

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 (GB)

Despite advances in technology and the burgeoning global village, differences between peoples and cultures remain paramount and we believe are an aspect of life to be cherished. Individuals and enterprises small and large rightly value their Mother Tongue. Nevertheless in the world of IPRs, particularly patents, translations are important in providing information on both technology and legal aspects of protection afforded to countries which might not have as their native language the language of the patent grant.

Machine translations of texts have long been the grail of industry and official bodies alike, but problems have existed in the realisation of an accurate rendering of one language into another. The machine translation of „hydraulic ram“ in one language into „wet sheep“ in another is an example we believe not to be apocryphal. However, things move on. We have learned of the initiative of the EPO in pursuing, in conjunction with

the EC, a project to provide a viable machine translation of patent texts which would be beneficial to European citizens and industry alike. We believe this to be a positive and far-sighted step which should be encouraged as it will enhance legal certainty and encourage innovation within the Member States of the EPC. We are sure our readers will look forward to receiving details of the progression of the project.

From future developments to present ones, we mention that there are „new“ appointments in the EPO in addition to the newly-elected President.

Mr Jesper Kongstad (DK) is now Chair of the AC. Mr Guillaume Minnoye (BE) and Mr Raimund Lutz (DE) have just been elected as VP in DG1 and DG5 respectively.

We congratulate them all, wish them well in their new roles, and look forward to working with them in the future.

### Nächster Redaktionsschluss für epi Information

Informieren Sie bitte den Redaktionssausschuss so früh wie möglich über das Thema, das Sie veröffentlichen möchten. Redaktionsschluss für die nächste Ausgabe der epi Information ist der **21. Januar 2011**. Die Dokumente, die veröffentlicht werden sollen, müssen bis zum 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 **21<sup>st</sup> January, 2011**. 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 **21 janvier 2011**. Les textes destinés à la publication devront être reçus par le Secrétariat avant cette date.

## Report on 125<sup>th</sup> Meeting of the Administrative Council (AC) The Hague, 26–28 October 2010

Terry Johnson  
Editorial Committee

By way of background, and to set the scene as it were, members will be aware that the AC is part of the European Patent Organisation, effectively being the legislative arm, the Office being the executive arm.

The AC was set up under Art. 4 para (b) EPC, more detailed aspects of its functions being set out in Arts. 26-36 EPC. The current chairman of the AC elected to the post this year is Jesper Kongstad, who is also Director General of the Danish Patent Trade Mark Office. (There is a report of a discussion the *epi* had with him in this issue).

The AC has three main committees, namely the Committee on Patent Law (CPL), the Technical and Operational Support Committee (TOSC), and the Budget and Finance Committee (BFC). (Reports of meetings of the respective chairs of these committees are also to be found in this issue). These committees advise the President and/or the AC on specific questions directed to them by the President, or Chair of the AC.

Participants in the AC are representatives of the Member States, the President of the EPO (and support staff), the Board of Auditors, and representatives of the staff of the EPO.

The *epi* has observer status, as has the government of Bosnia and Herzegovina, WIPO, the EC, the Nordic Patent Institute, and Business Europe. Observers can intervene in debates, but cannot vote.

The work of the AC is supported by a Permanent Secretary, Yves Grandjean, who is Director of the Council Secretariat.

In addition to the above, it should be mentioned that the AC has set up a Board in accordance with Art. 28 EPC (known as Board 28 or B28), which in general assists the Chair of the AC in preparing the work of the Council.

As is to be expected, there is an agenda drawn up for each meeting of the AC. Items are labelled A, B, or C. Category A is reserved for items which have been previously approved by the BFC with a 75 % majority, and which the AC can therefore adopt. Category B are items which require discussion by the AC. Category C is reserved for items which are confidential and which are discussed and adopted if approved, in a closed session of the AC, the Member States, the President (and any assisting employees), and the Board of Auditors being the participants in the closed session.

The 125<sup>th</sup> meeting of the AC was an extremely important one as it was the first to be attended by Benoît Battistelli following his election as President of the EPO.

The Chair opened the meeting by welcoming the President, new heads of delegations and new observers, (including your reporter !) and reported that he had had several meetings with the new President, all with a very positive outcome which he was confident would be the norm for the future, and therefore to the benefit of the European Patent Organisation.

He then gave the floor to the President. Mr Battistelli outlined the work he had undertaken since he took office in a comprehensive first address to the AC as President. On his very first day of office (1 July 2010) he met staff in Munich, and on the second, in The Hague. He subsequently had met staff in other offices so that he had met about half the staff complement early in his tenure. He hoped to build a positive and transparent relationship with the staff.

In order to maintain the EPO as a centre of excellence in the global world of IP he has commissioned two audits by external bodies, one on IT and the other on finances.

### Nächste Ausgaben · Forthcoming issues · Prochaines éditions

<u>Issue</u>	<u>Deadline</u>	<u>Publication</u>
1/2011	21 January	15 March
2/2011	09 May	30 June
3/2011	12 August	30 September
4/2011	04 November	30 December

Initial reports of the results of these separate audits will be presented to the AC, TOSC, and BFC in 2011 for evaluation. It is also hoped to implement the evaluated reports in 2011.

The President also reported on a major initiative regarding a harmonised approach for a global classification system for patent documents. This initiative comprises the USPTO and the EPO agreeing to work together towards the formation of a partnership to explore the development of a joint classification system. The system will be based on the European classification system (ECLA). It is proposed that this joint system will be aligned with WIPO standards and the IPC structure. This initiative is a work in progress of which IP5 partner offices, the AC and stake holders will be regularly updated.

The EPC has 38 Member States using 28 languages. Translation is a major issue for users, Offices, the EC, European industry, and the ongoing discussion towards the implementation of the EU patent. The president therefore reported that a study on machine translation had been launched by the Office, with technical and financial support being provided by the EC whose representative Margot Fröhlinger, confirmed that the EC financial contribution would be 40 % of a budget of 10 million euros, and that a MoU would be entered into with the EPO in respect of the project.

The President also presented the final report on the EPO, UNEP and ICTSI study „Patents and Clean Energy: bridging the gap between evidence and policy.“ This timely and comprehensive report concludes *inter alia* that greater and better availability of technological information including on IPRs, and the development of licensing of clean energy technologies would appear to provide practical measures which could resonate immediately in the present debate on climate change.

The AC has an extremely wide-ranging agenda. The Chair acts as what could be called a facilitator being extremely effective in this role. In introducing each agenda item he calls on the President, or the AC Member who has charge of it, to make a report. He then invites representatives of the Member States to speak if they have a view on the topic, and then observers. The President can inter-

vene at any time. The topics for the 125<sup>th</sup> meeting covered a wide range including, e.g. the need for urgent renovation/replacement of the main building (The Tower) in The Hague, which is in a sad state of disrepair, and funding for the European School in Munich.

Of possible particular interest to our members the AC elected the following as VPs: Mr Guillaume Minnoye (BE), as VP DG1 and Mr Raimund Lutz (DE) as VP DG5, who take up their appointments on 01.01.2011, and also decided: –

- 1) Voluntary divisional applications: Amendment of Rule 36 (1) (a) EPC listing communications from the EPO that trigger the 24 – month period for filing voluntary divisional applications. This is AC paper CA/D 16/10. It clarifies the law, and does not change it. It entered into force on the 26<sup>th</sup> October, 2010, ie as of the date of the meeting.
- 2) Amendments to Rule 71EPC and new Rule 71(a) EPC: These are aimed at introducing an additional procedural step in cases where the Applicant requests amendments or corrections in response to communications under Rule 71 (3) EPC. These amendments are set out in AC document CA/81/10 Rev.1e, and are scheduled to come into force on 1 April 2012.
- 3) Amendment to Rules 161 and 162 EPC, CA/134/10: This extends the period for dealing with replies to WO-ISA, IPER and IPER from one month to six(6) months. The amended Rules enter into force on 01.05.2011.
- 4) Morocco: The AC authorised the President to conclude a draft Validation Agreement with Morocco, (date of entry to be confirmed).

I believe the foregoing gives an accurate account of salient points covered during the meeting. My overall impression is that there is a very positive and constructive atmosphere between the Office and the Member States in the AC, and that the AC performs an important and necessary role as the legislature of the European Patent Organisation. Our Institute should, I believe, aim to foster and promote its valued status as an observer.

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## Interview with Jesper Kongstad (DK)

Chairman  
Administrative Council of the European Patent Organisation

1. *Having just been elected for a three year term at more or less the same time as a new President of the EPO assumed office, and bearing in mind the competencies of the AC, how do you see co-operation between the AC and the new President developing?*



JK: As I mentioned in my opening remarks to the AC, the president and I have had several meetings since he took office. These have been very positive and productive and provide a good basis for future co-operation. The focal point of the European Patent Organisation is the President. The executive branch of the Organisation is the Office through the person of its President. The AC is the legislative arm of the Organisation, through the person of the Chair of the AC. My job as Chair, as I see it, is to act as a facilitator who is strictly neutral whilst nevertheless seeking direction from the Member States. It is a multi-faceted job. The President and I have been colleagues on the AC for many years which I think bodes well for the future, indeed I envisage a very positive future for the EPO. My aim as Chair of the AC is to provide as positive a climate as possible in which the President can carry out his aims for the Organisation.

2. *The AC decided to set up a Board, the so-called B28 (Article 28 EPC). Would you kindly explain the role of the Board? How do you see it has improved the operation of the AC?*

JK: The role of the Board is to advise the AC Chair on preparation for and conduct of meetings of the AC. From time to time the Board is asked by the AC to draw up proposals for implementation eg on voting. The Board comprises three elected members from the Member States, the EPO President and the Chairs of the CPL, TOSC and BFC. The elected members have a three year term. The Board meets before every AC meeting and in my view, enhances the efficiency of the AC.

3. *The AC has three committees, the BFC, the CPL and the TOSC. Could you advise us of the interaction of the Board and these Committees – does the Chairman of the AC have a role in this interaction?*

JK: The main thrust of the Committees is to assist the working of the AC. There is a two way interaction between the Committees through their Chairs and the

AC through me. The Office also puts forward topics to the appropriate Committee for comment or advice, and the Committee responses to the Office are also put to the AC. The interaction between the EPO, the AC and the three Committees is in my view a pragmatic one which works to the benefit of the Organisation as a whole.

4. *The finances of the Office have come under increasing scrutiny of late. How do you see the financial matters being resolved in the long term for the good of all stakeholders?*

JK: The initiative of the President in commissioning an external financial audit is an important one for the Organisation. We hope to have an audit report in January 2011 with discussion on it at the March 2011 meeting of the AC. We also hope that concrete proposals can be tabled at our June 2011 meeting. Clearly sound financial matters are of great importance to insure that European stakeholders have a stable patent system in which to operate. Current trends are encouraging, the office has cut costs, and filings are increasing, so with the results of the audit in hand I am optimistic that the long-term prospects for the Organisation are good. The staff are of course decisive as to the financial outcome of operations, so the President's effort to establish a constructive dialogue with the staff is very important.

5. *One of the pressing matters is that of staff pensions, which in some quarters are perceived to act as a mill-stone around the neck of the Office. Can pension issues be resolved to the satisfaction of the staff and therefore for the long-term health of the Office?*

JK: The AC has had discussions on this subject, and a new system has been decided. Modernization of pension systems are taking place all over Europe and necessary. This has happened in my Office (DK) more than 20 years ago, and the pension scheme is today run by the labour unions, and the coming and present pensioners appoint Directors to the scheme, which essentially is a private one which operates in what must be said is a flexible labour market.

6. *There is a backlog of unexamined cases in most major POs, the EPO is not alone in this. However, the EPO is unique in having members of its AC drawn from all Member States, most of whom have national agendas to pursue and some, if not all have implemented work-sharing schemes with other offices. Do you see any conflict of interest between the Office and NPOs, and if so, how can this be resolved?*

JK: I do not see any conflict of interest. Indeed the diversity is I think, a positive attribute to the European patent system, so much so that the AC has embarked on a work-sharing scheme based on a pilot project between the Office, AT, DE, UK and the DK. Quality of examin-

ation has been shown to be improved, and I therefore hope that through co-operative efforts we will be able to further develop work-sharing for the good of the system.

7. *Leading on from the previous question, we understand that the EPN meets to discuss EPO/NPO co-operation and experiences. Should the AC be part of this dialogue?*

JK: „Definitely yes.“ The AC through the Member States is part of the EPN and, as you mentioned, is tied up with work-sharing, quality control and reduction in the backlog.

8. *We understand too that there is a project for (part time) working at home (PTHW) for examiners, presumably to promote reduction of the backlog and costs. Do you see this as an idea which might become the norm in the future?*

JK: The sole responsibility for this lies with the President of the EPO. The AC looks forward to hearing how PTHW might develop.

9. *WIPO has observer status on AC. Both the EPO and WIPO have a common aim in promoting patents for*

*green technology. How do you see the AC working to ensure that these aims are complementary, and not in conflict with one another?*

JK: The EPO has this well in hand, witness the comprehensive final report which the President presented to the AC on the study on „Patents and clean energy: bridging the gap between evidence and policy.“ I am confident that there will be no conflict, nor lowering of quality.

10. *The epi has observer status. Our organisation would wish to continue what we hope is and has been a constructive dialogue with the AC. How from your perspective do you see this developing?*

JK: The AC being a legislative body values continuing input from observer participants, particularly the *epi* as well as other such as Business Europe. The AC is effectively a public body, and accordingly values co-operation with users of the system. I think that I can say on behalf of the Contracting States that we look forward to a continuing dialogue with the *epi*.

## Interview with Guus Broesterhuizen (NL)

Chairman of the Budget and Finance Committee  
of the Administrative Council

As Mr Broesterhuizen informed us, all Member States participate in the BFC, as does the President of the EPO supported by EPO staff. The mandate of the Committee arises under Art. 3 of the Financial Regulations of the European Patent Organisation. The goal of the Committee is to discuss financial implications of technical and legal matters and to advise the AC accordingly. Mr Broesterhuizen voiced the view that discussions in the BFC are often of a global rather than of an in-depth nature. He aims to strengthen the latter, which would benefit the decision-making role of the AC, and could also lead to the AC being able to discuss matters of a more political nature. It seems too that there is a certain information gap between the EPO and the Member States. Being a governor (one of 38) of the EPO requires an in depth knowledge of things going on and hence a huge amount of information. This information might



and should be provided by the EPO, but grasping, understanding and drawing conclusions from it might be difficult. Solving this dilemma might need a review of the mandate, from the managerial point of view, of the President but also the external financial audit commissioned by the President should go a long way to plugging this perceived information gap.

As Chairman, Mr Broesterhuizen is a head of delegation in the Administrative Council and member of Board 28. This brings him close to the political decision making process which takes place in the Council. He is of the view that generally members of the BFC should not only have expertise in management and finance, but should also be close to the political decision making process.

Mr Broesterhuizen would also like to enhance his role as Chairman to assist, in his capacity of chairman of the BFC, the Office in preparing substantive papers before AC meetings, of course respecting the different roles and responsibilities of the BFC and the office.

The *epi* has observer status on the Committee. A representative of our EPO Finances Committee generally attends BFC meetings. Kim Finnilä suggested that Mr Broesterhuizen and our representative might have a one to one meeting when convenient at a future BFC meeting. This suggestion was welcomed by Mr Broesterhuizen.

## Interview with Mihaly Ficsor (HU)

Chairman  
of the Committee on Patent Law (CPL)

In general introductory remarks, Mr Ficsor noted that the tasks of his Committee are to advise the AC on (1) proposals concerning the legal framework of the EPC, (2) issues relating to international patent law harmonisation in a global context, and (3) harmonisation of national law in the Member States. Thus, with particular reference to point (1) above, the CPL have played an important role in preparing EPC 2000, and, as a follow-up to that, up-dating the Implementing Regulations.



Mr Ficsor is happy that the Committee seems to work very well. It carries out background work which can then be presented to the AC, which generally can then agree on acceptance of that work without further detailed discussion. If, however, there is still some debate on a particular point the CPL puts forward possible alternative solutions. We put the question of client/attorney privilege to Mr Ficsor. He replied that while this is not directly in the mandate of the CPL, nevertheless the Committee would not necessarily be averse to discussing it, as it is a legal question related to patents.

*epi* had imposed a guideline set of questions in advance of the interview. Each one was discussed during the interview and Mr Ficsor kindly set out his answers in writing, which are set out below, our questions being in italics:

### *Replies to the epi's questions*

*by Mihály Ficsor*

*in his capacity as Chair of the Committee on Patent Law*

- 1. How do you see your committee interacting with the work of the Administrative Council (AC) as a whole, and the NPOs? What is your/your committee's role in the AC Board (B28)?*

The tasks of the Committee on Patent Law are clearly defined by the AC Decision setting up the Committee. The Committee has to advise the Administrative Council on proposals for amending the legal framework of the European patent system. The Committee did play a crucial role in preparing the 2000 Diplomatic Conference for the revision of the EPC as well as in managing the legislative follow-up to the revision, including, but not limited to, the refinement of the Implementing Regulations prior to the entry force of the EPC 2000. Changes to the Implementing Regulations are regularly discussed

in the Committee, and I am of the view that, in that respect, it performs its duties in a rather satisfactory manner. On the basis of the preparatory work performed by the Committee, the Council can usually proceed to a smooth adoption of the proposed rule changes. In those exceptional cases where substantive differences of view remain within the Committee, and, as a result, the Council has to take a decision dictated by policy considerations of its members, the Committee also prepares the ground for such decisions in an appropriate manner, namely by setting out the political alternatives against their legal background.

International patent law, in particular global harmonisation, also lies within the remit of the Committee on Patent Law. However, maybe due to some institutional constraints of the Organisation, the Committee has so far only been used as a forum for internal discussion. Externally, these discussions have not resulted in a common position of EPC Contracting States that could have been represented as such to the negotiating partners on issues such as harmonisation of substantive patent law. This weakens Europe. Everybody knows this. However, little progress has been made in achieving that Europe should at last speak with one voice on international patent law issues. In my opinion, the Committee's current mandate is broad enough to cover the development of co-ordinated, joint positions of Contracting States on substantive patent law harmonisation or other global issues related to patents.

I also have to mention that, in principle, the Committee is also mandated to advise the Administrative Council „on matters concerning the harmonisation of national law in the Contracting States relating to the implementation of the EPC“. Nevertheless, the Committee is not very active in that regard, and seems to take a most careful approach to legal issues falling within the sovereignty of Contracting States. What the Committee can do is to draw attention to some legal problems that can, and should, be resolved at the level of national legislation. For instance, this is what the Committee has done with respect to the payment of national renewal fees in the context of a successful petition for review under Article 112a EPC.

Under Article 28 EPC, the Board of the Administrative Council has been set up with the task of assisting the Council's Chairman in preparing and ensuring the continuity of the AC's work. Thus, the Board has to contribute to preparing the Council's work programme, co-ordinating the work of the Council and its bodies, and facilitating cohesion and consensus within the Organisation. This requires that the chairpersons of the Council's committees be regularly involved in the Board's

discussions. This is what defines my role in the Board, too. I have to take part in setting agendas and ensuring smooth collaboration between the Committee and the Council. I am convinced that the Board is a good forum for achieving these goals and that its establishment was an excellent idea.

2. *Users are concerned about the time scale/limits for filing divisional applications. How does the committee react to these criticisms from users?*

Allow me to start by making two general, almost „philosophical“, remarks.

The first concerns the speed or frequency with which rules can be changed. If a norm is not stable enough, it is no longer a norm. What makes a rule a rule is its stability. If it is applied only once or for an exceptionally short period of time, it loses its general nature. If you keep changing a norm, you will end up having no norm whatsoever. Therefore, stability seems an inherent quality of all, legal and non-legal, norms governing human life and society. This is all the more so in the field of patents where long-term business decisions are usually required. Stability of the legal framework is an essential part of the legal certainty much needed for innovation and developing patenting strategies with long-term effects.

My second general remark would be that one should not stick to an overly narrow interpretation of the concept „user of the patent system“. It is not only the applicants' or the professional representatives' interests that the decision-makers of this Organisation must properly take into account and weigh. By definition, the interests of those who have to respect the exclusive rights conferred by patents are not articulated in the same organised manner as those of the biggest applicants. It is the duty of the national governments represented in the EPO's bodies to ensure that all interests that are at stake be taken into account before important decisions are made. I am a great supporter of open and thorough consultations with the so-called „stakeholders“. Consultations do indeed contribute to improving the quality of legislative drafts. From the more angles a legislative proposal is looked at and examined, the better its quality can be. In addition, consultations are also useful for properly assessing the interests of those potentially affected by any new provisions. However, views expressed in consultations cannot be regarded as mandatory instructions addressed to decision-makers. The latter have to listen to all sorts of users but they will not always necessarily act as they are told by those consulted. They are under an obligation to consider all the interests at stake.

I do understand that the new regime for filing voluntary divisional applications is a source of concern to a number of users. Since discussions started on this issue it has been a controversial one, I might even risk saying that an exceptionally hotly debated one. When, in March 2009, the Council finally took a decision on the relevant amendments to the Implementing Regulations, it was fully conscious of these controversies and the complexity of the matter. The Council had to strike a balance

between a number of different, and sometimes even conflicting, interests. Inaction did not seem to be an option. The main concern was to prevent a distortion of the system and to stop dysfunctional practices, which were criticised by, among others, the European Commission in its report on the pharmaceutical sector inquiry. As you may recall, the main objectives of revising the legal framework for divisionals were basically the following: ensuring and strengthening legal certainty, especially for third parties; increasing procedural efficiency and avoiding unnecessary delays in the granting procedure; and assisting the Office in coping with its ever increasing workload. It was, however, acknowledged that there was also a need to provide fair treatment for „legitimate“ voluntary divisional applications and to ensure that their room of manoeuvre should not be unduly limited.

Obviously, due to the changes to the legal framework for divisionals, certain stakeholders of the patent system have had to adapt their previous behaviour to the new regime. But that is normal. In fact, changing behaviours is just exactly what changing the law is all about. What is the point in changing the law if it results in no change whatsoever to the actual practice?

As all new pieces of legislation, the new rules on divisionals will have to be revisited. A review of the current legal framework will certainly be called for in the medium term. But for such a review to make real sense, we would need a sufficient amount of experience. Some users are naturally concerned about the new regime but this should not lead the EPO bodies to arrive at premature conclusions or take action hastily. The legal framework for divisionals might need further improving. For instance, we have to make sure that, due to the interplay between the new rules and some others, applicants should not lose their right to claim subject-matter they have previously disclosed in an earlier application. But first, we have to clearly identify the problems occurring in the application of the new regime. This takes time. So does finding solutions.

As announced at the last meeting of the Committee on Patent Law, in early December 2010, the Office will hold a brainstorming meeting with users' representatives with a view to drawing up a list of areas where further rule changes might appear necessary. I do believe that an even more structured, intensified dialogue with users may further improve the legal environment of patenting in Europe.

3. *The EPO published a notice on the 39th meeting of the CPL regarding proposed amendments of Rules 36, 161, 162, 71 and 71a and the unanimously favorable opinion of the CPL of the proposed amendments – is this a sign of more transparency in the working of the AC and its bodies?*

Yes. This is a sign of even more transparency. Not that the Committee would have had thus far any serious transparency deficit. I have been chairing its meetings for more than five years and I am unable to recall any meeting where we would have had any confidential items. Not a single one. No information is withheld from

users or the general public. But, of course, further improvements can be achieved in that regard, too, and the notice you have referred to is certainly one of them.

4. *Is your committee concerned about the differences in approach of the USPTO and the EPO in respect of business method patents, which differences could be said to lead to impediments of the development of European industry?*

The Committee on Patent Law has not specifically addressed this issue. Not even in the framework of discussions on substantive patent law harmonisation, as the issue of the technical character of patentable inventions does not form part of the so-called reduced package currently discussed within Group B+. Therefore, I am not in a position to say anything specific on this, not even on the assumption implied in your question.

In addition, it is difficult to envisage, in the short term, an objective debate in Europe on an issue like this after the negotiations on, and the eventual failure of, the proposed Directive on computer-implemented inventions. If adopted, that Directive would have confirmed the established law under Article 52 EPC, namely that business methods as such are not to be regarded as inventions that can be patented.

In general, I can however subscribe to the view that patent law issues should not be examined in isolation from economic, social or ethical considerations. Prior to introducing legislative changes, it would always have to be checked whether they in fact contribute to increasing Europe's competitiveness on the global market. In that respect, nothing should be taken for granted. On the other hand, none of the current bodies of the EPO's Administrative Council take primary responsibility for

looking into the economic impact of patent law and practice. The Committee on Patent Law has no explicit competence for that and its current composition would not be optimal for that purpose, either. Even the Budget and Finance Committee is only concerned about the finances and the budget of the Organisation itself. So perhaps there is some room for institutional improvement in that regard.

5. *Will the new guidelines for examiners be made available for users?*

The Committee on Patent Law does not normally discuss the Guidelines for Examination or changes to them. Nevertheless, as far as I know, the Guidelines are in fact publicly available, for instance on the Office's website. If your question is aimed at the so-called internal instructions and the availability thereof, I can only rely on the information I have received from the Office. They have launched a project for incorporating the internal instructions into the Guidelines. This is how they will eventually become publicly accessible. There will no longer be two separate sets of instructions to examiners – a publicly available one and another for internal use only –, but these will be integrated into a single, publicly accessible document called Guidelines.

6. *The epi submits numerous position papers on patent law developments. Do you see these as a help or hindrance?*

As a help, of course. I personally benefit a great deal from the epi's position papers in preparing for the meetings of the Committee. Hungary's national delegation regularly consults the Hungarian members of epi before CPL meetings. This kind of professional dialogue is invaluable.

## Interview with Josef Kratochvíl (CZ)

Chairman of the Technical and Operational Support Committee (TOSC)  
of the Administrative Council

In general opening remarks Mr Kratochvíl said that he welcomed the IT audit commissioned by the President.

All Member States participate in the TOSC deliberations. The Committee's basic task is to advise the Administrative Council on matters listed in the TOSC mandate. Among others, quality of examiners work have to play a key role



once discussing possibilities of reusing the work already done by other patent granting authorities.

*Replies to the epi's questions*

*by Josef Kratochvíl*

*in his capacity as Chair of the Technical and Operational Support Committee*

1. *How do you see your committee interacting with the work of the Administrative Council (AC) as a whole, and the NPOs?*

The Technical and Operational Support Committee (TOSC) was established after a thorough debate in the Council that had been running since 2008. The need of wider mandate for the former WPTI has emerged from

the growing importance of technical and operational aspects of patent proceedings, patent information infrastructures and related international cooperation between patent offices within and outside the Organisation. This cooperation aggregates opportunities for the Office as to how to manage limited sources of the Organisation more efficiently. There are many parallel initiatives in this field throughout patent offices and respective international and regional organisations and our task is to provide a necessary technical advice to the Council that would help further development of our European Patent Organisation. I hope that we are fulfilling our mandate by the desired way and that we will accept new challenges of closer coordination with all member states in the coming period.

*What is your/your committee's role in the AC Board (B28)?*

Let me start by summing up to the most important role of the B28 as such. It is designed to help the Chairperson of the Council manage its deliberations in the most effective way. Now we are almost 40 countries, this becomes quite challenging. The Council decided to invite both the chairperson of the CPL and the one of the TOSC to get both the legal and technical expertise on board. Helping the other Board members to find out possible technical and operational priorities and problems ahead seems to me of high importance.

2. *How far do different examination „clusters“ cooperate, so that a uniform approach to say obviousness is spread over the whole office?*

I suppose that the compliance of the Office's examination procedures with the condition of inventive step/non-obviousness is in competence of the President of the Office and his Vice-president for DG1 „Operations“. From the Committee's point of view, it could affect this issue indirectly only – for example, by recommendations how to improve an application of quality standards for examination products. Might not be a bad idea to ask details from the PD Quality Management.

3. *Does internal job mobility come within the remit of your committee?*

NO because it is the competence of the European Patent Office management.

4. *The mandate of TOSC extends into trilateral cooperation; assumingly also the IP5 cooperation?*

We should be aware that a decisive political direction of cooperation, between the Organisation and other pat-

ent systems lays in hands of the Council. In this respect, the Council authorizes the President of the Office who represents the organisation in these affairs. The Committee „shall provide the Council with opinions on operational aspects of trilateral technical co-operation between the EPO, the USPTO and the JPO, as well as other forms of technical co-operation in international „fora“ that naturally includes subsequent cooperation within the IP5.

In my view there is a lot of substance in what is going on in the IP 5 framework and would be helpful for Europe to learn from and select what could be in a way copied or we can learn from. The role of the TOSC is then directly there.

5. *Is the TOSC a fundamental player in the EPN?*

We are convinced that further development of the EPN is needed. Our committee has an important role in the exploration of elements of the EPN. Let me remember that an explicit field of our competence includes „operational issues concerning quality, especially monitoring of the European Quality System as well as technical arrangements for reuse of available patent procedure results (e.g. searches, examination communications). In performing its duties as outlined above, the TOSC shall inform and support the Council on technical issues pertaining to the concept of the European Patent Network, within the policy framework defined by the Council.“ This means that we have to focus our attention on technical side of the EPN concept. The key role in this respect is of course the political decision which stays with the Council. Without political support and enthusiasm for the EPN idea, we can hardly move on. I see the EPN as a network of stakeholders, patent offices in particular, having a common ultimate target to serve clients best. Ways to achieve are numerous, once the political will is with us, which I am convinced it is the case, technical „DETAILS“ are remaining only, and here I see the role of the TOSC.

6. *How do you see the role of epi in furthering the work of your committee?*

The TOSC welcomes every possibility to learn from experienced users in particular. Inputs of whatever nature, including pointed criticism would help us to stay in the real world. If we want to make a good work, we need qualified contributions from a wide spectrum of European patent system users. We look forward to cooperate with the epi as closely as possible.

We on behalf of the epi are extremely grateful to our interviewees for giving up their valuable time, not just for the interviews themselves, each of which took over an hour, but also for their advance preparation, which from the quality of their answers was clearly considerable. For our part, we took a lot from the interviews, which we hope to have conveyed in some small way to our members. It is clear to us that there is great transparency in the work and conduct of the AC and its committees, which is clearly healthy for the good of the European Patent Organisation.

Kim Finnilä,  
Terry Johnson  
(Reporter)

## Pre-Meeting Session

### 69th Council Meeting, Berlin, 19 November 2010

Terry Johnson  
Editorial Committee

The meeting took place in the afternoon of Friday 19 November, 2010 and comprised two sessions, namely:

1. The nature, structure and aims of committees of *epi*; and
2. Educational activities of the *epi*

The first session was opened by Paul Rosenich, Chairman of the *epi* Disciplinary Committee, who gave a comprehensive overview of the committee which has a legal basis for its existence in Art. 134 a of the Implementing Regulations. The committee members must be appointed after each Council election, the complement being one member from each member state, with the caveat that the Committee must not include a member of the *epi* Board. Any amendment to the Regulations can only be made by a decision of the *epi* Council with a 2/3 majority, that decision then having to be ratified by the AC of the EPO.

Breaches of the *epi* Code of Conduct are to be brought to the attention of the Committee, which is split up into Chambers to which cases are allocated for consideration. The Committee can impose various sanctions, e.g. it can issue a reprimand, can impose a fine of not greater than 10,000 EUR, can issue a warning, and can refer a case to the Disciplinary Board of Appeal of the EPO. Each Chamber usually comprises 4 members (3 plus 1 substitute).

The Committee has the power to conduct oral proceedings, which the EPO and *epi* Presidents can attend, or give written advice in advance of the proceedings. The Chairman Paul Rosenich reported that there were not enough French speakers to form the number of Chambers required to hear „French“ cases. He mentioned, too, that there is about one new case per month, and moreover that an increasing number of cases could be considered „difficult“, which puts a strain on the Committee. Most complaints came from clients, not fellow *epi* members. It would be helpful to ensure efficient working if Mr Rosenich was advised of members who would be willing to work on his Committee.

There was a discussion during which the possibility of whether „cross-border“ action could be taken was raised, i.e. could national groups consider cases, particularly where a party, or two or more in an adversarial case, are in one State. This is not possible as the Committee deals with EPO attorneys, not national attorneys, and moreover there is no legal basis for referral. On the other hand, there seems to be no reason why parties could not be asked if they would consider having the matter decided nationally without formal referral to the Committee. Despite the (increasing) work-load on the Chambers, some cases never get to a Chamber as the

matter is resolved in correspondence between the Committee and the party/ies.

The By-Laws do not restrict member states to have one representative, they can recommend nil, one, or more members.

For the future Mr Rosenich suggested that after each committee election, a pool of members willing to be a member of the Committee could be drawn up. This would be a help in forming a Chamber as the need arose.

A most interesting and informative presentation for which Mr Rosenich was warmly thanked by the meeting.

The next topic was a report of the Task Group on possible reorganisation of the *epi* as set out by the President, Kim Finnilä, in his proposals presented to the 68<sup>th</sup> Council meeting in Strasbourg. Dieter Speiser was the main presenter as leader of the Group, Mr Le Vaguerèse and Mr Lyndon-Stanford adding additional comments.

Mr Speiser made the point in his opening remarks that the Council of the Institute governs the working of the *epi*, so Council is the body which determines any changes in structure of the *epi*.

In this regard the Secretariat was, as suggested by the President, understaffed and would be strengthened by an additional member, and also additionally by the hiring of a professional who could support the work of the committees.

Committees are part of *epi* and essentially are its „engines“, so their size, composition and duties are of importance, the Group being charged with looking at these components. The Group had looked at the committees and concluded that those with fewer members, e.g. up to about 10, were more effective than those with a larger membership, some of the reasons for this being that not enough members of larger committees were fully active in the work of the committee. Also, some of the larger committees required under their terms of reference one member per member state, which could lead to unwieldiness. As a result of these studies the Group came up with a set of proposals which can be summarised as (i) members must agree to be active before elected; (ii) size of committees to be reduced and those proposed as members must produce to Council a CV and a note setting out their motivation to be on the committee to which they are to be elected; (iii) substitute members must agree to proposal; (iv) each constituency of the *epi* can nominate an associate member; (v) committees can elect further associates; (vi) the chair of a committee can elect up to three associates as full members; and (vii) committee chairs can invite

substitute and associate members to committee meetings, expenses for their attendance to be reimbursed.

The aim was to provide flexibility for the Chairs in an endeavour to promote efficiency. There was a lengthy discussion on this complex matter, some participants in the meeting not being convinced that CVs and „motivation“ letters would cure the problem of „silent“ or non-working Committee members. The President was of the view that the Chairs had to have more flexibility of operation, must themselves be suitable as leaders, and that a pool of possible members should always be available from which Committee members could be drawn. National groups should also be made aware of „sleeping“ members as in general it is they who nominate Committee members and could therefore take action to replace an ineffective member.

The President reported that he had had a meeting with Committee Chairs to discuss the issues and a further such meeting should ideally be held after the next Council election. The meeting was of the view that a professional support person should be engaged to assist the Committees in their work by, for example, reporting law and rule changes to them. This had been proposed previously by the President. The meeting did not form a positive view on the seven proposals put forward by the Group.

The second session was opened with a presentation by Walter Holzer, a former *epi* President who has recently been appointed „Responsible“ for international relations and development of the CEIPI and who has been a member of the AC of CEIPI for the last eleven years. He informed the meeting that CEIPI is part of the University of Strasbourg, and provides basic courses for sitting the EQE, and Master courses on matters such as litigation. In 2007 a Memorandum of Understanding (MoU) was concluded with *epi*, CEIPI also participating in the work of the Academy set up by the EPO. In addition to training courses, CEIPI also has courses on re-sitting, and „cramming“ for the EQE, all assisted by a network of tutors. There are three „head“ tutors and ten other tutors from DGI of the EPO, which pays for them. He observed that there was a need for more tutors from national groups, and a problem on training for candidates who would not physically go to Strasbourg. There was also the problem of a relative low pass rate, and a disparity of pass rate between Member States, e.g. a pass rate of 52 % in the UK, 40 % in Germany and 36 % in France in 2009.

Jean-Michel Zilliox, Director Operations and Customer Care at the European Patent Academy, then gave a very interesting and well-received presentation on the Academy, which was set up by the AC of the EPO in 2004 and operates under the EPO President and the Academy Supervisory Board of the AC. He observed that the

Academy would not have been set up without the active support and participation of the *epi*. The target audiences identified by the Academy were: Institutional strengthening (national patent offices), Professional representatives, Innovation support, Judicial training and Academia. The Academy co-operates with 40 non-member states of the EPC, and with European Judges (to promote harmonisation of jurisprudence). The Academy also seeks to teach its students the commercial implications of patent ownership as a business asset. The Academy has close co-operation with CEIPI, and in addition to preparation for the EQE, aims *inter alia* to provide training for „grandfathers“ in new member states, training for patent attorney support staff, and a Tutors' Network, a new generation of tutors being sought. E-training had been introduced which whilst not replacing the classroom, does provide a 24hr training opportunity via an EQE Forum, which has 1800 candidates and often up to 300 are online simultaneously.

Mr Zilliox sees enhanced co-operation and partnership with the *epi* in the future. He concluded by reporting that The German Institute for Invention (DIE) has nominated the European Patent Organisation's European Patent Academy for the prestigious „Diesel Medal“, also known as the German „Inventors' Oscar“.

Mr Fritz Schweinzer (Chair of the PQC) then followed with an interesting presentation on the work of his Committee, which is concerned *inter alia* about the low EQE pass rate, the difficulty of teaching candidates in all the member states, and the training of „grandfathers“ in new member states. The PQC had increased the number of „mock“ EQEs, the training of supervisors and the mentoring of candidates. Early registration for the EQE and the sending of information to all candidates had also been implemented. The committee was also working at CPE, and how best it might be implemented.

After this presentation, there was a long discussion, during which it emerged that, as one long-term EQE examiner put it, the examination has become less and less relevant for what attorneys need for everyday practice. This is partly due to the length and complexity of some questions/papers, the seeming lack of appreciation by EPO EQE examiners as to the work of an attorney, which is not limited to the EPC, these and other reasons leading to an overall lack of fairness in testing a candidate's ability to be granted a „right to practice“. Mr Zilliox said the Academy would look at the pass rate and try to find reasons to improve it, and would also look at means to enhance tutor education, which might improve matters in the long run.

No conclusion as such was reached, but the overview of education and this opportunity to voice concerns about the exam were by general consensus much appreciated by the participants.

## Report of the 69th Council Meeting 20 November 2010, Berlin

Terry Johnson, Editorial Committee

1. The President opened the meeting, thanked the German group for their organisation, and welcomed the delegates.
2. The meeting stood in silence for a minute to honour the passing of Mr Koitel from Estonia.
3. The Agenda was adopted with the addition of two further topics relating respectively to (1) a motion of Mr Leyder that articles in *epi* Information of more than half a page in length in one official language should be accompanied by a precis in the other two official languages, and (2) that a decision on attendance at an upcoming SACEPO Working Party on Rules should be taken.
4. The minutes of the last Council Meeting (in Strasbourg) were approved as were decisions from that meeting following a discussion to include as a decision Mr. Mercer's motion in paragraph 13 of the Strasbourg minutes for the Task Group on reorganisation of the *epi* to provide proposals by spring 2011 to include reduction of Council membership to less than 100 with a minimum of one member per country and to provide rules for split constituencies.
5. The Treasurer reported, including reference to the budget for 2011. The former book-keeper has admitted his offence, court and proceedings are in train. As a result of the activities of the former book-keeper, it was decided in conjunction with the *epi* Finances Committee to appoint a new firm of external auditors. After considering the credentials of possible firms, one, Consilia, was deemed to be the most suitable and the Board confirmed their appointment towards the end of September 2010. Consilia will have an expanded role from that of the former firm, including restructuring of the book-keeping department so as to be able to conduct bookkeeping according to the German HGB (Handelsgesetzbuch) standard, which would be of benefit to the *epi* and its members. To assist in this, new software has been brought in. Restructuring is nearly complete. The exercise will cost an additional EUR 35,000. Part of the restructuring and the initial problem has resulted in the *epi* no longer accepting cheques for example for annual subscriptions. If a cheque is sent in, it is returned to sender as a matter of course. In the future, each member will be sent a numbered invoice for his/her membership fee. Consilia hope to provide a final report by the end of this year for 2009.
 

Despite the foregoing, the Treasurer reported that the budget for 2011 did not require any drastic increase and indeed that as the membership was just over 10,000, he saw no need to increase the membership fee for 2011, which would thus stay at EUR 160. The *epi* Finances Committee confirmed that it approved maintenance of this fee at EUR 160 for 2011.

Council voted on maintenance of the membership fee of 160 EUR and acceptance of the budget as proposed, as follows: For: 110; Against: 0; Abstentions: 2

The motion was thus carried and will be effective for 2011.
6. The President reported on his and the Presidium's activities since the last Council meeting. He has been very busy, as usual. Some points may be of particular interest to members:
  - (i) The report included his PowerPoint slides presented by him to the AIPLA/FICPI colloquium in Edinburgh, 17-18 June 2010 on the Patent Offices' Backlog Crisis. (See issue 3/2010 for a report on that meeting).
  - (ii) He mentioned a disciplinary case, on which he had filed a Notice of Appeal. There is no outcome on this case yet. The Board has asked the Disciplinary Committee to consider publication of cases after final decision.
  - (iii) The Presidium met with the Chairs of Committees to see how the work of the Committees could be enhanced. This had been welcomed by the Chairs, particularly the proposal to employ a professionally qualified person to assist them in their work.
  - (iv) He had had a fruitful meeting with the President of the „Patentanwaltskammer“ to exchange views on topics of mutual interest.
  - (v) The 125<sup>th</sup> meeting of the AC of the EPO had been attended (see further report in this issue). The topic of machine translation was discussed in the AC and the *epi* Board had discussed it previously too, without coming to a firm view on to whether *epi* should support this or not. In the meantime, the AC approved at the 125<sup>th</sup> meeting a project (in co-operation with the EC) to investigate machine translation (see report of that meeting).
  - (vi) A meeting had been held with the new President of the EPO (see report in 3/2010). President Battistelli is supportive of continuing with regular meetings. Mr Battistelli had accepted an invitation for him and his management team to attend the next *epi* Board meeting (Budapest, March 2011).
  - (vii) The President reported that on the occasion of the 125<sup>th</sup> AC meeting, the opportunity had been

taken, with their prior agreement, to interview the respective chairs of the AC, CPL, TOSC and BFC. These initiatives on the part of the *epi* were positively and favourably received by the interviewees. (See report in this issue).

(viii) He had attended a meeting of the Task Group on possible reform of the organisation of the *epi* (see report in this issue of the pre-meeting before the Council Meeting, and below in this report).

(ix) A letter to National Associations regarding a comparison between procedures in the EPO Boards of Appeal and National Courts had been sent.

(x) He had attended the fifth Meeting of the Academy Advisory Board (AAB), which discussed how to achieve a proper advisory function for the AAB.

Council noted the report.

#### 7. The Secretary General gave his report.

(i) Membership was now about 10100, with Members from the latest Member State, Serbia (RS), to be added to the total list of members.

(ii) The EPO President had, as he is required to do, on a proposal from the National Office, appointed two members of the San Marino delegation to the *epi* Council. However, neither had appeared at the meeting, and no explanation for their absence had been given.

(iii) Regarding the Secretariat, Ms Claudia Schweiger had now been employed as an assistant to the Board primarily to assist it and Council at and before Council Meetings in all administrative aspects.

The post of bookkeeper/accountant is at the moment filled on a temporary basis. The post is advertised in a local (Munich) newspaper and via an internet portal.

The following next *epi* meetings are scheduled for:  
19 March 2011, 84<sup>th</sup> Board, Budapest (HU)  
23-24 May 2011, 70<sup>th</sup> Council Meeting, Dublin (IE)  
5 November 2011, 71<sup>st</sup> Council Meeting, Darmstadt (DE)

#### 8. Report of the *epi* Task Group on reorganization

Mr Speiser (DE) reported on the work of the Group in response to President Finnilä's proposals of June 2010. This provoked a long and animated debate (see fuller report of the Council pre-meeting on 19<sup>th</sup> November 2010 in this issue).

(1) During the debate a motion that funds up to € 150,000 should be made available to the Secretary General to hire a professional qualified Member of staff to support the work of the

Committees, particularly the chairs was put to vote. The motion was carried. Council also rejected a motion that is was necessary to reduce the size of Council in 2014.

(2) Following on from this, and from a discussion that the Board should be abolished in favour of an enhanced Presidium, Council voted in favour of the size of the Board being reduced as of 2014 within the limits set in the Founding Regulation.

(3) Council then rejected a motion that the size of the Board be reduced, for the term of the next Council (i.e from May 2011) to the minimum number prescribed in the Founding Regulation.

(4) Council then voted „Yes“ to the question of whether Council foresaw any problem if a Board member is prevented from attending a Board meeting.

(5) The Task Group had put forward propositions for reducing the number of committee Members without sacrificing input from required national groups and to provide the required number of active Committee members (see report of pre-meeting).

After much discussion, Council rejected the propositions en bloc.

The Task Group having completed its work, Council disbanded it, the President having thanked it for its work in reviewing his proposals.

#### 9. Succession

This being the last Meeting of the current Council, the President indicated that if elected by their respective constituents, he and Mr Quintelier would stand again for their present respective posts of President and Treasurer. Ms Arkan had indicated that she would stand down as a Vice-president, so would Mr Maué as Secretary General.

At the invitation of the President Ms Leißler-Gerstl (DE) said that if elected by her constituency, she would be willing to stand for election as a Vice-President in the next Council.

10. Various papers for opinion and Decision were approved, Mr Leyder's motion concerning provision of a précis of papers over a certain length in *epi* Information being withdrawn on the basis that the Editorial committee would consider each case as it arose. A discussion on rules for *epi* students was deferred to a future meeting, as was discussion for a proposal for a long term *epi* educational plan.

There being no other business the President thanked all those leaving this Council for their work over the preceding three years, to warm applause, and closed the meeting at 6.00 pm.

## The By-Laws Committee 1978 – 2010

C. Eder (CH)

former Chairman of the By-Laws Committee

At its first meeting on 8/9 April 1978 in the assembly-room of the hotel Penta in Munich the Council (consisting of members from 11 member states) set up a By-Laws Committee with 22 members and instructed this Committee with the preparation of By-Laws. In its first meeting on 28 June 1978 at Paris, this Committee first elected Mr H. Mulder (NL) as president and Mr D. Hijmans (NL) as secretary, since only these two persons were known by the Committee members for a good knowledge of the three official languages. The Committee discussed several principles to be included in the By-Laws and made decisions on 25 September 1978 at London, on 12 and 13 December 1978 at Amsterdam and on 29 March 1979 at Brussels.

A working group consisting of Messrs. J.S. Bushel (GB), C.E. Eder (CH), M. Lemoine (FR) and J.E. Schönhöfer (DE) held six meetings over several days (at Luxembourg, Basel, Regensdorf, London, Brussels and Basel). In these meetings, the working group worked out a first draft for By-Laws with the help of the By-Laws of national bodies and considered the decisions of the By-Laws Committee. The By-Laws Committee was informed of the work and asked for its approval. This Committee had a meeting at Munich on the 18/19 March 1980. It discussed the draft and brought it to the Council for approval. The Council asked in its meeting on 28 and 29 May 1980 at Milan for some modification and thereafter put into force the final wording of the By-Laws in its meeting on 4 November 1980 at Vienna. At the same meeting, the By-Laws Committee which consisted of 22 members was dissolved. Furthermore, the Council set up a new By-Laws Committee consisting of the four members of the working group and fixed its terms of reference. The following persons have been members of the Committee:

1980–1982	J.S. Bushel	1988–	T.L. Johnson
1980–2010	C.E. Eder	1993–1996	L. Nuss
1980–1987	M. Lemoine	1996–2008	T. Schuffenecker
1980–1987	J.E. Schönhöfer	2000–2005	L. Steiling
1983–1988	G. Edmunds	2005–	D. Speiser
1987–2000	K.-F. Dräger	2008–	P.J. Moutard
1987–1993	C. Madeuf	2010–	J. Jantschy

The protocols show that the Council in its later meetings very often issued rules, set up Committees and fixed terms of reference as well as made other decisions, which had to be effective for an unlimited validity period. As it has become more and more difficult to find all these decisions and to get and to keep an overview, the By-Laws Committee itself prepared a systematic collection of all decisions made by the Council with the help of preliminary work by the president of the EPPC, Mr Felix Jenny. The By-Laws Committee also prepared a draft for a decision for entering and keeping this collection in force and asked the Council for approval. The Council approved the proposals on 3 October 1994 at Funchal whereupon the Secretariat handed out to each Council member a complete loose-leaf-collection.

Over the years, it has become more and more difficult and expensive to deliver the corresponding documentation, i. e. all the old and the new papers to all Council members, especially to the new elected substitute Council members and the new elected committee members. As the complete collection of decisions was held in computer record of the Secretariat and was accessible to the public through the internet, the Council decided in its meeting on 27 and 28 May 2008 at Vilnius that the updated collection of decisions must be accessible to all members of the Institute via the internet and no paper edition shall be delivered. The collection of decisions has been made fully accessible, not only to the members of the institute, but also to the public since 2010.

## Next Board and Council Meetings

### *Board Meetings*

84<sup>th</sup> Board meeting on 19 March 2011  
in Hungary/Budapest

### *Council Meetings*

70<sup>th</sup> Council meeting on 23-24 May 2011  
in Ireland/Dublin  
71<sup>st</sup> Council Meeting on 5 November 2011  
in Germany/Darmstadt

## epi member count reaches 10,000

The 10,000<sup>th</sup> member of *epi* was recently registered and it is with some pride that we look at this large group of people that forms our truly European profession. The new member does not come from one of the „big three“ member states, but from a smaller yet equally important country for the European patent system: the Netherlands.



Mr Alexander van Loon, a Dutch national, has studied in Zurich at the Eidgenössische Technische Hochschule

(ETH) and at Wittenberg University in Springfield, Ohio (US) before obtaining a masters degree in Biomolecular Sciences from the University of Utrecht, and hence started his career with much international exposure like many in our profession. He is now working for Octrooi-bureau LIOC, a privately held intellectual property law firm in the Netherlands with a total of three patent attorneys and one trademark and design attorney. This IP boutique, similar to many others all over the continent, is a fine example of how our profession combines skills in different technical and legal fields to serve clients at home and abroad.

We wish Mr van Loon success in his new profession and hope that he will be able to enjoy his work as much as many of us do.

## Results of the 2010 European Qualifying Examination

Place of residence	Total number of candidates	PASS		NOT PASSED	
		Number	%	Number	%
AT	23	7	30,43 %	16	69,57 %
BE	36	12	33,33 %	24	66,67 %
CH	81	25	30,86 %	56	69,14 %
DE	888	234	26,35 %	654	73,65 %
DK	82	18	21,95 %	64	78,05 %
ES	81	16	19,75 %	65	80,25 %
FI	69	9	13,04 %	60	86,96 %
FR	241	77	31,95 %	164	68,05 %
GB	231	132	57,14 %	99	42,86 %
HU	4	0	0,00 %	4	100,00 %
IE	9	2	22,22 %	7	77,78 %
IT	156	30	19,23 %	126	80,77 %
LI	5	1	20,00 %	4	80,00 %
LU	1	0	0,00 %	1	100,00 %

Place of residence	Total number of candidates	PASS		NOT PASSED	
		Number	%	Number	%
NL	110	38	34,55 %	72	65,45 %
NO	3	0	0,00 %	3	100,00 %
PL	5	1	20,00 %	4	80,00 %
PT	1	0	0,00 %	1	100,00 %
RO	2	0	0,00 %	2	100,00 %
SE	136	29	21,32 %	107	78,68 %
SK	1	0	0,00 %	1	100,00 %
TR	3	0	0,00 %	3	100,00 %
CA	1	0	0,00 %	1	100,00 %
JP	1	0	0,00 %	1	100,00 %
US	1	0	0,00 %	1	100,00 %
TOTALS	2171	631	29,06 %	1540	70,94 %

\* This table includes all candidates who fulfil the conditions of Article 14(1) REE irrespective if they fulfil the conditions of Article 14(2) REE.

## 2011 Mitgliedsbeitrag/2011 epi membership fee/Cotisation epi 2011

Es wurde in der 69. Sitzung des *epi*-Rates am 10. November 2010 beschlossen, dass der *epi*-Mitgliedsbeitrag für das Jahr 2011 € 160 betragen wird. Alle Mitglieder werden vom Schatzmeister eine Rechnung über den Mitgliedsbeitrag 2011 erhalten. Aus der Unterlassung der Sendung der Rechnung kann das Mitglied keine Ansprüche herleiten.

Information zur Zahlungsmodalitäten entnehmen Sie bitte der *epi*-Webseite [www.patentepi.com](http://www.patentepi.com)

At the 69th *epi* Council Meeting on 20 November, 2010 it was decided that the *epi* membership fee for 2011 will be € 160. The Treasurer will send to each member an invoice relating to the payment of the 2011 membership fee. Whilst the member's attention is drawn to the sending of this invoice, he or she may not invoke the omission of such an invoice.

For information concerning payment, please see the *epi* website [www.patentepi.com](http://www.patentepi.com)

Lors de la 69ème réunion du Conseil de l'*epi*, le 20 novembre 2010, il a été décidé que le montant de la cotisation pour l'année 2011 serait de € 160. Le Trésorier enverra une facture pour le paiement de la cotisation à tous les membres de l'*epi*. Le membre ne peut se prévaloir de l'omission de l'envoi de cette facture concernant un tel paiement.

Pour toute information concernant les modalités de paiement, merci de consulter le site de l'*epi* [www.patentepi.com](http://www.patentepi.com)

Claude Quintelier  
Schatzmeister – Treasurer – Trésorier

## List of Professional Representatives as at 31.10.2010

by their place of business or employment in the Contracting States

No.	Contr. State	Total Repr.	% of Tot.Repr.
1	AL	11	0,11
2	AT	121	1,20
3	BE	174	1,72
4	BG	72	0,71
5	CH	437	4,33
6	CY	12	0,12
7	CZ	105	1,04
8	DE	3393	33,63
9	DK	187	1,85
10	EE	28	0,28
11	ES	170	1,69
12	FI	156	1,55
13	FR	914	9,06
14	GB	1939	19,22
15	GR	26	0,26
16	HR	27	0,27
17	HU	96	0,95
18	IE	60	0,59
19	IS	23	0,23
20	IT	436	4,32

No.	Contr. State	Total Repr.	% of Tot.Repr.
21	LI	17	0,17
22	LT	30	0,30
23	LU	17	0,17
24	LV	21	0,21
25	MC	3	0,03
26	MK	58	0,57
27	MT	7	0,07
28	NL	437	4,33
29	NO	110	1,09
30	PL	358	3,55
31	PT	44	0,44
32	RO	67	0,66
33	RS	0	0,00
34	SE	315	3,12
35	SI	31	0,31
36	SK	38	0,38
37	SM	44	0,44
38	TR	104	1,03
	Total :	10.088	100,00

## Filing date requirements under the EPC – filing by reference to a previously filed application

C. Mulder<sup>1</sup> (NL) and D. Visser<sup>2</sup> (GB)

### Introduction

The Patent Law Treaty (PLT) aims at harmonizing and streamlining formal procedures relating to national and regional patent applications and maintenance of patents. In spite of the goal of harmonization, the PLT does not establish a uniform procedure for all parties to the PLT by leaving many requirements optional, allowing divergence in implementation between parties. The European Patent Convention (EPC) was aligned with the PLT in the EPC 2000 revision. This article compares the requirements for obtaining a date of filing when filing by reference to a previously filed application set by the PLT and its implementation in the EPC. The freedom in implementation has resulted in an increased complexity of the filing date requirements.

This article is a sequel to the article „Filing date requirements under the EPC – an option to extend subject-matter?“ in epi Information 2/10, p. 44-48, and focuses on filing by reference.

### Filing by reference to a previously filed application – Article 5(7) and Rule 2(5) PLT

Article 5 of the PLT governs the requirements for the accordance of a date of filing.<sup>3</sup> In particular, Article 5(1) PLT prescribes the elements of an application required for according a date of filing. Article 5(7)(a) PLT obliges a Contracting Party to accept, at the time of filing, the replacement of the description and any drawings in an application by a *reference to a previously filed application*, subject to certain formal requirements.<sup>4</sup>

Rule 2(5) PLT provides two different types of requirements:<sup>5</sup> obligatory requirements (indicated by „shall“), and optional requirements (indicated by „may require“). Each PLT Contracting Party can decide which optional requirements it incorporates into its law as compulsory requirements for the accordance of a filing date. Article 5(7)(b) PLT permits a Contracting Party to regard

an application as not having been filed if the applicant fails to comply with the obligatory and any optional requirements under Rule 2(5) PLT implemented as compulsory by a PLT Contracting Party.<sup>6</sup>

A PLT Contracting Party may decide that any remaining non-compulsory requirement in Rule 2(5) PLT is regarded as a formal requirement. Failure to meet a formal requirement does not result in a (retroactive) loss of the filing date but in the application being refused or considered withdrawn.<sup>7</sup> The filing date accorded will not be affected by the loss of rights.

Rule 2(5)(a) PLT mentions two obligatory requirements and one optional requirement for the accordance of a filing date when filing an application by reference to a previously filed application:

- (i) The reference to the previously filed application *shall* indicate that the description and any drawings are replaced by the reference to the previously filed application;
- (ii) The reference *shall* also indicate the number of that application and the Office with which that application was filed;
- (iii) A PLT Contracting Party *may* require that the reference also indicates the filing date of the previously filed application.

A PLT Contracting Party *may decide* which of the optional requirements mentioned in Rule 2(5)(b) PLT are made compulsory for the accordance of a filing date:

- (iv) Filing a *copy* of the previously filed application and, where the previously filed application is not in a language accepted by the Office, a *translation* of that previously filed application, be filed with the Office within a time limit which shall be not less than two months from the date of receipt of the application;
- (v) Filing a *certified copy* of the previously filed application with the Office within a time limit which shall be not less than four months from the date of the receipt of the application.

In addition, a PLT Contracting Party *may make* the optional requirement in Rule 2(5)(c) PLT compulsory for the accordance of a filing date:

- (vi) Requiring that the previously filed application had been filed by the applicant or his predecessor or successor in title.<sup>8</sup>

1 Dr. Cees A.M. Mulder is a European Patent Attorney and Lecturer in Intellectual Property Law at the Department of International and European Law at the Faculty of Law of Maastricht University and specializes in procedural patent law of the EPC, the PCT, the PC and the PLT.

2 Dr. Derk Visser is a European Patent Attorney. He is partner of EIP in London and Lecturer in EPC and PCT for CEIPI; he specializes in drafting legal opinions on procedural and substantive issues regarding the EPC.

3 The Patent Law Treaty was adopted on 1 June 2000 at a Diplomatic Conference in Geneva; the Treaty entered into force on 28 April 2005. See <http://www.wipo.int/treaties/en/ip/plt/>.

4 „Explanatory Notes on the Patent Law Treaty and Regulations under the Patent Law Treaty adopted by the Diplomatic Conference on June 1, 2000“ (prepared by the International Bureau), Diplomatic Conference for the adoption of the PLT, Document PT/DC/48 Prov. (November 2000), Note 5.23. See [http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=4057](http://www.wipo.int/meetings/en/details.jsp?meeting_id=4057).

5 *Ibid.*, Note R2.05.

6 *Ibid.*; authors' interpretation of Note 5.24.

7 Cf. Article 6(8) PLT and the „Explanatory Notes on the Patent Law Treaty and Regulations under the Patent Law Treaty adopted by the Diplomatic Conference on June 1, 2000“, Note 5.23.

8 This requirement is, e.g., implemented in The Patents Act (GB), Article 15(1)(c)(ii): „a reference ... to an earlier relevant application made by the applicant or a predecessor in title of his.“

The requirements under Rule 2(5)(a) PLT must be complied with on the filing date of the application; any requirements under Rule 2(5)(b) PLT must be complied within the stated time limit.<sup>9</sup>

### Implementation of Rule 2(5) PLT in Rule 40 and 55 EPC

Article 80 EPC 1973 did not permit filing by reference. The implementation of the PLT in the EPC 2000 has made this special type of filing possible. Thereto the requirements set out in Article 5 and Rule 2 PLT have been incorporated in Rule 40 EPC, implementing Article 80 EPC (all further references to the EPC are to the EPC 2000). Rule 40(1)(c) EPC states that „a description or reference to a previously filed application“ is required for according a date of filing.

Rule 40(2) and (3) EPC deal with further requirements when the applicant refers to a previously filed application. In particular, Rule 40(2) EPC states that in this case the applicant must state the filing date and number of that application and the Office with which it was filed and indicate that the reference replaces the description and any drawings. Rule 40(2) EPC is a combination of the above-mentioned items (iii), (ii) and (i), respectively. In particular, the EPO has chosen to make the furnishing of the „filing date“ of the previously filed application compulsory for a reference filing [see item (iii) above].

In addition, Rule 40(3) EPC requires an applicant to file a *certified copy* of the previously filed application within 2 months of filing the application. This requirement corresponds to item (v) above, although the EPO appears not to comply with the prescribed time limit in Rule 2(5)(b)(ii) PLT which prescribes for the filing of the certified copy „a time limit which shall not be less than *four* months from the date of receipt of the application“. However, when the applicant does not provide the certified copy of the previously filed application within two months of the filing date (and the certified copy is not already available to the EPO), he will be invited under Rule 55 EPC to file it within a non-extendable period of two months.<sup>10</sup> Effectively, the EPO gives the applicant more than four months to file the certified copy of the previously filed application.

When an applicant files a European patent application by reference to a previously filed application, the EPO immediately accords the date of receipt of the reference filing as the date of filing (provided that all requirements of Rule 40(1) and (2) EPC have been met).

If the applicant has to rectify any deficiency for the accordance of a date of filing, e.g. because he omitted to indicate the number of the previously filed application or the Office where it was filed, the EPO will accord as the date of filing the date on which the required correction is

received. Only in one situation, the correction of a deficiency will not result in a re-dating of the application. Where the application is filed by reference to a previously filed application and the applicant files the certified copy of the previously filed application within two months of the filing date as required by Rule 40(3) EPC, or where he complies with the subsequent invitation to file the certified copy within two months from a communication according to Rule 55 EPC, the application maintains its original date of filing.<sup>11, 12</sup> Hence, it appears contradictory to call the requirement of filing a certified copy a „filing date requirement“, i.e. a requirement that must be complied with on the date of filing.

Since the EPO has chosen to make the filing of a certified copy of the previously filed application compulsory for the accordance of a filing date, the sanction on not providing the certified copy in due time is that the application will not be treated as a European patent application, as provided in Rule 55 EPC [cf. Article 90(2) EPC]. This implies that the filing date which was initially accorded upon receiving the reference filing is taken away retroactively.<sup>13</sup> Hence, the date of filing communicated to the applicant under Rule 55 EPC may be the original date of filing or the date of receipt of the missing item.

The sanction on late provision of an item in response to the Rule 55 EPC invitation, i.e. re-dating or no re-dating, is provided in the Guidelines only.<sup>14</sup> It is doubtful whether the mention of a sanction merely in the Guidelines is sufficient as legal basis, because, as a matter of principle, sanctions affecting the application or patent must have a legal basis in the EPC. Moreover, the broad possibilities of amendment of the Guidelines may not provide the desired legal certainty for parties about an important issue as the date of filing.

In the last sentence of Rule 40(3) EPC reference is made to Rule 53(2) EPC applying *mutatis mutandis*. This implies that the EPO will include a copy of the previously filed application into the file where this application is already available to the EPO under the conditions specified by the President,<sup>15</sup> and the applicant need not file a copy. The conditions appear to be the same as for availability of a priority document to the EPO.<sup>16</sup> However, the Guidelines state that the availability of US applications is „subject to the document exchange agreement with the USPTO“. <sup>17</sup> Whereas a US provisional or non-provisional patent application is regarded as available under Rule 53(2) EPC when claiming priority,<sup>18</sup> this application is *not* regarded as available Rule 40(3) EPC when filing by reference. Additionally, applications filed with receiving Offices other than the EPO are regarded as not available. For example, when filing a divisional by

11 *Ibid.*, Part A, Chapter II, § 4.1.5.

12 The statement in epi Information 2/10, p. 45 left column that the application will be re-dated after filing the certified copy in response to the Rule 55 EPC invitation is incorrect.

13 *Guidelines for Examination in the EPO* (April 2010); Part A, Chapter II, § 4.1.5.

14 *Ibid.*, Part A, Chapter II, § 4.1.5.

15 *Ibid.*, Part A, Chapter II, § 4.1.3.1. Also see Rule 4(3) PLT.

16 *Ibid.*, Part A, Chapter III, § 6.7.

17 *Ibid.*, Part A, Chapter II, § 4.1.3.1 (e) and Chapter III, § 6.7(v).

18 OJ EPO 2009, page 236.

9 „*Explanatory Notes on the Patent Law Treaty and Regulations under the Patent Law Treaty adopted by the Diplomatic Conference on June 1, 2000*“ (prepared by the International Bureau), Diplomatic Conference for the adoption of the PLT, Document PT/DC/48 Prov. (November 2000), Note 5.24. See [http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=4057](http://www.wipo.int/meetings/en/details.jsp?meeting_id=4057).

10 *Guidelines for Examination in the EPO* (April 2010); Part A, Chapter II, § 4.1.4; see <http://www.epo.org/patents/law/legal-texts/guidelines.html>.

reference to a Euro-PCT application filed with the USPTO as receiving Office, the applicant must file a certified copy of the Euro-PCT application with the EPO.

It should be noted that the period of more than four months to file a copy of the previously filed application may be too short for procuring a certified copy from some patent offices. To avoid losing the date of filing, it is recommended to file by reference only when the applicant has the certified copy available on the date of filing or when the EPO will include the copy into the file. An applicant may even consider using filing by reference only when the EPO will include a copy of the previously filed application into the file, because the advantage of filing by reference may not outweigh the expense and additional risk of having to file a certified copy.

Rule 40(3) EPC contains the additional requirement that the applicant must file a translation of the previously filed application where that application is not in an official language of the EPO. This requirement corresponds to item (iv) above.

Although both the filing of the copy and the translation of the previously filed application are mentioned in one sentence of the optional requirement in Rule 2(5)(b) PLT [see item (iv) above], the EPO has decided to treat these requirements differently.<sup>19</sup> Whereas the EPO has made the filing of the copy compulsory for the accordance of the date of filing, the filing of the translation is considered as an issue of formalities. In spite of the fact that the filing of the translation is mentioned in Rule 40 EPC, titled „Date of filing“, it is *not* regarded as a filing date requirement, because Rule 55 EPC does not refer to it.<sup>20</sup> This interpretation can be derived from the Guidelines.<sup>21</sup>

Hence, if the applicant does not furnish a required translation of the previously filed application, the date of filing already accorded to his application is retained. In the case of a missing translation pursuant Rule 40(3) EPC, the EPO will not send the applicant a communication under Rule 55 EPC but a communication under Rule 58 EPC, informing him that the required translation has not been filed [Rule 57(a) EPC referring to Rule 40(3) EPC, second sentence] and inviting him to file the translation within a non-extendable period of two months. Non-compliance results in the European patent application being deemed withdrawn under Article 14(2) EPC [*cf.* „different legal consequence“ in Article 90(5) EPC].<sup>22</sup>

When filing by reference, care must be taken to provide the correct application number of the previously filed application. A wrong number is (probably) not correctable, because a change in number amounts to replacing the filed application by another application, which was prohibited by G2/95. In contrast, an incorrect application number of a priority application when filing a

complete application can be corrected under Rule 53(3) EPC within at least four months from the date of filing. Similarly, a missing or wrong number of the parent application when filing a complete divisional application can be corrected under Rule 58 EPC.<sup>23</sup>

About 0.8 % of all European applications filed with the EPO since the entry into force of the EPC 2000 has been filed by reference; 80 % of these were divisional applications. Since 5 % of all filed applications are divisional applications, only one in eight divisional applications is filed by reference. The limited use of this new filing option in the EPC 2000 is explicable.

Filing by reference is advantageous when transmitting the application by fax, since the description and figures need not be sent anymore. However, when using electronic filing, the effort to include a copy of the application is relatively small. Hence, the advance in technology away from fax transmission appears to have taken away the main advantage of filing by reference. Moreover, filing the complete application does not have the disadvantages of the risk of uncorrectable errors and the obligation to provide a certified copy of the previously filed application. If filing by reference were optional in the PLT, filing by reference in Rule 40(1)(c) EPC and, consequently, Rule 40(2) and (3) EPC should be deleted from the EPC, thereby simplifying the procedure and removing the inherent confusion around the second sentence of Rule 40(3) EPC.

For the sake of completeness, the EPO has not implemented the optional requirement under the above item (vi) that the previously filed application need be filed by the applicant or his predecessor or successor in title. This raises the question whether the right to the patent may be transferred from a predecessor who filed the previous application to the present applicant after the date of filing by reference. In the case of a priority claiming application filed by another applicant than the priority application, the claim to priority must be transferred before filing the priority claiming application, according to EPO case law.<sup>24</sup> The same applies to filing a divisional application.<sup>25</sup>

## Conclusion

The PLT is designed to streamline and harmonize formal requirements of national and regional patent Offices for the filing and processing of national and regional patent applications, the maintenance of patents and certain additional requirements related to patents or patent applications. One of the crucial issues of a patent application is the accordance of a filing date. The mix of obligatory and optional requirements in the PLT and the freedom of choice for a PLT Contracting Party to implement (part of the) optional requirements as compulsory into its national law allows widely varying

19 *Cf.* „Filing date requirements under the EPC – an option to extend subject-matter?“ by Cees Mulder and Derk Visser in epi Information 2/10, p. 44-48.

20 In Rule 55 EPC reference is made to the first sentence of Rule 40(3) EPC relating to the filing of a certified copy of the previously filed application. However, Rule 55 EPC does not refer to the second sentence of Rule 40(3) EPC relating to the filing of a translation of the previously filed application.

21 *Guidelines for Examination in the EPO* (April 2010); Part A, Chapter II, § 4.1.4, last paragraph and Chapter III, § 14.

22 *Ibid.*, Part A, Chapter III, § 14.

23 *Ibid.*, Part A, Chapter IV, § 1.3.2.

24 *Ibid.*, Part A, Chapter III, § 6.1 and decision Legal Board of Appeal J 19/87; see <http://legal.european-patent-office.org/dg3/biblio/j870019eu1.htm>.

25 Decision Legal Board of Appeal J 2/01, see <http://legal.european-patent-office.org/dg3/biblio/j010002ep1.htm>

implementations in national or regional patent laws (compare e.g. the EPC and the PCT), leading away from the intended harmonization.

Although the implementation of filing date requirements in the EPC 2000 closely follows the PLT provisions, it has resulted in a system that is substantially more

complicated than under the EPC 1973, defying the aim of streamlining of the PLT.

Filing by reference appears already to have become outdated by advances in transmission technology and should not be regarded as a preferred option for filing a patent application with the EPO.

## No Teaching Without Disclosing – a response to Stellbrink

H. Sendrowski<sup>1</sup> (DE)

### 1. Introduction

In a recent article, Stellbrink<sup>2</sup> highlights a number of issues concerning inventions relating to industry standards subject to a non-disclosure and licensing agreement, and invites comments. Specifically, he observes that EPO examiners habitually refuse patent applications claiming an invention in the field of DVD technology; such refusals are based on Art. 83 EPC due to an alleged insufficient disclosure of the invention. In a nutshell, Stellbrink agrees that the DVD standard specification – albeit being an important teaching for carrying out the invention – is not described in the respective patent application due to the non-disclosure agreement covering the standard. However, he maintains that the invention is still sufficiently disclosed in accordance with Art. 83 EPC as every skilled person can get access to the standard specifications, and the specifications themselves are clear and enabling.

Indeed, the situation described by Stellbrink is set to raise eyebrows, as in other fields of technology references to industry standards traditionally are a suitable means of ascertaining sufficiency of disclosure. Furthermore, it is not compelling that a standard should cease to be enabling just by subjecting it to a non-disclosure agreement while still every interested party can get full access to and make full use of the standard specifications.

Alas, this is not the whole story. There are grave arguments supporting the EPO examiners' position.

### 2. The need for sufficient disclosure

According to a theory widely promulgated, patents are granted in exchange for the complete disclosure of an invention. The inventor is encouraged to invent by granting him an exclusive right to make use of the invention for up to 20 years. Without patent protection,

an inventor would be tempted to withhold key elements of his teaching for fear of competitors who, by sheer financial and economic power, could otherwise force him out of the respective market, thereby effectively preventing him from earning the fruits of his labour.

This encouragement and protection comes with a price tag: The inventor is required to disclose the invention in such precision that another skilled person could work according to the teaching and thus make practical use thereof. There would not be a reason for granting a privilege like a patent to an inventor who chooses not to disclose the invention. Instead, the scope of protection must be commensurate to the scope of enabling disclosure<sup>3</sup>.

Accordingly, Articles 83 and 100 b EPC stipulate that a European patent application and a European patent, respectively, shall disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

### 3. The standards of sufficient disclosure

3.1. There is no touchstone to measure sufficiency of disclosure against. Instead, the EPC relies on the notorious „person skilled in the art“. This has consequences with respect to the volume and detail of information required to achieve sufficiency of disclosure.

3.2. A problem not discussed by Stellbrink is the technical field to be considered „the art“, and correspondingly the capabilities attributed to the skilled person. According to T 422/93, the skilled person (when deciding on inventiveness) is to be defined in view of the technical problem to be solved on the basis of what the closest prior art discloses<sup>4</sup>. However, such reasoning does not seem appropriate for selecting the skilled person when deciding on sufficiency of disclosure. A major difference between the analysis of inventive step and of enabling

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<sup>2</sup> epi Information 2010, 91-94

<sup>3</sup> T 409/91, section 3.5

<sup>4</sup> T 422/93, section 3.6.1

disclosure is that in the latter case the skilled person already knows the contents of the patent application in question, whereas in the first case such content is unknown to him<sup>5</sup>. The closest prior art and the technical problem to be solved therefore are of no relevance when pondering sufficiency of disclosure. In addition, the solution provided by the invention may be taken from a different technical field compared to the field of the closest prior art (as analysed with respect to inventiveness). For this reason, the skilled person constructed in the process of deciding on inventiveness may have a very different common technical knowledge compared to the skilled person in the field the invention is taken from<sup>6</sup>. Moreover, industry standards being day-to-day business of the first skilled person may be unknown to or not sufficiently comprehended by the second skilled person. Thus, the mere label „industry standard“ does not entail a guarantee that a technical teaching is sufficiently disclosed according to the relevant skilled person’s judgement. The Boards of Appeal would still have to consider if the specifications provided by a standard are sufficient to enable the skilled person to carry out an invention. Even if products according to a standard had been available on the market for a long time before the relevant date of the patent application, this cannot be as such indicative that the average skilled person would be able to transfer any prior knowledge to the special circumstances of an invention. It should not be forgotten that by its very definition an invention surpasses the average skilled person’s abilities. Concluding, sufficiency of disclosure has to be decided on a case by case basis even if applicants claim that by reference to an industry standard the invention has been sufficiently disclosed.

3.3. Another requirement imposed by Art. 83/100 b EPC is that it is forbidden to impose an „undue burden“ on the skilled person when trying to carry out the invention. The degree of detail required by a patent application or patent document, respectively, to avoid undue burden has to be judged in view of the invention in question. A rough outline of an invention may be sufficient in one case, e.g. when a problem can surprisingly be solved by means already familiar to the skilled person in some other context, whereas a plethora of examples and instructions may be required in other cases, e.g. where the standard merely consists of a compilation of requirements, leaving it to the skilled person to develop by himself means for living up to these requirements in the frame of the invention in question. Again, just referring to an „industry standard“ may or may not provide the skilled artisan with enough information to carry out the invention.

5 cf. also T 694/92, section 7

6 The thesis that the standard for the skilled person’s knowledge is generally the same for the requirements of inventive step and sufficiency of disclosure is thus untenable. The mistake seems to result from a translation error concerning decision T 60/89, section 3.2.5, which unfortunately has also crept into the German version of the „Caselaw book“. The Board held – in the language of the proceedings – that the same level of *skill* has to be applied when, for the same invention, the two questions of sufficient disclosure and inventive step have to be considered. This was erroneously translated into „der gleiche Wissensstand“, i. e. the same *knowledge*.

But even disregarding difficulties in understanding the specifications of an „industry standard“, undue burden may also be imposed circumstantially. This is an important difference when comparing state of the art-related obstacles to patenting like novelty and inventive step with the requirement of sufficient disclosure. Even grave difficulties of finding and accessing a document are of no interest for qualifying a document as prior art<sup>7</sup>. Contrary to this, such difficulties may result in the very same document being left out of consideration when pondering sufficiency of disclosure. The inventor shall not be rewarded for cunningly hiding key teachings of the invention in documents unduly difficult (or costly<sup>8</sup>) to obtain, as such behaviour would again not be commensurate to the scope and ease of protection granted by a patent. Otherwise the inventor could profit twice: He would own a patent, and he could make a fortune by selling the necessary instructions to carry out the invention. If such sales were made under a non-disclosure agreement, he could even continue to sell the instructions long after the patent itself has expired. As Stellbrink correctly points out, once the level of detail of such instructions is sufficient, these instructions could not be developed a second time by another party without any criminal offence.

It may be surprising that mere formalities like the mode of access to information could influence the decision on enabling disclosure<sup>9</sup>. However, it should be remembered that Art. 83/100 b EPC stipulates that the invention should be disclosed clearly and completely in the application or patent document, and anything relied upon other than the literal content of the application documents or patent document needs justification to be taken into consideration. It would therefore be up to the advocates defending the righteousness of relying on standards subject to non-disclosure agreements and subject to the need for obtaining a licence to show convincingly how the intention underlying the EPC could be achieved, which is that all inventions shall become free art in their entirety („clear and complete“) once the corresponding patents lapse. In particular, the Boards of Appeal may consider that requiring the skilled person to obtain a license before disclosing the invention clearly and/or completely to him generally puts him under a persistent obligation<sup>10</sup> to pay royalties, to grant third party accounting experts access to his business records, and maybe even to abstain from invalidating patents held by the licensor or other licensees. Such obligations may be considered an undue burden for a skilled person

7 T 165/96, section 1.1.1.4

8 This was deliberately left undecided in T 82/07, section 6.5. Decisions T 50/02 and T 1030/00 do not seem to be applicable, as they are only concerned with the question of whether or not a document belongs to the state of the art. Stellbrink himself argues (correctly) that „state of the art“ is not a subject of Art. 83 EPC.

9 It is important to note that decision T 50/02 does not stand in the way of such considerations. That decision was concerned with defining the prior art; it did not attempt to abolish the established bar against undue burden with regards to enabling disclosure.

10 This is clearly different from other industry standards, e.g. those proclaimed by ISO or DIN. Even though such standard specifications also can only be obtained from one or few sources, any person interested in such standard merely has to buy a copy thereof.

who merely tries to carry out an invention, particularly when the patent pertaining to the invention has lapsed. And promising that licenses will be dispensed on every interested party does not vindicate from allegations that the licensing conditions (or the very requirement of having to ask for a licence) impose an undue burden.

#### 4. The means for sufficient disclosure

4.1. It is thus necessary to pay attention to the means allowable under the EPC for disclosing an invention. Obviously, nothing can go wrong when the invention is disclosed sufficiently clearly and completely in the original application documents and the patent document, respectively. However, this is not possible for such inventions which have to rely to a significant extent on teachings subject to a non-disclosure agreement.

4.2. *Stellbrink* also considers that „a reference to a document [is] sufficient to provide an enabling disclosure“, and indeed such references are commonly used to augment the literal content of application documents. However, this strategy is only successful when certain additional conditions established by the Boards of Appeal<sup>11</sup> are met. Some of these conditions *prima facie* may be difficult to comply with in cases as described by *Stellbrink*:

First, it is indispensable that the document referred to can be unambiguously identified. This can be a problem particularly where the document contents are allowed to change over time, e.g. when some parts of an industry standard specification are made obsolete or are otherwise amended in a revision of the standard.

Second, the document referred to must have been available to the EPO on the date of filing<sup>12</sup>, and to the general public upon publication of the application at the latest<sup>13</sup>. Now it is at least doubtful that a licensor – who consistently requires his licensees to accept a non-disclosure agreement – would at all be inclined to grant a license to the EPO, whose obvious intention is to make the licensed standard known to prospective patent applicants, e.g. in search reports<sup>14</sup>; and according to the facts of T 82/07 (section III), the Office has already tried in vain to obtain a copy of the DVD standard specifications<sup>15</sup>. However, and insofar I agree with *Stellbrink*, the inability of the Office to get hold of some

document is not indicative for a corresponding inability of the skilled person. But matters being as they are, the facts discussed above at least do not readily support the assumption that the second criterion actually is met in the DVD standard case.

Third, the document referred to must have been available „easily“, i.e. without undue effort. This requirement again has to be analysed on a case by case basis, as was emphasised by section 5 of decision T 737/90<sup>16</sup>. As discussed above, there are some arguments available indicating that access to an industry standard subject to licensing and non-disclosure requirements should not be considered „easy“. And given the volume of the DVD standard, the Boards of Appeal may consider that undue effort is required to find the relevant section of the standard applicable to the invention.

Thus, it is by no means a foregone conclusion that any reference to a document is sufficient to provide an enabling disclosure.

4.3. As a last resort an inventor may appeal to the skilled person's general knowledge. Certainly, the skilled person needs not be taught what he already effortlessly knows to do. However, any appeal to the general knowledge leads again to the problem of defining the skilled person. According to *Stellbrink*, the skilled person in the field of digital storage media may well not have come into contact with – let alone know effortlessly – the exact specifications of the DVD standard. In the absence of convincing arguments that „the“ skilled person will consider the DVD standard part of his general knowledge, such appeal must fail.

#### 5. An exception for industry standards?

*Stellbrink* argues that it would be in the European patent system's own interest to impose less stringent conditions on inventions that have to rely on an industry standard subject to a non-disclosure and license agreement. After all, the inventor generally has not chosen to impose such curfew; instead, he is a victim of the restrictions himself. And if inventors are prevented from obtaining patents for their inventions in the field of such industry standards, then this would result in an unnecessary impediment to the advancement of the arts: As inventors cannot hope to capitalise on their innovations, they will turn to some other technical field. In addition, industry standards may not even contain any above-average „progress“ at all, so they should not be able to block innovations from patent protection.

These arguments, interesting as they are, cannot possibly justify an exception for „industry standard related inventions“ from the requirements of sufficiency of disclosure applied to any other invention. First of all, how is an industry standard eligible for privileged (i.e. limited) examination to be defined, and who is to decide in case an

11 The Enlarged Board of Appeal have so far refused to give a ruling in such matters. For a discussion of „incorporation by reference“ during analysis of admissibility of amendments, see e.g. T 374/96, section 5.

12 T 737/90, section 4

13 T 429/96, section 4

14 certainly the EPO cannot rely on examiner affidavits as a substitute to the presentation of relevant prior art to the applicant

15 In fact, the EPO was informed by DVD FLLC that „execution of the non-disclosure agreement is limited to private companies that can vigorously protect the confidentiality of the Proprietary Information in the DVD Books“. In addition certainly the EPO could not rely on laws regarding unfair competition or cartels to get access to the DVD standard specifications. And given the information of DVD FLLC, it is highly questionable if indeed every interested skilled person would readily be granted such access: The DVD FLLC seems unwilling to grant access to self-employed engineers and scientists in public institutions (cf. summons in appeal regarding application EP98302034).

16 affirmed e.g. by T 429/06, section 5. See T 276/99 for a decision particularly emphasising that not disclosing something critical for the invention in a patent specification may impose a burden contrary to the provisions of Art. 83 EPC

opponent alleges that the so called standard is not a standard at all? Then, why should it be indispensable that the standard is subject to a combined non-disclosure and licensing agreement? Simply put, the restrictions lamented in the DVD cases have not resulted from the singular intervention of some supernatural power; instead, the restrictions are devised and implemented by those companies who gathered to create what they choose to call a standard. These restrictions may not be fair to inventors who find themselves unable to obtain patent protection. But then again, such unfairness can hardly be blamed on the European patent system in general or on the Office in particular. Instead, industry tries to simultaneously have the best of two mutually exclusive worlds, i. e. the world of trade secrets and the world of (published) patents. Running into difficulties when pursuing this approach should rather come as no surprise.

The situation of non-disclosed industry standards also hardly compares to that of deposition of biological samples. For example, compliance with an industry standard like the DVD standard can readily be verified,

but such verification may be virtually impossible in the field of biological production strains, as no identifiable trace of a production strain may be found on the purified product sold by an alleged infringer.

## 6. Conclusion

It is neither desirable nor possible within the current framework of EPC regulations to define inventions as being sufficiently disclosed merely because they refer to and rely on an industry standard, particularly when such standard is subject to a non-disclosure and licensing agreement. It remains to be seen if the effort required by the skilled person to access all or parts of the DVD standard is undue or not<sup>17</sup>. For the time being, it seems prudent not to set high hopes on a technical field where industry has chosen to act against the letter and spirit of the European patent system.

<sup>17</sup> As pointed out by Stellbrink, the Board did not have to decide on this question in decision T 82/07.

## Centenary Celebration of Dutch Patent Law

Participants in the 125<sup>th</sup> AC Meeting were cordially invited by the Director of the Dutch Patent Office to celebrate one hundred years of Dutch Patent Law. The event took place in The Hague in a fine building which houses the Public Library, a fitting venue for such an event. A memorable evening was enjoyed by all the participants, who witnessed presentations of a book celebrating the centenary to both Mr Battistelli and Mr Kongstad. Each participant was also given a copy at the end of the function. The occasion is summarised in the following press release, kindly provided by the Dutch Patent Office:

### A century of patents in the Netherlands

The year 2010 marks the 100th anniversary of the Dutch Patent Law. Several initiatives have been taken to celebrate this special year. On October 26th 2010 the English version of the jubilee book 'A century of patents in the Netherlands' was presented in the Public Library in The Hague.

Chris Buijink, Secretary General of the Ministry of Economic Affairs, Agriculture and Innovation, presented the first two copies of the book to Mr Battistelli, President of the European Patent Office (EPO), and Mr Kongstad, Chairman of the Administrative Council of the EPO.



*Chris Buijink, Benoît Battistelli, Jesper Kongstad & Guus Broesterhuizen*

*photo: Ellen Grootes*

In his opening speech, Chris Buijink stated that patents more and more help spread knowledge, and that patents and licenses have become drivers of open innovation. As an example Buijink mentioned the SonoDrugs project led by Philips. This is a European R&D project involving fifteen companies, university medical centres and universities from all over Europe. R&D projects like SonoDrugs would benefit tremendously from an affordable

single European Union patent. Buijink stressed, that the Netherlands believe the single EU patent should complement the national patents and should be released as soon as possible. It should include a harmonised system to settle disputes. Buijink said he was confident that the EPO is well-equipped to meet the challenges it faces in the future.

The Chairman of the Administrative Council of the EPO, J. Kongstad, as well as the President of the EPO, B. Battistelli, underlined the important role of the Netherlands Patent Office in the patent world. This role becomes evident not only in the number of patent applications (20 000 annually) and granted patents. The Netherlands have always promoted cooperation on a European level. Also, the Netherlands was one of the founding members of the EPO and its predecessor, the IIB. In his speech, Benoît Battistelli mentioned that the city of The Hague was chosen for establishing the IIB for having an excellent library of patent documents. With Jesper Kongstad, the EPO Président also recalled the role of Bob Van Benthem, the first president of the EPO and one of its architects.

Among the invitees of the book presentation were heads of delegations of the member states of the EPO; Ms van der Wel-Markerink, the mayor of Rijswijk where the EPO has several offices and Mr Berger and Mr Geijzers, former heads of the NL Patent Office. Mr Guus Broesterhuizen, director of the NL Patent Office, hosted this event.

The book is one of the steps to mark the 100th anniversary of the Dutch Patent Law (Rijksoctrooiwet). In 1817, the first Patent Act came into force in the Netherlands. In 1869, the Act was abolished once again and the Netherlands acquired the image of a free-spirited nation. The new act did not enter into force until 1910, the Patent Act 1910.

The authors, various members of the Dutch patent community, give their vision on the past, present and future of patent law. The book reflects the value of intellectual property and shows how a patent law from 1910 can still be of high value in the 21st century. The Dutch version was presented on October 7<sup>th</sup> to a gathering of professionals from the Dutch patent community.

As part of the celebrations of one hundred years of the Dutch Patent Law, TNT issued a special series of stamps featuring 10 unique Dutch inventions. Furthermore the Patent Parade, an interactive exhibition of Dutch inventions, is on a one year-journey travelling through the Netherlands. The exhibition visits the libraries of ten large cities in the Netherlands, thereby reaching around 1.2 million people.

NL Patent Office is part of NL Agency which is a department of the newly formed Ministry of Economic Affairs, Agriculture and Innovation. NL Patent Office grants patents in the Netherlands, informs about the patent system and represents Dutch interests in European and international organisations.

## How can we take the brakes off?

(Can your own priority application become your prior art?)

M. Rots (NL)<sup>1</sup>

My problem started when I read the article of Portal in *epi* information 2/09 pages 56-59. I hope to receive a response from Members clarifying that my concern is unfounded or suggesting a solution.

Portal describes decision T1443/05 according to which one's own priority application may become lethal for the complete application if the priority application is allowed to be published and priority is denied. The case underlying T1443/05 is a complex one and involves a disclaimer, but if I understand the logic correctly, it applies more widely. Apart from T1443/05, there have been some comparable decisions but as far as I am aware only

in opposition, e.g. on EP 1009795 and EP 1370633, not in appeal.

In these decisions the patent is fatally hit by its own priority application, the date of which is claimed but not acknowledged, which earlier application is then held to be novelty destroying because it was allowed to publish. (It does not matter whether the publication is of the priority application itself or via a complete application that is entitled to the priority date.) This is hard to digest. If priority is denied, how can the same priority application be novelty destroying?

An example may illustrate how this works. A process invention is made, e.g. reducing the environmental impact, and an application is filed for it. It contains 5

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examples. In the priority year it is recognised that within a subset of the process conditions, an improved product is obtained. For 3 of the 5 examples the resulting product is such an improved product. Time is of the essence and the priority application is progressed to grant. During the priority year a separate application is filed for the improved product claiming the priority of the earlier process application. With the direction the EPO decisions are taking recently, it seems that this will end in tears. The priority is denied because the product parameters defining the improved product were not disclosed in the first application. Because the priority application is prosecuted to grant, it is published and held to become part of the state of the art. The 3 examples inherently disclose a product falling within the scope of the claims of the later application and therefore destroy the novelty.

The critical issue here in my perception is not whether for a claim in the later application the right to priority can be acknowledged. The key question to address is whether the content of the earlier application can become part of the prior art of the later application even though the later application claims the priority of the earlier one. This seems to be at odds with the intent of the Paris Convention, which aimed to offer the applicant a year's time to investigate his invention.

In discussion on this topic, it is often said that one should simply not allow the priority application to be published. One application is enough. One should not be so greedy and then there would not be a problem. In my view that is not a satisfactory answer, especially where there are legitimate interests to get enforceable rights quickly. Another comment is that one can solve the problem with disclaimers. This is also unsatisfactory. In the above example, one would need three disclaimers. Disclaimers are fraught with difficulties and make the claims difficult to interpret. Moreover, there are circumstances where neither of these approaches would offer a solution.

The speed of innovation has been going up in many industries. Increasingly R&D work is done in parallel rather than sequentially because the race to the market is fierce and speed is more important than efficiency. In international companies, especially in the chemical field, a new technology will be spread quickly over several laboratories focussing on different but related applications. R&D teams in different parts of the world, each with their own patent attorney, progress the technology in parallel. More or less simultaneously, patent applications are filed for different applications and benefits of the new technology.

In the past, this way of working was also used, although less often. Inevitably in such programs, statements are made or examples are described in one patent application, which end up falling within the claims of one or more of the sister applications. The solution was for the later applications to claim the priority of the earlier applications that would otherwise be novelty damaging. One lost part of the priority year but that was the price to pay. It did not matter whether the parallel applications would be published or whether the priority claim would be acknowledged for any claims because the content of the applications of which the priority was claimed would not be held to be part of the state of the art.

It appears to me that this approach where the content of the earlier application whose date is claimed is not allowed to become part of the state of the art, also not if entitlement to priority for the claims is denied, would still be an effective solution today that also appears to be compatible with the EPC and most of the body of decisions of the Boards of Appeal. G2/98 does not address this issue and leaves ample space for such an outcome. A logic that could underpin such a construction is mentioned by Portal in his paper with reference to paragraph 3.5 of T665/00 (although the issues and circumstances in that case are different). However, the recent series of decisions suggests that the EPO is going in a different direction and perhaps is not aware of the problems this development is causing.

In this situation with parallel R&D work and adjacent patent applications, the use of disclaimers is not effective to address the problem. Each disclaimer will leave a hole in the protection. Furthermore, this direction over time would adversely affect the clarity and conciseness of the patents and applications, in particular of the claims. That would be undesirable too.

In the company I work for we have already had occasions where we had to postpone the filing of patent applications for fear of causing damage to work in adjacent programs. We are also considering measures to more strictly control the content of our patent applications for fear of self-collision. It is cramping our style and slowing us down. How can we remove these brakes on the innovation process?

The line of reasoning where your own priority application becomes the prior art that kills your application is also not understood by colleagues in other parts of the world. I hope that somehow I am misinterpreting the decisions or am overlooking an elegant way to avoid these problems. Any suggestions or comments would be much appreciated.

## Anmerkungen zu den Beiträgen von Frischknecht/Kley in epi information 1/2010 und Vögele/Nemec in epi Information 3/2010

F. Wagner (DE)

In Ihren Artikeln<sup>1</sup> befassen sich Frischknecht und Kley bzw. Vögele und Nemec mit der Auslegung des Ausdrucks „frühesten Anmeldung, zu der ein Bescheid ergangen ist“ in der neuen Regel 36(1)a EPÜ und stellen hierzu die These auf, dass das EPA je nach Fallgestaltung zwischen zwei unterschiedlichen Auslegungen wechseln würde.

Eine konsistente Anwendung der Regel 36(1)a durch das EPA in den beiden von Frischknecht und Kley beschriebenen Fällen ergibt sich jedoch bei folgender Auslegung der Regel 36(1)a):

### Schritt 1:

Betrachte (nur) diejenigen Anmeldungen der Familie, zu denen ein „erster Bescheid“ ergangen ist, d.h. „streiche“ diejenigen Anmeldungen, für die (noch) kein erster Bescheid ergangen ist;

### Schritt 2:

Wähle aus den verbleibenden Anmeldungen (für die ein „erster Bescheid“ ergangen ist) die früheste (älteste) Anmeldung aus; und

### Schritt 3:

Berechne die 24-Monatsfrist ab dem Tag des „ersten Bescheids“ dieser, im Schritt 2 ausgewählten Anmeldung.

Bei Anwendung auf die von Frischknecht und Kley vorgestellten Beispiele (Anmeldetag der Stammanmeldung EP1: 01.04.2010, Teilanmeldung EP2 eingereicht am 15.04.2010) bedeutet dies:

### Fall 1 (siehe auch Folie 7 der EPA Präsentation):

„erster Bescheid“ in der EP1 datiert vom 31.08.2012  
„erster Bescheid“ in der EP2 datiert vom 30.04.2012

### Schritt 1:

Zu allen Anmeldungen ist ein „erster Bescheid“ ergangen, alle Anmeldungen werden daher im Schritt 2 berücksichtigt.

### Schritt 2:

EP1 ist die früheste Anmeldung.

### Schritt 3:

Die 24-Monatsfrist berechnet sich daher ab dem Tag des „ersten Bescheids“ zu EP1 (31.08.2012).

### Fall 2:

„erster Bescheid“ in der EP2 datiert vom 30.04.2012  
EP1 wurde zurückgenommen, bevor ein erster Bescheid ergangen ist

### Schritt 1:

Zu EP1 ist kein erster Bescheid ergangen, EP1 wird daher im Folgenden nicht mehr berücksichtigt.

### Schritt 2:

EP2 ist die früheste verbleibende Anmeldung.

### Schritt 3:

Die 24-Monatsfrist berechnet sich daher ab dem Tag des „ersten Bescheids“ von EP2 (30.04.2012).

Die hier vorgeschlagene Auslegung führt daher in beiden Fällen ohne Widerspruch zu den gleichen Ergebnissen wie die „Präsentation“ des EPA.

### Fall 3 („Very(!) late first communication in the earliest application“):

(siehe auch: Folie 10 der EPA-Präsentation)

„erster Bescheid“ in der EP2 datiert vom 30.04.2012  
„erster Bescheid“ in der EP1 datiert vom 30.08.2014

### Fall 3a:

Solange zu der EP1 noch kein „erster Bescheid“ ergangen ist, ist EP2 die einzige zu berücksichtigende Anmeldung und die 24-Monatsfrist berechnet sich ab dem Tag des „ersten Bescheids“ der EP2: „voluntary divisional of EP is possible“ in einem ersten Zeitraum vom 30.04.2012 bis zum 30.04.2014.

Sobald in der EP1 ein „erster Bescheid“ ergangen ist, ist die EP1 die „früheste Anmeldung, zu der ein Bescheid ergangen ist“ und die 24-Monatsfrist berechnet sich ab dem Tag des „ersten Bescheids“ zur EP1: „voluntary divisional of EP2 is possible“ in einem zweiten Zeitraum vom 30.08.2014 bis zum 30.08.2016.

Insoweit führt die hier vorgeschlagene Auslegung zu dem in der EPA-Präsentation gezeigten Ergebnis.

### Fall 3b:

Unklar bleibt aber auch bei dieser Auslegung, warum gemäß Folie 10 der „Präsentation“ eine „freiwillige Teilung“ der Stammanmeldung EP1 auch zwischen dem Ablauf der 24-Monatsfrist ab dem „ersten Bescheid“ in der EP2 (01.05.2014) und dem Tag des „ersten Bescheids“ in der EP1, d.h. zwischen dem 01.05.2014 und dem 30.08.2014, möglich sein soll („voluntary divisional of EP1 is possible“).

Bleibe eine solche Teilanmeldung nach Auffassung des EPA auch zulässig, wenn EP1 nach dem Einreichen der (zweiten) Teilanmeldung aber vor dem Erlass des „ersten Bescheids“ in der EP1 zurückgenommen wird und EP1 so

<sup>1</sup> S. Frischknecht and H. Kley, epi Information 1/2010; Vögele and Nemec, epi information 3/2010

nie zu einer „Anmeldung, zu der ein Bescheid ergangen ist“, wird?

Regel 36(1) EPÜ unterscheidet in Bezug auf die „abhängige frühere europäische Patentanmeldung“ nicht zwischen der Stammanmeldung und früheren Teilmeldungen. Eine Rechtsgrundlage dafür, dass in der

(noch anhängigen) Stammanmeldung EP1, für die noch kein „erster Bescheid“ ergangen ist, eine „freiwillige Teilmeldung“ auch dann noch möglich ist, wenn in der ältesten Teilmeldung (EP2) vor mehr als 24 Monaten ein „erster Bescheid“ ergangen ist, ist nicht erkennbar.

## C-Book – How to write a successful opposition and pass Paper C of the European Qualification Examination, by William Chandler and Hugo Meinders<sup>1</sup>

Susan Kirsch<sup>2</sup>

The third edition of this „must have“ book is now available.

The C-Book is an essential tool, not only for all candidates taking Paper C (opposition) of the European Qualifying Examination (EQE), but also for any European attorney with an opposition practice. Who better to tell you how to write a successful opposition than two members of the Board of Appeal?

The third edition of the C-Book once again provides candidates with a wealth of information relevant to opposition practice. The key changes compared to the second edition include updated Guidelines references following the revised Guidelines published in April 2010 and updated case law. For candidates of the EQE Paper C, a particularly useful addition is the charts given on pages 97 and 100 detailing the many required steps in a well constructed inventive step argument, both for „normal“ and „partial problem“ inventive step argumentation respectively. The charts list each step, illustrate how each step was argued in the Examiners' Report C 2009 and provide an estimate of the number of marks awarded for each step with regard to use of information and argumentation. Another addition is the hints and tips in relation to exam technique and strategy provided in the chapter entitled „Assessing your own Paper“.

Bill and Hugo are both tutors for the respected CEIPI courses. The authors teach at the Regional Pre-prep courses, which take place in the Autumn, the main Preparatory seminar, which is now scheduled in November in Strasbourg, the „re-sitters“ course, also scheduled in November, and the „cramming“ course in early February. The various CEIPI Paper C courses aim to provide candidates of the EQE with all they need to know to pass

the dreaded opposition paper. The C-Book summarises much of what is taught at these seminars.

Many EQE candidates have extremely limited opposition experience, if any, prior to sitting Paper C. As a consequence, Paper C continues to cause candidates the most problems and has the lowest pass rate of the EQE Final papers. It is simply impossible to pass Paper C without a sound technique coupled with sufficient practice.

Paper C of the EQE has undergone a remarkable evolution over the last 10 to 12 years. The ever increasing emphasis on argumentation and, in particular, both interpretation and the problem solution approach, must be appreciated and understood by candidates if they are to provide an opposition statement with sufficient detail to impress the examiners. Both these key aspects are discussed at length in the C-Book.

The specific technique or methodology explained in the C-Book ensures that candidates focus on what is necessary to pass the examination, namely robust analysis and detailed argumentation, with constant reference to where the information relied upon is to be found in the papers. On top of this, the C-Book provides useful guidance on how to set out an opposition statement, how to tackle the legal aspects of the exam paper and provides important tips for exam technique and strategy. The C-Book also provides information regarding essential aspects such as added subject matter, entitlement to priority, state of the art, claim dependencies, how to deal with ranges within a claim, etc.

Candidates who read, understand and put into practice the methodology and information provided in the C-Book will be well equipped to sail over the biggest hurdle of the EQE.

<sup>1</sup> W.E. Chandler and H. Meinders C-Book Third Edition, Carl Heymanns Verlag 2010, ISBN 978-3-452-27363-5

<sup>2</sup> Susan E. Kirsch, European Patent Attorney and Chartered Patent Agent, Partner, Carpmaels & Ransford, London

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<b>Disziplinarrat (epi)</b>	<b>Disciplinary Committee (epi)</b>	<b>Commission de discipline (epi)</b>
AT – W. Poth BE – T. Debled BG – E. Benatov CH – M. Liebetanz CY – C.A. Theodoulou CZ – V. Žak DE – W. Fröhling DK – U. Nørgaard ES – V. Gil-Vega FI – C. Westerholm	FR – P. Monain GB – S. Wright** GR – A. Tsimikalis HR – D. Korper-Zemva HU – J. Markó IE – G. Kinsella IS – A. Vilhjálmsson IT – B. Muraca LI – P. Rosenich* LT – L. Kucinskas LU – P. Kihn	MC – G. Schmalz MT – L. Sansone NL – A. Hooiveld NO – E. Anderson PL – A. Rogozinska PT – A. J. Pissara Dias Machado RO – C. Pop SE – H. Larfeldt SI – J. Kraljic SK – T. Hörmann TR – T. Yurtseven
<b>Disziplinausschuss (EPA/epi)</b> epi-Mitglieder	<b>Disciplinary Board (EPO/epi)</b> epi Members	<b>Conseil de discipline (OEB/epi)</b> Membres de l'epi
BE – G. Leherte	DE – W. Dabringhaus	DK – B. Hammer-Jensen GB – J. Boff
<b>Beschwerdekammer in Disziplinarangelegenheiten (EPA/epi)</b> epi-Mitglieder	<b>Disciplinary Board of Appeal (EPO/epi)</b> epi Members	<b>Chambre de recours en matière disciplinaire (OEB/epi)</b> Membres de l'epi
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<b>epi-Finzen</b>	<b>epi Finances</b>	<b>Finances de l'epi</b>
AT – P. Pawloy* CH – T. Ritscher DE – M. Maikowski	FR – J.-L. Laget GB – T. Powell** IE – P. Kelly IT – S. Bordonaro	LT – M. Jason LU – J. Beissel SE – K. Norin
<b>Geschäftsordnung</b>	<b>By-Laws</b>	<b>Règlement intérieur</b>
BE – J. Jantschy**	DE – D. Speiser* FR – P. Moutard	GB – T. Johnson
<b>Standesregeln</b> Ordentliche Mitglieder	<b>Professional Conduct</b> Full Members	<b>Conduite professionnelle</b> Membres titulaires
AT – F. Schweinzer BE – P. Overath BG – T. Stoyanov CH – R. Ruedi CY – C.A. Theodoulou CZ – D. Musil DE – H. Geitz DK – L. Roerboel EE – J. Toome	ES – J.A. Morgades FI – J. Kupiainen FR – J.R. Callon de Lamarck GB – T. Powell* HR – A. Bijelic HU – M. Lantos IE – M. Lucey IS – T. Jonsson IT – O. Capasso	LT – R. Zabolieni LU – S. Lampe NL – H. Bottema NO – P. R. Fluge PL – L. Hudy PT – C.M. de Bessa Monteiro RO – D. Tuluca SE – R. Janson SI – J. Marn TR – K. Dündar
Stellvertreter	Substitutes	Suppléants
AT – E. Piso BG – N. Neykov CH – P.G. Maué DE – R. Kasseckert FR – J. Bauvir	GB – S.M. Wright HR – A. Dlacic IS – E.K. Fridriksson IT – G. Mazzini NL – E. Bartelds	NO – G. Østensen PL – J. Hawrylak RO – L. Enescu SE – S. Sjögren Paulsson SI – M. Golmajer Zima

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Europäische Patentpraxis	European Patent Practice	Pratique du brevet européen
AT – W. Kovac	FR – J. Bauvir	LV – J. Fortuna
AT – H. Nemeč	FR – J.-R. Callon de Lamarck	LV – A. Smirnov
BE – F. Leyder*	GB – E. Lyndon-Stanford	MT – D. Marlin
BE – O. Venite-Aurore	GB – C. Mercer	MT – L. Sansone
BG – V. Germanova	GR – E. Samuelides	NL – R. Jorritsma
BG – V. Shentova	HR – T. Hadžija	NL – L.J. Steenbeek
CH – E. Irniger	HR – G. Turkalj	NO – A. Berg
CH – G. Surmely	HU – Z. Lengyel	NO – K. Rekdal
CY – C.A. Theodoulou	HU – Z. Szentpéteri	PL – E. Malewska
CZ – I. Jirotkova	IE – L. Casey	PL – A. Szafruga
CZ – J. Malusek	IE – O. Catesby	PT – P. Alves Moreira
DE – G. Leißler-Gerstl	IS – E.K. Fridriksson	PT – N. Cruz
DE – G. Schmidt	IS – R. Sigurdardottir	RO – D. Nicolaescu
DK – E. Carlsson	IT – F. Macchetta	RO – M. Oproiu
DK – A. Hegner	IT – M. Modiano	SE – L. Estreen
EE – J. Ostrat	LI – B.G. Harmann	SE – A. Skeppstedt
EE – M. Sarap	LI – R. Wildi	SI – B. Ivancic
ES – E. Armijo	LT – O. Klimaitiene	SK – J. Gunis
ES – L.-A. Duran Moya	LT – J. Petniunaite	SK – M. Majlingová
FI – M. Honkasalo	LU – S. Lampe**	TR – H. Cayli
FI – A. Weckman	LU – P. Ocvirk	TR – A. Deris
<b>Berufliche Qualifikation</b> Ordentliche Mitglieder	<b>Professional Qualification</b> Full Members	<b>Qualification professionnelle</b> Membres titulaires
AT – F. Schweinzer*	FR – F. Fernandez	LV – E. Lavrinovics
BE – N. D'Halleweyn	GB – J. Gowshall	NL – F.J. Smit
BG – E. Vinarova	GR – M. Zacharatou	NO – P. G. Berg
CH – W. Bernhardt	HR – Z. Bihar	PL – A. Slominska-Dziubek
CY – C.A. Theodoulou	HU – Z. Köteles	PT – J. de Sampaio
CZ – J. Andera	IE – C. Boyce	RO – M. Teodorescu
DE – M. Hössle	IS – S. Ingvarsson	SE – M. Linderöth
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	Stellvertreter	Substitutes
		Suppléants
AT – P. Kliment	GB – A. Tombling	NL – A. Land
BG – M. Yanakieva-Zlatareva	HU – T. Marmarosi	PL – A. Pawlowski
CH – M. Liebetanz	IE – B. O'Neill	PT – I. Franco
DE – G. Ahrens	IS – G. Hardarson	RO – C.C. Fierascu
DK – B. Hammer Jensen	IT – I. Ferri	SE – M. Holmberg
EE – E. Urgas	LU – S. Lampe	SI – Z. Ros
FI – P. Valkonen	LT – A. Pakeniene	TR – B. Kalenderli
FR – D. David	LV – V. Sergejeva	
(Examination Board Members on behalf of the epi)		
CH – M. Seehof	FR – M. Névant	NL – M. Hatzmann

<b>Biotechnologische Erfindungen</b>	<b>Biotechnological Inventions</b>	<b>Inventions en biotechnologie</b>
AT – A. Schwarz BE – A. De Clercq* BG – S. Stefanova CH – D. Wächter CZ – R. Hak DE – G. Keller DK – B. Hammer Jensen ES – F. Bernardo Noriega FI – S. Knuth-Lehtola FR – A. Desaix	GB – S. Wright** HR – S. Tomsic Skoda HU – A. Pethö IE – A. Hally IS – T. Jonsson IT – G. Staub LI – B. Bogensberger LT – L. Gerasimovic LU – P. Kihn	LV – S. Kumaceva NL – B. Swinkels NO – A. Bjørnå PL – J. Sitkowska PT – A. Canelas RO – C. Popa SE – L. Höglund SI – D. Hodzar SK – K. Makel'ova TR – O. Mutlu
<b>EPA-Finzen</b> Ordentliche Mitglieder	<b>EPO Finances</b> Full Members	<b>Finances OEB</b> Membres titulaires
DE – W. Dabringhaus FR – P. Gendraud	GB – J. Boff*	NL – E. Bartelds
Stellvertreter	Substitutes	Suppléants
ES – J. Botella	IE – L. Casey	IT – A. Longoni
<b>Harmonisierung</b> Ordentliche Mitglieder	<b>Harmonization</b> Full Members	<b>Harmonisation</b> Membres titulaires
BE – F. Leyder** CH – Axel Braun LI – O. Söllner	ES – M. Curell Aguila GB – P. Therias	GB – J. D. Brown* SE – N. Ekström
Stellvertreter	Substitutes	Suppléants
BG – M. Yanakieva-Zlatareva FI – V.M. Kärkkäinen	GR – A. A. Bletas	IT – S. Giberti IT – C. Germinario
<b>Streitrecht</b> Ordentliche Mitglieder	<b>Litigation</b> Full Members	<b>Contentieux</b> Membres titulaires
AT – H. Nemeč BE – G. Voortmans BG – M. Georgieva-Tabakova CH – P. Thomsen CY – C.A. Theodoulou CZ – M. Guttman DE – M. Wagner DK – E. Christiansen ES – E. Armijo FI – M. Simmelvu	FR – A. Casalonga GB – E. Lyndon-Stanford* GR – E. Dacoronia HR – M. Vukmir HU – F. Török IE – L. Casey** IT – G. Colucci LI – B.G. Harmann LU – P. Kihn LT – O. Klimaitiene	LV – J. Fortuna MT – D. Marlin NL – L. Steenbeek NO – H. Langan PL – M. Besler PT – I. Franco RO – M. Oproiu SE – S. Sjögren Paulsson SI – N. Drnovsek SK – V. Neuschl TR – A. Deris
Stellvertreter	Substitutes	Suppléants
AT – W. Kovac BE – P. Vandersteen CZ – E. Halaxova DE – H. Vogelsang-Wenke ES – M. Curell Aguila FI – A. Weckman FR – J. Collin	GB – T. Johnson HR – M. Bunčić IT – O. Capasso LI – R. Wildi LU – P. Ocvirk LT – J. Petniunaite MT – L. Sansone	NL – R. Jorritsma NO – H. T. Lie PL – E. Malewska SE – N. Ekström SK – K. Badurova TR – S. Coral Yardimci

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DE – L. Eckey DK – P. Indahl FI – A. Virkkala	FR – C. Menes GB – R. Burt* IE – D. Brophy	IT – L. Bosotti NL – J. van der Veer RO – D. Greavu
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<b>Interne Rechnungsprüfer</b> Ordentliche Mitglieder	<b>Internal Auditors</b> Full Members	<b>Commissaires aux Comptes internes</b> Membres titulaires
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<b>Wahlausschuss</b>	<b>Electoral Committee</b>	<b>Commission pour les élections</b>
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epi-Delegierte	epi Delegates	Délégués de l'epi
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<b>SACEPO Working Party Guidelines</b>		
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