



## Report from the 91<sup>st</sup> Council Meeting

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- 19 Decision No. G4/19 of the European Patent Office – contribution to the discussion on double patenting in Poland**  
by J. Sielewiesiuk and M. Oleksyn

- 24 Tutors' Report on the EQE 2021 Papers and the Meeting between Tutors and EQE Committees**, by N. Cordes, L. Ferreira, A. Valborg Guðmundsdóttir, A. Hards, J. Hoekstra, H. Marsman and R. van Woudenberg



Cover:

### **Bright, Crisp, Cold**

This picture painted by  
Susanna Leon  
(European Patent Attorney, CH)  
is part of the  
**epi** Artists Exhibition 2021



## Susanna Leon

Susanna Leon is a European, UK and Swiss Patent Attorney working in the pharmaceutical field in Basel, Switzerland. Besides the patent work, she enjoys painting and sketching, especially from life. Much of her artwork is inspired by nature and the outdoors. She loves the challenge of painting en plein air and often combines sketching with hiking or cycle-touring. When travelling she is rarely without her sketchbook, palette and brushes. For her, the appeal of water-colour is its spontaneity, the intensity of colour and the way the wet pigment moves and interacts on the paper.

Susanna paints mostly for herself but has exhibited works in Switzerland, Italy and UK. She took part in the virtual **epi** artists' exhibition in 2021.

Susanna Leon ist zugelassene Vertreterin vor dem Europäischen Patentamt als auch Patentanwältin in Großbritannien und der Schweiz und arbeitet im pharmazeutischen Bereich in Basel (Schweiz). Neben ihrer Arbeit als Patentanwältin malt und skizziert sie gerne, insbesondere aus dem Leben. Viele ihrer Werke sind von der Natur und dem Freien inspiriert. Sie liebt die Herausforderung des Malens „en plein air“ und verbindet das Skizzieren oft mit Wanderungen oder Fahrradtouren. Auf Reisen ist sie selten ohne ihr Skizzenbuch, ihre Palette und ihre Pinsel unterwegs. An der Aquarellmalerei reizt sie die Spontaneität, die Intensität der Farben und die Art und Weise, wie sich das nasse Pigment auf dem Papier bewegt und interagiert.

Susanna malt hauptsächlich für sich selbst, hat ihre Werke aber auch in der Schweiz, Italien und Großbritannien ausgestellt. Sie hat an der virtuellen **epi** artists Exhibition 2021 teilgenommen.

Susanna Leon est conseil en brevets suisse et britannique, ainsi que mandataire en brevets européens. Elle travaille dans l'industrie pharmaceutique à Bale (Suisse). Outre son travail dans le domaine des brevets, elle aime peindre et dessiner, particulièrement d'après nature. La plupart de ses œuvres sont inspirées par la nature et le plein air. Elle aime le défi de peindre en plein air, et combine souvent le croquis avec la randonnée ou le cyclotourisme. Lorsqu'elle voyage, elle emporte presque toujours son cahier de croquis, sa palette et ses pinceaux. Pour elle, l'attrait de l'aquarelle est sa spontanéité, l'intensité des couleurs et la façon dont le pigment humide se déplace et interagit sur le papier.

Susanna peint principalement pour elle-même, mais a également exposé des œuvres en Suisse, en Italie et au Royaume-Uni. Elle a participé à l'édition 2021 de l'exposition (virtuelle) des artistes de l'**epi**.





European Patent Institute · Bayerstrasse 83 · 80335 Munich · Germany

17<sup>th</sup> December 2021

Dear Colleagues, dear Friends,

December is the time of the year when we wish our family, colleagues, and friends a wonderful Holiday Season, and a happy, peaceful, and successful New Year.

2021 was another challenging year for all of us – both in the **epi** Secretariat and in the Board.

Our Presidium, Board, Council and Committees continued to meet virtually, while looking forward to a post-pandemic world. We hope you share our view that while these virtual forums are improving, still they cannot substitute personal contact. We hope that you will join us in our sincere wish to rediscover the pleasure of getting together in person, who knows maybe already next year.

After an unprecedented one-year break, the EQE took place in March 2021, for the first time in a fully digital format. As a result, our **epi** family expanded even more by some 900 members to exceed 13,000 members for the first time. Hard work continues for the group working on the future EQE format and we hope 2022 will bring us closer to a modernised EQE.

Discussions on the future of the Institute and its strategic plan, as well as about substantive matters like oral proceedings by videoconference, or amendments of the description to reflect the scope of the claims continued in 2021.

We held many virtual meetings with other association representatives, organisations, and EPO representatives, and attended numerous meetings as observer, strengthening the position of **epi** as partner. We had the pleasure of welcoming Mr Campinos, President of the EPO during our autumn Council meeting; this is an opportunity for me to remind our members that they may attend Council meetings so far as accommodation permits.

The reports of your President and other Presidium members, as well as the report of our Executive Director have been presented to Council and all of us would be happy to discuss your ideas and suggestions for further improving our service to you.

Finally, I am proud that the 12<sup>th</sup> **epi** Artists Exhibition could be organised this year, 30 years from the first one. We appreciated the creative spirit and artistic talents of our **epi** family members, in a virtual format that allowed participation of a record number of artists. The gallery remains available to visitors. The painting shown on the cover of this issue of **epi** information was one of the exhibited artworks, used with kind permission of **epi** member Susanna Leon (CH).

To further progress and to see each other in person in 2022, we all need to stay well and to keep the **epi** family spirit within us!

**epi** is a special family to all of us in the Board. It is my pleasure and honour to address all members of the **epi** family, to wish them and theirs in the name of the Board a great Holiday Season and a happy, healthy, and prosperous 2022!

Francis Leyder  
President



The **epi** Board and **epi** Secretariat join in sending Season's Greetings  
with our best wishes for a prosperous and healthy 2022

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**HELPING HANDS**

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Institute of Professional Representatives before the European Patent Office



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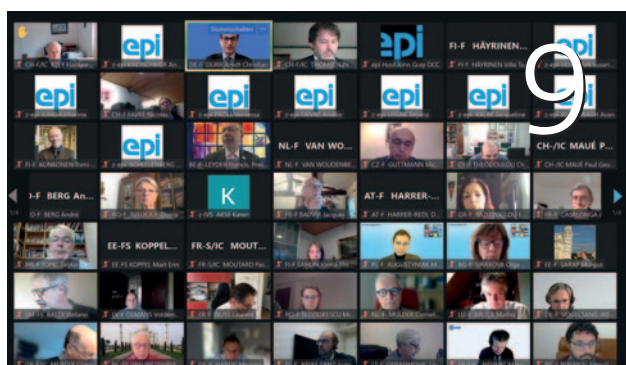
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# Editorial

## Wir schaffen das!

M. Névant (FR), Editorial Committee

**4** years ago, at this time of the year, I was writing my first editorial in which I paid tribute to Terry Johnson, the former Chair of the Editorial Committee. With great sadness I learnt that Terry passed away three months ago in New Zealand, his country of adoption. Terry's good spirits, immense knowledge and incomparable sense of humour will be greatly missed.



Marc Névant

**5860.** Angela Merkel was in office as Chancellor ("Kanzlerin") for so many days. Although Ms Merkel missed the record (held by Chancellor Helmut Kohl) by just 10 days, she nonetheless held the reins of the German government for 16 years (by far, more than the average life of a European patent), which is an incredible feat. Ms. Merkel had to deal (*inter alia*) with 4 US presidents, 4 French presidents, and 9 Italian Prime Ministers!

The ability to govern over the long term is a luxury that politicians can rarely afford. Ms Merkel had to handle a number of crises during her tenure, including a financial crisis, a migrant crisis, and most recently a sanitary crisis. Yet she stayed the course with her ideas and views of what was good for her country. I can only wish that the heads of the IP5 Offices could also have the luxury to serve and defend the interests of IP stakeholders over the long term.

As **2022** nears by, we are about to enter year 2 of the Covid-19 pandemic. Our Institute has managed to carry out its usual activities, through the work of the Presidium, Board and Committees, thanks to the (again) tremendous support of the Secretariat. Congratulations and warm thanks to all those who made this possible.

On behalf of the Editorial Committee, I sincerely wish all our readers a Merry Christmas and a Happy New Year.

# Obituary

## Terence Leslie Johnson



**T**erence Johnson, known to everyone as Terry Johnson, died suddenly in Nelson, New Zealand, on 16<sup>th</sup> September, leaving his wife, Annette Cunningham, and his blended family (une famille recomposée, eine Patchworkfamilie) with his daughter Katya, son-in-law and two grandchildren, his stepchildren and their children.

The funeral notice indicated that donations in memory of Terry can be made to The Brook Sanctuary, and the picture that you can see was made during a fundraising breakfast they held there last February.

Terry also started his career as an examiner, but as the EPO did not exist in 1968, he joined the UK Patent Office, and soon left for private practice in 1971, becoming a European Patent Attorney as a grandfather in 1978.

We are very proud and honoured that we had the pleasure to work closely with him at **epi** for many years, as he was first elected to this Council in 1997.

Terry was known for his integrity and dedicated professionalism, and we will always remember him as the warm and generous man he was. He had a long career in the Disciplinary Board of Appeal,

where he was appointed in 2007, still a member when he passed away.

We will miss his sense of humour and quite a few of us remember how collaboration with him was always pleasant and constructive and at the same time efficient and focused on good results.

Many of us remember the time when he acted as member of the Editorial Committee, which he chaired from 2014 until 2017. We were all looking forward to the thought-provoking editorials that he drafted during this period for our journal.

May he rest in peace.

*Note from the editor: this text was read by President Leyder during the Council meeting which took place on 13<sup>th</sup> November 2021*

# Obituary

## In memoriam Francisco Bernardo

**F**rancisco Bernardo passed away on 31<sup>st</sup> October 2021, succumbing to an illness that he had suffered from for the past year.

During this time, Francisco battled the illness with optimism, always with the support and care of his wife, his two daughters and the rest of his family and loved ones.

Francisco was 56 years old, with more than 30 of those years being dedicated to the Intellectual Property sector. He held a M. Sc. in Chemistry from the University of Oviedo and he was an examiner at the European Patent Office in The Hague from 1990 to 2001. When he returned to Spain, he headed the PharmaMar Patent Department before founding ABG Patentes in 2003 along with Vicente González (also deceased) and Juan Arias.

Passionate about his work, Francisco was a strong advocate of the IP system and he contributed to its dissemination in Spain by founding the EPI-CEIPI basic training course in European Patent Law in Madrid. His tremendous knowledge and involvement earned him the recognition



and respect of the profession both nationally and internationally.

Remarkable in every way, Francisco showed that he knew when to take the lead and when to step back, always showing his commitment to individual talent and development.

Throughout his illness and with his characteristic discretion, Francisco closely followed matters involving the firm and the sector until his final days.

Francisco was an educated man with an excellent strategic vision, a person who was rigorous, generous and kind. Without a doubt, at ABG Intellectual Property we have so much to thank him for and we will miss him greatly. We believe that carrying on his legacy and giving the best of ourselves every day is the greatest tribute that we can pay to him.

Rest in peace.

ABG Intellectual Property Team

*Note from the editor: this text was posted on the website of the firm where Francisco worked*



## Report from the 91<sup>st</sup> Council Meeting held by videoconference on 13<sup>th</sup> November 2021

M. Névant (FR)

### 1/ Meeting opening

President Leyder opened the meeting at 9 am and welcomed all participants. A test vote was conducted and scrutineers were appointed.

### 2/ Adoption of the agenda

The agenda was adopted with a few changes, namely the addition of motions presented by the German delegation, by the Swiss delegation, and by Mr Boff (GB). The first motion dealt with the format of Council meetings in the future. The second motion dealt with the postponement of a vote on a proposal from the IP Commercialization Committee. The third motion dealt with the use of gender-neutral language in documents issued by **epi**.

### 3/ In memoriam

President Leyder informed Council of the passing away of Mr Terence Johnson (GB), a former Council member, and of Mr Francisco Bernardo (ES), then a current Council member. President Leyder reminded Council of their career and involvement within **epi**. Mr Arias (ES) gave a eulogy for Mr Bernardo; Vice-President Vogelsang-Wenke read an email that Ms Johnson's widow sent to President Leyder in reply to **epi**'s condolence letter, and Ms Schellenberg (Secretariat) and Mr Mercer (GB) gave a eulogy for Mr Johnson. A minute of silence was observed by Council.

### 4/ Confirmation of the list of nominations for elections to Committees

The Secretary General, Ms Sirakova, confirmed the name of members having applied for a position in Committees with a vacant seat.

### 5/ Adoption of the minutes of the 90<sup>th</sup> Council meeting (C90) – matters arising from the decisions and actions recorded during C90 and previous Council and Board meetings

Mr Mulder (NL) noted that the point raised during C90 (discrepancies in the version of By-Laws available on the website at that time) had seemingly not been solved. Mr Moutard, Chair of the By-Laws Committee, explained that the most recent version uploaded on the website was in conformity with what had been decided during C87 (Lisbon). The minutes of C90 were approved. Secretary General Sirakova then referred to the accumulated file available to Council members concerning the actions still pending.

### 6/ Presentation by Mr Campinos, EPO President, and Q&A session

Mr Campinos provided an update on developments at the EPO since he addressed Council a year ago. Mr Campinos in particular stressed the following points:



**António Campinos**  
EPO President



**Francis Leyder**,  
epi President

- The Office will capitalize on new opportunities which have arisen in a digital workplace;
- Mailbox registration has increased by 65%;
- A user area pilot project has been launched;
- CMS will be decommissioned as of 1<sup>st</sup> January 2022 and replaced by Online filing 2.0;
- The transition to oral proceedings (OP) by videoconference (VICO) has increased the transparency of OPs (a 10-fold increase in the number public observers has been noted);
- 750 answers were received for the user survey on OP by VICO in opposition: two third of the answers found OP by VICO good or very good;
- There will be an enhanced format for the eEQE 2022, the concept of which is being discussed in a joint **epi**/EPO working group. There will be a “major” consultation before any change to the REE/IPREE (Regulation and Implementing provisions to the Regulation on the European qualifying examination) is made;
- There is still a need to improve quality of search reports and of the accompanying written opinion.

Mr Campinos concluded his presentation by saying that he was glad that the Unitary Patent system was on the verge of entering into force (likely in 2H22 or 1H23).

The text of the speech of Mr Campinos is available for **epi** members in a dedicated area of the website.

In the ensuing Q&A session, again brilliantly moderated by Vice-President Vogelsang-Wenke, Mr Campinos addressed the following topics raised by Council members:

- EQE: a first draft of the working group is planned to being sent to **epi** in Q122;
- EPO Academy: there is no plan to outsource the training of candidates to Universities;
- OP by ViCO: following G1/21, the Office’s approach for OP in examination and opposition will be based on common sense;
- CMS decommissioning: it could be contemplated to postpone the decommissioning by a few months but not more;
- AI-driven routing of applications to ‘competent’ Examination Division: this is working well;



**Vernessa Pröll,**  
**epi Secretariat**

- Complaints: there are less than 400 a year;
- Quality: the perception is different whether you are a user or an EPO examiner (20% gap), the EPO needs to acknowledge the way written opinions are drafted;
- Digitalization and environment;
- Teleworking and cybersecurity: the pilot project (to be presented to the Administrative Council) reflects what has been done over the past 20 months.

## 7/ Report of the President and Vice-Presidents

President Leyder referred to his report in the accumulated file, which included the activity of both Vice-Presidents.

President Leyder also presented a revised draft of the strategic plan of **epi** as required during C90. The plan was adopted at a large majority (93 in favour, 3 against, 16 abstentions).

Council also noted that, as promised during C90, the Audit and Assessment report was made available to Council members in redacted form.

## 8/ Report of the Secretary General

The Secretary General referred to her report in the accumulated file, and noted that since she was elected she attended 4 Presidium meetings and 3 Board meetings, in addition to monthly meetings with the EPO. The Secretary General also worked with the Deputy Secretary General on a proposed amendment of Decisions 3.3.4 and 3.3.5 (concerning the election of Committee members) that would be discussed later during the meeting. The Secretary General further informed Council members that it was still uncertain whether the next Council meeting could be held in person in Glasgow.

## 9/ Motion of the German delegation

The German delegation wished to have the “mood” of Council members on how future Council meetings should be organized, i.e. in person, virtual or in hybrid format. A vote ensued which gave the following result:  
In favour of in-person meetings: 80 (67%)  
In favour of virtual meetings: 4 (3%)  
In favour of hybrid meetings: 36 (30%).

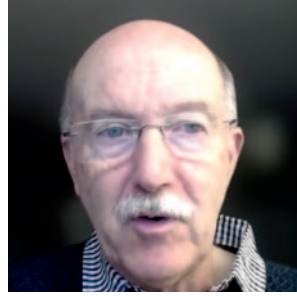
## 10/ Report of the Executive Director

The Executive Director, Ms Lissak, presented the progress made within the Secretariat since the last Council meeting, in particular on the following points:

- Accounting;
- IT projects;
- RACI matrix (RACI stands for responsible/accountable/consulted/informed);
- Organisational manual;



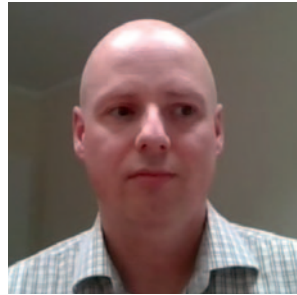
**Heike Vogelsang-Wenke,**  
**epi Vice-President**



**Christopher Paul Mercer,**  
**EPPC Chair**



**Peter Thomsen,**  
**epi Treasurer**



**Florian Stöckle,**  
**IPCC Chair**



**Olga Sirakova,**  
**Secretary General**



**Marc Nevant, Editorial**  
**Committee Chair**

- Compliance rules (there is a need to define the scope, procedures and consequences of the rules, and to appoint a Compliance Officer as well as a Compliance Board).

### 11/ Report of the Treasurer (part 1)

The Treasurer, Mr. Thomsen, presented a snapshot of the financial situation as of October 14, 2021, as well as a forecast for the remainder of 2021.

Revenues at the end of year are expected to be lower than planned (-136 kEUR). Expenses are also expected to be lower than planned, but to a greater extent (+440 kEUR), resulting in a planned surplus of +304 kEUR whereas the original 2021 budget had a planned deficit of - 197 kEUR. Concerning the 2021 expenses, the Treasurer noted that there is a significant increase in personnel salaries, Finance & Law, and IT compared to the budget. As many as 25 IT projects are being (have been) run to improve inter alia cybersecurity and the IT-architecture.

The Treasurer also provided an update on a number of topics and on-going projects, including:

- *Project New Accounting 22*: progress has been made, notably with respect to standard accounting processes which are better documented. The project will still be carried out in 2022.
- *Professional liability insurance (PLI) for members*: the **epi** supported PLI is still available and all previous contracts have been renewed upon request of the insured members. The annual premium amount has now reached over 200 kEUR which is an important indication for the insurers that the concept is sustainable. However, premium prices for larger groups of European Patent Attorneys are still not very attractive and further work is needed to address this issue.

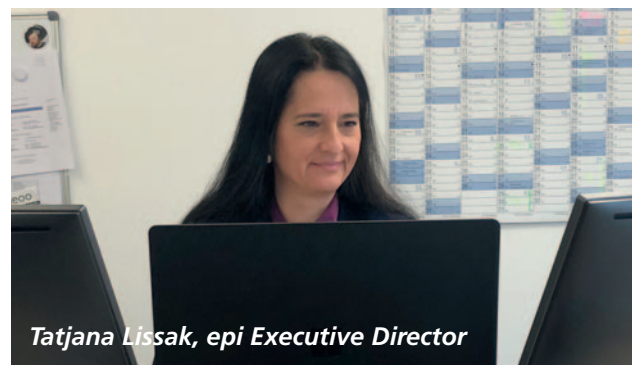
### 12/ Report of the epi-Finances Committee (part 1)

The Chair of the **epi**-Finances Committee, Mr. Quintelier, referred to his report in the accumulated file, and was pleased to note that a financial forecast had been included in the Treasurer's report.

### 13/ Report of the Treasurer (part 2 – 2022 Budget)

The 2022 budget was prepared assuming a return to a "new normal" situation and 1 "physical" meeting for each Committee, without increase of the subscription fee.

A sharp increase in revenues is expected compared to the 2021 budget (+ 20%), mostly coming from educational events. A sharp increase in expenses is also expected compared to the 2021 budget (+ 18%), with education, IT and salaries being the areas with the most significant increases. In particular, an unprecedentedly high IT budget of 374 kEUR is planned, to cover inter alia the implementation of a central Document Management System (DMS) which will be the pre-condition to fully digitalize the accounting processes. Other IT projects started in 2021 will be carried out in 2022, including projects on cybersecurity. Another opinion on the legal status of **epi** will also be sought. The number of educational events will also increase as it can be assumed that the Unitary Patent/ Uni-



**Tatjana Lissak, epi Executive Director**



fied Patent Court system will become operational during 2022, triggering a demand for a number of educational **epi** products on that topic, which justifies hiring an additional temporary staff member.

Taking into account all those factors, the Treasurer indicated that a budget with a deficit of -193 kEUR is planned for 2022.

## 14/ Report of the epi-Finances Committee (part 2)

The Chair of the **epi**-Finances Committee reported that the Committee noted with approval that there is no plan to change the membership subscription, and approved the Treasurer's proposals with respect to the 2022 Budget, investments in infrastructure and software in the Secretariat.

## 15/ Motion from Mr Boff (GB). Proposal to amend the Rules governing epi Studentship (4.1.2). Change of practice regarding the annual studentship fee

In the context of a proposal to amend the Rules governing **epi** Studentship, Mr Boff suggested to use, from now on, gender neutral language in **epi** documents generated in English. In this respect Council was asked to resolve that when referring to a generic or unidentified person, such persons shall be indicated using the singular "they" or its derivative forms "them", "their", or "theirs" as appropriate.

Council approved the motion (75 in favour (73.5%), 27 against (26.5%), 13 abstentions).

The Chair of the **epi** Studentship Committee, Mr Mercer, then presented a proposal to amend the Rules governing **epi** studentship. The proposal was mainly intended to streamline the procedure to become an **epi** Student and therefore to simplify the administrative control of the students' application.

The proposal was well received and approved by Council (91 in favour (91.9%), 8 against (8.1%), 16 abstentions). The Treasurer then presented a "discussion paper" on a potential change of practice regarding the annual studentship fee. The problem notably arises from the fact that if an **epi** Student pays the studentship fee at the beginning of the year and then passes the EQE, they will also have to pay the "regular" subscription fee. This could be regarded as an unfair double payment. In such a situation it could be contemplated that the successful **epi** Student only needs to pay 50% of the "regular" subscription fee.

The paper will be discussed with the By-Laws Committee in order to make a proposal at the next Council meeting.



*Amélie Faivre, epi Secretariat*

## 16/ Annual budget 2022

The Treasurer proposed to keep the amount of the annual subscription for 2022 at 190 EUR if paid before April 1, 2022 and 240 EUR if paid after April 1, 2022. The proposal means that the amount of the annual subscription for **epi** studentship is therefore also kept stable at 95 EUR.

Council approved the amounts proposed (107 in favour (95.5%), 5 against (4.5%), 5 abstentions).

The Treasurer also requested Council to approve the 2022 budget.

This was done at a large majority (108 in favour (98.2%), 2 against (1.2%), 5 abstentions).

## 17/ Election and by-election of Committee Members

A member of the Disciplinary Committee was elected as of 1<sup>st</sup> January 2022 for the remainder of the 3 year-term that will end in the spring of 2023.

Full and/or substitute members of the following Committees were elected (in that order) for the remainder of the three-year term that will end in the fall of 2023: Committee on Biotechnological Inventions, Litigation Committee, Online Communication Committee, Professional Conduct Committee.

The detailed and up-to-date composition of the Committees is available on the **epi** website (<https://patentepi.org/en/epi-bodies/epi-committees>).

## 18/ Possible amendments of decisions 3.3.4. and 3.3.5

These decisions define the rules governing how Committee members are elected during Council meetings (either according to the general elections procedure or to the by-elections procedure). The aim of the amendments is to save time



**Sadia Liebig, Katharina Jung, epi Secretariat**

during Council meetings and better streamline the Committees election process. Elections would be carried out by electronic voting before a Council meeting, and the result would be confirmed during the meeting itself. There would be no reopening of vacant positions. These measures would not apply to elections to the Disciplinary Committee. A first draft of amended decisions 3.3.4 and 3.3.5 was presented.

Council approved the principle of amending decisions 3.3.4. and 3.3.5 (90 in favour (90%), 10 against (10%), 12 abstentions).

The Secretary General and the Deputy Secretary General will work with the By-Laws Committee to fine tune the text of each amended decision to be voted at the next Council meeting.

### 19/ Professional Conduct Committee: proposed amendments of the Code of Conduct

The Chair of the PCC, Mr. Checcacci, presented proposed amendments to the Code of Conduct, in particular in relation to article 4 (conflict of interest) and article 5 (relationship with other members), as well as the creation of a new article concerning conduct provisions in connection with elections within epi. The proposed amendments need to be further discussed and fine-tuned before a decision can be taken by Council.

### 20/ Professional Education Committee: e-EQE

Mr Tiem Reijns (NL), a member of the EQE Examination Board, provided Council members with an update on the eEQE 2022. Candidates received in October access to the Wiseflow platform onto which a number of past papers had been loaded. Mock papers have been prepared by epi and will be made available to candidates.

Concerning the future eEQE, an analysis of dozens of previous papers is on-going with the aim of identifying, for each paper, the criteria to be tested. A set of modular papers will be presented once the analysis is done.

## 21/ Diversity and inclusion

In its September 2021 meeting, the Board decided to create an ad-hoc working group to address the topic of diversity and inclusion. The Chair of the working group, Mr Névant, presented the issues at stake (context, what are diversity and inclusion, why is it important for epi to look into this matter). On behalf of the working group, Mr Névant requested permission from Council to continue its work until at least C92 in order to (i) come up with a policy statement, (ii) help providing material to support our members to best address and adapt to the need of our clients, and (iii) propose actions to grow epi's commitment to diversity and inclusion.

This request was approved by Council.

## 22/ Briefing paper on European Patent Commercialization Certificate (EPCC). Motion of the Swiss delegation

The Chair of the IP Commercialization Committee, Mr. Stöckle, presented a proposal to create a European Patent Commercialization Certificate aimed at showing that a professional representative has acquired skills to cooperate with lawyers regarding the valuation of patents. The certificate would be obtained on a voluntarily basis.

The Swiss delegation presented a motion to postpone the vote on the EPCC to a later Council meeting. The motion was approved by Council (78 in favour (90.7%), 8 against (9.3%), 6 abstentions).

## 23/ Report from Litigation Committee

The Chair of the Litigation Committee, Mr. Thomsen, reported progress of discussions with the EPO Legal Division concerning the possibility to include UPC activities in our Regulation on Discipline. Mr Thomsen also mentioned that the process of appointing members of the UPC Advisory Committee will start soon. The Advisory Committee is in charge of establishing a list of candidates to be appointed as judges of the Court, and will be composed of one representative of each Contracting State. Mr Thomsen stressed that at least one of the representatives should be a European Patent Attorney.

## 24/ Review of decisions and actions and closing of meeting

The Deputy Secretary General listed all decisions made and actions taken during the meeting. President Leyder then thanked the participants and the support team before closing the meeting at 6:55pm. Break-out rooms were opened so that the participants could continue discussing various topics on an informal basis.

# Launch of the virtual epi Artists Exhibition on the epi website

The European Patent Institute is honoured to report, that the 12<sup>th</sup> **epi** Artists Exhibition has been launched virtually on the **epi** website on 28 October 2021.

We were very pleased to celebrate the 30<sup>th</sup> anniversary of the exhibition this year, as it has become a tradition within the cultural life of **epi** since 1991.

Covid-19 restrictions required us to organise the exhibition virtually on the **epi** website. Thus, the **epi** has put a lot of effort to create the appropriate platform for all our artists to present their artwork to a wider audience.

We are proud to have 31 creative members participating in the exhibition, with 206 great artworks of different kinds on display.

To duly honour the presentation of the **epi** artists and their artworks, the **epi** organised a virtual "Get Together" and gave the artists the opportunity to present themselves to the audience, introduce their artworks, and to exchange experiences and thoughts. The event took place right before the 91<sup>st</sup> Council Meeting. There was a lively atmosphere, and it was very much appreciated by all participating guests.

We thank all the artists for providing their contributions, and we are equally impressed by these extraordinarily talented **epi** members. More importantly, we very much look forward to continuing this valued and successful tradition!

You are kindly invited to follow this link for a virtual tour through the exhibition:

<https://artists-exhibition.patentepi.org>







# Patent practice

## Time Limits at the EPO

C. Mercer (GB)

**T**he EPO has indicated that it is considering whether there need to be any changes to the rules relating to time limits to support the end-to-end digitalisation of the patent granting process. We need to know whether you think that the present Rules need changing and, if so, how the Rules should be changed. If you have any comments on the issues referred to below; please send them to [eppc@patentepi.org](mailto:eppc@patentepi.org).

### The Ten Day Rule

Rule 126(2) EPC states that:

Where notification is effected by registered letter, ... such letter shall be deemed to be delivered to the addressee on the tenth day following its posting ..."

In practice, this means that, for a notification under this Rule which sets a deadline, it is necessary to calculate the date on which the notification is deemed to have been received and then add on the period for meeting

the deadline to work out what is the due date for a response.

This Rule was written when most notifications were sent by postal mail. However, the EPO is now encouraging the use of electronic means for delivering such notifications. The EPO is therefore considering whether the ten day rule is still required.

It could be said that removing the ten day delivery period would simplify the calculation of time limits, especially where the ten day period spans two months. However, most representatives use computerised records systems which may be able to automatically calculate the correct deadline and so there is no need to change. It could also be said that removing the ten day period would



Chris Mercer

reduce the time available to deal with a notification and so could lead to more deadlines being missed or to more further processing being required. It has also been said that this rule gives extra days to respond which are useful when the client is not aware and instructs on the last day. What do you think? What, if anything, would you consider important?

### The Response Date

A suggestion which has been put forward is that the EPO should be obliged to put the response date on the front page of any notifications under Rule 126. It has been suggested that this would make it more easy for everyone as the deadline could be seen immediately. However, this assumes that the EPO calculates the deadline correctly. What would be the situation if the EPO incorrectly calculated the response date? What if the notification sets two response dates but only one was on the front page? Would it help you to have the due date on the notification? In particular, would it still help as much if the ten-day rule were to disappear?

### Minimum Response Period

Rule 132(2) EPC states that:

... a period specified by the EPO shall be neither less than two months nor ..."

The EPO considers that there are circumstances where a matter could be dealt with in less than two months, for instance where there is a minor formality objection. However, that may depend on who the applicant is and by whom they are represented. It may be that an applicant is represented by a local agent and the local agent instructs a representative before the EPO. It could further be the case that the applicant does not have an EPO language as their language and requires a translation. This would make meeting a one month deadline even more difficult. It may also be difficult to determine what is a "minor" objection. Something which looks minor to a Formalities Officer may actually be major for the applicant. The time available to respond would also be reduced if the ten day period were to be removed. Would this lead to an increase in the number of requests for extensions or more further processing? What do you think?

If you have any further thoughts about time limits raised by the points above, we would also like to receive them as soon as possible.

As this is addressed to European patent attorneys, and attorneys like deadlines, please let us have your comments by **31st December, 2021**.



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# Belgian Patent Attorneys are getting organized – Launch of the Belgian Institute

E. Blanche – Belgian and European Patent Attorney – Head of Patents at Office Kirkpatrick

The first general assembly of the Institute for Belgian patent attorneys was held on 30 September 2021. This follows many years of preparation in a particularly complex frame of Belgian regulations.

Access to the profession requires the passing of a qualifying examination. Subsequently, there was no follow-up, no clear definitions of the prerogatives or obligations of Belgian patent attorneys. It was, therefore, very difficult for the Office to provide an up to date list of professional representatives resulting in many people on the list being long retired or even dead.

There was no organization responsible for training or continuous professional development or code of deontology. In essence, there was no official organisation for patent attorneys to contact; to address questions; or to share experiences.

Over several years, a small group of Belgian patent attorneys (which I'm not going to name lest I forget anyone) joined forces and worked hard in collaboration with the Belgian Patent Office to propose a text that would fit within Belgian laws. Thus, on 08 July 2018, a Law was enacted giving protection for the title of "Mandataire en brevets / Octrooigemachtigden" thereby giving birth to the Belgian Institute.

The mission statement of the Institute includes:

- Establishing a list of its members;
- Coordinating continuous professional development for its members;
- Ensuring the respect of the Disciplinary Rules and the Code of Conduct;
- Allowing the expression of opinions on subjects within its competencies (on its own initiative or on request);
- Allowing for the exchange of information with the Commission in charge of the qualification of the patent attorneys about the affiliation status of the members of the Institute.

The Institute is composed of three Divisions: a General Assembly, a Council and a Disciplinary Committee.

Belgium is a federal state, consisting of three Regions: Brussels, Flanders and Wallonia, and three official lan-

guages: Dutch, French and German, not necessarily overlapping. The use of languages within federal administrations is strictly defined in a law dating back to 1966. Depending on whether you are an individual or a company, and depending on your address, you may not be free to employ any language in your communications with federal services.

To be in line with language and representativity within the Institute, the President and Vice-president of the General Assembly must not belong to the same language community. The same rule applies in the Council, consisting of four elected members, where *"two members must belong to another linguistic group"* and the president and vice president of the Council must not belong to the same linguistic group. The Disciplinary Committee consists of four members (comprising a President nominated by the King and three elected members), and four additional members with similar language provisions. Elected and nominated members can hold office for up to six years in all three Divisions.



Emilie Blanche

At its initial meeting on 30 September 2021, the first task of the General Assembly was to proceed with the elections for the various divisions. A call for candidates had been published in spring. Applicants had to choose the language community they were running for (as many bilinguals could have run for both) and provide a CV. There was also an expectation of gender parity for the members of the Council.

An initial problem was to determine the number of active Patent Attorneys. Subsequently, elections were conducted step by step, starting with the President of the General Assembly, with a pause in between each vote to let the organizing team (the Belgian Office) check within the list of remaining candidates as to who could "run" for the next position in view of its language community and gender requirements where applicable. This led to situations where more than five people could be elected, and only one was suitable for the next round.



By mid-day, the elections had been successfully concluded. The afternoon was spent discussing the rules of each of the three Divisions, and voting on proposed amendments, process which could not be finalized due to the absence of a quorum by the end of the afternoon to allow validation of the votes.

It was gratifying to see that elected members originated from both industry and private practice, which will hopefully bring a constructive balance. Now, the Institute has to start

operations, a first Phase being finding an address, opening a bank account, and many other practical matters. The Disciplinary Committee will only start during a second Phase when a basis for its establishment has been determined and when members are officially affiliated to the Institute following payment of an annual membership fee. It is hoped that the profession can only benefit from a better organization (in terms of training and education); dialogue between colleagues (of both linguistic communities); communication with the Patent Office; and deontology rules.



13 May 2022:

## AIPPI – 125<sup>th</sup> Anniversary celebration Conference and dinner Save the date Brussels

Did you know that AIPPI was founded in Brussels almost 125 years ago?

AIPPI, the International Association for the Protection of Intellectual Property (Association Internationale pour la Protection de la Propriété Intellectuelle), is the world's leading not-for-profit association dedicated to the development and improvement of laws for the protection of intellectual property.

To celebrate its 125th anniversary, AIPPI Belgium & AIPPI International are pleased to invite you to **a one-day event combining a hybrid conference and a social event** in prestigious locations in the heart of Brussels, the SQUARE and the VAUDEVILLE.

The theme of the day will be IP and Common Welfare with special focus on Health and Environment.

**Who should attend?** AIPPI members, IP practitioners, political circles and institutions, media, non-governmental organisations, think tanks and any interested party.

Programme and practical information available at <https://www.aippi.be/events>.



# Case Law

## Decision No. G4/19 of the European Patent Office

### Contribution to the discussion on double patenting in Poland

J. Siewiesiuk, Partner, patent attorney, European patent attorney, AOMB Polska

M. Oleksyn, Senior Counsel, attorney at law, Sołtysiński Kawecki & Szlęzak

In light of the lately much commented decision of the Enlarged Board of Appeal of the European Patent Office in case no. G4/19 concerning prohibition of double protection of the same invention by means of a European patent, it is worth considering the current status of possible simultaneous patent protection in Poland.

The need to legally regulate circumstances where a single patent holder has protection under two or more exclusive rights whose scopes of protection coincide (in particular: exclusion of such protection – which is one of the possible solutions in this respect) arises primarily from the requirement of securing the legal situation of other market participants whose rights are limited by valid patents.

But let's start from the beginning and in proper order.

#### Poland as member of the EPO

Poland has been a member of the European Patent Organisation since 1 March 2004. Patents granted by the European Patent Office (EPO), stemming from European patent applications filed after that date may be validated in Poland and have the same legal effect in our country as patents granted by the Polish Patent Office (PPO) on the basis of national patent applications. The first validations of European patents in Poland appeared in 2005. According to the data in the annual report of the PPO for 2019, the number of validations of European patents in Poland in that year was 13,020 whereas the number of all European patents validated in Poland and remaining in force was 73,638. For comparison: the number of exclusive rights granted by the PPO and remaining in force was 21,959

(the total number of patents for inventions and protection rights for utility models).

### Filing patent applications with the PPO and the EPO

Applicants can apply for protection of the same invention by filing a national application with the PPO and by filing a European application with the EPO. Typically, they first file with the PPO (e.g. because of better accessibility – much lower official fees and proceedings in the Polish language), and up to 12 months later they file a second patent application – i.e. a European patent application with the EPO, claiming priority from the first filing. The application filed first is referred to as the first application. The application filed later is called the subsequent application.

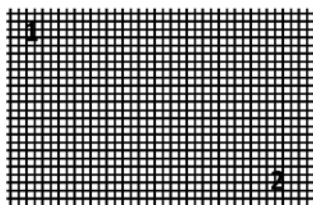
The first application and the subsequent application do not have to be identical but they often are. In order to properly claim priority, the subsequent application must relate to the invention described (disclosed) in the first application. In other words, priority holds to the extent

that the subject matter of the subsequent application coincides with the disclosure of the first application.

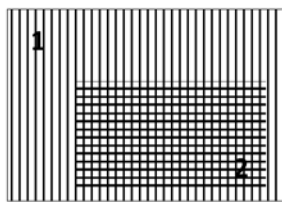
### Possibility of coexistence of a patent with the PPO and the EPO

The PPO and the EPO conduct parallel but independent proceedings. Experts of these offices make autonomous decisions independently of each other. It may therefore happen that both applications (the Polish one and the European one) are refused, that a patent is granted on the basis of only one of these applications or, finally, that two patents (the Polish one and the European one) are granted. In the latter case, it is possible to validate the European patent in Poland. The validated European patent will then coexist in the Polish legal system with the national patent.

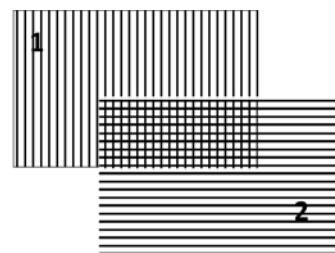
When looking at the material scope of the monopoly resulting from such coexisting patents (1 and 2), typically we will see one of the following three pictures, wherein No. 1 is the Polish patent and No. 2 is the validated European patent, or the other way round.



(A) Identicalness



(B) Inclusion



(C) Overlapping  
/ a shared part

Once a patent is granted, annual fees must be paid in order to maintain it in force, for a maximum of 20 years from the filing date. If the patent holder is not interested in maintaining the patent, it is enough to stop paying for protection, which results in the patent lapse at the end of the last year of protection that was paid for.

### Let's look at three possible scenarios...

It is reasonable to assume that the applicant (and later: the holder of the right) acts rationally. In particular: as a rule, entrepreneurs and companies do not want to pay twice for the same thing, e.g., for maintaining two patents with an overlapping scope, or for actions aimed at obtaining one of them (which require effort, time, and money) in a situation where the other one has already been granted. There is therefore a fairly natural economic 'barrier' that prevents coexistence of patents on 'the same thing'. However, we should be aware that, for the time being, in Poland there is no legal ban in this respect.

In practice, one of the following three scenarios is usually seen:

→ Scenario 1: PPO refusal and validation of the EP in Poland

In a situation where the proceedings before the PPO are still pending while the applicant gets a European patent granted, it is only natural that the applicant would like to abandon the national proceedings, validate the European patent in Poland and then maintain patent protection in the subsequent years, as needed.

Examples of such situations, drawn from the professional experience of the co-author (JS), are presented below:

Patent application entitled "Method of silvering surfaces, especially aluminium surfaces", Polish application no. P-392419 of 16 September 2010 – refused in May 2013; European application no. EP 11180709.5 of 9 September



2011 – granted in December 2012. The European patent was validated in Poland and remains in force.

Patent application entitled “Method of electrochemical-mechanical polishing of silicon carbide wafers”, Polish application no. P-391076 of 27 April 2010 – refused in November 2013; European application no. EP 11163617.1 of 23 April 2011 – granted in April 2013. The European patent was validated in Poland and remains in force.

Patent application entitled “Multi-family housing prototype with split-level, variable height apartments”, Polish application no. P-407724 of 31 March 2014 – refused in June 2020; European application no. EP 15187198.5 of 28 September 2015 (without priority) – granted in January 2020. The European patent was validated in Poland and remains in force.

In all of the above cases, the national proceedings in Poland (uncertainty of outcome) were abandoned in light of the obtained European patent (certainty of holding a patent).

→ Scenario 2: Polish patent first – no validation of the European patent in Poland

In a situation when proceedings before the PPO end with a grant, and later the applicant obtains a European patent, the applicant does not need to validate their European patent in Poland (and incur the associated costs). As long as the scope of protection under the Polish patent is satisfactory to the holder, only the national patent in Poland would be maintained.

Examples of such situations, drawn from the professional experience of the co-author (JS), are presented below:

Patent application entitled “Method of producing graphene”, Polish application no. P-391416 of 7 June 2010 – granted in August 2012, the patent remains in force; European application no. EP 11168749.7 of 6 June 2011 – granted in November 2018. The European patent was not validated in Poland (but was validated in selected other EPO member states).

Patent application entitled “Suspension of graphene oxide nanoflakes in water, its use and a method of preparation thereof”, Polish application no. P-407166 of 13 February 2014 – granted in September 2017, the patent remains in force; European application no. EP 15707557.3 of 5 February 2015 (as the regional phase of an international PCT application) – granted in July 2020. The European patent was not validated in Poland (but was validated in selected other EPO member states).

→ Scenario 3: Polish patent and validation of the European patent in Poland

However, it is also possible that the applicant completes the proceedings before the PPO with a grant and furthermore completes the proceedings before the EPO, also with a grant, validates this European patent in Poland, and then maintains both of these patents in force in our country.

In scenario 3, as long as the applicant is determined to complete both proceedings (before the PPO and the EPO), it does not matter which patent (Polish or European one) is granted first.

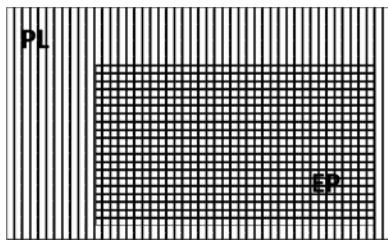
An argument for validating a granted European patent in Poland is the fact that protection under the European patent can be maintained longer than under the national patent priority of which is claimed – typically about a year later. Note that this is an advantage that always occurs, i.e., also in the absence of a national patent (scenario 1) or despite having a national patent (scenario 3).

By no means is this a purely academic possibility; to the contrary, it comes true as part of the legal system in our country.

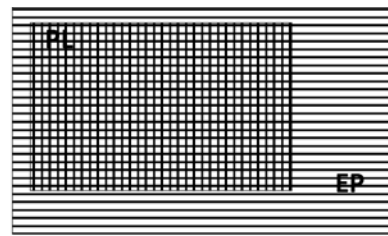
An example of such a situation, drawn from the professional experience of the co-author (JS), is presented below: Patent application entitled “One-stage method for production of HTP (high test peroxide) hydrogen peroxide for propulsion applications and system for production thereof”:

Polish application no. P-413099 of 14 July 2015 – granted in May 2019, patent no. PL 233084 B1 remains in force. European application No. EP 16179128.0 of 12 July 2016 – granted in August 2017. European patent no. EP 3118157 B1 has been validated in Poland and remains in force.

Interestingly, in this case the European application was identical to the Polish one. Each of the applications included – as the title suggests – two solutions, i.e., a method and a system designed to implement that method. Analysis of the claims of the patents granted based on these applications shows a rather complex relationship between the scopes of protection obtained: when it comes to the system, the Polish patent provides broader protection than the European one – the Polish patent covers what the European patent does, and more. As far as the method is concerned, however, it is the opposite. This is illustrated in the figure below:



system



method

## The real need for legal regulations

It is therefore clear that there is already a real need in Poland to legally regulate the issues of double patent protection resulting from a European patent validated in Poland and from a Polish national patent or protection right for a utility model. As time passes, this need grows, because more and more often we would see scenario 3 discussed above being implemented by the patent holder. Regulation should concern at least the following aspects:

in particular on the following points:

- the scope of actual protection under parallel overlapping rights,
- the question of validity of (one of) those rights – and its impact on the scope and validity of the other right,
- the question of changes in ownership of (one of) those rights – and their relation to ownership of the other right.

## Poland vis-à-vis other EPO member countries

There are 38 member states of the European Patent Organisation. In 31 of them, the issue of simultaneous patent protection on the basis of a national patent and a European patent is regulated and, generally, not allowed. In Portugal, simultaneous protection is allowed. In Austria, Denmark, Finland, Iceland, Norway, Poland, Sweden, and Hungary simultaneous protection is not excluded. In Poland – in practice – this means that, for the time being, there are no legal regulations in this respect.

## Practical implications in Poland

As mentioned above, the Polish patent law does not exclude the possibility for the same entity to obtain parallel patent protection in Poland on the same solution based on: (i) a national patent application filed with the PPO and the national patent obtained therefrom, and (ii) a European patent application filed with the EPO and the European patent obtained therefrom, later validated in Poland.

The recent EPO decision no. G4/19 on double patenting, and the above-mentioned scope of its admissibility in

Poland, provide an excellent opportunity to take a closer look at some practical consequences of the same entity obtaining two patents that are in force in the same territory with respect to the same solution. Observations made in this respect are all the more interesting considering that two patents that are in force in Poland on the same solution may (as shown earlier in the figures): (A) claim an identical scope of exclusivity, (B) be in a relationship of inclusion with each other (e.g. the scope of exclusivity resulting from a national patent is included in the broader scope of exclusivity resulting from a European patent validated in Poland – or vice versa), or (C) overlap each other, i.e., in a situation where, apart from the shared part covered by both patents, each of them claims some additional technical features concerning the protected solution that are not protected under the other patent. Below are some practical perspectives from which such a phenomenon may be looked at. We are leaving out of this summary the previously mentioned economic aspect related to the need to bear the costs of maintaining parallel protection of such co-existing exclusive rights.

## Which weapon in case of infringement?

If, without the holder's consent, a third party uses a solution protected by co-existing patents in Poland, the decision on which of the two should be used in the infringement suit would be based on the holder's assessment of the facts of the case, including the extent of the third party's possible encroachment on the protected patent exclusivity, as well as the occurrence of one of the cases (A)–(C) presented above. Of course, the most interesting variant is the one where the technical solution used by a third party (e.g. a solution contained in a marketed product) falls within the scope of exclusivity that results from both coexisting patents. Such a situation raises an important question as to which patent is the appropriate legal tool for defence against infringement. Under such circumstances, the patent holder should be interested in and analyse at least such aspects as: (i) the impact of the proceedings conducted in Poland on any possible proceedings in other countries concerning the same technical solution, (ii) the effects that a final judgment in a case based on one of the coexisting patents would have on any proceedings based on the other one, (iii) the

scope of claims that may be pursued in an infringement suit based on each of the patents.

### Defence against invalidation

The validity of a granted patent may be challenged by a third party who can prove that a granted patent did not meet the legal patentability requirements.

Also, an attack on validity of a patent is a fairly standard means of defence when the holder takes legal action to enforce the patent, in particular by initiation of court proceedings. In this context – in view of last year's abolition in Polish patent law of the requirement that the entity requesting invalidation of a patent must demonstrate the existence of the so-called legal interest in seeking invalidation, thereby opening up access to invalidation for everyone – the holder's choice of only one of the coexisting patents as the cause of action will in no way affect the level of risk of an attack on the validity of both patents.

However, what is important in the context of proceedings to attack the validity of coexisting patents in Poland are the legal grounds for requesting invalidation with respect to a national patent and a European patent validated in Poland and the consequences that may ensue. The authority competent to assess a request for invalidation of both a national patent and a European patent validated in Poland is the Polish Patent Office. But a national patent shall be invalidated on the grounds set out in the Polish Act of 30 June 2000 – Industrial Property Law, whereas the grounds for invalidating a European patent shall be sought in the provisions of the European Patent Convention of 5 October 1973. And although the grounds for invalidation of both types of patents are very similar (because the cited provisions of the Convention and of the Polish Act are harmonized): (i) they are not identical, and (ii) the practice and case-law concerning the use of each ground have some differences too. This in turn may affect the decision of the PPO and of administrative courts on the validity of each of the two types of patents, also in a situation where they protect an identical solution.

### Coexisting patents in trade

In the context of the simultaneous effect on the market of two patents that are 'identical' or very similar with regard

to their scope of protection, reality may produce many interesting scenarios. As an example, let's think of a situation where one of the patents ceases to be property of the previous patent holder (or of a company in the holder's capital group) and feeds a competitor's portfolio of intellectual property rights.

### Coexisting patents vs. company valuation

Last but not least, from the perspective of the value of a business, the fact that an entity holds two patents in Poland on the same solution may (but does not have to) have a significant impact on its market valuation. But a potential sale by the patent holder of one of the patents held (particularly to an entity from outside the patent holder's capital group) would certainly have an impact on such valuation. Such a transaction of selling one of the patents will in fact deprive the valued company of exclusivity to use the specific innovative solution.

### Practical tips for entrepreneurs

Before the issue of simultaneous double protection is properly regulated in our country, Polish entrepreneurs who want to maximally benefit from the tools of Polish (national) and European patents should make sure to:

- properly prepare the application description, including properly drafting the patent claims, in order to use properly the priority right, obtain the patent and, after it has been granted, have a practical ability to enforce protection on its basis;
- conduct proceedings before the PPO and the EPO consciously and in a coordinated way, weighing the benefits and costs (see scenarios 1, 2 and 3 discussed earlier);

In view of the complexity and multi-layered nature of the aspects presented above, it will also be important to be supported by specialists experienced in this field – patent attorneys who professionally appear before the PPO and the EPO, as well as attorneys at law experienced in patents. This circumstance has also been noticed by the Polish legislator, who, in July 2020, introduced (with few exceptions) the rule of obligatory representation by a professional attorney in cases concerning protection of intellectual property rights.





# Education

## Tutors' Report on the EQE 2021 Papers and the Meeting between Tutors and EQE Committees

N. Cordes (NL), L. Ferreira (PT), A. Valborg Guðmundsdóttir (IS), A. Hards (DE), J. Hoekstra (NL), H. Marsman (NL), and R. van Woudenberg (NL)

Each year in September-October, the European Patent Academy and the **epi** arrange a meeting of EQE tutors and members of the EQE Committees, usually referred to as "the Tutor Meeting". The goals are to discuss this year's papers, to improve future EQE's by openly exchanging ideas and to help tutors prepare candidates for next year's exam.

The Examination Board has kindly given the tutors permission to publish their own report of the important points so that candidates can more easily find this information. In addition, the comments can greatly assist when reading and interpreting the official Examiners' Reports. The Tutors' Report appears each year in the last edition of **epi Information**.

This year's meeting was held by videoconference, in the mornings of 19 and 20 October 2021. Tutors, other EPO

and **epi** members from the Academy, EQE secretariat and **epi** institute, as well as Committee members and Examination Board members were present. Unfortunately, this year's meeting did not have the usual, much appreciated, informal aspect of the meeting (dinner, drinks, coffee, lunch). We all look forward to having the 2022 Tutor Meeting again in person at the EPO!

Some participants submitted questions for the Committees by email prior to the meeting, which were distributed to the committee members prior to the meeting. During the meeting, additional questions were asked. The questions were addressed by the Committees and the Examination Board when discussing the papers. The answers are incorporated in this report and can be used to supplement the information from the Examiners' Reports.

This Tutors' Report contains the following sections:

1. Pass rates EQE 2021;
2. The online EQE: e-EQE;
3. General remarks from the Tutor Meeting;
4. Paper A;
5. Paper B;
6. Paper C;
7. Paper D;
8. Pre-Exam; and
9. Concluding remarks.

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

My special thanks to my co-authors -in alphabetical order- Nico Cordes, Luis Ferreira, Anna Valborg Guðmundsdóttir, Andrew Hards, Jelle Hoekstra, and Harrie Marsman for finding time to prepare the individual paper summaries.

We all wish you good luck in 2022,  
Roel van Woudenberg (editor)

## 1) Pass rates EQE 2021

In view of the cancellation of EQE 2020 in view of the COVID-19 pandemic, the Supervisory Board allowed all candidates that satisfied the 3-year supervised training period (4-year for examiners) to sit one or more main exam papers in 2021 without the need to have sat and passed a Pre-Exam<sup>1</sup>. As a result, the number of Pre-Exam candidates was about 2/3 of the usual number. The number of main exam candidates was significantly higher (about double) for this same reason, but especially because of the 2020 cancellation which required the whole 2020 group to defer its sitting to 2021.

In 2021, 547 candidates out of 626 (87%) passed the Pre-Exam, similar as in 2019 (2019: 88% from 920 candidates; 2018: 74%; 2015-2016-2017: 76%).

1093 out of 2780 candidates that took at least one paper candidates passed the EQE (compared to 672 out of 1746 last year).

For the individual main exam papers, paper A, B and C showed a similar pass rate as in 2019. The pass rate of paper D was very high due to a full awarding of 25 marks to the first 25-mark D1-part (in view of an issue at its

start, see below), whereby candidates only needed 25 resp. 20 marks from the rest of the paper (i.e., the second 25-mark D1-part and the 50-mark D2-part) for a pass resp. compensable fail.

The official results for each paper, as published on the EQE website and dated 29 June 2021 for EQE2021, are shown in the table below:

EQE 2021*	#Candidates**	PASS***	COMP.FAIL	FAIL
Pre-Exam (4 x 70min)	626 (920)	87,37 %	--	12,62 %
A (3½ h + 30 min)	1905 (1002)	74,38 %	4,41 %	21,21 %
B (3½ hours)	2005 (819)	55,26 %	10,02 %	34,71 %
C (2 x 3 hours)	1852 (1043)	47,08 %	9,67 %	43,25 %
D (90 min + 90 min +3 hours)	2003 (1198)	85,57 %	5,89 %	8,24 %

\*Note: As of 2017, the Pre-Exam, A, B, C, and D papers are designed according to Rule 22-27 IPREE as 4h, 3½h, 3h, 5h and 5h respectively, but all candidates are granted an additional thirty minutes per paper to these durations (by Decision of the Supervisory Board of 17 November 2016). In the e-EQE 2021, the Pre-Exam and C and D papers were split into multiple parts. Each part had to be completed before the start of the next break, with the next part only becoming available after the break. As a result, candidates were no longer free to allocate their time as they see fit across the different parts of the Pre-Exam and the C and D papers. To compensate for this restriction, the total duration of the Pre-Exam, C and D papers was extended. Once the time allowed for a part had elapsed, it was possible to go back to that part.

\*\*Note: The 2019-numbers are given in brackets.

\*\*\*note: These pass rates as published do not include the results of any appeals. It is not known whether/ how many appeals have been successful in interlocutory revision by the Examination Board or before the Disciplinary Board of Appeal.

## 2) The online EQE: e-EQE

### The EQE went online

The Communication of 20 April 2020 of the Supervisory Board of the EQE<sup>2</sup> provided:

"On 4 March, the Board had unanimously decided to cancel the exams and pre-exams scheduled to take place in Munich and ten additional European cities from 16 to 19 March 2020. It did so after thoroughly analysing the information publicly available at the time about the COVID-19 pandemic in Europe. The main driver of such decision was the need to safeguard not only the health and safety of the nearly 3.000 people that participate and are involved in the organisation of the Exams, but also to preserve the health and safety of the public in general. At the time, the Supervisory Board also informed the interested parties that it would continue to follow-up closely the developments of the COVID-19 and that a final decision on the 2020 Exams and Pre-Exam would be taken and communicated."

In their communication of 23 July 2020<sup>3</sup>, the Supervisory Board indicated that the EQE 2021 would be an e-EQE:

<sup>1</sup> Decision of the Supervisory Board, 20 April 2020 & Communication of the Supervisory Board, 20 April 2020

<sup>2</sup> Communication of the Supervisory Board, 20.04.2020

<sup>3</sup> EQE 2021 – Important information from the Supervisory Board, 23.07.2020

“The European qualifying examination (EQE) 2021 is planned to be conducted online. [...] The EQE syllabus and the structure of the various examination papers will be as outlined in the REE and IPREE and in line with previous years' examination papers (Compendium)”.

In their “Information on the schedule” communication of 2 December 2020<sup>4</sup>, it was indicated how the exam papers and the schedule would be adapted for the online EQE 2021 (e-EQE):

“The EQE 2021 exam schedule is now available. Candidates are advised that this document may be subject to minor changes as testing continues.

The EQE 2021 will take place online using LockDown Browser.”

“The pre-examination and both papers C and D will be split into parts. This means that candidates will not be free to allocate their time as they see fit across the different parts of the papers. To compensate for this restriction, the total duration of the relevant papers has been extended. Once the time allowed for a part has elapsed, it will not be possible to go back to that part.”

“The **pre-examination** will have the same syllabus and character as before, but it will be split into four parts. Each part must be completed before the start of the next break, with the next only becoming available after the break.”

“**Paper D** will have the same syllabus and character as before, but it will be split into three parts. Each part must be completed before the start of the next break, with the next part only becoming available after the break. Paper D lasts six hours. Candidates will be allowed to print only the calendar.”

“**Paper A** will have the same syllabus and character as before [note from the editor: Paper A was not split in parts]. Paper A lasts four hours. Candidates will be allowed to print the prior-art documents and the drawings of the application, but not the letter of the applicant.”

“**Paper B** will have the same syllabus and character as before [note from the editor: Paper B was not split in parts]. Paper B lasts 3.5 hours. Candidates will be allowed to print the prior-art documents and the drawing(s), but none of the following: the description and claims of the application, the EPO communication, the client's letter and the amended claims.”

“**Paper C** will have the same syllabus and character as before, but it will be split into two parts. The first part is

to be completed before the break, with the second part only becoming available after the break. It will not be possible to go back to the first part after the break. Paper C lasts six hours. Candidates will be allowed to print everything except the claims of the patent in suit/opposed.”

The communication also included the start and end times of each (part of the) paper, and information about possible unscheduled breaks, which were only allowed for paper A, B, C part 1, C part 2, and D2, but not for the shorter parts (the four Pre-Exam and the two D1 parts).

### **Wiseflow**

EQE 2021 was conducted using the locked browser in the examination platform Wiseflow. Wiseflow provides a secure online exam platform, allowing candidates to take the exam from any suitable location (without any other person in the room and without any other electronic equipment in the room/within reach apart from the computer and screen used for the exam), i.e., typically from home or the office. There were no examination centers. A computer with a network connection was required, and only a single screen could be used of a size and resolution at the candidate's choice.

For the Pre-Exam, Wiseflow provides the questions in all three EPO languages and with onscreen True/False answer options (clickable bullets) to each of its 4 statements, also presented in all three languages.

For the main exam papers, Wiseflow provides a secure environment (FLOWlock) with the paper in pdf format and a proprietary editor with basic formatting functions (underline, bold, italics, but no underline: for indicating deletions in paper B, indicating the deleted part between square brackets was suggested; enumerated lists, bullet lists). The editor allowed a basic copy/paste from any text part of the examination paper into the editor, and within the editor. No annotation or highlighting was possible in the main exam papers, but was possible in the answer in the editor and in the Pre-Exam onscreen questions. Answers could only be provided by typing into the editor; it was not possible to scan a handwritten answer and upload that.

As in the previous exams, candidates could bring any paper documentation, and make notes on paper. These notes could however not be handed in. During the exam (and in the last Mock), the legal texts on the EPO website were also available in Wiseflow from “External Resources”; PCT legal texts were however not available as they are not on the EPO server. During the Tutor Meeting, we were informed that EPO legal texts will again be available in Wiseflow during EQE 2022, but unfortunately again no PCT legal texts.

<sup>4</sup> Information on the schedule for the EQE 2021 examination papers, 2 December 2020



## Mock exams

Candidates were able to have a first look at the examination system Wiseflow by means of a mock examination (Mock 1). Mock 1 was intended for candidates to test their equipment and get acquainted with the examination environment. Candidates, and registered tutors, were able to access the respective mock papers according to their enrolment to the EQE 2021 papers. There was no proctoring in Mock 1. Mock 1 was open from 22 December 2020 until 28 February 2021.

From Monday 1 to Friday 5 February 2021, a second Mock exam was available with a Pre-Exam paper prepared by the **epi** and main exam papers prepared by **epi**. Mock 2 was conducted with the same times and breaks as in the e-EQE 2021. Mock 2 included proctoring (AI and human invigilation), requiring a camera and microphone. In this manner, Mock 2 allowed candidates to test the system under realistic examination conditions. Also, some issues were detected and candidates were informed about those by the FAQ on the EQE website as well as by various blogs (e.g., the use of Alt-Tab in Wiseflow is considered by the system as a suspicious key combination and immediately ends the flow).

A further mock examination Mock 3 took place on 23 February 2021 with one main exam flow and one Pre-Exam flow. Mock 3 provided the last chance for candidates to test their equipment and system settings, including camera, microphone, invigilation, and ZenDesk. The contents of Mock 3 was not new as it focused on the testing of the equipment.

Many updates of the Wiseflow User Guide, Wiseflow Tutorial, e-EQE requirements, Tips for Candidates, and FAQ were published on the EQE website from December until late February, and various updates were made to the Wiseflow system between December and late February. Several blogs informed candidates about any updates and allowed candidates to share experiences and discuss issues and options.

At the Tutor Meeting, Nicolas Favre (Examination Board) indicated that more than 12% of the EQE 2021 candidates had not taken part in any of the Mocks and had not tested the exam platform prior to the exam! He strongly recommends all candidates to test the system and settings, and that special care needs to be taken with respect to virus scanner and automatic updates (which the lockdown browser will detect as unauthorized activities).

Nicolas observed that no one had tested what would happen if you do not do anything on your computer, but just read on paper for 30 minutes (as you may do in paper C) and/or work on paper for a while; there is a risk that your computer activates your screen saver or changes power mode.

## The actual e-EQE

The online exam took place from 1 March 2021 (Pre-Exam) and 2 – 5 March 2021 (main exam papers). Compared to earlier years, the main exam papers were in the same sequences as before (D, A, B, C), but A and B were held on subsequent days rather than on the same day, to limit the time behind the screen on a single day.

In the Pre-Exam, the sequence of the questions was randomized in each of the four parts (legal as well as claims analysis), to reduce the chance of cheating. Furthermore, in the legal part, the sequence of the statements within a question was randomized.

At the start of the first part of main exam paper (D1-1), all candidates could only see the German version of the first D1-part in Wiseflow. Candidates were not (immediately) aware whether the problem was an individual problem or a general problem and took all types of action: waiting, refreshing, getting in the Zendesk queue for support, exciting the system, ... Although technically the problem was solved about 6 minutes later (so that the candidates that had managed to keep a cool head could start to work on the English or French version), and candidates were awarded 30 minutes extra time (but requiring a refresh-action to actually receive those 30 minutes). This caused quite some unrest and discomfort and also resulted in a wide variety of conditions between candidates (time available depending on individual actions taken and language used; different panic and stress levels).

The day after the exam, the Examination Board issued a message<sup>5</sup> indicating that: "The Examination Board for the EQE is aware of a disruption affecting paper D1.1 and guarantees that no candidate will be disadvantaged as a result during the marking process."

At the Tutor Meeting, the Examination Board indicated that they had considered a large variety of ways to try to compensate for the differences; it thus took quite some time to decide on the matter and, when D 11/19 was issued and emphasized the need for a level playing field and equal treatment of all candidates, the fairest solution was to neutralize D1-1, i.e., to award the full amount of 25 marks out of 25 to all candidates for this first part of D1. This decision was widely appreciated.

## Legal basis in the EQE 2021

According to the decision of the Supervisory Board of 20 April 2020, "For the 2021 main examination only, candidates' answers will be marked either on the basis of the legal texts and document versions in force on 31 October

<sup>5</sup> Message from the Examination Board about paper D1.1 dated 3.3.2021

2019, or on the basis of those in force on 31 October 2020, depending on which of the two dates would give the candidate the higher mark.” Hereby, candidates that had fully prepared for EQE 2020 and were confronted less than two weeks before the planned exam, were not required to update all their legal texts for the EQE 2021.

It was indicated at the Tutor Meeting that apart from Guidelines of November 2018 (as being the ones in force on 31 October 2019) and from Guidelines of November 2019 (as being the ones in force on 31 October 2020), as well as the Guidelines of March 2021 (as being the ones in force on the date of the main exam papers and available via “External Resources” in Wiseflow during the exam) were accepted as valid legal basis.

At the Tutor Meeting, a tutor indicated that the differences between these three versions of the Guidelines are relatively small, but some differences may have affected the difficulty/ease of finding an answer (e.g., D1-2, Q.5 can be answered via GL/PCT-EPO A-V, 8 in the Nov 2019 or March 2021 version, but not in the Nov 2018 version, which did not yet include Chapter V – Drawings; a candidate using the Nov 2018 version thus had to find Rule 26.3ter PCT itself). This was considered acceptable as being a consequence of being flexible.

### 3) General remarks from the Tutor Meeting

#### *Opening words*

The meeting itself opened with words of welcome and introduction by Nicolas Favre (Chair of the Examination Board).

Nicolas indicated that the meeting would not be recorded in view of privacy and to allow open discussion. He also asked all participants to refrain from recording.

Nicolas drew the attention of the audience to the fact that the EQE is a joint EPO-**epi** effort, made possible by a large number of volunteers who were thanked for their immense work and time. It was commented that after such a large effort of carrying out the exam electronically and while working under very challenging conditions because of the new pandemic ‘normal’, it may be quite advisable to favour stability and avoid abrupt changes. It was generally accepted that changes should be communicated as soon as possible and always with ample time for the benefit of candidates.

#### *General remarks e-EQE 2021*

Some questions were received prior to the meeting. Generally, these questions would not be answered explicitly, but the answers were included in the presentations by the Committees.

Nicolas indicated that this very first e-EQE was an experiment. It went well, although it was not perfect, as it was a first-time event. The EQE learned from technical glitches, one having big consequences (the D1-1 disruption, see above). If glitches would happen again, the organization will react as soon as possible.

D1-1 was neutralized as a whole. It took some time to take that decision: many scenarios and measures were considered. The fairest was to neutralize.

The EQE learned a lot from the system and will optimize it further, as far as in their control and abilities. The Wiseflow system was selected from various candidates as it was the best suitable platform for the EQE in view of the need for 3 languages, all at the same time, and with 1000s of candidates at the same time.

The Examination Board tried to be as fair as possible in the marking to take into account the circumstances. E.g., for paper B there was not just one answer to get close to full marks. Also, apart from results from the pre-marking, comments on the blogs and other information available to the Examination Board were used in finalizing the marking scheme. Nicolas reminded us that the EQE is a joint effort between the EPO and **epi**, and that some of the comments posted on blogs indicate that some candidates seem to not be aware of this, as they refer to the EPO only.

All complaints, formal complaints timely filed as well as later complaints sent to the EQE secretariat, have all been considered by the Examination Board, even though no individual feedback was given to all concerned.

The number of appeals is higher this year than in previous years. However, the number of appeals is about proportional to the number of candidates, such that the number of appeals does not seem to be affected by the exam being online. At this moment, no further comments could be made about appeals in view of chair pending status.

All main exam papers are marked by two markers, which later check where and why they disagree.

The short time between the decision to go online and the exam was too short to adapt all papers significantly (the design process takes more than 2 years). Most EQE 2021 papers were as originally planned, i.e. on paper, versions, which were adapted within a very short time to the online format.

Guinea pig sessions, where members from other Committees take the exam, are done about 18 months before the exam, when the paper is in a more or less its final stage, in one language only (English). The guinea pigs also include

non-native English language speakers. As is clear from the timing, the guinea pig sessions were not done using Wiseflow, but with the classical paper exams.

The Examination Board decides as to what is printable and what is not. Each Committee is represented in the Examination Board. The Committees perform the actual split into parts and make the printable and online-only parts.

#### ***Outlook to 2022 [comments made spread out over the meeting by various people]***

Improvements to Wiseflow are not yet known. Technical limitations and functionality choices by the supplier may prohibit some improvements (e.g., Alt-Tab behaviour will likely stay the same, despite the wish to have it changed). It is expected that there will be some form of highlighting or annotation in the pdfs of the paper.

Discussions are ongoing on a possible EQE reform as of EQE 2024 or later. At this moment, no decisions have been taken yet, and no further information is available. EQE 2024 papers will be prepared according to the current format so that the exam can still be held in the current format, and –when a decision is taken– will also be made according to the new format.

#### **4) Paper A by Andrew Hards and Anna Valborg Guðmundsdóttir**

Paper A 2021 was held electronically and thus the paper was adapted to the Wiseflow and LockDown browser environment. However, fragmentation of the paper into smaller units was not possible and thus the candidates were presented with a full Paper A to solve within the traditional 4 hours.

Just before the examination, candidates were allowed to print the prior-art documents and the drawings of the application, but not the contents of the applicant's letter. A challenge of the LockDown browser was thus the analysis of the applicant's letter, seeing as it was not possible to mark or highlight the text in the PDF.

Paper A was presented at the tutor's meeting by the main drafter Jeremy Mauger and the topic this year involved coated engine components made from super-alloys for use at above 1600°C. The technical problem was to provide for increased lifetime of the components during these high temperatures as the coating ended up being partially lost when subjected to thermal stress. The solution was to provide for the coating on the component in the form of a columnar microstructure while still covering all three embodiments provided by the client each having a slightly different optimization effect.

Further to the above, the client proposed using two methods resulting in a different column microstructure coating, being either formed directly or machined afterwards on the component. The key idea here was to identify the essential features of each method producing the coating required to solve the technical problem, while assuring novelty vis-à-vis D1 and D2. To fulfil these requirements, it was sufficient to state that the two methods form the components of claim 1 or alternatively incorporate the essential features of claim 1 therein.

As usual, candidates should focus on adapting the applicant's letter into a description. The guidance provided by the committee included removing the personal instructions to the client and making sure that the description is logical and consistent with the set of claims drafted. Further to that, it is of course important to present the problem of the invention and highlight the advantages of the significant dependent claims. The figures or examples can be omitted.

The committee also stressed that candidates must not provide for more than one version of an independent claim ("shot-gun approach") in hopes for catching the best claim. This strategy will result in the worst claim being marked instead. As such, the "famous last claim" can destroy a perfect claim set.

In previous years, there would always be a few papers where the markers struggled with the candidate's handwriting. It was mentioned that the markers welcomed the easily readable typed solutions this year.

In general, the tutors at the meeting felt that Paper A 2021 was traditionally structured and in line with previous years. The paper tested essential and non-essential features, had a good mix of mechanics and chemistry plus requiring different claim types. This was supported by a pass rate of 74.4% with compensable of 4.4% which is within the normal range.

When enquired if the structure of Paper A can be expected to change in the near future, the committee said that they are not against that as such. However, the exams are setup for the claims to require certain features, preventing ambiguous or multiple potential solutions, making the current exam structure favourable. We will have to see if the next papers for A will show more variation in the future, as was done for paper B 2021 which introduced new exam aspects this year.

#### **5) Paper B by Harrie Marsman & Luis Ferrera**

For Paper B, moderator Nicolas Favre (Chairman of EQE Examination Committee I) and Harald Schmidt-Yodlee (EPO, main drafter) attended the meeting. Harald was assisted in the preparation of the Paper by Michael Kelly (EPO) and Carsten Hohendorf (**epi**).



Harald gave a presentation on the paper that had a pass rate of 55.3%, complemented by a compensable grade rate of 10.0%.

It was admitted that Paper B was perhaps the least suitable paper to be tested in an eEQE, due account taken of the split paper C, which otherwise would have been the more challenging paper to take electronically. Although it was tried to relieve the difficulties in the paper being provided electronically, the paper was not easy. In particular, it is not easy to see parts of the paper side-by-side and it is not possible to see parts of the answer side-by-side. Highlighting was also not possible. Paper B was probably the most affected paper by the lack of a major part of the exam in printed form.

Paper B was on a compost container for producing organic fertilizer from organic refuse using earthworms. The technical field was considered generally understandable by all candidates. The application presents the optimum conditions for earthworms in the composting process. The earthworms need a moist and aerobic environment. The refuse should not be too wet, because (1) the compost starts to smell and (2) earthworms will not compost the refuse. If the refuse is too dry the earthworms will not survive. It is therefore necessary to control the moisture by removing excess water if the refuse is too wet and by spraying water on the refuse, if the refuse is too dry. The application also refers to a dark environment for optimal development of the earthworms, which can be achieved by locating the container in a dark area, by a non-transparent covering lid, or by a floating lid.

Harald gave an overview of the paper, discussed the prior art and official communication, and the client's instructions and claims. Expected claims, expected arguments and inferior solutions were then discussed. This has also been covered in the very complete Examiners' Report.

Main issues in the paper were the presence of 3 independent claims: a container claim 1, a method for producing a fertilizer claim 4, and a calculation method for optimizing processing organic refuse claim 6. In addition to novelty and inventive step objections, the Examiner raised an objection under Art. 52(2)(c) EPC, a novum in paper B. Furthermore, 3 prior art documents were cited by the Examiner and reference was made to a third party observation dealing with an alleged public prior art, another novum.

This made that there were quite some arguments to be made and a difficulty of the paper was that compared to previous single papers B, this year there was less guidance to the solution. Or said in other words, there was not one single golden solution, this year.

Added to this, this was the first time that paper B was tested in an eEQE, and a number of tutors criticized the

fact that if less guidance is given by the applicant in its letter, the amount of time to draft the answers may need to be correspondingly increased.

Nevertheless, some participants expressed their preference to being able to copy/paste and make use of the new system. A tutor also suggested that a typing course could be selectively advantageous to those candidates disposed to improve their typing skills.

Fact was that there were quite a number of suitable solutions for claim amendments which all could score a considerable amount of marks. Thus, candidates who argued effectively in supporting a well-reasoned solution got substantial marks. It was said that creative candidates sometimes find unexpected solutions and this was not penalized. This applied especially to container claim 1 and quite some marks were available if the process method claims did not contain the same container limitations. Nevertheless, providing separate independent claims not referring to each other was something that was not necessarily expected from the majority of candidates.

In this respect, it was remarked that it was very important that a candidate decided rather quickly on a set of claims and then focused on the arguments in respect of support in the application as originally filed, novelty and inventive step, and in this paper also on the Art. 52(2)(c) EPC objection, and the public prior use issue raised in a third party observation.

Although the last two issues were not particularly difficult to argue, these were new types of objections and the total number of issues was quite high to solve in the allotted time.

On the three independent claims, it was emphasized that the Examiner in his Communication did not raise objections under Art. 82 EPC (non-unity) or under R. 43(2) EPC (multiple independent claims). The candidates were thus expected not to come up themselves with solutions to hypothetical objections under these EPC provisions. According to the IPREE, candidates have to respond to all objections raised. It is simply not needed to argue against issues that were not raised by the Examiner. Dealing with these points was seen as a waste of time with no marks to gain. Art. 123(2) EPC was seen as being clearly hinted at when the client mentions that "we performed further experiments".

The committee also commented that there was no indication of candidates losing points or making mistakes linked with the minor lack of marking-up in the client's amended claim 5 (only EN/DE versions).

In respect of claim 6, an objection was raised under Art. 52(2)(c) EPC. As said, this was a novum in paper B. In the

end, it could easily be solved by including in said claim that the method was a computer implemented method. But also other ways to amend this claim could attract marks to a maximum of 4 marks. There was no clarity objection regarding this claim in the office communication, therefore extensive reformulation was not necessary. However, the candidates who did so were not penalized. It was also commented that CII aspects frequently show up in numerous technical fields. As this matter received relatively few points, it was not seen to be a major obstacle to candidates.

The public prior use was clearly insufficiently elaborated and for that reason did not affect any of the claims. While referring to the relevant issues coming from the Guidelines, up to 8 marks were available. It was commented that most candidates did well in this matter and none adapted the claims to circumvent this document.

As was the case with the previous single papers B, the points for the claims are coupled to the amendments of the set of claims as suggested by the client. However, this year somewhat more own creativity was expected in the sense that the possible amendments were not necessarily in line with the suggestions of the client. This was not seen as a departure from the syllabus and character of previous years.

In particular, the preferred solution did not cover the embodiment with a transparent cover to use in a dark environment. The client's letter indicates that the scope of the suggested claims was commercially important such that the water spraying device was an acceptable delimitation. The client's letter may also be interpreted as indicating that the commercial scope should not be substantially reduced any further. However, this was not the interpretation of the Examiners' Report.

What was however as in previous years, and in fact to even a higher degree, was that the client is the authority in terms of the commercial products to be protected and not an authority in patent law.

It was stressed that by not responding to all the points raised in the official communication, a number of candidates were losing some marks that were relatively easy to obtain. Again it was mentioned that candidates were neither expected to write a letter to the client nor, as almost always is the case, write a letter to the marker. In particular, amendments proposed by the client but which cannot be carried out do not require any explanation.

For the argumentation of inventive step of the independent claims, there was a total of 26 marks. 20 marks for the defence of container claim 1, 4 marks for method claim 5 and 2 marks for the computer implemented method claim. Shorter inventive step arguments were appropriate for

claims 5 and 6. Even using '*mutatis mutandi*' could attract marks if used in correct places of the problem-solution argumentation.

For the container claim, D1 was clearly the closest prior art; in case you would have started from D2 or D3, a high number of marks would be lost. Starting from D1, a discussion on inventive step was expected wherein the non-obviousness of the invention based on D1 *per se*, and in combination with both either D2 or D3 would follow.

As indicated above, the Examiners' Report is quite detailed and should be read attentively.

A final remark by one of the Committee members was that he wished to observe that he was disappointed by quite unacceptable and inappropriate language expressed by certain candidates in a number of blogs after the Exam. The audience sympathised with him on that point.

## 6) Paper C by Jelle Hoekstra

The examination of Paper C 2021 was different from previous years in that it was held online and that it was split in two parts. Thirty minutes extra were given as a compensation for the expected overhead caused by this. The patent to be opposed and the prior art was available for printing, with exception of the claims of the patent that were only available online in the exam platform.

Looking first at the exam as if it was not held online, it can be observed that the paper was longer than average and that the technical content was more mechanical than average (and including more drawings). This will have been challenging for some candidates.

Annex 1 relates to an underwater energy storage device as is also claimed by the independent claims 1 and 4. The description of Annex 1 on the other hand was limited to storing electric energy using an underwater hydroelectric energy storage device. Annex 2 makes clear that old subsea storage tanks for petroleum products can also be seen as storing energy underwater, although they cannot be used as hydroelectric power plants. Since all prior art can be seen as underwater energy storage devices, all prior art is potentially relevant for both independent claims.

Annex 1 [0003] makes clear that underwater hydroelectric energy storage devices store electric energy as potential energy by using an electric pump to pump water into a reservoir against the hydrostatic pressure. At a later moment, propelled by the hydrostatic pressure, the water passes through a turbine which drives a generator. This converts the potential energy back into electric energy. Dependent claims 3(1), 5(4) and 6(5) include such a pump, turbine and generator and

should as such be seen as limiting the technical field to underwater hydroelectric energy storage devices. Annex 5 did not lie in this narrower field and could not be used as closest prior art in an inventive step attack on these claims.

Annex 1 claimed two priorities. Claim 1 was entitled to the first priority date; claims 2-5 were entitled to the second priority date. Claim 6, depending on claim 1 was attacked under Art.123(2). For claim 6, depending on claim 5, the committee had designed a partial priority situation. The range of claim 6 split into two sub-ranges. One subrange was entitled to the second priority date; the other subrange only to the filing date. This situation is new in Paper C, following G 1/15. Since partial priority will be here to stay in Papers C and D, it is recommended that candidates master situations as described in claim 6.

Five pieces of prior art were provided. A3, A5 and A6 were straightforward Art.54(2) documents. A2 could be used under Art.54(2) for the filing date part of claim 6(5). For all other claims A2 was published too late to be directly useable but could be used as evidence of earlier prior use and the footnote in A2 represented common general knowledge. The earlier prior use in A2 could not be used in any attack since the visible part of the prior use did not disclose sufficient detail. This is unusual in paper C. The evidence of common general knowledge in A2 could be used. It is recommended that candidates familiarize themselves with using 'too late' documents as evidence and prior use. A2 used in this exam provides a good example. A4 could be used under Art.54(3) for claim 1 and under Art.54(2) for the other claims. It was unusual that A4 was not novelty destroying for claim 1 and that the Art.54(3) aspect could not be used.

The following expected attacks on the claims were as such not unusual for Paper C:

- Claim 1: lack of novelty A3, combining two embodiments which was allowed based on a link between the embodiments.
- Claim 2(1): lack of inventive step – partial problems, using A3, A6, A4
- Claim 3(1): lack of novelty A3
- Claim 4 (independent): lack of novelty A5 in view of common general knowledge in the footnote of A2
- Claim 5(4): lack of inventive step using A4 and A5 (A5 was not closest, resulting in a swap)
- Claim 6(1): was added during examination and could be attacked under Art.123(2). The claimed range was shown in the description but not for the claimed embodiment.
- Claim 6(5): the first partial range lacked inventive step using A4 and A5, similar as for claim 5(4). The second partial range lacked inventive step using A2 and A6.

(Quite) some candidates did not agree with the intended attack on claim 4, arguing that A5 did not disclose 'buckling resistance'. Candidates performing an inventive step attack along the lines of claim 5 seem to have been awarded most/all marks for claim 4.

In summary, had Paper C 2021 been held onsite it would probably have been seen as a rather usual paper, albeit a bit long and a bit too mechanical.

In the online exam, the committee had the challenge to divide a paper into a two-part online exam, using a paper which was originally prepared for a single part, onsite exam. Quite some of the older C papers naturally split into two parts (independent claims targeted at different objects and the prior art more or less falling into two different groups). That was unfortunately not the case here – all independent claims relate to an underwater energy storage device and all prior art was possibly relevant.

A very creative argument was found by the committee for explaining why paragraph [18]-[23], claims 4-6 and Fig.5 of Annex 1 were not supplied to the European patent attorney yet in part 1 ("Due to unforeseen circumstances the European Patent Register does not seem to be functioning properly this morning. I present you with the information we have available now and will give you the rest of the information when the European Patent Register is available again"). The full prior art was already given for part 1. In part 2, the full paper was supplied. Candidates had to fully analyse almost 39 pages twice. This has clearly been challenging. A2 and A5 were not used to attack claims 1-3 in the first part. Had claims 4-6 been available immediately, it would have been easier to conclude that A2 and A5 were indeed not relevant for part 1 but only for part 2. Alternatively, A2 and/or A5 could have been provided in part 2 only or the time allocation to the two parts could have been changed (adding the extra 30 min. to part 1 only). The splitting in C 2021 leaves room for improvement.

All in all, C 2021 was somewhat more challenging than previous papers, due to its length, the split and some unusual aspects such as the partial-priority situation, but most well-prepared candidates will have been able to recognize and type most of the attacks in the time available for each of the parts. Candidates no doubt appreciate being able to type the attacks and be able to copy parts from the exam paper.

## 7) Paper D by Roel van Woudenberg

Representing Examination Committee III: Tiem Reijns (chairman), Martin Noe, Olivier Kern (D1), Scott Roberts (D2)



## General remarks (Tiem Reijns)

Tiem Reijns indicated that, apart from the technical difficulties, paper D was generally well-scored: candidates seemed (somewhat) better prepared, and the electronic syllabus was used widely.

This year's D paper had a record pass rate due to the neutralization (85,9% pass, 5,9% compensable fail). However, also already before neutralization the pass rate would have been good: about 50%. (Note that candidates obtained their real score, as well as the score including the neutralization. Unfortunately, no statistics were made available on the real scores, not on the effect of the neutralization). This high pass rate was not expected, but it may be due to the D2 being relatively straightforward and fair (as also some tutors indicated), and due to the forced time allocation (causing candidates to use more time on D1 and scoring better than the last few EQE's on D1; fewer candidates skipped entire D1 questions). Also, the D 2021 paper is designed for 5 hours, 30 minutes extra is available for answering since 2017, and an additional 30 minutes was available to compensate for restriction of the parts (limited freedom to allocated time across the complete paper, only within a part).

During the first 5 minutes of the first D1-part, D1.1 was only available in German. The D1-1 disruption was due to a human error. Many candidates panicked and exited from Wiseflow, requiring the invigilator password for continued use, resulting in a long queue. The Examination Board reacted quickly with a message that no candidates would be adversely affected. After extensive considerations, and after D11/19 emphasized level playing field, it was decided to neutralize D1-1. Other solutions were discarded, e.g., taking D1.1 out completely would have taken us out of the 40:60-60:40 D1:D2 ratio, and it would also have had disadvantages candidates who would have done well on D1.1.

The electronic syllabus was used widely. However, copying a legal provision or a part of the Guidelines into your answer (e.g., by copying it from the legal texts on the EPO website available via External Resources) is not considered an answer.

Only legal basis from the REE/IPREE is legal basis scoring marks. However, alternative legal basis is often accepted too, such as in some cases the Euro-PCT Guide.

Three versions of the Guidelines were allowed: November 2018 (legal text in force on 31.10.2019), November 2019 (legal text on 31.10.2020), and March 2021 (available in External Resources). Candidates are requested to stick to the syllabus and to indicate in their answers which version they are using. Candidates using the latest version of the Guidelines had a slight advantage (see above), which is accepted as being a consequence of being flexible.

Copying the question into your answer is allowed, but scores no marks, neither does a timeline.

An advantage of copying the question into your editor may be that you can annotate in the editor, and that you can copy the sub-questions.

A tutor commented that it is much appreciated that limiting the knock-on effect of an early error has been a consistent design aspect in modern D2-papers (certainly as of 2013). It gives a lot of relief to candidates that run into a difficult issue early and are not confident on whether and how they solved it.

## Answering and marking

The purpose of the Examiners' Report is to help future candidates prepare. The Examiners' Report shall be read as the correct factual answer for 100 marks. In some questions alternative answers attracted marks, but only the best answer is in the Examiners' Report. Some additional comments were awarded extra marks (sometimes referred to as bonus marks).

In principle, all information in a question is relevant. Candidates should answer the question, and should not speculate. Giving both a correct and a wrong answer to the choice of the marker, did not attract any marks.

Full legal basis is what is needed to support the answer in full: Article and/or Rule and/or Guidelines and/or case law, whatever is needed to support all aspects of the answer. Alternative legal basis often attracts (full) marks. There are no negative marks in D1, nor in D2.

## D1-part: summary of the paper

This year's D1 came in two parts of 90 minutes and 25 marks each. The D1 had a well-balanced mixture of EPC and PCT questions, with common topics as well as some less familiar topics.

Candidates that were well-prepared, with a sound legal knowledge and familiar with their legal reference books and other material should have been able to score 50-60% or more out of the 50 marks within the time available.

Some topics were expected, such as divisionals and (restoring) pendency; languages and translations – here, in PCT; priority, in particular some form of partial priority – here, in the form of a partial first application issue G 1/15, T 282/12; restoration of priority – here, recognition by the EPO as dO of restoration done by the USPTO as rO under the unintentional criterion; fees – here refunds of search and examination fees. Some topics were not so familiar, e.g., a PCT application filed with the EPO in English but with the text in the figures in Portuguese, and amendments

of a granted patent in view of a national prior right in Germany (requiring discussions on Art. 105a EPC as well as on Art. 123(2)&(3) EPC).

The online access to the Guidelines GL/EPO and GL/PCT-EPO was convenient and may have been of additional help. E.g., the GL/EPO have an extensive part on refunds in GL/EPO A-X, 10, including links to RFees 9 and OJ 2019, A4 with the refundable amounts in 10.2.1 on refunds of search fees. As a PCT example, using GL/PCT-EPO may have been a very efficient way to find the R.26.3ter PCT provisions in GL/PCT-EPO A-V, 8 "Text matter in drawings" together with a paper copy of the PCT Rules, that gave all information needed to answer. Some would have preferred hyperlinked pdf versions of the Guidelines rather than HTML pages, so that one could use them in the same way as during normal work, but the HTML version worked well too.

The legal texts in force on 31 October 2020 are the valid legal texts for EQE 2021 according to the REE/IPREE, but -in view of the cancellation of EQE 2020-exceptionally also the legal texts in force on 31 October 2019 ("the EQE 2020 syllabus") were accepted (Decision Supervisory Board 20 April 2020), with the marking "depending on which of the two dates would give the candidate the higher mark". The texts that were available online were neither of those two, but the actual texts on the date of the exam, 2 March 2021; answers based on these texts were also accepted. Note that there were some differences which allowed to answer more efficiently when using the online editions: e.g., in the 2021-edition of the GL/EPO the effect of failing to meet the filing requirements for divisionals was made explicit and could have been of help for answering Q.1; the 2021-edition of the GL/PCT-EPO was extended with A-VI, 1 "Claim to priority", including A-VI, 1.5 "Restoration of the right of priority" which could have been of help for answering Q.2.

The first D1 part, D1.1, consisted of questions 1 (9 marks), 2 (8 marks) and 6 (8 marks), i.e., 25 marks, for which 90 minutes were available (minus or plus time due to the D1.1-issue, see above), followed by a break.

In Q.1, an EP application had been filed with inventions X and Y, of which only X was searched. The question tested the legal consequences of filing a divisional in a wrong language, and the steps required to have the non-searched invention Y searched while the original EP application was no longer pending.

Q.2 related to restoration of priority right upon entry into the EP phase. It tested the (non-)recognition of successful restoration of priority by the USPTO as rO in the EP phase as well as the steps to get to a successful restoration after entry into the EP phase.

Q.6 asked about the procedural steps to limit claims for a single EPC state in view of a national prior right while maintaining the claims unamended for the other EPC states, as well as the allowability of a proposed amendment. The latter required identifying issues under Art. 123(3) EPC.

The second D1 part, D1.2, consisted of questions 3 (7 marks), 4 (8 marks) and 5 (10 marks), i.e., also 25 marks, for which again 90 minutes were available.

Q.3 asked whether the search and/or examination fees could be refunded, at which rate, and what you would have to do to obtain the refunds. Two situations were tested. In the first situation, no claims were filed with the EP application, and the candidate had to recognize that the search would not start if no claims would be filed. In the second situation, the invitation under Rule 70(2) EPC was waived, such that the search report was issued with a first communication under Art. 94(3) EPC.

Q.4 addressed a priority situation wherein EP-D1 claims priority from an identical US-D directed to bolts made of metal, while an even earlier EP-D0 from the same applicant directed to a bolt made of aluminium was cited in the search report of EP-D1. The answer required a careful discussion of the first application in the meaning of Art. 87(1) EPC and partial priority (G 1/15, or more specifically, T 282/12: partial first application). It also tested the use of a disclaimer to restore novelty over EP-D1, which was a Art.54(3) prior right.

In Q.5, candidates had to discuss two scenarios wherein a PCT application was filed with the EPO, indicating the EPO as ISA, and candidates had to indicate what the effect of the language was on the competent rO and on possible further translations. In Q.5-(1)&(2), the PCT application was completely filed in Portuguese. In Q.5-(3)&(4), the PCT application was filed in Portuguese with the drawings in English. So, candidates had to address which languages the EPO as rO accepts (Rule 157(2) EPC), and what happens if the language is wrong (Rule 19.4 PCT); which languages the EPO as ISA accepts (EPO-WIPO Agreement), and what the effect is if the text of the drawings is in a different language than the language of the description and the claims (Rule 26.3ter(a) PCT).

The full answers to the questions are given in the Examiners' Report. It also indicated, as every year, important guidance for answering (e.g., "Candidates are reminded that they should pay attention to the way the questions are asked") - most of these points were also emphasized at the meeting (see above under "General remarks" and "Answering and marking").

## D2-part: summary of the paper

The 50-mark, 3-hour D2 was of lower complexity than the D2s of the previous years and relatively straightforward. The paper presented all inventions and applications in a clear and concise way (and largely chronologically), including abbreviations for the various claims features and including effects of all features to support inventive step. The questions were very explicit and were, as in most recent years, a clear agenda as to what to address.

Well-prepared candidates, that did not only give their conclusions but gave a complete reasoning without any implicit steps, should have been able to address most of the expected aspects (but will also have missed some aspects or some detail) and to score 50-60% or more out of the 50 marks within the 3 hours available.

Some key aspects were a complex patent situation with invalid priority due to a first application issue (W-JP – W-IT – W-EP), insufficiency of disclosure / lack of enablement (B, S+Y+B), and amendments during opposition (Art.123(2)/Art.83 - Art.123(3) trap w.r.t. B; as well as Art.123(3) w.r.t. the amendment to S+Y+A), a competitor being commercially successful already with products under the scope of a (potential) claim of a currently dead application, missed EP entry of HP-PCT and remedy, (no) Art.54(3) effect of HP-PCT application (yet), whether/how opposition against W-EP would be partially or fully successful, and, in particular, admissibility of new arguments and evidence in opposition proceedings.

There were not too many events in the timeline - for most candidates the most essential tool when doing a D2 case - such that the risk of losing a lot of time due to a redraw of the timeline was small.

Compared to earlier D2-papers of 60 marks, the length and difficulty of this D2 matched well to 50 marks. The situation as-is is quite standard, as are the improvements and the FTO questions, but with few tricky bits. Funny subject-matter and nice names, hopefully makes candidates smile during a stressy exam!

### Comments from Committee

The Committee commented on the questions submitted prior to the meeting and addressing various specific items in D1 and D2 questions.

### Questions in the D1 part

Oliver Kern and Tiem Reijns commented on the questions submitted w.r.t the D1-part.

In Q.1, the legal basis for EP-A2 not being treated as a divisional cited in the Examiners' Report was J 13/14, but

Art.90(2) EPC was also accepted (same marks). Art.121(3) EPC was indicated as justification as to why the parent was revived (pending restored).

W.r.t. Q.6: the legal basis for limitation for a single state only can be found in the Guidelines. Note that 2018/2019 version of the GL may have left room for some doubt, as it stipulates that the substantive requirements for limitation had to be met for all claim sets: if interpreting this as all including the set for the other states, one would conclude that the other, non-limited claim set does not meet these requirements (as it is not a limitation vis-as-vis the claims as granted for the other states, R .95(2) EPC). However, that possible misunderstanding is taken away in the 2021 edition, where the underlined words have been added in D-X, 10.1:

"The limitation could result in the claims becoming different in different contracting states if the requester wishes to restrict the claims with respect to one or more, but not all, contracting states in order to avoid conflict with national prior rights. Such different sets of claims can be allowed, provided that the substantive requirements are met for all sets for which the requester is seeking an amendment."

It was not required to propose an alternative, allowable amendment (even though the candidate's solution did) when answering Q.6: the question only asked whether the proposed amendment was allowable, not whether another amendment would be possible. It was also not considered to be an implicit aspect of the question, which a tutor had considered in view of the word "advise" just before the explicit questions.

In Q.4, both G 1/15 as well as T 282/12 (which is exactly to this situation) were accepted as legal basis for the partial priority due to a partial first application issue. In Q.4, it was expected to not only conclude on prior art status (Art.54(2) or (3) EPC), but also on the effect thereof (novelty yes/no).

W.r.t. Q.5, it was commented that Euro-PCT Guide (2020) 2.23.001 only covers the situation where the whole PCT application is in a single language. To answer Q.5, GL/PCT-EPO and/or R.26.3ter itself were needed.

### Questions and comments w.r.t. the D2 part

Scott Roberts, the main drafter of the D2-part, commented on the paper and on the questions submitted w.r.t the D2-part.

Scott indicated that feedback from the tutors was taken into account when drafting this paper: some humour, simple abbreviations of the subject-matter (single-character abbreviations for each feature), and reducing perpetual incorrectness. He indicated that it is a design feature of



the D2 to reduce perpetual incorrectness and an important consideration in the design. High-level topics are generally independent, can be recognized by candidates separately and can be solved independently. It was suggested that future papers would also include simple abbreviations of their subject-matter in the paper.

A tutor commented that the paper does not indicate since when we manufacture SPRINGY (S) (see [002]): this appears not to have impact, but it could have been important if a candidate considered that priority EP from W-IT for S in W- was valid. The Committee indicated that the first disclosure of Springy feature S was not given as it may have a risk in that it may have effect in underlying design, as it could deemphasize the important parts of the case (priority of W-EP claim 1). If backup is too recognizable, the need for the real question may become too limited.

A tutor suggested that there may be more marks for FTO, as this year only few marks. The Committee commented that the conclusions follow from other analysis, which was more than half of the marks, so that the number of marks reflects the nature of the conclusions. Even though it was suggested that it be considered to deduce marks if candidates conclude wrongly on rights conferred (esp. when concluding wrongly that a patent provides a positive right to make/sell/use), the D committee indicated that they do not want to do a negative marking for any type of errors.

## 8) Pre-Exam by Nico Cordes and Roel van Woudenberg

Representing Examination Committee IV: Stefan Kastel (epi)

### General remarks

The Pre-Exam 2021 was split into 4 parts (2 legal, 2 claims), each designed for 60 minutes and with 10 minutes extra time for each part to accommodate for the limitations caused by the split into parts was appreciated, in particular the reduced freedom to allocate time across the various questions. The split into parts was generally appreciated, as it allowed to limit the duration behind the screen and allowed to take a drink or leave the exam position for other reasons during scheduled breaks.

Each of part 1 and part 2 comprised 5 legal questions, in randomized order within a part, and with the four statements of each question being presented in a randomized order. As in 2019, the claims analysis part consisted of 2 cases, each having 5 questions in part 3 resp. part 4. In the claims part, the questions were in the same order for all candidates, but the four statements of each question were presented in a randomized order.

All questions, statements, prior art documents and claim sets were provided in all 3 languages. This resulted in quite some scrolling, especially in the claims parts, where a single webpage showed the claim set in all 3 languages, the case statement of the question in all 3 languages, and then 4 tri-lingual statements with a True/False tick boxes. (Note: for Pre-Exam 2022, adaptations to the layout and some degree of language selection are being implemented.)

Within a part, candidates were free to take the questions in any order. After finalizing a part, it was no longer possible to go back to that part to make any changes.

At the Tutor Meeting, it was indicated that all information that was brought to the attention of the Committee and the Examination Board, as well as posts and comments on blogs, were carefully considered to see whether any neutralization were required. However, apart from a complete neutralization of Q.10 (herein, the numbering follows that as presented in the Compendium-version of the paper) due to a drafting error, no individual statements were neutralized. Some appeals are still pending, but no comments could be made at the time of the meeting.

### Legal part

The legal part of this year's Pre-Exam had similar style and a difficulty level as in 2019, and a bit more difficult than those of 2016, 2017 and 2018. As in the last few years, the legal questions were a mix of questions addressing several topics that were to be expected (such as time limits, fees, filing date requirements, languages, EP entry) as well as some less-usual topics which well-prepared candidates would have been able to find in their EPC/ reference materials/ Guidelines (lack of enablement, who can speak at oral proceedings, auxiliary requests, appeal). Some usual topics, such as divisionals and EP-entry, were back as expected. The most recent G-decisions, notably partial priority (G 1/15 and G 1/16), were not yet tested in this Pre-Exam, while G 1/15 was already tested in the D2-part of the D paper of 2019 and also in this year's D1-part of the D paper.

Well-prepared candidates having good knowledge of the EPC and PCT and knowing their material well (reference books, EPO Guidelines, PCT Applicants' Guide, Euro-PCT Guide) for fast look-up should have been able to answer most of the statements correctly and well within the time available, provided they had their material updated to the legal status of 31 October 2020 (the cut-off date for Pre-Exam 2021). The EPO Guidelines in particular play a key role to get to the right answers. Candidates with a poor preparation will have found those questions considerably more difficult than the questions from earlier years.

Q.1 tested renewal fees for a EP application and for its divisional, and was relatively straightforward. The question required also careful reading, as it asked whether the fee can be validly paid on a certain day, and did not -as is more usual- ask for the last possible date (although it appeared to be the last day).

In Q.2, various aspects of priority under PCT were asked, as well as to whom to pay the international filing fee.

Q.3 tested aspects of a divisional: pendency, language, generation fee, prior art effects between parent and divisional.

Q.4 tested miscellaneous aspects of a PCT application in the international phase and the EP phase, including the requirements for a PCT application to become Art.54(3) prior art.

Q.5 asked about filing an opposition, an intervention, or third party observations and party status.

Q.6 was possibly one of the most difficult questions, addressing Art.83 objections. The answer to statement 6.3, which asked whether essential technical information that is present in the abstract can be incorporated into EP-X as missing parts within one month from the date of filing, led to discussions amongst candidates on the blogs. The Examiners' Report considered this not to be possible as the abstract is not part of the disclosure (Art. 85 EPC), so that this incorporation would offend Art. 123(2) EPC. However, some candidates argued that the available technical information could still be submitted as a missing part under R.56 EPC, where the abstract would just serve the purpose to indicate that the applicant had such the information available, and in view of R.56 providing for a 2-month time limit (i.e., not as the basis for amendments in the application as filed), where the presence of the "one month" in the statement seemed to indicate that a provision with a time aspect in it had to be considered. However, the statement was not neutralized.

Q.7 checked fresh opposition grounds in opposition appeal, requiring G 10/91 and, for an intervenor joining during the appeal stage, G 1/94. Candidates may have found it difficult to answer Q.7 as the situation was not about first instance opposition, i.e., well covered by the Guidelines, but about appeal, i.e., not covered by the Guidelines, and needed Decisions of the Enlarged Board for answering.

Q.8 presented various persons and asked whether they could speak or make submissions during oral proceedings. In Q.9 the use of different languages by the representative or the EPO during oral proceedings was checked.

Q.10 was probably the most difficult question, but it was neutralized due to an edit error when the question was

amended after the review (Q.10 mistakenly refers to applicant B and applicant A while it was intended to refer to only one applicant B, different from applicant A in Q.4). It addressed non-unity in the international phase: protest, EP entry with non-unity, refund of (additional) search fee in the EP phase, and (100%) refund of the search fee if a divisional is filed.

### Claims analysis part

The claims analysis part of the Pre-Exam 2021 had a similar style as in 2019, in that the claims analysis part was structured into two parts which were in the 2021 exam separately identified as part 3 and 4 (with parts 1 and 2 being the legal parts). Parts 3 and 4 each concerned a separate case with their own set of questions, rather than one case of ten questions as in all pre-2019 exams.

Part 3 concerned a European patent application for a glass composition for use as a photochromic lens. As opposed to earlier pre-exams, this part did not explicitly identify a limited number of embodiments (e.g., a 'first' embodiment, a 'second' embodiment) but rather described a wide range of different compositions (e.g., with different compounds, different weights, optional aspects, etc.) as well as several distinct categories of invention (e.g., a composition, a manufacturing process, a photochromic lens).

The European patent application was accompanied by three prior art documents D1-D3. Interestingly, the prior art status of D1-D3 was not explicitly identified, but instead the filing date of the European patent application and the filing and publication dates of the prior art were given, from which one could determine that D1 and D2 were Art. 54(2) EPC documents and that D3 appeared to be an Art. 54(3) EPC document. The Art. 54(3) status of D3 was later questioned in two statements on inventive step (statements 15.1 & 15.4). This was the first appearance of an Art.54(3) prior art in the claims analysis part of the Pre-Exams.

For questions 11-13, a first claim set of nine claims was provided, which included six claims for the composition, two process claims and a product-by-process claim. The statements covered a wide range of topics including the scope of protection of a product defined by its intended use, numerical ranges, the scope of protection of a product-by-process claim, essential features, clarity, and novelty. The answer to statement 12.4, which questioned the clarity of a claim containing the terms 'low' and 'high', was widely discussed online amongst candidates. The claim was considered to be clear by the Examiner's report as both relative terms were considered to be clear in the context of the whole disclosure of the application. Some candidates, however, remarked online that while 'high' was defined in the application, the term 'low' was not defined in the application. The statement was ultimately not neutralized. For question 14, a second claim set of five claims

was provided which represented amendments filed during examination, with the following statements questioning the allowability of amendments under Art. 123(2). For statement 15, a third claim set of 3 claims was provided, with the following statements questioning inventive step. The answers to statements 15.1 and 15.2 were challenged in the blogs. The claims define claims defines “A glass composition for use as [a photochromic lens comprising ...]” and these statements indicated the phrase “technical field, i.e. the field of photochromic lenses”. One could argue that the technical field of the claim is not the lens (*product*) but the composition (*material*), which view one could consider confirmed by claim I-8 (defines “A process for manufacturing a photochromic lens *from* the glass composition”). The Examiners’ Report did not acknowledge this interpretation, but took the claims to be in the technical field of photochromic lenses; the two statements were not neutralized.

Part 4 concerned a European patent application for a protection device for a tablet computer. The description described two different embodiments: a first embodiment and an alternative second embodiment.

The European patent application was accompanied by two prior art documents D1-D2, of which the prior art status was explicitly identified as being Art. 54(2) EPC prior art. Interestingly, D1 seemed far removed from the invention as it described a shipping box. However, the shipping box did appear to have at least some features in common with the protection device, and also seems to be suitable to ‘protect’ a tablet computer. This ‘suitability’ was then later questioned in statements on novelty over D1.

For questions 16 to 19, a claim set of seven claims was provided, which each defined different embodiments of the protection device. The statements covered a wide range of topics including clarity, scope of protection, novelty over D1 (being the shipping box prior art) and D2, and basis for amending claim 1 of the claim set. The answer to statement 18.1, which questioned the novelty of a particular claim over D2, was widely discussed online amongst candidates as there seemingly was an inconsistency between a prior art embodiment as described in D2’s text (in which a part of the device was divided into 3 sections) and as shown in D2’s figure (which showed the part being divided into 4 sections); depending on whether one considered the part of D2’s embodiment to be divided into 3 or 4 sections, the answer to the statement would differ. The Examiners’ Report did not acknowledge this discrepancy; the statement was not neutralized. The answer to statement 19.4, which questioned the basis for a particular amendment of claim 1, was also widely discussed online amongst candidates, with some candidates arguing that the amendment represents an unallowable intermediate generalization with respect to the description as some features, which were present in the embodiment

serving as basis in the description, were omitted/not included in the claim. The Examiners’ Report argued that the omitted features were part of all embodiments and thus could be omitted from the claim. The statement was ultimately not neutralized. For question 20, a single claim was provided, with the following statements questioning the inventive step of the claim.

During the tutor meeting itself, the Examination Board stated that they received questions and suggestions on the neutralization of select statements, and that they reviewed the statements but did not see a reason to neutralize the statements.

### Comments and questions

In response to a question from a tutor, Stefan Kastel indicated what the Committee and Examination Board consider when deciding on a possible neutralization of a statement or question: statistics, blog posts and comments may indicate possible problems and committee discussion. The Committee provides their intended solution as a recommendation to the Examination Board. The Examination Board decides on the matter.

Stefan indicated that tutors and candidates can help by posting comments and considerations in the blogs.

Q.10 in the current Pre-Exam was fully neutralized due to a drafting error in the paper, or rather due to an error in amending the question after feedback from the review rounds. The design and review of the paper comprises a first test by the Committee members. Then, a second test is done with the guinea pig group, composed of members from other Committees. Also, EC V (the Quality Committee) checks the paper. Despite that, the error in Q.10 was unfortunately not spotted as late-stage amendments do not go through all the review steps again.

Stefan indicated that the current exam is essentially an exam designed to be done on paper, which was reformatting into the online version. The same will apply to the 2022 Pre-Exam. On the longer term, the Pre-Exam may benefit from Wiseflow or another online exam system as it can also allow to, e.g., ask for dates rather than just True/False.

A tutor noted that the tri-lingual presentation in Wiseflow required a lot of scrolling, and requested to split the languages for Pre-Exam 2022 and later. Stefan commented that tests are ongoing to split it, and this will also be done in the Mock, while there is also still some work needed.

No detailed statistics were shared as to scores per question, or per part. It was indicated that no such statistics are available as the Secretariat had other priorities in view of all the changes this year.



The relatively high pass rate cannot be attributed to a high score on the legal parts or a high score on the claims analysis parts: there is no clear relation, and the scores for the parts are higher than previous scores.

A tutor commented that randomizing the sequence of statements within a single question in the legal part and in the claims part, as well as of questions in the legal parts, has the risk that it may provide an equal level playing field, due to some sequences being more difficult than others. The Committee indicated that randomization is done to make cheating more difficult, and that the intention is to draft new questions such that there is no problem if the order of the statements is changed.

Q.19 comprised 4 alternative amendments to claim IV.1. Each statement read "Under Article 123(2) EPC, there is basis for amending claim IV.1 of the originally filed application as follows: [...]". The question and the statements were silent about how the dependent claims were amended. A tutor asked whether the effect of the amendment to the complete claim set had to be considered when answering the statements, as amending claim IV.1 as suggested could strictly speaking also lead to (possibly) non-

allowable subject-matter in the resulting claim dependencies – see GL (2021) H-V, 3. Stefan indicated that the question only asked about the claim itself, and not about the effect in the dependencies. He also indicated that it could be expected that the full claim set with amendments indicated would be given if it would have to be considered.

## 9) Concluding remarks

The annual meeting of EQE tutors and members of the EQE Committees took place on 19 and 20 October 2021 by videoconference. The EQE 2021 papers were discussed in detail. The questions submitted prior to the meeting were addressed by the Committees when discussing the papers, and several other questions were asked during the meeting.

With this report, tutors summarize the papers, including their online format, and provide information of the points discussed at the meeting so that candidates can also find this information. In addition, we hope that our summaries and comments can assist when reading and interpreting the official Examiners' Reports of the EQE 2021 papers.

Next deadline for epi Information	Nächster Redaktionsschluss für epi Information	Prochaine date limite pour epi Information
<p>The Editorial Committee invites contributions for publication in the next issue of <b>epi</b> Information. Documents for publication or any enquiry should be sent by eMail to (<a href="mailto:editorialcommittee@patentepi.org">editorialcommittee@patentepi.org</a>) no later than <b>4 February 2022</b>.</p> <p>Further information can be found in our "Guidelines for Authors" here: <a href="https://patentepi.org/r/guidelines-epi-info">https://patentepi.org/r/guidelines-epi-info</a></p>	<p>Bitte senden Sie Ihre Beiträge zur Veröffentlichung in der nächsten Ausgabe der <b>epi</b> Information an den Redaktionsausschuss. Alle Artikel oder Anfragen schicken Sie bitte an folgende Email Adresse <a href="mailto:editorialcommittee@patentepi.org">editorialcommittee@patentepi.org</a> bis spätestens <b>4. Februar 2022</b>.</p> <p>Weitere Informationen finden Sie in unseren „Guidelines for Authors“ auf der <b>epi</b> Webseite: <a href="https://patentepi.org/r/guidelines-epi-info">https://patentepi.org/r/guidelines-epi-info</a></p>	<p>La Commission de Rédaction vous invite à lui faire parvenir vos contributions pour publication dans le prochain numéro d'<b>epi</b> Information. Les documents pour publication ou toute demande d'information doivent être envoyés par courriel (<a href="mailto:editorialcommittee@patentepi.org">editorialcommittee@patentepi.org</a>) au plus tard le <b>4 février 2022</b>.</p> <p>De plus amples informations sont disponibles dans nos « Directives pour les auteurs » à l'adresse : <a href="https://patentepi.org/r/guidelines-epi-info">https:// patentepi.org/r/guidelines-epi-info</a></p>

# Preparation for the 2022 EQE on the epi-learning platform

To support EQE candidates and **epi** Students on their way to the European Qualifying Examination, the **epi** currently offers a number of training courses:

- **epi** Students' forum
- DI Advanced Questions
- **epi** Tutorials

In view of the current pandemic situation, these take place 100% online – and are handled via the epi-learning platform<sup>1</sup>. Furthermore, **epi** Students

- have exclusive access to a training video on patent claims
- can enrol for webinars (and access recordings thereof) offered to **epi** members (such as Case Law Online).

## epi Students' forum

**epi** has created a Student Forum on the **epi** Learning Platform<sup>2</sup> so that **epi** Students can ask questions regarding the exam papers of the EQE. Your questions can be posted anonymously in accordance with the Student Forum Rules. The questions will be reviewed by **epi** Tutors who will post appropriate replies.

The Student Forum is divided into the following sections: Pre-exam, Paper A, Paper B, Paper C, Paper DI and Paper DII. There is also a General section for questions not specifically related to individual exam papers. Please use the appropriate section(s) for your questions. Unfortunately, we are not able to answer technical questions about the EQE format nor the browser that will be used for the

exams; such questions should be directed to the Examination Secretariat at the EPO.

**epi** hopes that you will find the **epi** Student Forum helpful in your preparation for the EQE. If you do not already have access to the **epi** Learning Platform, please contact the Education Team ([education@patentepi.org](mailto:education@patentepi.org)).

## DI Advanced Questions

A set of 57 advanced legal questions has been prepared to help candidates preparing for Part I of the 2022 EQE Paper D. The questions relate to various topics of the EPC and the PCT.

Every Monday three new questions will be posted on the platform. One week later, 'model answers' will be published, where necessary with comments. In addition, there will be monthly webinars where a tutor (Cees Mulder) will explain the difficulties in the questions from the preceding weeks and answer questions from participants. **epi** Students must register for this training but no fee is involved.

## epi Tutorials

The most individually tailored training offering is **epi** Tutorials. Candidates can privately write answer scripts for one or more of the past EQE papers (pre- or main examination). Experienced **epi** Tutors will then review the answer scripts and provide personal feedback via videoconference or e-mail.

Due dates and feedback sessions are individually organised between the tutee and tutor. The tutorial fee (400 EUR per paper) covers a maximum of two different years. **epi** Students enjoy a 50% discount.

<sup>1</sup> <https://www.epi-learning.org>

<sup>2</sup> <https://www.epi-learning.org>

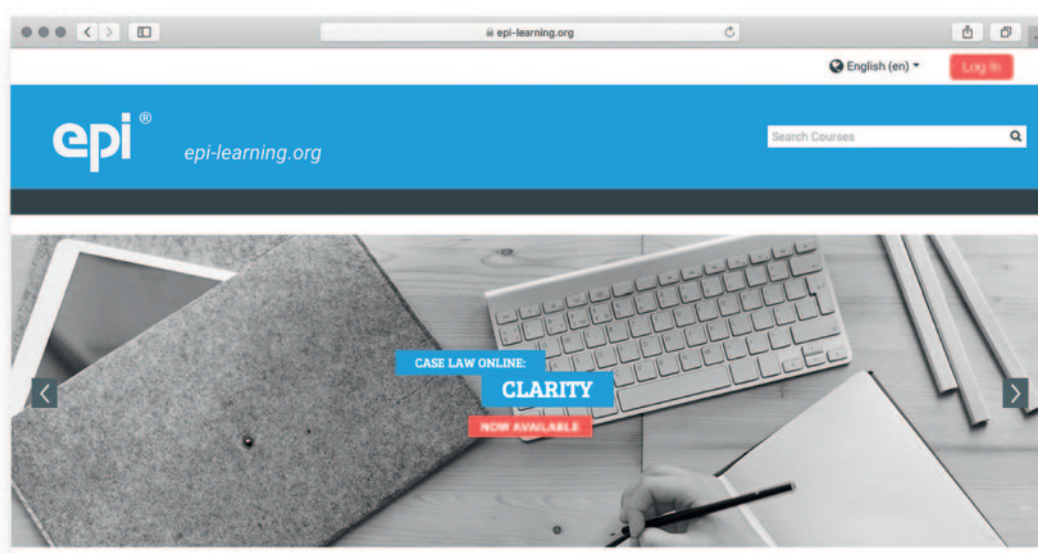
# epi Student membership

**epi** student members have access to additional information on the **epi** learning website, including the student forum described below. Other benefits of student membership include receiving alerts about **epi** training courses, priority access to our educational events, and reductions on course fees for **epi** educational events, such as tutorials, Mock EQEs, seminars and webinars. Candidates for **epi** student membership may apply, at

any stage of their training, to the **epi** Secretariat ([epi.student@patentepi.org](mailto:epi.student@patentepi.org)), simply by filling in the online application form<sup>1</sup>, providing the necessary documents<sup>2</sup> and paying the fee.

- 1 <https://patentepi.org/en/epi/form/47/registration>
- 2 <https://patentepi.org/en/epi-students/epi-studentship/rules-governing-the-epi-student-membership.html>

## epi-learning



**epi-learning**<sup>1</sup> is the platform for all online training activities organised by the **epi**.

**epi** Students are automatically registered in this platform and can take advantage of support and training offers specifically designed for **epi** Students.

To register you on the platform we need your consent. This will be presumed when you fill in the survey link<sup>2</sup> the required data.

<sup>1</sup> <https://www.epi-learning.org>

<sup>2</sup> [https://www.surveymonkey.de/r/epi-learning\\_platform](https://www.surveymonkey.de/r/epi-learning_platform)

Via **epi-learning**, **epi** Members can access relevant online courses, online lessons, and other resources, such as recordings of the following webinars:

- New Rules of the Procedure of the BoA and further developments
- Supplementary Protection Certificates (SPC)
- Conflicts of Interest
- Privilege in patent matters
- Collaboration with overseas patent colleagues

You can find more training offers on **epi-learning**<sup>3</sup>.

<sup>3</sup> <https://www.epi-learning.org/course/>





# Committee Reports

## Report of the Committee on EPO Finances

J. Boff (GB), Chair

Since the 90<sup>th</sup> Council Meeting, the Committee has been quiet, but with a rush of papers to consider for the Budget and Finance Committee meeting of 26<sup>th</sup> October 2021. Most of these papers were for background interest only and included the draft budget for 2022 [CA/50/21] and statistics for 2020 [CA/F5/21].



Jim Boff

However, of greater direct relevance to users, was the proposal for a biennial fee increase in 2022 [CA/61/21]. This proposes inflation based average increases of 3% in fees, with the exception of the international search and preliminary examination fees which will remain static. Over the years **epi** has consistently argued that regular fee review was preferable to sudden jumps, but has also consistently argued that inflation indexing was not an appropriate method of review.

Assuming approved by the Administrative Council in December, this fee increase will come into effect 1<sup>st</sup> April 2022.

### General situation

Total EP applications (direct Europeans and Euro-PCT) appear to be around 3% up on the same period as last year. The number of grants is significantly lower than last year, but roughly in line with the EPO's budget.

# Report of the Committee on Biotechnological Inventions

A. De Clercq (BE), Chair

Our yearly committee meeting (digital) was held on 11 October 2021. We discussed the below points at the meeting and thereafter.

## 1. Guidelines for Examination proposals for 2022

The biotech aspects of the new proposed 2022 GLs were studied by the committee (F-IV, 4.12 and G-II, 5.2, 5.4 and 5.6). Our suggestions were discussed in the Guidelines sub-committee meeting on 9 September 2021 which was attended by Ann De Clercq and Simon Wright. Our plant and antibody experts gave advice before the meeting. The following suggestions were passed on for discussion in the SACEPO meeting WP on Guidelines on 28 October 2021:

- For **plant disclaimers** we suggested that the EPO should not cite objections as to the need of a disclaimer for a plant which could have potentially been obtained by an essentially biological method without evidence. The objections must be reasoned and the burden of proof should be with the EPO. It was reported that EPO in the Guidelines confuses products of microbiological processes with those of essentially biological processes and this should be avoided. ED objections have also been reported recently regarding transgenic plants with two recombinant DNAs which are not in line with the current Guidelines regarding the necessity for disclaimers for plant products obtained by technical processes, in particular transgenic plants.
- For **antibodies** we mainly suggested that some of the passages might be made more general so that they do not only relate to only IgG's. Further we suggested that it could be clarified in future revisions of the Guidelines how many CDR's need to be defined in different situations. Now it might not be clear. The inventive step requirements for antibodies are perceived to be too strict in the current Guidelines. Methods exist to produce antibodies but this does not necessarily imply that all methods will lead to obvious antibodies. Many steps could be used in these methods to prepare inventive antibodies. Also another antibody to the same target may be very beneficial to certain types of patients or very beneficial in other ways. Antibodies may have alternative unexpected effects and do not always have to have beneficial effects. We hope the Guidelines can be amended in the future so that this is better reflected.

- A late draft proposal to amend G-II, 5.3 for **genetically modified animals** was also discussed and we proposed that this should be limited to vertebrate animals.

## 2. Patentability of plants and animals – G 3/19

Some interested parties plead to also exclude plants produced by random mutagenesis from patentability. Our committee is following up these discussions.

Regarding the extent of the plant disclaimers, we think this will be more for the CJEU level to determine once cases go to court (same situation as after G1/98 except that no cases on transgenic plants ever went to court in view of the regulatory situation).



Ann De Clercq

A German Symposium on patentability of plants and animals was held on 8 July 2021 in which a balanced overview was given by different speakers (see annexes). This was attended by Chris Mercer and Simon Wright.

## 3. ST26 standard for Sequence listings

The introduction of the new ST26 standard for sequence listings has been postponed until 1 July 2022. We look forward to training courses by the EPO and also practical training courses by WIPO (up till now only introductory and advanced courses but no practical courses yet). An ad-hoc committee of the Biotech Committee is following the developments in this area.

## 4. Deposits of biological materials

With respect to deposits of biological material, we flagged decision **T 32/17**<sup>1</sup> (relating to EP2311654) wherein a reference to a deposit of a hybridoma was considered not to be the same as a reference to the amino acid sequence of the antibody produced by the hybridoma. In **T 32/17**, depositing a hybridoma was not enough to establish novelty over a prior

<sup>1</sup> <https://patentepi.org/r/info-2104-01>

public use of a functionally equivalent antibody. In other words, the deposit, while enough to establish sufficiency and reproducibility, was not considered by the board to also limit the claim to the actual amino acid sequences of the antibody produced by the deposited. Because the claim to the hybridoma was not considered to disclose the sequence of the antibody it produced and because the burden was on the patentee, a lack of novelty ensued. Some members of our committee think this is a correct decision (at least the decision would be in line with case law on plant deposits for the purpose of Art 84 EPC). This decision however for some other members of our committee raises a question with respect to the long-held belief that **G1/92** means that any property of a compound/molecule/peptide/protein would be available if the product as such could be obtained – including the amino acid sequence of a protein. This was also the conclusion reached by the OD in this case which this Board overturned. Will the first instance follow this decision or **G1/92** in this field? This topic will be followed further.

## 5. G2/21

EPPC has set up a working group to prepare an amicus brief on **G2/21**. Several members of the biotech committee will also form part of this group as it also very much concerns biotech topics.

## 6. Meeting with EPO DG1

Biotech topics for an upcoming meeting with EPO DG1 (no date set yet) are being assembled.

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\* Annex 1: Report Symposium hosted by The Federal Ministry of Justice and Consumer Protection, Patentability of Plants and Animals  
<https://patentepi.org/r/info-2104-02>

Annex 2: Program Speakerlist, Symposium hosted by The Federal Ministry of Justice and Consumer Protection, Patentability of Plants and Animals  
<https://patentepi.org/r/info-2104-03>





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## Next Board and Council Meetings

### Board Meetings

119<sup>th</sup> Board Meeting by videoconference on 3 March 2022

120<sup>th</sup> Board Meeting by videoconference on 7 April 2022

### Council Meetings

92<sup>nd</sup> Council Meeting on 7 May 2022 (meeting place to be decided)

# Annual Subscription 2022

P.R. Thomsen (CH), Treasurer

In accordance with the decision of **epi** Council C91 on 13 November 2021, the amount for the **epi** annual subscription has been set at 190 EUR for 2022, if paid within 3 months, and at 240 EUR if paid later.

The annual subscription for **epi** Students was set to be 95 EUR for 2022.

In order to minimize the workload in processing accurately and efficiently subscription payments, and independently of the transmitting way, please note that:

- Each payment should be clearly identified indicating invoice number and full name of the member.
- Unidentifiable payments bear to risk of being rejected.
- Invoices regarding the **epi** annual subscription 2022 will be sent by email around mid of January 2022.

Every member will receive an invoice, even if a direct debiting mandate from an EPO account has been provided to the **epi**.

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

The 2022 annual subscription can be settled as follows:

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- By debiting an EPO deposit account on 25 February 2022
- The form to set up/amend/delete a direct debiting mandate can be found on the **epi** website (<https://patentepi.org/en/the-institute/annual-subscription.html>)
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## 2. Bank Transfer

- By bank transfer in Euro (bank charges to be covered by payor)
- Please note that payment should be received on **epi**'s account by 31 March 2022

If payments are not made prior to 1 April 2022, the annual subscription is increased to an amount of 240 Euro.

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The link to the online payment tool can be found on our website (<https://patentepi.org/r/online-payment>).

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In case you plan to withdraw from **epi** membership, please note that you may avoid the annual subscription 2022 if you submit a request to be deleted from the list before 1 April 2022 with the Legal and Unitary Patent Division of the EPO (see <https://www.epo.org/applying/online-services/representatives/deletion.html>).

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