (Law No. 527/1990), nevertheless, the Law No. 206/2000, on the Protection of Biotechnological Inventions (which is an implementation of Biotech Directive 98/44/EC) in Section 2.b classifies plants and animals among the patentable inventions, "if the technical feasibility of the invention is not confined to a particular plant or animal variety".</p>	No

MS	National Law / EN translations	Remarks	Q
DE	<p>Patentgesetz in der Fassung der Bekanntmachung vom 16. Dezember 1980 (BGBl. 1981 I S. 1), das zuletzt durch Artikel 1 des Gesetzes vom 19. Oktober 2013 (BGBl. I S. 3830) geändert worden ist</p> <p><b>§ 2 a (1)1 Patentgesetz</b>  <i>Patente werden nicht erteilt für</i>  <i>1. Pflanzensorten und Tierrassen sowie im Wesentlichen biologische Verfahren zur Züchtung von Pflanzen und Tieren und <u>die ausschließlich durch solche Verfahren gewonnenen Pflanzen und Tiere;</u></i></p> <p><b>EN Translation</b>  <i>Patents shall not be granted for</i>  <i>1. <u>plant or animal varieties or for essentially biological processes for the production of plants or animals and plants and animals exclusively obtained by such processes;</u></i></p> <p>(The underlined part has recently been added to the German provision. The amendment entered into force on 25 October 2013)</p>	<p><i>Bundestagsdrucksache 17/14222 regarding No. 1 (Amendment of Section 2a of the Patent Act – PatG):</i></p> <p><i>With this supplementation to Section 2a Subsection 1 Number 1 PatG, it will be clarified that, with regard to essentially biological processes for the production of plants and animals, <u>not only the processes but also plants and animals produced by such processes are not patentable, even if they are no plant or animal varieties which are anyhow excluded from patentability under Section 2a Subsection 1 Number 1 PatG.</u> The current version of this stipulation literally adopted Article 4 of the Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions ([...] – Biopatent Directive). In this respect, the Enlarged Board of Appeal of the European Patent Office determined in its decision concerning patent cases “broccoli” and “tomato” (G2/07 and G1/08) of December 9, 2010 that the mere use of technical process steps for performing or supporting essentially biological processes do not render the processes patentable. However, in its decision, the Enlarged Board of Appeal does not deal with the question of the patentability of products in the form of animal and plants produced by such animal- or plant related processes. The Federal Government is of the opinion that, according to the object and purpose of Article 4 of the Biopatent Directive, the patentability exclusion should mandatorily also apply to such animals and plants. The non-patentability of conventional breeding processes could otherwise be easily circumvented. In the interest of breeders and farmers, it shall therefore be clarified that plants and animals which immediately arise from their conventional breeding should not be covered by patents of third parties having generic product claims. The potential to obtain patent protection by the German industry – especially the chemical and pharmaceutical industry – should, however, not come restricted by anything going beyond the intention of this clarification. Products derived from biologically bred animals or plants, such as plant oils, should remain patentable provided they comply with the other patentability requirements. Only with a formulation which clearly relates the patentability exclusion of processes and products to the same matter, i.e. “plants and animals”, it will be possible to comply with the available scope for national regulations defined by the EU-Biopatent Directive which is particularly restricted to clarifications. In this context, the terms “plants and animals” do not only cover the produced animals and plants, but also material, such as seed, or in connection with animals, sperm, ova and embryos, which is obtained by conventional biological processes and is useful for the production of plants and animals. The use of the term “exclusively” shall safeguard that undisputable patentable, especially genetically modified plants and animals will not be covered by the patentability prohibition because of the fact that they additionally underwent an essentially biological crossing and selection process.</i></p>	Yes
DK	<p>Patents Act, cf. Consolidate Act No. 91 of 28 January 2009 LBK nr 91 af 28/01/2009 Gældende (Patentloven)</p> <p><b>Section 1(4)-1(6)</b></p> <p><b>EN Translation</b>  <i>(4) Patents shall not be granted in respect of plant or animal varieties. Patents may, however, be granted for inventions, the subject-matter of which is plants or animals if the technical feasibility of the invention is not confined to a particular plant or animal variety. In this Act a “plant variety” means a plant variety as defined in Article 5 of Council Regulation (EC) No. 2100/94 on Community plant variety rights.</i></p>	<p>The Danish patent law seems to be more “liberal” than the German law, and also slightly more than the Dutch law. This section was amended in the implementation of the Biotech Directive.</p>	No

MS	National Law / EN translations	Remarks	Q
	<p>(5) Patents shall not be granted in respect of essentially biological processes for the production of plants or animals. In this Act an "essentially biological process" means a process consisting entirely of natural phenomena such as crossing or selection. Patents may, however, be granted for microbiological processes or other technical processes or products obtained by such processes. In this Act a "microbiological process" means any process involving microbiological material, performed on microbiological material or resulting in microbiological material.</p> <p>(6) Inventions may be patentable even if they relate to a product consisting of or containing biological material or to a process by means of which biological material is produced, processed or used. Biological material which is isolated from its natural environment or produced by means of a technical process may be the subject-matter of an invention even if it previously occurred in nature. In this Act "biological material" means any material containing genetic information and capable of reproducing itself or being reproduced in a biological system.</p>		
EE	<p>Estonian Patent Act of March 16, 1994 <b>Art. 7</b></p> <p><b>EN Translation</b> Non patentable inventions (...) (2) The following biotechnological inventions shall not be protected by a patent: (...) 5) essentially biological processes for the derivation of biological materials, plants or animals, except microbiological processes for the derivation of micro-organisms; 6) inventions the application of which is confined to a single plant or animal variety. (3) For the purposes of this Act, "essentially biological process for the derivation of a biological material, plant or animal" means a process which consists entirely of natural phenomena such as crossing and selection.</p>		No
ES	<p>Law No. 11/1986 of March 20, 1986 on Patents <i>Ley 11/1986, de 20 de marzo de 1986, por la que se aprueba la Ley Patentes y Modelos de Utilidad</i> <b>Art. 5.3</b></p> <p><b>EN Translation</b> Non-patentable subject matter are: 3. Essentially biological processes for the production of plants or animals. For these purposes essentially biological processes means processes which consist entirely of natural phenomena such as crossing and selection.</p> <p><i>The previous paragraph will not affect the patentability of inventions related to a microbiological method, or to any other technical method, or to a product obtained by such methods.</i></p>	<p>Art. 5.3 of the Spanish Patent Law excludes essentially biological processes but <u>not</u> the products.</p> <p>There is a proposal for changing the Spanish patent law in the near future, but this provision will not be amended.</p>	No
FI	<p>Finnish Patents Act, No. 550 of December 15, 1967 <b>Chapter 1, Section 1</b> as amended 30.6.2000/650 and 18.11.2005/896</p> <p><b>EN Translation</b> Anyone who has, in any field of technology, made an invention which is susceptible of industrial application, or his or her successor in title, is entitled, on application, to a patent and thereby to the exclusive right to exploit the invention commercially, in accordance with this Act (18.11.2005/896). (...) Patents shall not be granted for plant or animal varieties. Inventions which concern plants or animals shall nevertheless be patentable if the technical feasibility of the invention is not confined to a particular plant or animal variety. The concept of plant variety within the meaning of this Act is defined by Article 5 of Council Regulation (EC) No 2100/94 on Community plant variety rights.</p>	<p>Finnish Patents Act excludes from patentability plant or animal varieties and essentially biological processes for the production of plants or animals. There is no legal provision excluding the products derived from essentially biological processes from patentability.</p> <p>The Biotech Directive was implemented to Finnish Patents Act by amendment which entered into force on 30<sup>th</sup> June 2000. The implementation was done in cooperation with other Nordic countries. Therefore the legislation regulating the patenting of biotechnological inventions is very similar in different Nordic countries.</p>	No

MS	National Law / EN translations	Remarks	Q
	<p><i>Patents shall not be granted for essentially biological processes for the production of plants or animals. For the purposes of this Act a process for the production of plants or animals shall be considered essentially biological if it consists entirely of natural phenomena such as crossing or selection. What is said above shall be without prejudice to the patentability of inventions which concern a microbiological or other technical process or a product obtained by means of such a process. For the purposes of this Act 'microbiological process' means any process involving or performed upon or resulting in microbiological material.</i></p> <p><i>Inventions shall be patentable even if they concern a product consisting of or containing biological material or a process by means of which biological material is produced, processed or used. Biological material which is isolated from its natural environment or produced by means of a technical process may be the subject of an invention even if it previously occurred in nature. For the purposes of this Act 'biological material' means any material containing genetic information and capable of reproducing itself or being reproduced in a biological system.</i></p>		
FR	<p>French Intellectual Property Code (CPI) <b>Art L611-19</b></p> <p><b>EN Translation</b> <i>The following shall not be patentable:</i> 1° animal varieties; 2° plant varieties as defined in Article 5 of Regulation (EC) No. 873/2004 introducing new rules governing intellectual property ownership of Community plant variety rights; 3° essentially biological processes for the production of plants and animals. A process that consists entirely of natural phenomena such as crossing or selection shall be regarded as biological process.</p>	<p>Following the EU Directive N°98/44 of July 6, 1998 on biotech inventions, the French Parliament enacted a law on bioethics on August 6, 2004 (J.O n° 182 of August 7, 2004, which deals with the human body (Article L.611-18 of the French Intellectual Property Code)) and another law on the protection of biotechnological inventions on December 8, 2004 (J.O n° 286 of December 9, 2004, which deals with plants and animals (Article L.611-19 of the French Intellectual Property Code)).</p> <p>The new provisions recognize that biological material (i.e., any material containing genetic information and capable of reproducing itself or being reproduced in a biological system) may be involved in a patentable invention, provided that it can be isolated from its natural environment or produced by means of a technical process and that it complies with the traditional patentability requirements (the invention must be new, involve an inventive step, and be susceptible of industrial applications).</p> <p>On July 7, 2015, the French IPO published a Communication stating that pursuant to the provisions of article L-611-19, the exclusion of essentially biological processes from patentability extends to the results of such processes, i.e. extend to plants obtained by performing such processes, even when said plants are not varieties. As a consequence and according to this Communication, the French IPO will refuse national French patent applications that would be directed to crossing and selection processes to obtain plants or directed to plants obtained by crossing and selection.</p> <p>Up to date there is no case law in France with respect to the patentability of plants or plant material product claims, wherein the plants or plant materials are produced by an essentially biological non-patentable process.</p>	No
GB	<p>UK Patents Act 1977 <b>Section 76A and Schedule A2</b></p> <p><i>76A Biotechnological inventions</i> <i>(1) Any provision of, or made under, this Act is to have effect in relation to a patent or an application for a patent which concerns a biotechnological invention, subject to the provisions of Schedule A2.</i> <i>(2) Nothing in this section or Schedule A2 is to be read as affecting the application of any provision in relation to any other kind of patent or application for a patent.</i> <b>SCHEDULE A2 BIOTECHNOLOGICAL INVENTIONS</b> <i>(...)</i></p>	<p>Section 76A and Schedule A2 of the UK Patent Act excludes from patentability any essential biological process for the production of animals or plants. The UK has no legal provision excluding the products derived from essentially biological processes from patentability.</p>	No

MS	National Law / EN translations	Remarks	Q
	<p>3 The following are not patentable inventions — (...) (f) any variety of animal or plant or any essentially biological process for the production of animals or plants, not being a micro-biological or other technical process or the product of such a process.</p> <p>4 Inventions which concern plants or animals may be patentable if the technical feasibility of the invention is not confined to a particular plant or animal variety.</p> <p>11 In this Schedule: “essentially biological process” means a process for the production of animals and plants which consists entirely of natural phenomena such as crossing and selection; (...)</p>		
GR	<p>Law No. 1733/87 (FEK 171 A' of 22.09.1987) “Technology transfer, inventions, and technological innovation” as amended by Art. 18, of Law No. 1739/1987 (FEK 201, A' of 20.11.1987) <b>Article 5.8.b</b></p> <p><b>EN Translation</b> Patents shall not be granted in the following cases: b. plant or animal varieties or biological processes for the production of plants or animals; this provision does not apply to microbiological processes or the products thereof.</p>	<p>The Greek national law “Technology transfer, inventions, technological innovation and establishment of the Commission of Atomic Energy” (number 1733/1987 as in force) contains a provision excluding the varieties of plants and animals from patentability, besides essentially biological and microbiological processes and the products derived there from. The products derived from essentially biological processes for the production of plants or animals are not excluded from patentability. A process for the production of plants or animals is essentially biological if it consists entirely of natural phenomena such as crossing or selection. Inventions relating to plant (or animal) varieties have patentability, only if the technical feasibility of the invention is not confined to a particular plant (or animal) variety. See presidential Decree 321/2001, the implementation of the EU Directive 98/44 on the legal protection of biotechnological inventions (relevant Art. 2–3).</p>	No
HR	<p>Croatian Patent Act <b>Art. 6.1</b></p> <p><b>EN Translation</b> Excluded from patent protection shall be: 1. inventions which concern animal breeds, plant varieties and essentially biological processes for the production of plants or animals, with the exception of inventions which concern non-biological and microbiological processes and products resulting from such processes, as provided for in Article 5, paragraph (4) of this Act; a microbiological process shall imply, under this Act, any process involving or performed upon or resulting in microbiological material.</p>	<p>Art. 5.4) (...) An invention which concerns plants or animals shall be considered patentable if the technical feasibility of the invention is not confined to a particular plant or animal variety and if the process for carrying out the invention is not essentially biological.</p>	No
HU	<p>Hungarian Patent Act (Act XXXIII of 1995 on the protection of inventions by patents) <b>Art. 6.4.b</b></p> <p><b>EN Translation</b></p> <p>4. The following shall not be patentable: (a) plant varieties [Article 105(a)] and animal breeds; (b) essentially biological processes for the production of plants or animals.</p> <p>5. Inventions which concern plants or animals shall be patentable if the technical feasibility of the invention is not confined to a particular plant variety or animal breed. (...)</p>	<p>Art. 6 of the Hungarian Patent Act excludes from patentability only essentially biological processes for the production of plants and animals. Hungary has no legal provision excluding the products derived from essentially biological processes from patentability.</p>	No
IE	<p>Irish Patents Act 1992 <b>Section 10b</b></p> <p>A patent shall not be granted in respect of (...) b) a plant or animal variety or an essentially biological process for the production of plants or animals other than a micro-biological process or the products thereof.</p>	<p>The Irish Patents Act 1992 at present does not contain provisions which exclude plants and animals exclusively obtained by such processes.</p>	No

MS	National Law / EN translations	Remarks	Q
IS	<p>Icelandic Patents Act No 17/1991 <b>Art. 1</b></p> <p><b>EN Translation</b> (...) A patent shall not be granted for plant or animal varieties. It is however possible to grant patents for inventions pertaining to plants and animals if the implementation of the patent is not confined for technical reasons to a particular plant or animal variety. In this Act, plant variety refers to a plant variety as it is defined in the Act on Plant Variety Rights, No. 58/2000. A patent shall not be granted on an essentially biological process for producing plants or animals. By an essentially biological process, this Act refers to a method that on the whole is based on natural phenomena such as crossing and selection [...]"</p>	<p>The relevant provisions are almost identical to the Danish Patent Act.</p>	No
IT	<p>Italian Industrial Property Code (IIPC) <i>Decreto Legislativo 10 febbraio 2005, n. 30 Codice della proprieta' industriale, a norma dell'articolo 15 della legge 12 dicembre 2002, n. 273 and further amendments</i> <b>Art. 45.4.b</b></p> <p><b>EN Translation</b> <i>Patentable subject matter</i> (...) 4. It cannot be a patentable subject-matter (...) b) plant varieties and animal breeds and essentially biological processes for production of animals or plants, including new plant varieties with respect to which the invention consists only of the genetic modification of another plant variety, even if such modification results from a process of genetic engineering. 5. The provision of paragraph 4 shall not apply to micro-biological processes and products obtained by these processes.</p> <p>As to plants or group of plants, Art. 81 IIPC recites:  <i>Art. 81-quater Patentability</i> 1. It can be patentable, subject to fulfilment of novelty, inventive step and industrial applicability requirements: (...) e) an invention relating to plants or animals or a plant grouping characterized by the expression of a specific gene and not by its whole genome, provided that their application is not limited, from a technical standpoint, to the obtainment of a particular plant variety or animal species and that they are not obtained by means of essentially biological processes only, (...)</p>	<p>Plant varieties are clearly excluded from patent protection.</p> <p>Then exclusion of patentability of plants is limited to plants univocally used for the production of plant varieties <u>and</u> obtained solely through essentially biological processes.</p>	No
LI	See under "CH"		No
LT	<p>Lithuanian Patent Law (Law on Patents of 18 January 1994, No. I-372 as changed on: 08 November 1994; 09 and 23 December 1997; 15 June 2000; 21 December 2000; 30 October 2001; 30 June 2005; 08 June 2006; 10 May 2007; 23 December 2010) <b>Art. 5.1 paragraph 2)</b></p> <p><b>EN Translation</b> <i>Patents should not be granted for</i> (...) 2) plant or animal varieties or essentially biological methods for obtaining thereof. <i>This provision does not apply to microbiological production methods of plants or animals and to the products obtained by such methods, in case the technical implementation of the invention is not limited to a particular plant or animal variety.</i></p>	<p>What is emphasized in bold appeared as from 30/06/2005.</p>	No

MS	National Law / EN translations	Remarks	Q
LU	<p>Loi du 20 juillet 1992 portant modification du régime de brevets d'invention telle que modifiée par la loi du 24 mai 1998 et par la loi du 11 août 2001 et par la loi du 7 avril 2006 et la loi du 25 avril 2008</p> <p><b>Art. 5 bis</b></p> <p><b>EN Translation</b></p> <p>1. Not patentable are:</p> <p>a) Plant and animal varieties</p> <p>b) Essentially biological methods for obtaining plants or animals.</p> <p>2. Inventions concerning plants or animals are patentable if the technical implementation of the invention is not limited to a particular plant or animal variety.</p> <p>3. Paragraph 1, item b), does not affect the patentability of inventions related to a microbiological method, or to other technical methods, or to a product obtained by such methods.</p>		No
LV	<p>Patent Law of the Republic of Latvia (in force since 01.03.2007)</p> <p><b>Art. 10 (Biotechnological Inventions)</b></p> <p><b>EN Translation</b></p> <p>1. A patent shall be granted to biotechnological inventions:</p> <p>1.1. containing biological material isolated from its natural environment or acquired with the help of a technical method, even if it has been previously met in nature;</p> <p>1.2. pertaining to plants or animals if the technical nature of the invention does not confine itself to some specific plant or animal variety; and</p> <p>1.3. pertaining to microbiological or other technical method or a product acquired with such a method if it is not a plant or animal variety.</p> <p>2. A patent shall not be granted to plant or animal varieties or to the basically biological methods for the acquisition of plant or animal varieties.</p>		No
MC	<p>Patent law in Monaco N°606 of June 20, 1955</p>	<p>There is no specific provision in the national law that excludes from patentability the plant products directly obtained by using an essentially biological process.</p>	No
MK	<p>Macedonian Law on Industrial Property</p> <p><b>Art. 26.1</b></p> <p><b>EN Translation</b></p> <p>A patent may not protect an invention:</p> <p>1) which relates to new animal and plant varieties and essentially biological processes for the production of animals or plants, with the exception of biotechnological inventions, for which the technical feasibility is not restricted to a certain type, and microbiological processes and products generated from such processes;</p> <p>(...)</p>		No
MT	<p>Maltese Patents and Designs Act (Cap. 417 Laws of Malta)</p> <p><b>Art. 4.5</b></p> <p>A patent shall not be granted in respect of: (...)</p> <p>e) plant and animal varieties:</p> <p>Provided that patents shall not be granted for plant varieties only after a new form of plant variety protection is introduced in such form as may be prescribed:</p> <p>Provided further that a patent may still be granted for a plant variety in respect of which a patent application is still pending on the date that a new form of plant variety protection is prescribed;</p> <p>(f) essentially biological process of the production of plants or animals:</p> <p>Provided that this is without prejudice to the patentability of inventions which concern a microbiological or other technical process or a product obtained by means of such a process;</p> <p>6. Inventions which concern plants or animals shall be patentable if the technical feasibility of the invention is not confined to a particular plant or animal variety.</p> <p>(...)</p>		No

MS	National Law / EN translations	Remarks	Q
NL	<p>Dutch Patent Act 2010 (Rijksoctrooiwet 2010)  <b>Art. 3.1.d</b></p> <p><b>EN Translation</b>  <i>No patents shall be issued for:</i>                      (...)   (c) <i>plant or animal varieties,</i>                      (d) <i>essentially biological processes, entirely consisting of natural phenomena such as crossings and selections, for the production of plants or animals as well as the products obtained as a result there by (...)</i></p>	<p>Unlike the EPC and in conflict with the Biotech Directive (98/44 EC), the Dutch Patent Act 2010 excludes from patentability plants or animals produced by essentially biological processes, even if the technical feasibility of the invention is not confined to a particular plant or animal variety</p>	Yes
NO	<p>The Norwegian Patents Act, no 9 of December 15, 1967 (last amending Act on July 1, 2013)  <b>Section 1</b></p> <p><b>EN Translation</b>  <i>Within any technical field, any person who has made an invention which is susceptible of industrial application, or his successor in title, shall, in accordance with this Act, have the right on application to be granted a patent for the invention and thereby obtain the exclusive right to exploit the invention commercially or operationally.</i>  <i>Subject matters not regarded as inventions include anything which merely consists of:</i>                      1. <i>discoveries, scientific theories and mathematical methods;</i>                      2. <i>aesthetic creations;</i>                      3. <i>schemes, rules or methods for performing mental acts, playing games or doing business, or programs for computers;</i>                      4. <i>presentations of information.</i></p> <p><i>Inventions may also constitute patentable inventions when they concern a product consisting of or containing biological material, or a process by means of which biological material is produced, processed or used. Biological material, which is isolated from its natural environment or produced by means of a technical process, may be the subject of an invention even if it already occurs in nature. Biological material means, for the purpose of this legal text, material that contains genetic information, and can reproduce itself or be reproduced in a biological system.</i></p> <p><i>A patent cannot be granted in respect of plant or animal varieties. Inventions that concern plants or animals may, however, be patentable if usage of the patent is not technically limited to one particular plant or animal variety. The King may, by regulation, determine what should be considered a plant or an animal variety.</i></p> <p><u><i>A patent cannot be granted for what are essentially biological processes to produce plants or animals. An essentially biological process means, for the purpose of this legal text, a process, which consists entirely of natural phenomena such as crossing or selection. A patent may, on the other hand, be granted for microbiological or other technical processes or for a product produced by such processes. A microbiological process means, for the purpose of this legal text, any process involving, performed upon or resulting in the production of microbiological material.</i></u></p> <p><i>A patent shall not be granted for methods for surgical or therapeutic treatment or diagnostic methods, practiced on humans or animals. This provision shall not prevent the grant of patents for products, including substances and compositions of substances, for use in such methods.</i></p>	<p>Products obtained by microbiological or other technical processes are patentable, but the law does not say anything of products obtained by essentially biological processes.</p> <p>Also relevant is the patent regulation’s definition of “plant variety”;  <b>Section 88 Definition of plant variety</b>                      Under the patent act and regulation a plant variety is understood to be a stock of plant within a single botanical tax on of the lowest rank, which</p> <ol style="list-style-type: none"> <li>1. Can be defined on the basis of the characteristics resulting from a given genotype or combination of genotypes,</li> <li>2. can be distinguished from any other population of plants on the basis of the occurrence of at least one of the said characteristics, and</li> <li>3. can be considered as a unit with regard to the ability to reproduce unchanged.</li> </ol> <p>The existence of characteristics as mentioned in first paragraph no. 1, can be invariable or variable between variety constituent parts of the same kind, provided that the variation level is due to the genotype or combination of genotypes.</p>	No

MS	National Law / EN translations	Remarks	Q
PL	<p>Industrial Property Law (Law of June 30, 2000 on Industrial Property (as last amended by Law of 23 January 2004, and Law of June 29, 2007))</p> <p><b>Art. 29</b></p> <p><b>EN Translation</b>  <i>Patents shall not be granted for: (...)</i>            2) <i>plant varieties or animal breeds as well as purely biological processes of or animals breeding; this provision does not apply to microbiological processes for breeding or products obtained by these processes.</i>            2. <i>A process for plants or animals breeding referred to in Art. 29.1. is purely biological if it consists entirely of crossing, selection or other natural phenomena.</i></p>	<p>While essentially biological processes of plants or animals production are excluded from patentability, there is no explicit exclusion of patentability of products derived from essentially biological processes.</p> <p>Furthermore, biotechnological inventions directed to plants or animals other than strictly plant variety or animal breed are patentable. I.e.:</p> <p><i>Art. 93.1. Patentable biotechnological inventions are in particular: (...)</i>            3) <i>inventions relating to plants or animals if technical feasibility of the invention is not confined to a particular plant variety or animal breed.</i></p>	No
PT	<p>Portuguese Industrial Property Code (IPC) – (approved by Decree-Law 36/2003 of 5 March and amended by Decree-Law 318/2007 of 26 September, Decree-Law 360/2007 of 2 November, Decree-Law 143/2008 of 25 July and Law 16/2008 of 1 April)</p> <p><b>Art. 53.3.b</b></p> <p><b>EN Translation</b>  <i>Limitations regarding patents</i>            3. <i>The following shall also not be the subject matter of a patent: (...)</i>            b) <i>Plant or animal varieties, as well as essentially biological processes for the production of plants or animals; (...)</i></p> <p><i>Art. 54 Special cases of patentability</i>            1. <i>The following shall be patentable: (...)</i>            d) <i>An invention concerning plants or animals, if its technical feasibility is not confined to a particular plant or animal variety;</i>            e) <i>A biological material isolated from its natural environment or produced by means of a technical process, even if it previously occurred in nature;</i>            f) <i>An invention concerning a microbiological process or other technical processes, or products obtained by means of such processes.</i>            2. <i>An essentially biological process for the production of plants or animals means any process consisting entirely of natural phenomena such as crossing or selection. (...)</i></p>	<p>These matters are set forth in greater detail in the “Guide to Procedures concerning Technological Rights”, published by INPI, which states as follows:</p> <p><i>5.2.1. Plant varieties</i>  <i>The term “plant variety” is defined in Rule 26(4) EPC. A patent will not be granted if the material claimed is directed to a specific plant variety or to specific plant varieties. However, if the invention relates to plants and animals and if the technical feasibility of the invention is not confined to a particular plant or animal variety, the invention is patentable (see IV, 3.2) [Rule 26(4), Rule 27(b) EPC].</i>  <i>When a claim to a process for the production of a plant variety is examined, Article 97(2) IPC (Article 64(2) EPC) shall not be taken into consideration (see G1/98, OJ 3/2000, 111). Therefore, a claim to a process for the production of a plant variety (or plant varieties) is not a priori excluded from patentability simply because the resulting product constitutes or may constitute a plant variety.</i></p> <p><i>5.2.2. Processes for the production of plants or animals</i>  <i>A process for the production of plants or animals is essentially biological if it consists entirely of natural phenomena such as crossing or selection. To give some examples, a method of crossing, interbreeding or selectively breeding, say, horses, involving merely selecting for breeding and bringing together those animals having certain characteristics would be essentially biological and therefore unpatentable. On the other hand, a process of treating a plant or animal to improve its properties or yield or to promote or suppress its growth, e.g. a method of pruning a tree, would not be essentially biological since although a biological process is involved, the essence of the invention is technical; the same could apply to a method of treating a plant characterised by the application of a growth-stimulating substance or radiation. The treatment of soil by technical means to suppress or promote the growth of plants is also not excluded from patentability (see also IV, 4.8.1) [Rule 26(5) EPC].</i></p>	No
RO	<p>Romanian Patent Law 64/1991</p> <p><b>Art. 9.b</b></p> <p><b>EN Translation</b>  <i>Patents shall not be granted under this Law in respect of: (...)</i>            b) <i>plant varieties and animal breeds, as well as the essentially biological processes for the production of plants or animals. This provision shall not apply to microbiological processes or products obtained thereby; (...)</i></p>	<p><b>Art. 7.b-c</b></p> <p><i>Art. 7 – A patent shall be granted for any invention having as a subject-matter a product or a process, in all technological fields, provided that it is new, involves an inventive step and is susceptible of industrial application.</i>  <i>Inventions in the field of biotechnology shall be patentable if they relate to: (...)</i>            b) <i>plants or animals, if the technical feasibility of the invention is not limited to a particular plant variety or animal breed;</i>            c) <i>a microbiological process or other technical process or a product, other than a plant variety or animal breed, obtained by means of said process.</i></p>	No

MS	National Law / EN translations	Remarks	Q
RS	<p>Serbian Patent Law (Issued in "Official Gazette of the Republic of Serbia", no. 99/11, dated December 27<sup>th</sup> 2011); in force since January 4<sup>th</sup>, 2012</p> <p><b>Art. 9.3</b></p> <p><b>N Translation</b>  <i>Exceptions to Patentability</i>                      A patent shall not be granted in respect of:                      (...)                 </p> <p>3. a plant or animal variety or an essentially biological process for the production of a plant or animal, provided that this provision shall not apply to microbiological processes or the products obtained by means of such process.                      (...)                 </p> <p><i>Essentially biological process referred to in item 3) of this Article for the production of plants or animals is a process consisting entirely of natural phenomena such as crossing or selection.</i></p>		No
SE	<p>The Patents Act (Swedish Statute Book, SFS, 1967:837, in the version in force from July 1, 2014)</p> <p><b>Article 1 a</b></p> <p><b>EN Translation</b>  <i>Patents are not granted in respect of plant varieties or animal breeds. A patent may, however, be granted in respect of an invention that relates to plants or animals if the technical feasibility of the invention is not confined to a particular plant variety or animal breed. The concept of a plant variety is defined in Chapter 1, Article 3, of the Act on the Protection of Plant Varieties Rights (Act 1997:306). Patents shall not be granted in respect of essentially biological processes for the production of plants or animals.</i>                      (...)                 </p> <p><i>A patent may, however, be granted for an invention that concerns a microbiological process or another technical process or a product obtained by means of such a process.</i>                      (...)                 </p> <p><i>An invention may be patentable even if it concerns a product consisting of or containing biological material or a process through which biological material is being produced, processed or used. A biological material which is isolated from its natural environment or produced by means of a technical process may be the subject of an invention even if it previously occurs in nature.</i>                      (...)                 </p> <p><i>(Act 2004:159).</i></p>	Under Swedish law, there is no provision excluding products derived from essentially biological processes.	No
SI	<p>Intellectual Property Act</p> <p><b>Art. 16</b></p> <p><b>EN Translation</b>  <i>Subject-matter of short-term patent protection</i>                      (1) With the exception of processes, plant varieties and animal breeds, a short-term patent may be granted for inventions which are new, susceptible of industrial application and are the result of a creative effort.</p>		No
SK	<p>Slovak Act No. 435/2001 Coll. on Patents, Supplementary Protection Certificates and on Amendment of Some Acts as Amended (The Patent Act)</p> <p><b>Art. 6.1</b></p> <p><b>EN Translation</b>  <i>Exceptions to patentability</i>                      1. Patents shall not be granted to                      a) plant and animal varieties,                      b) essentially biological processes for creation plants or animals,                      (...)</p>	<p><i>Art. 3 Definition of terms</i>                      For purposes of this Act                      (...)                 </p> <p><i>c) essentially biological process for creation plants or animals shall mean a process based exclusively on natural phenomena such as breeding or selection,</i>                      (...)</p>	No

MS	National Law / EN translations	Remarks	Q
		<p><i>Article 5</i>  <i>Patentability of inventions</i>            1. Patents shall be granted for inventions from all fields of technology, which are new, involve inventive activity and are industrially applicable.            2. Patents pursuant to paragraph 1 shall be also granted for biotechnological inventions concerning to a product consisting of or containing biological material, or to a process by means of which biological material is produced, processed or utilised, including cases when invention relates to (...)            b) a plant or an animal, if a technical feasibility of an invention is not reduced to a particular plant or animal variety (Act No 132/1989 Coll. on Protection of Rights to New Plant and Animal Variety),            (...)</p>	
SM	<p>Industrial Property Consolidation Act of the Republic of San Marino, Law n. 79 of 25 May 2005  <b>Art. 2.4</b></p> <p><b>EN Translation</b>  <i>(Subject-matter of the patent and exclusions from patentability)</i>            4. The following inventions are not patentable:            (...)            c) inventions concerning animal varieties or essentially biological processes for the production of animals varieties; this provision shall not apply to microbiological processes and the products thereof;            (...)            5. An essentially biological process means a process, which consists entirely of natural phenomena such as crossing or selection.</p>	The wording excluding plants and animals exclusively obtained by such processes present in DE and NL law is not present in San Marino Act	No
TR	<p>Turkish Decree Law 551  <b>Art. 6</b></p> <p><b>EN Translation</b>  <i>(Non-Patentable subject matter and Inventions)</i>            (...)            Patent shall not be granted for inventions in respect of following subject matter.            b) Plant or animal varieties/species or processes for breeding/ plant or animal varieties/species, based mainly on biological grounds.</p>		No

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Informieren Sie bitte den Redaktionsausschuss so früh wie möglich über das Thema, das Sie veröffentlichen möchten. Redaktionsschluss für die nächste Ausgabe der **epi** Information ist der **19. Februar 2016**. Die Dokumente, die veröffentlicht werden sollen, müssen bis zum diesem Datum im Sekretariat eingegangen sein.

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### Prochaine date limite pour **epi** Information

Veillez informer la Commission de rédaction le plus tôt possible du sujet que vous souhaitez publier. La date limite de remise des documents pour le prochain numéro de **epi** Information est le **19 février 2016**. Les textes destinés à la publication devront être reçus par le Secrétariat avant cette date.

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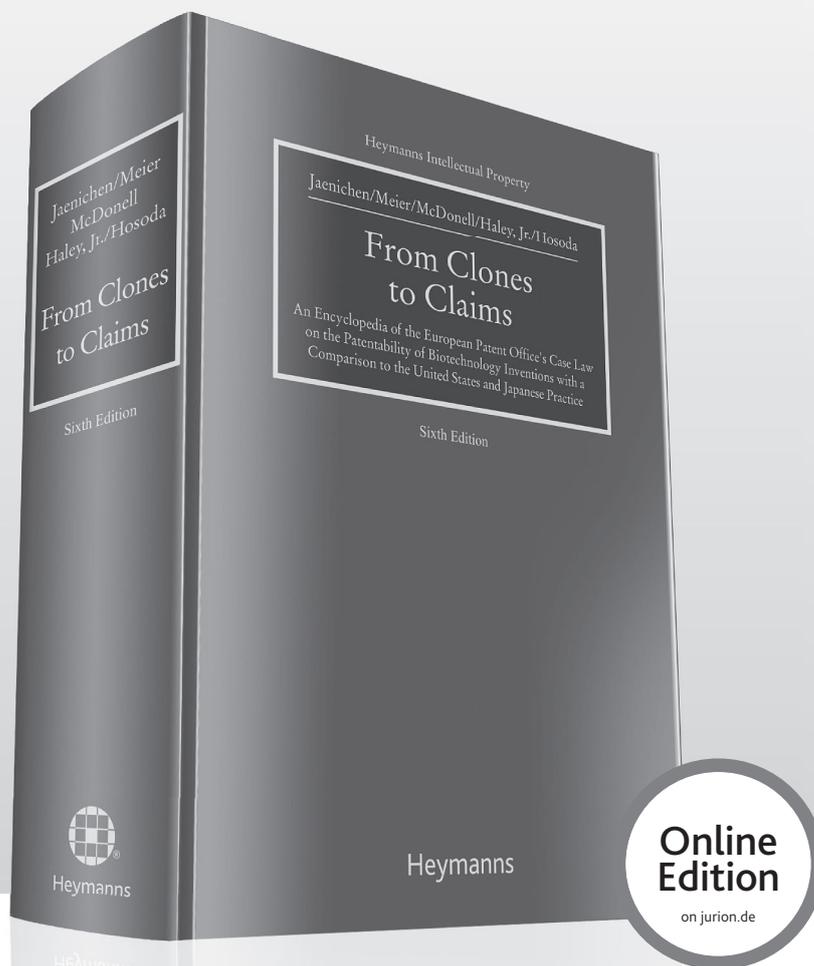
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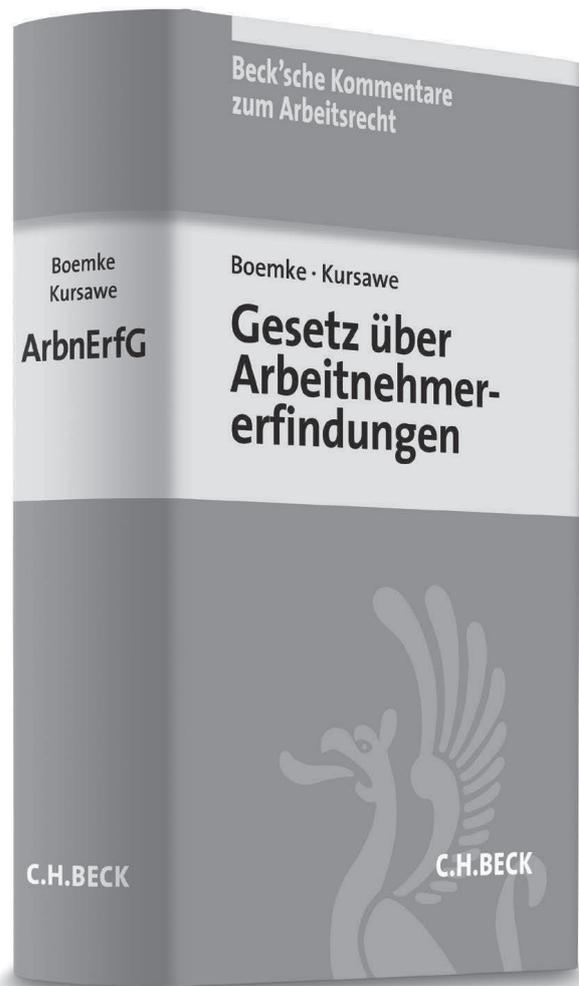
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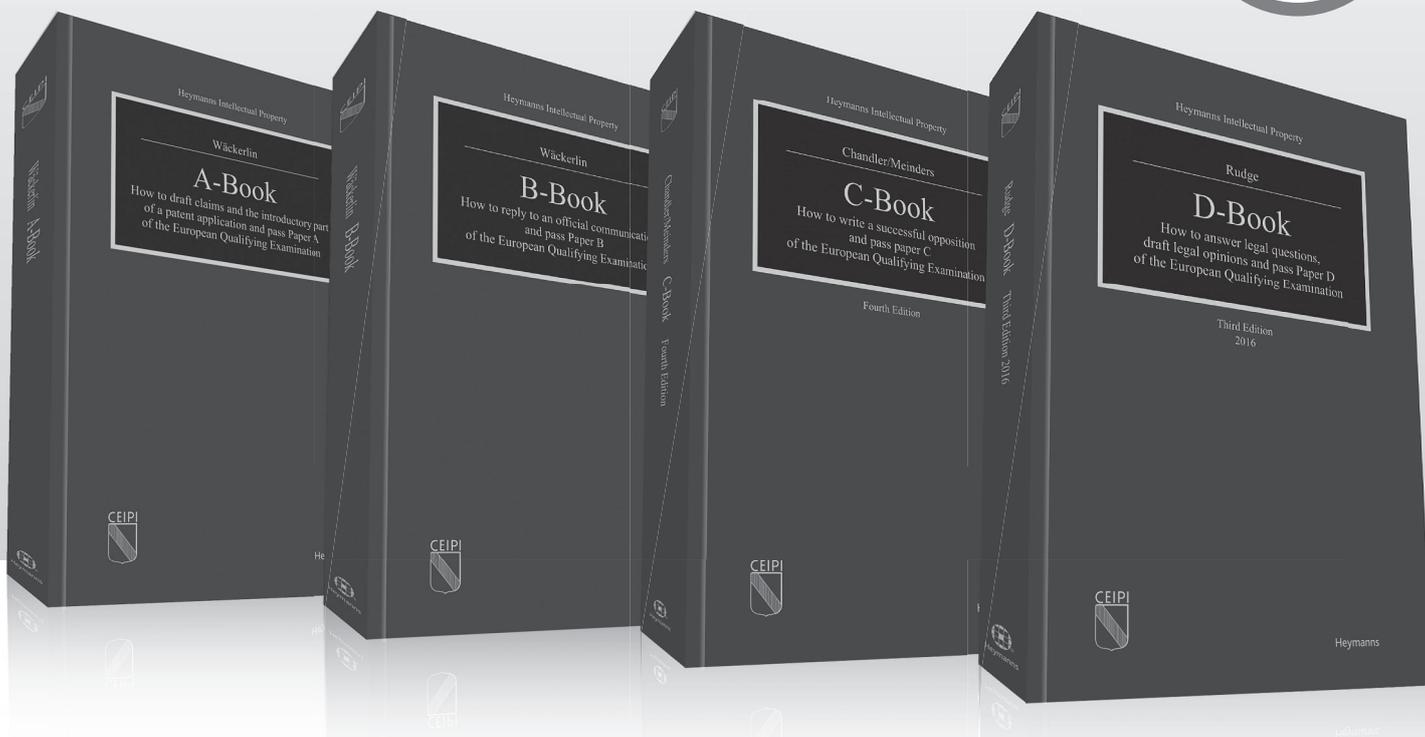
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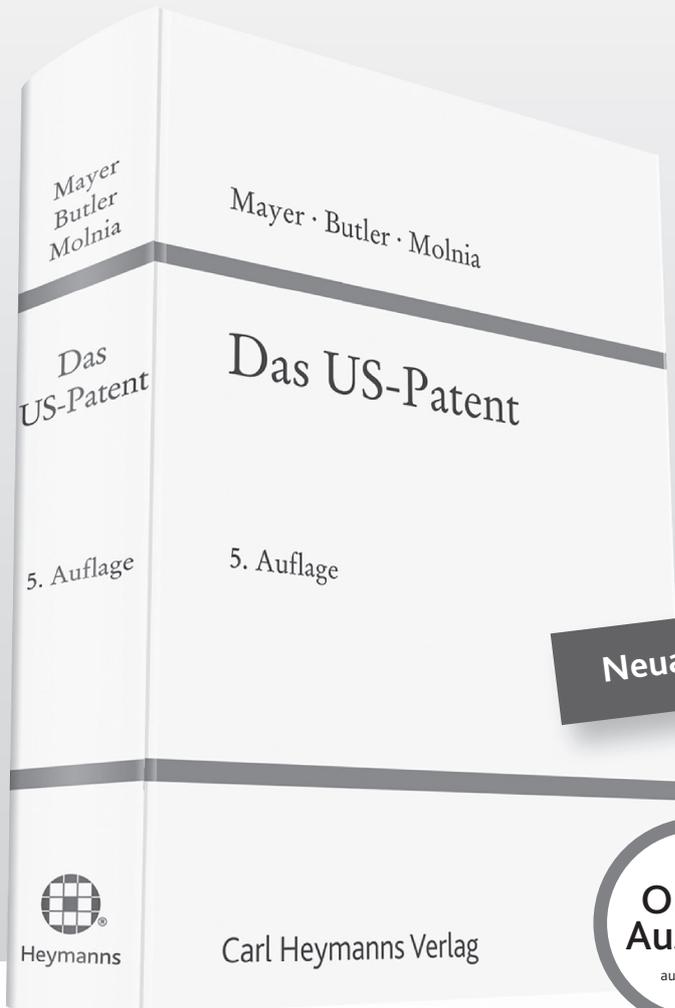
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Der Anhang enthält oder nimmt Bezug auf die wichtigsten Quellen des US-Patentrechts:

- United States Code, Title 35 Patents (35 USC), ■ Leahy-Smith America Invents Act und die wichtigsten Federal Regulations (37 CFR), ■ Manual for Patent Examination Procedure. Anhand der Übersichten im Anhang findet der Leser schnell, wo im Text eine bestimmte Vorschrift erläutert wird.

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