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Cover:

**Bijloop**

Picture painted by

Nyske Blokhuis

(European Patent Attorney, NL)



## Nyske Blokhuis

Nyske Blokhuis is a Dutch and European Patent Attorney at EP&C [NL/BE], EQE-tutor at Maastricht University, tutor at the European Patent Academy and author of several books on the EQE. "Coming from a creative family, I have always enjoyed making things with my own hands. A few years ago, I picked up a paintbrush again for the first time in many years, and immediately fell in love with the process. My favourite medium is watercolour, but every once in a while I work in different medium, such as acrylics. I love painting outdoors on location, preferably in nature. I study watercolour with the internationally renowned artists Tom Shepherd and Michael Solovyev, and I'm a member of the Dutch branch of the International Watercolour Society."

Nyske Blokhuis ist niederländischer und Europäischer Patentanwalt bei EP&C [NL/BE], EQE-Tutor an der Universität Maastricht, Tutor an der Europäischen Patentakademie und Autor mehrerer Bücher über die EEP. "Da ich aus einer kreativen Familie stamme, habe ich schon immer gerne mit meinen eigenen Händen etwas hergestellt. Vor ein paar Jahren habe ich zum ersten Mal seit vielen Jahren wieder einen Pinsel in die Hand genommen und mich sofort in den Prozess verliebt. Mein Lieblingsmedium ist Aquarell, aber hin und wieder arbeite ich auch mit anderen Medien, wie z. B. Acrylfarben. Ich liebe es, draußen vor Ort zu malen, am liebsten in der Natur. Ich studiere Aquarellmalerei bei den international bekannten Künstlern Tom Shepherd und Michael Solovyev und bin Mitglied des niederländischen Zweigs der International Watercolour Society."

Nyske Blokhuis est conseil en brevets néerlandais et européen chez EP&C [NL/BE], tuteur EQE à l'université de Maastricht, tuteur à l'Académie européenne des brevets et auteur de plusieurs ouvrages sur l'EQE. "Issu d'une famille créative, j'ai toujours aimé fabriquer des choses de mes propres mains. Il y a quelques années, j'ai repris un pinceau pour la première fois depuis de nombreuses années et je suis immédiatement tombée amoureuse de ce processus. Mon médium préféré est l'aquarelle, mais de temps en temps, je travaille avec d'autres médiums, comme l'acrylique. J'aime peindre en plein air, de préférence dans la nature. J'étudie l'aquarelle avec les artistes de renommée internationale Tom Shepherd et Michael Solovyev, et je suis membre de la branche néerlandaise de l'International Watercolour Society."



The **epi** Board and **epi** Secretariat join in sending Season's Greetings  
with our best wishes for a prosperous and healthy 2023

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Institute of Professional Representatives before the European Patent Office

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# Editorial

## Anybody home?

M. Névant (FR), Editorial Committee

In the 1985 cult movie “Back to the future”, the villain Biff Tannen repeatedly knocks on the head of George McFly (father of the movie’s hero, Marty McFly) while saying the famous quote “Hello, hello. Anybody home? Think McFly, think!”



Marc Névant

In a previous editorial (see issue 3/21 of **epi** Information) I worried that the time was long gone when representatives of the Member States on the Administrative Council (AC) of the European Patent Organisation had some interest in patent matters. It is quite obvious that what is good for the users of the patent system in Europe is no

longer at the centre of discussion during meetings of the AC. It rather seems, viewed from the outside, that a substantial amount of time is spent on financial matters, which is in my view a sad state of affairs. It does not seem therefore that there is anybody home in the AC trying to foster the patent system in Europe.

Of further and greater concern is whether there is still anybody home at the EPO. Decisions are more and more often made without hearing what users, and in particular **epi** members and their representative bodies, have to say. Pseudo consultations are organised to give a semblance of moral approval to decisions already taken. The most recent example is the decision concerning the format of oral proceedings in examination and opposition<sup>1</sup>. The EPO press release dated 15 November 2022 explains that the survey conducted during the autumn (on whether VICO is good or not) gathered responses from almost 400 users. Bearing in mind that there are currently roughly 14,000 **epi** members (+ hundreds of in-house patent counsels), I really wonder how such a small sample size can be said to be representative of the profession.

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

<sup>1</sup> The point here is not to discuss whether VICO is good or not, but to question the methodology used

## Report from the 93<sup>rd</sup> Council Meeting held in Málaga, Spain on 22<sup>nd</sup> October 2022

L. Casey (IE)

The Presidium members at C93 were President Francis LEYDER (BE), Vice-Presidents Heike VOGELSANG-WENKE (DE) and Bogoljub ILIEVSKI (MK), Secretary General Olga SIRAKOVA (BG) and Treasurer Peter THOMSEN (CH).

131 Council members (with voting rights) were registered. Due to an air traffic control strike, only one Council member from Italy was able to attend. No Council member from Cyprus was present as the registered Cypriot member had to cancel participation at short notice.

### 1/ Meeting opening

President Francis LEYDER opened the meeting at 09:15 and welcomed all the participants. The meeting was immediately suspended to enable all Council members with voting rights to collect their voting devices. At approximately



09:20, the President declared the meeting resumed. A test vote was successfully conducted. Scrutineers Gabriele LEISSLER-GERSTL (DE) and Valérie MELLET (LU) were appointed.

### 2/ Adoption of the Agenda

The agenda was adopted by 96% in favour; 2% against and 2% abstaining with the following changes:

- Item 14B: (Amendments of the “Guidelines for Reimbursement – What is reimbursed”): withdrawn at the request of the Treasurer;
- Item 15A: Possible amendments of the By-Laws and CoD;
- Item 15C: Reinstatement of the Nominations Committee;
- Item 15D: Possible delegation from Council to the Board;
- Item 20: Motion by some members of the German delegation to be put to C93 in relation to the EQE.

### 3/ Confirmation of the list of nominations for elections to committees

The Secretary General confirmed the names of members for election to committees as follows:

For the Committees’ Election Committee:

Zelika BRKIC (RS)  
Andreas DITLER (DE)  
Moritz KOPLIN (DE)  
Christian LÄUFER (DE)  
Jean-Nicolas LONGCHAMP (CH)  
Thomas MARX (DE)  
Ana NEVES (PT)  
Anders Kjer PEDERSEN (DK)  
Alexandru Christian STRENC (RO)

For the Litigation Committee:

Konstantina KORiatopoulou (GR)

#### 4/ Adoption of the Minutes of the 92<sup>nd</sup> Council meeting

The Minutes were approved. Action points arising were noted.

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

President Francis LEYDER referred to his report in the accumulated file which also included activities of the Vice-Presidents. He noted that there were five formal Presidium meetings and two Board meetings since his last report dated 25.04.2022. In a wide ranging report, the President noted, inter alia, that **epi** had successfully obtained observer status at meetings of the Administrative Committee of the UPC being represented by Peter THOMSEN (CH) assisted by Kim FINNILÄ (FI).



#### 6/ Report of the Secretary General

Secretary General Olga SIRAKOVA referred to her report in the accumulated file and thanked the Deputy Secretary General Magdalena AUGUSTYNIK for her assistance. She confirmed that, although subject to review depending on the COVID 19 circumstances, all **epi** Council meetings will revert to in-person meetings.

Among the items of her report were:

- (i) the next Council meeting (C94) will be held in the Copenhagen/Malmö region of Denmark/Sweden on 01.05.2023 – 03.05.2023.

The dates and location for C95 have not yet been finalised with Ljubljana and Budapest under current consideration;

- (ii) where possible, a Board meeting should be held in the same location as the immediate next Council meeting;

- (iii) **epi** membership as of 04.10.2022 comprises 13 905 **epi** members and 482 **epi** Students;
- (iv) on 15.07 2022, the Government of Montenegro deposited the Instruments of Accession to the EPC thus rendering Montenegro (ME) the 39<sup>th</sup> EPO Contracting State as of 01.10.2022.

The Secretary General thanked the **epi** Secretariat with a special acknowledgement to Danielle KHOURY, Avan AL DABBAGH and Jacqueline KALBE.

In relation to the dates of C94 and in response to a question from the floor, the Treasurer, Peter THOMSEN, explained that the dates selected were a compromise taking into consideration the cost of airline tickets at that time of the year. Prior to COVID 19, the average airline ticket cost was € 347; subsequently (to C93), the average cost had risen to € 366.

In relation to Montenegro, the President noted that the EPO will appoint Montenegrin Council members. There is no patent attorney association in Montenegro.

#### 7/ Report of the Executive Director

Executive Director Tatjana LISSAK presented her comprehensive report with, apart from day-to-day activities, emphasised on various projects including IT projects. Since May 2022, eleven projects were completed; ten are on-going; three are pending and there is a backlog of seven. She advised that the Document Management System project had been halted because it was not suitable for the Secretariat's requirements and was also cost prohibitive.

Apart from IT, the main focus until end of this year will be Compliance and the so-called Cultural Change; RACI (Responsible/Accountable/Consulted/Informed) Matrices and the Organisational Manual.

#### 8/ Preparation for 2023 elections

The Chair of the Electoral Committee Markus MÜLLER was unable to attend the meeting. Instead, his report was presented by the Executive Director Tatjana LISSAK. It was noted that 2 November 2022 is the deadline date for receiving nominations to Council for the period 2023 – 2026. As in previous elections, nominations may include a candidates photograph and a short *curriculum vitae*.

#### 9/ Treasurer's Report

The Treasurer, Peter THOMSEN, presented his report. In a wide ranging presentation, the Treasurer noted that:

- (i) the COVID19 pandemic that heavily influenced the previous two years is still affecting travelling and meetings in 2022 and likely beyond; increased geopolitical tensions including Russian



military aggression in Ukraine; the subsequent energy crisis; and continuous, high, partly double-digit inflation rates in the vast majority of European countries have created an environment with new uncertainties for the expenses and income of **epi**. Additionally, the shifting timelines around the new UP/UPC system have had their effect;

- (ii) following the historically high pass rates in the eEQE, **epi** has welcomed approximately 900 new members resulting in an annual subscription of approximately 2.4m EUR. However, he also noted that there will be a decrease in membership of approximately 200;
- (iii) income from educational activities will be with approximately 40% lower than originally budgeted due to changed plans and timelines for **epi** seminars and webinars, in particular in connection with preparing the profession for the upcoming UP/UPC system;
- (iv) many committees are still meeting electronically. Thus, committee expenses are lower than expected. However, the budget plans for at least 1 physical meeting per committee in the coming year;
- (v) in the Secretariat, expenses are slightly higher than expected in the areas of **epi** administration, representation and Finance & Law. The inflation that started to increase in 2021 is affecting secretariat expenses. In addition, energy costs will undoubtedly further accelerate secretariat costs during 2023;
- (vi) Finance & Law expenses are approximately 17% higher than originally planned due to further external opinion work to have a firmer understanding of the potential implications of the German Host State Law on **epi** in view of our legal status;
- (vii) all factors taken together from the forecast estimation are leading for 2022 to an overall expected deficit of 239k EUR which is only marginally higher than the originally budgeted - 193k EUR;

(viii) price increases and inflation are new factors for any budget. In September 2022, predictions for inflation rates were around 8% by the European Central Bank. The German Bundesbank and UK Bank of England have forecasted double digit rates. 2023 is also a special year for **epi** because it will be the year of electing a new Council; new Board/Presidium members; and, subsequently, new Committee members.

The Treasurer comprehensively outlined his assumptions for 2023 noting that the overall 2023 budget plans for a deficit of 371k EUR. He proposed an annual subscription fee of 190 EUR (if paid before 01.04.2023 and 240 EUR thereafter). The proposed Student membership is 95 EUR. Commenting on these proposals, the Treasurer noted that *"Although the planned deficit of 371k EUR is on the high side, our financial situation would allow, in my view, to absorb such a deficit for 2023 since we had, during the last 3 years, annual financial results with an overall surplus of together +590 k EUR. However, I am also alert that we need to closely follow and analyse the affects of inflation, particularly increases in travel costs during next year which may make it necessary to consider an increase in the annual subscription that has been kept stable since 2016"*.

The Treasurer also requested Council to take note of the planned investments in 2022-2024.



## 10/ epi-Finances Committee Report

Claude QUINTELIER (Chair) presented his report referencing the Accumulated File. He noted that the late posting of the Treasurer's Report was not particularly advantageous which found agreement with the Treasurer noting that preparation of the budget in the present volatile circumstances was particularly difficult. This was compounded by the earlier date of the Autumn Council meeting being held approximately three weeks earlier than is usual. Claude QUINTELIER opined that there was a need to keep a very close control over the budget. Furthermore, he noted that the Committee gave cautious approval of the budget that more data are provided at the next epi-Finances Committee meeting, by which time some actual 2023 costs will have been incurred. The Committee also expressed its wish to have data relating to the evolution of costs and income of epi over the past years. In addition, the Committee noted that there has been no final decision on the revised EQE format, and that this is unlikely to be taken until the Autumn of 2023. In view of this the Committee is of the opinion that no training expenditure should be incurred until the revised EQE format is definitely known. However, the Committee supports the inclusion in the 2023 budget of a position to be used by the PEC once the revised EQE format is decided.

Council approved the budget by 87% to 9% with 4% abstaining. In addition Council approved the Annual Subscription of 190 € (and 240 € for late payment) by 91% to 5% with 4% abstaining.

## 11/ By-Laws Committee (BLC) Report

Pascal MOUTARD (Chair) presented his report. In a series of slides, he referenced in particular Articles 23, 64 and 12.

In relation to Article 23, amendment to Article sub-section 4a was proposed which now reads: *"In each election year the following agenda items shall also be dealt with at the Council's autumn meeting: validation of the electing of the members of Committees, other than the Disciplinary Committee, and the Electoral Committee and the Committees Elections Committee, for a term ending with the Council's autumn meeting of the next election year"*. This was approved by 95% with 2% against and 3% abstaining.

In relation to a new Article 23 Subsection (to replace current Article 23(6) which will subsequently be Article 23(7)), the following was proposed and to be referred to as Article 23(6): *"At the autumn Council Meeting in the year before each election year, the Council shall elect the members of the Committees Elections Committee"*. This was approved by 94% in favour, with 3% against and 3% abstaining.

In relation to Article 64, subsection 1), paragraph 1, the following was agreed to by 92%, with 3% against and

4% abstaining: *"Except for items specifically reserved for Council meetings in accordance with Articles 23.2 - 23.6 and for items mentioned in Art. 27.2, 50.2 and 50.3, the Council shall be entitled to take decisions by Internet voting"*.

Council approved by 80% in favour to 8% against with 12% abstaining the following amended Rule 12, paragraph 1 the following: *"Draft minutes of each Board and Presidium meeting shall be sent to all members of the relevant body as soon as possible and in any case within four weeks after the relevant meeting and they shall be deemed approved if none of the relevant members present at that meeting raises an objection within such time as shall be*



*fixed by the relevant body at the relevant meeting. If an objection is raised, all parts of the minutes to which there is no objection shall be deemed approved. The Board or the Presidium respectively shall determine how to deal with any objection raised"*.

An amendment was also proposed to 5.2.2 ("Decisions concerning provisions for accounting") of the Collection of Decisions resulting the deletion of the reference to Article 4(2) of the Discipline Regulation by 94% in favour, 1% against, with 5% abstaining.

Amendment was also proposed to 3.3.2.15 ("Terms of Reference of the Nominations Committee") of the Collection of Decisions with 92% in favour, 2% against and 6% abstaining.

In relation to the “Recommendation of the Council concerning the title (the professional designation)” in Montenegro, Council decided to postpone the decision until Montenegrin members would have been appointed.

## 12/ Nomination Committees

The Nominations Committee was reinstated until C95 in its former composition with 85% in favour, 7% against and 7% abstaining:

Chris MERCER (GB); Paul-Georg MAUÉ (CH); Laurent NUSS (FR); and Mihaela TEODORESCU (RO).



## 13/ Powers of Council

Articles 3.1 and 3.2 of the By-Laws of the Institute confer certain duties and powers of the Council. The President proposed that the Board would have, in particular limited circumstances and until C94, the right to initiate an action before the Disciplinary Committee for their consideration. For reasons of confidentiality, the President was unable to elaborate on the particular limited circumstances. There was a robust discussion in relation to this matter and the appropriateness of such a delegation of power from Council to the Board. Various amendments were proposed with the following question put to the floor: *Does Council agree to delegate to the Board for a period*

*ending on the date of the 2023 Spring Council the power to file in the name of epi disciplinary complaints against epi members?* This did not find favour as voting on the matter was 36% in favour; 48% against; with 15% abstaining.

## 14/ Litigation Committee Report

The Chair of the Litigation Committee, Peter THOMSEN, noted, *inter alia* that **epi** had been granted observer status at the Administrative Committee of the Unified Patent Court. A new working group entitled the Administrative Committee UPC Advisory Group has been established to prepare for the meetings of the Administrative Council. The newly formed working group comprises the following members of **epi**:

- Francis LEYDER (President);
- Heike VOGELSANG-WENKE and Bogoljub ILIEVSKI (Vice Presidents);
- Peter THOMSEN (Chair of the Litigation Committee);
- Kim FINNILÄ (Vice Chair of the Litigation Committee and Chair of the Litigation Committee Rules of Procedure and CMS sub-committee);
- Triona WALSH (Secretary of the Litigation Committee);
- Giuseppe COLUCCI (Chair of the Litigation Committee Representation and Privilege sub-committee);
- Tilman PFRANG (Chair of the Litigation Committee Virtual proceedings sub-committee);
- John GRAY (Chair of the OCC);
- Yannick BIRON (Secretary of the OCC); and
- Nicole van der LAAN (Legal Advisor to the Litigation Committee).

Peter THOMSEN and Kim FINNILÄ, the Chair and Vice-Chair of the Litigation Committee respectively, have been selected as representatives of **epi** at the Administrative Council meetings.

A consolidated version of the Rules of Procedure of the UPC together with the fees as adopted by the UPC Administrative Committee, can be found on the Unified Patent Court website<sup>1</sup>.

## 15/ Diversity and Inclusion Working Group Report

The report was presented by Fatema SARDHARWALA (GB) in the absence of the Chair Marc NEVANT (FR). It was noted that at C91, Council approved a motion on the use of gender-neutral language in **epi** documents. The work of the Committee is on-going and more substantial information can be viewed on the **epi** website<sup>2</sup>.

<sup>1</sup> <https://patentepi.org/r/info-2204-01>

<sup>2</sup> <https://patentepi.org/r/info-2204-02>

It was requested that the Group continues its activities until at least C94 in order to:

- (i) help providing material to support our members to best address and adapt to the need of our clients; and
- (ii) propose actions to grow **epi**'s commitment to diversity and inclusion.

This was approved with 80% in favour; 15% against; with 5% abstaining.



It was also noted that there are currently 7 members in the Working Group (Marc NEVANT (FR) (Chair); Olga SIRAKOVA (BG); John GRAY (GB); Sally BANNAN (GB); Jonna SAHLIN (FI); Cyra NARGOLWALLA (FR); and Fatema SARDHARWALA (GB). It was requested that Nina FERARA (DE) be added to the group which was approved by 80% with 14% against and 6% abstaining.

## 16/ EQE

A presentation entitled “*Consultation Results and Considered solutions*” by Tiem REIJNS provided a comprehensive analysis in relation to the New EQE concept details of which are in the accumulated file. In the period May 2022 to August 2022, consultations with questionnaire and sample papers were issued to 712 participants. In addition, 15 letters were received: National Associations (3); Industry (2); Training Institutes (3); Other associations (2); Private Practice (2); Other (2) and a Candidate. The results were analysed. An aspect under the microscope was the suitability of Multiple Choice Questions (MCQ). It was suggested that MCQ are the source of the problems with the Pre-Exam and should be avoided. It would appear that research has shown that MCQ are suitable for basis level testing. In the New EQE:

- (i) the basic knowledge is tested through MCQ;
- (ii) creativity through open questions; and
- (iii) complexity is tested in open answer papers (M2 and M4).

It was also suggested that the variation in the different testing techniques should be within reasonable limits.

Also presented in the report were responses received from EQE-2022 candidates.

In this post Covid-19 era, there is a suggestion to move back to examination centres even though there are some disadvantages. For example, some candidates live close to an examination centre whereas others need to get their by air with the need to stay in hotels. In some cases there the further complications of a visa requirement.

The report arrived at a number of solutions of which the more significant were an annual examination; deferring M1 to 24 months and M3 to 36 months; drafting, responding and opposing to be always present in one paper.

## 17/ Presentation by the German Delegation

The German Delegation submitted a number of questions in relation to EQE for Council's consideration. The Delegation considered it essential to seek the opinion of Council regarding some important aspects to have a reliable mandate for proper discussions in the future with the EPO or in the Administrative Council, as indicated in their letter to the Presidium of 9 October 2022. The questions and Council's responses (following debate) were as follows:

- (i) *does Council agree that the essential element of the examination is not only the testing of knowledge but also the testing of practical skills, such as drafting a patent application and preparing arguments?*  
89% in favour, 3% against; 8% abstaining;
- (ii) *single and multiple choice is certainly an effective questioning technique to test knowledge. However, according to our view, practical skills can only be tested with free-form questions and answers that are based on a given set of facts. Does Council agree that a rule is introduced in the Regulation on the European qualifying examination for professional representatives (REE) or at least in the Implementing provisions to the Regulation on the European qualifying examination (IPREE) that the EQE as a whole is only considered passed, if at least one paper addressing the core competences – drafting claims and/or a patent application on the basis of information on facts provided and developing arguments on the basis of information on facts provided – is produced in free-form and passed?*  
71% in favour ; 19 % against, 10% abstaining;
- (iii) *before the pandemic, the exams were held in presence at test centres. In the last two years, candidates sat at home by necessity. However, experience at universities and colleges has shown that with online*

exams, the threshold for cheating is significantly lowered. Recent reporting has revealed that even chess grandmasters are not afraid to cheat. Does Council agree that there should be a possibility that the EQE will again be conducted in test centres, in particular to enable reliable invigilation and to ensure a fair examination?

58 % in favour, 25% against, 17% abstaining;

- (iv) does Council agree that the Professional Education Committee (PEC) be tasked with investigating what opportunities candidates have to cheat during EQE and whether candidates have been caught in past online exams?

37% in favour, 47 % against, 16% abstaining;

- (v) *It is a fundamental principle that the profession, i.e. professional representatives, and examiners at the European Patent Office draw up and also correct the EQE. This ensures that not only academic knowledge but also practical knowledge is conveyed and examined. This principle, which is also practised by national professions, such as patent attorneys and tax advisors in Germany, has proven itself, but has long been viewed critically by the European Commission from an antitrust perspective. Is Council in favour of EQE continuing to be carried out by the profession, i.e. by professional representatives and examiners, and not by third-party providers such as universities, educational institutions, etc.?* 77% in favour, 9% against, 14% abstaining.

## 18/ Presentation by the EPO Vice-President Steve ROWAN

Vice-President Heike VOGELSANG-WENKE introduced Steve ROWAN, EPO Vice-President Patent Granting Process, who addressed the Council followed by a question/answer session.



Steve ROWAN comprehensively responded to a plurality of questions posed by Heike VOGELSANG-WENKE.

## 19/ Update on UPC

Chris MERCER gave a brief presentation entitled “Considering the benefits and disadvantages of the UP/UPC”. A more comprehensive presentation had been made the previous day at the Pre-seminar Meeting.

## 20/ UPC: designation of practitioner

Giorgio CHECCHACCI (IT) made a presentation on how a practitioner could indicate that they are UPC qualified. The presentation centred on the title “European Patent Litigator”. Following a debate on the matter, Council adopted the recommendation to use the professional title “European Patent Litigator” for **epi** members who are authorized to represent parties before the UPC according to Art 48.3 UPCA with 71% were in favour; 22% were against with 15% abstaining.

## 21/ Review of Decisions and actions and closing of meeting.

The Secretary General listed all decisions made and actions taken during the meeting.

The President referenced the pre-Council seminar held the previous afternoon entitled “Considering the benefits and disadvantages of the UPC and UP”. He thanked the participants for their attention, various reports and debate; and the **epi** Secretariat for their diligence and unstinting support before declaring the meeting concluded at approximately 19:00. Subsequently, participants travelled to the Corocoro Restaurant in Marbella located some 40km from the Hotel where they were entertained by Flamenco Show with guitarists and singers accompanying the dancers followed by a well earned Dinner and an interesting selection of local food and wines.

# Council adopts recommendation on professional title "European Patent Litigator" for representatives before the UPC

In view of the upcoming Unified Patent Court (UPC), the **epi** Council adopted at their last Council meeting on 22<sup>nd</sup> October 2022, a recommendation on a new title to be used by European Patent Attorneys entitled to

represent parties before the UPC under Art 48(2) UPC Agreement (UPCA). The title may be used by those who have been registered on the list of European Patent Attorneys according to Art 48(3) UPCA.

## Empfehlung zum Titel für epi-Mitglieder, die befugt sind, Parteien vor dem UPC zu vertreten

In Anbetracht von Art. 4(c) und Art. 9(3) der Vorschriften über die Errichtung sowie der Empfehlung des Rates zum Titel (Punkt 4.2.2.2 der Sammlung der Beschlüsse des Rates) empfiehlt der Rat, dass epi-Mitglieder, deren Name in die Liste gemäß Art. 48(3), letzter Satz, des Übereinkommens über ein Einheitliches Patentgericht (UPC) eingetragen sind, neben dem Titel "European Patent Attorney" oder einem der in Punkt 4.2.2.2 aufgeführten Äquivalente, die folgende Titel führen:

**European Patent Litigator**

## Recommendation on the professional title to be used by epi members who are authorized to represent parties before the UPC

Having regard to Art. 4(c) and Art. 9(3) of the Founding Regulation as well as to the Recommendation of the Council concerning the title (item 4.2.2.2 of the Collection of the decisions of the Council), the Council recommends that epi members whose name has been entered on the list mentioned in Art. 48(3), last sentence, of the Agreement on a Unified Patent Court (UPC) use the following professional title, in addition to the title "European Patent Attorney" or any of its equivalents listed in said item 4.2.2.2:

**European Patent Litigator**

## Recommandation sur le titre professionnel à utiliser par les membres de l'epi qui sont autorisés à représenter les parties devant l'UPC

Vu l'art. 4(c) et l'art. 9(3) du Règlement de création ainsi que la Recommandation du Conseil concernant le titre (recommandation 4.2.2.2 du Recueil des décisions du Conseil), le Conseil recommande aux membres de l'epi dont le nom a été inscrit sur la liste mentionnée à l'art. 48(3), dernière phrase, de l'Accord relatif à une juridiction unifiée du brevet (UPC), d'utiliser le titre professionnel suivant, en plus du titre de "European Patent Attorney" ou de l'un de ses équivalents énumérés dans ladite recommandation 4.2.2.2:

**European Patent Litigator**

## Election to Council 2023

The Council of the Institute is due to be elected for its new term at the beginning of 2023. The nomination phase was completed on 12 December 2022 and the list of candidates is available on the epi website at <https://patentepi.org/r/election-to-council-2023>

The election shall be by remote e-voting. You shall receive by post, in the second half of January 2023, a personal letter with instructions for remote e-voting on a secure website of our independent voting service provider, Civica.

**The deadline for submitting your vote is 15 February 2023, midnight.**

The results of the election will be published on the epi website and subsequently in epi Information 1/2023.

If you have any questions, please contact the epi Secretariat as follows:

By email: [pbc-support@patentepi.org](mailto:pbc-support@patentepi.org)  
or Tel +49 89 242052 0



# Patent practice

## Advice from PCC

**The Professional Conduct Committee provides advice or opinions upon enquiries from epi members under Art. 7(d) of the epi Code of Conduct. Any advice given does not have regulatory force and is prepared with the intention to provide helpful assistance. No liability of any kind attaches to the epi, the Professional Conduct Committee or any members of that Committee in respect of these advice. In accordance with Article 7(d) CoC, opinions of the Professional Conduct Committee shall not be binding on the disciplinary bodies.**

**The following advice has been considered useful for epi members as the questions it addresses are particularly significant. Thus, it has been decided to publish it, in anonymised form.**

### Summary of Referral

**T**he Referring Member has raised the question of whether there is a limit to the time period during which a European Patent Attorney who has moved from one position of employment to another is under obligation to a former client that the Referring Member represented at his/her former firm. The question has arisen in the context of the European Patent Attorney being instructed by a current client of his/her new firm to take action against the interest of the former client. In particular the Referring Member has been asked to handle the prepa-

ration, filing and prosecution of an opposition (presumably at the EPO) against a patent owned by the former client.

The Referring Member does not state whether he/she was directly responsible for the patent in question; but he/she has indicated that he/she had responsibility for the relationship with the former client entity.

The Referring Member left his/her previous employment approximately two years ago.

### Legal and Ethical Questions Raised

The Referral raises a number of somewhat interdependent issues. It is difficult to resolve what seem to be conflicting aspects of the situation.

The main questions appear to be:

1. Based on a practical interpretation of Article 3(2), it seems necessary to ask whether a fiduciary relationship with the former client arose when the Referring Member was in his/her previous employment.
  - a. If a fiduciary relationship existed, what obligations would this have created with respect to:
    - a.i. Safeguarding of the former client's confidential information;
    - a.ii. Acting in a manner that is contrary to the interests of the current client?

2. Is there a material risk of prejudice to the position of the former and current clients if the Referring Member:
  - a. Should act as instructed; or
  - b. Should not act as instructed?
3. If the conclusion reached is that the Referring Member should be restrained in some way from acting against the former client, should the restriction apply in a general sense to all possible actions that the new client requests; or should it be limited in some way to merely the use of the confidential information that has come into the knowledge of the Referring Member?
4. Are there any other factors which have weight in determining the freedom of the Referring Member to represent the new client as requested?

### Sources Accessed

This advice has been prepared primarily with reference to the **epi** Regulation on Discipline ("RoD"), Article 3(2); The Code of Conduct of the Institute of Professional Representatives before the EPO, Section 4(f) (the "Code"); and (to a limited extent) the English law Court of Appeal case referred to as *Glencairn v Final Touch* [2020] EWCA Civ 609<sup>1</sup>.

Article 3(2) of the RoD reads,

*"A professional representative shall refuse or withdraw his services if acceptance or continuation would necessitate his dealing with a particular matter on which he has represented or advised another client with opposing interests and the conflict has not been resolved."*

*Glencairn v Final Touch*<sup>2</sup> is a case decided under the laws of England, with subsidiary reference to various judgements in certain Commonwealth countries. Consequently its relevance to the Referral may be limited; and there may be other sources of law in other jurisdictions that are at least as relevant. Equally, the judgement is instructive with respect to the obligations that arise from a fiduciary relationship and also with respect to the question of whether prejudice is likely to arise as a practical matter.

### The Regulation on Discipline

A straightforward reading of the RoD as reproduced above suggests that there is a simple resolution to the Referral: as long as the Referring Member did not himself/herself draft or prosecute the patent that is to be opposed, he/she appears to be free to represent the new client in opposing the patent.

This is based on the reference in the RoD to the "*particular matter*": if the Referring Member was responsible for the

patent application that constitutes the "*particular matter*" when in his/her previous firm then he/she is forbidden to provide services to the new client in respect of the opposition, unless the former client gives consent to this (or the conflict is in some other way resolved). Otherwise (i.e. if the Referring Member was not responsible for the patent) there is no "*particular matter*" falling within the scope of Article 3(2) and, as indicated, the Referring Member is free to act for the new client.

However it seems clear firstly that such a simplified interpretation could not have been intended when the RoD was drafted.

This inference is based on the underlying reason for creation of this Article of the RoD. This surely was, primarily, to minimise the risk of harm to a former client arising when a European Patent Attorney ceases to act for the former client and furthermore seeks to act against the former client on behalf of a new client.

Clearly in such situations a narrow interpretation of the "*particular matter*" can bring exactly the same hazard to bear on the former client.

This can be illustrated by an example: suppose the Referring Member drafted and prosecuted a patent application directed to a pharmaceutical compound. Clearly under any reading of Article 3(2) the Referring Member would be prohibited from opposing that patent if instructed to do so by the new client. However, what would be the situation if the new client instructed the Referring Member to oppose not the patent to the pharmaceutical compound, but instead a further patent directed to a salt of the compound?

A narrow reading of Article 3(2) would allow the Referring Member to oppose the salt patent because it is not the "*particular matter*" (i.e. the original pharmaceutical compound patent). However in that situation the former client might well suffer at least as much harm (if not more harm,

<sup>2</sup> *Glencairn v Final Touch* relates to somewhat different circumstances than those set out in the referral. The case concerns a situation in which a firm of English solicitors (attorneys-at-law) acting for a first defendant acquired confidential information about the terms on which a claimant was prepared to settle litigation. The solicitors' firm subsequently was instructed by a second defendant, that was unrelated to the first, in a similar dispute against the same claimant. The claimant sought an injunction to prevent the solicitors' firm from representing the second defendant at all, because of a fear that confidential information acquired by the solicitors could be used to the detriment of the claimant. In particular there was a concern that the second defendant could gain an advantage in negotiations because it had become known by that defendant's legal representatives on what terms the claimant might be prepared to settle the dispute.

The English Court of Appeal decided against injunctioning the solicitors' firm. This was for a number of reasons, including that (in the view of the Court) adequate safeguards of the acquired confidential information had been set up; and therefore the practical risk of harm was very low.

Moreover the Court of Appeal determined that at no point had the solicitors' firm been in a position to have a fiduciary relationship with the claimant, which entity was never its client. Consequently various sanctions that might have applied in the case of a client-attorney relationship were not applicable.

<sup>1</sup> <https://patentepi.org/r/info-2204-05>

<https://patentepi.org/r/info-2204-05>

if the salt patent was commercially more valuable) as if the Referring Member had opposed the pharmaceutical compound patent. Hence a literal interpretation of Article 3(2) could defeat what appears to be the underlying objective of protecting the former client from hazards of this kind.

A similar problem arises with respect to divisional European patent applications: is a divisional case the same “*particular matter*” as the parent from which it is derived? A literal interpretation of Article 3(2) suggests not; but everyday experience of divisional patent practice shows that a divisional case may be so close in terms of both its objective and content that it would not be reasonable to say it is not, in practical terms, the same “*particular matter*” as the parent.

In some other cases of course it would be clear that e.g. a divisional case or a patent directed to the salt of a compound is not the same “*particular matter*” as the parent case on which such filings are based. It will be a matter of assessment in individual cases whether the “*particular matter*” definition embraces (or not) the case that is to be the subject of opposing action.

In short therefore it seems clear that a mere difference of patent number does not automatically mean that two patents do not relate to the same particular matter; and in all likelihood it will be necessary to have detailed information in any given case to determine whether the wording of Article 3(2) permits a representative such as the Referring Member to act.

A second factor of relevance to Article 3(2) of the RoD is that it contains no limitations as to time. It seems therefore that any effect of Article 3(2) will be perpetual unless any conflict on which it has a bearing becomes resolved.

The complete silence of Article 3(2) on the duration of its effects suggests that the Professional Conduct Committee is not free to interpret the duration aspect in any way except that the effect of the Article is perpetual unless a resolution is possible.

## Resolution of the Conflict

The most obvious way in which a conflict as viewed under Article 3(2) may become resolved is if the former client grants consent for the Referring Member to file an opposition. The conflict also could be resolved through the former client ceasing to exist (although in that case it may be unlikely there would be any requirement to oppose the patents of that entity) or through the former and new clients reaching an agreement in a manner that renders the conflict moot. It must be assumed that these are all unlikely outcomes in the present case. Therefore it is somewhat likely that the effect of Article 3(2) will in the present case be long-lasting, if not perpetual.

## Fiduciary Relationship

The analysis in *Glencairn v Final Touch* among other things indicates that there is no set definition of what form a fiduciary relationship may take; and there could be various kinds of relationship that give rise to one or more fiduciary obligations. In this regard see Paragraph [73] of the judgement. Nonetheless for the reasons explained below it seems clear that a fiduciary relationship existed in the client-attorney dealings between the former client and the Referring Member.

Paragraph [20] of *Glencairn v Final Touch* lays out the situation very clearly: in circumstances in which a solicitor was instructed by a former client,

*“there is a continuing fiduciary duty owed by the solicitor to the former client and a risk of disclosure of information which is [...] confidential to the former client [...].”*

There seems to be no reason not to apply this interpretation to the relationship between a former client and a patent attorney. In other words a relatively simple assessment indicates that the Referring Member’s former employment established a recognisable fiduciary relationship with the former client; and therefore Paragraph [20] is relevant guidance.

## Fiduciary Obligations

Note that Paragraph [20] addresses both the confidential nature of information learned; and the risk that such information may be disclosed (in a way that is harmful to the former client).

Notwithstanding that *Glencairn v Final Touch* by reason of relating essentially to a single EPC Contracting State may not be unassailably applicable to the work of a European Patent Attorney, Paragraph [20] sets out a position that one imagines would apply in the majority of EPC States if not all of them. In view of this for purposes of this advice it seems reasonable to conclude (a) that the Referring Member must maintain confidentiality of any information obtained from the former client; and (b) that there is a perpetual risk of disclosure of that information.

That risk would seem to exist regardless of any undertaking made by the Referring Member not to make use of the confidential information. Paragraph [20] implies that it may not be within the ability of the Referring Member to ensure that no breach of relevant confidential information occurs. As an example in this regard one may consider information such as a prior art document a detailed interpretation of which does not take place until some time after an opposition has been filed. In such a situation, which is not uncommon in opposition practice, the Referring Member would not be cognisant of a breach of confidentiality until long after it had occurred.

Paragraph [66] of *Glenclairn v Final Touch* explains that although the fiduciary relationship between a solicitor and a client comes to an end with termination of the solicitor's retainer, the obligations of confidentiality that arose while the fiduciary relationship existed endure without termination. The same situation seems to arise when for example a European Patent Attorney leaves a firm that has a fiduciary relationship with a client: the patent attorney thereafter does not have to behave as though a fiduciary relationship continues to exist. However any confidential information gained as a result of the fiduciary relationship must remain confidential at least for the remainder of the patent attorney's active professional life.

## Restraint of Individuals vs Restraint of Firms

The RoD appears to have effect only with respect of the actions of individual European Patent Attorneys. It therefore seems unlikely that the RoD could be invoked to prevent someone else in the Referring Member's new firm from handling the opposition. However in suggesting this the Referring Member's colleagues must have regard to Section 4(f) of the Code. This reads:

*"(f) Supplementary to Articles 2 and 3 of the Disciplinary Regulation, a member shall not take any action against a particular matter which is being handled or has been handled by the member or another person in his office, unless the client in the matter agrees to this action or unless the member has no cognisance of the matter and is no longer in a position to take cognisance of it. The member is not permitted to make use in the action of information obtained during the time the matter was previously handled, unless the information is public."*

This provision in the present case may prevent the Referring Member's firm as a whole from handling the opposition, because (self-evidently) the Referring Member has cognisance of the matter in question and (in all likelihood, although as noted this was not stated) was himself/herself responsible for it at the former firm. Hence a colleague (who is not the Referring Member) only would be free to handle the opposition, etc., if it could be clearly demonstrated that the colleague has no cognisance of the former work of the Referring Member in his/her previous employment.

The cognisance problem could be avoided through setting up of an effective information barrier within the Referring Member's firm, such that any colleague having responsibility for the instructed opposition the Referring Member is prevented from accessing information or documents of relevance to the matter that are in the Referring Member's possession or sphere of knowledge.

Such an information barrier however in the view of the Chamber must genuinely be effective, and must not be capable of circumvention by the Referring Member or the

allocated colleague. Moreover it must exist at least from the outset of the allocated colleague's receipt of materials of relevance to the opposition.

It is observed that the size of the Referring Member's current firm may determine the ease with which an information barrier may be established. A large firm or one having multiple office locations may be more readily able to set up an information barrier than a small firm. Of course if the current firm employing the Referring Member is a sole trader practice it would not be possible to set up a meaningful information barrier at all (and indeed there then would exist no colleague who could handle the matter in place of the Referring Member).

## Other Factors

The only other obvious factors that appear to be relevant are:

- a) Will the new client be prejudiced by refusal of the Referring Member and/or his/her firm to act?
- b) Will the establishment of the Referring Member's business and his/her ability to practise his/her chosen profession be prejudiced by refusal of the Referring Member and or his/her firm to act?

The answer to both these questions is that there could potentially be detriment. For example if the Referring Member's technical knowledge is sufficiently specialised that the new client cannot locate alternative representatives having the same level of skill, detriment to the new client could arise.

Similarly if the Referring Member's practice is specialised in the technology area of the former and new clients he/she may find it hard to establish a practice unless he/she indicates a willingness to provide representation in the opposition.

As noted these risks seem real and possible; but considering that the practices of many patent attorneys are wide-ranging as to technical scope; and also considering that such considerations do not seem to be underlying reasons for the existence of (in particular) Article 3(2) of the RoD, for present purposes they have to be considered as secondary factors that do not detract from the overall conclusions presented below.

## Conclusions and Advice

Balancing the various competing factors outlined above the conclusions of the Chamber are:

- A. The relationship between the Referring Member and the former client clearly was fiduciary and, by the Referring Member's admission, gave rise to confidential information;
- B. The RoD makes clear that, without limit as to duration, a European Patent Attorney may not act against the interest of a former client in respect of a matter.

- C. An orthodox legal analysis concludes that although any fiduciary relationship with a former client ends when the European Patent Attorney moves to a new firm that is not retained by the former client, any obligations of confidentiality arising from the fiduciary relationship are perpetual unless the patent attorney is specifically released from them by the former client; or unless other circumstances (such as winding up of the former client) arise that end the obligations.
- D. This obligation cannot be discharged through the giving of undertakings not to make use of confidential information. As explained, disclosure of confidential information to the detriment of the former client may occur without this being immediately apparent.
- E. The references to a “*particular matter*” in the RoD should be interpreted more broadly than at first sight seems justified by the wording of the provision. If this is not done the reason for the RoD could be undermined as explained above, and it is incumbent on **epi** not to interpret the RoD in a way that frustrates its objectives.
- F. In the present case it does not seem possible for a colleague of the Referring Member to handle the opposition without transgressing Section 4(f) of the Code, unless a truly rigorous information barrier can be established, in the Referring Member’s firm, such that the Referring Member as a result has no cognisance of any opposition handled by a colleague against the matter forming the subject of the enquiry; and the colleague has no cognisance of any relevant information gained by the Referring Member in his/her previous employment.

- G. Further considerations of commercial detriment to the new client and the Referring Member, that in a limited way mitigate the foregoing, may have some force; but bearing in mind the obvious intention of the RoD to protect clients such as the former client of the Referring Member these must be treated as subsidiary factors that do not overturn the main conclusions above.

For the foregoing reasons the Referring Member is advised that it does not seem possible for him/her personally to handle the opposition without a serious risk of breaching at least the RoD, and potentially the Code of Conduct as well (if the matter is handed to a colleague in the same office and no effective information barrier is established). In view of this the Referring Member is urged to review whether it is possible to establish an effective and timely information barrier. If this is not possible (because of the nature of the Referring Member’s firm; because material pertaining to the opposition has been received in a manner giving the Referring Member cognisance of it; or because the Referring Member’s colleague has cognisance of confidential material acquired by the Referring Member) the Referring Member is advised to ask the new client to identify alternative representatives to handle the opposition.

This advice does not have regulatory force and is prepared with the intention to provide helpful assistance. No liability of any kind attaches to the **epi**, the Professional Conduct Committee or any members of that Committee in respect of this advice. In accordance with Article 7(d) Code of Conduct of the Institute of Professional Representatives before the European Patent Office, the opinion of the Professional Conduct Committee shall not be binding on the disciplinary bodies.

# The Unitary Patent System

On behalf of the Litigation Committee (K. Finnilä)

According to an announcement<sup>1</sup> on 5 December 2022 on the Unified Patent Court (UPC) website the start date of the UPC will be postponed to 1 June 2023 with the three-month sunrise period commencing on 1 March 2023. The main reason is that *“The additional time is intended to allow future users to prepare themselves for the strong authentication which will be required to access the Case Management System (CMS) and to sign documents.”*

Despite this postponement, the EPO will allow for early request for unitary effect and request for a delay in issuing the decision to grant a European patent as of 1 January 2023.



Kim Finnilä

More details can be found on the new web site of the UPC - <https://www.unified-patent-court.org/en> - launched in November 2022. The new website contains detailed information on the Court and related documentation. The web site is also updated in relation to the CMS concerning the “opt-out” and the “registration as a representa-

tive before the UPC” with information on providers holding certificates that meet the requirements of the UPC.

The UPC Administrative Committee (AC) held its third meeting on 19 October 2022, where Kim Finnilä and Triona Walsh represented **epi** as observers. At this meeting the main issues were the preparations for launching the UPC including recruitments, training and HR issues. The agreement on data exchange between the EPO and UPC was also mentioned. More on this on the UPC web site under “news”.

As a follow-up on the UPC AC meeting the Litigation Committee established a regular contact with the UPC IT Team. A third meeting was held on 16 December 2022. The **epi** representatives mainly include the members of the UPC Advisory Group. The aim is to improve the situation for future users of the CMS.

In this connection the Litigation Committee in close cooperation with the OCC also set up a “Forum for sharing UPC CMS experiences and solutions<sup>2</sup>” (kindly see announcement on the **epi** website and the relevant section on the forum<sup>3</sup> for **epi** members). All **epi** members have been informed by email. The discussions in the Forum are monitored and analysed by three OCC members Oana Boncea, Tassilo Meindl and Ronny Vavrin, who also are invited to the **epi**-UPC IT Team meetings.

<sup>1</sup> <https://patentepi.org/r/info-2204-26>

<sup>2</sup> <https://patentepi.org/r/info-2204-12>

<sup>3</sup> <https://patentepi.org/r/info-2204-25>

Next deadline for <b>epi</b> Information	Nächster Redaktionsschluss für <b>epi</b> Information	Prochaine date limite pour <b>epi</b> Information
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>15 February 2023</b> . 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>	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>15. Februar 2023</b> . 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>	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>15 février 2023</b> . 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>



# Education

## Preparation for the 2023 EQE on the epi-learning platform

In order 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
- EQE Online Workshops
- **epi** Tutorials
- **epi** Tutor consultation hour

In addition, **epi** Students

- have exclusive access to a training video on patent claims on the [epi-learning.org](https://epi-learning.org) platform.
- can enrol for webinars (and access recordings thereof) offered to **epi** members (such as UP/UPC) at a reduced fee.

### **epi** Students' forum

In this forum, **epi** Students have the opportunity to ask questions and to discuss topics related to the European Qualifying Examination (EQE) at any time. Posting questions and answers in the forum is, by default, anonymous. **epi** Students are automatically enrolled and access to the forum is free of charge. Posts will be answered by an **epi** Tutor and will be available for all to see.

### **EQE Online Workshops**

The EQE Online Workshops are especially designed for EQE candidates who have passed the Pre-Examination and are now preparing for the main EQE. Each online workshop comprises usually between 6 to 8 online ses-

sions in which participants will work in small groups on real examples of practical and strategic aspects of the examination paper in question. Workshops can be booked per paper.

Further updates will be provided when available.

## 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 video-conference or e-mail.

In addition, candidates also have the opportunity to submit scripts for the “Mock January 2021” and “Mock December 2021” available on Wiseflow. Here, candidates can write these scripts as timed papers on Wiseflow, submit them on the system and download them for submission as part of the **epi** tutorials.

Due dates and feedback sessions are individually organised between the tutee and tutor. The tutorial fee (400 € per paper) covers a maximum of two different years. If candidates wish to write the two “Mock” papers, they would be considered to be the two papers and will have the same tutorial fee. **epi** Students enjoy a 50% discount.

## epi Tutor consultation hour exclusive for epi Students

Each week, an experienced **epi** Tutor will be available for an hour to answer questions you may have, relating to each one of the exam papers, starting with Paper D (first week), with the other papers following in each of the next four weeks. The cycle of sessions will then repeat in 5-week blocks. These sessions are free of charge and there is no need to register in advance – just select the relevant link on the **epi** learning platform.

### Session Calendar

All sessions will be held on Wednesdays from 16:00 to 17:00, CET.

Paper D:

04 January 2023

08 February 2023

Paper A:

11 January 2023

15 February 2023

Paper B:

18 January 2023

22 February 2023

Paper C:

25 January 2023

01 March 2023

Pre-Examination:

01 February 2023

08 March 2023

## DI Advanced Questions

A set of 60 advanced legal questions has been prepared to help candidates preparing for Part I of the 2023 EQE Paper D. The questions relate to various topics of the EPC and the PCT.

Every Monday, for 20 weeks, starting on 10 October 2022, 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 a kick-off virtual classroom (VC) on 4 October 2022 and monthly VCs where Mr 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 on [epi-learning.org](https://epi-learning.org) but no fee is involved.

### Session Calendar

60 DI Questions:

10 October 2022 to 21 February 2023

Virtual Classrooms (VCs):

20 December 2022, 24 January 2023, 21 February 2023

## Upcoming epi events

### SESSION CALENDAR

- 18 January 2023:  
Webinar: Internal Communication Barriers
- 1 February 2023:  
Webinar: Keeping and Transferring Files
- 7 February 2023:  
Seminar: Unitary Patent  
and Unified Patent Court in Milan
- tbc Q1 2023:  
Seminar: Unitary Patent  
and Unified Patent Court in Vienna
- tbc Q1 2023:  
Seminar: Unitary Patent  
and Unified Patent Court in London (tbd)
- 8 March 2023:  
Webinar: Collaboration with  
overseas patent colleagues – Japan
- 29 March 2023:  
Seminar: A fresh look at procedural  
aspects of appeal proceedings – Oslo

- 27 June 2023:  
Seminar: A fresh look at procedural aspects of appeal proceedings  
– Madrid/Düsseldorf (tbd)
- 27 September 2023:  
Seminar: A fresh look at procedural aspects of appeal proceedings – London
- 22 November 2023:  
Seminar: A fresh look at procedural aspects of appeal proceedings  
– Madrid/Düsseldorf (tbd)

### UP/UPC Webinar Recordings

**epi** is offering the purchase of the recordings of the recent webinars relating to the Unitary Patent and the Unified Patent Court to **epi** members and **epi** students.

The topics are:

1. Opt-Out and Strategy
2. Transitional provisions for the Unitary Patent
3. UP/UPC – What to do before the start of the system

Sounds interesting? Please find all the relevant information on the **epi** website<sup>1</sup>

<sup>1</sup> <https://patentepi.org/r/up-upc>

## epi Student membership

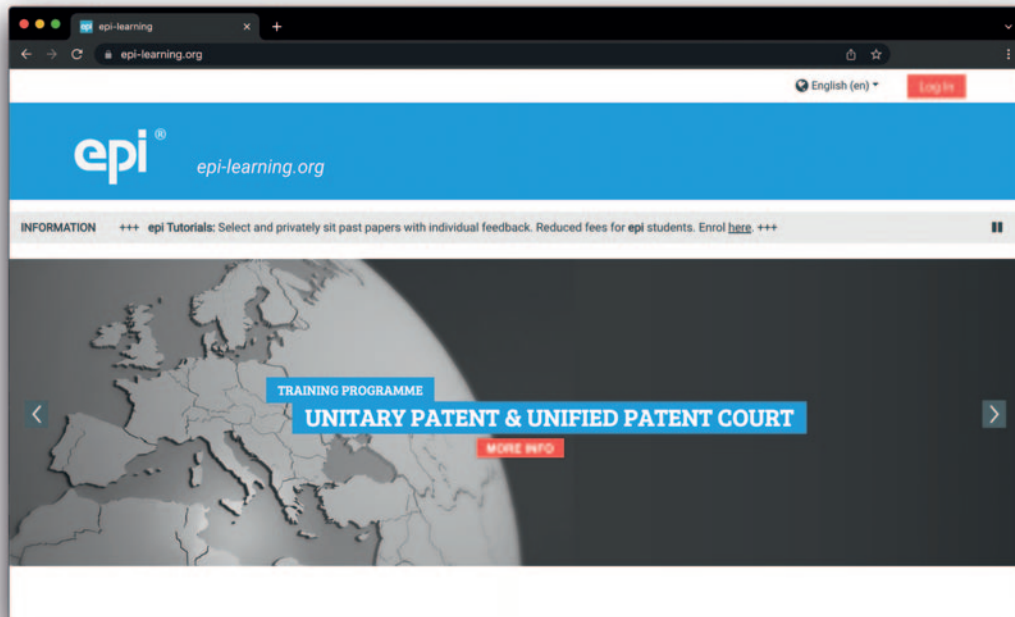
**epi** student members have access to additional information on the **epi** learning website, including the student forum described below. Other benefits of student membership include receiving alerts about **epi** training courses, priority access to our educational events, and reductions on course fees for **epi** educational events, such as tutorials, 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 tool<sup>1</sup>, providing the necessary documents<sup>2</sup> and paying the fee.

<sup>1</sup> <https://patentepi.org/r/info-2204-06>

<sup>2</sup> <https://patentepi.org/r/info-2204-07>



# 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.

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

- Added Matter
- Collaboration with overseas patent colleagues
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# Tutors' Report on the EQE 2022 Papers

## and the Meeting between Tutors and EQE Committees

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Each year in autumn, the EPO 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 last 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 again held by videoconference, in the mornings of 8 and 9 November 2022. On the first day, Papers A, B, C and the Pre-Exam were discussed; on the second day, Paper D and General matters.

On the first day, only about 50 people participated of which about 35-40 tutors; on the second day, even fewer people participated. The low attendance may be due to the online videoconference format, which is less attractive and less interactive than an onsite meeting, also due to the lack of social, informal moments. The very late announcement of the dates (the meeting was only announced by 11 October, less than one month before the event and in a busy part of the year), by a message on the **epi** website (whereas before 2020 all tutors were informed by email by the EPO Academy or the EQE secretariat), may have played a role too. We all look forward to having the 2023 Tutor Meeting again in person at the EPO in Munich or The Hague!



Some questions for the Committees were submitted by email prior to the meeting, unfortunately also less than other years. During the meeting, additional questions were asked. The questions were addressed by the Committees and the Examination Board when discussing the papers and in the General part. 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 2022;
2. The Online EQE 2022;
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 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, Harrie Marsman, Zsófia Pintz and Sander van Rijnsouw for finding time to prepare the individual paper summaries.

We all wish you good luck in 2023,  
*Roel van Woudenberg (editor)*

### 1) Pass rates EQE 2022

The official results for each paper of EQE 2022, as published on the EQE website and dated 7 July 2022 (one day after the candidates received their Results letters in MyEQE) for EQE2022, are shown in the table on the next page:

In 2022, 680 candidates sat the Pre-Exam, similar as in 2021 (626), but 30% less than in 2019 (920) and 2018 (935). This low number is probably still an effect of the

EQE 2022*	#Candidates**	PASS***	COMP.FAIL	FAIL
Pre-Exam (4 x 70min)	680	96,76%****	--	3,24%
A (3½ h + 30 min)	886	59,82%	13,09%	27,09%
B (3½ hours)	1158	77,55%	6,74%	15,72%
C (2 x 3 hours)	1400	49,14%	12,07%	38,79%
D (90 min + 90 min +3 hours)	704****	62,64%	8,52%	28,84%

\*The Pre-Exam, A, B, C, and D papers are designed as papers of 4h, 3½h, 3h, 5h and 5h respectively [Rule 22-27 IPREE]. Since 2017, all candidates are granted an additional thirty minutes per paper to these durations [Decision of the Supervisory Board of 17 November 2016]. In the Online EQEs of 2021 and 2022, 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 to the lengths shown in this column.

\*\* 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 or are still pending before the latter.

\*\*\* The FAIL rate includes no-shows.

\*\*\*\* Due to the neutralization of complete Part 3 (Q.11-15) and Q.20, i.e., 70 out of 100 marks, of Pre-Exam 2022.

\*\*\*\*\* In view of the high pass rate of paper D in 2021 due to the neutralization of D1.1 because of the initial absence of the paper in English and French when the exam was started, there were relatively few resitters this year, so that the number of candidates sitting the D exam was lower than usual (usually 1000-1200, depending on pass rate of paper D the previous year and Pre-Exam pass-rate) and such that the pass-rate was expected to be higher than usual (as the pass-rate for resitters is lower than that for first-time sitters). The number of resitters was indicated to be even less than the number of fails in 2021, such that maybe some that failed in 2021 gave up for the time being or permanently. Further, all candidates were awarded full (5) marks for Q.5 of D1 2022.

decision<sup>1</sup> of the Supervisory Board to allow all candidates to sit main exam papers in 2021 without the need to have sat and passed a Pre-Exam, in view of the cancellation of EQE 2020 due to the COVID-19 pandemic. Of these 680 candidates, 658 (97%) passed the Pre-Exam. This pass-rate is much larger than in recent years (2021: 87% from 626 candidates; 2019: 88% from 920 candidates; 2015-2018: 74-76%), due to the neutralization of 6 questions (complete part 3 of 5 questions as well as question 20; worth 30 out of 100 marks).

885 out of 1918 candidates that took at least one paper passed the EQE (compared to 1093 out of 2780 last year). When comparing the results for the individual main exam papers with earlier years:

- Paper A showed a significantly lower pass rate than in 2021 (74%) and 2019 (79%);
- The pass rate for paper B was significantly higher than in 2021 (55%) and 2019 (53%) and the highest of the last 5 years; paper B shows a wide variation from year-to-year (e.g., in 2017, the pass-rate for B was 67%, in 2018 73%, in 2019 53%; 2021 55%);
- The pass rate for paper C was similar as in 2021 (47%) and 2019 (50%);

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

- The pass rate of paper D was a lot higher than usual (e.g., D 2019: 49%; 2018: 33%; 2017: 39%; 2016: 42%); this high pass-rate is largely due to a full awarding of 5 marks to question 5 in view of an error in the English version of the question (see below), but presumably also due to the relatively few resitters and due to the 20% extra time that is given in view of the split into 3 parts.

## 2) The Online EQE 2022

In their "Information on the schedule for the EQE 2022 examination papers" communication of 25 June 2021, updated on 2 December 2021<sup>2</sup>, it was indicated how the exam papers and the schedule would be adapted for the online EQE 2022. The document provided that:

"The EQE 2022 will take place online using the same setup as the EQE of 2021 [i.e., using WISEflow/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. The pre-examination lasts four hours and forty minutes. Candidates will be allowed to print the prior-art documents for the claim analysis parts before the start of the appropriate part. The documents allowed for printing will be made available during the break preceding the relevant claim analysis part."

"**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." The June version also indicated that "Candidates will be allowed to print only the calendar", but this was replaced in the December version by "No calendars will be provided" in view of the Notice from the Examination Board of 19 November 2021<sup>3</sup> which provided that "[a]s of the 2022 examination, the practice concerning calendars will change: calendars will no longer be provided to candidates as part of the examination papers for the pre-examination and Paper D."

<sup>2</sup> Information on the schedule for the EQE 2022 examination papers, 2 December 2021

<sup>3</sup> Notice from the Examination Board for the European qualifying examination (EQE), 19 November 2021 (available on the EQE website under the link named "Calculation of time limits in paper D and pre-examination")

**“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. The latter 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 parts and the two D1 parts).

The communication also indicated that “The documents allowed for printing will be made available approximately ten minutes before the start of the examination”. Printing was only available before entering the respective exam flow, but not anymore after entering the flow in the secure environment.

Compared to the 2021 exam, the most significant changes in the schedule were different lengths of the D1.1, D1.2 and D2 parts for D, as well as the absence of calendars in the Pre-Exam and paper D exam papers.

About two weeks before the start of the exam, in the OJ of 28 February 2022, a new version of the “Instructions to candidates concerning the conduct of the European qualifying examination” [OJ 2022, A20] was published.

### **WISEflow**

EQE 2022 was again conducted online 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 2022, WISEflow presents each question on the left half of the screen in a language selected from the three EPO language. On the right half of the screen, 4 statements are presented in all three languages with a True/False answer option to each trilingual statement (clickable bullets). In the claims analysis parts, the prior art documents are provided as pdf documents via a hyperlink; these document could be printed before entering the exam flow.

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 (headers and ToC navigation pane; underline, bold, italics and strikethrough (the latter being added compared to 2021; 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. A basic form of annotation/ highlighting was introduced in the main exam papers (an improvement compared to 2021) and it was possible in the answer in the editor and in the Pre-Exam onscreen questions. Care had to be taken with the annotation of the pdf of the paper: Only the highlights/annotations from one of the tabs were saved so that they were visible in other tabs when the paper was subsequently opened in another tap and so that they reappeared when that first tab would be closed and again opened; however, highlights/annotations done on the same exam paper opened in further tabs (e.g., on a page showing a prior art document) got lost when the tab was closed; also when a further tab was refreshed, the annotations made on that tab disappeared and a copy of the annotated paper of the first tab appeared.

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, the legal texts on the EPO website were also available in WISEflow via a hyperlink “Legal texts”, including the GL/PCT-EPO and the Euro-PCT Guide; 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 2023; availability of the PCT Applicant’s Guide is in preparation<sup>4</sup> but not yet certain; other PCT legal texts seem unlikely. Candidates are recommended to check the actual situation in WISEflow during the Mocks.

<sup>3</sup> Notice from the Examination Board for the European qualifying examination (EQE), 19 November 2021 (available on the EQE website under the link named “Calculation of time limits in paper D and pre-examination”)

<sup>4</sup> The IB has made available a special edition of the PCT Applicant’s Guide <https://pctlegal.wipo.int/eGuide/eqe/documents.xhtml> containing individual annexes and the introductions to the International Phase and the National Phase as a new searchable web-application, as of 31 October 2022. Please monitor the EQE website and check the status in WISEflow.

## Mock exams

In the first week of September 2021, it was announced<sup>5</sup> that a first batch of mock exams would be made freely available to candidates and registered tutors on WISEflow for an extended period from mid-October 2021. These included all main exam 2021 papers, A 2019, B 2019, C 2014, D 2016, Pre-Exam 2019 and Pre-Exam 2021 as well as mock main exam papers made by **epi** (the same mock papers as for e-EQE 2021).

Early/mid November 2021, main exam and Pre-Exam candidates were informed by the EQE secretariat that the full and updated system would be available, including invigilation, on dedicated dates and times in December, whereby candidates could test WISEflow with a set of mock examinations under exam conditions, i.e., timed examinations according to the schedule of the EQE 2022 (2 – 10 December) with video and audio invigilation (AI and human). A new set of main exam papers was provided by **epi** for these mocks; the Pre-Exam Mock again used the 2019 Pre-Exam. Accidentally, the C paper offered on 10 Dec was not the newly prepared one; for that reason, a new C mock was made available on 21 December. The EQE secretariat strongly recommended making use of these mock exams to test equipment and settings.

On 14 December 2021, the EQE secretariat informed the main exam candidates by email with information on the further availability of the **epi** Mocks, for a longer period but without any video/audio/human invigilation, as well as a date for a further mock under exam conditions (3 February 2022) to check your equipment and setting. The latter Mocks were available until 6 March 2022, i.e., shortly before the start of EQE 2022.

## The actual Online EQE 2022

The online exam took place from 8 – 17 March 2022 (Main Exam) and 18 March 2022 (Pre-Exam). Compared to earlier years, the main exam papers were in the same sequences as before (D, A, B, C), but there was always at least one day in between two successive main exam papers. 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.

## Legal basis in the EQE 2022

It was indicated at the Tutor Meeting that apart from Guidelines of March 2021 (as being the ones in force on 31 October 2021, according to Rules 2 and 22(1) IPREE),

<sup>5</sup> "Information on planned mock examinations" dated 1 September 2021; updated on 16 November 2021 (indicating that "[T]he updated version of WISEflow will be ready for new mock exams in December", rather than "in January at the latest" in the September version).

also the Guidelines of March 2022 (as being the ones in force on the date of the main exam papers and as such available via the hyperlink "Legal texts" in WISEflow during the exam) were accepted as a valid legal basis.

## 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 said that the Committees and Examination Board very much appreciate the feedback from the tutors and invited all to actively participate. He urged all participants to have the cameras on, as a discussion meeting like this does not work with people hiding behind black screens. Nicolas expressed his thanks to everyone who supported this year's EQE. The EQE takes an extreme lot of resource, most from volunteers. Drafting of paper is one of the most work-intensive things. Tutors responded that the effort put in the papers is much appreciated.

### WISEflow

The EQE is currently in a difficult time in transition from the current, "old" EQE to the New EQE. The current system is not optimal, as we have paper papers done in electronic form. The Committees and the Examination Board are working to do it the best they can within the current boundary conditions.

Simone Fausti (EQE department) commented on the exam platform. He indicated that all feedback had been taken into consideration, but it is not always easy to accommodate for certain wishes. For EQE 2023, the format of the platform will be substantially the same as 2022. As an illustration of work that is ongoing on further improving the system, Simone mentioned that the EQE is working on the possibility to have legal basis available consistent with cutoff date, rather than -as so far- on the date of the exam. For the PCT Applicant's Guide, an EQE compilation was frozen on 31 October 2022 and testing is progressing to make that available; it is however not yet certain that it will be available. Also for PCT Articles and Rules, the gap has been seen and the EQE is looking whether they can be made available; however, technical hurdles may hinder it for EQE 2023.

In response to a question of a tutor as to when WISEflow would become available for preparation for EQE 2023, Christoph Machwirth (EQE) answered that it became available for candidates last week and that tutors will get access soon, at least those that registered for today and that requested access<sup>6</sup>. Others can register at a later moment.

<sup>6</sup> Those tutors got access on 10 November 2022, so shortly after the Tutor's meeting.

## Complaints and appeals

As to complaints and appeals, Nicolas Fabre indicated that the Examination Board looks at each and every complaint<sup>7</sup> and appeal<sup>8</sup>. Each appeal is intensively discussed on case-by-case by the Examination Board before deciding on interlocutory revision or not. Complaints are discussed in groups. Complaints are often difficult to handle because they are often not complete – presumably because they need to be submitted soon after the exam; better documentation of the situation is often required.

If the Examination Board does not grant interlocutory revision, the appeal is sent to the Disciplinary Board of Appeal (DBA), without comment as to its merit<sup>9</sup>. All decisions from the Disciplinary Board of Appeal are rediscussed in the Examination Board. If remarking needs to be done, then the decision is also discussed in the harmonization meeting. It was noted that appeal decisions sometimes come only a few days after the next EQE, i.e., too late to prevent an unnecessary resit. Nicolas indicated that there is a clear division of power between the Examination Board and the DBA. Whereas the Examination Board has a strict time limit for interlocutory revision<sup>10</sup>, there is no formal time limit for the DBA to decide.

It was also noted that many non-successful appeals are withdrawn at some time during proceedings and then not published. As a result, almost all published appeals are successful, which gives a misleading picture: success rate cannot be judged from the published appeals.

### **Outlook to 2023 [comments made spread out over the meeting by various people]**

Candidates already received WISEflow access in the week prior to the tutor meeting. When registering for this meeting, tutors could also register to get WISEflow access. Those that have registered will get access within the next 1-2 weeks. Tutors that did not yet registered for WISEflow access can still do so using the registration page on the **epi** website<sup>11</sup>. Candidates are strongly advised to check WISEflow and their setup using the Mocks as well as the Mock under exam conditions (including invigilation with camera and microphone). WISEflow system requirements are provided on/via the EQE FAQ “What are the system requirements?”<sup>12</sup> and the recommendations via the link<sup>13</sup> on that page.

7 Rule 19(3) IPREE; OJ 2022, A20, item I.8

8 Article 24(3), 1st sentence REE (in OJ 2019, SE3)

9 This follows the principles of Art. 109(2) EPC

10 Two months from notification of the decision – Art.24(2), 2nd sentence REE

11 Via <https://patentepi.org/r/info-2204-08>

12 <https://www.epo.org/learning/eqe/faq.html>

13 At the time of writing this article, the link is to “Lockdown computer recommendations” on <https://patentepi.org/r/info-2204-09>

The UPC roadmap indicated that the sunrise period is expected to start 1 January 2023 and the UPC is expected to go live per 1 April 2023<sup>14</sup>. That means that Germany is expected to deposit its instrument of ratification in December, i.e. after syllabus cutoff date, so that it will not be in EQE 2023.

The change of Rule 126(2)/127(2) EPC per 1 November 2023 is of no relevance for EQE 2023, nor for EQE 2024 (assuming that the REE/IPREE remain unamended until then), as the amendments is after the legal cut-off dates of 31 October 2022 and 31 October 2023 respectively. It has not yet been decided what version of the legal texts will be available online in those exams, but for EQE 2024 it would be confusing of the online version of the Guidelines is the actual version in force during the exam, which would have been amended to reflect the amended Rule, without the 10-day legal fiction for deemed delivery. It was indicated that no decision has been made yet as to how to this will be dealt with.

### **New EQE**

The EQE 2023 and 2024 will still be according to the current format. Dates for EQE 2023 and EQE 2024 have been announced on the EQE website<sup>15</sup>.

Tiem Reijns (New EQE WG) indicated that the “New EQE” is still being defined, with the results from the consultation being reviewed now being reviewed and implemented in the concept paper. Improvement ideas have been presented to the **epi** Council meeting this October. The changes that the Working Group is now working on will make the structure more easy than in the proposal used for the consultation. Only this implementation is completed, the new REE and related documentation will be prepared including transitional provisions. He indicated that it is not a workable solution to run the current and the New EQE in parallel for a long time, so that the transitional provisions will need to include exemptions. Changing the REE and the other documentation is very complicated. Once we know how future exam will be legally embedded in future REE, the transitional provisions will be drafted. The transitional provisions will be fair, candidates will not be disadvantaged. It was noted that it is not the New EQE WG, nor the EQE Secretariat, **epi**, the EPO, the Examination Board or the Supervisory Board that will need to adopt the new REE, but the Administrative Council<sup>16</sup>.

14 At the moment of finalizing this reports, the start of the Sunrise Period has been postponed for two months to 1 March 2023, followed by the entry into force of the UPCA on 1 June 2023. Please refer to the UPC website for the actual status (<https://www.unified-patent-court.org/en>)

15 See <https://www.epo.org/learning/eqe/notices.html> -> Dates for the EQE 2023 - notice of 16 December 2021 & Dates for the EQE 2024 - notice of 20 September 2022

16 The current REE are in OJ Suppl 3/2019, page 1 and 217.

These current REE were adopted by “Decision of the Administrative Council of 10 December 2008 amending the Regulation on the European qualifying examination for professional representatives before the European Patent Office (CA/D 26/08)” and entered into force on 1 January 2009. The current IPREE are also in OJ Suppl 3/2019, page 18-35. These current IPREE were adopted by the Supervisory Board on 13 December 2018 and entered into force on 1 January 2019.

### Why so few questions from tutors this year?

Tiem Reijns (Examination Board) asked why there were so few questions submitted this year and only from a single course institute. Tutors responded that it was not well known that meeting took place as there had not been a mailing with an announcement, but only a short announcements and registration page on the **epi** website. Also, the registration form did not include an invitation to submit questions by email or upload. It was also indicated that the online format also does not help, as it gives only very limited interaction and lacks social character. Several participants indicated that the networking aspect is completely absent in this online form and that this is a real pity. However, another tutor indicated that the online format makes participation easier as no travelling is needed, saving time and cost; this tutor suggested to have the meeting in hybrid form so as to have the combined benefits. Open discussion between tutors to pre-discuss questions is also missing in this online form. It was noted that when the Academy organized the meeting, before 2020., the announcements were done well in time and explicitly included an invitation to submit questions in advance, this year, the Academy did not organize the meeting and the EQE Secretariat was involved only very late, while also the roles of the EQE Secretariat and **epi** Learning were not so clear to the participants. It was indicated that the organization will need to be improved next year and that a single organization shall be the point of contact.

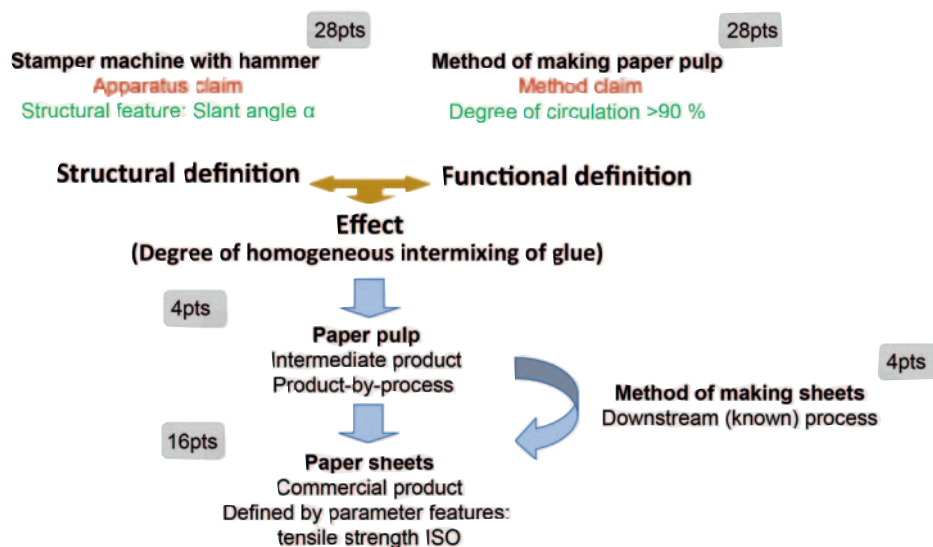
#### 4) Paper A by Andrew Hards and Anna Valborg Guðmundsdóttir

In 2022, Paper A was again held electronically within the traditional 4 hrs without being split into parts. Just before the examination, candidates were allowed to print the prior-art documents and the drawings of the application, but not the letter of the applicant.

Paper A was about a method to prepare durable paper sheets from paper pulp, which can be obtained by stamper beating of a mixture of lignin-free raw plant material and glue. A particular challenge was not only to claim the various types of inter-related independent claims but also how to actually claim them. The distinguishing features in each type of independent claim were different. The five independent claims expected this year (see Figure), could be claimed in a single application as they all related to the effect obtained by the degree of homogeneous intermixing of the glue into the paper pulp.

D1 described the traditional method of preparing paper pulp by stamper beating of cloth rags, where stamper machines have a fixed angle of 90° between hammer head and hammer shaft. D2 outlined a process for paper manufacturing from plant materials.

The technical contribution over D1 and D2 lies in making paper pulp from plant material while adding the glue during stamper beating. To ensure pulp circulation during beating, the set-up of the traditional stamper machine as described in D1 needs to be adapted to a fixed head-to-shaft angle deviating from 90°, this being the distinguishing feature of the stamper apparatus.



A discussion point during the tutor's meeting was the "disclaimer-type" formulation of the head-to-shaft angle being "not 90°". The distinction between this feature and arbitrarily close angles has been argued controversially in the case law. However, the EQE committee considered this to be acceptable and to provide the broadest scope, as compared to defining the angle positively e.g. between 82 and 60°, which would easily allow competitor circumvention. Fortunately, the state-of-the-art D1 has the same level of accuracy mentioning specifically the number 90°, so excluding this value affords novelty without numerical overlap.

A further critical point was that candidates should identify that the primary method claim could be drafted independently of the product stamper but then required the distinguishing step of homogeneously mixing the glue and the pulp. This could be formulated with either a displacement parameter or a viscosity difference parameter. Realising the significance of this parameter feature and defining the method without backreference to the stamper apparatus could bring an extra 10 points.

Finally, the paper sheet claim should not be drafted merely as a product-by-process claim, as the material could be defined structurally using the tensile strength parameter and the ISO norm (the norm should not be omitted). If

this was not recognised 6 pts were lost for the final paper sheet product claim. The tutor's mentioned that norms can change and should always include a date to avoid being challenged in opposition – probably this depends on the technology involved.

In addition, since this final paper sheet claim is independent, it was important to also include the essential features of “lignin-free + plant material” and “comprising homogeneously mixed glue”, with each omission losing 6 pts.

Dependent claims and the description each gave 10 pts, so these sections became critical for most candidates who missed out on all the intricacies of intermediate products, product-by-process claims and parameter definitions of the final product paper sheets. The description should focus on defining the differences over the state of the art, in particular the stamper in D1 and how the solution solves the technical problems related thereto, as well as establishing definitions of unclear terms used by the applicant.

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

For Paper B, Nicolas Favre (Chairman of EQE Examination Committee I) and Wim van der Poel (Coordination Examination Committee I and member of the Examination Board) informed the attendees that the main drafter for Paper B, Andreas Böhm-Pélissier, is now a Board of Appeal member and for that reason could not participate in this meeting.

Co-drafter Ali Hijazi gave a presentation on the paper that had a pass rate of 77.55%, complemented by a compensable fail rate of 6.74%. Just like for the presentation on Paper A, the presentation on Paper B closely followed the Examiners' Report.

Ali Hijazi noted that, although being rather mechanical in nature, this Paper B was “quite classical” and had good passing rates. There was no need to panic with all mechanical terms used, because of the explanations given in the paper and the clear guidance given by the client.

Paper B was on a snowshoe that allows wearers to downsize the deck while walking, ensuring that walking in snowshoes is as natural as possible, or for storage. In addition, the snowshoe allows its wearer to adapt the deck width and gripping properties to the snow conditions.

Ali gave an overview of the paper, discussed the prior art and official communication, and the client's instructions and claims. Expected claims and expected arguments were then discussed. In respect of D1, it was highlighted how D1 did not disclose the specific pulley mountings (axles, sliding slots). For D2, it was emphasized that it contained explicit teaching that the deck shown therein was not combinable with D1. As indicated, this has also been covered in the very complete Examiners' Report.

As was the case with the previous single Papers B, the points for the claims were closely coupled to the amendments of the set of claims as suggested by the client.

One of the main issues in the paper was to create novelty for the snowshoe claim over D1. The client's proposal to combine original claims 1, 4 and 5 does not achieve this, as is also in line with the Art. 94(3) communication.

Original claim 6 is a good candidate to bring novelty. In the Art. 94(3) communication no novelty (nor an inventive step) objection is raised against this claim. Further, the client significantly indicated that he would be ready to accept some additional features of original claim 6 to be incorporated in amended claim 1. However, the client at the same time stated that the embodiment in claim 6 without the expansion control means is important for the low-cost market.

This should have brought the candidates to only add some of the features of original claim 6 in amended claim 1. Introducing also the expansion control means in an amended claim 1 resulted in a reduction of 10 (of the 30 available) marks for the claims. This severe punishment was motivated by indicating that this limitation clearly was against the wish of the client. As in previous years, the client is the authority in terms of the commercial products to be protected.

In the argumentation, it was expected to use the basis for intermediate generalization as laid down in the Guidelines H-V, 3.2.1 and applied to the contents of paragraphs [012] and [013] of the application as filed. Although the technical field was evidently mechanical, it was considered that given the robust indications, this argumentation was not problematic to candidates.

In its suggested new claim 1, the client also added the feature that the pulleys can rotate freely. However, paragraph [004] only mentioned that the wheel rotates about an axle. This limitation violates Art. 123(2) EPC and should therefore have been removed from claim 1 by the candidates. As expected, all modifications to the originally filed claims had to be discussed and basis had to be provided.

Another aspect, although “only” associated with 2 marks, was the use of the two-part form. Ali noted that within the Committee subgroup it was deemed appropriate to use the two-part form, not only because this is in the Rules of the EPC and in the Guidelines, but also because the client used the two-part form, which was deemed to express the wish of the client. In a short discussion on this point, Ali noted that for this Paper B, it was not that complicated to draft a claim in the two-part form starting from D1 as the closest prior art. In addition, it was observed that applying the two-part form in Paper B was in general easier than in Paper A.

Finally, Paper B contained some clarity issues that often occur in Paper B: process language was present in a product claim, inconsistent claim wording was used for one of the claimed features, and the claim dependency in the suggested set of claims needed be adapted (correcting dependencies usually provides significant marks while being a relatively straightforward amendment). As expected, there was no need to correct potential/hypothetical issues not raised in the official communication.

For the argumentation of inventive step of the independent claim, there was a total of 38 marks to be gained if the candidate started from D1 as closest prior art. However, starting from D2 or D3 was also possible, be it that only 25 marks were achievable in the discussion of inventive step. In addition, it was less easy to bring claim 1 in the two-part form in respect of D2 or D3.

For this year's Paper B, it was noted that an argument in the inventive step discussion that the claimed feature "can-not be found" in the available documents was insufficient to collect the maximum number of marks.

There was a question on the use of the phrase "sliding in the guiding slots" as used in the expected claim 1. Why was that not seen as processing language? Ali commented that perhaps the use of "configured to slide" would have been better, and further pointed out that no objection to the said phrase was made in the Art. 94(3) communication. The same applied by-the-way, he said, in respect of a missing reference sign in claim 1.

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

## 6) Paper C by Sander van Rijswou

Hanno Schombacher gave the main presentation for Paper C 2022; introducing the topic, its problems and the expected solution. Additional remarks were made by Paolo Provvionato. The notes below focuses on the additional information provided during the meeting, that is not in the Examiners' Report for Paper C 2022.

### Effective dates

There was no problem about priority at all. In this respect, it was an easy paper. There were not many points for the client-letter part of the exam.

### Prior Art

Annex 2. This prior art was an internet newsletter. Relevant is to discuss how it is disclosed? You had to look at the guidelines. It was considered publicly available from the day it was assumed posted. Relevant pointers to this included the header of the newsletter. You could derive the publication date.

Annex 3. A3 was more complicated for the date, it is not so clear when it was disclosed. In the document balls are

talked about that were used in the past. Important in this document, is that two different prior uses were substantiated. The two embodiments should be distinguished by a candidate.

This type of disclosure, with two different pieces of prior art in a single reference will be in future C papers again.

Annex 4 was a USB stick with slides that were shown at a presentation

Annex 6 is a 54(3) document. How can you use that specific information? You can only use it for novelty, or general technical knowledge

**Claim 1.** Lack of novelty with respect to A5 was expected. A5 clearly shows all the features apart from the product by process feature 'whereby a void is formed between the inner strand and the outer layer by removal of material using a solvent'. You need to identify that this is a product by process feature, and that there is a guideline section for that.

A5 does not use a solvent but heat. It had to be argued, that in A5 the removal creates a void. This was not seen by all candidates. The solvent also creates a void, this is in A4. Since both processes have the same result—the partial removal of material—there is no structural difference.

There was no information that a void created by a solvent is different from a void created by thermal treatment. Any idea that there could be a difference, comes from hindsight by the candidates. This is invalid information. The information in the paper, was simply that there was partial removal of material, and that there is a void.

Later the novelty of Claim 1 was further discussed after a question. Although the novelty of claim 1 could be defended by the proprietor, the main skill is making the best out of the material that we have. That is a basic skill for a patent attorney. In real life, we find ourselves attacking a patent, with even less good material than is presented in paper C, and we have to do our best to attack the patent. The way the paper is constructed, obviously it is not perfect. There will be things that do not perfectly match the solution. Otherwise, the paper would become a crossword puzzle. Since, at least, it could be debated whether the product by process claim is novel or not, it is a good opposition position.

The alternative attack on claim 1 is an inventive step attack. This attack could give you nearly full marks if a candidate correctly identified all the features. A few marks are lost for not identifying the product by process features.

It was also expected to point out the difference between the phrases (suitable) 'for' and 'such as' in Claim 1. There were marks for that.

**Claim 2.** Features of claim 1 are included in the method of claim 2. This makes it clear that A5 has to be the closest prior art.

**Claim 3.** Added subject matter. The claim as filed was split into two parts. Was there any basis for this isolation of features? If you isolate the features, information is missing. The claim becomes more generic. Other embodiments are included that are not disclosed. No reference to the guidelines was needed.

**Claim 4.** Two attacks were expected. The claim lacked novelty with respect to A6. The second attack was lack of inventive step. Some candidates missed the novelty attack. The bladder of claim 4 was implicitly disclosed.

**Claim 5.** The difficulty was the closest prior art. Both prior uses of A3 comprise a goal, and ball. So they were not so different in this respect. However, the second ball in A3 is a further development of the first ball. The skilled person would not change a further development back to the previous model. There is no incentive to combine the second, further developed ball, with the first older ball.

Starting from the second prior use was considered less convincing. Why would a skilled person modify the second prior use with the first prior use? Moreover, they both have the problem of unreliable goal detection.

Many candidates mixed the two prior art embodiments, sometimes not even distinguishing the two embodiments at all.

**Claim 6** was not liked by the candidates. The claim was a computer implemented invention which caused problems for some candidates

It was the first time that a mixed-type invention was used in the exam. Candidates were expected to use the COMVIK approach, well-documented in the Guidelines<sup>17</sup>.

The claim itself is technical, it is only that there is a non-technical feature. Candidates should identify the features that contribute to technicality.

Often candidates simply said that it was completely non-technical. They did not identify the technical features. You have to apply the guidelines, which are quite comprehensive. There were several hints that the feature in Claim 6 was not technical: the reference to business in A1, and to commercial in A3.

<sup>17</sup> Guidelines G-VII, 5.4 on "Claims comprising technical and non-technical features". Note that in the 2022 edition, Example 4 in G-VII, 5.4.2.4 was replaced in view of G 1/19 and a new Example 5 was added in G-VII, 5.4.2.5 which explicitly and in detail applies the steps of the problem-solution approach according to COMVIK.

A normal set of claims in any technical field now often comprise a computer product claim. This is quite usual. So if the paper is to test whether a candidate is fit for practice, the paper has to include such a claim. An attorney should know how these claims are considered by the EPO. It should be assumed by candidates that this kind of claim will occur more often in the paper.

### Incorrect attacks

A question was asked about incorrect attacks. At a previous tutor meeting it was suggested that these were included in the marking scheme to ensure uniform marking.

Paolo Provvisionato explained that incorrect attacks are not included in the marking scheme, but that alternative attacks are. In the pre-marking meeting, a good sample of papers are looked at to see if there are trends in the answers that require attention. Sometimes candidates spot differences, or mistakes, or misunderstandings. Alternative answers that are not considered model answers, but those that deserve consideration, are considered because they fit in the definition of fit for practice.

For example, this year it was noted that the product by process features were difficult for some, as they can be debated. Some people did not follow the approach in the Examiner's report. However, they lost maybe a couple of points, assuming they attacked the claim with some sense. Since Claim 1 could have been attacked differently, the candidates that did so in the proper way were surely successful.

### 7) Paper D by Roel van Woudenberg and Zsafia Pintz

The D committee was represented by Tiem Reijns (**epi**, chairman D, member Examination Board), Markus Markmann, (EPO, D1) and Gabriele Gislon (**epi**, D2).

### General remarks (Tiem Reijns)

Paper D 2022 was generally well-scored: the pass-rate was 62.6% and 8.5% compensable fails. Candidates seemed well prepared, but there were very few resitters and first-time sitters generally score higher than resitters. It is expected that the pass-rate goes back to 40-50% (as before) when the number of resitters increases.

The electronic syllabus was used widely. Also, the answers contained a lot of copy-pasted parts from the Guidelines (sometimes entire paragraphs), which is helpful in correcting, but not really showing understanding and hence not attracting any marks if not applied to the facts of the case; a mere copy is not considered an answer.

The forced time allocation caused candidates to prepare better (and score better) on Part I. Fewer candidates than before skipped entire Part I questions. Part 2 was relatively straightforward with a straight timeline, but it was not easier than usual: candidate missed a lot of aspects in their answers.

There was a problem with D1, Q5 for which all candidates received full marks; this also had a small positive effect in the pass-rate. In the English version of D1, Q5, a document date was given as 2017 and hence clearly pre-published, while it was given as 2019 in the German and French versions, i.e., in priority period so that a careful (partial) priority assessment was necessary. In view of this error and in order to provide a level playing field and equality amongst candidates (D 11/19 of 26.04.2021, online on 14.06.2021), the Examination Board decided to neutralise D1, Q5.

The error was indicated to be a human error. The paper was checked by several people, in all three languages, no one had spotted the error. If the meetings would have been in person, it would almost certainly have been spotted.

A tutor asked whether why the Committee or the Examination Board had not informed all candidates during the Exam that there was an error in the English version and how it had to be corrected, so that the exam could have continued, as was done in paper times, such that there would not have been a need for any neutralization. Tiem indicated that this was a small question, such that changing the question on the flight could have made people that already started with answering it lose time. Also, D1.1 2021 learned that giving extra time in the WISEflow system also does not always work and has complications.

#### *General – REE/IPREE*

The paper length was similar as in the last 5 years, with 30 min extra time for revision and another 30 min extra due to reduced flexibility on allocating time. From the submitted answers it seemed there was no serious time pressure in Paper D 2022.

Only legal basis from the syllabus in the REE/IPREE is legal basis. However, alternative legal basis is often accepted too: sometimes from other parts in syllabus, often also other documents as long as totally relevant and fully covering the scope.

Candidates using the latest Guidelines rather than those on 31.10.2022 were not be penalized, as the online version that is offered is the latest one. However, it is advised to stick to the syllabus. If a newer version is used, it is recommended to indicate that the newer Guidelines were used.

#### *Examiner's Report, 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 based on the information provided and shall not speculate. Giving both a correct and a wrong answer to the choice of the marker, will NOT attract marks. Every word is there for a reason. Focus on trigger words when preparing your answer.

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. Including the marking table was overlooked in the compendium. A corrected Examiners Report on the EQE website now.

The split of marks for D2, Q1 over the sub-questions a-e is not provided in 2022, as it was felt overdone to split the (only) 22 marks for 5 sub-questions into individual marks for the sub- sub-questions.

#### **D1-part: summary of the paper**

This year's D1 came in two parts: 1 first part of 1 h 30 min and 26 marks (D1.1) and a second part of 1 h 10 min minutes and 19 marks (D1.2), i.e., a total of 45 marks. 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 45 marks within the time available.

Some topics were common topics that candidates could have expected, such as remedies (here, re-establishment in the further processing period), fees, priority – even though it was surprising that partial priority was again tested (also already in D2 2019 and D1 2021 –, dealing with lack of unity, procedural and substantive aspects of opposition. Some topics were not so familiar, e.g., missed renewal fees that fell due in between when loss occurred due to missed FP correction and the decision on reestablishment, or amendments at a very late stage of examination.

The online access to the Guidelines GL/EPO and GL/PCT-EPO in html-form (only) was convenient and may have been of additional help.

The first D1 part, D1.1, consisted of three questions of 8, 10 and 8 marks, i.e., a total of 26 marks, for which 1 h 30 minutes were available, followed by a break.

In Q.1, the time limit to respond to an office action, as well as -after analyzing the case- that for its further processing was missed. It was asked which steps need to be

performed to ensure that the prosecution continues and by when. The answer had to include an analysis of the situation as-is, and re-establishment of the further processing period, and remedying two missed renewal fees using Rule 51(4) EPC.

In Q.2, the applicant asked you to correct a spelling mistake in one of the claims, the correction of which is obvious, while the period to respond to the Rule 71(3) communication is running. Also, he wants a grant as soon as possible and the granted patent to take effect in the Netherlands. Candidates were expected to file reasoned corrections under Rule 139/Rule 71(6), respond a.s.a.p. to the next Rule 71(3) (some candidates incorrectly still proposed a waiver), pay the next renewal (with surcharge), and file translations of the claims and pay a national fee to the NL office.

Q.3 related to a PCT application with two inventions lacking unity, of which only one was claimed. In a first sub-question, it asked how to request SIS and whether that could also include the second invention, requiring a candidate to address all details of PCT Rule 45bis. In a second sub-question, it asked whether the second invention could be examined in the European phase, requiring amending to the second invention when/ shortly after entering the European phase and paying an additional search fee in response to the invitation under Rule 164(2) that the Examining Division would issue.

The second D1 part, D1.2, consisted of another three questions of 6, 5 and 8 marks, i.e., a total of 19 marks, for which 70 minutes were available.

Q.4 related to an EP application to a new raw material, but which did not describe a method for obtaining it. Instead, it referred to the relevant part of an earlier, non-published application. Candidates were asked to discuss whether the product was sufficiently disclosed, and had to check the requirements in Guidelines F III, 8 / H-IV, 2.2.1. Candidates also had to recognise that, as a result, the application did not give rise to a valid priority for the product, whereby a subsequent application that invalidly claimed priority from it was not new with respect to a 54(3) prior right.

Q.5 has two aspects: 1) a partial priority situation where a first conceptual part of the claimed range benefits from priority but the remaining conceptual part does not, and 2) a clearly erroneous disclosure, prior art to the remaining conceptual part only, for which it is clear to the skilled person what it should be, so that it is considered to contain the correction (Guidelines G-IV, 9 (i)), and 2). When combining the two aspects, a candidate would need to conclude that the claim is new.

In the English version of the exam paper, the disclosure was accidentally mentioned in 2017 rather than 2019, whereby the priority analysis became unnecessary and the claim trivially not novel. Due to the difference with the (correct) German and French version, the Examination Board decided to neutralize this question and award the full 5 marks to all candidates.

In Q.6, two scenarios were presented. In the first scenario, an opposition was filed based on a 54(3) prior art that disclosed claim 1, but not claim 2, of the granted patent; the sole opponent withdrew the opposition the day after the opposition period expired. In the second scenario, the opposition was rejected and the sole opponent filed an appeal based on that same document; the opposition was subsequently withdrawn. For both scenarios it was asked how the opposition would continue and what the proprietor can do, before the EPO, to address the lack of novelty. Continuation of own motion and requesting maintenance in amended form was expected for the first scenario, and immediate termination of the opposition/appeal and request for limitation under Art.105a for the second scenario.

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

This year's D2 was a 55 mark paper for which 3 h 20 min was available. It was somewhat more difficult than D2 2021, but somewhat less complex than the D2s of earlier years. The paper presented all inventions and applications in a clear and concise way, including acronyms 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 55 marks within the time available.

The paper had to be taken fully from the screen in WISE-flow – nothing was printable. The pdf of the paper could be viewed side-by-side with the editor, without an annotation possibility; or in one or more separate tabs, with limited annotation possibility. For the first time, no calen-

dars were given with the exam paper<sup>18</sup>, but candidates had to bring their own lists of Saturdays and Sundays and had to check EPO closure dates in the OJ.

As usually, the paper required a careful analysis of a plurality of EP and PCT patent applications from the client (OTP) and a competitor (TOR). Also, there is another, (possible) friendly party (Avidus). The various applications described and/or claimed one or more of a) a FEED machine with a feeding duct, b) a FEED machine with two feeding ducts (FEED-2), c) a CLEAN method (usable with a FEED-2 machine), d) a SPRAY device, and e) a FEED machine with a SPRAY device. The first question explicitly asked to address each of these in turn.

A mix of common and less-common aspects of a D2 paper were to be considered: non-patent disclosures: a demonstration at a fair, a brochure, exchange of technical documents and a prototype in the presence of a secrecy agreement, a video on the client's website; multiple applications from the same application claiming the same subject-matter - careful check of first application requirement/issues; differences between a subsequent application and its priority application; interpretation of "a" (vs "one" and "two") in a claim - novelty, scope of protection; product and method claims; Art.54(3) prior art, also vs the European phase (only) of a PCT-application; non-claimed subject-matter; entitlement; the other party just received a R.71(3) communication for an application with a broad claim scope - how to reduce/remove the risk; and different territories: EP and non-EP (US, IN).

Also, some suggestions and explicit requests from the client has to be addressed, e.g., a suggestion of the client to submit recently obtained evidence of a new effect in support of inventive step in defending his patent in opposition - why/ why not follow the suggestion; in respect of a pending opposition filed by a German lawyer with the need for a response to the notice of opposition, the client suggests to submit that the lawyer has no interest in the case so that the opposition must be rejected ; opponent argues lack of novelty w.r.t. a video on the client's website and lack of inventive step; intervention in a pending opposition appeal, while the client only received a "cease and desist" letter from the proprietor and while the opponent/appellant is considering to withdraw the appeal (if they can make a deal with the proprietor rather than with the client) - based on a new ground of opposition; and how to be attractive for an investment fund that can help the client to manufacture their own machines and to expand in US, CN and IN.

<sup>18</sup> Notice from the Examination Board for the European qualifying examination (EQE), 19 November 2021 (available on the EQE website under the link named "Calculation of time limits in paper D and pre-examination")

This was one of the rare D2-papers where you do not need any licensing or cross-licensing! It may have cost candidates significant time during the exam to confirm and feel confident that this was indeed the case.

### 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 (presented by Markus Markmann)

A tutor requested a clarification of the interpretation given by the D Committee on Rule 51(4) EPC, in the case of re-establishment in respect of the further processing period. In particular, it was asked whether the relevant loss of rights in the Rule was the deemed withdrawal due to the missed period to respond to the Office Action, or the loss of the right to revive due to missing the period for further processing, where the latter period is the one remedied with re-establishment. If the first, both missed renewals would be in Rule 51(4)(a); if the second, the 5<sup>th</sup> year renewal would be in Rule 51(4)(b) and the 6<sup>th</sup> year renewal in Rule 51(4)(a). The tutor noted that the scenario of this two-stage loss is not documented in any section in the Guidelines in the context of Rule 51(4)(a) or (b), not in any case law.

Markus answered by providing, as legal basis for date of loss of right: G 4/98, r.3.3 and G 1/90 r.6: "3.3 What has been said so far indicates that under the EPC there is no retroactive effect where the EPC uses the term "deemed to be withdrawn". See also G 1/90, where the Enlarged Board of Appeal stated in the case where the EPC deems the application to be withdrawn that "the loss of rights occurs on expiry of the time limit that has not been observed." (point 6 of the Reasons), and J 4/86 (supra, point 1.1)." Consequently, the loss of rights occurred on expiry of the time limit set by the communication under Art. 94(3) EPC, i.e. on expiry of 11 Jan 2021. The loss of right at expiry of the further processing period is a loss of right to file a further processing request, but not resulting in the application being deemed to be withdrawn, which is required by Rule 51(4). Also, no further loss of right occurs due to non-payment of renewal fees (OJ special edition 5/2007, page 92, chapter III, comment to Rule 51(4) EPC). Hence, the sole relevant loss of rights occurred on expiry of 11 Jan 2021, i.e. before due date of 5th renewal fee, whereby Rule 51(4)(a) is applicable.

The possible solution mentions "Article 1(2) and Article 1(3) of the London Agreement" as legal basis for "To have the European patent based on EP-B take effect in the Netherlands, file a translation only of the claims in Dutch". Markus indicated that Nat.Law Table IV (or Nat.Law Table

IV, column 3) were also accepted, as alternative legal basis to Art. 1(2) & (3) London Agreement, without a loss of marks.

The model solution does generally not include possible alternative legal basis. It was indicated that alternative legal basis is legal basis that has the same content as the model solution. For example, where the Model Solution cites a section from the Guidelines, which refers to a T decision and provides a reasoning based on that decision, citing the T decision as alternative to the Guidelines is also fine as long as the argumentation is used.

A tutor commented that at earlier occasions, the D Committee indicate that there is a trigger word in the question for every aspect that is to be discussed in the answer. The tutor asked what the trigger word was in Q.2 for discussing the renewal fee. Markus commented that the D Committee has been very consistent in indicating that every word in the question has a reason/meaning. Markus answered that, for the renewal fees, the "trigger word" is the filing date.

The D Committee confirmed that a mere copying of a Guidelines section, a mere copying of a headnote or reason from a decision, or a mere copying of a part of the Case Law Book, does not result in any marks at all, even if the relevant passage is the correct passage that should be applied when answering a certain question. To score marks, the context and relation to the question must be clear.

A tutor noted that, when comparing the number of statements /words per mark for Q.6 to that of Q.1, Q.2 and Q.3, it seems that a significantly longer answer was needed for full marks for Q.6 than for the other questions. The tutor asked whether the number of marks available for Q.6 was initially larger but was it reduced to get the total number of marks for this D1 to 45. Markus answered the number of marks is proportional to the complexity, which is not necessarily proportional to the number of words of the question. The indication how complex an answer is given by the number of marks indicated in the header of the question.

### **Questions and comments w.r.t. the D2 part (presented by Gabriele Gislón)**

Gabriele Gislón, co-author of the D2 part, discussed the 2022 D2 part. He indicated that the paper had four main topics: 1) Analysis of a complex patent situation, 2) applicant not entitled to the application, legal remedy, 3) novelty-only prior art generated by overlapping applications of the same applicant, and 4) admissibility of new grounds in appeal proceedings, legal remedy via intervention. Hence, for solving two of the problems, some kind of national proceedings were necessary:

1) The bad party (competitor) had stolen the invention and filed an application to which he was not entitled. Clear from contract etc;

2) Necessity to have fresh grounds in appeal, which was only possible via intervention. So national proceedings as basis for intervention in appeal had to be addressed.

A tutor asked whether Art. 55 had to be addressed in Q1 or Q3: as-is vs. improvement. The tutor noted that Art. 55 had in the past always been an improvement topic (Q.3) and never an as-is topic (Q.1). Gabriele answered that the analysis of the situation as it stands includes that TOR-EP is per se non prejudicial to novelty of OPT-EP1. This is a fact rather than a discussion of improvements. Further, because of the video prior art, informing the EPO would not have been an improvement and would thus not be required in the answer to Q3. The Committee emphasized that it is important that the candidate compares the new situation with the as is situation. For this year's solution it fitted better in the way it was published, in the Committee's opinion. However, a candidate who wrote it elsewhere in their answer, would have received the points. In response to a tutor asking whether it matters where the answer is if as-is and improvement are asked in separate questions, Tiem indicated that it does not matter: the Committee gives the points irrespective of where the discussion is in the answer.

It was commented that this D2, as well as that of 2021, seemed to be relatively easy. Gabriele answered that the Committee spends a lot of time to trim the first draft of the paper to make it as clear as possible in the shortest possible time. He also noted that this paper had quite some complexity, requiring required knowledge of several different issues. The Committee was happy that the paper was seen as easy to understand. For the next D2, the Committee again strives for an easy to understand paper with, again, a reasonable difficulty level.

It was also observed that, if candidates had not noted the Art. 55 issue, the video prior art discussion would still allow candidates to score marks for discussing that claim. Also, the video prior art rendered the conclusion that the claim is not new, important for the rest of the paper, independent of an Art.55 discussion. A tutor commented that designing D2 papers to prevent knock-on effects of a single error or oversight has been consistent practice for many years and is much appreciated.

### **8) Pre-Exam by Nico Cordes, Andrew Hards and Roel van Woudenberg**

Examination Committee IV (Pre-Exam) was represented by Stefan Götsch (EPO; general part) and Volker Franz (EPO; specific questions/statements)

We will first give some general comments on the paper, then discuss the legal part of the paper, followed by the claims analysis part, and then discuss the session at the Tutor meeting.

### General remarks

This was the second online EQE with the Pre-Exam being held in a similar way as in 2021: the Pre-Exam was split into 4 parts and the questions had to be taken almost fully from the screen (only the description of the application and the prior art in the claims analysis parts were printable). Each part had to be completed before the start of the next break, with the next set of questions only becoming available after the break in between two successive parts. The split into parts means that candidates were not free to allocate their time as they see fit across the different parts of the paper. To compensate for this restriction, the total duration of the paper was extended: for every part, an extra 10 minutes was available so that each part lasts 70 minutes. Once the time allowed for a part had elapsed, it was not possible to go back to that part. The Pre-Exam 2023 will have a similar design.

In the legal as well as the claims analysis parts, the order of the four statements in each of the questions was randomized, i.e., it was different for different candidates. Also, the order of the questions was randomized in the legal parts (e.g., the sequence used below is the one shown in the Compendium<sup>19</sup>), but not in the claims analysis parts.

All questions, statements, prior art documents and claim sets were provided in all three official EPO languages. Other than in Pre-Exam 2021, candidates could view the question body in a single language of choice in a first column on the left half of the WISEflow window. However, the statements were presented in a second column on the right half of the window in all three languages without the possibility to select just one: this resulted in quite some scrolling, especially in the claims parts, where a single webpage showed four tri-lingual statements with True/False tick boxes.

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.

The online Pre-Exams have the same syllabus and character as the earlier paper exams, and candidates are -as before- allowed to bring any printed reference material. During the exam candidates also had access to the EPO Legal Text pages, so including the full EPC Articles and Rules, Guidelines, GL/PCT-EPO, National Law Tables, Case Law, and the Euro-PCT Guide (HTML versions), but not to the PCT Legal

Texts (they are not on the EPO domain, but on the WIPO domain<sup>20, 21</sup>) and not to the full pdf-versions. Access was to the live versions, so to the versions in force on 18 March 2022 (so not the version of 31.10.2021 acc. Rules 2 and 22(1) IPREE) and answers based thereon were also accepted<sup>22</sup>.

The exam had a mix of topics (common and some less common), with some surprising absences: no time limits, no remedies, no EP entry, no 71(3) acts, no priority. Entitlement was certainly unexpected for many candidates, as well as some elements of the appeal question and details on (late) fee payment under PCT.

Unfortunately, complete part 3 (Q.11-15) as well as Q.20 had to be neutralized due to errors in (some language versions of) the paper, i.e., 30 out of 100 marks were awarded to all candidates irrespective of their answers. The lack of any further neutralizations (e.g., statement 1.3) and/or specific neutralizations in part 3 (e.g., statement 11.3) may be a side-effect of this, as the pass rate was already above 96% due to these neutralizations: only 22 (including no-shows) out of 680 candidates failed.

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 Part 3 (Q.11-15) and Q.20 (herein, the numbering follows that as presented in the Compendium-version of the paper) due to translation/ drafting errors, no individual statements were neutralized. In view of the high pass rate, it seems unlikely that some appeals may still be pending. However, no comments could be made by the Committee and Examination Board at the time of the meeting on possible pending appeals nor on possible concluded appeals.

### Legal part

The legal part of this year's Pre-Exam had similar style and a difficulty level as in 2021 and 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 filing date requirements, languages, representation, late submissions in opposition) as well as several less standard topics (such as entitlement, composition of the Board of Appeal, payment of international filing fee with late-payment fee, transfer of opponent status) which well-prepared candidates would have been

<sup>19</sup> Compendium: Pre-Exam:

<https://www.epo.org/learning/eqe/compendium/preexamination.html>

<sup>20</sup> PCT Resources on WIPO domain: [www.wipo.int/pct/en](http://www.wipo.int/pct/en) (English)

<sup>21</sup> It was indicated that candidates need to monitor the Notices on the EQE website to check what is available online in Pre-Exam 2023.

<sup>22</sup> For the questions of Pre-Exam 2022, the differences between both versions of the Guidelines had no effect on the answers.

able to find in their EPC/ PCT/ reference materials/ Guidelines, albeit with some effort. Surprisingly, not a single question addressed time limits, neither under the EPC nor under the PCT, while it was the first exam for which no calendars were provided with the exam paper and the Examination Board had emphasized prior to the exam that candidates should bring their own list of Saturdays and Sundays and should be able to look up the closure days in the OJs of the last few years<sup>23</sup>. The most recent G-decisions, notably partial priority (G 1/15), were not yet tested in this Pre-Exam (while G 1/15 was already tested in D papers of 2019, 2021 and again this year, 2022). Additionally, no questions dealt with priority as such this year.

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, our course material such as our flowcharts) 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 2021 (the cut-off date for EQE 2022). 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 addressed key aspects of entitlement (applications filed by non-entitled persons) and stay of proceedings, a rather unexpected topic in view of the level expected from candidates when sitting the Pre-Exam. The question addressed the requirements for requesting a stay, effects of the stay, renewal fees during stay and options after a successful national decision recognising entitlement, and could be answered using Guidelines A-IV, 2.2 on "Stay of proceedings for grant" and its subsections.

In Q.2 the topics: own motion of the Opposition Division, fresh grounds, third party observations and limited extent of opposition, were addressed, testing the candidates understanding of G 7/95, G 9/91 and G 10/91 and/or Guidelines D-V, 2.1-2.2 and E-VI, 3. The main aspects which were tested were the extent of the opposition and the competence of the Opposition Division.

Q.3 tested various aspects of appeal, and was considered difficult by various candidates. It was one of the few legal questions where the answers had to be found in the EPC itself (Art. 21(2)-(4), Art. 111 EPC) rather than in the Guidelines. The questions focused on the composition of the Board of Appeal, remittal and fresh grounds for opposition as a basis for the Board's decision.

In Q.4, transfer of a European application was tested (for specific designated states, European Patent Register), similarly as in an earlier Pre-Exam. Candidates may not be very familiar with transfers from their daily practice and may thus consider this a difficult question. Note however, that the question can be fully answered using Guidelines E-XIV, 3 on "Transfer of the European patent application" and E-XIV, 4 on "Transfer of the European patent", so that a candidate that is well familiar with the EPC and his/her reference material can nevertheless answer this question efficiently.

Q.5 addressed various aspects of filing of a direct European application and language of proceedings (reduction of filing fee, filing date, translation and (no) change of language of proceedings), and should not have given any difficulty to a well-prepared candidate.

Q.6 addressed various aspects of filing a divisional application (filing offices, language of filing, timing aspects), and was also quite straightforward, using, e.g., Guidelines A-IV, 1.

Q.7 was directed to first and further medical use of a known product (molecule). Not all candidates are familiar with such medical use/indication claims from their daily practice, but the special provisions of Art. 54(4) and (5) EPC in view of novelty for purpose-directed product claims for first and further medical indication are considered a key element of the EPC, so that all candidates need to understand and apply these provisions. They were also tested already in an earlier pre-exam and are well documented in Guideline G-VI, 7.1.

Q.8 was possibly the most difficult question. It addressed the payment of the international filing fee without and with the late-payment fee for a national and resident of the USA: where to pay the corresponding fees and what are the consequences of non-payment, as well as who will notify the applicant or the designated office that the application is deemed to be withdrawn (resp. rO [PCT Rule 26bis.1(c)] and IB [PCT Rule 29.1(ii)]).

Q.9 addressed more aspects on the filing of a direct European application (filing date/ language of filing, request for grant form, representation for filing) as well as on filing an international application (submission of claims on filing). Candidates may have overlooked that one statement was on an international application (claims for filing date) while the other three were on direct EP applications and would have lost 2 marks by answering all statements as if they related to direct EP applications.

In Q.10, various post-grant topics were tested: correction of errors in the B1 specification, grounds of opposition, language of opposition and transfer of opponent status. The wording of statement 10.4 was slightly different in

<sup>23</sup> Link "Calculation of time limits in paper D and pre-examination" on EQE website to "Notice from the Examination Board for the European qualifying examination (EQE)" dated 19 November 2021.

the original Compendium than in the real exam<sup>24</sup>, but this did not lead to a neutralization – at the meeting, it was indicated that the original Compendium included the wrong text and that it was corrected in an updated version of the Compendium as soon as that was discovered.

### Claims analysis part

The claims analysis part of the Pre-Exam 2022 had a similar style as in 2019 and 2021, in that the claims analysis part was structured into two parts which were in the 2022 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 10 questions as in the exams before 2019:

- Part 3: A yoga mat and a textile bag for a yoga mat (questions 11-15)
- Part 4: Preserving an alcoholic beverage in a bottle (questions 16-20)

Each of the parts 1-4 was given their own timeslot with each timeslot being divided by a break of 20 minutes (between parts 1 and 2, and between parts 3 and 4) and a larger break of 80 minutes between the legal parts and the claims analysis parts.

**Part 3** dealt with the topic of a Yoga mat.

However, there was a translation error in the German version [005] of the description, second line, where it should read Poly-Y and not Poly-X:

#### English version (correct)

[05] *In an embodiment, the second face contains a material which reduces the generation of sweat on the athlete's body. We have found that **poly-Y** is a highly suitable material, since it provides improved reduction of sweat generation on the body of the athlete while the athlete is in contact with the mat. ...*

#### German translation (incorrect)

[005] *In einer Ausführungsform enthält die zweite Seite ein Material, das die Schweißbildung im Körper des Sportlers reduziert. Wir haben festgestellt, dass **Poly-X** ein sehr geeignetes Material ist, denn es sorgt*

*für eine verbesserte Reduzierung der Schweißbildung auf dem Körper des Sportlers, während der Sportler Kontakt zur Matte hat. ...*

Due to this translation error, the Examination Board decided that part 3 was to be fully neutralized, meaning that each candidate was awarded the full 25 points (5 questions of each 5 points) irrespective of their answers and of which language was used.

Otherwise, notable aspects of part 3 included the following:

The prior art documents D1-D4 were presented as 1 paragraph each, thereby fitting all prior art documents onto just a single A4 page. This conciseness should have helped candidates in reducing the reading effort and thereby the complexity of this part.

The claim set of 14 claims contained several independent claims, namely an independent claim on the yoga mat, an independent claim on a textile bag for covering and transporting yoga mats, and an independent use claim.

Substantive topics in part 3 included clarity, scope of protection, novelty, inventive step, and support for amendments. Of particular interest were:

- In Q11 a statement which tested whether candidates would recognize a functional feature, and a statement which tested that an indication of a purpose in a claim on a physical entity will limit the claim to a certain degree, namely by requiring the physical entity to be at least suitable for the stated purpose.
- In Q12 a statement which questioned whether a particular claim was novel over D1-D4, requiring candidates to perform four novelty assessments for a single statement (as the claim indeed turned out to be novel over D1-D4).
- In Q14 a statement about the clarity of a claim with an unusual parameter.
- In Q15 a statement which concerned the novelty of a use claim, where the claimed use was implicitly disclosed by D1.

**Part 4** dealt with the topic of preserving wine.

Notable aspects of part 4 included the following:

The prior art documents D11-D13 were presented as 2 paragraphs each, so more extensively than the prior art in part 3 but nevertheless very concise compared to previous pre-exams.

The claim set of 9 claims included two independent claims, namely a method for preserving wine in a bottle and a method for more generally preserving an alcoholic beverage in a bottle. The latter independent claim included 7 dependent claims.

<sup>24</sup> In the exam itself, statement 10.4 read: "To transfer the status of opponent to a different person during opposition proceedings, it is sufficient to file a declaration including the names, addresses and signatures of both the original opponent and the person wishing to take over the status of opponent." In the exam as published later in the initial version of the compendium, and in the initial Examiners' Report, it reads: "In order to request a transfer of the status of opponent to a different person during opposition proceedings, it is sufficient to file a declaration including the names, addresses and signatures of both the original opponent and the person wishing to take over the status of opponent.", i.e., the opening words differ between "To transfer the status of opponent" and "In order to request a transfer of the status of opponent".

Substantive topics in part 4 included clarity, scope of protection, novelty, inventive step, and support for amendments. Of particular interest were:

- In Q16 a statement in which candidates were required to recognize that a stated purpose ("for preserving wine") is a limiting feature in a method claim and that the prior art, which does not disclose this purpose, is therefore not novelty destroying.
- In Q17 a statement on the novelty of a claim 5 which was dependent on claim 3 or 4. However, in the dependency on claim 4, there was technical contradiction in the claim which made judging the novelty of claim 5 when dependent on claim 4 difficult. However, such a contradiction was absent in the dependency on claim 3, and in this dependency, the claim lacked novelty.
- In Q18 a statement on whether the EPO would issue a Rule 62a communication in the search phase for the set of claims, which required candidates to recognize that the two independent claims would likely contravene Rule 43(2), and a statement which required candidates to recognize that Art. 123(2) allows (that is, does not disallow) amendments by which an originally filed claim is added to the description.
- In Q19 a statement on the allowability of an amendment which represented an (unallowed) intermediate generalization.
- In Q20 four statements on the inventive step. However, as the question failed to indicate which one of the claims is to be considered for the inventive step, question 20 was neutralized, meaning that all candidates received the full 5 marks for this question irrespective of their answers.

### Comments and questions at the Tutor Meeting

Rather than showing a presentation with all Pre-Exam questions one-by-one, Stefan Götsch went through the general questions that were submitted in writing prior to the meeting and Volker Franz commented on specific questions and statements.

Stefan Götsch indicated that the Committee and Examination Board consider statistics, blog posts and comments when deciding on a possible neutralization of a statement or question, as these may indicate possible problems and ambiguities. The information is also used in the process of the Committee.

Stefan indicated that the Committee and Examination Board strive to have the answers and results available to candidates a.s.a.p. after the exam. Previously, a pdf of the paper was only made available together with the Examiner's Report and the result (but the candidate could take his paper copy home from the exam and use that for discussing with col-

leagues and tutors). Since the implementation of WISEflow, the Examiner's Report and scores are usually completed after a week, after which they are sent to the Examination Board for review and approval and for deciding on possible neutralization, and finally the scores need to be corrected via WISEflow. Last year, there was quite a lot of delay due to collection of scores through WISEflow. As a side-effect, it is not possible to announce the date of availability of exam answers in advance.

For the closure dates of the EPO in years preceding the exam, as well as in the year of the exam, candidates are referred to the relevant notices in the OJ EPO on the EPO website, which are available online in the exam.

In 2021 and 2022, the EPO legal texts (as far as HTML or small pdfs) were available online via External Resources/ Legal Texts. PCT texts were not available online yet; candidates are recommended to check notices on EQE website to check for possible changes.

Rather than being presented with trilingual questions and statements, requiring a lot of scrolling, a tutor asked to allow candidates to select a single language. Stefan indicated that WISEflow now allows, in the left column, to choose a single language for the body of the question. In the right column, all 4 statements are presented in all 3 languages. The Committee would also prefer that a single language can be selected, but WISEflow is not able to offer that. The 2023 format will be same as in 2022. New mocks will also be in the same format.

A tutor argued that randomizing the sequence of statements within a single question in the legal part and in the claim analysis part does not provide a level playing field (whereas equal treatment is of key importance according to D 11/19), as some candidates got "easier" sequences than others. Likewise, for randomizing the sequence of questions in the legal part, where some candidates got the most difficult question of a part as the first (e.g., Q.8 of part 2, directed to PCT, first). Stefan indicated that the randomization will not be changed: the Pre-Exam 2023 will use the same scheme as Pre-Exam 2022. The Committee considers that, as legal Qs are independent, a candidate is free to take them in any order, and the same for the statements, so that in their view there is no unequal treatment.

A tutor asked how the Committee and Examination Board dealt with the technical issues that some candidates had faces with the WISEflow/Lockdown Browser during the exam. For example, when launching the flow for Part 2, an endless process saying "Initialising. Preparing the assignment" just after the ID verification via camera occurred with various candidates. Stefan indicated that the complaints filed in this respect have been dealt with by the Examination Board, and that compensation was awarded where appropriate.

This year's pre-exam did not contain any questions on time limits, while correctly calculating time limits is a key competence of a patent attorney and while earlier exams always contained multiple time limit questions. It was asked why no such questions were asked, and similarly why there was hardly any PCT in this Pre-Exam. Stefan commented that each exam may or may not have questions to particular topics and that the Committee tries to balance them. He also indicated that he cannot comment as to which topics will be covered next year. He noted that no changes have been made yet to the rules for notification, so the EQE 2023 time-limits are based on current rules (in particular, current Rule 126(2)/127(2) EPC).

A tutor noted that no decisions in Pre-Exam 2021 appeals seem to have been published, so that none were filed, the appeals were all granted in interlocutory revision, or the appeals were withdrawn. Also, no Pre-Exam 2022 appeals have been published yet. When asked about the existence of appeals to Pre-Exam 2021 and 2022, Stefan indicated that the Committee cannot comment on appeals. Likewise, the Committee refrained from commenting on whether the 22 persons that failed did indeed sit the exam and failed, or did not show up (a no-show gets 0 marks and hence is a fail), nor as to whether any specific action was taken to support these candidates in preparing for future exams.

Volker Franz commented on specific questions and statements. He said that the Committee is always checking blogs to see where any ambiguities are apparent from candidates and others that took the exam for real or as an exercise. The blogs provide important feedback for the learning process of the Committee.

W.r.t. statement 1.3, asking whether the renewal need to be paid during a period of stay or not, a tutor submitted that it is not unambiguously clear from Rule 14 EPC nor from the Guidelines whether the renewal fees that continue to fall due during the stay also need to be paid during the stay or whether they are deferred to the date of resumption (as for Rule 142(2) EPC) so that they only need to be paid upon resumption. In this context, the tutor noted that a due date is not a period (see, e.g., J 4/91, r.3.2) while Rule 14(4) only refers to periods. Also, the tutor referred to Guidelines A-IV, 2.2.4 that provides: "Stay of proceedings implies that the legal status quo existing at the time of the suspension is maintained, i.e. neither the EPO nor the parties can validly perform any legal acts while proceedings are suspended (J 38/92)". However, if payment would be required and non-payment would lead to a deemed withdrawal, the legal status would change, contrary to this provision. Hence, the tutor considered that one could argue the case law on Rule 142(4)<sup>25</sup> to apply *mutatis mutandis* which would lead to the conclusion that the due date for new renewals would be deferred to the date of resumption, and hence result in an opposite answer. Volker responded that most candidates answered as expected. He also indicated that the paper

needs to be a challenge for the candidates: a statement is sometimes close to the wording of the Article, Rule and/or Guidelines, sometimes further. Here the statement was not exactly the wording of the Rule, which may have caused doubt. He indicated that the comment will be considered in designing future questions.

Q.2 comprises, in the question body common to all statements: "For the following statements, assume that the right to be heard of all parties involved has been respected and no amendments have been filed during the opposition proceedings." Some candidates commented on blogs that this wording does not exclude/prevent that the proprietor still files amendments in response to the objections in statements 2.1 – 2.4. However, the answers in the Examiner's Report concludes for statement 2.1 and 2.3 that "... the opposition division may revoke...", thus ignoring that the proprietor can still amend to overcome the new ground, after which the opposition division may not revoke but must maintain in amended form. A tutor suggested that, if that would not have been intended, the phrase above should preferably have read: "For the following statements, assume that, at the moment that the Opposition takes its decision, the right to be heard of all parties involved has been respected and no amendments have been filed during the opposition proceedings", arguing that that would have excluded further submissions. The tutor asked whether it has been considered to neutralize statement 2.1 and 2.3 in view of the wording used. In response, Volker answered that no neutralisation was considered, as the question was sufficiently clear<sup>26</sup>.

25 Both Rule 142 (4) as well as Rule 14(4) use similar wording w.r.t. periods for renewals while both are silent on due dates. Hence, in the absence of case law on Rule 14(4), one could consider the case law on interruption under Rule 142(4) (Guidelines E-VII, 1.5; J 902/87 *mutatis mutandis*) to be applicable *mutatis mutandis* lead to the conclusion that the due dates of renewals falling due during the dead period would be deferred to the date of resumption – herein, it is noted that that case law is also based on the lack of "due date" in Rule 142 and the difference between due dates and periods. However, some legal texts indicate that renewal fees need continue to be paid during the stay, using as an argument that any person can pay so that, in case the applicant should not pay renewal fees and thus cause the application to die, the claimant is free to pay the fee in his place and will also do so to keep the application alive. This however seems contrary Guidelines A-IV, 2.2.4 mentioned above.

It may also be noted that, when the situation arises in real life, the EPO issues a communication to the applicant on record informing him that which explicitly tells him that "renewal fees must also be paid if they fall due during the staying". This may explain the lack of any case law on it (together with the rare occurrence of such situations).

26 Note from the editor: D 2/21 addresses how Pre-Exam question needs to be interpreted by a candidate when answering the exam paper. D 2/21, referring to D 5/16, r. 33, clarifies that candidates shall not dig for exotic exceptions and candidates cannot twist the interpretation to their advantage, and that it is rather a question of the correct interpretation or general understanding, rather than looking for exceptions or far-fetched interpretations. D 2/21, reason 5: "However, if a statement is logical and makes sense, so that, using common sense, it is clear what answer was expected, candidates cannot rely on exceptions to the rule or explore alternative interpretations with a view to showing that a different answer might also be conceivable in specific instances (see e.g. D 5/16, point 33 of the Reasons). It follows that in the case of a pre-examination, the review requested by the appellant does not concern the question of whether the evaluation of the assessment of the respective statement *stricto sensu*, i.e. the appellant's assessment of the statement concerned as "True" or "False", is correct. It is rather a question of the correct interpretation or the general understanding of the statement concerned, including the facts underlying the pre-examination question and the conclusion to be drawn therefrom as to whether the statement concerned is clearly to be assessed as "True" or "False" [...]". Refer to the full decision for details.

W.r.t. statement 3.4 (reading “A board of appeal may base its decision on a fresh ground for opposition only submitted during the appeal proceedings without the consent of the patentee”, a candidate submitted that the answer shall be TRUE, as the situation is not clearly scoped and that, in particular, the statement does not indicate whether the fresh ground is raised by the (original) opponent, the board, or someone else. The candidate considered it an invitation to check whether there are situations where a fresh ground of opposition may be considered and found that an intervener may raise a fresh ground, after which the Board of appeal must decide to remit the case to the first instance opposition division (G 1/94, reason 13<sup>27</sup>). Volker responded that the question was directed to general principles for proceedings before the Board of Appeal in opposition. Considering an intervention scenario, allowing fresh grounds, was not expected<sup>28</sup>.

For statement 10.4, the statement in the actual exam and that in the exam as initially published in the compendium, and in the initial Examiners’ Report were different<sup>29</sup>. This was due to an initial use of a wrong version in the compendium (exam and Examiner’s Report), which were updated shortly after it was recognized to be incorrect.

In statement 19.4, claim II.4 was amended to include the limitation that the alcoholic beverage “having 10 vol.% alcohol or more”. The amended claim also omitted the phrasing “in a bottle” of original claim II.2, but that deletion was not shown by strikethrough or otherwise indicated. A tutor asked whether the later omission was intentional, and whether the lack of indication of its deletion was not creating an unequal playing field between candidates that did not see the deletion (and hence no potential issue) and those that did (and thus had to also take that issue into account in considering whether the amendment was allowable). Volker responded that the presence or absence of “in a bottle” has no impact on the answer. Also, it was not considered an unfair playing field for candidates that did/ did not see it. As no minutes are made from all Committee meetings, it could not be reconstructed whether it was deleted on purpose or by accident.

Due to an error in the German version in [005] (wherein should have read Poly-Y and not Poly-X, see above), the Examination Board decided to award full marks to all candidates for questions 11 to 15. Also Q.20 was neutralized, due to an accidentally omitted sentence in the question body (indicating in respect of which claim inventive step had to be assessed). It was asked how these errors could have occurred and what measures will be taken to prevent such errors (similar errors happened in D 2022, Q.5: 2017 vs 2019 in English version; in B 2021: not all amendments marked)? Volker indicated that new checks will be added to the review process; also the actual WISEflow version will be checked more carefully.

A tutor asked whether it was considered to inform all candidates during the Exam that there was an error in the paper and how it had to be corrected, so that the exam could have continued without the need for any neutralization? Volker mentioned that, when the exam was on paper in exam centres, candidates were informed during the exam when an error was found. However, in view of the short 70-minute durations of each part, there may not be enough time to note that there is an error and also to inform all candidates while having an equal playing field for all.

Nicolas Favre (Examination Board) indicated that the Examination Board, software/system providers and all others involved are still learning and improving.

## 9) Concluding remarks

The annual meeting of EQE tutors and members of the EQE Committees and of the Examination Board took place on 8 and 9 November 2022. The meeting took place by video-conference.

With this report, tutors summarize the papers, including their online format, and provide information of the points discussed at the meeting so that candidates and other tutors can also find this information. In addition, we hope that our summaries and comments can assist when reading and interpreting the official Examiners’ Reports<sup>30</sup> of the EQE 2022 papers.

<sup>27</sup> G 1/94, reason 13: “If a fresh ground for opposition is raised by the intervener, the case should be remitted to the first instance for further prosecution unless special reasons present themselves for doing otherwise, for example when the patentee himself does not wish the case to be remitted”

<sup>28</sup> See also footnote above on D 2/21.

<sup>29</sup> In the real exam, statement 10.4 reads: “10.4 To transfer the status of opponent to a different person during opposition proceedings, it is sufficient to file a declaration including the names, addresses and signatures of both the original opponent and the person wishing to take over the status of opponent.” In the exam and the Examiners’ Report as initially published in the compendium it read: “10.4 In order to request a transfer of the status of opponent to a different person during opposition proceedings, it is sufficient to file a declaration including the names, addresses and signatures of both the original opponent and the person wishing to take over the status of opponent.”

<sup>30</sup> Candidates are reminded that “The purpose of the examiner’s report is to enable candidates to prepare for future examinations (cf. Art 6(6) of the Regulations on the European qualifying examination for professional representatives).”

# Report from the epi Tutors Meeting

## Baris Atalay (TR) epi Tutor

The epi Tutors Meeting took place on 17-18 October 2022 in Munich. The meeting, organized by the Tutors and Coaches sub-committee of the Professional Education Committee, allowed participating tutors to enjoy a face-to-face experience while, at the same time, providing the possibility of online participation. A broad range of topics covering different aspects of tutoring practice and the European Qualifying Examination were presented by speakers accompanied by Q&A sessions.

On the first day, the first two parts of the discussion were presented by Margaret Mackett and covered an overview of epi educational activities currently offered to EQE candidates and, the benefits for tutors in making use of the epi-learning website. In the next session, Katerina Hartvichova and Oana Boncea started a discussion on how to train in an online environment; this was then followed by Nina Ferara's session which was primarily aimed towards attracting more epi tutors and focusing on benefits of being a tutor. The first day presentations also touched generally upon issues on how one could improve the experience for candidates in view of the changing exam, focusing on various tutoring strategies that current epi tutors use/could start using.

The second day's first session was conducted by Claude Quintelier, who presented the conceptual framework for testing knowledge of the candidates, based on the existing EQE Regulation. In the subsequent section, Petra Pecharova expressed her views on the advantages of the proposed e-EQE modular system. Petra's session was followed by Tiem Reijns' presentation on consultation results in relation to the e-EQE consultation and questionnaire. Tiem summarised suggestions for improvement in the letters received during consultation process; such suggestions mainly relating to the definition of core skills being tested, modular sitting requirements and the syllabi. The final session was presented by Katerina Hartvichova and related to the adaptation of the epi tutorials to the new e-EQE.

The epi Tutors Meeting was a success as many topics of great importance were discussed while participating tutors were engaged throughout the sessions.

## "Call for Tutors"

We are looking for people passionate about education and patent law and practice, who would join us in our quest to help our future colleagues and who would be excited to participate in various education projects as tutors.

What is it like to be an epi Tutor? Our epi Tutors share their story:

*"While studying for the EQE, I had the chance to take some preparatory courses. Things just clicked afterwards - it was still a lot of work to prepare for the exam, but I could build upon the foundations built by the tutors. Immediately after qualifying, I reached out to one of my former tutors to ask if I could become one myself. The stars aligned, and I was able to start tutoring that very same year. My knowledge was still fresh, and I could pick up various tutoring techniques from the other tutors. It's been a few years now, and the EQE has been in flux - keeping us on our toes and requiring adaptation of our work. I love giving back and being part of the tutoring community, not to mention keeping my legal knowledge up to date!"*

epi Tutor: Nina Ferara

*"While preparing EQE I attended to some preparatory courses and had the chance to meet great tutors. I remember especially one of them who really struck me after she explained in a perfect way after she perfectly clarified some important details I was missing. For me being a tutor is this getting to the point in customized way. When after qualification I had the opportunity to become a tutor I was honoured for this opportunity: my preparation and legal knowledge was still fresh and I was ready to share it with the students. During these years I really enjoyed the tutoring experience: I also learned a lot both for professional and human exchange with the other tutors, certainly by doing that I had also to keep my legal knowledge up to date but the most satisfying part is when a student were striked after I was able to hit the point."*

epi Tutor: Sara Morabito

Sounds interesting to you? Further information can you find on the epi website<sup>1</sup>.

<sup>1</sup> <https://patentepi.org/en/education-and-training/epi-experts.html>



# Committee Reports

## Report of the Professional Conduct Committee

G. Checcacci (IT) Chair

### 1) Proposals to amend the Code of Conduct

**A**t the Council meeting C92 in May, the Code of Conduct has been amended, so that it is now ready for the entry into force of the UPC Agreement, whenever it happens.

The amended CoC has been published in OJ 6/2022. The EPO has presented to the Patent Law Committee a supporting document, agreed with **epi**. This document will be presented at a next meeting of the Administrative Council, for information. Anyway, the amended CoC is already in force.

The second basket of amendments, presented at the Council in previous meetings, has been put on hold for the moment. Consultations are foreseen with other **epi** Committees in order to arrive at an agreed proposal, for a next Council meeting.

### 2) Official title for **epi** members who are authorized to represent clients before the UPC under Art. 48(2)(3) UPCA

**epi** members who fulfil the conditions of Art. 48(2) UPCA will be shortly allowed to request to be inserted in the list mentioned in art. 48(3) UPCA; they will be thus entitled to represent parties before the UPC.

A quick search on the internet can show that many colleagues are preparing to the UPC also in this respect; however, lacking an official title, the designations used are many, different and premature. The definition of an official title seemed thus essential to PCC.

After fruitful discussions, first within PCC, then with EPLIT (the private association with which **epi** has already collaborated for the definition of the text of the draft UPC Code of Conduct, still to be adopted by the Administrative Committee of UPC), finally within the Council, the Council decided to recommend the title

#### European Patent Litigator

The Recommendation is published in this same issue of **epi** Information. Please note that the Recommendation refers to Art. 48(3) UPCA, i.e. to the official list kept by UPC. Thus -quite obviously- no **epi** members should use this title until their name is entered in that list.



Giorgio Checcacci

# Report of the epi-Finances Committee

C. Quintelier (BE) Chair, T. Powell (GB) Secretary

The 89<sup>th</sup> meeting of the **epi**-Finances Committee took place in hybrid video/in-person format at the Novartis Campus, Basel on 7 October 2022. The Treasurer, Deputy Treasurer and Internal Auditors attended as invited guests. The Executive Director, Head of Finance and Ms Ullmann acting as Committees Co-ordinator also attended.

The Head of Finance & Accounting presented a review of the data held by the Secretariat relating to the payment of **epi** members' subscriptions. Notwithstanding the variety of ways in which the subscriptions are paid by or on behalf of members, it is the responsibility of individual members to ensure that their contact details, including their e-mail addresses, are correct and up to date. The Committee recommends that a reminder of this requirement be made a step in the acceptance of subscription payments.



Claude Quintelier

The Committee received a report principally from the Deputy Treasurer on the **epi** budget for 2023. This includes a likelihood of a substantial deficit, that is to be funded from reserves.

The Committee noted that the current volatility in operational costs, in particular deriving from energy costs and general inflation, mean it is difficult to have certainty over budget figures. Nonetheless concerns were raised over the projected deficit.

The Committee therefore recommends that the out-turn relative to the projections in the budget be closely monitored, in particular with respect to levels of reimbursements of operational expenses.

The Committee gave cautious approval of the budget on condition that more data are provided at its next meeting, by which time some actual 2023 costs will have been incurred. The Committee also expressed its wish to have data relating to the evolution of costs and income of **epi** over the past years.

The Executive Director provided an update on management projects in the Secretariat. Progress on these was noted with approval. In particular the Committee endorsed the decision to abandon the DMS project in favour of more economical provision of the required functionality from among the existing software packages in use.

The Executive Director and Head of Finance & Accounting further gave explanations of the transition of work in the Accounting Department away from having solely a function of recording historical transactions. The department now undertakes forecasting and strategy functions and this development is heartily supported by the Committee.

The Committee reviewed a request to reinstate the production and distribution of printed copies of **epi** Information. This proposal would have significant cost implications and is not supported by the Committee. The Committee instead recommends encouraging members to view the on-line edition of **epi** Information, with a proposed survey of attitudes towards the preferred format taking place in 2023.

The Committee reviewed a proposal to commence training of trainers in preparation for the revised EQE format. The Committee noted however that there has been no final decision on the revised EQE format, and that this is unlikely to be taken until the Autumn of 2023. In view of this the Committee is of the opinion that no training expenditure should be incurred until the revised EQE format is definitely known. However, the Committee supports the inclusion in the 2023 budget of a provision to be used by the PEC once the revised EQE format is decided.

# Report of the Disciplinary Committee

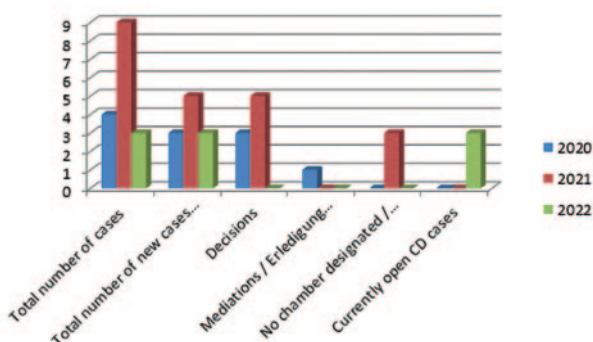
P. Rosenich (LI), Chair

The annual Disciplinary Committee meeting was held in Malaga as a physical meeting in advance to the Council Meeting C93 to save costs and travel from 20 to 21 October 2022.

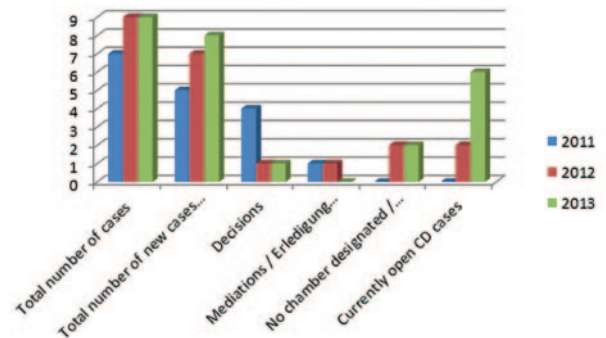
Among others, the following topics were discussed during the meeting:

- DC member for Italy
  - The DC member of Italy stopped his activity at DC and withdraw from DC in view of retirement and for that reason DC requests Council to fill the emptied position urgently.
- New Member State Montenegro- the DC waits for the proposal from the EPO President and expect DC-appointment.
- Decision of the DC recommendation in re-file inspection for the **epi** President and for the EPO President based on a request of the UK DC member John Gray in view of DBoA-Decision D2/20
  - > New possibility of file inspection for Presidents during the procedure and before Appeal.
- New practise after discussion with **epi** President Francis Leyder and the representative of the EPO President Hans-Christian Hugg at the DC meeting in order to assist DC in deciding about practical questions flowing out of DC recommendation to DC chambers in re-file inspection. Result:
  - > File inspection through the **epi** Case Management System and the existing login for the **epi** President.
  - > Postal delivery of official file parts to the EPO President on his request.
- Statistics of DC cases 2020-2022 and 2011-2013 show that the DC works efficient and even better now and the **epi** members "behave better" than in the past.

## Statistics of current DC Work 2020-2022 (to be compared with 2011-2013)



## Statistics of past DC work (10 years ago)



The following information was additionally stated:

- The Disciplinary Committee is fully prepared to judge about **epi** members acting before the UPC
- The DC is within budget
- Due to the temporary leave of Vernessa Pröll, the Deputy Registrar, Sadia Liebig is holding successfully the position alone and hence DC has smooth business as usual. The support of the Legal Advisor Nicole van der Laan (DC's former Registrar) is equally appreciated and DC thanks for it.
- The new Council term starts up from 2023 –the DC asks Council to please be prepared to soon appoint a new DC in spring 2023 and hope that Council supports DC with the same experienced members as currently or equal alternatives.
- The President of **epi** Francis Leyder reminded DC that budget for training is provided and DC plans to happily take advantage of this in 2023.
- As a matter of long standing practise – and as long as the Chair of the Disciplinary Board does not take a case from the DC into the DB – short delays in judgments (beyond 15 months) are excused. Due to the pandemic sometimes chambers had difficulties to decide on time. Generally, DC chambers try to be as fast as possible.



Paul Rosenich

# Report of the Online Communications Committee

J. Gray (GB), Chair

## OCC-EPO annual meeting

OCC had its regular annual meeting with EPO IT and customer support leaders on 9 November 2022. Background to the OCC-EPO meeting was a growing concern among OCC, Presidium and wider membership that the design and deployment of new systems lacks the robust focus on reliability and legal certainty that users expect of the EPO systems. There was also a question whether user participation and feedback yields the expected improvements in functionality or usability, according to the users. These themes were addressed directly in the meeting, so that hopefully participants will have a shared foundation for discussion of specific systems.

## MyEPO Portfolio (formerly “New User Area”)

Professional users question the utility of a system that replicates/imitates some but not all functions of a proper case management system. A number of serious issues quickly surfaced as the system came into wider use, beginning with those mentioned in **epi** Information 2/2022 and continuing with display of erroneous due dates.



John Gray

After the meeting, we are optimistic that the EPO will learn from these. Unpredictable behaviour around past deadlines will be investigated also.

To avoid using regular users as “guinea pigs” for new functions, any major features will be trialled with focus groups, before being released into the

mainstream. The portfolio will at long last include cases where a party is Opponent, not proprietor or applicant.

EPO promises pilots of machine-machine interfaces (APIs) early in 2023, which are critical to the utility of the system for volume users.

Decommissioning of legacy Mailbox, MyFiles, Administration Facility is anticipated by June 2024. This seems acceptable when the new system already has all functions of those systems within it.

A drawback at this stage is the incomplete integration of fee payment with the filing tasks. Users familiar with

eOLF and OLF 2.0 expect streamlined operation equivalent to the form 1038e in current systems, rather than a backwards step.

OCC reiterated the annoyance caused when non-familiar number formats are displayed in new systems, so that, e.g. application numbers presented by MyEPO are in a form that can't be pasted into directly to Central Fee Payment.

Administration of users, associations etc.. is facilitated by the new systems, but the new system also exposes how records are out of date as to who is still with which firm, etc.. EPAs, firm administrators and management need to pay better attention to the updating of records of associations, access to portfolios, smart cards etc..

## UP and UPC IT infrastructure

There are now forms for UP steps and OCC members have tested these with satisfaction. The procedure looks rather laborious, but then it is simpler than multiple national designations!

OCC continues to support LitCom in submissions to the UPC Preparatory Committee concerning the UPC CMS, critical for managing Opt-out procedures (see also LitCom report in this issue). Members were keen to know whether EPO smart cards could be used as a form of authentication, but

- the familiar EPO smart card will be replaced with a new multifactor authentication platform over the next couple of years.
- UPC has set a higher standard of authentication (with or without) being fully aware of the practical implications.
- UPC decided against making it easy for EPAs to administer opt outs etc, even when EPAs are already appointed by owners for the management of their European patents and will be in the forefront of operations in the Sunrise period and beyond.

Following the switch to web-based systems, designers unfortunately believe that their systems are self-explanatory and therefore no manual is required. We explained this makes it hard for users to practise in advance, making it hard also to ‘train the trainers’.

Good news is that UPC personnel and their IT provider are keen to engage with users directly. The OCC/LitCom working group set up a forum on an urgent basis for EPAs to share knowledge on the UPC CMS. A different platform would be required to allow interaction with non-members.

### Other topics:

Online Filing 2.0 has settled down through the year, with minor improvements being reported through the latest "Release Notes<sup>1</sup>". The **opposition form 2300** is now available in pilot form, with user comments requested. A benefit of the OLF 2.0 system is that it allows colleagues (attorney, trainee, paralegal) to collaborate in online filings while working remotely.

More countries are developing **national filing systems** based on the new **Front Office** platform, after the proof of concepts by Lithuania and Spain. EPO want to 'enable' all offices to adopt by the end of the Strategic Plan mid-2023. Members will want to ensure their own national offices have Front Office or some other service established as soon as possible, so that there is no rush when, one day, the original OLF system is turned off.

EPO reassured us of its preparedness for power outages in the winter. Rule 134(5) remedies should work for parties who experience local outages.

Legal changes to enable continued "**digital transformation**" were noted. Any changes in actual practice will be up for discussion later.

EPO plans on **decommissioning the existing Smart Cards** over a 2-year roadmap (see image).

<sup>1</sup> <https://patentepi.org/r/info-2204-09>

During 2023, eOLF and all existing applications will be updated to use a new two-factor authentication platform. Users will be able to use their smart card and the new authentication system in parallel, so that they can transition gradually to using the new system before the smart cards become useless.

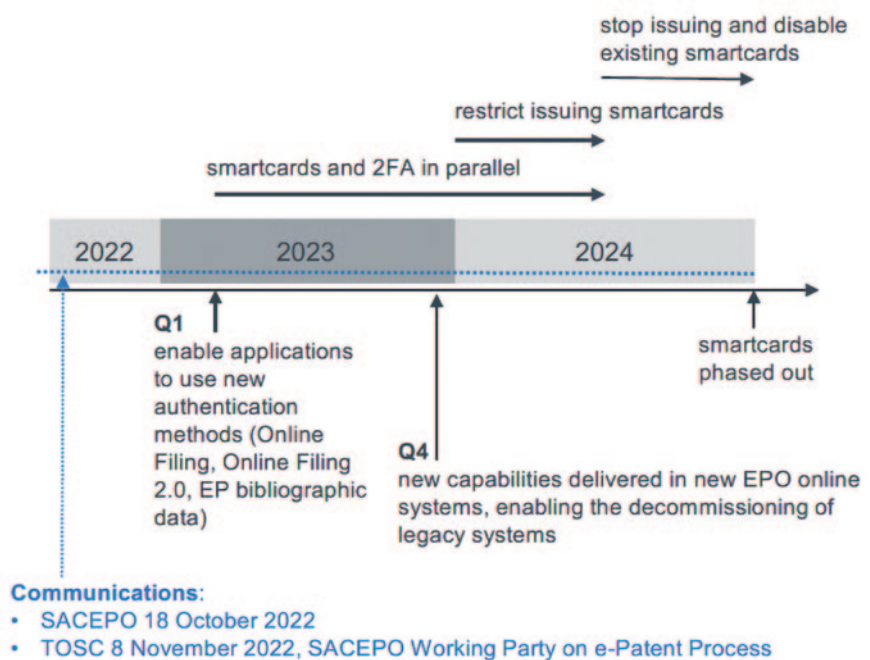
Numerous other topics were discussed, including improvements requested in the **Third Party Observations** form, **digital signatures on assignments**, alternatives to fax for "**rescue**"/**emergency filings**.

OCC members remain active in various other sub-groups, focus groups and pilots. There are plenty of opportunities for users to participate in pilots and contribute to the success of future systems.

### Interacting with the OCC

Thanks always to the members who report to us the random issues they face with EPO IT systems. You can submit issues and information directly to the OCC Chair at [OCC@patentepi.org](mailto:OCC@patentepi.org).

## Approach to smartcards and status



# Report of the Harmonisation Committee

J. Brown (GB) Chair

Following the C92 Council meeting, a response was filed to the EPO Consultation on Substantive Patent Law Harmonisation ("SPLH").

The EPO reported their findings, following the Consultation, to the Plenary Session of Group B+ on 21st September, 2022. The presentation to the Group B+ Plenary, together with the draft report prepared (Part I and Part II), were very interesting but have unfortunately not been published yet.

Our President and I attended the 34<sup>th</sup> session of the Standing Committee on the Law of Patents, held at WIPO, Geneva, from 26<sup>th</sup> to 30<sup>th</sup> September 2022. Topics dis-

cussed included Exceptions and Limitations to Patent Rights (see especially SCP/34/3<sup>1</sup>), a Sharing Session on patentability of inventions **using** artificial intelligence (AI) and **by** AI, Patents and Health (see SCP/34/6) and a Sharing Session focusing on cross-border aspects of confidentiality of communications between clients and their patent advisers. In this regard, I understand that the Swiss Patent Office made a presentation on this topic at the Plenary Session of Group B+ on 21<sup>st</sup> September 2022 but to date I have not seen what was presented.

1 SCP documents are available on the WIPO website, which can be searched using the document number you wish to look at

## Report from the Diversity & Inclusion Working Group

M. Névant (FR)

The Diversity and Inclusion (D&I) Working Group (WG) was set up in September 2021, and has met on a monthly basis since then.

The first "task" of the WG was to prepare a policy on D&I to be adopted by **epi** Council. This was done during the Council meeting in May 2022 (C92). The policy can be found here<sup>1</sup>.



Marc Névant

In the aftermath of C92 the WG tackled the following issues:

1/ The attention of the WG was drawn to the fact that **epi** forms for registering to seminars or to meetings are in

English and all comprise a mandatory pre-filled salutation, i.e. either Mr or Ms. Remedies are currently being investigated, for example allowing selection of salutation rather than pre-filled as now, and including a further salutation option in the forms (e.g. "not specified", "no title", "Mx" etc.).

2/ A seminar on D&I was held on the eve of the C92 meeting. A video recording of that seminar is available via the **epi**-learning platform<sup>2</sup> (which can only be accessed after specific registration). The WG is currently working to make the video available to all members (after login) directly from the "diversity and inclusion" **epi** webpage.

In a presentation given during C93, the WG stressed that it is important to continue D&I-related work, including updating information and providing materials and support for members. The WG considered whether this is best handled by a permanent Committee within **epi**, ideally to be set up at a future Council meeting, with appropriate Terms of Reference. At the end of the presentation Council approved a motion allowing the WG to continue its work until at least C94.

1 <https://patentepi.org/r/info-2204-10>

2 <https://patentepi.org/r/info-2204-11>

# Report of the Committee on Biotechnological Inventions

A. De Clercq (BE), Chair

**B**elow is a summary of discussion points since our last report<sup>2</sup> in **epi** information. The following topics were discussed during our last meeting of 22 September 2022 and afterwards.

## 1. ST26 standard for Sequence listings

We refer to the discussion in our last report<sup>2</sup> in which we gave an overview of the new ST.26 WIPO Standard for Sequence Listings which came into force on the big bang date of 1 July 2022<sup>1</sup> and the problems created by the conversion of an ST.25 format sequence listing to an ST.26 format sequence listing. This is currently required for (1) divisional EP applications filed as from 1 July 2022 when the parent application was filed before 1 July 2022 with an ST.25 format sequence listing and (2) end of priority applications filed as from 1 July 2022 (both EP or PCT) when the earlier application was filed before 1 July 2022 with an ST.25 format sequence listing. Annex VII of the WIPO Standard ST.26<sup>3</sup> explains situations in which subject-matter could be deemed to have been added when making a conversion of a sequence listing from the ST.25 to the new ST.26 format. This involves many risks and creates a huge extra effort and costs for applicants.

A position paper<sup>4</sup> on this matter was prepared by our ad-hoc group and passed on by **epi** to the EPO on 21 June 2022 (this was also published on the **epi** website and in **epi** information 2-2022). The EPO replied<sup>5</sup> on 28 July 2022 (see also discussion in our last report in **epi** information 2-2022<sup>6</sup>). The committee finds this reply unsatisfactorily. It is also commented on in IP Kat blog posts of 1/08/2022<sup>7</sup> and 9/08/2022<sup>8</sup>.

The EPO has in the meanwhile published FAQs<sup>9</sup> relating to WIPO Standard ST.26 for divisionals as well as relating to sequence listings in the communication under R. 71(3) EPC. These FAQs do not clarify the questions and

do not offer solutions for the problems of practitioners. Matters will have to be put much more clearly. For example as to which page fees would have to be paid when including the ST.25 sequence form the parental application in a divisional application and in which cases this needs to be done. The EPO clearly warns for added matter issues in relation to filing an ST.26 sequence listing for (i) divisional applications where an ST.25 sequence listing was present in the parent application or (ii) for end of priority applications where an ST.25 sequence listing was present in the priority document. These FAQs also illustrate the extra burden and problems applicants are faced with in case of divisionals with ST.26 sequence listings at the EPO.



Ann De Clercq

We also prepared comments to parts of the new (still confidential) draft EPC GLs (A-IV, 5, 5.3-5.4) relating to sequence listings that appear unclear and discussed at the SACEPO WP GLs meeting. The EPO promised to look into it by the next revision.

The UK Patent Office has already indicated on 28 February 2022 in an update of their Guidelines for examination<sup>10</sup> that they will allow transitional measures. We refer to the discussion in our last report<sup>2</sup>. We strongly continue to request that the EPO would adopt the same practice as the UK Patent Office for EP applications.

Further communications/training webinars by the EPO may be very useful and needed to further inform patent attorneys and patent administrators (paralegals) dealing with the matter and allow questions to be addressed. Up till now only FAQs are available on the EPO website (FAQs<sup>9</sup>) and further information at WIPO level is given on WIPO Sequence Suite<sup>11</sup>. A new software version of the program WIPO sequence 2.2.0 became available on 13 October 2022 (see WIPO Sequence Suite<sup>11</sup>).

<sup>1</sup> On the legal side a decision of the President (<https://patentepi.org/r/info-2204-13>) and Notice of the EPO (<https://patentepi.org/r/info-2204-14>) were published on 9 Dec. 2021.

<sup>2</sup> <https://patentepi.org/r/info-2204-15>

<sup>3</sup> <https://patentepi.org/r/info-2204-16>

<sup>4</sup> <https://patentepi.org/r/info-2204-17>

<sup>5</sup> <https://patentepi.org/r/info-2204-18>

<sup>6</sup> <https://patentepi.org/r/info-2204-19>

<sup>7</sup> <https://patentepi.org/r/info-2204-20>

<sup>8</sup> <https://patentepi.org/r/info-2204-21>

<sup>9</sup> <https://patentepi.org/r/info-2204-22>

<sup>10</sup> <https://patentepi.org/r/info-2204-23>

<sup>11</sup> <https://patentepi.org/r/info-2204-24>

## 2. Plant patenting

We refer to our earlier discussion on plant patenting in our last report. At the SACEPO WP GLs meeting of 11 October 2022, we reiterated our concerns about amongst others the need for **plant disclaimers** for which we held there is no legal basis. We regret at this moment no changes are being considered in the GLs. We are eager to discuss these matters in upcoming meetings with the EPO. We would like our comments to be heard and hope the EPO takes the necessary time to listen to our comments. We also look forward to any Technical Board of Appeal cases on this topic. The committee is also following up the developments on national level in the EPC members states.

We also raised the following comment on patentability of plants during the CPL56 meeting on 15 November 2022 wherein we were presented with report CA/PL 20/22:

*epi thanks the EPO for its detailed report on plant and animal patenting. The EPO has implemented a disclaimer solution in the GLs for examination. epi would like to understand where the basis is in R. 28 (2) for a disclaimer requirement as mentioned in item 15 of the report. The fact that only 1 patent was granted with a disclaimer as mentioned in item 16, may reflect the unwillingness or resistance to incorporate a disclaimer because applicants might perceive such a disclaimer is not needed and/or has no legal basis. epi believes that G3/19 may not have brought legal certainty and stability as mentioned in item 27 of the report. The disclaimer would appear to introduce legal uncertainty for applicants, because the scope of what is disclaimed, and how national courts or the UPC will interpret the coverage of the remainder of the claim remain to be seen, particularly in light of various definitions of “essentially biological processes” or “exclusively obtained by essentially biological processes”.*

## 3. Antibodies

We refer to our earlier discussion on antibodies in our last report in **epi** information 2-2022. With respect to antibodies, we informed the EPO at the SACEPO WP

GLs meeting of 11 October 2022 that we think the new EPC GLs (G-II, 5.6) unfortunately still do not address some of our concerns on the inventive step requirements for antibodies. We would like that the Guidelines are not stricter than the Case Law on antibodies. We also request that individual Examiners would not insist to include framework region sequences in the claims in addition to CDR sequences when the surprising effect does not involve the binding affinity (this is not what the Case Law reflects). The GLs need to be very carefully drafted and reflect the Case Law as they are also being referred to in national Court cases. We would like our comments to be heard and hope the EPO takes the necessary time to listen to our comments. We would like to see a process wherein there is more interaction with the **epi** practitioners when draft GLs are made (also in the other Biotech areas). We deem it important that the EPO may wish to be continuously updated by practitioners in the field of antibody inventions as antibody patenting should receive prime importance. We look forward to additional meetings with the EPO on antibodies.

## 4. Process of drafting GLs in Biotech

The biotech committee observes that the role the Guidelines can play is not assessed when determining quality.

An example of the impact of the GLs is the manner in which G 3/19 was embodied in the GLs. Another example is that in a recent French court decision on SPCs, the French court used the EPO GLs to determine whether there was an independent inventive step and specifically used the part of the GLs on antibodies. This shows that the content of the GLs may have an effect in litigation, which is very dangerous, particularly if the GLs are not in line with the case law.

## 5. Further meetings

We look forward to a new date also for discussing Biotech Issues with DG1 of the EPO and with other EPO circles, as in general we think this is of prime importance to obtain strong IP protection in the Biotech sector. We would also like to hold a further committee meeting before the next council meeting.



# General Information

## epi Board

### Präsident / President / Président

BE – LEYDER Francis

### Vize-Präsident(in) / Vice-Presidents / Vice-Président(es)

DE – VOGELSANG-WENKE Heike

MK – ILIEVSKI Bogoljub

### Generalsekretär / Secretary General / Secrétaire Général

BG – SIRA KOVA Olga

### Stellvertretender Generalsekretär

### Deputy Secretary General / Secrétaire Général Adjoint

PL – AUGUSTYNI AK Magdalena

### Schatzmeister / Treasurer / Trésorier

CH – THOMSEN Peter

### Stellvertretender Schatzmeister / Deputy Treasurer

### Trésorier Adjoint

HU – SZENTPÉTERI Zsolt

## Next Board and Council Meetings

### Board Meetings

124<sup>th</sup> Board Meeting in Skopje on 24 March 2023

### Council Meetings

94<sup>th</sup> Council meeting in Malmö (Sweden) from 1-3 May 2023

# Annual Subscription 2023

P.R. Thomsen (CH), Treasurer

In accordance with the decision of **epi** Council C93 on 22 October 2022, the amount for the **epi** annual subscription has been set at 190 EUR for 2023, if paid before 1 April 2023 and at 240 EUR if paid later.

The annual subscription for **epi** Students was set to be 95 EUR for 2023.

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 2023 will be sent by email around mid of January 2023.

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 2023 annual subscription can be settled as follows:

## 1. Direct Debiting Mandate

- By debiting an EPO deposit account on 25 February 2023
- 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>)
- In case a direct debiting mandate is set up with **epi**, kindly note the following:

The due annual subscription will be debited automatically from the EPO account on account on 25 February 2023. Please make sure that the EPO account has sufficient funds at that date. Any new direct debiting mandate or amendment/cancellation of a previous one must be received from the account holder at the **epi** Secretariat at latest by 15 February 2023. If you have any questions relating to the direct debiting mandate, please get in touch with the **epi** Secretariat ([accounting@patentepi.org](mailto:accounting@patentepi.org)).

## 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 2023

If payments are not made prior to 1 April 2023, the annual subscription is increased to an amount of 240 Euro.

Account holder: European Patent Institute  
Bank Name: Deutsche Bank AG  
BIC-SWIFT: DEUTDEMMXXX  
IBAN No: DE49 7007 0010 0272 5505 00

## 3. Paypal

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

## 4. Credit Card

- By credit card (Visa or Mastercard only)
- The link to the online payment tool can be found on our website (<https://patentepi.org/r/online-payment>)

For payments with American Express, please use PayPal.

In case you plan to withdraw from **epi** membership, please note that you may avoid the annual subscription 2023 if you submit with the Legal and Unitary Patent Division of the EPO a request to be deleted from the list until 1 April 2023 (see <https://www.epo.org/applying/online-services/representatives/deletion.html>).

# LIVE NOW: Option to update your annual subscription invoice address via our **NEW** self-service functionality

Dear **epi** members,

As we are approaching the end of the year, we are starting to prepare for annual subscription invoices for 2023. You certainly have an interest that your **epi** annual subscription invoice will show the correct address and is sent to the proper e-mail address.

No action is required from your side at the moment if the address foreseen for your annual subscription invoice and your e-mail for the invoice to be sent to is correct. You may check your data in our new self-service area on the **epi** website in the member-restricted area "My Account".

<https://patentepi.org/en/epi/user/account>

In case you have provided us in the past with an invoicing address or specific e-mail address that differs from the data mentioned in the List of Professional Representatives pursuant to Art. 134 EPC, this provided address will be reflected in the self-service area and we will continue to use this address for invoicing. We nevertheless encourage you to double check your data in our new self-service area on the **epi** website in the member-restricted area "My Account".

With this introduced self-service area, there is now also a new possibility to update by yourself the address to be shown on your annual subscription invoice for 2023 and beyond as well as the specific email-address to which we will send your invoice in early January.

Therefore, you should act NOW, but latest until end of 2022, in particular:

1. If you wish that your annual subscription invoice reflects a different address from the address mentioned in the List of Professional Representatives pursuant to Art. 134 EPC

2. If you wish to have your annual subscription invoice sent to an e-mail address other than your e-mail lodged with the EPO for the List of Professional Representatives.

Please note that any final reminder for your annual **epi** subscription, if necessary, will still be sent to the postal address that you have provided to the EPO for the List of Professional Representatives.

You may also use this function if you would like, after having received an annual subscription invoice, e.g. in February, to have issued a corrected invoice with other address details. Please be advised however, that you need then to send an additional request for a corrected invoice per email to [accounting@patentepi.org](mailto:accounting@patentepi.org) after having updated your contact details in the self-service area of the website.

Further down, you will find a more detailed description, how you may check and amend your invoice address and/or email address to receive the invoice in the new self-service area.

We are continuously trying to improve and optimize the annual subscription process and hope that you find this new feature useful.

Please contact the **epi** Secretariat under [accounting@patentepi.org](mailto:accounting@patentepi.org) for any questions and myself under [treasurer@patentepi.org](mailto:treasurer@patentepi.org) with any suggestion or concern about the annual subscription process.

Kind Regards  
Peter R. Thomsen  
The Treasurer

# Detailed step-by-step description how to update the address of your epi annual subscription invoice and/or the email-address for receiving the invoice

- Logon to the **epi** website <https://patentepi.org/en/login> and you will be taken into the section "My Account".
- On the menu on the left-hand side, please choose "My Personal Data" and you will be taken to "My data overview".
- In this section, you can find your data as on the List of Professional Representatives before the European Patent Office. This data can only be updated by contacting the Legal and Unitary Patent Division of the EPO, e.g. by using EPO Form 52301/52301a
- Further down on the page, you will see the headline "Different invoice address for **epi** annual subscription".

**Different invoice address for epi annual subscription**

Please note that the absence of a different mailing and email address, **epi** will use by default your data in the list of professional representatives for the purpose of issuing the annual subscription invoice.

☐ If you wish to have the invoice issued to a different address, please tick the following box, and provide the necessary data below.

VAT no.

PO no.

EPO Account

Please use the form to set up/amend/delete a direct debiting mandate which can be found [here](#)

Click the tick box next to "If you wish to have the invoice issued to a different address, please tick the following box, and provide the necessary data below" and an additional section will open.

The site will expand, and you will be given the opportunity to enter your data and press submit at the bottom.

**Different invoice address for epi annual subscription**

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Name 2

Addition

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**epi** will use this email address **only** for sending your annual subscription invoices. Please, keep this field blank if you like to receive those invoices to your email address provided under "epi additional data" or "As on the list of professional representatives before the EPO".

VAT no.

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Please use the form to set up/amend/delete a direct debiting mandate which can be found [here](#)

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Disziplinarorgane, Ausschüsse und Rechnungsprüfung · Organes de discipline, Commissions et Vérification des comptes

Disziplinarrat (epi)	Disciplinary Committee (epi)	Commission de Discipline (epi)
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Disziplinarausschuss (EPA/epi)	Disciplinary Board (EPO/epi)	Conseil de Discipline (OEB/epi)
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Beschwerdekammer in Disziplinarangelegenheiten (EPA/epi)	Disciplinary Board of Appeal (EPO/epi)	Chambre de Recours en Matière Disciplinaire (OEB/epi)
<b>epi Mitglieder</b>	<b>epi Members</b>	<b>Membres de l'epi</b>
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SACEPO – EPP	SACEPO – EPP	SACEPO – EPP
BE – BIRON Yannick	FI – HONKASALO Marjut Anneli	

# Contact Data of EPO Legal Division

## Update of the European Patent Attorneys Database

Please send any change of contact details to the European Patent Office so that the list of professional representatives can be kept up to date. The list of professional representatives, kept by the EPO, is also the list used by **epi**. Therefore, to make sure that **epi** mailings as well as e-mail correspondence reach you at the correct address, please inform the Legal Division of the EPO (Dir. 5.2.3) of any change in your contact details.

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

European Patent Office  
Dir. 5.2.3  
Legal and Unitary Patent Division  
80298 Munich  
Germany

Tel.: +49 (0)89 2399-5231  
Fax: +49 (0)89 2399-5148  
[legaldivision@epo.org](mailto:legaldivision@epo.org)  
[www.epo.org](http://www.epo.org)

The relevant form(s) to be submitted in the case of changes can be downloaded from the EPO website:  
<https://www.epo.org/applying/online-services/representatives/changes.html>

Further information and forms relating to the list of professional representatives can be found on the EPO website (<https://www.epo.org/applying/online-services/representatives.html>) and in the FAQ section of the **epi** website (<https://patentepi.org/en/faq>).

Thank you for your cooperation.

# IPRISK Professional Liability Insurance for epi Members

## Why?

European patent attorneys handle National, European and Foreign patent applications and patents. Those patent applications and patents may have a high commercial value and the loss of those patents might cause their proprietor serious damages for which the patent attorney might be liable. In particular for those working in private practice it is thus highly recommended to have a professional liability insurance.

At **epi** we realized that it was not always easy, and in particular not cheap, for our members to subscribe an appropriate professional liability insurance, so we decided to help our members in offering them a product tailor-made for them.

## What?

In line with the **epi** Council decisions, **epi** negotiated and agreed a framework contract for a professional liability insurance setting out general principles and conditions applicable in all 38 EPC Contracting States. The framework contract was signed with RMS, a Coverholder at Lloyd's, and placed by certain Underwriters at Lloyd's of London.

Any **epi** member offering services to external clients can benefit from this insurance. The insurance premium to be paid is calculated on the basis of the turnover of the insured **epi** member and depending on the insurance coverage selected.

## Which are the advantages for epi members?

- An insurance coverage selectable between 500 000€ and 5 000 000€ per incident, per year and per insured member
- Covers the work done by the support staff of the patent attorney
- Covers the work of the patent attorney before the EPO and the national offices in Europe before which the **epi** member is entitled to act
- Additional coverage for trademarks and design work can be obtained with the payment of an additional premium
- Competitive conditions and premiums
- Possibility to have a retroactive coverage
- Knowledge of the profession on the side of the insurance company

## More information needed?

Please have a look at the **epi** website <https://patentepi.org/r/iprisk> where you can also find a questionnaire which you can fill in to obtain a price offer.

For further information you can also send an email to [insurance@patentepi.org](mailto:insurance@patentepi.org)



Under Framework Agreement with



Institut der beim Europäischen Patentamt zugelassenen Vertreter  
Institute of Professional Representatives before the European Patent Office  
Institut des mandataires agréés près l'Office européen des brevets

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