

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)

Hubris as readers will know is derived from ancient Greek, and means extreme pride or self-confidence. When hubris offended the gods of ancient Greece, they were not slow to exact punishment. In modern times, the charge of hubris is often levelled at particular echelons of society, such as the political classes.

We are prompted to reflect on this by the result of the recent General election in the United Kingdom. We would not presume to comment on or analyse the outcome, we are not in the business of national or other politics, save to say that pundits who study these matters have commented publicly and frequently since the election that one of the Parties expected to do well, and which apparently did not do so as reflected in the final result, might have ignored some sections of the electorate.

A lesson to us all in the **epi** to take care to consider the aspirations, working practices and training of all our members across all constituencies. Sometimes this can be difficult, but with the setting up of the Reporting Group by Council, we are confident that our Institute will go forward with policies reflecting the importance of the **epi** in the wider context of the world of IP encompassing as it does the EPC, the UP and UPPC, and the PCT amongst others. As to the PCT, there are interesting developments on e-filing, reported elsewhere in this issue. We also offer our congratulations to Francis Gurry, recently re-elected as Director General of WIPO, a person we believe to whom hubris is an unknown word.

We believe that that quality is applicable to all our **epi** officers, and to our colleagues in the EPO. We hope so.

Report of 78th meeting of Council, 25th April, 2015

T. Johnson (GB) (Chair of the Editorial Committee)

A full complement of members attended the 78th meeting of Council in Barcelona and a pre-event on Friday, 24th April, namely an Interactive simulation of Oral Proceedings before an Opposition Division of the European Patent Office. The “case” involved a patent for an applicator for face cream, suitable subject matter for show – casing the beautiful face of the **epi** in operation on behalf of clients!

We were fortunate in having as ‘chairman’ of the Division hearing the case Daniel Thomas, former Director of DG1, and a person well-versed in Oral Proceedings. He gave the respective representatives, Chris Mercer for the Patentee and Claude Quintelier for the Opponent, a hard time when necessary, interspersed with comments to the audience concerning procedural points. An impressive set of documentation had been prepared by the **epi** beforehand, including, details of the patent, the granted claims, main and auxiliary requests, and prior art, so the audience was well briefed.

The protagonists handled themselves with real professionalism, as did the Chairman, so the audience gained valuable insights into oral proceedings and how they should be conducted. The main lessons taken away by the audience were: know all the papers in the case in depth, be prepared for anything and do not be taken by surprise, and always address the Division directly.

This event was a ‘first’ for the **epi**, and was very successful, instructive, and enjoyable for all participants.

As to the Council meeting itself, Axel Casalonga gave a detailed report on the status of the Unitary Patent and related issues concerning the UPPC. There could be difficulties on representation for EPAs, particularly if representation is limited to EPAs who are nationals of EU Member States. There was a discussion on a Code of Conduct for EPA representatives before the UPPC. Council agreed that the **epi** should be involved in discussions prior to a code of conduct being established, and deputed our President to consider the matter.

The Secretary General introduced a new legal member in the Secretariat, and also confirmed that the move to

the 5th floor of the current office building had been completed successfully owing to the efforts of the Secretariat ‘team’, who were thanked with acclamation.

The Treasurer General reported that the final results for 2014–2015 were very good, coming in under budget. There was a discussion over the future finances as although the cost of distributing ‘hard’ copies of **epi** Information would be largely dissipated from about 2016 when distribution would be in electronic form, nevertheless there would be for example increases in staff costs, the cost of the move to the 5th floor, the funding of more external activities for example in member states, and educational activities. The Internal Auditors were working with the Treasurer General to develop revised financial procedures, while the Finance Committee will work with the Treasurer General with a view to seeing where costs might be cut, for example by abolishing the Board, or reducing it in size. The annual subscription has been constant for several years. There was a discussion on whether an increase would be appropriate. A decision will be made at a subsequent meeting.

The Reporting Group, in conjunction with the Editorial Committee, reported on recent work. The website continues to be updated with a view to making it more user friendly, there may be a demonstration to the next Council. The Reporting Group is working towards improving reporting on and transparency of information to members, reform of structures of **epi** bodies such as committees, improving methodology of working to make working **epi** processes more effective, and continuation of and development of leadership roles within **epi**.

The Professional Education Committee inter alia reported on the introduction of Continuing Professional Education (CPE) for **epi** members. Following discussion, a new proposal will be presented to the Cologne Council meeting (November 14, 2015).

Council discharged the Bureau and Treasurer General for the preceding year.

Information about
epi membership and membership subscription
or
Rules governing payment of the **epi** annual membership fee
is available on the **epi** website www.patentepi.com

National/Regional Phase Entry Using ePCT

F. Leyder (BE), Chair, M. Samuelides (GR), Vice-Chair

Introduction

1. The PCT Working Group was established by the PCT Assembly to do preparatory work for matters, which require submission to the Assembly. Since 2008, the Working Group meets once a year in Geneva. In 2014 it met from the 10th to the 13th of June. The next meeting will be held in May 2015.

Summary of discussion in the 7th meeting of PCT Working Group of 2014

2. In the meeting of June 2014, the International Bureau (IB) proposed developing an interface that will enable applicants to trigger a national phase entry with respect of an International Application by submitting the required information and documents electronically using ePCT¹. Payment would, at the outset, still need to be made directly to the relevant designated Office (DO), however the IB retains the option of establishing a centralized payment services at a future stage of development. IB invited the National Offices to consider the proposal and noted that it would work with interested designated Offices to identify what information is essential to assist effective national phase entry.
3. According to the proposal the applicant would be allowed to select one or more participating designated Offices and give ePCT access to the international application to agents/professional representatives (PR) in the states, where national phase entry is considered. The system would allow any person with eEditor or eOwner rights to add or modify the data and documents and those with eViewer rights to review, but not to edit. Once all of the required data is entered, a "submit" button would become available. This would cause a national phase entry request to be created for the relevant designated Office (DO). It is understood that submission of the request could be performed by any person having access to the international application and not solely to the applicant or the PR.
4. The IB developed a mockup of an ePCT national phase information page², national phase entry requests, which had been submitted via ePCT, and draft national phase entry requests in the process of preparation.
5. A number of delegations expressed interest in the concept of national phase entry using ePCT, noting that there are a number of legal and technical

issues, which should be addressed, including the role of the local PR. In the view of a number of delegations, it would be essential to appoint a PR, because their early involvement ensures that the national phase entry is conducted correctly.

6. User groups provided an extensive list of issues to be addressed, including matters of universal relevance and others, which would be specific to certain designated States. FICPI submitted a comprehensive statement with considerations on the proposal and suggestions for further development. The main criticism is related to the late involvement of PR's.
7. The Working Group agreed that the International Bureau should continue to develop this concept in consultation with all interested parties, taking into account the comments made. Thus, it is expected that the IB will submit a modified paper to be discussed in the WG that will be held in May 2015.

Recent relevant opinions

8. EPPC members discussed the national/regional phase entry using a "centralized" interface in its meeting of February 2015³.
9. The EPPC members recognized according to the provisions of PCT, the appointment of a local PR can also be effected after the national/regional phase entry and the actual procedural steps for the entry may be performed prior to such an appointment. However, it was noted that the entry into the national/regional phase by someone with no experience in the practice of a designated/elected office, using a "universal" interface may result in serious mistakes and/or omission of actions, which may require additional effort to remedy the problem, or which could result in partial or even total loss of rights.
10. EPPC members also noted that an agent, who is not a PR authorized to represent before a DO is not liable for the procedural steps performed through the interface in the national phase entry.
11. It was decided that EPPC should monitor the developments and provide further comments once the IB submits a paper for the next session of the Working Group. Further, it was decided to introduce the issue in the next Council to establish an **epi** position.
12. On April 2015 APAA (**A**sian **P**atent **A**ttorneys **A**ssociation) submitted to the IB a paper on the issue of national/phase entry using ePCT. The paper

¹ Paper PCT/WG/7/12 prepared by the International Bureau

² Paper PCT/WG/7/12, paragraph 11

³ Written submission of EPPC members are included in the Appendix.

acknowledges that “is an excellent tool for effecting national phase entry”, but further notes that

- (a) “APAA members submit that the designation of a local attorney must be mandatory for NP entry and it is suggested that NP entry be effected by the local agent using the ePCT system, thereby giving all the benefits without any downside”, and
- (b) The system “could have a significant impact on the development of the profession (i. e. patent agents) and therefore the mature understanding and application of intellectual property principles in those jurisdictions (i. e. “technology importing jurisdictions”)”.

Conclusion

13. In view of the discussion in the Council, a draft paper reflecting the opinions expressed in the EPPC during its February 2015 meeting is annexed to the present (2 pages).

COMMENTS OF EPPC ON NATIONAL/REGIONAL PHASE ENTRY USING ePCT

1. In general, the ePCT interface for “centralized” national entry, will be used
 - (a) by applicants, who i) either decide late to enter the National Phase and do not have the time to find a local professional representative (PR), or ii) who wish to delay the appointment of a PR,
 - (b) by a PR, who has the right to represent before the DO
 - (c) by persons acting on behalf of the applicant, who have not the right of representation before the designated office (DO).
2. Such an interface, provided that it handles properly all requirements for national phase entry as well as it is used by persons, who have experience in processing applications in the DO, facilitate the national phase entry. However, it should be considered, if there are hazards linked with the use of the interface, in particular by users who are not familiar with the procedures of the DO.
3. The interface encourages the national phase entry without appointing a PR having the right to practice before the DO. Such a practice, although it may be followed without problems by experienced applicants, it is generally not recommended, as mistakes and omissions during national phase entry, may be a source of deficiencies that have an impact on the fate of the application, for the reasons presented below:
 - (a) Particular requirements of some DO’s, such as calculation of fees and filing of certified translations, may result in deficiencies during national phase entry.
 - (b) The appointment of a PR after the national phase entry, limits the available time that the representative will have to correct deficiencies that may occur during entry. Such a situation may increase the cost of entry for the applicant, in comparison to the cost when the entry is performed by a PR.
4. Further, the use of an interface that will be administrated by an authority that is not the DO, may create a confusion, as to which is responsible, i. e. the administrating authority or the DO, where there is an error or a malfunction during the transmission of the request submitted by the user.
5. Having considered the above, it is concluded that the interface may be a useful tool for persons, who are familiar with the international legislation, the national legislation of the DO and the respective procedures, but there are hazards, when it is used by persons that are not familiar with them and who will be encouraged to delay the appointment of a PR after the entry in national phase. Further, it may be an incentive for the establishment of service providers that will perform automatically the national phase entry in many states and which will not be liable for the procedural steps that they perform.
6. If the national authorities agree in receiving requests for national phase entry through an interface that will be administrated by the IB and the project continues, the following should be carefully considered:
 - (a) Define which authority, the IB or the DO, is responsible, if the interface is not compliant with the national requirements of a DO.
 - (b) Provide a unique help desk, which will be competent to provide the users with information of both technical and legal/procedural information regarding the national phase entry.
 - (c) It would be helpful to encode the requirements of DO’s in the interface as far as possible, i. e. the interface would not accept the request for national phase entry unless the basic requirements are fulfilled.
 - (d) The interface should be comprehensive as to the requirements of each DO. It will be very helpful, if it may handle the requirements related to the duty of the applicant to disclose known prior art.
7. It is anticipated that the interface will simplify the transmission of data to DO’s. Provided that the national authorities accept to receive requests via such a tool and that it will be decided to proceed with the development of the interface, **epi** will monitor the progress and will provide with opinion and comments, in order to minimize any hazards associated with its use.

Abbreviations:

- DO: Designated (or Elected) Office
 IB: International Bureau
 PR: Professional representative

Report of the Harmonisation Committee (HC)

F. Leyder (BE), Secretary

This report completed on 12 May 2015 covers the period since my previous report dated 13 February 2015.

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

The ESAB and the economic effects of introducing a grace period in Europe

Initiated by the EPO Economic and Scientific Advisory Board (ESAB), a Workshop on the economic effects of introducing a grace period in Europe was held at the EPO on 26 November 2014. The report of the Workshop is now available on the EPO website, together with the programme: <http://www.epo.org/about-us/office/esab/workshops.html>

The EPO's Economic and Scientific Advisory Board (ESAB) has issued on 17 March 2015 a statement on the possible introduction of a grace period in Europe.

As reported on the EPO website (<http://www.epo.org/news-issues/news/2015/20150317.html>), there was no consensus amongst ESAB members regarding the desirability of the introduction of a grace period in Europe. However, they did agree that Europe should consider introducing a grace period only if two vital conditions are met:

1. the grace period must be a "safety-net" grace period, and

2. the grace period must be internationally harmonised in the key global patent systems.

In preparing its statement, the ESAB took into account the report of the workshop held in Munich on 26 November 2014 and an economic study which the ESAB had commissioned from external consultants (the report of which is now available on the EPO website <http://www.epo.org/about-us/office/esab/workshops.html>).

EPO Tegernsee Symposium

The European Patent Office held a symposium in Munich on 12 February 2015, entitled "EPO Symposium on Harmonisation: Tegernsee and beyond". The presentations and a report prepared by the EPO are available on the EPO website:

<https://e-courses.epo.org/mod/url/view.php?id=7297>.

22nd Session of the SCP

The 22nd session of the Standing Committee on the Law of Patents (SCP 22) is planned be held in Geneva, from the 27th to the 31st of July 2015. **epi** will be represented. The meeting papers will be available on the WIPO website:

http://www.wipo.int/meetings/en/details.jsp?meeting_id=35591

Report of the Committee on EPO Finances

J. Boff (GB), Chair

The principal matters occupying the Committee have been the fees relating to the Unitary Patent and methods of payment of fees to the EPO.

Renewal Fees for Unitary Patent

epi have a place as observer on the Select Committee. In response to proposed levels of fees **epi** have pressed for lower fees, arguing that: –

- increasing the penetration rate (the proportion of granted patents that elect unitary protection) by having low fees assured EPO finances more than having high fees that would lead to a low take up.
- a high fee would make the system unaffordable by SMEs and so would bias the system towards large companies even more than the current situation, par-

ticularly in those countries where there was currently a low validation rate. In contrast, low fees benefited all applicants in all countries.

- high fees would do great damage to the reputation of the European system, and thus could lead to lower filing numbers overall.

The Select Committee are aiming to be in a position to reach a final decision on rules and fees by June 2015.

Fee payment methods

This matter relates to closure of EPO bank accounts and the amended Arrangement for Deposit Accounts, and to possible new means of fee payment. The matter continues to be in discussion in Committee.

Report of the European Patent Practice Committee (EPPC)

F. Leyder (BE), Chair

This report completed on 07.05.2015 covers the period since my previous report dated 13.02.2015.

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

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

1. G3/14

The readers of **epi** Information remember that the *amicus curiae* brief of our Institute has been published in issue 4/2014, at pages 162-4.

The decision has now issued (on 24.03.2015). It states: “In considering whether, for the purposes of Article 101 (3) EPC, a patent as amended meets the requirements of the EPC, the claims of the patent may be examined for compliance with the requirements of Article 84 EPC only when, and then only to the extent that the amendment introduces non-compliance with Article 84 EPC.”

Whilst Question 1 of the referral asked how the term “amendments” as used in **G 9/91** is to be understood, the Enlarged Board has concluded that neither the context of Article 101(3) EPC nor the object and purpose of the EPC as implemented by this article gives an unambiguous answer to the question of interpretation. It has added that the indication is that what is relevant is the amendment itself and its effect as regards the ground for opposition which it is intended to overcome. The Enlarged Board has clarified that if a claim is amended by limiting it to a complete dependent claim or by striking alternatives, such an amendment cannot be held to introduce non-compliance with Article 84 EPC; for other amendments based on dependent claims, it has to be decided case by case. Further, it concluded that if the patent is defended as granted, the fact that new prior art is cited which demonstrates that a granted claim is unclear has to be lived with. The Enlarged Board accepted that it is not optimal that there may be granted claims, even after amendment, which do not comply with Article 84 EPC.

Noteworthy that in the *travaux préparatoires* leading to the EPC2000, **epi** had suggested at an early stage that lack of clarity should be made a ground of invalidity (G3/14, at 70).

2. Independence of the Boards of Appeal

At the AC meeting of 25–26.03.2015, there was presented a paper (CA/16/15) submitted by the President of the EPO, entitled “Proposal for a structural reform of the EPO Boards of Appeal (BOA)”.

This paper had been circulated for comments in the MSBA sub-committee, and on the basis of the comments received our delegates to the AC meeting had been instructed. On behalf of **epi**, they expressed that we would not support moving the Boards, even less outside Munich, and that we would need more time to review in detail these proposals.

An *ad hoc* working group has been set, which met on 6.4.2015 to prepare a draft paper containing the basic ideas for the **epi** position. This paper has been accepted by our Council at the end of its meeting in Barcelona on 25.04.2015.

The CA/16/15 paper has now been published on the EPO website, in the context of a public consultation. Our Institute will prepare and submit a paper. We have also requested a meeting with Mr Kongstad, Chairman of the Administrative Council, to explain our views.

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

The SC (Select Committee of the Administrative Council of the EPOrg) held its 13th meeting on 23–24.03.2015, dealing with the level of renewal fees, the amount to be reimbursed in the compensation scheme, and (again in closed session) the distribution key.

On 5.05.2015, the Court of Justice of the EU rejected the actions of Spain against both Regulations (C-146/13 and C-147/13).

The next meeting would take place on 26–27.05.2015. The agenda would comprise a proposal on the level of renewal fees, the compensation scheme, draft Rules relating to Unitary Patent Fees and, in closed session, the distribution key.

The next one would be held in the margins of the AC meetings in June 2015. The June meeting would see final decisions on all items.

4. SACEPO/WPR 12

The 12th meeting of the Working Party on Rules was held on 31.03.2015. As promised in the 11th meeting, the EPPC provided its updated “wish list” for rule amendments for consideration one month prior the meeting.

The agenda comprised essentially the following points relevant to the EPPC:

2. Amendment of Rule 46 EPC to allow filing of colour drawings: only the principle was discussed; all users approve.

3. Amendment of Rule 82 EPC for typed documents in opposition: it is proposed to add a third sentence to Rule 82 (2) EPC "*Where decisions under Article 106 (2) or Article 111 (2) have been based on documents not complying with Rule 49 (8) the proprietor of the patent shall be invited to file them within the three month time period.*" All users approved. The EPO repeated that they would accept amendment of full paragraphs (as numbered in the B1 specification).

4. Amendment of Rule 147 EPC for preservation of files: there were some discussions because it was not clear what was kept and for how long. We argued for keeping the electronic files for the whole 20 years at least (so that grounds for refusal would – when applicable – remain known).

6. Any other business:

– Report on the Meeting of the International Authorities: the report itself is on the WIPO website. The EPO mentioned that there had been no compromise on the treatment of missing parts; this will be made clear in the EPO-PCT Guidelines. Also, same day priority claims remain an open question since they are not allowed in all national laws. Further, it was discussed whether the RO could forward to the ISA the search report it made for the priority application, together with the search copy (US/RO and others intend to make a reservation).

Incidentally, the EPO mentioned that automatic debiting from EPO deposit accounts would soon be available for PCT applications.

– Report on the state of play of the Unitary Patent.

– **epi** proposals for amendments to EPC Implementing Regulations: beyond clarification of some points, most were not discussed. The EPO repeated that in their view third party observations can only be filed in proceedings;

some users mentioned limitation proceedings and the unitary patent as reasons for placing them in the public part of the file.

5. Partnership for Quality (PfQ)

The PfQ meeting with **epi** took place in the afternoon of 20.04.2015, with a dozen members from the relevant sub-committees. The agenda covered essentially the EPO's quality management system, an update on recent developments relevant to quality, and developments in IP5 and work-sharing programmes.

6. PCT WG

The PCT Working Group was established by the PCT Assembly to do preparatory work for matters, which require submission to the Assembly. Since 2008, the Working Group meets once a year in Geneva. The next meeting is scheduled from 24 to 27.05.2015.

The PCT sub-committee prepared a position on the item "National phase entry using ePCT" which has been approved by Council during its meeting in Barcelona on 25.04.2015.

7. Examination Matters 2015

During this event, I enjoyed a poster prepared by Piotr Wierzejewski (DG1, Patent Procedures Management) which nicely summarises recent procedural changes in European patent practice. He kindly provided me with several copies, which were displayed during our Council meeting in Barcelona. The posters generated great interest, and the EPO kindly consented to publication in our journal.

Overview of procedural changes at the EPO

What	When	Description
Treatment of formal issues	2015	Amendment of Guidelines for Examination and/or Implementing Regulations (if necessary) to provide more flexibility when treating formal deficiencies (e.g. handwritten amendments)
Rules 124–127 and 129	2015	Terminology clarification in light of legal developments in EPC contracting states and IT developments at the EPO; replacement of term "post" with "delivery services"
Rule 147	2016	Shift to electronic file
Rule 71(3) waiver	Q3 2015	Proposal to introduce waiver of subsequent R 71(3) communications
Rule 164	Q4 2014	Give all applicants, irrespective of their chosen route, the same rights regarding non-unity prosecution; All Euro-PCT applicants to be able to ask for a European search report on any invention claimed, irrespective of previous ISA; all Euro-PCT applicants to be able to choose any searched invention as the basis for further prosecution
PCT-EPO Guidelines	Q4 2015	EPO will provide "Guidelines for search and examination at the EPO as PCT authority", describing specific procedures and substantive issues before EPO as RO/ISA/IPEA
PPH implemented	Done	Applications filed at EPO having corresponding application in any of other IP5 offices (JPO, KIPO, SIPO, USPTO) and whose claims are found to be patentable (allowable) will be processed at EPO in accelerated manner. PPH must be requested by applicant
PCT Deposit Accounts	Q3 2015	Holders of EPO deposit accounts to be able to request automatic debiting of accounts on basis of automatic debit order for specific international application. Electronic and online filing of debit orders
Global Dossier	Ongoing	Cooperation between IP5 offices to bring electronic files together to create a Global Dossier service

(from P. Wierzejewski, DG1 Patent Procedures Management)

Minutes of Meeting of **epi** Biotech Committee with EPO Directors on 25 November 2014 at the EPO, Pschorrhöfe Building, Bauteil VII, Room 1901, Munich

S. Wright (GB), Secretary

In Attendance:

Ulrich Thiele (UT, dir. 1404)
Siobhán Yeats (SY, dir. 1406)
Victor Kaas (VK, dir. 1408, Munich)
Francisco Fernandez y Brañas, dir. 1403, the Hague)
Maria Fotaki (MF, dir. 1405, Munich)
Aliko Nichogiannopoulou (AN, dir. 1401, Munich)
Sonke Holtorf (SH, dir. 1405, the Hague)
Enrique Molina Galan (EMG, dir. 1401 – the Hague)
Klaus-Peter Doepffer (KPD, dir. 1412, Munich)
Bernardo Noriega, Francisco (ES)
Capasso, Olga (IT)
De Clercq, Ann (BE)
Hally, Anna-Louse (IE)
Jaenichen, Hans-Rainer (DE)
Jonsson, Thorlakur (IS)
Mattsson, Niklas (SE)
Schouboe, Anne (DK)
Wächter, Dieter (CH)
Wright, Simon (GB)
Keller, Günter (DE)
Vogelsang-Wenke, Heike (DE)
Swinkels, Bart Willem (NL)

Ms Yeats opened the meeting at 13:00, following a joint lunch.

1. STEM CELLS

The EPO guidelines have been amended to take account of recent practice, in particular on the Brüstle case. A recent decision T2221/10 (Technion) has confirmed the practice of the EPO concerning the 10 January 2008 cut-off. In other words, cases filed after this date may be allowed if the patentee can rely on the literature paper (by Chung) which confirms the single blastomer process (SBB) whereby a stem cell can be removed from an embryo without destruction of said embryo. This is the first decision to have to deal with the situation after the Brüstle decision. Note that while decisions of the CJEU are not legally binding for the EPO, they may be considered as persuasive.

Thus, the EPO will generally grant cases in the stem cell area if at the effective date of the application methods were available for producing embryonic stem cells that did not require destruction of human embryos at any time in the past.

T1441/13 (Asterias) took account of the SBB process, and there was a disclaimer of the non-destruction of embryos. The claims were not allowed, however, as they

did not enable the “remaining” subject matter left, after the disclaimer.

There was also an attempt to introduce a disclaimer using the same wording as Rule 28(c), namely excluding embryos for industrial and commercial purposes. It was decided that this was unclear, and potentially the subject matter that was being disclaimed was not within the scope of the claim in the first place.

We are awaiting the decision from the CJEU on the parthenotes/ISCC case which has been referred to the CJEU¹.

T1836/10 concerns a case by a German researcher claiming a method for isolating embryonic stem cells by SBB. The application was refused on the basis that there was direct use of an embryo even if it was not destructive.

2. PLANTS

There has been a process on the seedless watermelons case – T1729/06. There was a hearing in October before the Enlarged Board of Appeal concerning the tomatoes and broccoli cases. It was noted that the French and German versions of Article 53 (c) EPC mention breeding, whereas interestingly the English version refers to processes for the production of plants, which appears potentially wider. This was an interesting decision because factually the process produced sterile fruit, and not a plant. The Board found that although the claimed process contained crossing steps, it was not an excluded essentially biological process for producing a plant, because no meiosis or sexual crossing took place.

The EU Expert Group on Biotechnology, set up following Article 16c, Directive 98/44/EC, is expected to deliver a report some time after the Enlarged Board of Appeal has decided on the tomatoes and broccoli cases (expected first quarter 2015).

3. PATENTING ANTIBODIES

There was some discussion of the scope of claims, and whether CDRs and sequences are required in the claims. Some Technical Board of Appeal decisions state that functional language is acceptable. It is still not clear how many CDRs are required by the EPO to properly define the antibodies. Decisions of relevance are T1300/05, T617/07 (where a single CDR was acceptable), T352/07 (thought possibly though to be less relevant, from Board

¹ This decision has been rendered by the CJEU in the meanwhile after this meeting on December 18, 2014

3.3.2, Oswald). T067/11 is a good reflection of current practice.

4. ELECTRONIC TOOLS

This concerns sequence listings, colour drawings and scanning.

As far as sequence listings are concerned, these will be included in the eDossier which will start some time in 2015. Note that the EPO can re-run its earlier search at any time, and as announced on 1 October there will be a web-based top up search facility that could be performed by the Applicant (Search For Life). The results would be sent to the Applicant only, and this would give the Applicant documents that have been published after the original search. It would not be sent to third parties, but would be part of the CMS.

As regards colour drawings, the EPC Guidelines still require them to be in black and white only. The question was asked, though, what is the status of a document that is filed at the EPO in colour in Opposition proceedings? For example, certain literature papers are published in colour, but of course are converted to black and white when filed at the EPO. The original document, as available to a skilled person, is in colour. Does the EPO consider the black and white colour version as filed to be the one that is to be considered?

The Guidelines still require prior art sequences, including fragments and variants, to be included in a sequence listing. The **epi** is of the view that this may be at odds, with decision J8/11, which suggests that prior art sequences do not need to be included in listings. The EPO suggested that if an invention is, for example, a molecule that binds residues 35 to 45 of a known protein, then one must include sequence 35 to 45 in the sequence listing (despite the fact that that is not actually the invention, and despite the fact that that sequence is already known).

The EPO argued that J8/11 suggested that you must identify (for example by accession number) the prior art sequence, but the **epi** is to investigate whether this imposes additional restrictions above and beyond what the Board stated in J8/11.

5. PHARMACOGENOMICS

A new Examiner group is being set up to review the EPO's practice in this area. One of the relevant decisions is T734/12. The issue here concerns statistical probability when considering novelty, in other words whether the claiming of a smaller patient group would be anticipated by a more generic disclosure of a prior art larger patient group.

6 ADDED MATTER

The EPO noted that the Guidelines have been amended by introducing a reference to newer case-law. Examiners

have been informed about this change. The **epi** is awaiting evidence from Examiners that the standard has actually been relaxed somewhat, and that Examiners will in fact see the specification through the eyes of a person skilled in the art.

7. MEDICAL USE CLAIMS

T1780/12 concerns double-patenting, and decided that one could have one case with Swiss style claims, and another application with equivalent EPC 2000 style claims. Other decisions in this area are T803/10 and T2461/10. Note that T1570/09 said that a single set of claims cannot have both Swiss style claims and EPC 2000 claims, but this will probably not be followed.

8. SUMMONS TO ORAL PROCEEDINGS

The EPO's internal Guidelines state that the EPO should issue at least one Examination Report for Summons issued. Examiners have wide discretion, and can issue a Summons when they feel that no further progress is being made. The EPO said that following an internal instruction in February 2014, Applicants will be given at least five or six months notice before the Summons, so the period for Response should be at least the same as if the EPO issued a regular Examination Report with a six month term.

9. FEEDBACK TO EXAMINERS – THE RESULT OF APPEALS

The **epi** asked whether Examiners were told of the result of Appeals against their decisions, e.g. to refuse. Apparently this is not automatic, but most Examiners do in fact take an interest in the outcome of their files. Note that interlocutory revision is very rarely used – only about 5 % of cases use this procedure. The **epi** thought that it could be used more, in appropriate cases. In cases before an Examining Division where a Refusal has been issued, but that is overturned on appeal, then of course the case is returned to the Examiner for resumption of examination proceedings, so that he/she can see the result of his Appeal. The **epi** hopes that Examiners will take note of cases where they have been overturned on Appeal, although the EPO pointed out that often the facts upon which the Boards rule (claims, arguments) are different from those that formed the basis for the refusal.

10. DEPOSITS

The expert solution is being maintained, but as a result of lack of use the list of experts is unlikely to be updated. A procedure should be set up how to deal with the appointment of an expert.

The meeting then ended with thanks from Ms Yeats, in the chair.

Examination Matters 2015: Successful event in new format

Authors:

Examination Matters Organising Committee of the EPO: Sjoerd Hoekstra, Rainer Stach, Maaïke van der Kooij, Björn Gundlach, Norbert Glaser, Giovanni Arca, Andrea Urban

Examination Matters 2015: Around 150 professional representatives from 21 different member states attended the eighth edition of this European Patent Academy seminar, held in The Hague on 16 and 17 April. In its new format it gave far more patent attorneys the opportunity to meet examiners and discuss matters related to patent examination.

Unlike in previous years, Examination Matters offered free seating arrangements, allowing participants to select the workshops they wanted to attend on an *ad hoc* basis. This new format was chosen to allow for more efficient organisation and give 25% more participants access to an attractive selection of 23 interactive workshops. Like last year, some of the workshops were jointly hosted by presenters from DG 1 and the **epi**, while this year we also had two lawyers from Directorate Patent Law running a workshop. Each participant was able to attend six workshops and two plenary sessions. The workshops were designed to assure maximum interaction between presenters and relatively small groups of participants, for optimum mutual learning benefit.

The focus of this year's seminar was on computer-implemented inventions (CII). Accordingly, the event

opened with a speech by Grant Philpott (Principal Director Telecommunications & Computers), who invited guests to attend the plenary session on "CII at the EPO, with focus on ICT" and visit five workshops dealing with CII-related topics. Paolo Rambelli, chairman of the **epi**'s Professional Education Committee, then addressed the participants. In his opening speech, he dubbed Examination Matters "the feather in the cap" among EPO training events for patent attorneys.

Examination Matters once more underlined its status as the most prominent showcase for DG 1 and a major training event for patent practitioners. Just two weeks after online registration opened, the seminar was fully booked (with over 80 more applicants on a waiting list), which testifies to the overwhelming interest in the event among European patent practitioners. Moreover, a quarter of the participants had attended the seminar before.

Feedback from participants once again showed the perceived benefit of such a unique and direct interaction with EPO examiners. As one participant put it: "This is the only opportunity offered where one can directly meet examiners and discuss the most interesting examination topics."

Exchange of opinions between examiners and attorneys is vital for an effective learning process, and in that respect Examination Matters once again proved to be a unique and highly influential event.

Report on the EPO-**epi** seminar on Guidelines2day and Art. 123(2) in The Hague

B. van Wezenbeek (NL), PEC member

On Wednesday 15 April 2015 the kick-off was held for a new one-day seminar series resulting from the cooperation between the EPO Academy and the **epi** educational team. More than one hundred attendees heard EPO speakers discuss the recent changes in the EPC and the practice of the Office, e.g. on changes in the fees and deposit arrangements, the new notification under Rules 124–129, the handwritten amendments, the new Rule 164 and several procedures, like PCT-Direct, PPH and the Early Certainty from Search. As usual, the presentations of the EPO speakers were accompanied by presentations of **epi** speakers who presented practical issues and critical notes to the subjects under discussion. Each of the subjects was closed off with a lively Q&A session with the audience.

After lunch, the presentations focused on Art. 123(2), where EPO speakers first outlined the position of the EPO with regard to this subject. The most important contribution of the day, however, was a presentation on behalf of the **epi**, where examples from the practice were given and commented and where emerging trends in the case law were discussed.

As usual, the day was closed with informal drinks, where the audience could further discuss with the speakers on the various subjects.

This seminar will be repeated in several cities all over Europe. Since the identity of the speakers will vary in the following seminars, no names have been given in the above report.

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<u>Issue</u>	<u>Deadline</u>	<u>Publication</u>
3/2015	August 7, 2015	September 30, 2015
4/2015	November 6, 2015	December 31, 2015

CEIPI preparation courses for the EQE pre-examination and main examination 2016

The Centre for International Intellectual Property Studies (CEIPI), in particular its International Section, offers, as part of the Euro-CEIPI collaboration with the European Patent Academy, a complete range of high-quality exam preparation courses using proprietary high-quality training material. The tutors for these courses are a mix of professional representatives (from private practice and industry), and staff of the EPO. All have extensive knowledge and practical experience in the procedures before the EPO and the Boards of Appeal.

A **pre-examination** will be held in 2016 for those candidates who fulfil the requirements to present themselves to the pre-examination of the EQE in 2016 (see supplementary publication 2, OJ EPO 2014).

The CEIPI is organising courses in Strasbourg to help candidates prepare for that pre-examination.

The seminar preparing for the pre-examination 2016 will take place from 2 to 6 November 2015. It will cover relevant topics which can be expected for the pre-examination. The seminar will give participants the opportunity to apply their knowledge in a mock examination.

The course fee is EUR 1 600. Closing date for enrolment is 25 September 2015. More information can be obtained from christiane.melz@ceipi.edu or from the CEIPI website at www.ceipi.edu

As a complement to this seminar, the CEIPI offers a pre-exam "Cramming Course" as a last minute opportunity to candidates wishing to improve their skills in respect of the pre-examination. Participants will sit two papers under exam conditions, followed by a discussion of the drafted papers with the tutor. This two-day Cramming Course will take place on 28 and 29 January 2016. For English- and German-speaking candidates, the course will be organized in Munich. For French-speaking candidates, it will be held in Paris.

The course fee is EUR 750. Closing date for enrolment is 4 January 2016. More information can be obtained from christiane.melz@ceipi.edu or from the CEIPI website at www.ceipi.edu

For all papers of the EQE **main examination** 2016 (A+B, C and D), the preparation programme starts with "Introductory Courses" in the early autumn of 2015, either in Strasbourg or in Paris, so as to set candidates "on the track", as early as possible, for preparing for the EQE.

The introductory courses are followed by the "Preparatory Seminars" for papers A+B and C in November 2015 and for paper D in January 2016 in Strasbourg, France. These seminars build up on the introductory courses and expand on the issues treated, as well as provide for working on a mock exam under exam conditions, which is then compared with a CEIPI "model solution".

CEIPI, by its tutors, has developed this programme over the recent years and believes it has been successful

in providing a large number of candidates (about 500 every year) with a set of courses adapted to the EQE, increasing their chances of success.

For paper C, which every year appears to be one of the major stumbling blocks of the EQE, this programme is supplemented with a "Special C-Resitter" course in November 2015, specifically designed for those who have failed the C-paper (more than) once. In addition, last-minute "Cramming" Courses for papers A+B and paper C are organized in January 2016, approximately one month before the examination. In these courses candidates can sit recent papers under exam conditions, followed by subsequent feedback from a tutor on the papers and the work delivered by the candidates, in small groups. The Cramming Courses also provide for answering any last-minute questions regarding papers A+B or paper C, respectively.

The "Special Resitter" course is offered in Strasbourg. The Cramming Courses for papers A+B and for paper C will be held in Munich for English- and German-speaking candidates and in Paris for French-speaking candidates.

All courses are provided in the three EPO official languages: English, French and German.

The program is as follows (more extensive information is contained in OJ EPO 4/2015):

„Introductory Courses" 2015:

Paper	Paris (FR)	Paris (EN)	Strasbourg (EN, DE)
A+B	02.10.	02.10.	18.09.
C	03.10.	03.10.	19.09.
D	04./05.09.	30.09./01.10.	16./17.09.

Each course can be booked separately. The fee for each one-day course in Paris or Strasbourg is EUR 500. The fee for the one-and-a-half day courses in Strasbourg and Paris is EUR 750 each.

Closing date for enrolment is 15 July 2015.

More information can be obtained from sylvie.kra@ceipi.edu or from the CEIPI website at www.ceipi.edu

"Preparatory Seminars" 2015/2016:

The A+B seminar will be held in Strasbourg, from 16 to 18 (am) November 2015, the C seminar from 18 (pm) to 20 (pm) November 2015. The A+B and the C part respectively can be booked separately.

The D seminar will be held in Strasbourg, from 4 to 8 January 2016. Should the enrolments for this seminar exceed the seminar capacity, a second D seminar would take place from 18 to 22 January 2016. All these seminars are intended for those who wish to sit the EQE main examination in 2016.

The fee is EUR 1 600 for the five-day courses (ABC or D); for the A+B or the C part on its own the fee is EUR 825.

Closing date for enrolment is 25 September 2015.

More information can be obtained from christiane.melz@ceipi.edu or from the CEIPI website at www.ceipi.edu

The "Special C-Resitter" course 2015 will be held in Strasbourg on 27 and 28 November 2015.

The course fee is EUR 850. The price includes the "C-Book", 4th edition.

Closing date for enrolment is 2 October 2015.

More information can be obtained from sylvie.kra@ceipi.edu or from the CEIPI website at www.ceipi.edu

The "Cramming" course for papers A+B will be held in Munich (EN, DE) on 26 and 27 January 2016 and in Paris (FR) on 30 January 2016. The "Cramming" course for

paper C will be held in Munich (EN, DE) on 28 and 29 January 2016 and in Paris (FR) on 27 January 2016.

The fee for the Munich courses for papers A+B or for paper C is EUR 650 respectively. The fee for the Paris courses for papers A+B or for paper C is EUR 500 each.

Closing date for enrolment is 4 January 2016.

More information can be obtained from sylvie.kra@ceipi.edu or from the CEIPI website at www.ceipi.edu

Contact: Christiane Melz, Secretariat of the International Section of CEIPI, phone 0033 368 858313, christiane.melz@ceipi.edu

Contact Data of Legal Division

Update of the European Patent Attorneys database

Please send any change of contact details using EPO Form 52301 (Request for changes in the list of professional representatives: <http://www.epo.org/applying/online-services/representatives.html>) to the European Patent Office so that the list of professional representatives can be kept up to date. The list of professional representatives, kept by the EPO, is also the list used by **epi**. Therefore, to make sure that **epi** mailings as well as e-mail correspondence reach you at the correct address, please inform the EPO Directorate 523 of any change in your contact details.

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

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legaldivision@epo.org
www.epo.org

Thank you for your cooperation.

Next Board and Council Meetings

Board Meetings

93rd Board meeting on September 19, 2015 in Porto (PT)

94th Board meeting on March 12, 2016 in Tallinn (EE)

Council Meetings

79th Council meeting on November 14, 2015 in Cologne (DE)

80th Council meeting on April 30, 2016 in Athens (GR)

81th Council meeting on November 12, 2016 in Berlin (DE)

82th Council meeting on April 24/25, 2017 in Munich (DE)

Nächster Redaktionsschluss für **epi** Information

Informieren Sie bitte den Redaktionsausschuss so früh wie möglich über das Thema, das Sie veröffentlichen möchten. Redaktionsschluss für die nächste Ausgabe der **epi** Information ist der **7. August 2015**. 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 **7th August 2015**. 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 **7 août 2015**. Les textes destinés à la publication devront être reçus par le Secrétariat avant cette date.

Guidelines for authors

M. Nollen (NL)

The **epi** Information is a regular publication sent to more than 11,000 Professional Representatives before the EPO. With the object of maintaining and improving quality of the **epi** Information, the Editorial Committee has adopted following Guidelines for authors.

Introduction

The **epi Information** is a regular publication sent to nearly 12,000 potential readers. Nearly all of those – more than 11,000 – are the Professional Representatives before the EPO, which are members of the **epi**. It goes without saying that such a large audience has the right to a publication that meets the standards of quality that our Profession is proud to represent.

In view thereof, the Editorial Committee has adopted Guidelines for authors. These Guidelines are intended for supporting authors in drafting papers and will be used by the Editorial Committee in reviewing draft papers. They are intended as the “Rules of Procedure of the Editorial Committee”.

Contents

1. Contributions to the **epi** Information are addressed to Professional Representatives before the EPO. This applies to level of background knowledge, content and the international character of the audience.
2. Contributions to the **epi** Information may be news and information from the **epi**, articles, book reviews, letters and announcements. The articles and book reviews focus on European patent practice in its widest sense, including information on other jurisdictions deemed relevant for European patent practice.
3. Announcements include announcements from the European Patent Office, from other professional, non-commercial organisations in the field of intellectual property and from further third parties. Announcements from further third parties will be considered as advertisement, unless the Editorial Committee decides otherwise.

Format of contributions

1. Articles may be submitted in English, French or German. Articles shall contribute to the permanent education of Professional Representatives.
2. Articles shall have a maximum length of 3000 words. The Editorial Committee may decide to allow longer articles if it is of the opinion that the article is highly relevant and the length is appropriate for the content.
3. Articles shall start with an abstract in English. A French and German translation of the abstract shall be published at the end of the article. Support may be provided for such translation.
4. Articles shall address a point of law, of procedural or material nature. Articles shall end with a conclusion or discussion section, providing a summary of the reasoning of the article.

5. Reference to Case Law of the Board of Appeal is highly preferred, where an article addresses a subject of European Patent Practice. When addressing Case Law, the article shall contain an analysis or summary of one or more relevant decisions, such that this decision can be followed by a Professional Representative without reading it in detail.

Format of other contributions

1. Other contributions shall be in English.
2. Letters shall have a length of at most 500 words. Book reviews shall have a length of at most 1200 words (2 pages in the **epi** Information). Announcements shall have a length of at most 600 words (1 page in the **epi** Information). The Editorial Committee may decide to deviate from these maximum lengths, or to shorten a contribution.
3. Such contributions shall be informative, clear and not longer than appropriate in respect of their content.

Role of Editorial Committee

1. The Editorial Committee is responsible for the content of the **epi** Information. It may invite **epi**-members and others to provide a contribution on a subject deemed relevant.
2. The Editorial Committee decides on publication of a contribution. A contribution will be (a) accepted as such (b) conditionally accepted if amended to meet the guidelines (c) likely accepted if rewritten (d) refused.
3. The Editorial Committee will inform authors of its decision. When conditionally accepting a contribution, the Editorial Committee may make amendment proposals. When requesting rewriting, the Editorial Committee shall provide a reasoned statement with suggestions. When refusing, the Editorial Committee shall provide a reason.
4. Refusal of a contribution is to be foreseen when the contribution would offend morality, is of a clearly commercial nature and/or is not relevant to European patent practice in its widest sense. Refusal shall also be foreseen for any contribution constituting a complaint to a decision of the EPO in relation to a specific case in which the author or his firm was involved as a representative. A contribution may furthermore be refused for editorial reasons, for instance if several contributions on a single subject are submitted.
5. When taking decisions, the Editorial Committee shall not merely address quality or brilliance, but also shall provide a forum for any opinion on European Patent Practice, particularly from the community of Professional Representatives.
6. Decisions of the Editorial Committee are not open to debate or discussion.

Second Medical Use Claims in the Light of the Decisions T1570/09 and T1780/12

Dr. F. Letzelter LL.M. (DE)

In 2014, the two decisions T1570/09 and T1780/12 of the Technical Board of Appeal of the European Patent Office shed light on the issue of second medical use claims in the European practice. On first sight, there seems to be a certain degree of contradiction between these two decisions. However, when seen together, they provide important pointers for the practitioner in connection with the claiming of second medical use in pending applications having a priority date predating January 29, 2011. For the time being, it should for such pending applications be carefully considered to file one or more divisional applications in order to obtain a granted patent for both a Swiss-type second medical use claim and an EPC 2000 type second medical use claim.

I. Background

From the outset, the European Patent Convention contained stipulations excluding the patenting of methods of medical treatment for humans and animals. In the EPC 1973, Art. 52 (4) contained the legal fiction that *„methods for the treatment of the human or animal body by surgery or therapy [...] shall not be regarded as inventions which are susceptible for industrial application ...“*. In the EPC 2000, this statutory fiction was replaced by the stipulation of Article 53 (c) according to which *“European patents shall not be granted in respect of [...] methods for treatment of the human or animal body by surgery or therapy ...“*.

The reasoning behind such exclusions from patentability is the intention to keep the professional practice of medical doctors free of interference from patent protection.¹

As a compensation to this exclusion from patent protection, the EPC 1973 explicitly provided protection for known substances or compositions by reference to their first use in any method of medical treatment (Art. 54 (5) EPC 1973). This stipulation of the EPC 1973 explicitly allowed for “first medical use” claims. However, there was no corresponding stipulation for “second medical use” claims, i.e. claims to substances or compositions which could protect further uses of compounds already known for a medical use.

The lack of clarity in connection with such “second medical use” claims has been resolved by the decision of the Enlarged Board of Appeal G5/83 in 1984 which established the Swiss-type claim for such second medical uses, having the format

“Use of product X in the manufacture of a medicament for treating Y“.

When the EPC 2000 was drafted, it was intended to fill this loophole in connection with second medical uses and provide an explicit stipulation in the EPC. New Art. 54 (5) EPC 2000 provides for the patentability of the second medical use. With entry into force of the EPC 2000, second medical use claims could be drafted with the format

“Product X for use in the treatment of Y“

However, the entry into force of the EPC 2000 did not cause an immediate disappearance of Swiss-type claims in the practice of the EPO. As a matter of fact, the Swiss-type second medical use claims and the EPC 2000 type second medical use claims coexisted for a number of years.

In 2010, however, the decision of the Enlarged Board of Appeal G2/08 ruled that *„where the subject-matter of a claim is rendered novel only by a new therapeutic use of a medicament, such claim may no longer have the format of a so-called Swiss-type claim“*.

In this decision, the Enlarged Board of Appeal argued that the Swiss-type claim format for second medical use was only justified in view of a loophole existing in the provisions of the EPC 1973. The Enlarged Board of Appeal found that with the coming into force of the EPC 2000, this loophole was closed and the need for the Swiss-type claim format for the second medical use no longer exists. In this connection, the Enlarged Board of Appeal argued:²

“Article 54 (5) EPC now permits purpose-related product protection for any further specific use of a known medicament in a method of therapy. Therefore, as mentioned in the preparatory document (MR/24/00, point 139) the loophole existing in the provisions of the EPC 1973 was closed.

In other words “cessante ratione legis, cessat et ipsa lex”, when the reason of the law ceases, the law itself ceases.

The cause of the praetorian approach ceasing, the effect must cease.”

As a transitional regulation, the Enlarged Board of Appeal ruled that the decision shall not have a retroactive effect, and is only set to apply to applications with a priority date of January 29, 2011 or later.³

In other words, for pending European patent applications having a priority date predating January 29, 2011, Swiss-type claims are in principle still allowable.

1 See e.g. the decision of the Enlarged Board of Appeal G02/08, item 5.3, page 21, last paragraph

2 See the decision of the Enlarged Board of Appeal G 2/08, item 7.1.2, page 42, 2nd, 4th paragraph

3 See the decision of the Enlarged Board of Appeal G 2/08, page 44, last paragraph

In 2014, the two decisions T1570/09 and T1780/12 have shed light on the question whether, and if yes under which circumstances, patent protection for both Swiss-type second medical use claims and EPC 2000 type second medical use claims can coexist.

II. The Decisions T 1780/12 and T1570/09

The decision T1780/12 was based on an appeal against the refusal of the examining division of a divisional application on the ground of double patenting. The parent application of this divisional application had already been granted with a Swiss-type second medical use claim.

Subsequent to the granting of the parent, the applicant sought grant of a divisional application with a EPC 2000 type second medical use claim having the same features as the Swiss-type second medical use claim already granted in the parent.

The examining division refused the divisional application under Art. 97 (2) EPC in conjunction with Art. 125 EPC, stating that claim 1 of this divisional application is “related to the same subject-matter” as claim 1 granted for the parent application. The examining division had made reference to the travaux préparatoire (OJ EPO, Special edition 4/2007 English version, page 54) and argued that “it is noted that the EPC legislator considered the two formats discussed here equivalent and clearly stated so in the relevant preparatory documents”.⁴

The Board of Appeal set aside this decision of the examining division and came to the conclusion that for the purpose of double patenting, a EPC 2000 type second medical use claim is not directed to the same subject-matter as a Swiss-type medical use claim.

The Board of Appeal argued that a Swiss-type claim is a purpose-limited process claim whereas a second medical use claim formatted in accordance with EPC 2000 is a purpose-limited product claim. Accordingly, in the Board’s view, these two claim types belong to different claim categories and the Board concluded that the claimed subject-matter is different. The Board concluded:⁵

“It follows from the above analysis (see points 16 and 17) that the claims under consideration belong to different categories, i.e. purpose-limited process claim vs. purpose-limited product claim and differ in addition in at least one technical feature. It is generally accepted as a principle underlying the EPC that a claim to a particular physical activity (e.g. method, process, use) confers less protection than a claim to the physical entity per se, see decision G 2/88 (supra, reasons, point 5). It follows that a purpose-limited process claim also confers less protection than a purpose-limited product claim.”

Accordingly, the divisional application was granted with the EPC 2000 type second medical use claim,

despite the already granted parent with the Swiss-type second medical use claim.

The subsequent decision of the Technical Board of Appeal T 1570/09 was based on a different case scenario. The applicant, during an appeal proceedings stemming from a refusal of the application by the examining division, was seeking grant of a claim version containing two independent claims having essentially the same features, one being a Swiss-type second medical use claim and one being a EPC 2000 type second medical use claim.

The appellant argued that the two independent claims should be allowed in one single set of claims in order to preserve his legitimate interest when seeking full protection for his invention. In this connection, the appellant argued that the scope of protection of the two different forms of claims was not identical and that the interpretation of the two different claim forms by the national courts of the contracting states might differ from one state to another and also deviate from the EPO’s practice.⁶

However, the Technical Board of Appeal did not agree to these arguments of the appellant and refused the respective request of the appellant with the following arguments:⁷

“In the present case the appellant has been able to formulate under Article 54 (5) EPC 2000 an allowable purpose-limited product claim (claim 4 of the main request) which seeks protection for the same medical indication of the same substance as in the Swiss-type claim 1, and the notional novelty of claim 1 is not derived from the “medicament” itself. Therefore, there is no longer an objective reason for justifying the simultaneous presence of both claims in the set of claims to be proposed for grant. Allowing such a set of claims would cause the contradictory legal situation that the old provisions in Article 54 EPC 1973 together with Article 52 (4) EPC 1973, and the new provisions in Article 54 EPC 2000 together with Article 53 (c) EPC 2000 would apply simultaneously to one and the same set of claims.”

The Board concluded:⁸

“Under the circumstances depicted above, the appellant’s argument that Swiss-type form claims and purpose-limited product claims confer different scopes of protection under Article 69 EPC at national level cannot succeed as a valid justification for allowing the main request. The answer given to question 3 in G 2/08 confirms that the theoretical possibility of different interpretations of the scope of protection conferred under Article 69 EPC at national level is not stated as a reason for prolonging the life of Swiss-type form claims in those cases where there is no longer any legal reason for applying the praetorian rule in accordance with the old law (EPC 1973) instead of Article 54 (5) EPC 2000.”

4 See the decision of the Examining Division in the application EP 04 007 843.8 dated March 27, 2012

5 See the decision of the Technical Board of Appeal T1780/12, item 22, page 15, last paragraph to page 16, first paragraph

6 See the decision of the Technical Board of Appeal T1570/09, item X. on page 5

7 See the decision of the Technical Board of Appeal T1570/09, item 4.4, page 14

8 See the decision of the Technical Board of Appeal T1570/09, item 4.6, pages 16 and 17

With these arguments, the Technical Board of Appeal therefore refused the granting of a claim version with a Swiss-type second medical use claim and an EPC 2000 type second medical use claim as independent claims in the same application.

III. Discussion and Conclusion for the Practice

On first notion, the two decisions T1780/12 and T1570/09 might seem somewhat contradictory. However, on closer inspection of the grounds given by the Boards of Appeal in these decisions, it can be argued that the different outcome is simply based on the fact that the issues to be decided were different.

In the decision T1780/12, the issue to be decided was the question of double patenting in connection with the granting of a divisional application in relation to its parent. Here, the Board of Appeal ruled that a Swiss-type second medical use claim and an EPC 2000 type second medical use claim are of a different claim category, one being a purpose limited process claim and the other being a purpose limited product claim, and are therefore different in their scope of protection. It is this difference in the scope of protection that brought the Board of Appeal in T1780/12 to the conclusion that granting a patent on a divisional application with an EPC 2000 type second medical use claim does not constitute double patenting in relation to the already granted parent with a Swiss-type second medical use claim. According to the Board, this difference in the scope of protection is based on the fact that the claims are of a different category, one being a purpose limited process claim and the other being a purpose limited product claim.

This decision seems to be in accordance with the older decision of the Technical Board of Appeal T250/05 in 2008, which found that post grant, a Swiss-type second medical use claim cannot be converted into a EPC 2000 type second medical use claim because such a conversion would extend the scope of protection (Article 123 (3) EPC). It also seems to be in accordance with the decision of the Enlarged Board of Appeal G 2/08 which found that a EPC 2000 type second medical use claim is "*likely broader*" than the Swiss-type second medical use claim with the same features.⁹

When studying the grounds of the decision T1570/09 in detail, one comes to the conclusion that the Board of Appeal avoided a discussion whether or not there is a

difference in the scope of protection between these two claim types. Instead, the Board of Appeal points out that "... G2/08 confirms that the theoretical possibility of different interpretations of the scope of protection conferred under Article 69 EPC at national level is not stated as a reason for prolonging the life of Swiss-type form claims ...".

Accordingly, in T1570/09 the Board does not base its decision to not allow a Swiss-type second medical use claim and an EPC 2000 type medical use claim as two independent claims in the same claim set on a lack of differences in the scope of protection of the two claim types. Instead, the Board uses the formalistic argument that it "*would cause a contradictory legal situation*" to allow both claim types in one application.

In the author's opinion, these findings in T1570/09 do not contradict the possibility to receive a grant for a Swiss-type second medical use claim in one application and a EPC 2000 type second medical use claim with the same claim limitations in another application, the two applications being parent and divisional application, as decided in T1780/12.

Assuming that both decisions will be fully considered in the practice of the Examining Divisions, this has important implications for the practice of prosecuting pending European applications having a priority date predating January 29, 2011. For those applications for which a second medical use is of interest, the filing of one or more divisional applications should be carefully considered, in order to obtain a granted patent for both a Swiss-type second medical use claim and an EPC 2000 type second medical use claim. Within the framework of the two decisions T1780/12 and T1570/09, getting both types of second medical use claims granted seems to be only possible when filing a divisional application.

In view of the possibility that the scope of protection of these two types of second medical use claims could be interpreted in a different way by national courts, a notion that is actually supported by the decisions G2/08, T250/09 and T1780/12, it could be an important advantage to receive a granted patent for both types of second medical use claims.

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⁹ See the decision of the Enlarged Board of Appeal G 2/08, item 6.5, page 40

Handwritten Amendments in Oral Proceedings

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1. Introduction

Representatives as well as the members of the examination divisions, of the opposition divisions and the Boards of Appeal are interested in basing the oral proceedings upon handwritten amendments of the application or patent. The reason for this interest is that handwritten amendments streamline the process of amending the documents and of checking the amendments with respect to a violation of Art. 123 (2) EPC. However, handwritten amendments intervene with the interest of the European Patent Office (EPO) to automatically capture the amended documents as a part of an automated printing process. The present contribution is direct to an investigation of the admissibility of handwritten amendments in oral proceedings.

2. Situation until December 31, 2013

Since the beginning of the European Patent Convention it used to be established case law that handwritten amendments were admitted in oral proceedings at the EPO.² Subsequently, the admissibility of handwritten amendments had also been entered into the Guidelines for Examination in the European Patent Office (see e. g. A-III, 3.2; A-VIII, 2.1; H-III, 2.3 in the editions until September 2013).

3. Situation since January 1, 2014

With simple notice dated November 8, 2013 (see official journal EPO, 12/2013, p. 603, 604) the EPO intended to change the established practice without any change of the related case law or of the related rules or articles of the EPC. As the motivation for the intended change of the established practice the notice names

- the intended improvement of the quality of the publications and
- the introduction of an automatic system to electronically produce the *Druckexemplar* with an electronic capture of submitted documents.

Motivated by these considerations the EPO announced that handwritten amendments in docu-

ments replacing parts of the European patent application will no longer be accepted. According to the notice, the change of practice should also apply in oral proceedings.³

4. Critical analysis of the present situation

Based on the notice summarized above in fact opposition divisions forced the patent owner to prepare printed amended documents without permitting handwritten amendments in oral proceedings. In order to be able to do so, the representative of the patent owner has to carry around a storage device and/or a laptop computer containing the electronic files of the relevant documents. Thus equipped, in a short break of the oral proceedings the representative has to work with his laptop and the printing facilities of the EPO to amend the documents and print them. As already anticipated by the early decision T 0113/92, the risk that the representative of the patent owner unintentionally introduces an amendment violating Art. 123 (2) EPC is increased. Further, the opponent and the opposition division are obliged to check any amended document in its entirety.

5. Decision T 0037/12

In the appeal proceedings T 0037/12, the opponent requested not to consider handwritten amendments presented for the first time in the oral proceedings. This request was based upon the fact that Rule 99 (3) EPC (which relates to appeal proceedings) in the same way refers to formal requirements of the third part of the Implementing Regulations (including Rule 49 EPC directed to printed or typed amended documents) as Rule 86 EPC (which is related to opposition proceedings). If according to the above notice by the EPO Rule 49 EPC in connection with Rule 86 EPC should be interpreted that handwritten amendments should no longer be accepted, this should apply *mutatis mutandis* in connection with Rule 99 (3) EPC in the appeal proceedings.

In decision T 0037/12, para. 3., the Board of Appeal analyses the admissibility of handwritten amendments in oral proceedings under consideration of Rules 86, 99 EPC referring back to Rule 49 EPC:

a) As stated in G 1/91, a generic referral to a chapter of the Implementing Regulations as included in Rule 61a

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2 In the early decision T 0113/92 the Board of Appeal "...considers the submission of a completely redrafted specification instead of a revised version of the printed patent publication ... as not appropriate because major parts of the patent publication have not been changed. Accordingly the Board and all of the parties of the proceedings have had to perform a time-consuming comparison of these unchanged parts of the specification with the printed patent publication instead of concentrating upon the only relevant question of whether the changes of the specification accommodate the changes of the claims. The submission of unnecessary complete reprints obviously violates the principle of process economy according to which proceedings should be performed as fast as possible, as purposeful as possible and as cost-efficient as possible." (see paragraph 3 of T 0113/92)

3 "To amend such documents in oral proceedings, the EPO recommends bringing a laptop or a similar device on which the amendments can be prepared. It will also provide suitable technical or other facilities. The rooms made available for patent agents generally contain computers which can read CD-ROMs, USB sticks, etc., together with printers which normally allow documents to be printed direct from USB sticks. The EPO recommends that parties bring electronic copies of documents likely to be amended, on a medium free of computer viruses or malware. It will also provide applicants and patent proprietors with electronic copies of their *Druckexemplar* or patent specification (EP-B)." (see official journal EPO, 12/2013, p. 603, 604)

EPC 1973 (now Rule 86 EPC, see the same wording in Rule 99 (3) EPC) does not necessarily mean that any rule contained in the chapter referred to is applicable. Instead, the Enlarged Board of Appeal underlined that it was obvious that some of the rules in the chapter referred to are in fact not applicable.

b) The decision T 0037/12 also cites documents dating back to the formation of Rule 61a EPC 1973 (now Rule 86 EPC), wherein the interim committee responsible for the introduction of Rule 61a EPC 1973 underlines that (due to the complexity of the present subject) in the opinion of the interim committee it was better to choose a general wording for the referral than to use a specific referral to single rules (dok.CI/Final 11/77 of October 14, 1977).

c) The decision further cites the document CA/PL 29/06 relating to the introduction of the amendment of paragraph 3 of Rule 99 EPC:

"Rules 76(3), 86, 92(1), 99(3) and 107(3) EPC refer to Part III of the Implementing Regulations. This means that the provisions of Part III are to be applied mutatis mutandis in opposition, limitation, revocation, appeal and review proceedings. Close analysis shows that numerous provisions in the third part of the Implementing Regulations can play an important role in these proceedings. Ample references are needed to ensure comprehensive coverage. In cases where Part III is generally to be applied mutatis mutandis, it will be necessary to establish whether and how a rule is actually applicable to a particular set of circumstances. Consequently, it will not matter if the reference is irrelevant in the case of one or the other provision."

(CA/PL 29/06 Add. 1, page 3).

d) As cited by the Board of Appeal, in the meeting of the Patent Law Committee of 19th to 21th September 2007 the EPO argued against respective opposing arguments of the **epi**:

"[D]etailed references in isolated cases would be less safe to use. Mutatis mutandis refers to formal requirements. In both case law and EPC, we have made good experience with wide references."

(CA/PL PV 30, page 19).

e) According to the Board of Appeal, in written proceedings the applicant is able to use adequate office devices for preparing amended documents to be submitted. The burden of the applicant to fulfil formal requirements by submitting printed or typed documents is balanced by the need of unambiguous clear documents used for the production of the patent publication (see Rules 50 (1), (2) and 49 (12) EPC). Instead, according to the Board of Appeal the situation is different in oral proceedings wherein any amendment has to be immediately identified in order to analyse the relevance and the admissibility of the amendment. Typed or printed amended documents require a word-by-word analysis, which collides with the economy of the proceedings. Furthermore, the representative has no access to the usual office facilities. Any typed or printed amendment necessarily requires a break of the proceedings with a

loss of time. According to the Board of Appeal, the interest of unambiguous and clear documents can be fulfilled by strict requirements concerning the legibility of the handwritten amendments.

f) The Board of Appeal underlines that there was no reason to change an established practice.

g) Further, the Board of Appeal states that the EPO had no legislative competence, which, however, would be required for a change of the established practice.

h) Finally, the Board of Appeal refers to T 1635/10 wherein it has been stated that the change of the established practice in appeal proceedings would deteriorate the efficiency of oral proceedings at the Board of Appeal.

On this basis, the Board of Appeal came to the conclusion that handwritten amendments were admissible for amended documents submitted in the oral appeal proceedings.

In T 0037/12 the Board of Appeal additionally stated:

"The question whether these arguments should not apply to the opposition proceedings in a comparable way may remain open because this question is not subject to the present decision. Instead, conversely it is to be analysed if it would be required to adapt the practice of the Boards of Appeal to that of the first instance. Due to the grounds given, this is not the case."

6. Conclusion and discussion

The answer to the question whether handwritten amendments are admissible should consider both the interests

- of the representatives, opponents and the members of the examination divisions, opposition divisions and Boards of Appeal (favouring the admissibility of handwritten amendments) and
- of the EPO favouring printed amended documents for an automated capture and printing.

The careful consideration of these interests might lead to different results in different states of proceedings:

a) In written proceedings it seems to be acceptable that handwritten amendments are not admitted because the involved parties have enough time and the required facilities for a thorough preparation and analysis of the amended documents.

b) However, handwritten amendments should be admitted in oral proceedings from the reasons specified in the decision T 0037/12.

Unfortunately the related rules (in particular Rules 49 (8), 49 (12), 50 (1), 86, 99 (3) EPC) leave a broad space for interpretations which might require a clarification by amending the Rules.

The involved different interests as summarized above might be completely satisfied by codifying the admissibility of handwritten amendments in oral proceedings with the additional obligation for the applicant or patent owner to submit confirming printed documents within a given term of e. g. two month after the date of the oral proceedings.

Unless any clarifying amendment is introduced into the Rules the cited decision T 0037/12 gives legal certainty for the representatives that handwritten amendments are admitted in oral proceedings in front of the Board of Appeal. However, concerning the admissibility of handwritten amendments in oral examination or opposition proceedings a clarifying notice of the EPO (overruling the former notice of November 8, 2013) would be highly appreciated.

(Deutsche Übersetzung)

6. Zusammenfassung und Diskussion

Die Antwort auf die Frage, ob handschriftliche Änderungen zulässig sind, sollte den Interessen

- der Vertreter, Einsprechenden und der Mitglieder der Prüfungsabteilung, Einspruchsabteilung und der Beschwerdekammern (welche die Zulässigkeit handschriftlicher Änderungen favorisieren) und
- des Europäischen Patentamts, welches gedruckte geänderte Dokumente für eine automatische Erfassung und den Druck favorisiert,

Rechnung tragen. Die sorgfältige Abwägung dieser Interessen kann zu unterschiedlichen Ergebnissen in unterschiedlichen Stadien der Verfahren führen:

a) Im schriftlichen Verfahren erscheint es akzeptabel zu sein, dass handschriftliche Änderungen nicht zugelassen werden, da die Beteiligten genug Zeit haben und über die erforderlichen Einrichtungen für eine sorgfältige

Vorbereitung und Analyse der geänderten Dokumente verfügen.

b) Hingegen sollten aus den in der Entscheidung T 0037/12 spezifizierten Gründen handschriftliche Änderungen in mündlichen Verhandlungen zugelassen werden.

Leider lassen die zugeordneten Regeln (insbesondere Regel 49 (8), 49 (12), 50 (1), 86, 99 (3) EPÜ) Raum für Interpretationen, was eine Klarstellung P durch Änderung der Regeln erfordern könnte.

Die oben zusammengefassten unterschiedlichen Interessen könnten vollständig befriedigt werden, wenn die Zulässigkeit handschriftlicher Änderungen in mündlichen Verhandlungen kodifiziert würde mit der zusätzlichen Verpflichtung für den Anmelder oder Patentinhaber, bestätigende gedruckte Dokumente innerhalb einer vorgegebenen Frist von beispielsweise zwei Monaten nach dem Datum der mündlichen Verhandlung nachzureichen.

Ohne jedwede klarstellende Änderung der Regeln gewährleistet die zitierte Entscheidung T 0037/12 Rechtssicherheit für die Vertreter dahingehend, dass handschriftliche Änderungen in mündlichen Verhandlungen vor der Beschwerdekammer zulässig sind. Hinsichtlich der Zulässigkeit von handschriftlichen Änderungen in mündlichen Verhandlungen vor der Einspruchsabteilung oder der Prüfungsabteilung wäre eine klarstellende Mitteilung des Europäischen Patentamts (unter Aufhebung der vorhergehenden Mitteilung vom 8. November 2013) wünschenswert.

Increasing Formalism in Appeal Proceedings – The EPO Boards of Appeal Headed to a Mere Reviewing Instance?

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Abstract

A study has been undertaken to investigate the impact of the Rules of Procedure of the Boards of Appeal (RPBA) as amended in 2002 on the nature and efficiency of appeal proceedings. To this purpose samples of *inter partes* decisions of the EPO Boards of Appeal were selected on a random basis from the years 1995, 2004 and 2013. The selected decisions then were analyzed in accordance with a set of queries. This analysis' outcome suggests that the new RPBA, while directing the parties to submit complete cases as early as possible, concurrently lead to a significant over all increase in formal discussions replacing substantive ones of the past, without making the appeal proceedings more efficient.

A. Legal Background

I. Article 114 EPC

1. Pursuant to Article 114 (1) EPC, "In proceedings before it, the European Patent Office shall examine the facts of its own motion; it shall not be restricted in this examination to the facts, evidence and arguments provided by the parties and the relief sought". Article 114 (2) EPC stipulates: "The European Patent Office may disregard facts or evidence which are not submitted in due time by the parties concerned".

The EPC thus on the one hand generally authorizes independent fact finding by instances of the European Patent Office (EPO), while on the other hand vesting them with a discretionary power of preclusion.

2. The extent of the authorization to examine the facts of the EPO's own motion was controversial for *inter partes* proceedings in the early years of the Office. In 1993, the Enlarged Board of Appeal eventually restricted this power considerably by finding:

- that the power of an Opposition Division or a Board of Appeal to examine and decide on the maintenance of a European patent depended upon the extent to which the patent was opposed in the notice of opposition⁵, and
- that an Opposition Division or a Board of Appeal was not obliged to consider all the grounds for opposition referred to in Article 100 EPC, going beyond the grounds relied on by the opponent in its statement of opposition. In principle, the Opposition Division

should examine only such grounds for opposition which had been properly submitted and substantiated in accordance with Article 99 (1) in conjunction with Rule 76 EPC. Exceptionally, the Opposition Division might in application of Article 114 (1) EPC consider other grounds for opposition which, *prima facie*, in whole or in part would seem to prejudice the maintenance of the European patent. Fresh grounds for opposition might be considered in appeal proceedings only with the approval of the patentee.⁶

3. The Enlarged Board took the view that in contrast to the merely administrative character of the procedure before the Opposition Division, the appeal procedure was to be considered as a judicial procedure. Such procedure was by its very nature less investigative than an administrative procedure. Although Article 114 (1) EPC formally covered also the appeal procedure, it was therefore justified to apply this provision generally in a more restrictive manner in such procedure than in opposition procedure.⁷

II. Rules of Procedure of the Boards of Appeal

1. Under the impression of an ever-increasing workload, the Presidium of the Boards of Appeal amended the RPBA in 2002,⁸ which then entered into force on May 1, 2003.⁹ The *travaux préparatoires* express the intention that the existing "philosophy" of the appeal procedure as developed by the Boards was to be maintained. The amendments were intended to increase the efficiency and shorten the length of appeal proceedings by introducing some elements of case-law into the rules, seeking to ensure that they contain a similar degree of detail and certainty as procedural rules of other courts. *Inter alia*, it was the intention to include a more defined and controlled initial phase of proceedings and a more pragmatic exercise of the discretion under Article 114 (2) EPC thereafter.¹⁰ In particular, Articles 12 and Article 13 (1) RPBA provided a cut-off point after which any further material submitted would be *ipso facto* late. Article 13 RPBA made the admissibility of any amendment to a party's case as filed ("whether relating to facts, evidence, arguments or requests") after the cut-off point a matter for the Board's discretion, but gave the Board a specific authority to refuse the amendment on the grounds of complexity of the new subject matter submitted, of the current state of proceedings and the need for procedural economy. In particular, amendments should not be

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5 G 9/91, OJ EPO 1993, 408 – "Power to examine/ROHM AND HAAS; Headnote.

6 G 10/91, OJ EPO 1993, 420 – "Examination of oppositions/appeals"; Headnote.

7 *Supra* Reasons pt. 18.

8 In accordance with Article 23(4) and Rule 12(3) EPC.

9 See OJ EPO 2003, 61.

10 See decision T 1621/09-3.2.03 of 22.09.2011; Reasons pt. 25ff.

admitted if they would lead to adjournments of oral proceedings.

The intended overall effect of the new Rules was to prevent “ping pong” submissions and “salami” tactics in written proceedings and to provide the Board (and the rapporteur in particular) with an appeal file containing one comprehensive submission from each party.

2. While Article 12 (4) RPBA appears to give the parties some kind of guarantee that everything presented by them at the very beginning of the appeal proceedings would be taken into account by the Boards if and to the extent it relates to the case under appeal, this Article includes a proviso referring back to events in preceding first instance proceedings by vesting the Board with the power “to hold inadmissible facts, evidence or requests which could have been presented or were not admitted in the first instance proceedings”. Hence, this proviso in principle allows preclusion of subject-matter from being reconsidered in appeal proceedings under certain circumstances.

III. Conclusion

1. Summing up, it is notable that with respect to appeal proceedings the Enlarged Board of Appeal has construed Article 114 (1) EPC to only be of limited importance, and pursuant to Rules 12 and 13 RPBA Article 114 (2) EPC takes full effect after the initial phase of the appeal proceedings, but may also preclude amendments to a party’s case in subsequent appeal proceedings based on first instance events.

2. Article 114 EPC thus implies a tension between powers based on diverging principles: on the one hand, the Boards’ power to examine the case *ex officio*, suggesting that all relevant facts and requests needed to be considered. On the other hand, the power not to consider submissions that had been filed too late. An investigation of the course the appeal proceedings are about to take in this area of friction under the impact of the amended RPBA would therefore appear highly interesting, in particular whether or not the intended goals of increased efficiency and shortened procedure materialize at all. And if so, whether or not this comes along with a change of the “philosophy” of the appeal procedure.

B. Study of case law of the EPO Boards of Appeal over time

In order to answer the above questions, a comprehensive study of the case law of the Boards of Appeal over the last twenty years has been undertaken in order to identify trends showing up on a statistical basis from a series of decisions at different points of time.

I. Method

1. We decided to look at the years 1995, representing the situation well before the RPBA amendment, 2004, i.e. shortly after the implementation of the new Rules, and 2013, the most recent year where complete data are

available and the application of the Rules maybe expected to have consolidated. From the EPO data base,¹¹ samples of 150 *inter partes* decisions of the Technical Boards of Appeal were taken from each of those years on a random basis, i.e. altogether 450 cases. For reasons of language skills, only English and German cases were selected. Furthermore, cases without substantive examination of patentability, e.g. cases of revocation on request of the patent proprietor or cases of missing statement of grounds, were not taken into account. The samples thus corresponded to 20 to 30 % of all cases meeting these criteria for each year.

2. From each decision, the following data were collected:

- Case No. of the decision
- Deciding Board of Appeal
- Date of the decision
- Appellant(s) (patentee and/or opponent(s))
- Result of opposition proceedings (revocation of patent/rejection of opposition/maintenance in amended form)
- Whether or not the appeal decision was final
- Order of the decision (appeal allowed or dismissed)
- Result of appeal proceedings (revocation of patent/rejection of opposition/maintenance in amended form/remittal for substantive further prosecution)
- Number of pages of the reasons of the decision
- Percentage of pages of the reasons dealing with formal and procedural matters (including issues under Article 84 and 123 EPC)
- Percentage of pages of the reasons dealing with late submissions (covered by Articles 114(2) EPC and/or 12(4) and 13(1) RPBA)
- Whether or not a revocation of the patent was based on formal (Articles 84, 123(2) and 123(3) EPC, respectively) and/or substantive (Articles 52(2), 54, 56, 57 and 83 EPC, respectively) grounds
- Whether or not requests have been amended in appeal proceedings
- Number of auxiliary requests either formally or substantively examined in the decision
- Whether or not new submissions (requests and/or evidence) have been admitted depending on the point of time (submitted with the statement of grounds or the reply to it/submitted before or after summons to oral proceedings/submitted during oral proceedings/not submitted or admitted in first instance proceedings)
- Whether or not substantive examination did not occur because of non-admittance of all final requests
- And as a last point, whether or not the principle of *reformatio in peius* was applied.

II. Results

The results of a straightforward analysis and comparison of the data for the respective years can be summarized by means of the following percentage rates:

11 <http://www.epo.org/law-practice/case-law-appeals/advanced-search.html>

(a) Results of subsequent appeal proceedings as compared with the results of opposition proceedings

1. Patent revoked in opposition proceedings (Fig. 1; n=number of cases)

Result of appeal proceedings	1995 (n=56)	2004 (n=59)	2013 (n=50)
Revocation of patent	34 % (n=19)	44 % (n=26)	62 % (n=31)
Rejection of opposition	5 % (n=3)	2 % (n=1)	4 % (n=2)
Maintenance of patent as amended	46 % (n=26)	32 % (n=19)	10 % (n=5)
Remittal of case to first instance	14 % (n=8)	22 % (n=13)	24 % (n=12)

There is an increasing tendency to simply confirm the decision taken by the opposition division against the patent proprietor resulting in a double revocation rate in 2013 as compared with 1995. As a consequence, the Boards apparently do no longer even endeavor to maintain patents in amended forms. At best, they tend to remit the case to the opposition division. The combined percentages of revocations and maintenances in 1995 (80%) thus roughly correspond to the combined percentages of revocations and remittals in 2013 (86%), characterizing a transition to an appeal procedure that overall is less positive for the patentee and also less final.

2. Opposition rejected in opposition proceedings (Fig. 2)

Result of appeal proceedings	1995 (n=57)	2004 (n=48)	2013 (n=36)
Revocation of patent	19 % (n=11)	31 % (n=15)	39 % (n=14)
Rejection of opposition	61 % (n=35)	33 % (n=16)	53 % (n=19)
Maintenance of patent as amended	16 % (n=9)	29 % (n=14)	6 % (n=2)
Remittal of case to first instance	4 % (n=2)	6 % (n=3)	3 % (n=1)

Here too, first instance decisions in 2013 were confirmed in the majority of cases. Nevertheless, compared to 1995 the percentage of patent revocations has again almost doubled in 2013 and maintenance decisions are decreasing, whereas in 2004 the percentages of revocations, rejections and maintenances were rather on even terms.

3. Patent maintained in amended form in opposition proceedings (Fig. 3)

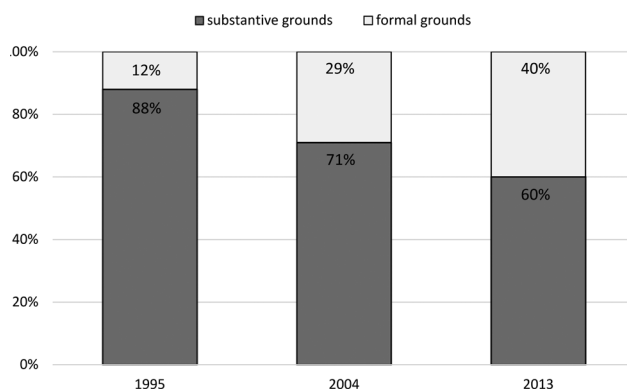
Result of appeal proceedings	1995 (n=37)	2004 (n=43)	2013 (n=64)
Revocation of patent	27 % (n=10)	40 % (n=17)	47 % (n=30)
Rejection of opposition	3 % (n=1)	0 % (n=0)	3 % (n=2)
Maintenance of patent as amended	62 % (n=23)	53 % (n=23)	47 % (n=30)
Remittal of case to first instance	8 % (n=3)	7 % (n=3)	3 % (n=2)

Here again a marked increase of revocations at the expense of confirmations can be observed in 2013, the revocations now equaling the percentage of confirmations of the first instance decision.

(b) Grounds for revocation in appeal proceedings (Figs. 4 and 5)

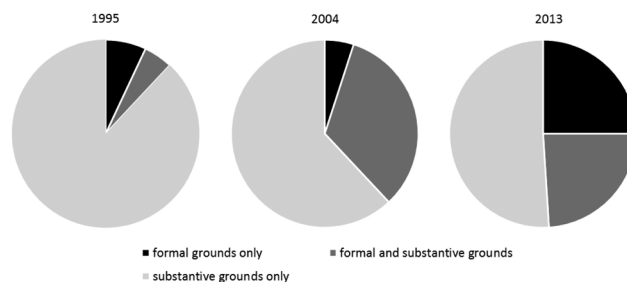
1. As shown in Fig. 4, the grounds for revocation in appeal proceedings have changed considerably from 1995 to 2013. Whereas in 1995 about 88% of the grounds for revocation were of substantive nature (predominantly inventive step), this number reduced to 60% in 2013¹².

Grounds for revocation in appeal proceedings (Fig. 4)



2. The ratios of revocation cases in which formal grounds only, substantive grounds only, and both formal and substantive grounds played a role are depicted in Fig. 5. Notably, while in 1995 and 2004 only 7% and 5%, respectively, of the revocation cases (3 cases in total each) were solely based on formal grounds, in 2013 this number increased to 25% (19 cases in total). At the same time, the ratio of revocation cases in which only substantive grounds for revocation played a role decreased from 88% in 1995 (35 cases) to 62% in 2004 (36 cases) and finally to 51% in 2013 (38 cases).

Distribution of grounds for revocation in appeal proceedings (Fig. 5)



3. As regards revocations on formal grounds, it is striking that they are either based upon Article 123(2) EPC – a number of 2 cases in 1995 as compared to 22 cases in 2013 (2004: 13 cases), amounting to an increase by a factor of 11 – or upon other formal or procedural reasons (mainly relating to late amendments not admitted; 25 cases in 2013; 9 cases in 2004) that hardly show up in the data of 1995.

(c) Length of the decisions and amount of reasoning

1. The length of the reasons for the decision has slightly increased from on average 8.3 pages in 1995 to 9.6 pages in 2013, which amounts to an increase of 16%.

12 It should be noted that in some revocation cases both formal and substantive grounds may play a role, e.g. if a main request is rejected based on formal grounds and an auxiliary request is rejected based on substantive grounds.

2. During the same time period, the proportion of the reasons dealing with formal and procedural issues shows a sharp rise of about 75 %.

3. An even more pronounced surge by 600 % can be observed for issues of lateness among the reasons (from 2 % of the reasons on average in 1995 (0.2 pages) to 12 % in 2013 (1.2 pages). At the same time also the number of cases in which issues of lateness were discussed in the reasons increased (from 23 in 1995 to 76 in 2013).

(d) Amendments of requests and number of auxiliary requests

1. Amendments of requests in appeal proceedings increased slightly: in 1995, in 69 % of all cases amended requests were filed. In 2004 and 2013 this number increased to 71 % and 76 %, respectively.

2. However, the number of auxiliary requests dealt with in the reasons rose significantly by 150 % over the period under consideration. On average, almost two auxiliary requests per case had to be examined by the Boards in 2013. The number of cases in which auxiliary requests had to be examined similarly rose from 34 % of all cases in 1995 to 54 % of all cases in 2013.

(d) Admittance of new submissions in appeal proceedings

1. Overall admittance of new submissions (Fig. 6)

Admittance of new submissions in appeal proceedings (Fig. 6)

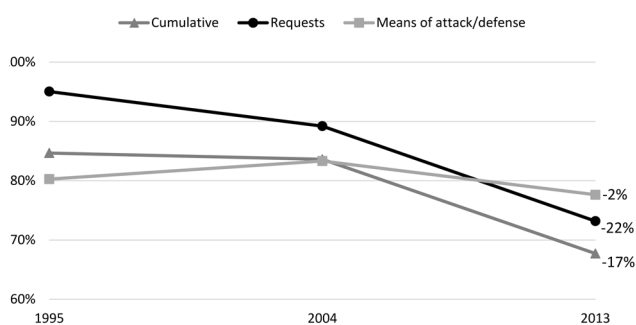


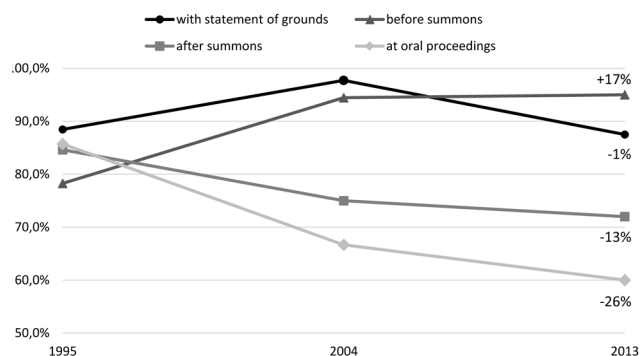
Fig. 6 depicts the likelihood that new submissions are admitted in the appeal proceedings. The likelihoods relate to the fraction of cases in which all (of possibly multiple) requests or means of attack/defense were admitted. In the remaining fraction of cases, therefore, at least one new request or a new means of attack/defense was not admitted. As can be seen from Fig. 6, in the period from 1995 to 2004, the admittance of new requests in appeal proceedings slightly decreased, whereas the corresponding admittance of new means of attack and/or defense slightly increased, resulting in a rather stable overall admittance rate. However, from 2004 onwards, the overall admittance rate appears to fall off more distinctly, which is in particular due to the aggravated admittance of requests (minus 22 % in 2013 as compared to 1995) while the Boards are more lenient regarding new means of attack or defense.

Similar results are obtained when looking at the likelihood that none of the new submissions is admitted. The

fraction of cases in which none of the newly submitted requests was admitted increased from 0 % in 1995 to 11 % (11 cases) in 2013 (2004: 3 %; 3 cases). The fraction of cases in which none of the new means of attack and/or defense were admitted on the other hand remained rather stable (8 % in 1995 and 2004; 11 % in 2013; 6, 5, and 8 cases, respectively).

2. Admittance of new means of attack and/or defense depending on time of submission (Fig. 7)

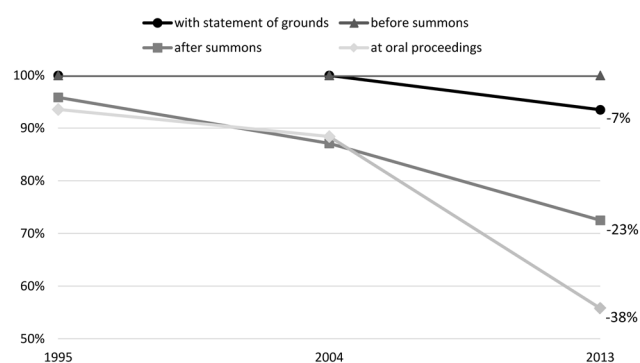
Admittance of means of attack/defense in appeal proceedings (Fig. 7)



Our analysis shows that in 2013 new means of attack and/or defense suffer reduced admittance, irrespective of whether such means were submitted with the statement of grounds by the appellant (or with the reply to it by the respondent), after summons to oral proceedings or during oral proceedings. In the latter case, the decrease of admittance rate was the most pronounced (minus 26 % as compared to 1995; from 6 cases admitted out of 7 cases in 1995 to 3 out of 5 cases in 2013). Also when the new means of attack/defense were submitted after the summons, a pronounced decrease is observed (minus 13 % as compared to 1995; from 11 cases admitted out of 13 cases in 1995 to 18 out of 25 cases in 2013). Interestingly, if such means were submitted after the grounds of appeal (or the reply thereto) had been submitted but before a summons was issued, i. e. presumably in the course of exchange of arguments among the parties, they were increasingly admitted and considered by the Boards.

3. Admittance of new requests depending on time of submission (Figs. 8 and 9)

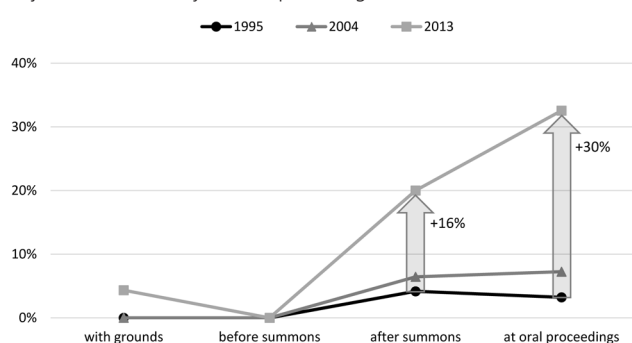
Admittance of requests in appeal proceedings (Fig. 8)



The graphs for admittance of new requests in appeal proceedings roughly follow the same pattern in that requests submitted either with the statement of grounds, after summons to oral proceedings or during oral proceedings are progressively less admitted in appeal proceedings. In particular, requests filed after summons or during oral proceedings have doubtful chances of admittance in 2013 (admittance rate reduced by 23 % (from 23 out of 24 cases in 1995 to 29 out of 40 cases in 2013) and 38 % (from 58 out of 62 cases in 1995 to 24 out of 43 cases in 2013), respectively as compared to 1995). However, the admittance rate of requests filed between the initial appeal phase and summons to oral proceedings remains rather stable, i.e. if requests are filed in this period most of them will still be admitted.

Notably, also in Figure 8, the displayed numbers relate to the fractions of cases in which all (of possibly multiple) requests submitted during the respective periods of time were admitted. Here, it is instructive to also look at the fraction of cases, in which none of newly submitted requests was admitted, see *infra* Fig. 9:

Rejection of all newly filed requests (Fig. 9)



As can be seen from Fig. 9, the risk that all newly filed requests are rejected increased from 1995 to 2013 for requests filed after summons and at oral proceedings. Notably, the risk of non-admission increased by 16 % for new requests filed after summons and by 30 % for new requests filed at oral proceedings. In 2013, there is also a non-negligible risk (about 5 %) that no new requests are admitted even if these are filed with the grounds of appeal. In the years 2004 and 1995, this risk did not materialize.

4. Submissions not admitted pursuant to Article 12(4) RPBA (Fig. 10)

Non-admittance in appeal proceedings due to neglect or non-admittance in first instance (Fig. 10)

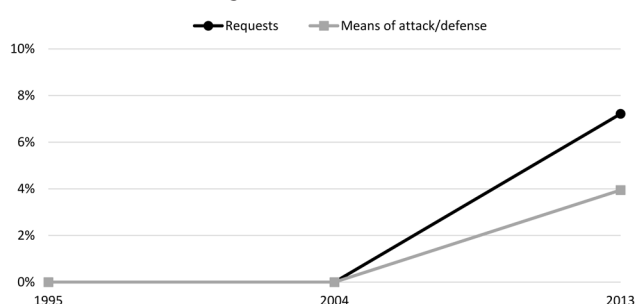


Fig. 10 shows that in 2013 the Boards used their discretionary power so as not to admit submissions which could have been submitted, or had been disregarded, in first instance proceedings, whereas this phenomenon is entirely missing in 1995 and 2004. In about 7 % (7 cases in total) of the cases in 2013, requests were not admitted pursuant to Article 12(4) RPBA, and the non-admittance rate for means of attack or defense was roughly half of the percentage of requests (3 cases in total).

C. Discussion of study results

1. Impact of the new Rules of Procedure on efficiency and length of procedure

1. The study shows on the one hand that a preclusion effect exists in 2013, with a clear tendency to become the more pronounced the more advanced appeal proceedings are. This applies particularly to new submissions in oral proceedings which are now less easily admitted. E.g., new auxiliary requests filed during oral proceedings were admitted in 1995 at a rate of 94 %; this rate dropped in 2013 to 56 %.

2. Hence, it can be said that the RPBA take the intended effect of controlling the discretion of the Boards to admit amendments to a party’s case so that an early submission is rewarded and late submissions are progressively penalized. The fact that new requests and/or new means of attack or defense submitted in the period between the beginning of appeal proceedings and the arrangement of oral proceedings have a relatively high admittance rate by the Boards may be due to justified reactions occasioned by early submissions of an opposing party. While “salami” tactics thus do no longer pay off under the new Rules, the Rules apparently cannot entirely suppress an exchange of “ping pong” submissions.

3. On the other hand, the study casts doubts on whether an overall improvement in respect of efficiency and length of procedure has been achieved since the amount of reasoning has increased by 16 % (from 8.3 pages on average in 1995 to 9.6 pages in 2013), and amendments to requests in appeal proceedings are even more frequent than in 1995. In addition, the number of auxiliary requests maintained in appeal proceedings – to the effect that these requests had to be dealt with in the Boards’ decisions – rose dramatically by 150 %.

4. This seems to reflect the fact that in the past requests were often presented (and admitted) on a tentative basis during appeal proceedings with a view to arrive at an allowable version in a convergent way, this version then being maintained as the only final request considered by the Board in its decision. The new RPBA, however, induce the patent proprietor to file a sufficiently high number of auxiliary requests as early as possible on a precautionary basis in order to cover all limitations he is prepared to accept while avoiding any admittance problems.

5. This phenomenon appears to be aggravated by Article 12 (4) RPBA including an element of reprehensible omission in preceding first instance proceedings so that

any submissions not filed or filed too late or withdrawn in opposition proceedings may become inadmissible in subsequent appeal proceedings. The provision necessarily tends to blow up the subject of dispute, most notably by increasing the number of auxiliary requests submitted sufficiently early in opposition proceedings and, depending on the course of the proceedings, maintained in opposition proceedings until the end and then presented again at the very beginning of appeal proceedings. Otherwise, such requests may not have been admitted in 2013, even when already filed with the statement setting out the grounds of appeal. This can be seen from Figs. 8 and 9.

6. Hence, some kind of *actio=reactio* principle appears to also hold with respect to unilaterally conceived procedural measures which by not taking into account evasive maneuvers of the parties concerned may not work in reality as expected in theory.

II. Impact of the new Rules of Procedure on the "philosophy" of the appeal proceedings

1. Although according to the *travaux préparatoires* no change of the "philosophy" of the appeal proceedings was intended by the new RPBA, our study shows that appeal proceedings have indeed been substantially transformed.

2. Such change is already apparent from the observation that there is a growing tendency of deciding against the patent proprietor since the revocation rates generally seem to mount up in appeal proceedings, irrespective of how the case was decided in the first instance. The study thus implies that the Boards of Appeal have become less "anmelderfreundlich" over time.¹³

3. Even more salient is a pronounced formalization of appeal proceedings. Whereas in 1995 more than 90 % of the revocation cases were based (at least in part) on substantive grounds, this in 2013 held true only for 75 %. The proportion of the reasons dealing with formal and procedural issues accordingly increased by about 75 % and among them issues of lateness, which had been more or less absent in the past, boomed by 500 %: in 2013 on average one-tenth of the reasons related to such lateness issues.

4. Hence, our study indicates that the focus of argument is changing: while in the past substantive arguments played a predominant role, this is less true in 2013. Rather, the battleground has shifted to the formal sector, replacing substantive efforts by formal ones without bringing about a net reduction of effort. One might consider this change to be an inevitable consequence of excluding specific subject-matter from further

discussion (here technical addenda) because the dispute in contentious proceedings must then occur somewhere else (here with respect to procedural matters). It must also be expected that such process of change is more or less reinforcing itself since case law on procedural aspects once established will be referred to by the parties in appeal proceedings and thus will again have to be dealt with in the reasons of further decisions. Representatives therefore normally cannot afford to forego formal attacks.

5. Moreover, the cut-off possibilities provided by Articles 12 (4) and 13 (1) RPBA shift the appeal procedure closer towards a mere reviewing exercise of the first instance decision. Pursuant to decision G 9/91 and opinion G 10/91 mentioned above, the Boards' hands are already tied with respect to the extent of opposition and in particular with respect to an *ex officio* examination of fresh grounds for opposition. The new Rules now further limit the subject of dispute by imposing cut-off constraints on the parties, either because of lateness or because of omission in first instance proceedings. Submissions of the latter type have normally not been considered by the opposition division and will meet with closed doors in appeal proceedings.

D. Summary and evaluation

1. Our study of 150 decisions for each of the years 1995, 2004 and 2013 gives reason to assume that appeal proceedings have become more difficult for patent proprietors and much more formalized for all parties. While the intended cut-off effects with respect to late amendments may have been achieved, this seems not to have increased the efficiency of appeal proceedings. In fact, our study conveys the impression that substantive issues to some extent have been replaced by formal ones so that the subject of dispute leaves the technical arena and focusses on procedural law, without reducing the burden on the Boards and/or the parties. As construed by Articles 12 (4) and 13 (1) RPBA, the power of the Boards under Article 114 (2) EPC leads to a further limitation of the *ex officio* principle enshrined in Article 114 (1) EPC and brings the appeal proceedings more closely to an outright reviewing instance.¹⁴

2. The predominant restrictive approach in allowing late submissions has serious effects on the work of patent attorneys. After all, it is their task to safeguard their clients' interests. Unless instructed otherwise by their clients, they have to raise objections to the admittance of submissions of their adversaries which might be considered late. If they file late submissions themselves, they bear the risk that these will not be admitted. Hence, not only does this "late-filed" business have a self-enforcing tendency. Any statement in a decision that submissions are not admitted because they could have been filed earlier in the proceedings might have the further effect

13 Cf. in this context Nollen, Revocations by the Board of Appeal – statistics and analysis, *epi* Information 1/2015, 17 (which has come to our attention after completion of this work) and Hess, Müller-Stoy, Wintermeier, Sind Patente nur Papiertiger?, *Mitteilungen der deutschen Patentanwälte* 2014, 439 (English translation available at http://www.bardehle.com/uploads/files/Patent_Papiertiger.pdf), arriving at a similar result for German nullity proceedings.

14 As now explicitly confirmed by recent decision T 65/11-3.5.03 of 5.12.2014 – "Devices and transducers with cavity resonator/RAMENZONI et al.", Reasons pt. 2.4.

to invite clients to hold responsible their attorneys, should their case be lost. As a consequence, attorneys will need to think twice whether to submit a new document or a further request during the appeal procedure, if this will entail the risk of professional liability, even in cases where – from an objective point of view – negligence on the part of the attorney cannot be asserted. Such a development clearly is not in the interest of the parties involved.

3. The situation is aggravated by the increased use of Article 12(4) RPBA for the rejection of claim requests which could have been filed in first instance proceedings. Up to the amendment of the RPBA in 2002, non-admittance of late submissions which could have been filed in first instance proceedings was restricted to cases of procedural abuse in the sense of deliberately withholding evidence.¹⁵ Recent case law extends the application of Article 12 (4) to all cases in which submissions including claim requests should have been filed or were rejected in first instance proceedings.¹⁶ This means that the proprietor, in order to be on the safe side, must file and maintain auxiliary requests intended to overcome all objections raised by the opponent or the Opposition Division, even if he assumes that most of them are without merit. It goes without saying that an obligation to defend the patent in all possible directions is not appropriate in order to concentrate the proceedings on the points considered essential by the Board.

4. For parties' late filed submissions, the Boards usually refer to G 9/91 and G 10/91¹⁷ as an authority for emphasizing that the principle of *ex officio* examination is of limited importance in *inter partes* appeal proceedings. However, late *ex officio* objections are not excluded and may even occur towards the end of oral proceedings.¹⁸ Furthermore, it is consistent case law that the applicant or proprietor is responsible for submitting requests which are appropriate for overcoming any deficiencies. Assisting the proprietor in such attempts is, however, considered to violate the principle of impartiality, even if the Board itself raised the objection at a late stage of the proceedings.¹⁹ Introducing new facts and evidence and raising late objections *ex officio* even at a late stage and thereby assisting the opponent's case is apparently seen to be in line with the Boards primary role as review instance as elaborated in G 9/91 and G 10/91 and not in conflict with the Board's impartiality. On the contrary, any hints how an objection might be overcome and the patent be saved appear to be forbidden. Thus, the proprietor may occasionally have the impression that his true adversary is not the opponent but the Board of Appeal.²⁰ This raises the question whether the current

practice is still in line with the proprietor's fundamental procedural rights.

5. Sometimes, the provisions of the RPBA are applied without duly considering that they are implementing general principles of law laid down in the Convention itself and that they have to be interpreted and applied, as expressly stipulated in Article 23 RPBA, considering higher-ranking provisions of the Convention. Therefore, refusing late submissions based on the RPBA must not result in a violation of the right to be heard. So far, the case law in review proceedings under Article 112a EPC has not resulted in general rules trying to balance possibly diverging legal principles as examination *ex officio*, disregarding late submissions and the right to be heard. Rather, the Enlarged Board of Appeal, as a rule, restricts itself to confirming that the Boards act within the limits of their discretion even if the exercise of this discretion in the individual case limits the right of the proprietor to fully defend the patent against late attacks²¹ or results in a decision based on a surprising deviation from consistent case law addressed only in a side-remark during oral proceedings.²²

6. The rejection of late filed facts and evidence limits the procedural possibilities of both, the proprietor and the opponent, although the effect on the opponent is diminished by the Boards' readiness to raise late objections *ex officio*. The rejection of late claim requests is solely to the proprietor's detriment. The chances of the proprietor to have the patent maintained is further diminished by the fact that formal standards for allowing claim amendments appear to be much stricter than in national jurisdictions. There is a very strict standard and sometimes rather formalistic manner in assessing the criterion of added-subject matter. The "inescapable trap" created by the Enlarged Board of Appeal²³ and not balanced by the possibility of a cross-appeal²⁴ hardly seems to be of any importance in the Contracting States.²⁵ The approaches developed by the Boards of Appeal under the headwords of "intermediate generalization"²⁶ and "singling out"²⁷ impede the broadening or modifying of the original claims. Finally, the proprietor's position is less favorable compared to the opponent's position since the prohibition of *reformatio in peius* is applied even if new attacks are allowed in appeal proceedings.²⁸ In this context, thanks to recent decision G 3/14²⁹ of the

15 Cf. "Case Law of the Boards of Appeal of the European Patent Office", 4th edition 2001, VI.F.3.1.3f.

16 For example, T 28/10 of 12.12.2011 – "Fungizide Wirkstoffkombination/BAYER CROPS SCIENCE AG"; Reasons pt. 3.3.

17 G 9/91 and G 10/91, *supra*.

18 R 1/13 of 17.06.2013 – "Petition for review/NTT"

19 For example, T 1072/93 of 18.09.1997; Reasons pt. 5.3

20 See for example the petitioner's submissions dated 23.05.2014 in case R 9/14.

21 Wegner and Hess, The right to be heard before the EPO Boards of Appeal – overruled by formal regulations?, *epi* Information 1/2014, 32.

22 R 14/12 of 25.10.2013 – "Petition for review/HYDRO-QUEBEC".

23 G 1/93, OJ EPO 1994, 541 – "Limiting feature/ADVANCED SEMICONDUCTOR PRODUCT".

24 G 9/92, OJ EPO 1994, 875 – "Non-appealing party/BMW", Reasons pt. 16.

25 See Pagenberg/Teschemacher, The inescapable trap – a case for reconsideration?, *Festschrift Straus*, Berlin 2009, page 481. For Germany: BGH, GRUR 2011, 40 – Winkelmesseinrichtung.

26 See Steinbrener, Die (un)zulässige Verallgemeinerung des Erfindungsgegenstands und der Fachmann aus europäischer Sicht, GRUR 2009, 356.

27 Whereas the German practice applies the same principles of law, the assessment is more liberal because more weight is put on the understanding of the skilled person than on the mere wording of the specification; see recently BGH, Mitteilungen der deutschen Patentanwälte 2012, 344, Reasons pt. IV.1.c).

28 G 1/99, OJ EPO 2001, 183 – "Reformatio in peius/3M".

29 G 3/14 of 24.03.2015 – "Examination of clarity objections".

Enlarged Board of Appeal, the proprietors are fortunate that their room for manoeuvre has not been further restricted by allowing objections to clarity in additional situations.

7. One of the aims of the amendment to the RPBA was to increase legal certainty by codifying principles developed for dealing with late submissions in the previous case law. However, it appears that, although there is a clear tendency to a more rigid approach in refusing late submissions, the weight of the criteria for exercising this discretion seems to be rather different in different Boards. There are Boards for which the relevance of late submissions for the decision to be taken is still an important criterion, whereas others refuse to consider it at all, even for submissions filed with the statement of grounds of appeal and even if a plausible explanation for the late filing is given.³⁰ A clear divergence exists in cases in which submissions are filed in appeal proceedings which had been rejected by the Opposition Division. Some Boards restrict themselves to the examination whether the department of first instance has applied erroneous criteria in exercising its discretion³¹, whereas other Boards also examine whether the reason for not admitting the submission persists at the appeal stage.³² The latter approach seems quite correct because the factual situation is different.

8. It is an old question whether or not there is a fair balance between the chances of the competitor attacking the patent and of the proprietor defending it.³³ As the statistical data suggest, the practice of the Boards of Appeal applying the RPBA seem to have moved the scale to the proprietor's detriment. Hence, the balance between the rights of the proprietor and those of the opponent deserves to be reconsidered.

9. While there is a public interest in the revocation of patents not fulfilling the requirements of patentability, the increasing emphasis on formal requirements can hardly be justified with such interest. Rather, the amendments to the RPBA had originally been aimed at increasing efficiency. The data resulting from our study may, however, be interpreted as an indication that the positive effects caused by not considering substantive questions are more than compensated by the increased efforts necessary for dealing with procedural and formal aspects. This becomes evident in the daily practice of oral proceedings. Often, the morning and the early afternoon is spent for tiresome discussions on procedural and formal problems before the substantive discussion can begin which one would expect to be the core of the examination of the patent's validity.

10. It thus appears that the new Rules of Procedure, while originally conceived to cause the parties to put all their cards on the table at the very beginning of appeal proceedings, in reality have triggered a gradual transition to blocking any amendments to a party's case, while preserving the full discretion to raise objections *ex officio* within the framework of the grounds for opposition dealt with in first instance proceedings. It is doubtful whether such change of philosophy was envisaged or even intended, and whether it would be desirable in view of the fact that the Boards of Appeal are the last, but only judicial instance in European administrative validity proceedings.

Résumé

Une étude a été mise en œuvre en vue d'analyser l'impact du Règlement de procédure des chambres de recours (RPCR), tel qu'il a été modifié en 2002, sur la nature et l'efficacité des procédures de recours. A cette fin, des échantillons de décisions inter partes des chambres de recours de l'OEB datant des années 1995, 2004 et 2013 ont été sélectionnés sur une base aléatoire. Ensuite, les décisions sélectionnées ont été analysées à l'aide d'une série de questions. Le résultat de l'analyse laisse à penser que le nouveau RPCR, tout en obligeant les parties à soumettre l'ensemble de leurs moyens invoqués le plus tôt possible, entraîne simultanément une augmentation générale significative de discussions formelles qui remplacent les discussions quant au fond du passé sans rendre les procédures de recours plus efficaces.

Zusammenfassung

Die Auswirkungen der 2002 erfolgten Neufassung der Verfahrensordnung der Beschwerdekammern (VOBK) auf die Natur und Effizienz des Beschwerdeverfahrens wurden in einer Studie untersucht. Zu diesem Zweck wurden Stichproben von Inter partes-Entscheidungen der Beschwerdekammern des EPA aus den Jahren 1995, 2004 und 2013 nach dem Zufallsprinzip ausgewählt. Die ausgewählten Entscheidungen wurden anschließend anhand eines Fragenkatalogs analysiert. Das Ergebnis der Analyse legt nahe, dass die neue VOBK zwar die Parteien veranlasst, ihren vollständigen Sachvortrag so früh wie möglich vorzubringen, gleichzeitig aber insgesamt eine deutliche Zunahme formaler Diskussionen zur Folge hat, die die sachlichen Diskussionen der Vergangenheit ersetzen, ohne das Beschwerdeverfahren effizienter zu machen.

30 For example, T 724/08 of 16.11.2012; Reasons pt. 3.4.

31 For example, T 902/09 of 30.04.2014 – "Nutritional compositions/DSM"; Reasons pt. 2.1.2.

32 For example, T 1253/09 of 25. 04.2012; Reasons pts. 6 and 7.

33 Beier, Die Rechtsbehelfe des Patentinhabers und seiner Wettbewerber im Vergleich, GRUR Int. 1989, 1; Reply: Teschemacher, GRUR Int. 1989, 190.

Guidelines2day and Article 123 (2), seminar in Copenhagen 27 April 2015

H. Rystedt (SE)

On 27 April 2015, some 70 European Patent Attorneys from eight countries gathered at the Danish Patent and Trademark Office to attend a seminar arranged by the EPO and supported by the **epi**. The morning of the full-day seminar reviewed the latest changes to the Guidelines while the afternoon looked at the application of Article 123 (2) EPC in examination, opposition and appeal proceedings. The EPO was represented by Ms. Laurence Brüning-Petit from Directorate Patent Law and Mr. Jochen Moser of Directorate Practice and Procedure, and the **epi** was represented by Mr. Leythem Wall from Finnegan's London office.

The Guidelines for Examination were amended in 2014 and the new Guidelines apply as of 1 November 2014 (see OJ EPO 2014, A88). It is now the policy of the EPO to revise the Guidelines every year to keep them in line with substantive and procedural developments. A list of sections amended in the 2014 revision is available on the Guidelines site on the EPO website. When viewing the Guidelines in HTML-format, there is also the possibility to tick a box in order to show any modifications made in the 2014 revision.

The revised Guidelines aim to include all procedural changes, clarify existing procedures and practices, and also include and reference the latest decisions from the Boards of Appeal. It is thus a very comprehensive and valuable tool for professional representatives as well as administrative staff interacting with the EPO.

The rest of this article will however not deal with the Guidelines *per se*, but rather the new rules and practices reflected in them. As it is not possible to cover every aspect dealt with in the seminar, the present author will highlight what he believes is most relevant to the daily work in a patent department or IP law firm. For the interested reader who wants more detailed information, references will be made to the Guidelines, OJ EPO, or EPO website.

Doing business with the EPO electronically

One topic dealt with, which is not actually reflected in the Guidelines but a very important aspect of the daily life of a patent department, was electronic communication with the EPO. The EPO Online Filing (OLF) tool is probably the most used way to do this. This is, at least in the mind of the present author, a pretty nice tool which serves its purpose very well. However, it is a software product that needs to be installed by the users and thus puts a burden on the IT services in the firm or company. The EPO has launched new web-based online filing tool Case Management System, or CMS. This tool requires an activated smart card (and therefore requires the installation of the Gemal to smart card reader software) and may be used for applications and subsequent sub-

missions in all phases of EP and PCT proceedings with the exception of priority documents. A simpler tool that does not require a smart card or any software installation is the web-form filing. This service only requires an online registration and can be used for filings and subsequent submissions with the exceptions of opposition, limitation, revocation, appeal and priority documents.

The online services also include the Mailbox, which provides means for electronic notification of communications up to grant. This service requires a smart card and activation of the service. There is also a web-based application for online fee payment. Also this service requires a smart card and also a deposit account. This service can be used to monitor the deposit account and set up and manage automatic debit orders, and of course effect fee payments.

Further information on the new online services can be found on the EPO website under "Applying for a patent", and "Online services".

Changes in fees

Rule 6 EPC relating to language-related fee reductions was amended 1 April 2014 to support small applicants with an official language other than DE, FR or EN. The new fee reduction is 30 % and applies only to the filing and examination fees. The reduction is available to SMEs (as defined in European Commission's recommendation 2003/361/EC), natural persons and non-profit organisations, universities, and public research organisations. The applicant(s) must sign a declaration to the effect that they comply with the requirements and random checks will be performed by the EPO to ensure that the system is not abused. Section A-X-9.2 of the Guidelines provides detailed information on all procedural aspects of the fee reduction.

An administrative change that has potential to have a significant impact on the administrative side of a law firm or patent department relates to the use of deposit accounts. In case there are insufficient funds available on the deposit account, it was previously possible to keep the original date for the payment by paying an administrative fee of 30 % of the shortfall. This administrative fee has been abolished and this remedy is thus no longer available. In case of insufficient funds, the payment will be deemed to have been made only on the day when there are sufficient funds available on the deposit account. Means of redress include further processing and re-establishment of rights, but these means may not always be available. Furthermore, while the current available funds will be visible through EPO online services, this may not always take into account pending orders. It is therefore strongly advised to keep a separate record of the account activities in order to not inadver-

tently fail a payment due to insufficient funds. The EPO are looking into possibilities to pay by alternative means, such as by credit card. The relevant sections in the Guidelines are A-X 2 and 4.2

Rule 103 EPC relating to reimbursement of the appeal fee has been amended as of 1 April 2014 and now includes a new paragraph 103 (2) which provides for a 50 % reimbursement if the appeal is withdrawn after filing the grounds for appeal. The purpose is of course to provide an incentive to withdraw appeals where the appellant realises that the chances of success are low, and thereby reducing the workload of the Boards of Appeal.

Early entry into the European phase and expedited processing

Entry into the European phase of a PCT application is usually done on or shortly before the 31 month deadline. Under Articles 23 and 40 PCT, the EPO is actually not allowed to process the application until the expiry of this time limit, unless the applicant expressly requests this. If an early entry into the European phase is desired, it is therefore necessary to comply with all requirements of Article 159 EPC, and the applicant must also expressly lift the processing ban. If an expedited examination is desired, it may also be wise to file a request for PACE on entry. It should be noted that once the PCT application has entered the European phase, the international processing of that application is terminated as far as the EPO is concerned. While the international processing of the PCT application may continue and be of relevance to other jurisdictions, no further action taken in the PCT application will have any effect on the European application. While it may seem easy to enter early into the EP phase, the procedural steps are rather complex and it is advised to review the applicable section E-VII 2.9 of the Guidelines and OJ 2013 page 156.

A further possibility to speed up proceedings before the EPO in connection with PCT applications is the so called "PCT-Direct" option. This applies to PCT-applications based on applications where the EPO has already made a search. If the search opinion is negative, it is possible to submit comments on this together with the PCT-application. These comments may include substantial comments on the interpretation of prior art documents and explanation of amendments made in the PCT application relative to the earlier application. Applications should be filed with EPO as Receiving Office to ensure fast transmittal. PCT-Direct is in force since 1 November 2014 and further explained in OJ 2014, A89.

The EPO also informed the audience about the scheme called Early Certainty from Search. Under this scheme, the EPO aims to issue all searches with opinion within six months of filing, to prioritise the completion of already started examinations over beginning work on new files, and to expedite grants shortly after a positive search opinion. This scheme will also provide a fast track examination for third party observations, provided that they are properly substantiated and not anonymous.

Rule 164 EPC

A much awaited rule change entered into force on 1 November 2014 with the amended Rule 164 EPC, dealing with Euro-PCT application considered to lack unity of invention. Under the old version, an applicant who wished to proceed with an invention which was not searched in the international phase had to perform all steps for EP entry, including payment of all relevant fees, before having the possibility to file a divisional application in order to proceed with the invention of choice. However, the execution of the amended rule is complex and may lead to some confusion for users not dealing with non-unity objections on a regular basis.

Rule 164 differentiates between whether the EPO should draw up a supplementary search report (part (1) of the rule) or not (part (2)). If the supplementary search report is not dispensed with, then the procedure is analogous with the procedure under Rule 64 EPC, which governs the procedure for Euro-Direct applications. In this case the claims on file at the expiry of the period under Rule 161 (2) EPC form the basis of the assessment, which is independent of any findings of the International Search Authority.

If the supplementary search report is dispensed with, then EPO will issue an invitation to pay a search fee for each invention that was not searched by EPO as ISA. The time limit for paying the extra search fee(s) is two months. The search results will be annexed to a communication under Article 94 (3) or Rule 71 (3).

The execution of the amended rule is rather complex and there are some special cases that may arise. This may lead to some confusion for users not dealing with non-unity objections on a regular basis. If entering the EP phase with a set of claims that is likely to be considered as lacking unity, it is advised to consider the Guidelines section C-III 2.3, F-IV 13.1 (iv) and Euro-PCT Guide (8th edition 2015) part E, chapter XV.

Article 123(2)

The final part of the seminar was devoted to added subject matter and Article 123 (2) EPC. It has long been accepted that literal support for any amendment is not required, but a symposium with users of the system revealed that the users still find the application of Article 123 (2) by the EPO examiners to be too academic. While the article itself has not been amended, the Guidelines section H-IV 2.3 has now been modified to put a focus on what is really disclosed to a skilled person.

Mr Wall made a masterly presentation about various standard problems arising from amendments not having literal support in the application as filed, ending in some clear and helpful drafting tips for avoiding future problems as much as possible.

One problem arises from the desire to combine specific elements from separate lists. In general, this is only in line with Article 123 (2) if the specific combination is disclosed in the application as filed. In order to provide as many fall-back positions as possible, it may be a good

idea to provide sub-hierarchical groups and as many preferred lists and combinations as possible.

A second problem relates to specific features only being present in certain embodiments and not disclosed as stand-alone features. Introduction of such a feature into a claim without introducing all of the other features of the respective embodiments may violate Article 123 (2). To mitigate this problem, one should try to de-contextualise the features so that they are not disclosed as being dependent on other features in specific embodiments, unless of course they actually are technically dependent on those other features.

Concluding remarks

The Guidelines2day roadshow is a very comprehensive format that in a single day provides a good update on many relevant aspects on dealing with the EPO. If you have a gnawing feeling that you may have lagged behind in your reading of the Official Journal and the EPO newsletter, it is a very good way to catch up. The upcoming dates and locations are available on the EPO website, <http://www.epo.org/about-us/office/academy.html>.

The EPO's Enlarged Board of Appeal paves the way for patentability of claims to plants in Europe

A. De Clercq (BE)

The law in two contracting states of the European Patent Convention ("EPC"), Germany and the Netherlands, excludes the patentability of products obtained by essentially biological processes (e.g. see Art. 3 (1) (d) ROW 1995). In its recent decision in the consolidated cases G 2/12 ("Tomatoes II") and G 2/13 ("Broccoli II"), the Enlarged Board of Appeal of the EPO indicated that such is not the case in the EPC. Tomatoes II and Broccoli II have paved the way for patentability of plants in Europe. In the process, the Enlarged Board set aside some doubts and, in fact, confirmed the practice which has been applied for years.

Article 53 (b) EPC states that European patents shall not be granted in respect of "plant or animal varieties or essentially biological processes for the production of plants or animals". The Enlarged Board previously concluded in G 1/08 (Tomatoes I) and G 2/07 (Broccoli I) that the legislator's intention for Article 53 (b) EPC had been to exclude from patentability those plant breeding processes which were the conventional methods of plant-variety breeding at the time. Accordingly, the Enlarged Board decided in Tomatoes I and Broccoli I that the processes as claimed in the respective patents were not allowable because they *contain steps of sexually crossing whole genomes of plants and of subsequently selecting plants. Such processes were regarded as excluded from patentability as being "essentially biological"*

In Broccoli II and Tomatoes II, however, the Enlarged Board highlighted the difference between a product claim, a process claim and a product-by-process claim, the latter being a product claim that should be addressed for patentability separate from the process that is used to produce it. The Enlarged Board clarified that if one claims a product (other than a plant variety) obtainable by such excluded processes, such product (e.g. a plant or plant material including fruit and edible parts of the plant) may nevertheless be patentable. Furthermore, such product is explicitly not excluded from patentability under Article 53 (b) EPC solely because it was obtained by the unpatentable process.

More particularly, the Enlarged Board held that:

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

2. In particular, the fact that the only method available at the filing date for generating the claimed subject-

matter is an essentially biological process for the production of plants disclosed in the patent application does not render a claim directed to plants or plant material other than a plant variety unallowable; and

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

These new decisions of the Enlarged Board of Appeal provide clarity and perspectives for pursuing European patent protection for commercial plant products (plants and plant material, such as fruit). Thus, even if an invention consists of a biological process excluded under Article 53 (b) EPC, the product of that process can still be patented, provided that claim language can be found to define it (including the possibility of product-by-process claim language where appropriate), the claimed plant or plant material is novel and inventive in the usual manner, and the claim does not fall under the exclusion of plant varieties. Accordingly in decision G1/98, it was already held that "a claim wherein specific plant varieties are not individually claimed is not excluded from patentability under Article 53 (b), EPC even though it may embrace plant varieties." In other words, patent protection should only be impossible if the product is not novel or inventive, or if the claimed product is a plant variety as such.

The Enlarged Board reasoned that a narrow interpretation of the exclusion does not lead to an erosion of the exception, so that "the legislator's intentions could be frustrated by the choice of the claim category and by 'skilful' claim drafting", because the process itself remained excluded from patentability. The product claim, on the other hand, must still satisfy the other criteria for patentability (such as novelty and inventive step).

In summary, Tomatoes II and Broccoli II clarify that product claims or product-by-process claims directed to plants or plant material other than a plant variety thus are not excluded from patentability under Article 53 (b) EPC and are allowable if they fulfill the formal and substantive requirements of the EPC. The decision appears to make a lot of sense, especially since all parties involved (patent proprietors, opponents, as well as the President of the EPO) had agreed with this notion before the Enlarged Board confirmed it.

M. Müller, C. Mulder: Proceedings Before the European Patent Office – A Practical Guide to Success in Opposition and Appeal

M. Hogenbirk (NL), G. Abbas (NL)

Edward Elgar Practical Guides 2015, pp. 174. Paperback. ISBN 978 1 78471 530 4

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This book was written in a joint effort by Marcus Müller, a member of the Boards of Appeal at the European Patent Office, and Cees Mulder, a European Patent Attorney and lecturer in European Patent Law. The book tries to provide insight in the “rules of the game” of proceedings before the European Patent Office. The authors decided to write the book in addition to the series of “Opposition and Appeal” seminars they jointly had presented in the course of 2014. It was felt that there was a need for a practical guide to help applicants and patent attorneys in particular in preparing for and dealing with oral proceedings in opposition and appeal before the European Patent Office.

In the introduction it is indicated that a first objective of this book is to set out in detail the legal framework for opposition and appeal proceedings before the European Patent Office. The second objective is to give practical advice on which choices are appropriate in which circumstances.

The book promises a better understanding of how opposition divisions and boards of appeal approach the cases before them. It discusses issues regarding how to draft and prosecute patent applications to avoid problems later on in opposition and appeal, properly attack or defend a patent, react if the patent is amended, argue in case of late filings, and act in oral proceedings. The Rules of Procedure of the Boards of Appeal are also discussed including their influence on opposition proceedings. It is notable that the size of the book has clearly been picked keeping practicality in mind. The book is compact in size and as such easily brought to any proceedings despite the file size of the case at hand. It also concentrates the information on oral proceedings before the EPO preventing having to flip through Case Law in case of unexpected circumstances.

The book starts with a relatively short Chapter on the Drafting and Prosecution stage, followed by a more elaborate Chapter about the Opposition stage and an also more detailed Chapter on the Appeal stage with focus on inter partes appeals, then a short Chapter on ex parte appeals, and a final Chapter on some further issues. The book contains a 10 page keyword index. Further, the book contains 7 pages with tables of legis-

lation and decisions to which reference is made throughout the book.

As said, the first Chapter deals with drafting and prosecuting. It is believed that this subject matter should have been presented at most as an Annex of this publication. The book is meant as a practical guide to success in opposition and appeal, and will be consulted in those stages of the proceedings before the European Patent Office. In an attempt to be complete the authors have very concisely addressed drafting and prosecuting in the first Chapter. However, by doing so in this specific guide that further fully relates to opposition and appeal, the authors made this first Chapter slightly off-topic.

Each of the Chapters on Opposition and Appeal starts with an introduction and some pages on admissibility. Also each of the Chapters deals with the risks of late submissions, which may be different depending on the stage in which the late filing takes place. Further, procedural aspects of oral proceedings are explained. Specific aspects of Opposition and Appeal Proceedings before the European Patent Office are discussed.

All Chapters in the book contain numerous helpful clarifications (practical advices) and examples cases (mostly recent relevant decisions) which are displayed in a different format to distinguish them from the main text. In those practical advices both the position of the proprietor and the position of the opponent are illustrated with examples and useful comments.

The book focuses on the practical aspects of the proceedings and contains more than 80 ‘practical advice’ sections and around 45 ‘example cases’ complementing the explanation of the procedural and substantive issues arising at different stages of opposition and appeal proceedings. The large collection of practical advices is what makes the book stand out from the usual books on the European Patent Convention and related topics. The EPC, the Guidelines for Examination and Case Law and also The Annotated European Patent Convention by Derk Visser do not provide such practical advices this book fills that gap and provides for guidance in case one ends up in a position similar to a situation described in the practical advice. Besides the practical advices the authors cite case law on the various stages of the proceedings. The larger part of the cited decisions corresponds to the decisions cited the Case Law book. However, the authors also cite numerous decisions not addressed in the Case Law book and the Guidelines making the book a good supplement to the usual recourses.

The reviewers are of the opinion that the book is indeed an invaluable aid in preparations for proceedings before the European Patent Office, although not all of

the contents may be perceived as useful by the experienced patent attorney who has dealt with a lot of cases in oral proceedings. Especially the practitioner who only occasionally deals with proceedings before the European Patent Office in opposition and appeal will greatly benefit from this publication. It gives a comprehensive overview in a relatively limited number of pages in an easy to read format. Due to its convenient size, the book can easily serve to make a check-list and provides a good start or help in preparing proceedings. A useful mix is provided of procedural information and the substantive legal framework, including practical and tactical aspects

and advices, which guides the practitioner to avoid unpleasant surprises, or at least makes him/her aware of risks, opportunities and pitfalls. The publication does not claim to help out in all situations. It is always relevant to remember that Oral Proceedings are examples of complex human interactions in which injustice may easily happen when things are misunderstood or misinterpreted or when a complex argument is not fully appreciated.

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