

# eipi Information

Institut der beim Europäischen Patentamt  
zugelassenen Vertreter

Institute of Professional Representatives  
before the European Patent Office

Institut des mandataires agréés près  
l'Office européen des brevets

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## Editorial

T. Johnson

Members will find a report in this issue of the comprehensive Agenda addressed by the recent meeting of Council in Bucharest.

Training and qualification are, rightly so, a continuing major concern. It is we think important to our members that there is a continually replenished pool of new members properly trained in practice under the EPC, to provide consistent advice to European industry, and those abroad, who wish to apply for European Patents.

It is also we think desirable that the EPO provides quality patents which are granted following as harmoni-

zed an examination by the various Examining Divisions as possible, so industry has confidence that it has a patent of value to protect its valuable rights. Those patents could be the subject of Opposition, so it is of concern that there appears to be some variations in decisions handed down by the Boards of Appeal and, we perceive at the Opposition Division level too. The *epi* is not slow to take up these issues with the EPO and we hope that our members would agree that these matters should continue to be addressed. Nothing can ever be perfect, but aspiring to be so is a perfection in itself!

### Nächste Ausgaben

Issue  
1/2006  
2/2006  
3/2006  
4/2006

### Forthcoming issues

Deadline  
16 February  
12 May  
18 August  
6 November

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31 March  
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29 September  
29 December

### Nächster Redaktionsschluss für epi Information

Informieren Sie bitte den Redaktionsschuss so früh wie möglich über das Thema, das Sie veröffentlichen möchten. Redaktionsschluss für die nächste Ausgabe der *epi* Information ist der **16. Februar 2006**. Die Dokumente, die veröffentlicht werden sollen, müssen bis zu diesem Datum im Sekretariat eingegangen sein.

### Next deadline for epi Information

Please inform the Editorial Committee as soon as possible about the subject you want to publish. Deadline for the next issue of *epi* Information is **16<sup>th</sup> February 2006**. Documents for publication should have reached the Secretariat by this date.

### 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 **16 février 2006**. Les textes destinés à la publication devront être reçus par le Secrétariat avant cette date.



Foto: B. Jensen

## Bericht über die 59. Ratssitzung Bukarest, 17. – 18. Oktober 2005

Die Sitzung wurde vom Präsidenten, Herrn Chris Mercer eröffnet.

Herr Mercer forderte den Rat auf, zu Ehren der kürzlich verstorbenen Mitglieder Herrn Modiano, Herrn Oekonomidis und Herrn Waxweiler eine Schweigeminute abzuhalten.

Dann begrüßte der Präsident einen Beobachter aus Lettland, da bis zur Sitzung noch keine Ernennung vom EPA für Ratsmitglieder aus Lettland vorgenommen worden war.

Die Stimmenzähler wurden ernannt und die vorher verteilte überarbeitete Tagesordnung wurde angenommen.

Das Protokoll der 58. Ratssitzung in Budapest wurde angenommen.

Nach dem Tod von Herrn Modiano wurde Herr Mittler als neues Vorstandsmitglied für Italien ordnungsgemäß gewählt.

Dann wurden neue Mitglieder für den PQC aus CZ, EE, LT, PL, SI und SK gewählt.

Frau Kilimiris aus Griechenland vertrat Herrn Oekonomidis.

Bezüglich der Angelegenheiten, die sich aus dem Protokoll der letzten Ratssitzung ergaben, lag ein Bericht des Präsidenten zu den einzelnen Punkten vor. Nach

einem kurzen Überblick über die Empfehlungen des Vorstands seit der letzten Ratssitzung legte der Präsident seinen Tätigkeitsbericht vor. Im Anschluss daran wurden dem Rat die Berichte des Generalsekretärs und des Schatzmeisters vorgelegt.

Der Präsident berichtete, dass er mit Vertretern des CIPA und der Patentanwaltskammer eine erfolgreiche Sitzung hatte. Man hatte vereinbart, die Termine der jeweiligen Institute aufeinander abzustimmen. Der Präsident schlug vor, sich mit jedem nationalen Institut wenigstens über die Informationen/Termine zu verständigen.

Der Generalsekretär wies in seinem Bericht auf die Notwendigkeit der Aktualisierung der Broschüre „Patente in Europa“ hin und bat um Freiwillige für diese Aufgabe.

Der Schatzmeister berichtete, dass nur 3,2 % der Mitgliedsbeiträge mittels VISA bezahlt werden. Eine Diskussion über die Ausgaben kam auf. Der Finanzausschuss legte seinen Bericht in Verbindung mit dem des Schatzmeisters vor. Der Haushalt für 2006 auf der Grundlage von 8050 Mitgliedern wurde angenommen. Der Rat stimmte einstimmig dafür, den Beitrag für 2006 bei termingerechter Zahlung bei 150 EUR zu belassen

und bei 175 EUR bei Zahlung am oder nach dem 1. Mai eines Jahres.

Der Haushalt für 2006 wurde angenommen.

Es entstand eine Diskussion über einen vom EPA bei Deloitte in Auftrag gegebenen Bericht, in dem unter anderem die Qualität der von den Ämtern gelieferten Dienstleistungen beleuchtet wurde.

In dieser Diskussion wurde berichtet, dass Griechenland das EPÜ 2000 ratifiziert hat, welches zwei Jahre nach der 15. Ratifizierung in Kraft treten wird. Es wird eine Diplomatische Konferenz stattfinden, nach der die Ausführungsvorschriften und Richtlinien überarbeitet werden. In Zusammenarbeit mit dem PQC werden alle Änderungen vom EPPC begutachtet werden.

Weiterhin wurde berichtet, dass das *epi* jetzt Beobachterstatus beim Haushalt- und Finanzausschuss des EPA hat.

Dann folgte eine Diskussion über die letzte SACEPO-Sitzung und über die sogenannte Patent-Autobahn. Der Rat vertagte jeden Beschluss bezüglich der Position des Instituts bis zur Bekanntmachung näherer Einzelheiten. Präsident Pompidou hat auch eine strukturelle Reform für den SACEPO vorgeschlagen. Er hatte Herrn Mercer gebeten, 10 Mitglieder des *epi* vorzuschlagen, die Mitglieder eines 28köpfigen SACEPO werden sollen.

Es folgte eine Diskussion zu einem Bericht über computer implementierte Erfindungen.

Ein Bericht über eine Sitzung der Untergruppe zur Arbeitsgruppe für EPLA wurde vorgelegt.

In einem Bericht wurde festgestellt, dass die Beschwerdekammern des EPA widersprüchliche Beschlüsse gefasst haben.

Eine lange Diskussion über einen Bericht des Vorsitzenden des EPPC betreffend einen möglichen Weg zur Harmonisierung (oder teilweisen Harmonisierung) europäischer Patente fand statt. Der EPPC wurde gebeten, sich nochmals mit der Angelegenheit zu beschäftigen.

Der EPA-Finanzausschuss berichtete, dass auf der letzten Verwaltungsratssitzung vorgeschlagen wurde, die offiziellen Gebühren alle zwei Jahre zu überprüfen;

auch Produktivität und Qualität wurden angesprochen, da der Hauptpunkt für das *epi* die Höhe der offiziellen Gebühren ist.

An den folgenden Bericht des PQC schloss sich eine lange Diskussion an. Die Hauptpunkte für den Ausschuss waren der Termin für die europäische Eignungsprüfung, die Benutzung von Computern während der Prüfung, die Zulassung zu den Listen A und B, die Verkürzung der dreijährigen Vorbereitungszeit und die verbindliche frühe Einschreibung der Kandidaten für die Prüfung beim *epi*-Sekretariat.

Der Disziplinausschuss legte einen umfangreichen Bericht vor. Der Vorschlag, dass der Vorsitzende die Mitglieder von Mitgliedsstaaten über Disziplinarangelegenheiten einschließlich der Vorgehensweise des Ausschusses informieren soll, wurde angenommen.

Der von Herrn Mercer ernannte Ad-Hoc-Ausschuss zur Überarbeitung der *epi*-Gründungsvorschriften legte seinen Bericht vor und man dankte ihm sehr für seine bisherige Arbeit. Der Ausschuss wurde gebeten, seine Arbeit fortzusetzen.

Der Geschäftsführungsausschuss hatte mit dem Ad-Hoc-Ausschuss zusammengearbeitet und wurde gebeten, unsere Berufsbezeichnung in der deutschen Sprache zu überprüfen.

Eine Zusammenfassung vieler dieser Berichte steht an anderer Stelle in dieser Ausgabe der *epi*-Information.

Auf diesen Punkt folgten ein kurzer Bericht über den derzeitigen Stand des Gemeinschaftspatents und eine Diskussion über die PCT-Strategie-Debatte im EPA.

Die Termine für die nächsten Ratssitzungen wurden bestätigt: die 60. Ratssitzung am 15. und 16. Mai 2006 in Salzburg, die 61. Ratssitzung am 16. und 17. Oktober 2006 in Istanbul und die 62. am 21. und 22. Mai 2007 in Polen.

Der Präsident dankte den rumänischen Delegierten herzlich für die erfolgreiche Organisation der 59. Ratssitzung und schloss die Sitzung am 18. Oktober 2005 um 12.50 h.

## Entwurf der Beschlussliste, 59. Ratssitzung Bukarest, 17. – 18. Oktober 2005

1. Die Entwürfe der Vorschläge der Ausschüsse werden nicht an die nationalen Verbände geschickt.
2. Der Rat beschloss, 25 % des *epi*-Vermögens in geringer verzinsten Papieren, jedoch zu einem höheren Zinssatz anzulegen als zu dem derzeitigen von 2 % und 2,25 %.
3. Der Rat nahm den überarbeiteten Beschluss betreffend die Rückerstattung von Reisekosten an (entsprechend der Neuformulierung des Erstattungsformulars).
4. Der Beitrag für das Jahr 2006 beträgt wie bisher 150 EUR bei Zahlung vor dem 1. Mai und 175 EUR bei Zahlung am oder nach dem 1. Mai.
5. Der Haushalt für 2006 wurde angenommen.
6. Der Rat gab keine Zustimmung zum Vorschlag betreffend das Gemeinschaftspatent, den Herr Lyndon-Stanford in seinem Schreiben vom 23. Juli an das britische Patentamt gemacht hatte, und beschloss, mit dem britischen Patentamt nicht weiter darüber zu diskutieren.



7. Der Rat nahm die Beibehaltung des Termins für die Europäische Eignungsprüfung im März an.
8. Der Rat beschloss, die Anforderungen für die technische Qualifikation auf dem gegenwärtigen Niveau zu halten. Er beschloss, dass die A- und B-Liste und die Ausbildungsdauer von drei Jahren beibehalten werden sollen.
9. Der Rat beschloss, den Entwurf des Vorschlags zur Änderung der Artikel 8, 9 und 10 der Gründungsvorschriften dem Verwaltungsrat vorzulegen.

## Report of the 59<sup>th</sup> Council Meeting Bucharest, 17<sup>th</sup> – 18<sup>th</sup> October, 2005

The meeting was opened by the President, Mr. Chris Mercer.

Mr. Mercer asked the Council to stand in silence for one minute in honour of recently deceased members, Mr. Modiano, Mr. Oekonomidis and Mr. Waxweiler.

The President then welcomed an observer from Latvia, no nomination by the EPO for Council members from Latvia having been made at the time of the meeting.

The scrutineers were appointed and the previously circulated revised Agenda was adopted.

The Minutes of the 58<sup>th</sup> Council meeting in Budapest were approved.

Following the death of Mr. Modiano, a new Board Member for Italy, Mr. Mittler was duly elected in his stead.

New Members for the PQC were then elected, respectively for CZ, EE, LT, PL, SI and SK.

Mrs. Kilimiris from Greece substituted for Mr. Oekonomidis.

With regard to matters arising from the minutes of the previous meeting, there was a report from the President on the individual issues. Following a brief review of the recommendations made by the Board since the last Council meeting, the President gave his report of activities. Subsequent to the President's report, the reports of the Secretary General and the Treasurer were also provided to the Council.

The President reported that he had had a successful meeting with representatives of CIPA and the Patent-anwaltskammer. It had been agreed to try to coordinate the calendars of the respective Institutes. The President proposed to open a dialogue with every National Institute with a view at least to information/calendar exchange.

The Secretary General in his report referred to the need to update the brochure "Patents in Europe", and asked for volunteers to assist in the task.

The Treasurer reported that only 3.2% of the Membership paid their subscriptions by Visa. There was a discussion on expenses. The Finance Committee also reported, in conjunction with the Treasurer's Report. The Budget for 2006, based on 8050 members, was approved. The subscription was unanimously approved by Council to remain at 150 Euros for 2006 if timely paid, and at 175 Euros if paid on or after 1<sup>st</sup> May in any one year.

The Budget for 2006 was approved *nem con*.

There was a discussion on a Report commissioned by the EPO from Deloitte, which discussed *inter alia* quality of services provided by the Offices.

During this discussion it was reported that Greece has ratified the EPC 2000, which will come into effect two years after the 15<sup>th</sup> ratification. There will be a Diplomatic Conference, after which the Implementing Regulation and Guidelines will be revised. Consideration of any changes would be with the EPPC, in liaison with the PQC.

It was also reported that the *epi* is now an observer to the Budget and Finance Committee of the EPO.

There then followed a discussion on the last SACEPO meeting, including a discussion on the so-called Patent Highway. The Council deferred any decision as to the Institute's position until more details are known. President Pompidou has also proposed structural reform for SACEPO. He had asked Mr. Mercer to nominate 10 members from the *epi*, those 10 to be part of a 28 person SACEPO membership.

There was a discussion on a report concerning computer-related inventions.

There was a report on a meeting of the sub-group on the working party on the EPLA.

As to the Boards of Appeal of the EPO, there was a report on perceived inconsistencies of decisions emanating therefrom.

There was a long discussion on a Report from the Chairman of the EPPC concerning a possible way forward for harmonisation (or part harmonisation) of European patents. The EPPC was asked to reconsider the matter.

The EPO Finance Committee reported that the next AC proposed to review official fees every two years; productivity and quality were also being addressed, the main issue for the *epi* being the level of official fees.

There was a report from the PQC and a long discussion thereon. Main issues for the Committee were the *date* of the EQE, use of computers in the exam, list A/B admissions, reduction of 3 year training period, and mandatory early registration of candidates for the exam with the *epi* Secretariat.

The Disciplinary Committee gave a comprehensive report. A proposal that the Chairman would advise members in Member States on aspects of disciplinary

matters, including practice of the Committee, was approved.

The Ad Hoc Committee on the revision of the *epi* Founding Regulations, set up by Mr. Mercer, reported and was thanked warmly for its work to date. The Committee was asked to continue its work.

The By-Laws Committee had worked with the Ad Hoc Committee, and was asked to look at our professional title in the German language.

A summary of many of these reports may be found elsewhere in this edition of *epi* Information.

This topic was followed by a brief report on the current status of the Community Patent and by a discussion on the PCT-Strategy debate in the EPO.

The dates of the next Council meetings were confirmed, with the 60<sup>th</sup> Council meeting to be in Salzburg on 15 – 16 May, 2006, the 61<sup>st</sup> Council meeting in Istanbul on 16 – 17 October 2006 and the 62<sup>nd</sup> in Poland on 21 – 22 May, 2007.

After having warmly thanked the Romanian delegates for the very successful organisation of the 59<sup>th</sup> Council meeting, the President closed the meeting at 12.50 on 18<sup>th</sup> October, 2005.

## Draft List of Decisions, 59<sup>th</sup> Council Meeting Bucharest, 17<sup>th</sup> – 18<sup>th</sup> October, 2005

1. Draft committee proposals will not be sent to national associations.
2. Council approved of investing 25% of the *epi* assets in lower rated papers and at a higher rate than the current rate of 2% and 2.25%.
3. Council approved the revised decision concerning the Refund of Travel Expenses (according to the new wording of the sheet for claim for reimbursement).
4. The subscription fee for the year 2006 is maintained at 150 EUR if paid before May 1<sup>st</sup>, and at 175 EUR if paid on or after May 1<sup>st</sup>.
5. The budget for 2006 was approved.
6. Council did not approve the proposal, pertaining to the Community Patent, made in Mr. Lyndon Stanford's letter of 23<sup>rd</sup> July to the UK Patent Office and decided against continuing to discuss with the UK Patent Office at this stage.
7. Council approved maintaining the date of the EQE in March.
8. Concerning the EQE, Council approved that requirements for technical qualification should be maintained at the present level. It also approved maintaining Lists A and B as well as the three-year training period.
9. Council approved that the draft proposal for amendment of Articles 8, 9 and 10 of the Founding Regulations be presented to the EPO Administrative Council.

## Compte rendu de la 59ème réunion du Conseil Bucarest, 17-18 octobre 2005

Le Président Mercer ouvre la séance.

M. Mercer invite le Conseil à observer une minute de silence à la mémoire des membres du Conseil récemment décédés, M. Modiano, M. Oekonomidis et M. Waxweiler.

Puis le Président souhaite la bienvenue à un observateur de Lettonie, les nominations par l'OEB des membres du Conseil pour ce pays n'ayant pas été reçues à la date de la réunion.

Les scrutateurs sont désignés et l'ordre du jour révisé est adopté.

Le compte rendu de la 58ème réunion du Conseil à Budapest est approuvé.

A la suite du décès de M. Modiano, M. Mittler est élu nouveau membre du Bureau pour l'Italie.

De nouveaux membres de la Commission de Qualification Professionnelle sont élus, respectivement pour les pays suivants : CZ, EE, LT, PL, SI et SK.

Mme Kilimiris, membre grec du Conseil, remplacera dorénavant M. Oekonomidis.

Le rapport du Président sur les différentes questions relevant de la réunion précédente est suivi d'un bref compte rendu des recommandations faites par le Bureau depuis la dernière réunion du Conseil. Puis le Président présente son rapport, lequel est suivi des rapports respectifs du Secrétaire Général et du Trésorier.



Le Président s'est réuni avec les représentants de CIPA et de la « Patentanwaltskammer ». Il a été convenu d'essayer de coordonner les calendriers des différentes organisations. Le Président a proposé d'ouvrir le dialogue avec toutes les associations nationales pour obtenir au moins un échange d'informations/calendrier.

Le Secrétaire Général mentionne dans son rapport la nécessité d'une mise à jour de la brochure « Introduction aux brevets en Europe » et fait appel à des volontaires pour l'aider dans cette tâche.

Dans son rapport le Trésorier annonce que seulement 3,2% des membres règlent leur cotisation par carte de crédit. Il s'ensuit un débat sur les dépenses. Le rapport du Trésorier ainsi que le rapport de la Commission des Finances sont présentés. Le budget 2006, basé sur 8050 membres, est approuvé. Le Conseil approuve à l'unanimité de maintenir le montant de la cotisation à 150 EUR si le paiement est effectué avant le 1er mai et à 175 EUR dans le cas d'un paiement effectué le 1er mai ou au-delà de cette date.

Le budget 2006 est approuvé à l'unanimité.

Le débat s'ouvre ensuite sur l'étude financière commandée par l'OEB au cabinet de consultants Deloitte, laquelle adresse notamment la question de la qualité des services fournis par l'Office. Lors des débats, il est porté à la connaissance des membres que la Grèce a ratifié la CBE 2000, laquelle entrera en vigueur deux ans après la 15ème ratification. Il y aura une Conférence Diplomatique qui sera suivie d'une révision des dispositions d'exécution. La commission EPPC est chargée, en collaboration avec le PQC, d'étudier les changements qui s'avéreront nécessaires.

Le Conseil est également informé que l'*epi* jouit désormais du statut d'observateur à la Commission du Budget et des Finances de l'OEB.

La dernière réunion du SACEPO fait l'objet d'une discussion au cours de laquelle est également évoquée la question du « Patent Highway ». Le Conseil attendra que davantage de détails soient disponibles pour prendre une décision concernant la position de l'*epi*. Le Président Pompidou a proposé une réforme du SACEPO. Il a demandé à M. Mercer de nommer 10 membres de l'*epi*. Ces derniers feront partie des 28 personnes appelées à constituer le SACEPO.

Le rapport concernant les inventions mises en oeuvre par programme d'ordinateur constitue un nouveau sujet de discussion. Puis suit le rapport de la réunion du sous-groupe de travail sur le EPLA.

En ce qui concerne les Chambres de recours de l'OEB, un rapport est présenté portant sur certains défauts de cohérence entre certaines de leurs décisions.

Le Conseil discute longuement le rapport du Président de l'EPPC, dans lequel est proposée une possibilité d'ouverture vers une harmonisation (ou harmonisation partielle) des brevets européens. L'EPPC est invité à se pencher sur la question.

La Commission des Finances de l'OEB informe qu'à la prochaine réunion du Conseil d'Administration il sera proposé d'ajuster les taxes officielles tous les deux ans ; la productivité et la qualité sont aussi évoquées, l'accent étant mis par l'*epi* sur le niveau des taxes officielles.

La Commission de Qualification Professionnelle présente son rapport. Celui-ci est suivi d'un long débat au cours duquel sont principalement discutés les points suivants : la date de l'examen, l'usage des ordinateurs à l'examen, les listes d'admission A/B, la réduction de la période de formation de trois ans, ainsi que l'inscription préalable obligatoire des candidats à l'examen auprès du Secrétariat de l'*epi*.

Un rapport détaillé de la Commission de discipline est présenté par le président de la commission. La proposition faite par celui-ci de conseiller les membres sur des questions de discipline, y compris sur les pratiques de la commission, est approuvée.

La Commission Ad Hoc, mise en place par M. Mercer pour préparer un projet de modification du Règlement de création de l'*epi*, présente son rapport. Celui-ci remercie vivement les membres de la Commission pour le travail réalisé à ce jour et leur demande de poursuivre leur tâche.

La Commission du Règlement Intérieur qui a travaillé avec la Commission Ad Hoc est invitée à examiner le titre professionnel dans la version allemande.

Un résumé de la plupart de ces rapports est publié dans ce numéro de epi Information.

Suivent un bref rapport sur le statut actuel du Brevet Communautaire et une discussion sur le débat à l'OEB au sujet de la Stratégie PCT.

Les dates des prochaines réunions sont confirmées. La 60ème réunion se tiendra à Salzburg les 15-16 mai 2006, la 61ème réunion à Istanbul les 16-17 octobre 2006 et la 62ème réunion en Pologne les 21-22 mai 2007.

Après avoir remercié chaleureusement la délégation roumaine pour l'organisation très réussie de la 59ème réunion du Conseil, le Président clôt la séance le 18 octobre 2005 à 12.50 heures.

## Projet de liste de décisions, 59ème réunion du Conseil Bucarest, 17-18 octobre 2005

1. Les projets de documents préparés par les commissions ne seront pas envoyés aux organisations nationales.
2. Le Conseil approuve que 25% des revenus de l'*epi* soient investis dans des papiers à un taux d'intérêt peu élevé, mais supérieur aux taux actuels de 2% et 2,25%.

3. Le Conseil approuve les modifications de la décision concernant le remboursement des frais de voyage (conformément aux modifications du formulaire de demande de remboursement).
4. Pour l'année 2006, le montant de la cotisation est maintenu à 150 EUR si le paiement est effectué avant le 1er mai et à 175 EUR dans le cas d'un paiement effectué le 1er mai ou au-delà de cette date.
5. Le budget 2006 est adopté.
6. Le Conseil a rejeté la proposition, concernant le Brevet Communautaire, faite par M. Lyndon-Stanford à l'Office des brevets britannique dans un courrier du 23 juillet et s'est prononcé contre la poursuite actuelle des discussions avec l'Office des brevets britannique.
7. Le Conseil approuve de maintenir au mois de mars la date de l'examen européen de qualification (EEQ).
8. Dans le contexte de l'EEQ, le Conseil approuve que les conditions requises pour les qualifications techniques soient maintenues au niveau actuel. Il approuve également de maintenir les listes A et B ainsi que la période de formation de trois ans.
9. Le Conseil approuve que la proposition d'amendement des articles 8, 9 et 10 du Règlement de création de l'Institut soit présentée au Conseil d'Administration de l'OEB.

## Treasurer's Report

### C. Quintelier (BE)

The accounts up to June 30, 2005 have been finalised, based on the sent invoices. The number of *epi* members is 8110, so that with a budget based on 8000 members we should be in a position to reach the budgeted subscription amount.

Due to an improved computer system and the substantial efforts of the Secretariat it was possible to trace much better the origin of the payments and attribute them to the intended members. This has led to a substantial reduction in Rule 102(1) letters (664 in 2005 against 887 in 2004).

Only 250 (3.2%) *epi* members used the possibility to pay their annual membership subscription by credit card. Although this number has to be considered as rather small, it is proposed nevertheless to maintain this possibility as such for next year.

Our income from our assets showed comparable figures to the one of 2004. However a few of our investments reached their end and had to be reinvested. As the actual rates are much lower, they were reinvested at 2 and 2.25%, which is much lower than the 4.25% on which the money was invested on beforehand. The actual low investment rate has for consequence that *epi* investment policy should be reviewed. The 2% and 2.25 % rate corresponds to the actual inflation rate, which signifies that there is a potential risk that *epi* purchasing power could be affected.

It should also be noted that the income on CPE seminars originates from late payments of the Paris 2004 seminar.

On the expense side the amount indicated for the Board meeting costs already covers a majority of hotel costs for the Bratislava meeting, which have to be paid in advance.

As concerns Committees expenses a severe increase of costs vis à vis 2004 has been noted for some of them. An analysis of those costs shows that they are mainly due to expensive flight tickets.

A letter signed by the Secretary General and the Treasurer has therefore been sent to the Committee Chairpersons in order to invite them to plan their meetings at least 6 weeks in advance so that the participants can book their tickets at least four weeks in advance. In view of the increased number of Committee members it is important that meetings are planned preferably two months or even more in advance and that the Committee members book their flight at least four weeks in advance and thus benefit from reduced air fares.

In the same context of limiting the costs relating to air fare tickets, a modified version of the Guidelines for reimbursement had been mailed to the Council and Committee members. This modified version takes i.a. into account the fact that APEX tickets no longer exist and now uses "economy with reduction for early booking".

The high postage costs find their origin in the costs related to the mailing involved with the election.

With respect to the 2006 Budget, based on 8050 members, an increase in the personnel expenses has been foreseen. The increase should cover the costs involved with an increase of the personnel staff at the Secretariat. An extra staff member is required to deal with the organisation of seminars which will be organised in cooperation with PQC. Indeed, and following the request expressed at the Budapest Council meeting, it is the intention to organise more seminars in order to provide continuous education satisfying the need of the *epi* members. Therefore not only the budget of the *epi* Secretariat and seminars has been increased, but higher

income on the past CPE seminars is budgeted. The higher income from those seminars should finance (partly) the costs and work involved with these seminars. Besides reimbursement of the travel costs of those persons presenting the seminars (*epi* rules) it is also

envisaged to pay the latter persons. A proposal for the latter payment will be discussed by PQC and the treasurer.

In view of the Salzburg and Istanbul Council meetings the Council budget has been raised by 10000 EUR.

## Report of the Committee on Biotechnological Inventions

Ann De Clercq (BE)  
Chairwoman

### I. Committee Meeting December 1, 2004, Munich

The Committee met on December 1, 2004 at the *epi* secretariat and the following matters were discussed at this meeting.

#### 1. Implementation of the EU Directive on biotechnological inventions

##### (a) EPO matters

##### (i) *ICOS* decision

The committee discussed similar cases to the *ICOS* decision which the members were watching. It was explained that the EPO was now allowing post-published data in support of credible function, for example see T 504/04. It was also remarked that in a case similar to *ICOS*, concerning GPCR proteins, a statement that the proteins were chemokines was not enough.

##### (ii) *morality/Art 53(a)*

It was discussed that there were now a number of appeal cases on stem cells, including application number 99966171.3. Greenpeace had issued a press release on a granted HGS case, and a mention of this in the German Parliament was to be expected later in the week.

##### (iii) *"isolated" term in claims*

Members discussed that they were still receiving requests for insertion of the term "isolated" in claims relating to proteins or nucleic acids. Members also had some cases where the EPO were still saying that the claims covered the human genome. Members had also received an objection to the written description because they had only described the actual sequence, and not related sequences, despite indications that such objections should not be raised in the trilateral report. Differences in the type of objections received from different Examiners seem to be common.

##### (iv) *other matters*

In T 792/00 an Examiner argued that one could not use post-published data. It was remarked that The Hague now had lots of new Examiners, fresh from research that were less well trained. Members discussed that the result depended on the composition of the Opposition Division, and there was significant variance.

Some members felt that Opposition Divisions were becoming tougher on Article 83. One biotech Board recently reversed two decisions on this issue. The burden of proof was now firmly on the opponent. There was a suggestion to try and persuade DG2 to change the Guidelines; perhaps, one could better effect this through the EPPC and SACEPO.

There was a mention of the Myriad BRCA2 case, particularly the priority issue. The EPO seemed to want to revoke the patent just to improve its image in the public eye. At the hearing Greenpeace and others had just criticised the gene patenting and the licensing strategy which was of course irrelevant to patentability. There was a discussion over whether one could be able to convince the EPO to deem Greenpeace's opposition as inadmissible.

Some members commented that they thought that the EPO was under much more political pressure. In Germany the Greens had a greater influence, and had supported Greenpeace bricking up the EPO. This was partly reflected by the EPO press release concerning revocation of the Myriad patent, and the restriction of the Oncomouse patent. The EPO's PR department was clearly looking at the influence of the EU. Apparently the Myriad press release needed changing as it was initially inaccurate.

The Amgen/TKT House of Lords decision in the UK was also briefly discussed where the patent had been revoked for insufficiency.

In T 397/02 a Serrono case, the EPO had accepted later published data. There was discussion of T 189/01 (*Yeda*) concerning antibodies and the meaning of "specifically binding". In T182/03 one biotech Board had accepted inventive step for a splice variant, rather unusually,

because it had apparently been a good target for a pharmaceutical compound.

In T 150/03 the same Board had denied inventive step for the cloning of a human gene equivalent to a rat protein. The rat had a high homology to the human protein.

*b) Implementation in EPC member and other EU states see item III below (updated with further news received after our meeting)*

## 2. Meetings with DG2 directors

The EPO agreed that they would revise the minutes of the epi/DG2 meeting in order to allow the publication of these minutes in the epi Journal.

It was agreed to have another meeting between the epi and DG2.

### 3. EPO Practice

Decision T 609/02 was discussed. T 1045/98 (Schering) was also discussed where a cell culture experiment had been deemed good enough to support second medical use claims. It was an interesting point that if even if one had to delete the second medical use claims, one would still be allowed product coverage. An interesting question now was what might happen if one wanted to enforce the patent in Germany or France: would the protection be limited to the function?

The UK Patent Office has produced a position paper generally against reach through claims, although that did not seem to be a major shift from current policies.

It was further discussed that the German Patent Office seemed to be having problems with gene patents. The German Patent Office was not following EPO case law, but was keen to develop its own ideas.

In the Oncomouse case there had been no written decision yet. The claims had been restricted to mice, we think for moral reasons.

## 4. Other matters

Public debate in countries about biotechnology patents was also briefly discussed

A report was made by one member regarding Biodiversity and traditional knowledge. This member had represented the epi at a Spring meeting, and also at a September meeting at WIPO. There is a long way before we see a convention on TK, but in time he thought we will. There was a question over TK that was already in the public domain. Brazil and India were taking a lead in TRIPS and WIPO negotiations, as well as in SPLT negotiations, and were arguing that it should be mandatory in patent application to include origin and information on the prior and conformed consent. This was in danger of stalling negotiations on the SPLT.

At present there is stalemate but the EU last Christmas issued a paper suggesting no serious sanctions for lack of compliance. The EU thought that origin should be a formality requirement only, and there would be no

sanction of invalidity. Switzerland however had wanted the source, and were pressing for it to be mandatory for filing a PCT application.

The reaction from the USA was to try and by-pass WIPO, but if the US voted against the proposal in WIPO it may still go through as only a majority was needed.

Interestingly in New Zealand the Supreme Court had now been considering a similar issue for several years, in particular whether there were rights to develop and commercialise natural fauna or flora, under the ancient 1840 Treaty of Waitangi.

## II. Next Biotech Committee Meeting

The next Biotech Committee Meeting is scheduled on October 26<sup>th</sup>, 2005 in Munich.

## III. Progress in the Implementation of the Biotech Patent Directive 98/44/EC in member states

- IT - No news as yet, but we are expecting a notice from the ECJ criticizing Italy for non-implementation.
- AT - The directive had not yet been implemented. It may be by the end of 2004 but more likely in early 2005. Examiners at the Austrian Patent Office are currently relying on EPO case law, so no problems are expected. The Bill is likely to be in accordance with the Directive.
- SE - The Directive was implemented on 1 July 2004. There is was a solid majority in favour of the Directive in the parliamentary debate, but Swedish legislation being almost entirely in accordance with the Directive.
- TR - A new draft regulation had been prepared, but not yet passed by the Parliament. In essence, it was a translation of the Directive. Implementation is expected next summer.
- NO- It had been implemented on 1 February (or May?) in 2004. Norway has set up a special group to look into ethical issues.
- IC - Iceland has also implemented the directive.
- CH- The Directive has not yet been implemented, but the Swiss are working on a general new biotech patent law.
- DE - Germany has implemented the directive as well. Germany also introduced a purpose-bound product protection for human genes. Germany thus followed the French model.
- BE - Belgium amended its Patents Act (April 28<sup>th</sup> 2005, published May 13, 2005), in the framework of the transposition of the biotech patent directive 98/44/EC. Belgium has transposed the directive literally with exception of including a requirement of disclosure of the geographical origin of plant or animal origin taken from the recitals of the directive (Art. 15§1 new number 6) of the new Patent Act). The Belgian legislator has also taken the opportunity to amend also other provisions of the Patents Act beyond the scope of the biotech directive.

ES - The Directive has been implemented, and is almost a direct translation of the Directive.

FR - France has implemented the directive, but clearly not Article 5 or 6(e). The implementation appears to limit the scope of the product claims to the function of the gene.

NL - There has been a Government proposal, and this was amended by Parliament to bring it more into line with the directive. The law went to the Higher Parliament which two weeks before the meeting accepted the law in a form almost completely compatible with the Directive. The new law is expected to be published in the Gazette in a few months, and then implemented.

FI - The Directive was implemented in July 2000

LU - The EU may take further action if the law is not implemented soon.

PT - The directive has been implemented.

Note that the ECJ condemned Belgium and Luxembourg on 9 September 2004 and Austria on 28 October 2004 for not yet implementing the Directive.

It is not clear how France and Germany will apply the new laws at this moment. A further discussion on these issues is to be held at the next epi Biotech Committee meeting on the 26<sup>th</sup> of October.

#### IV. Important Biotech Decision

T315/03 Harvard Oncomouse decision relating to Art. 53(a) EPC and Rule 23d(d) EPC. TBA has now further limited the claims to cover a "transgenic mouse".

#### V. Next Meeting with DG2 directors

The next meeting between the epi Biotech Committee and DG2 Biotech Directors will take place on October 27<sup>th</sup>, 2005.

The presently proposed items for discussion are:

1. Stem cells
2. Predicted Function of genes and proteins
3. Summons to Oral Proceedings
4. Diagnostic methods
5. Origin of biological material
6. Priority exhaustion
7. Recent case law on Divisional applications
8. Rule 51(4) Procedure: Amendments by Examiners and situations in which translations of claims need not be filed

The EPO is currently still revising the minutes of the 2 previous epi/DG2 meetings in order to allow the future publication of these minutes in the epi Information.

## Report of the Disciplinary Committee

Paul Rosenich (LI)  
Chairman

### General Report of the Disciplinary Committee (17.2)

*1) Upon proposal of the Past Chairman of the Disciplinary Committee, Mr. Georges Leherte, the Disciplinary Committee elected unanimously on its meeting of 27<sup>th</sup> June 2005 new Officers:*

Paul Rosenich,	Chairman
Emil Gabriel Benatov,	Vice Chairman
Simon Mark Wright,	Secretary
Victor Gil-Vega,	Vice Secretary
Georges Leherte,	Advisor of Chairman (in the transition – hand over – period) and continued Member of the Ad Hoc Working group for amending the Regulation on Discipline

*2a) The said meeting decided on the following points:*

A) The Disciplinary Committee should investigate the current status of national Regulations on Discipline throughout the Member States of EPC.

B) The Disciplinary Committee needs an update of the (language) skills of its members.

C) Different as in the past the Chairman will build pre-selected new Chambers, so that if new cases arise the Chairman will send this case directly to already existing Chambers.

D) The new Chairman needs to meet the new President of epi to discuss questions related to the further development of the Disciplinary Committees Work and Tasks.

E) The proposed new Regulations on Discipline need further considerations and discussions. The proposal currently under inspection of the EPO is not satisfying the needs and wishes of this Disciplinary Committee and its National Delegates.

*2b) Since July the following actions have been successfully set:*

A) The Officers collected already from almost all Member states the required information and shortly after the Bucharest Council a summary report will be prepared.

B) The Secretary collected from almost all Members of the Disciplinary Committee the required information.



Astonishingly it was very difficult and time consuming to receive a response from some Members.

C) Since B) is successfully done now, the Chairman installed fixed chambers which most likely can deal with any and all cases coming up in the future.

D) The Secretary pre-informed the President and the President communicated already with the Chairman. This Communication will be deepened on Sunday before the Bucharest Council.

E) This point was reported to the President and will be further discussed according to D).

The President informed the EPO. No approved final draft of revised Regulations on Discipline has been issued from the Ad Hoc Working Group.

Please see the attached Special Report (17.3) for more on point E).

### *3) Assisting new Member States and the Profession in the member states on questions of Discipline*

The Chairman was invited from some Committee Members to offer information (training) on disciplinary matters. The Chairman is willing to follow these invitations in order to improve the overall knowledge in Disciplinary matters.

### *4) Current Cases before the Chambers of the Disciplinary Committee*

All six CD- Cases of 2004 have been successfully finished. One of those was referred to the EPO Disciplinary Board of Appeal. From previous years no cases are pending.

2005 only two CD-Cases were filed. One is pending within an extension term until 26<sup>th</sup> February 2005. Since the fixed Chambers have not yet started operation the second case is pending at the Chairman's desk. The responsible pre-selected Chamber will take over these cases in November 2005 at the latest.

### *5) Observation of the Chairman regarding the content of the complaints*

The Chairman is concerned about a negative trend which seemingly started in 2004. Some complaints are filed in very bad shape. It seems that complainers just want to throw masses of papers to the chambers or even just citations of internet homepages with hundreds of pages without clearly pointing to the facts and without formulating understandable requests. The Chairman and the Secretary are of the opinion that each complainer should present his/her case and supporting evidence in an organized manner. The Chairman will take the liberty to refuse complaints in the future, if it is obviously impossible for a well instructed Chamber to start with any fruitful work based on the material in front of them.

## **Special Report of the Disciplinary Committee (17.3)**

Please refer also to E) of the General Report (17.2)

Already during the past chairmanship of the Disciplinary Committee some Members of that Committee formulated negative concerns regarding the proposed

changes of the Regulation on Discipline. The different proposals of the Ad Hoc Working Group (Past President of *epi*, Mrs. Dybdahl of EPO and the past Chairman of the Disciplinary Committee) have been criticized frequently.

However without much discussion a past Council adopted a proposal which was sent to the EPO in order to get an opinion, if said proposal is acceptable for the EPO. Such opinion has not been presented so far.

The representative meeting (14 out of 24 Members) on 27<sup>th</sup> June 2005 of the Disciplinary Committee discussed and concluded that said proposal should not come into force.

The past Chairman defended said proposal but accepted that the majority of the Members of the Disciplinary Committee is against said proposal. The Disciplinary Committee asks the Council to reconsider and discuss the future function and needs of the Profession and its Disciplinary Committee regarding Regulations on Discipline. In the discussion among the Members it seemed of utmost importance that the Body of the Disciplinary Committee remains an *epi* Body under the power of *epi* versus a Body of the EPO with some participation of some *epi* members.

Following said discussions in the Disciplinary Committee the Ad Hoc Working Group, which consists now only of two members: the past Chairman and Mrs. Dybdahl, proposed a current compromise, which was not yet discussed in detail in the Disciplinary Committee:

This compromise is based on the following assumptions:

"The need for a disciplinary reform is to bring the disciplinary procedures in line with legal requirements currently prevailing in the European Union:

the disciplinary body should consist of *independent judges* who can *efficiently* handle disciplinary cases in a *short delay*, and should therefore

involve "*legally qualified*" judges as well as dedicated "*professional representative*" judges,

avoid "*external*" (*arbitrary, subjective*) influences (as currently from a "*Disciplinary Committee*", with "*judges*" designated on a case by case basis according to nationality criteria),

avoid the current "*suspiciousness*" of an internal corporatist jurisdiction, and

concentrate judicial power in a single first instance body (rather than the current time-delaying first half of a first instance ("*Disciplinary Committee*") with limited judicial power (dismissal, warning or reprimand), optionally followed by a second half of the first instance ("*Disciplinary Board*") with additional judicial power (fine, deletion from the register)."

The Chairman is of the following opinion regarding the above assumptions:

The Chambers of the Disciplinary Committee proved that their Members were independent Judges who efficiently handled disciplinary cases in short delay. Nine month to fifteen month is a much shorter term as in any courts or even as in the EPO cases are dealt with.



It has to be noted that in this timeframe the Members of the Chambers not only operated as independent Judges but often also experienced as valuable Mediators between the Parties. In total a valuable work was done for the profession.

Already since the June meeting 2005 the Disciplinary Committee decided to install fixed Chambers so that this request of the above assumption is already fulfilled.

Regarding a unification of the Disciplinary Committee (first half) with the Disciplinary Board (second half) further discussions could be held. However since most cases turned out not to reach the second half, this discussion is of minor importance.

The current proposal from the Ad Hoc Working Group:

Involve – according to the opinion of said Group – a reasonable compromise for the update of the disciplinary regulations, by providing

a single first instance *epi*/EPO Disciplinary Board, designated as “*Disciplinary Board under the EPC*”, consisting of

- three professional representatives, designated in sequential rota from a total of eight professional representatives appointed by the *epi* Council, and
  - two legally qualified members of the EPO, with a mandatory (preliminary) mediation stage involving disciplinary committee members selected according to the nationality of the plaintiff and the defendant; a Disciplinary Board of Appeal ;
- as well as the publication of *all* final decisions of the Disciplinary Board and of the Disciplinary Board of Appeal (in anonymous version).”

The Council is asked to take note of this General and Special Report of the Disciplinary Committee. The Chairman proposes that further discussions should be held in the Ad Hoc Working Group and in the Disciplinary Committee in order to put forward a fresh proposal which finds the acceptance of said Group and said Committee. Said fresh proposal should then be presented to the Council for final decision. Said fresh proposal should participate from the experiences of national regulations in all Member States by considering these national regulations (see A in the General Report).

## Report of the Harmonisation Committee

F. Leyder (BE)  
Chairman

1. The Harmonisation Committee deals with all questions concerning the worldwide harmonization of Patent Law, and in particular within the framework of WIPO.

2. As mentioned in the report published in *epi* Information 2/2005, the Standing Committee on the Law of Patents (SCP) met on 1 and 2 June 2005. The documents are available on the WIPO website, in particular a draft report prepared by WIPO for adoption at the next SCP meeting, whenever that may be. ([http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=7128](http://www.wipo.int/meetings/en/details.jsp?meeting_id=7128))

3. Accordingly, the matter went back to the WIPO Assemblies, which met from 26 September to 5 October 2005. The press releases are available on the WIPO website: <http://www.OMPI.int/pressroom/en/>

The 2004 Assembly had created an Intersessional Intergovernmental Meeting (IIM), a high-level, temporary forum to examine the development agenda proposed by the “Friends of Development” led by Brazil and Argentina.

The 2005 Assembly constituted a Provisional Committee to take forward the IIM process to accelerate and complete the discussions on proposals relating to a WIPO Development Agenda and report with any recommen-

dations to the 2006 Assembly. Two one-week sessions are planned.

As to the SCP, the 2005 Assembly agreed to hold:

- (i) A three-day, informal open forum in Geneva in the first quarter of 2006 on all issues that have been raised in the draft SPLT or that member states wish to include in that draft. These issues will be discussed with contributions from speakers “reflecting a balance of geographical representation and perspectives and technical expertise.” Member states may submit proposals for issues and speakers for the forum until 15 November 2005 and the final program will be published in January 2006 following consultations that will be conducted by the Chair of the WIPO General Assembly with interested member states; then
- (ii) A three-day informal session of the SCP shortly after the open forum to agree on a work programme for the SCP, taking into account the discussions of the open forum; and finally
- (iii) A five-day session of the SCP to initiate this work program before reporting to the 2006 Assembly.

“While some member states favoured giving priority to the harmonization of four prior-art related issues and to defer discussion of other issues of substantive patent law pending resolution of that initial package of issues,

others believed that a reduced set of provisions would exclude from the discussions certain areas of interest to them (for example, general exceptions, provisions on the transfer of technology and on the protection of public interest issues, such as public health, biodiversity and nutrition).” [WIPO press release]

4. One of the WIPO assemblies was the first PLT assembly following the entry into force of the Patent Law Treaty on 28 April 2005. It considered the applicability of certain changes already made under the PCT to the PLT.

## Report of the Professional Conduct Committee

T. Powell (GB)  
Acting Chairman

As has been the trend in recent years, there has been no meeting of the Professional Conduct Committee.

The Committee has recently prepared a response that was dispatched by the Secretary-General, to a conduct-related enquiry from a Japanese company. The matter is now dormant.

The Acting Chairman plans shortly to convene the Committee in order to deal with the following issues:

1. Appointment of Chairman, Deputy Chairman and Secretary;

2. Review of the terms of reference of the Committee for the benefit of new members;
3. Discussion of suggested practices concerning EU money-laundering regulations;
4. Discussion of suggested practices concerning storage and archiving of files;
5. Discussion of suggested practices concerning privilege in client communications.

It is in the nature of the topics that the Committee may discuss that the Committee cannot guarantee reaching consensus on for example Items 3 – 5 listed.

## Report of the Professional Qualification Committee (PQC)

S. Kaminski (LI)  
Chairwoman

Since the last Council meeting in Budapest, PQC has met twice. The first meeting mainly revolved around how to cope with the tasks that we will be confronted with. A new structure of PQC was envisaged and different working groups were formed in order to be more flexible and more effective.

Unfortunately, only few members of the new member states were present at the two meetings; this should be changed. Each country should be represented by one member. The problems dealt with in PQC are not only those with regard to the EQE, but also with regard to the training in the profession.

The attempts within the EPO to modernise and to restructure the EQE – as we have known for some time – concern various aspects. The working groups will deal with these aspects, i.e. will get into the questions and

problems and try to propose possible solutions and get in touch with the respective people at the EPO.

### *The working groups*

WG on Admission

Liaison with Examination Board

WG on *epi* Tutorials

WG 1 on Continuing Professional Education for *epi* members having passed the EQE or having dealt with European and PCT applications for many years

WG 2 on Continuing Professional Education for Grandfathers and Grandmothers from the new EPC Countries

The newly elected Chairman of the Examination Board, Mr. Philpott, was kind enough to join the second PQC meeting which took place at the beginning of September. He gave us the opportunity to present our wishes and concerns.

### *Date of EQE*

As already reported in Budapest the envisaged change of the date of EQE from March/April to January was reversed. From the candidates' side as well as from the side of the Examiners many doubts and objections were expressed. The main problems were seen in losing time for preparation and in not having the summer time for marking the papers; even getting the results of the EQE in June instead of late September/early October was not considered an advantage, as the time interval between Examination and Results would not have changed. As a first result of the joint PQC-EB meeting the change of date for the EQE 2007 was taken back.

PQC is strongly against changing the date to an earlier time and presented their arguments to the Examination Secretariat. We have to set the goal to have a rather late date of EQE, e.g. late April or early May, and to get the results in August. Of course, measures have to be taken to enforce this.

### *Use of computers*

One of these measures will be to allow or even suggest that the candidates might use their own laptops. Many other alternatives have been discussed but do not really seem feasible. One problem, just as an example, if EPO would put computers at the disposal of the candidates, would be the different types of keyboards used for the different languages.

A specially developed software should ensure that only material pertinent to the EQE could be used and that any other contents would be suspended. A first pilot program is planned for 2007. PQC will observe these developments.

### *List A/B admission*

The principles for acceptance as now applied have been developed in four DG3 decisions. Please recall that initially a candidate had to prove having passed five years of technical studies to meet the requirements of a list A admission. This was reduced step by step to four years of technical studies. Candidates with only three years of technical studies, such as for instance those with a Bachelor's degree or those with a diploma from a "Fachhochschule", were admitted as list B candidates only. However, decision of DG3 (for instance D0018/04) knocked over this principle. In this context one should bear in mind that the contents of the curriculum have changed dramatically within the last decade. Non-technical lectures, such as economics, for instance, are also considered a part of the technical training.

We have to decide on a guaranteed quality of our profession and with that also of its future. In any case, a basic requirement is that the acceptance has to be measurable and transparent for all. It is, of course, true that it is nearly impossible for the Secretariat to check, indisputably, each and every possible degree in all the Contracting States. One possible approach would be to use the ECTS credit system the European Commission is introducing and which shall become mandatory for higher education systems. Even if only in a trial stage,

the system could be used as a basis for decisions on admission. When looking at the number of candidates from the different Contracting States it is evident that most of them – at the time being – come from EU states which will have to adopt this system before long. Candidates from countries not having adopted this system might then have to provide something like a confirmation from their Universities showing the workload required to achieve the learning outcome and competence acquired. PQC will check seriously different possibilities.

### *Reduction of the three years training period*

Just to recall the situation: When, more than a decade ago, the reduction of the training period for candidates from four to three years was decided, the regulation concerning a possible reduction of the training period because of having attended specified IP courses was left as it was. Apparently, at that time, it was thought to be easy to decide if a certain IP programme would meet the requirements for being awarded the reduction. Today, however, with IP courses spreading out like mushrooms, it is practically impossible to check and decide if a certain course really meets the requirements, if the candidate had really and fully attended the course, if the candidate had to pass a final exam, etc. You can imagine how difficult and time consuming such decisions would be to make, and this for all Contracting States.

PQC came to the conclusion that – in view of transparency and equal treatment – no reduction at all should be given for having attended any IP course whatsoever. We felt that three years of training are the minimum of training on the job one should have to undergo, a further reduction is regarded as deficient for the profession.

### *Mandatory early registration of the candidates*

PQC strongly supports the idea that the candidates have to register with the Secretariat at the beginning of their training period. With this, some problematic points would be overcome. For instance, the Secretariat could – at an early stage – check the entitlement of the candidate to sit the exam. And the candidate could easily furnish all necessary proofs as discussed above. The candidates as well as their trainers would – at an early stage – be integrated into the *epi* system, that means that it would be easy to inform the candidates of training programs, such as the *epi* tutorials, and to furnish material for their preparation. Up to now, this was not possible, the names of the candidates were known neither to the Secretariat nor to *epi*. Furthermore, it will be guaranteed that the candidates will really have a training period of three years before sitting the exam. Introducing such mandatory measure will only be possible for an Examination date as from 2009 on.

### *epi tutorials*

At the present time, 405 students are registered. Even if there are occasional complaints and problems, the *epi* tutorial system is a big success. This, of course, is due to *epi* tutors doing voluntary work, which can not be valued highly enough. We are still seeking more tutors, as also

with regard to the new countries there will be an urgent need.

On November 28, 2005, a tutor's meeting will take place in Strasbourg, which will be attended by *epi* tutors, CEIPI tutors and other invited tutors. They will be given the opportunity to discuss the papers with the members of the Examination Board.

#### *CPE seminars*

BE and NL are planning a seminar on "amendments of European Patent Applications" in February 2006, to be given by D. Thomas in Eindhoven (Philips). This seminar could then be repeated in 2006-2007. Furthermore, D.

Thomas is willing to give the seminar on "oral proceedings" again. Further seminars are being planned.

#### *EQE 2005*

The results have been published on the EPO's website.

#### *epi Examiners*

There is an urgent need for more *epi* members to volunteer as Examiners for EQE. We are well aware of the fact that this is a very demanding and time-consuming job. *epi* is considering to have the *epi* Examiners rewarded.

## Report of the Liaison Representative for on-line filing

R. Burt (GB)

The EPO should be issuing version 3.0 of the EPOLINE on-line filing software later in 2005 or early 2006. The current EPOLINE version is Version 2.10 Service Pack 4 – if Applicants are using Service pack 3, they should update at once as there are problems with SP3 such that it was withdrawn by the EPO.

The currently available on-line filing system using PDF to attach documents is reasonably safe although one must always check for conversion errors when converting from your word processing system to PDF. There are some problems with the networked version of the soft-

ware which we hope will be resolved in version 3.0 but it can be used with care.

Use of Pat-XML and the submission of XML versions of documents cannot be recommended, particularly with the networked version.

The EPO have informed *epi* that secure on-line file inspection is currently under review due to unresolved issues. Until these situations are resolved this service will not be available in the near future. There is no concrete date as to when the service will be resumed.

## Pre-Announcement epi-Seminar

On February 24, 2006 a seminar will be held relating to "Amendments to European patent applications during examination". This seminar will be organised by *epi* within the current project of Continuing Professional Education and will be repeated in other EPC countries. Presentations will be given by Daniel X. Thomas (Director at DGII of the EPO). Daniel X. Thomas has also presented several *epi* seminars on "Oral proceedings" in different countries, which were a great success.

The location of the seminar is High Tech Campus Eindhoven in The Netherlands.

Further information on the program of the seminar, the registration form and registration fees will be published on the *epi* website, and will be sent by e-mail to *epi* members in Belgium and the Netherlands and through the national professional organisations.

In case you are interested to have this seminar organised in your country, please contact your national PQC member.



Institut der beim Europäischen Patentamt  
zugelassenen Vertreter

Institute of Professional Representatives  
before the European Patent Office

Institut des mandataires agréés  
près l'Office européen des brevets

epi · Postfach 26 01 12 · D-80058 München

2 January 2006

**RECHNUNG**  
epi-Beitrag 2006

**INVOICE**  
epi Subscription 2006

**FACTURE**  
Cotisation epi 2006

**EUR 150**

**Postbank München, Account No 703-802, BLZ (Bank Sorting Code) 700 100 80  
IBAN No DE77 7001 0080 0000 703802 - BIC-SWIFT: PBNKDEFF**

Diese Rechnung wird versandt zur Verwendung bei Ihrer Steuererklärung, auch wenn bereits eine Einzugsermächtigung erteilt ist.

Although you may already have issued a direct debiting mandate, you will require this invoice for completing your tax declaration.

Cette facture vous est envoyée pour raison de déclaration fiscale, même si vous avez déjà fait une demande de prélèvement automatique.

Die Rechnung kann wie folgt bezahlt werden (drei Möglichkeiten):

The invoice can be settled as follows (three possibilities):

La facture peut être réglée de la façon suivante (trois possibilités) :

**1. durch persönliche Kreditkarte (nur Visa oder Mastercard)**

**1. by credit card (Visa or Mastercard only)**

**1. par carte de crédit (uniquement Visa ou Mastercard)**

In diesem Fall kopieren Sie bitte **lesbar** in das nachstehende Feld die Frontseite der Kreditkarte und geben Sie im 3-stelligen kleinen Feld die Kontrollnummer an. Das sind die letzten drei Ziffern im Unterschriftsfeld. Das **epi**-Sekretariat wird nach Eingang dieser kopierten Rechnungsseite alles Notwendige für die Abbuchung von Ihrem Kreditkartenkonto veranlassen.

In this case please copy **readable** the credit card in the box below and write the verification number in the three small boxes. The verification number is the last three digits on the signature panel. After receipt of a copy of this page the **epi** Secretariat will process the debiting of the credit card account.

Si vous désirez utiliser cette possibilité, veuillez copier **lisible** la carte de crédit dans le cadre repris ci-dessous et écrire le numéro de vérification dans les trois petites cases. Le numéro de vérification est formé par les trois derniers chiffres repris sur la bande où la signature est appliquée. Après réception d'une copie de cette page, le secrétariat de l'**epi** traitera le retrait du compte de la carte de crédit.

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siehe beiliegendes Formular zur Einzugsermächtigung, das bis zum 15. Februar 2006 an das **epi** zurückgeschickt werden muss;

see enclosed direct debit mandate form which must be returned to **epi** by February 15, 2006.

voir autorisation de prélèvement annexée, à retourner à l'**epi** avant le 15 février 2006.

### 3. durch Banküberweisung in EUR

Eurochecks sowie alle deutschen Schecks werden akzeptiert.

### 3. by bank transfer in EUR

Euro cheques and banker's drafts are also accepted.

### 3. par virement bancaire en EUR

Les eurochèques et les chèques de banque sont également acceptés.

**In diesem Fall sind die Bankgebühren zu Ihren Lasten.**

**All bank charges are payable by the subscriber.**

**Les frais bancaires sont à votre charge.**

Auf dem Überweisungsträger muss angegeben sein für jedes einzelne Mitglied:

Please note that it is essential that each member state:

Il est indispensable d'indiquer pour chaque membre sur l'ordre de virement:

- **Name**
- **Mitgliedsnummer (neben dem Namen auf dem Adressaufkleber).**

- **name**
- **membership number (shown next to the name on the label above).**

- **nom**
- **numéro d'affiliation (inscrit à côté du nom sur l'étiquette).**

**Fehlt der Name und/oder die Mitgliedsnummer, kann der Beitrag nicht ordnungsgemäß verbucht werden!**

**The lack of the personal name and/or of the membership number may make it impossible to identify correctly the subscription payment!**

**S'il manque le nom et/ou le numéro d'affiliation, le paiement de la cotisation ne peut être correctement identifié !**

Bei Zahlungseingang nach dem **30. April 2006** ist der Beitrag **EUR 175**.

Subscription payments made after **30 April 2006** must be in the amount of **EUR 175**.

La cotisation est de **EUR 175** si le paiement est effectué après le **30 avril 2006**.

**Falls Ihr Beitragskonto schon einen Fehlbetrag aufweist, erhalten Sie ein zusätzliches Blatt. Bitte überweisen Sie dann auch den Fehlbetrag.**

**If your subscription account shows a deficit already, a separate sheet is attached. In this case please also transfer the outstanding amount.**

**Si votre compte cotisation accuse déjà un solde débiteur, vous trouverez une feuille en annexe. Dans ce cas, veuillez aussi virer la somme manquante.**

Sollten Sie Ihren Jahresbeitrag nicht bezahlen, nehmen Sie bitte zur Kenntnis, dass **Ihr Name von der Liste der zugelassenen Vertreter gelöscht wird**, gemäß Regel 102(1) der Ausführungsordnung zum EPU. Ihr Name kann jedoch gemäß den derzeit gültigen Regeln wieder in die Liste aufgenommen werden, sobald Sie den ausstehenden Beitrag bezahlt haben, gemäß Regel 102(3).

Please note that if you fail to pay your annual subscription **your name will be deleted from the list of professional representatives**, cf. Rule 102(1) of the Implementing Regulations of the EPC. However, you may, upon request, be entered under the current regulations on the list of professional representatives as soon as your outstanding subscription has been paid, cf. Rule 102(3).

Nous vous rappelons que, si vous n'avez pas acquitté votre cotisation annuelle,  **votre nom sera radié de la liste des mandataires agréés**, voir Règle 102(1) du Règlement d'exécution de la CBE. Toutefois, vous pouvez faire une demande de réinscription sur la liste des mandataires agréés selon les règles en vigueur après avoir acquitté votre cotisation impayée, voir Règle 102(3).

Der Schatzmeister  
Claude Quintelier

The Treasurer  
Claude Quintelier

Le Trésorier  
Claude Quintelier

## Payment of epi subscription fees 2006

The possibility for Members of the Institute to pay the annual subscription by personal credit card was introduced last year after the relevant contracts had been settled with Lufthansa AirPlus Servicekarten GmbH for use of Visa- and Master-cards and with Dresdner Bank.

### **Credit card payment is at no charge to members.**

In order to pay by credit card the individual member of the *epi* transmits the data of his personal credit card to the Institute either by fax or by mail (not by e-mail!). The Secretariat recommends to copy the first page of the invoice form together with the credit card and to return this copy to the Secretariat. Additionally the member has to fill in the verification number of the credit card (i.e. the last three figures of the number on the rear side of the card). The rest of the transmitting procedure will be handled by the Secretariat.

In order to minimise the workload in processing accurately and efficiently subscription payments it is very important that independently of the transmitting way (credit card, direct debiting or bank transfer) **each payment can be clearly identified with a specific**

**member.** Obviously unidentifiable payments subsequently cause considerable problems for the Secretariat and in many instances unnecessary protracted correspondence.

It will be appreciated that the additional workload in sorting out these problem payments is very time consuming. Therefore the Secretariat requests your help and asks that all members personally ensure that their subscription payment – whether by credit card, by EPO deposit account (before February 15) or by bank transfer – gives as a basic level of information **your name and membership number.** For example when instructing a bank transfer payment please inform your bank that your name and membership number must be shown on the transfer advice sent to the *epi*.

If your firm or company is making a single payment to pay the subscriptions of a number of members please ensure that the name and membership number of each *epi* member covered by this single payment is given on a list accompanying the payment.



Bitte einreichen an:

Please return to:

Retournez s.v.p.

**epi-Sekretariat**  
**Postfach 26 01 12**  
**D-80058 München**

**Telefax 089 - 242052-20**

**Einzugsermächtigung**

**Direct debiting mandate**

**Autorisation de prélèvement**

**Eingangsfrist im epi-Sekretariat:**

**Deadline for receipt by the epi Secretariat:**

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

**15. Februar**

**15 February**

**15 février**

Bitte senden Sie diese Einzugsermächtigung oder eine Kopie hiervon **nur an das epi-Sekretariat**, nicht an das EPA.

Please, send this debiting mandate or a copy thereof **to the epi Secretariat only**, not to the EPO.

Veuillez envoyer cette autorisation de prélèvement ou une copie de celle-ci **uniquement au Secrétariat de l'epi**, pas à l'OEB.

Bitte verwenden Sie **nur dieses Formular**, gegebenenfalls mit einem gesonderten Blatt für die Namen mehrerer **epi**-Mitglieder. Wenn die Liste der **epi**-Mitglieder sich seit letztem Jahr geändert hat, schicken Sie bitte eine neue Einzugsermächtigung.

**Please use only this form**, if necessary with a separate sheet for the names of several **epi** members. If the list of **epi** members has changed since last year please send a new mandate.

**N'utilisez que ce formulaire**; ajoutez si nécessaire une feuille séparée pour les noms de plusieurs membres de **l'epi**. Si la liste des membres de **l'epi** a été modifiée depuis l'année dernière, envoyez s.v.p. une nouvelle autorisation de prélèvement.

Name/Vorname des <b>epi-Mitglieds</b> : <b>epi member's</b> surname/first name: Nom/prénom du <b>membre de l'epi</b>	
<b>epi-Mitgliedsnummer</b> : <b>epi membership number</b> : <b>Numéro d'affiliation à l'epi</b> :	
Die Einzugsermächtigung gilt für <b>mehrere epi-Mitglieder</b> Falls "ja", bitte ein gesondertes Blatt mit den Namen und Mitgliedsnummern beifügen.  This direct debiting mandate applies to <b>more than one epi member</b> If "yes", please list names and membership numbers on a separate sheet. <div style="float: right; text-align: right;">                     nein      ja  <input type="checkbox"/> no    <input type="checkbox"/> yes                      non        oui                 </div>	
L'autorisation de prélèvement s'applique <b>à plusieurs membres de l'epi</b> : Dans l'affirmative, prière de joindre au présent formulaire une feuille séparée portant le nom et le numéro de ces membres.	
Name des <b>Kontoinhabers</b> : <b>Account holder's</b> name: Nom du <b>titulaire du compte</b> :	
<b>Kontonummer</b> beim EPA: EPO <b>account number</b> : <b>Numéro de compte</b> auprès de l'OEB:	
_____ Datum · Date	_____ Unterschrift des <b>Kontoinhabers</b> · <b>Account holder's</b> signature Signature du <b>titulaire du compte</b>

**NOT FOR USE AFTER FEBRUARY 15**

## Einzugsermächtigung

### Eingangsfrist im *epi*-Sekretariat: 15. Februar

Das Institut der beim Europäischen Patentamt zugelassenen Vertreter (*epi*) wird hiermit ermächtigt, den *epi*-Jahresbeitrag für das auf der vorhergehenden Seite angegebene *epi*-Mitglied in der jeweils gültigen Höhe von dem vorstehend genannten und beim Europäischen Patentamt (EPA) geführten laufenden Konto einzuziehen. Die Einzugsermächtigung gilt für den nächstfälligen und künftig fällige Beiträge bis auf schriftlichen Widerruf. Sie gilt ebenso für offene Beiträge vergangener Jahre. 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).

Der Einzug des Beitrags erfolgt mit Wirkung vom 25. Februar des laufenden Jahres. Alle an das EPA am Abbuchungstag zu entrichtenden Gebühren und Auslagen gehen dem Einzug des *epi*-Beitrags vor. Mehrere Beiträge, die vom selben Konto abgebucht werden sollen, fasst das *epi* zu einem Gesamtbetrag zusammen. Demgemäß erteilt das *epi* dem EPA einen Abbuchungs-

auftrag über den Gesamtbetrag. Reicht das Guthaben nach Begleichung der vorrangigen EPA-Gebühren und Auslagen zur Ausführung des Abbuchungsauftrags des *epi* nicht aus oder trifft die vorliegende Einzugsermächtigung beim *epi* nach dem 15. Februar ein, kann der Abbuchungsauftrag nicht ausgeführt werden. Das *epi*-Mitglied wird über den fehlgeschlagenen Einzugsversuch informiert. Überweist es den Beitrag dann nicht bis spätestens 30. April (Kontoeingang) für das *epi* spesenfrei im normalen Bankverkehr, erfolgt ein Einzugsversuch des erhöhten Jahresbeitrags am 25. Juni. Schlägt auch dieser Versuch fehl, muss der erhöhte Beitrag im normalen Bankverkehr beglichen werden.

Mit Wirkung vom 25. Juni kann der Beitrag auch für *epi*-Mitglieder, die zum vorausgegangenen Abbuchungstag noch keine Einzugsermächtigung vorgelegt hatten, eingezogen werden. Eingangsfrist für die Einzugsermächtigung im *epi* ist hierfür der 15. Juni.

Falls ein gesondertes Blatt mit den Namen mehrerer *epi*-Mitglieder beigelegt wird, braucht es nicht gesondert unterschrieben zu werden.

## Direct debiting mandate

### Deadline for receipt by the *epi* Secretariat: 15 February

The Institute of Professional Representatives before the European Patent Office (*epi*) is hereby authorised to debit from the deposit account held with the European Patent Office (EPO) as specified on the previous page the *epi* annual subscription for the *epi* member named on the previous page at the appropriate rate. This direct debiting mandate applies to the forthcoming and all subsequent subscriptions until it is revoked in writing. It also applies to outstanding subscriptions from previous years. Debiting will be 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).

Subscriptions are debited with effect from 25 February of each year. All fees and costs payable to the EPO on the debiting date have priority over the *epi* subscription. The *epi* will combine several subscriptions to be debited from the same account into one overall sum, for which it will then issue the EPO with a debit order. If, after priority

payment of EPO fees and costs, the credit balance is not sufficient to carry out the *epi* debit order, or if the direct debiting mandate is received by the *epi* after 15 February, the debit order is not carried out. The *epi* member will be informed. Then, if the annual subscription has not been credited to the *epi* account through the standard banking procedure and at no expense to the *epi* by 30 April (reception on *epi* account), an attempt will be made to debit the higher annual subscription on 25 June. Should this attempt also prove unsuccessful, the higher annual subscription must be paid to the *epi* through the standard banking procedure.

Subscriptions of *epi* members who had not issued a direct debiting mandate by the previous debiting date may also be debited with effect from 25 June. The deadline for receipt of the direct debiting mandate by the *epi* is then 15 June.

If a separate sheet with the names of several *epi* members is enclosed, it does not need a separate signature.

## Autorisation de prélèvement

### Date limite de réception au Secrétariat de l'*epi*: 15 février

L'Institut des mandataires agréés près l'Office européen des brevets (*epi*) est autorisé par la présente à prélever, sur le compte courant ouvert à l'Office européen des brevets (OEB) dont le numéro est mentionné sur la page précédente, le montant en vigueur de la cotisation annuelle du membre de l'*epi* dont le nom figure sur la page précédente. La présente autorisation de prélèvement est valable pour la prochaine cotisation venant à échéance ainsi que pour les cotisations suivantes, jusqu'à révocation par écrit. Elle vaut également pour les cotisations des années précédentes non encore acquittées. 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 prélèvement de la cotisation prend effet le 25 février de l'année en cours. 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 à l'*epi*. L'*epi* regroupe en un seul montant plusieurs cotisations devant être débitées du même compte. A cette fin, l'*epi* donne à l'OEB un ordre de débit pour le montant

total. Si, après règlement prioritaire des taxes et des frais dûs à l'OEB, la provision du compte ne suffit pas pleinement pour exécuter l'ordre de débit de l'*epi* ou si la présente autorisation parvient à l'*epi* après le 15 février, l'ordre de débit ne peut être exécuté, et le membre en est informé. Si celui-ci ne vire pas le montant de la cotisation le 30 avril au plus tard (date d'inscription au compte de l'*epi*), par une opération bancaire normale et sans frais pour l'*epi*, il sera procédé, le 25 juin, au prélèvement du montant majoré de la cotisation annuelle. Au cas où ce prélèvement non plus ne peut être effectué, le montant majoré de la cotisation doit être acquitté par une opération bancaire normale.

Avec effet au 25 juin, il est également possible de prélever le montant de la cotisation annuelle des membres de l'*epi* n'ayant pas produit d'autorisation de prélèvement à la date de débit précédente. A cette fin, la date limite de réception des autorisations de prélèvement par l'*epi* est le 15 juin.

S'il est joint une feuille séparée portant le nom de plusieurs membres de l'*epi*, il n'est pas nécessaire de la signer.

## Regeln für die Zahlung der epi-Mitgliedsbeiträge

### Beschluss des *epi* Rates auf seiner Sitzung in Kopenhagen am 11./12. Mai 1992

- 1) Der jährliche *epi* Mitgliedsbeitrag ist innerhalb von zwei Monaten nach Fälligkeit zu zahlen, und zwar vor dem 1. März.
- 2) Für Mitglieder, die bereits zu Anfang eines Jahres in die Liste der zugelassenen Vertreter eingeschrieben sind, ist das Fälligkeitsdatum der 1. Januar.
- 3) Für Mitglieder, die erst im Verlauf eines Jahres in die Liste der zugelassenen Vertreter aufgenommen werden, ist das Fälligkeitsdatum der Tag der Eintragung in die Liste.
- 4) Der jährliche Mitgliedsbeitrag wird erlassen, wenn
  - der schriftliche Antrag des Mitgliedes auf Löschung von der Liste der zugelassenen Vertreter vor dem 1. April beim Europäischen Patentamt eingeht;
  - eine Person nach dem 30. September in die Liste der zugelassenen Vertreter aufgenommen wird.
- 5) In allen anderen Fällen muss der volle jährliche Mitgliedsbeitrag bezahlt werden. Ratenzahlungen, Stundungen oder Beitragsreduzierungen können nicht gewährt werden.
- 6) Zahlt ein Mitglied, das bereits zu Anfang des Jahres auf der Liste der zugelassenen Vertreter stand, seinen Beitrag nicht vor dem 1. Mai (Eingang auf dem *epi* Konto), ist sein Beitrag EUR 175.–. Gleiches gilt für Mitglieder, die erst im Verlauf des Jahres in die Liste der zugelassenen Vertreter aufgenommen

worden sind, falls sie ihren Mitgliedsbeitrag nicht innerhalb von vier Monaten nachdem sie durch „epi-Information“ oder einen Brief über seine Höhe informiert worden sind, zahlen.

- 7) Soweit die Zahlung mittels Banküberweisungen erfolgt, hat dies in Euros und frei von Bankspesen für *epi* zu geschehen. Dabei sind der Name und die Mitgliedsnummer jedes einzelnen Mitglieds, für das die Zahlung erfolgt, anzugeben.
- 8) Wegen der beachtlichen Bankgebühren und darüber hinaus wegen des zusätzlichen Verwaltungsaufwand werden keine Schecks angenommen.
- 9) Der *epi*-Rat beschließt Änderungen des Mitgliedsbeitrages vor Anfang des Folgejahres. Er informiert alle Mitglieder durch „epi-Information“ über den

neuen Beitragsbetrag und die Zahlungsmodalitäten. Alle Mitglieder, von denen angenommen werden kann, dass sie die entsprechende „epi-Information“ erhalten haben, müssen Zahlungsvorkehrungen innerhalb der oben genannten Zeitspanne treffen, ohne dass eine zusätzliche Aufforderung hierzu erfolgt. Der Schatzmeister wird jedoch zu Beginn eines Jahres bzw. bei neuen Mitgliedern nach Eintragung in die Liste zusätzlich Rechnungen an alle Mitglieder verschicken. Verspätete Zahler, von denen angenommen werden kann, dass sie die oben genannte „epi-Information“ erhalten haben, können sich aber nicht darauf berufen, diese Rechnung nicht erhalten zu haben.

## Rules Governing Payment of the epi Annual Membership Fee

### Decision taken by the *epi* Council at its meeting in Copenhagen on 11/12 May 1992

- 1) The *epi* annual membership fee has to be paid within two months after its due date, namely before March 1<sup>st</sup>
- 2) The due date for members being on the list of professional representatives at the beginning of the year is 1 January.
- 3) The due date for members entering the list of professional representatives in the course of the year is the moment of entry on this list.
- 4) The annual membership fee is waived if
  - a member's written demand for deletion from the list of professional representatives arrives at the European Patent Office prior to 1 April;
  - a person is registered on the list of professional representatives after 30 September.
- 5) In all other cases the entire annual membership fee has to be paid. No instalments, extensions of the term of payment, or reduction of payment may be granted.
- 6) Members on the list of professional representatives on 1 January who fail to pay their membership fee prior to 1 May (reception on *epi* account) will have to pay a subscription of EUR 175.– . The same applies to members who entered the list during
  - the course of the year if they have not paid the fee within four months after being notified of its amount through „epi Information“ or by letter.
- 7) Payments by money transfers have to be made in Euros and free of bank charges for *epi*. They must indicate the name and registration number of each member for whom the fee is paid.
- 8) Due to the substantial bank charges and furthermore to the additional administrative requirements no personal cheques will be accepted.
- 9) The *epi* Council decides on modifications of the amount of the annual membership fee before the beginning of a year. It informs all members through „epi Information“ of the new amount of the fee and the conditions for payment. All members deemed to have received the respective „epi Information“ will have to make provisions for payment within the above mentioned time-limit without further request. The Treasurer will, however, also send out fee invoices to all members at the beginning of the year or to new members after their registration. Late payers deemed to have received the before mentioned „epi Information“ may not plead not having received this invoice.

## Règles relatives au paiement de la cotisation annuelle epi

### Décision prise par le Conseil de l'*epi* à la réunion de Copenhague les 11 et 12 mai 1992

- 1) Le paiement de la cotisation annuelle *epi* est dû dans les deux mois qui suivent la date d'exigibilité, c.à.d. avant le 1<sup>er</sup> mars.
- 2) La date d'exigibilité pour les personnes inscrites sur la liste des mandataires agréés au début de l'année est le 1er janvier.
- 3) La date d'exigibilité pour les personnes admises sur la liste des mandataires agréés en cours d'année est la date d'admission sur cette liste.
- 4) N'est pas redevable de la cotisation de l'année en cours:
  - un membre qui demande par écrit à l'OEB sa radiation de la liste des mandataires agréés avant le 1er avril;
  - toute personne inscrite sur la liste des mandataires agréés après le 30 septembre.
- 5) La cotisation annuelle doit être payée dans son intégralité dans tous les autres cas. Aucun versement partiel, report d'échéance ou réduction du montant ne peut être accepté.
- 6) Toute personne inscrite sur la liste des mandataires agréés au 1er janvier et dont la cotisation n'est pas payée avant le 1er mai (date de réception sur le compte de l'*epi*) doit payer une cotisation de EUR 175.–. Ceci s'applique également à toutes les personnes inscrites sur la liste en cours d'année, dont la cotisation n'est pas réglée dans les quatre mois qui suivent la notification dans „epi Information” ou par lettre.
- 7) Les paiements par virement doivent être faits en Euros, sans frais bancaires pour l'*epi*. Le nom et le numéro d'affiliation de la/les personne(s) pour qui la cotisation est destinée doivent être indiqués clairement sur le virement.
- 8) Les chèques ne sont pas acceptés en raison des frais bancaires importants et du supplément de travail que leur traitement nécessite.
- 9) Le Conseil de l'*epi* décide des modifications du montant de la cotisation annuelle avant le début de l'année. Tous les membres sont informés par „epi Information” du nouveau montant de la cotisation et des conditions de paiement. Toute personne qui, en tant que membre, reçoit „epi Information” devra s'assurer que sa cotisation est payée dans le délai imparti, ci-dessus mentionné, sans autre notification. Le Trésorier enverra toutefois aussi un appel de cotisation à tous les membres au début de l'année, de même qu'aux nouveaux membres après leur inscription. Toute personne recevant en tant que membre „epi Information”, mentionné plus haut, et n'ayant pas payé sa cotisation à temps ne pourra pas alléguer qu'elle n'a pas reçu l'appel de cotisation.

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## RESULTS OF THE EUROPEAN QUALIFYING EXAMINATION 2005

### FIRST SITTING – Examination in full and modular sitting

Nationality	Candidates (in total)	PASSED				FAILED			
		Total	%	Examina- tion in full	modular sitting (2modules)	Total	%	Examina- tion in full	modular sitting (2modules)
AT	11	5	45,5	3	2	6	54,5	6	0
AU	1	1	100,0	1	0	0	0,0	0	0
BE	18	6	33,3	2	4	12	66,7	11	1
CH	14	4	28,6	3	1	10	71,4	10	0
DE	227	67	29,5	55	12	160	70,5	138	22
DK	21	6	28,6	4	2	15	71,4	11	4
ES	7	3	42,9	0	3	4	57,1	1	3
FI	15	1	6,7	1	0	14	93,3	11	3
FR	77	30	39,0	19	11	47	61,0	31	16
GB	147	68	46,3	63	5	79	53,7	68	11
HU	1	0	0,0	0	0	1	100,0	1	0
IE	7	2	28,6	2	0	5	71,4	3	2
IN	1	0	0,0	0	0	1	100,0	1	0
IT	33	10	30,3	3	7	23	69,7	9	14
LI	1	0	0,0	0	0	1	100,0	0	1
LU	1	0	0,0	0	0	1	100,0	1	0
NL	33	16	48,5	12	4	17	51,5	17	0
NZ	2	0	0,0	0	0	2	100,0	2	0
PT	1	1	100,0	1	0	0	0,0	0	0
RO	1	0	0,0	0	0	1	100,0	1	0
RU	1	0	0,0	0	0	1	100,0	0	1
SE	35	8	22,9	4	4	27	77,1	14	13
TR	1	0	0,0	0	0	1	100,0	1	0
UA	1	0	0,0	0	0	1	100,0	1	0
US	2	0	0,0	0	0	2	100,0	2	0
ZA	1	0	0,0	0	0	1	100,0	1	0
<b>TOTAL</b>	<b>660</b>	<b>228</b>	<b>34,5%</b>	<b>173</b>	<b>55</b>	<b>432</b>	<b>65,5%</b>	<b>341</b>	<b>91</b>

RESITTING -Examination in full  
 Total number of candidates: 68  
 Passed: 1 (1,47%); Failed: 67 (98,53%)

RESITTING – Examination in part  
 Total number of candidates: 895  
 Passed: 283 (31,62%); Failed: 612 (68,38%)



## 51<sup>st</sup> Council Meeting of the Asian Patent Attorneys (APAA) New Delhi, 12<sup>th</sup> – 15<sup>th</sup> November, 2005

T. Johnson (GB)

The *epi* was invited as a guest of APAA to attend its 51<sup>st</sup> Council Meeting.

Other Organisations invited were AIPLA, AIPPI, ECTA, ASEAN-IPA, FICPI, GACG, LESI and WIPO. Each one was specifically referred to and welcomed during the opening ceremony.

APAA had arranged two Workshops, one on Patent Harmonization – now termed convergence in some quarters – and the Madrid Protocol and its effect on trade marks in the Asian Region. Both Workshops were well attended. APAA will continue its study of the topics.

There was a special lunch meeting for APAA Council members and the invited guest organisations which included on this occasion a representative of the Indian Government. Each organisation *via* its representative

was invited to give a short address. For the *epi* I thanked the APAA in the name of our President, Board and Council for the invitation, gave a brief history of the Institute and its anchoring in the Founding Regulation of the European Patent Organisation, and gave a brief résumé of topics of current interest to the *epi*, with special emphasis on qualification as a European Patent Attorney, to provide a pool of quality, qualified practitioners to represent clients before the EPO.

I mentioned other topics of interest arising from our recent Council Meeting in Bucharest.

I concluded by saying that the *epi* would hope to be able to continue with its cooperation with the APAA over the coming years on matters of mutual interest.

### epi Art Exhibition 2006

As reported in issue 3/2005 of *epi* Information the next *epi* Art Exhibition will be held from

**16 February to 3 March 2006**

at the European Patent Office, Erhardtstrasse, Munich.

The opening will take place on Thursday, 16 February at 6 p.m.

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## The Community Patent Court: a tower of Babel?

### The linguistic regime in patent infringement proceedings before the European Court of Justice, the Community Patent Court and the European Patent Court. Problems and possible solutions<sup>1</sup>.

Y. Savatier<sup>2</sup> (FR)

*Due to the highly technical character of patent law litigation, the linguistic regime of the proposed Community Patent Court, modelled on that of the European Court of Justice, risks transforming that Court into a tower of Babel. The three-language regime of the proposed European Patent Court appears to be more adequate: it could build on more than 25 years of European patent law and practice, in particular the numerous decisions of the EPO Boards of Appeal.*

#### INTRODUCTION

Europe is formed of a wide variety of independent nations, each of which has its own civilisations, traditions, roots and cultures embedded in one or more languages. While some languages are more important than others as regards the number of speakers, there is no single dominating language in the whole of Europe, in contrast to the situation in the United States, Japan or China. Due to the close relationship between languages and national, social and cultural identities<sup>3</sup>, the language issue has always been a politically sensitive subject and consequently a stumbling block in the construction of Europe's supranational law and institutions.

Belgium, France, Germany, Italy, Luxemburg and the Netherlands first signed the treaty establishing the European Coal and Steel Community (ECSC) in Paris on 18 April 1951, then in Rome on 25 March 1957 two treaties establishing the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). These countries decided that a single Court, the Court of Justice of the European Communities (briefly referred to as the European Court of Justice, ECJ) would serve to interpret community law for each of those communities. For the ECSC Treaty which expired on 1 January 2003, the only authentic version is the French version, but the EEC and Euratom Treaties have an authentic version in each of the

official languages of the Member States. Community law is thus multilingual, each of the official languages of the Member States being treated equally. This principle was maintained upon accession of new Member States and amendments of the EEC Treaty by the Single European Act of 17 February 1986, the Maastricht Treaty on European Union of 26 February 1992, the Amsterdam Treaty of 2 October 1997 and the Nice Treaty of 26 February 2001. Since 1 May 2004, the European Union (EU) has 25 Member States, which have 21 official languages.

On 7 October 1977 the European Patent Convention (EPC) came into force. It is authentically drafted in three languages: English, French and German. The EPC established a new system of patent law and a new patent granting authority for all Contracting States, the European Patent Office (EPO). The EPO grants European patents drafted in English, French or German, which after grant and translation (if necessary) have the same effects as national patents in each of the designated contracting States. Validity and infringement can then be litigated before the national courts of the Contracting States. Since 1 July 2005, there are 31 Contracting States, including all Member States of the EU except Malta.

Despite harmonisation of national laws regarding patentability and to some extent the interpretation of claims, the law as regards validity and infringement of European patents has received differing interpretations by the different national courts of the Contracting States. Besides, the court procedures and practices adopted in each of those countries differ widely.

Furthermore, due in particular to translation requirements, the cost of a European patent validated in all Contracting States is considerably higher than that of a US, Japanese or Chinese patent.

Since the early 2000s there have been two separate ongoing projects for dealing with those problems<sup>4-12</sup>

1 This paper is based on the author's oral presentation on 10 June 2005 in the framework of the CEIPI-EPI course on Patent Litigation in Europe. A French version of this paper was published in "Propriété Industrielle", November 20, 2005, pages 18-20.

2 Yves Savatier, MOINAS & SAVOYE SA, Geneva

3 "Un peuple qui perd sa langue, perd son âme", Frédéric Mistral  
"Un peuple qui perd sa langue, perd sa voix dans le concert des nations", Paul Valéry

4 Stefan Luginbühl, "Streitregelungübereinkommen vs. Gemeinschaftspatent", 2004 GRUR Int. 357, and "A New Court would help resolve the European Patent Mess", European Affairs, Winter/2003 109.

5 Jan Willems, "Ways and roadblocks: the EPLA and the Community patent", Special edition No. 2, 2003 OJ EPO 190.

6 Jürgen Schade, "The Protocol on Litigation under the EPC and the Commission's proposal for a Community Patent" Special edition No. 2, 2001 OJ EPO 170.

The first project is the Proposal of the European Commission for a Council Regulation on the Community Patent, commonly referred to as the Community Patent Regulation (CPR), presented on 5 July 2000, the latest version of which was published on 8 March 2004<sup>14</sup>. The CPR provides for a unitary and autonomous Community patent to be granted by the EPO for the whole territory of the EU and a centralised Community Patent Court (CPC) having exclusive jurisdiction in first instance in matters of nullity actions, infringement actions, actions for declaration of non-infringement and counterclaims for invalidity, with possibility of appeal before the Court of First Instance of the ECJ.

The second project is the draft European Patent Litigation Agreement (EPLA) that is being considered by the EPO Working Party on Litigation on behalf of certain States that are parties to the EPC, which are interested in harmonising litigation procedures. This working party was mandated by the intergovernmental conferences of Paris in June 1999, and London in October 2000. The latest version of this project was published on 13 September 2005<sup>15</sup>. The EPLA provides for a European Patent Court including a Court of first instance with a Central Division and Regional Divisions, and a Court of Appeal, which would have exclusive jurisdiction where a defendant is domiciled in a Contracting State, in respect of actions for actual or threatened infringement, actions and counterclaims for revocation of European patents.

This paper will first present the linguistic regime in patent infringement proceedings before the European Court of Justice, the Community Patent Court and the European Patent Court, and then discuss for the ongoing projects a few problems and possible solutions.

## I. The linguistic regime in patent infringement proceedings

### 1. *The linguistic regime in patent infringement proceedings before the European Court of Justice (ECJ)*<sup>13</sup>

In an action for infringement of a patent right before a national court, the defendant may rely on community law provisions relating to the free movements of goods, in particular Articles 28 to 30 of the EC treaty, or he may question the validity of national law provisions under

7 Uwe Dreiss and Christof Keussen, "The Community Patent in Litigation" epi Information 1/2002, pp. 18-26

8 Rowan Freeland, "Litigation of Patents in Europe: the proposed European Patent Litigation Protocol and the Proposed Community Patent" epi Information 1/2004, pp. 10-21

9 Thierry Schuffenecker, "The fundamental structure of the EPLA Court Statute" Control Topics of CEIPI-EPI course on Patent Litigation in Europe 2003/2004, pp. 59-63 (CEIPI library).

10 Laurent Nuss, "Main differences between the European Patent Litigation Agreement and the jurisdictional system of the Community Patent Regulation" Control Topics of CEIPI-EPI course on Patent Litigation in Europe 2003/2004, pp. 8-9 (CEIPI library).

11 Harrie Temmink, DG Internal Market, European Commission "Status of the European Patent Law Reform", International Patent Litigation conference, London, 29-30 September, 2004.

12 Tony Rollins, MERCK SHARP & DOHME "Status of the European Patent Law Reform", International Patent Litigation conference, London, 29-30 September, 2004.

13 "Brown and Jacobs: The Court of Justice of the European Communities", L. Neville Brown and Tom Kennedy, Sweet & Maxwell 2000.

community law (e.g. with regard to Council Regulation EC 44/2002 on jurisdiction, recognition and enforcement of judgements, Directive 98/44/EC on protection of biotechnological inventions, or Directive 2004/48/EC on enforcement of intellectual property rights). The national Court then has the option of deciding, upon request by the parties, one of them, or of its own motion, to refer the case to the European Court of Justice for a preliminary ruling ("renvoi préjudiciel"). The parties in the patent infringement proceedings are not formal parties in such proceedings but they have the opportunity to submit observations to the Court, both in writing and at an oral hearing.

The language of proceedings is that of the national court that made the reference, i.e. any of the 21 official languages of the Member States. But a Member State retains its right to file observations in its own language. The Advocate General is free to deliver his opinion in his own language.

For historical and practical reasons, French has been adopted as the internal working language of the Court. Deliberations are conducted in French and judgments are first drafted in that language, then translated into the language of the proceedings. The final version in the language of proceedings is, however, the authentic version.

The situation would not be changed should the CPR project and/or the EPLA project come into force. The ECJ would retain its exclusive jurisdiction for preliminary rulings.

### 2. *The linguistic regime in patent infringement proceedings before the Community Patent Court (CPC)*<sup>14</sup>

#### *Translation of Community patents*

The linguistic regime for an application for a Community patent would be, until grant of the patent, substantially the same as that for a European patent application under the present European Patent Convention. The application would have to be filed in, or translated into an Official language of the EPO, which would become the language of proceedings before the EPO.

After grant, a translation of the claims (but not of the specification) would have to be filed in all of the official languages of the Member States, except for Member States who would waive the translation requirement.

#### *In proceedings before the Community Patent Court*

The CPC would conduct proceedings in the official language of the Member State where the defendant is domiciled, or in one of them to be chosen by the defendant if that State has more than one official language. Where the defendant is not domiciled in the European Union, the language of the proceedings would be the language of the EPO proceedings.

14 Proposal for a Council Regulation on the Community Patent of 8 March 2004 Annex I, Proposal for a Council decision establishing the Community Patent Court and concerning appeals before the Community Patent Court of 23 December 2003, and Proposal for a Council decision conferring jurisdiction to the Court of Justice for disputes relating to the community patent of 23 December 2003.

However, at the request of the parties and with the consent of the CPC, any official language of the European Union could be chosen as the language of the proceedings.

The CPC could hear parties, witnesses and experts in a language other than the language of the proceedings. Interpretation would then be provided into the language of the proceedings and, at the request of any party, into the language used by that party in accordance with the Rules of Procedure.

The CPC could allow submissions of accompanying documents in a language other than the language of the proceedings, thus avoiding unnecessary and costly translations. However the Court could order the submission of a translation into the language of the proceedings.

The language of the appellate proceedings would be the language of the first instance proceedings.

### 3. *The linguistic regime in patent infringement proceedings before the European Patent Court*<sup>15</sup>

The EPLA refers in its introductory part to the London Agreement.

#### *Translation of European patents under the London Agreement*

Any State having as an official language English, French or German would agree to dispense with the need to translate the European patent.

Any State not having as an official language English, French or German would agree to dispense with the translation of the European patent if the latter has been granted, or a translation thereof has been supplied, in an Official language of the EPO of its choice. Such a State could still require a translation of the claims (but not of the specification) under the conditions of Article 65(1) EPC.

Any State could provide that in case of litigation, a complete translation of the European patent in an official language of that State must be provided at the request of the alleged infringer, or the competent court or quasi-judicial authority.

#### *In proceedings before the European Patent Court*

The language of the proceedings before the Central Division of the Court of first instance would be the language of proceedings before the EPO.

The language of the proceedings before a Regional Division of the Court of first instance located in a State having as an official language one of the official languages of the EPO would be that official language.

The language of the proceedings before a Regional Division of the Court of first instance located in a State having as official language either no or several official languages of the EPO would be the official language of the EPO designated by that State.

However if the parties and the Court agree, the language of the proceedings could be any other official language of the EPO, and any language other than the language of the proceedings could be used during all or part of the proceedings.

The language of the appellate proceedings would be the language of the first instance proceedings.

## II Problems and possible solutions

Before the European Patent Court, the language of proceedings would be English, French or German, whereas before the Community Patent Court, the language of proceedings could be any of the 21 official languages of the Member States.

The CPC, let alone the specialised Chamber of the Court of First instance dealing with appeals, could not have among its judges persons with a good command of each of those 21 official languages. Translations and interpretations would hence frequently be necessary throughout the proceedings, making them generally clumsy and costly, and possibly in some cases unworkable, for everyone except the defendant. Translation and interpretation would absorb a large part of the human and financial resources of the CPC. In respect of some of the official languages having a limited number of speakers and/or of Member States with little tradition in patent law (e.g. Malta), it would probably be extremely difficult both for the claimant and the CPC to find translators and interpreters knowledgeable in all technical fields concerned by patent law. The linguistic advantage that a defendant alleged infringer currently has in judicial proceedings, of using his domestic language within the territory where he is domiciled and that is covered by the national part of a European patent, would thus be increased, being extended to the whole territory of the Community. This would not contribute to making the Community patent attractive to industry.

The pragmatic suggestion proposed by the EPLA, which consists of using as the language of the proceedings one of the three official languages of the EPO (i.e., English, French or German), would on the contrary facilitate the enforcement of patents, by allowing a patentee to sue an alleged infringer in a language understood by himself and/or competent European Patent Attorneys, patent specialists and lawyers. Indeed, thanks to the outstanding success of the European Patent over the last 25 years, there are such persons in every European country, who are familiar with the different aspects of European patent law and practice, and in particular the official languages of the EPO. The EPLA would thus prevent a potential infringer from taking abusive shelter of a linguistic advantage.

The EPLA could come into force independently of the London Agreement.

The great cultural, social and linguistic diversity of the EU represents a wealth and a potential for Europe's future that it is desirable to preserve. The linguistic regime of the EJC, like that of other Community Insti-

<sup>15</sup> Draft Agreement on the establishment of a European patent litigation system and Draft Statute of the European Patent Court. Working Party on Litigation on 13 September 2005.

See also the European Patent Convention as revised on 29 November 2000 and the London Agreement on application of Article 65 EPC of 17 October 2000, which are referred to in the Draft Agreement and Draft Statute mentioned above, respectively.



tutions, is conceived to preserve this diversity, which is an important aspect of our European identity.

However, upholding any particular diversity has its price and a reasonable balance should be kept between this price and the advantages brought by this diversity. Patent litigation is a highly technical subject matter that is understood by a very small part of the population (typically people having a scientific or engineering degree who are familiar with patent law) and hence represents only a minor aspect of a country's culture. Upholding linguistic diversity in the language of the proceedings would thus have little bearing on preserving cultural and social diversity within the EU, but the economic costs would be unacceptably high. Indeed, as set forth above, allowing the use of any of the 21 official languages of the European Union as the language of the proceedings before the CPC would be difficult and costly to implement, and more seriously, it would not allow proper enforcement of the Community patent. Indeed, the CPC would run the risk of being transformed into a tower of Babel where neither the judges, nor the claimant could understand the language of the proceedings, and all submissions, apart from those of the defendant alleged infringer, could become lost in translation.

The three-language regime of the EPO is a pragmatic solution, more in agreement with our European identity than a one-language regime, and more efficient than a regime with too many languages. The extension of the three-language regime to litigation of European patents or Community patents granted by the EPO, would appear to be the most natural and consistent extension of the present law. It could build on the current practice of European patent law, in particular the numerous decisions of the Boards of the Appeal of the EPO.

In the current political context, it seems unlikely that the CPR as proposed will become law.

Hopefully, the European Commission will no longer oppose the EPLA and the latter will come into force in the near future. By improving the enforcement of patents, notably building on the linguistic regime currently in place, which has already proved its efficiency and ease of use, the EPLA would contribute to the Lisbon objective of increasing the competitiveness of European industry by boosting research and innovation. The linguistic regime of the European Patent Court could serve as a useful foundation for a future Community Patent Court.

## Alternatives to 'Disclaimer' decision G1/03

E. Nederlof (NL)<sup>1</sup>

### Introduction

In G1/03<sup>2</sup>, the Enlarged Board of Appeal (EBA) has formulated conditions for the amendment of a claim by the incorporation of a disclaimer. These were formulated on the basis of both Art. 123(2) and 84 EPC. From said Art. 123(2) it follows that the subject matter of an amended claim should not extend beyond the content of the application as filed. In other words, said subject matter should be disclosed in the application as filed. Apparently, the EBA assumed that the 'subject matter' of a claim is amended by the mere incorporation of a disclaimer. For, in the opposite case, Art. 123(2) would of course not come into play at all.

In most cases a disclaimer has no basis in the application as filed. Fortunately, the EBA in G1/03 has confirmed that a disclaimer does not have to be disclosed in the application as filed for it to be allowable under Art. 123(2). In G1/03 it has been laid down in a *limitative* way in which cases such 'undisclosed' disclaimer may be

allowable under Art. 123(2).<sup>3</sup> First of all, an undisclosed disclaimer may be incorporated in a claim with the purpose of rendering it novel over an anticipation. A second type of allowable cases is that of excluding subject matter which, under Art. 52-57, is not patentable for non-technical reasons. According to G1/03, the disclaimer should *only* remove the matter that is not novel or not patentable for non-technical reasons. In addition, the EBA has specifically stated that an undisclosed disclaimer which is or becomes relevant for the assessment of inventive step or sufficiency of disclosure adds subject-matter contrary to Art. 123(2). This means, for example, that an undisclosed disclaimer should not exclude non-inventive matter. That is to say, an undisclosed disclaimer should not render inventive an invention which as such, without the disclaimer, does not involve an inventive step.

Schulze derives from G1/03 a third type of allowable cases under Art. 123(2), namely the use of 'double negation' disclaimers for complying with Art. 123(3).<sup>4</sup>

1 The author of this article has written a thesis about the conditions for the use of disclaimers. Copies of the original Dutch text of said thesis and/or an English translation thereof will be emailed upon request. For the author's contact details reference is made to the European Patent Attorneys' database on the EPO website.

2 G1/03 (OJ EPO 2004, 413).

3 From 2.6.5 of the reasons of G1/03 it follows that an undisclosed disclaimer may not be incorporated for a purpose different from the purposes as identified in G1/03.

4 Schulze, Escaping the inescapable – G 1/03 leads out of The Trap, epi Information, 2005, 83-84.

He intends to use such disclaimers in the post-grant phase as a replacement of a positively defined feature added contrary to Art. 123(2) before grant. By such replacement Art. 123(2) is complied with without contravening Art. 123(3). That is to say, the undisclosed feature no longer belongs to the subject matter of the claim within the meaning of Art. 123(2), whereas it still determines, by means of the added 'double negation' disclaimer, its scope of protection within the meaning of Art. 123(3). In my opinion, however, there is no support in G1/03 for the use of an undisclosed disclaimer with the purpose of complying with Art. 123(3). For, such use is not one of the types of allowable cases of undisclosed disclaimers under Art. 123(2) that have been laid down in G1/03 in a *limitative* way.<sup>5</sup>

According to G1/03, an undisclosed disclaimer is allowable if it is necessary to render a claim novel over an anticipation from the *fictitious* state of the art under Art. 54(3). At the time of filing his application, the patent applicant would not have been able to take into consideration such fictitious state of the art, not having been published yet at that time.<sup>6</sup> Further, an undisclosed disclaimer may be used to exclude matter disclosed in an anticipation from the *real* state of the art under Art. 54(2), as long as said anticipation is an 'accidental' anticipation. The EBA in G1/03 considers an anticipation as 'accidental' if 'it is so unrelated to and remote from the claimed invention that the person skilled in the art would never have taken it into consideration when making the invention'.

As mentioned above, an undisclosed disclaimer may not be or become relevant for the assessment of inventive step. From Art. 56 it follows that in such assessment the fictitious state of the art is not to be considered. As far as the real state of the art is concerned, it appears that the EBA in G1/03 links the concept of 'accidental' character to any (ir)relevance the anticipation might have for the assessment of inventive step. For it is mentioned in the reasons of G1/03, that an 'accidental' anticipation is an anticipation which is completely irrelevant for the assessment of inventive step of the invention, and would therefore not be considered in such assessment. More especially, an anticipation may be considered 'accidental' if the anticipation belongs to a remote technical field and concerns a dissimilar technical problem. From the reasons of G1/03 it also follows that said two elements of technical field and technical problem, should not be considered in isolation but in combination.

### G1/03 criticised

In my opinion, the greatest disadvantage of the G1/03 decision is that the EBA has maintained a distinction between accidental and non-accidental anticipations.

<sup>5</sup> Furthermore, a patentee can be held accountable for the pre-grant addition of an undisclosed feature since at that time he could have been aware of the complete content of the application as filed. Apart from that, it is likely that a claim containing a 'double negation' disclaimer violates the clarity requirement of Art. 84.

<sup>6</sup> Except in a case where the earlier and later applicant are identical.

The legal security of both patent applicants/patentees and third parties is thereby not strengthened. In addition, the right of the patent applicant/patentee to a fair protection is jeopardised.

First of all, there is question of a great, subjective room for judgment regarding the '(non-)accidental' character of an anticipation. For the above-mentioned terms 'remote technical field' and 'dissimilar technical problem' are relatively vague and unclear. The judgment about the 'accidental' character of an anticipation will often be based on a subjective evaluation of the facts in a specific case. This may lead to unpredictable and divergent decisions (of different deciding bodies), and therefore to a reduction of legal security.

The judgement as to whether or not an anticipation is 'accidental' should be based on an assessment of the relevance thereof for inventive step. With that the similarity between the technical problem of the anticipation and that of the invention is of importance. Due to said relevance for inventive step, the *objective* technical problem which the invention solves over the closest prior art, is to be formulated. This implies that all steps, except the last one, of the 'problem-and-solution approach' applied in the assessment of inventive step should be performed. In my opinion, the assessment of novelty when assessing the allowability under Art. 123(2) of a claim containing an undisclosed disclaimer, and the assessment of inventive step (which is of a more subjective nature) should be strictly separated from each other. Furthermore, this (partial) assessment of inventive step in the test against Art. 123(2) has a number of characteristics which also have an adverse effect on legal security. It may, for example, occur that the objective technical problem is reformulated by different deciding bodies in the course of time, possibly in light of prior art discovered later.<sup>7</sup> Further, the question as to whether one or the other disclosure forms the closest prior art, mostly implies a subjective evaluation. The decision with respect to the objective technical problem is therefore often an arbitrary one. Because of this, any judgement on the 'accidental' character of an anticipation is always subject to change.

Further, it may occur that an anticipation *as such* does not take away inventive step of a claim, but is nonetheless considered to be a 'non-accidental' anticipation. Because in such a case a disclaimer is unallowable, a patent for a (partially non-novel) inventive invention might not be obtained or might turn out not to be valid. This jeopardises the right to a fair protection. A special disadvantage is that when in a post-grant procedure the disclaimer is considered yet unallowable under Art. 123(2), merely removing the disclaimer is not the solution because of Art. 123(3). This may result in that a patent is invalid in retrospect.

As discussed above, the EBA in G1/03 admitted a number of exceptions to the general disclosure requirement of Art. 123(2) with respect to undisclosed dis-

<sup>7</sup> The Board of Appeal in T323/97 (OJ EPO 2002, 476) specifically pointed to (the disadvantage of) this possibility of reformulation of the technical problem.



claimers. Said exceptions are justified by the EBA in that in the allowable cases the disclaimer cannot provide a 'technical contribution' to the claimed subject matter but merely limits the scope of protection. The term 'technical contribution' originates from an earlier decision of the EBA, namely G1/93<sup>8</sup>. G1/93 relates, in a general sense, to the allowability under Art. 123(2) of incorporating an undisclosed (limiting) feature in a claim. There would be question of such a 'technical contribution' if a claim without disclaimer does not involve an inventive step and the claim with disclaimer does. In such a case the disclaimer provides a contribution to inventive step. According to G1/93, the underlying idea of Art. 123(2) is that a patent applicant shall not be allowed to improve his position by adding matter not disclosed in the application as filed. For this would give the patent applicant an unwarranted advantage. Further this could be damaging to the legal security of third parties relying on the content of the original application. Said underlying idea of Art. 123(2) should also be taken into account in any alternative approach to G1/03.

### **1st Alternative approach: Is it really necessary to distinguish between accidental and non-accidental anticipations?**

Since the distinction between accidental and non-accidental anticipations results in the disadvantages as mentioned above, the first obvious alternative would be not to make such distinction any longer. The EBA in G1/03, however, rejected such an alternative approach.

In said 1st alternative approach a disclaimer is always allowable under Art. 123(2), as long as it is necessary to render the claim novel over an anticipation, whether accidental or non-accidental. However, in said approach it should nonetheless be avoided that the undisclosed disclaimer provides a 'technical contribution' within the meaning of G1/93. This is avoided by just 'ignoring' the disclaimer in the assessment of inventive step. Consequently, the disclaimer may indeed contribute to novelty but not to inventive step. This approach corresponds with a standpoint taken by a Board of Appeal in T871/96<sup>9</sup> (4.2 of the reasons). Said standpoint implied that 'the limiting clause represented by the disclaimer is meaningless in assessing the inventive step'. Therefore, it has to be ignored. Consequently, distinguishing between accidental and non-accidental anticipations is unnecessary.

In current practice of drafting patent applications, applicants normally draft fall-back positions for preferred embodiments. A main claim can be limited to one of those preferred embodiments if it would not be novel or would not involve an inventive step. Usually, the applicant has shown that the preferred embodiments solve the technical problem as described in the application. The EBA in G1/03 fears that said practice would be abandoned if undisclosed disclaimers would be allowed

which exclude matter disclosed in 'non-accidental' anticipations. In my opinion, said fear of the EBA is unfounded. Amongst other things, because said practice has emanated from the need to fulfil both the requirements of novelty and inventive step *and* the requirement under Art. 123(2). It is especially of importance that in the assessment of inventive step the problem-and-solution approach is applied. Further, it is of importance that, according to jurisprudence of the Boards of Appeal<sup>10</sup>, it is required that the technical problem can be derived from the application as filed.

Since in the above-mentioned alternative approach a disclaimer cannot be used to improve inventive step, in some cases one might still have to fall back on a preferred embodiment in order to 'restore' inventive step. However, this is only allowable under Art. 123(2) if there is a basis in the application as filed for such preferred embodiment. In my thesis<sup>11</sup>, the requirement of ignoring a (novelty creating) disclaimer in the assessment of inventive step when applying said alternative approach, has been further explained by means of a case example.

In the above-mentioned alternative approach, a 'technical contribution' within the meaning of G1/93 can also be avoided if it is required in the test against Art. 123(2) that with the disclaimer only the non-novel matter is excluded, and nothing more than that. This latter requirement is in fact one of those as stipulated in G1/03.<sup>12</sup> It ensures that no distance is created between the anticipation and the invention in question. Consequently, it is avoided that novel, possibly non-inventive matter is excluded by means of the disclaimer. In my thesis<sup>13</sup>, the application of this 1st alternative approach wherein nothing more than the non-novel matter is excluded, has been further explained by means of yet another case example.

### **2nd Alternative approach: Is Art. 123(2) really applicable?**

As mentioned above, the EBA in G1/03 assumed that the subject matter within the meaning of Art. 123(2), of a claim is amended by the mere incorporation of a disclaimer.<sup>14</sup> However, is that really the case? In other words: Is Art. 123(2) applicable to the use of disclaimers? In order to be able to answer said question, it is first necessary to agree on a definition of the term 'disclaimer'.

In the jurisprudence under the EPC, a 'disclaimer' is defined as a 'negative technical feature', typically excluding from a general feature specific embodiments or areas.<sup>15</sup> The adjective 'negative' refers to the fact that

<sup>8</sup> G1/93 (OJ EPO 1994, 541).

<sup>9</sup> T871/96 (not published in OJ EPO).

<sup>10</sup> *Case Law of the Boards of Appeal of the EPO*, 4th edition, 2001, 108-110.

<sup>11</sup> See footnote 1.

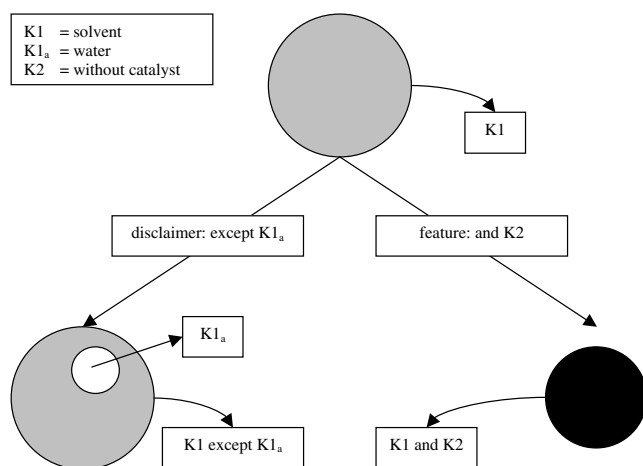
<sup>12</sup> See in that respect also: *Rudge*, The case for disclaiming anticipations – whether accidental or otherwise, CIPA Journal, 2003, 563-566.

<sup>13</sup> See footnote 1.

<sup>14</sup> In the above-mentioned 1st alternative approach, the incorporation of an undisclosed disclaimer can still contravene Art. 123(2), for example in a case where the disclaimer is not necessary to create novelty.

<sup>15</sup> G1/03, 2 of the reasons.

with a disclaimer a part of the scope of protection is excluded. In practice a disclaimer is often used in order to exclude from one or more features specific embodiments or areas. In this respect Stamm uses the expression of the 'limitation of the range of a feature'.<sup>16</sup> An example of such a limitation by means of a disclaimer is when in a claim,  $K1_a$  = 'water' is excluded from the feature  $K1$  = 'solvent'. An example of another kind of limitation is when the negatively formulated feature  $K2$  = 'without catalyst' is added to the claim. Both examples are illustrated in the following figure.



Both by the incorporation of a disclaimer and by the addition of a feature the scope of protection of a claim is limited, as illustrated in the above figure. In the first example of said figure only one embodiment ('water') of an existing feature is excluded. In the second example, on the other hand, the scope of protection is halved by the addition of a novel feature ('without catalyst'). Unlike the first example, in the second example the range of an existing feature is not reduced. On the contrary, a novel feature has been added, thereby amending the subject matter of the claim. By the addition of said feature, it is now required that no catalyst is to be used.

Stamm is of the opinion that a disclaimer only reduces the range of a feature but leaves the content of the feature unchanged.<sup>17</sup> A disclaimer could therefore be redefined as a passage in a claim, excluding a part from the scope of protection through limiting the range of one or more features. In this respect König uses the expression 'Beschränkungserklärung'<sup>18</sup>, and not the above-mentioned expression 'negative technical feature'. That is to say, a disclaimer is not a feature but merely implies a declaration of limitation. Based on the foregoing, a disclaimer should not be seen as a feature that would amend the 'subject matter' within the mean-

ing of Art. 123(2). In such view, said Art. 123(2) is not applicable to the incorporation of disclaimers. This is the core of a 2nd alternative approach to G1/03 that can be identified. In said 2nd approach the purpose of introducing a disclaimer, for example creating novelty, is irrelevant. Consequently, for example, more than only the non-novel matter may be excluded by a disclaimer.

A disclaimer may indeed render a claim novel, and is therefore always relevant in the assessment of novelty. However, in the assessment of inventive step the disclaimer is not relevant. For in said latter assessment the 'subject matter' of the claim is involved, which subject matter remains unaffected by a disclaimer (as illustrated in the above figure). Also in the above-mentioned 2nd alternative approach a 'technical contribution' within the meaning of G1/93 should be avoided. More specifically, a disclaimer should not contribute to inventive step. In order to effect this requirement in practice, the disclaimer should always be ignored in the assessment of inventive step, just as in the above-mentioned 1st alternative approach.

From the foregoing it appears that when determining the scope of protection and in the assessment of novelty on the one hand, and in the assessment of inventive step on the other hand, different 'entities' play a role. For in the former case the disclaimer should always be taken into account, in the latter case never. This corresponds with the distinction that Stamm makes between the 'scope' (or 'scope of protection') of a claim and the 'content' (or 'subject matter' within the meaning of Art. 123(2)) thereof. According to him, a disclaimer only changes the scope and not the content of a claim. The content of a claim is indicated by Stamm as 'Intension', and the scope as 'Extension'.<sup>19</sup> Said term of 'Intension' can be equated with Rudge's concept of 'subject matter related to the invention' for which subject matter a disclaimer is meaningless.<sup>20</sup> One Board of Appeal, in T378/94<sup>21</sup>, has made a similar distinction (3.1.1 of the reasons). According to that decision, the 'Begriffsinhalt' of a claim ('Intension') should be distinguished from the 'Begriffsumfang' ('Extension') thereof.

In my opinion, disclaimers as redefined in the above way should never be regarded as features amending the 'subject matter' within the meaning of Art. 123(2). This is in agreement with the above-mentioned 2nd alternative approach. Consequently, in such view said Art. 123(2) is no longer relevant. This would safeguard the right of the patent applicant/patentee to a fair protection. Furthermore, it would strengthen the legal security of both patent applicants/patentees and third parties, as compared to the current practice under G1/03.

16 Stamm, Disclaimer und verstandene Anmeldung im logischen Ordnungssystem, Mitteilungen der deutschen Patentanwälte, 2004, 243.

17 Stamm, Konstanter Inhalt und reduzierter Bereich – Lehren aus den Disclaimer-Entscheidungen der GBK, Mitteilungen der deutschen Patentanwälte, 2004, 489.

18 König, Disclaimer und rechtliche Folgen, Mitteilungen der deutschen Patentanwälte, 2004, 487.

19 Stamm (as in footnote 16), 245.

20 Rudge (as in footnote 12), 566.

21 T378/94 (not published in OJ EPO).

# No exhaustion of priority rights!?

T. Breimi<sup>1</sup>(CH), M. Liebetanz<sup>2</sup> (CH)

## 1. Introduction of a doctrine of exhaustion of priority rights in T998/99

As reported in the literature more than a year ago (Vigand, Prop. Ind. 2004, 16; Tobias Breimi, sic! 2/2004, S. 141 ff) a Board of Appeal of the European Patent Office introduced a "doctrine of exhaustion of priority rights" in decision T998/99, outlining that the priority rules according to the Paris Convention as well as their quasi-autonomous incorporation in the EPC are to be regarded as an exception and that therefore a strict interpretation is indicated. This is seen to be supported by the fact that in the EPC special cases, such as multiple priorities (Article 88(2) EPC) as well as partial priorities (Article 88(3) EPC) are mentioned explicitly, while there is no explicit mention of multiple claiming of the same priority for the same country.

## 2. Unclear situation

At that time it was decided that the decision T998/99 was not approved for publication in the Official Journal. This in spite of the fact that the Board of Appeal having issued T998/99 initially intended its publication. In that context it is pointed out that in principle not a specific panel determines whether a decision will be published or not, but the Board of Appeal which issued the decision (see e.g. OJ 9/2002, S. 442). The particular reasons why in that special case publication was prevented are unknown. The decision was forwarded to the members of the Boards of Appeal only and of course it was made accessible in the file of the case and it was published on the website where all decisions of the Boards of Appeal of the European Patent Office are made available.

Nevertheless people in the field noted that decision and a controversial discussion developed. Experts were starting to feel uneasy, because the decision with its unexpected breach with established practice led to an unclear legal situation. The application strategy would have to be structured in different way if that decision was to be applied in the future. The uncertainty was enhanced by the fact that in the past, even repeatedly, questions were asked in the European Qualifying Examination, the official answer to which was based on claiming a priority more than once (see for example Question 2 from part D1 1999). In that situation the European Patent Organisation was confronted with accusations that with the non-publication in the Official

Journal of that obviously highly relevant decision it tries to sweep a problematic case under the carpet. Furthermore it was tried to ensure that this important legal question was referred to the Enlarged Board of Appeal in order to eliminate this legal uncertainty.

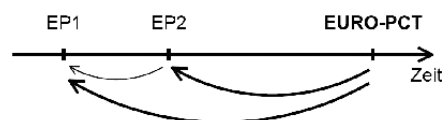
Unexpectedly the decision T998/99 was then suddenly published in the Official Journal earlier this year (see OJ 4/2005, S. 229). This publication was however without including any comment nor indication whether the European Patent Office would be going to apply this decision in the future or whether it would be treated as a "single decision".

## 3. Rejection of the doctrine of exhaustion of priority rights in T0015/01

Recently, another Technical Board of Appeal issued another decision T0015/01, rejecting the above doctrine of exhaustion of priority rights. This more recent decision is analysed in somewhat more detail as regards this particular legal question.

### 3.1. Facts of the case

In this case, a first European Patent Application EP 1 was filed on June 6, 1991. On March 18, 1992, a subsequent European Patent application EP 2 with a somewhat extended description but with a main claim identical to the one of EP 1 was filed. EP 2 claimed priority of the first application EP 1. Both applications EP 1 and EP 2 lapsed before their publication. Within 12 months from EP 1 a EURO-PCT application was filed identical to EP 2 and claiming the priority of EP 1 and EP 2. This situation is shown in the figure



The EURO-PCT application entered the regional phase before the European Patent Office and a European Patent EP 0 587 780 B1 was granted with a main claim as originally filed. Opposition proceedings were instituted against this patent, and the opposition division maintained the patent with a main claim, which was identical to the main claim as filed in the original applications EP 1, EP 2, as well as EURO-PCT.

In the following appeal proceedings the appellant argued that EURO-PCT could not validly claim the priority of EP 1 because the priority of EP 1 was already claimed in EP 2. In view of T998/99 the priority right was thus

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already exhausted. The question of a valid priority claim to EP 1 was pertinent for the decision because there were documents of the state of the art published between the filing dates of EP 1 and EP 2.

### 3.2. Reasons for the decision

The decision discusses that specific legal question extensively, almost 1/3 of the reasons for the decision relates to this specific topic (Reasons for the decision 25. – 41.).

At first there is a very clear analysis, which legal basis is applicable for a EURO-PCT application claiming priority of a European first filing. It is mentioned (paragraph 25 of the decision) that in principle the conditions for and the effect of any priority claim of an international patent application, which has entered the regional phase before the European Patent Office, is determined by Article 8 (2) a) PCT in conjunction with Article 4 Paris Convention.

Only for the specific question of an internal priority, so if the priority of one or more patent application (here EP 1 and EP 2) is claimed, which is filed in or for a contracting state, the conditions and effects of the priority claim in that state are governed by the national or in this case regional law (see Article 8 (2) b) PCT). The legal basis for the situation, which has to be considered, are therefore Articles 87-89 EPC, and Article 87(2) allows such internal priorities explicitly. It seems doubtful that Article 8 (2) b) should not be applicable in this situation in view of the fact that each of EP 1 and EP 2 designated more than one state, as some authors propose (see Vigand, Prop. Ind. October 2005). The question may however remain open as in the following discussion the relevant articles of the EPC are applied such as to comply with the Paris Convention.

The existence of the doctrine of exhaustion of priority rights and its relevance for the case is pointed out. But it is also pointed out that this concept is neither undisputed nor generally accepted. Furthermore it is expressly confirmed that this doctrine has so far neither been applied by the examining division nor by the Boards of Appeal of the European Patent office with the sole exception of the decision T998/99, which gave rise to controversial discussions.

It is noted that it cannot expressly be derived from the EPC whether multiple claiming of a priority is allowed or not, and the central question of the decision is how this gap in law should be interpreted. In other words the main issue is, whether the doctrine set up in T998/99, stating that the concept of priority is an exception to a general principle and therefore a strict interpretation is required, is truly correct.

The concept of priority, as it is defined in the Paris Convention, is defined as a corner pillar of the Paris Convention. As an elementary *ratio legis* of that principle it is mentioned that it shall follow the general purpose to protect the interests of an applicant during a limited period of time in its intention to obtain an international protection for his invention, this also in view of the principle of territoriality in patent matters. Furthermore it is argued in a convincing manner that the original Articles of the priority in the Paris convention were

revised several times, wherein all these revisions followed the main purpose which was to enhance the flexibility of the system for the applicant and to enhance the applicants legal position, such as to encourage innovation. Amongst other things, this leads to the explicit implementation of multiple and partial priorities (Art. 4F Paris convention) as well as to the possibility of dividing a patent application under the preservation of the original priority claim (Art. 4G Paris convention). The corresponding Articles can be found in the autonomous priority Articles in the EPC.

In view of this fundamental character of the priority rules the board concludes that the narrow interpretation, as it was used in T998/99, is not justified, because priority represents no exception to a general principle.

At this point it shall be noted that there is already case law which clearly states that no principle can be derived from the EPC that something that according to the EPC is not expressly foreseen is not permitted (see J0009/99, Reasons 1.5, OJ 6/2004, P. 309). A stricter interpretation according to T998/99 is therefore not justified. It shall furthermore be noted that this is not deemed to be in contradiction with J0015/80 denying the priority claim to a German Geschmacksmuster. The narrow interpretation in that specific case came about because the Board could explicitly not find a general understanding of the Paris Convention which would allow to claim the priority of a Geschmacksmuster and it is stated that as a matter of fact this was only possible in one single country. In the present matter however there is a current and well-established practice and there are exceptionally very few decisions following the doctrine of exhaustion of priority rights.

As a general rule of interpretation for a legal question in connection with a priority claim the decision T0015/01 concludes with a very broad statement, that such matters: "*have to be construed in a manner which ensures that the general purpose they serve, namely to assist the applicant in obtaining international protection for his invention, is fulfilled as far as possible*" (see Reason 34 of the decision). The question of legal certainty of third parties when using such an applicant-friendly interpretation is unfortunately not discussed in the decision. In view of the strict temporal restriction of the exercise of the priority right however, it seems as if the interests of third parties would not be affected by such an interpretation.

Afterwards it is argued using examples that it can very well be in the interest of the applicant to claim a priority several times and that there is no reasonable ground in any of these situations to refuse this possibility. In particular it is clarified that claiming a priority several times should be allowed and that the doctrine of exhaustion of priority rights is not an appropriate instrument in order to prevent double-patenting.

As a logical consequence the doctrine of exhaustion of priority rights, as it was introduced in T998/99, was rejected explicitly, because it would run contrary to the principle to by means of priority provide a flexible und



useful instrument to obtain international protection for the applicant.

Particularly remarkable is the fact that in EP 1 different contracting states were designated as in EP 2. In the meantime Monaco, among others, had ratified the EPC. Monaco was also designated in the following EURO-PCT application and the European Patent was granted for Monaco. If the board had used the doctrine of exhaustion of priority rights, it would have had to come to the conclusion that exhaustion of the priority is not applicable in that case, and this would have led to the bizarre situation that the claim of priority for Monaco would have been valid, whereas for the other designated countries it would have been invalid. The question, which after the more recent decision is hypothetical, whether it would have been possible for the applicant to file different claims for Monaco as for the other designated states, could then have been raised. Rule 87 EPC, which in such a situation would apply, would not admit this, because in this case neither of the applications EP 1 and EP 2 was published and therefore they would not have been part of the state of the art according to Art. 54 (3) and (4) nor would they have to be taken into account for the designated states except Monaco as a prior right in the sense of Art. 139(2) EPC.

These considerations show that a doctrine of exhaustion of priority rights does not fit reasonably into the systematic framework of the EPC. According to Art. 118, a European patent application is uniform unless otherwise stated so by the EPC. This means that in principle such a different treatment of different designation states is not foreseen. Only explicit exceptions (these have to be interpreted in a strict way) as for example rule 87 EPC are able to interfere with such principal uniformity.

It is especially interesting that the board thought about referring the question to the Enlarged Board of Appeal although none of the parties requested so. The Board states that a referral is only appropriate if it is *required* for ensuring uniform application of the law. In view of the fact that T998/99 is only a "single decision" in contradiction with the usual practice of the EPO, the referral is regarded as not being necessary.

#### 4. Remarks and conclusion

It looks as if the doctrine of exhaustion of priority rights is from the table due in view of the explicit decision T0015/01. Admittedly, it can not be excluded that the two conflicting decisions T998/99 and T0015/01 will be discussed in a different case again and that the decisions will have to be submitted to the Enlarged

Board of Appeal. But in view of the fact that the chairman of the board in charge of T0015/01, is a member of the Enlarged Board of Appeal herself and in view of the fact that T998/99 was demonstrably a "single decision", in contradiction to the usual practice having caused controversial discussions within the EPO as well, the risk seems rather low that the Enlarged Board of Appeal would come to a different result.

At the end, a principal question to be raised is how should such "single decisions" be dealt with? This difficulty has to be taken seriously since the number of decisions of the Boards of Appeal is constantly increasing and the publication policy is the responsibility of the corresponding board. This problem is known for example from the decision that caused a confusing controversy around the question whether an applicant, which is according to Article 14(2) EPC would not be entitled to use an admissible non-EPO-language can nevertheless do so for getting a filing date (Pro J15/98, published OJ 4/2001, P 183; Contra J9/01). In that case the earlier decision (J15/98) was published in the Official Journal, whereas the practice of the EPO surprisingly followed a later decision (J9/01), which was not published. At the EPO internally this was already settled, but only much later this practice was communicated to the outside with the guidelines for examination (A-VIII; 3.1). A specific warning notice in an Official Journal or within the guidelines neither given up on the publication of J15/98 nor upon the publication of the amended guidelines.

The decision T0015/01 is welcome insofar that it highlights the status of T998/99 as a "single decision" very clearly and therefore provides certain security to the interested circles in that the case law of T998/99 will not be applied in the future.

It would nevertheless be appreciated if the European Patent Office would highlight amendments in its practice as well as decisions, which will not be followed in practice, and that the European patent office would publish a corresponding notice in the Official Journal. This should not cause particular difficulties, since the so-called important decisions will at the earliest be published only 6 months after their completion in the three official languages. This period provides enough time to the EPO, to prepare, to adjust and to publish a suitable notice in the Official Journal. A simple notice in form as a footnote to the decision (e.g. "A notice in order to amend the guidelines, part... is in preparation", or "An amendment of the guidelines is not foreseen") would increase the legal certainty considerably without undue effort.

## Die Patentgerichtsbarkeit in Europa – Status quo und Reform von Michael Schneider<sup>1</sup>

S. Luginbühl<sup>2</sup>

Das Vorwort der im Frühsommer dieses Jahres publizierten Dissertation von *Michael Schneider* wird mit folgenden Worten eingeleitet:

“Die Ausgestaltung der Patentgerichtsbarkeit hat die Harmonisierungsbestrebungen dieses für Innovation und Wachstum wichtigen Rechtsgebietes auf europäischer Ebene seit den Anfängen in den 1950er Jahren begleitet. Eine kompromissfähige Lösung ist bis heute nicht gefunden worden. Die vorliegende Arbeit versucht vor dem Hintergrund dieser Harmonisierungsbestrebungen, der Streitregelung der Europäischen Bündelpatente sowie der nationalen Patentstreitregelung Europas und eines Rechtsvergleichs mit den USA eine Analyse des aktuellen Kommissionsvorschlages für eine Gemeinschaftspatentverordnung und des EPO-Entwurfs eines Streitregelungsübereinkommens für Europäische Patente einschließlich ihrer Umsetzungsmöglichkeiten im Rahmen der sich stetig verdichtenden Gemeinschaftsrechtsordnung.“

Damit ist zum Inhalt dieses Buches schon sehr viel ausgesagt. In einfacher und klarer Sprache hat es *Schneider* geschafft, das bestehende europäische Patentsystem, sein Streitregelungsmechanismus und die bestehenden Reformbestrebungen in präziser Weise zusammenzufassen und sich in kritischer und kompetenter Weise damit auseinanderzusetzen. Das in der renommierten Schriftenreihe zum gewerblichen Rechtsschutz des Max-Planck-Instituts für Geistiges Eigentum, Wettbewerbs- und Steuerrecht unter der Obhut von *Professor Joseph Straus* erschienene Werk besticht im Weiteren durch seine bündige Gliederung in fünf aufbauende Kapitel. Damit findet jeder interessierte Leser rasch in diese komplexe Materie.

Nach einer kurzen Einleitung mit der Problemdarstellung behandelt die Arbeit im ersten und zweiten Kapitel die Entstehungsgeschichte und die Struktur des gegenwärtigen europäischen Patentsystems und seiner Institutionen, ohne dabei den analytischen Blick vom Thema der Streitregelung zu lassen. Im dritten Kapitel befasst sich der Autor schwerpunktmäßig mit dem Gemeinschaftspatentübereinkommen, den nationalen Patentrechtsdurchsetzungssystemen der drei „Großen“ in Europa (Deutschland, England und Frankreich) sowie mit dem Phänomen der grenzüberschreitenden Unterlassungsverfügungen. Dabei setzt er sich ausführlich mit den verschiedenen gescheiterten Fassungen des Gemeinschaftspatents und seinen unterschiedlichen Streitregelungssystemen ausein-

ander. Als Hintergrundinformation für das Verständnis der heute noch bestehenden Zäsur zwischen dem zentralisierten Erteilungsverfahren und dem national verbliebenen Patentstreitregelungssystem ist die Schilderung ein wenig zu eingehend ausgefallen. Dieses kleine Manko wird jedoch mit Bezug auf die Darstellung der nationalen Systeme gleich wieder wettgemacht. Darin fasst *Schneider* in konziser Art die heutige Situation in den wichtigsten Ländern zusammen und vermittelt mit Blick auf ein mögliches künftiges einheitliches Patentgericht bedeutende Hinweise auf die Anzahl von Patentstreitigkeiten in Europa. Im Rahmen seiner Analyse zu den grenzüberschreitenden Unterlassungsverfügungen kommt er zum Schluss, dass weder die internationale Zuständigkeitsordnung des Brüsseler-Übereinkommens<sup>3</sup> noch der Brüsseler-Verordnung<sup>4</sup> geeignet sind, als Grundlage für eine interessengerechte und umfassende Erledigung von solchen Fällen herangezogen zu werden. Damit wird nach einem kurzen Exkurs zum Patentstreitregelungssystem der USA, bei dem der Forschungsaufenthalt des Autors während dem Erstellen der Arbeit am *U.S. Court for the Appeals for the Federal Circuit* aufleuchtet, auf das vierte und vom Leser mit großer Spannung erwartete Kapitel über die Reform der europäischen Patentstreitregelung überführt.

Dargestellt und verglichen werden die beiden parallelen Projekte der EG für eine Gemeinschaftspatentverordnung mit der Realisierung eines Gemeinschaftspatentgerichts und der von der Pariser Regierungskonferenz der EPÜ-Vertragsstaaten eingesetzten Arbeitsgruppe „Streitregelung“ für ein fakultatives Streitregelungsübereinkommen mit einem Europäischen Patentgericht. *Schneider* macht dabei deutlich, dass unabhängig von der Tatsache, ob zwischen den EG-Mitgliedstaaten eine Gemeinschaftspatentverordnung verabschiedet und in Kraft gesetzt wird, auf der Ebene der EPO Handlungsbedarf zur Beseitigung der heutigen unbefriedigenden Situation betreffend die Streitregelung von europäischen Patenten besteht. Im Weiteren zieht er in seiner Abhandlung zur Frage der Vereinheitlichung der Eingangsinstanz die Schlussfolgerung, dass die begrenzte Anzahl qualifizierter Richter in Europa, die Verbindung des Patentnichtigkeitsmit dem Patentverletzungsverfahren, das Erfordernis der Besetzung der Richterbank mit technischen Richtern und der lokalen Präsenz des Gerichts, trotz des umfassenden Eingriffs in die Verfahrensautonomie der EG-Mitglied-

1 *Michael Schneider*, Die Patentgerichtsbarkeit in Europa – Status quo und Reform, Carl Heymanns Verlag, Köln, 2005, ISBN 3-452-25801-7, 386 Seiten, 100,- €

2 Stefan Luginbühl, Rechtsanwalt, Jurist in der Direktion Internationale Rechtsangelegenheiten des Europäischen Patentamts

3 EWG – Übereinkommen über die die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen vom 27. September 1968, ABl. EG 1989, Nr. L 285/1.

4 Verordnung (EG) Nr. 44/2001 des Rates vom 22. Dezember 2000 über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen, ABl. EG 2001, Nr. L 12/1.



staaten bzw. der EPÜ-Vertragsstaaten letztlich der Lösung von nationalen Eingangsinstanz in einer einheitlichen Patentgerichtsbarkeit vorzuziehen ist.

Nach einer kurzen inhaltlichen Darstellung der beiden vorgeschlagenen Entwürfe behandelt *Schneider* die rechtlichen Probleme und politischen Risiken der beiden Vorschläge. Zum einen macht er darauf aufmerksam, dass aufgrund eines möglichen Fehlschlages im Rahmen des notwendigen Ratifikationsprozesses des EG-Ratsbeschlusses für die Übertragung der Zuständigkeiten für Gemeinschaftspatentstreitigkeiten auf das Gemeinschaftspatentgericht ein erhebliches Risiko einer möglichen Zementierung von nationalen Einheitsinstanzen besteht. Zum anderen setzt er sich mit der von der Europäischen Kommission vertretenden Ansicht auseinander, dass die am Streitregelungsübereinkommen beteiligten EG-Mitgliedstaaten die Kompetenz verloren hätten, den betreffenden Bereich untereinander und im Verhältnis zu Drittstaaten durch völkerrechtliche Übereinkommen zu regeln. Dabei kommt er zum Schluss, dass die EG über keine ausschließliche Kompetenz zum Abschluss des EPLA verfügt. Diese Ansicht einer „geteilten“ Kompetenz zwischen Mitgliedstaaten und EG dürfte sich mit der zwischenzeitlich in Kraft getretenen Richtlinie 2004/48/EG zur Durchsetzung der Rechte des Geistigen Eigentums (gemeinhin als „Durchsetzungsrichtlinie“ bezeichnet)<sup>5</sup> noch weiter verstärkt haben.

5 Richtlinie 2004/48/EG des Europäischen Parlaments und des Rates vom 29. April 2004 zur Durchsetzung des Rechts des Geistigen Eigentums, ABl. EU 2004, Nr. L195/16 und Erklärung der Kommission zu Artikel 2 der Richtlinie

Abschließend geht der Autor auf eine mögliche Verschmelzung der beiden Projekte ein. Dabei folgert er, dass historische Gründe und die von der Europäischen Kommission angestrebte Mitgliedschaft der EG in der EPO für eine Durchbrechung des Rechtsprechungsmonopols des EuGH sprechen würden und die Gemeinschaftspatentgerichtsbarkeit mit der Gerichtsbarkeit für europäische Patente trotz politischer Hürden verbunden werden könnte. In überzeugender Weise hat *Schneider* damit dargelegt, dass durch eine offene Haltung, die bestehenden Probleme des heutigen europäischen Patentstreitregelungssystems in pragmatischer Weise gelöst werden könnten, ohne dabei weder das Bedürfnis nach einem Gemeinschaftspatent noch nach einer rechtlich abgesicherten Lösung vernachlässigen zu müssen.

Obwohl die Dissertation bereits Ende 2003 abgeschlossen worden ist, hat sie nichts von ihrer Aktualität eingebüsst. Dies ist nicht zuletzt auf die ungenügende Entscheidungsfreudigkeit der europäischen Staaten in dieser Sache zurückzuführen. Das vorliegende Werk von *Michael Schneider* ist ein weiterer wichtiger Aufruf an die politischen Entscheidungsinstanzen in Europa, einen entscheidenden Schritt in Richtung Schaffung eines einheitlichen europäischen Patentgerichts zu machen und unseren Kontinent im Sinne der Vorgaben von Lissabon wettbewerbsfähiger zu gestalten.

2004/48/EG des Europäischen Parlaments und des Rates zur Durchsetzung der Rechte des geistigen Eigentums, ABl. EU 2005, Nr. L 94/37.

## Comment on Editorial 3/2005

Gerbert Kern (DE)

You complain about EPO Examiners who “decline interviews and exercise a guillotine to the procedure” of patent examination. The blamed Examiner’s arguments probably stem from Rule 86 (3) EPC:

“After receipt of the first communication from the Examining Division the applicant may, of his own volition, amend once the description, claims and drawings provided that the amendment is filed at the same time as the reply to the communication. No further amendment may be made without the consent of the Examining Division.”

This rule does not contain a permission for discretion or caprice but is misunderstood if not interpreted in full compliance with Article 113 EPC:

“(1) The decisions of the European Patent Office may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments.

(2) The European Patent Office shall consider and decide upon the European patent application or the

European patent only in the text submitted to it, or agreed, by the applicant for or proprietor of the patent.”

This Article, a key-stone of the procedural precepts, has actual priority over Rule 86 EPC and should govern the eventual decision of the Examining Division about its consent to amendments. In fact, according to Article 113 EPC, such consent cannot be withheld except in the situation where a text submitted or agreed by the applicant or proprietor has already been subject to full dialectic discussion implying the disclosure of all arguments for and against a forecast final decision. In this context, the procedural guillotine has no legal use. See also Mitteilungen der deutschen Patentanwälte 7/1994, pages 169 to 173.

Shouldn't we muse on a malus instead of the conventional bonus in qualifying an Examining Division's conclusion when artificially produced in disregard of Article 113 EPC.

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