

Examiner's report pre-examination 2016

Preliminary remark: the references from the Guidelines are from the version of the Guidelines which was to be used in the present examination.

Question 1

The opposition division will consider the third party observations under Article 115 EPC, since third party observations may be directed to patentability in the broad sense: for instance, they may be directed to issues of sufficiency of disclosure or unallowable amendments, Guidelines, E-V, 3. Third party observations are communicated to the proprietor, Rule 114(2) EPC. Third party observations become part of the file and are accessible to the public according to Article 128(4) EPC, see also Guidelines, A-XI, 2.1. The opposition division can introduce a fresh ground for opposition into the proceedings, Article 114(1) EPC and G 9/91.

1.1 - False

1.2 - True

1.3 - True

1.4 - True

Question 2

Subsequent to the applicant's approval in response to the communication under Rule 71(3) EPC, the examining division may resume the examination procedure at any time up to the moment when the decision to grant is handed over to the EPO's internal postal service, Rule 71a (2) EPC, G12/91, see also Guidelines, C-V, 6.1. Within the period under Rule 71(3) EPC, the applicant may request reasoned amendments, Rule 71(6) EPC: in this case the applicant will not be required to file the translation of the further amended set of claims or to pay the fee for grant and publication, Guidelines, C-V, 4.1. Claims fees for the two dependent claims are only due, if the amendment is accepted and a second communication under Rule 71(3) EPC is issued, Guidelines, C-V, 4.8.1. The examining division may still consider third party observations filed up to the moment when the decision to grant is handed over to the EPO's internal postal service, Guidelines, C-V, 6.1.

2.1 - False

2.2 - False

2.3 - False

2.4 - False

Question 3

The communication is deemed to be notified on [21 December + 10 days (Rule 126(2) EPC) =] 31 December 2015. If a period of two months is set, the reply must be filed at the latest on [21 December + 10 days (Rule 126(2) EPC) = 31 December 2015 + 2 months (Rule 131(4) EPC) =] 29 February 2016. If a period of four months is set, the reply must be filed at the latest on 2 May 2016 [21 December + 10 days (Rule 126(2) EPC) = 31 December 2015 + 4 months (Rule 131(4) EPC) = 30 April 2016, extended to Monday, 2 May 2016 (Rule 134(1) EPC)]. Further processing can be validly requested within two months of the communication of a loss of rights due to the missed time limit, Rule 135(1) EPC and Rule 112(1) EPC. Since this communication will be issued only sometime after 2 May 2016 and since such a communication will be deemed to be delivered only on the tenth day following its posting (Rule 126(2) EPC), there is absolute certainty that further processing can be requested on 4 July 2016. Note that a request for further processing may also be filed between expiry of the unobserved time limit and notification of the communication concerning either the failure to observe a time limit or a loss of rights, Guidelines, E-VII, 2.1.

3.1 - False

3.2 - False

3.3 - True

3.4 - True

Question 4

Rectification of the designation of the inventor can be requested even after proceedings before the EPO are terminated, Rule 21(1) EPC and Guidelines, A-III, 5.6. The incorrect designation is rectified upon request and no evidence is required, Rule 21(1) EPC. If a further inventor is to be designated, the consent of the inventor previously designated is not necessary, Rule 21(1) EPC, Guidelines, A-III, 5.6. If the request is filed by Béatrice, the consent of the applicant is required, Rule 21(1) EPC.

4.1 - True

4.2 - True

4.3 - False

4.4 - True

Question 5

Hassan has the right to practice before the DPMA with which PCT-G was filed. Consequently, he can be validly appointed as a representative (agent) to practice before the IB, the competent International Searching Authority and the competent International Preliminary Examination Authority in respect of PCT-G (Article 49 PCT and Rule 90.1 PCT). Statements 5.2 to 5.4 relate to representatives (agents) dealing with international applications in general, and these statements are not restricted to PCT-G and Hassan as the representative (agent). A waiver of power of attorney under Rule 90.4(d) and Rule 90.5(c) PCT is currently in force, see Notice from the European Patent Office dated

2 March 2010 concerning the waiver of power of attorney under Rule 90.4(d) and Rule 90.5(c) PCT, OJ 5/2010, pages 335-336. The Demand shall be signed by the applicant, Rule 53.8 PCT. However, any act by an agent shall have the effect of an act by the applicant, Rule 90.3(a) PCT. Thus, the request for the Demand need not be signed by the applicant. A withdrawal of an international application has to be filed either by the applicant(s) or by a representative (agent), provided that he has been appointed by the applicant(s) signing the request, the demand, a separate power of attorney or a general power of attorney (Rule 90bis.5, Rule 90.4(a) PCT and Rule 90.5(a) PCT. [Note that the case referred to in Rule 90.4(e) PCT does not apply whenever the representative (agent) was appointed by the applicant signing the request or the demand].

5.1 - True

5.2 - True

5.3 - False

5.4 - False

Question 6

The obligation to pay renewal fees to the EPO terminates in 2015, with the payment of the renewal fee due in respect of the year in which the mention of the grant of the European patent is published in the European Patent Bulletin, Article 86(2) EPC. An opposition can be filed at the latest on (25 November 2015 + 9 months =) 25 August 2016, Article 99(1) EPC and Rule 131(4) EPC. Any infringement of a European patent is dealt with by national law, not under the EPC, Article 64(3) EPC. A patent gives the patent proprietor the right to exclude third parties from using the protected invention: it does not automatically allow the patent proprietor to produce and sell matter that is protected by the patent.

6.1 - True

6.2 - True

6.3 - False

6.4 - False

Question 7

EP-W is considered to be filed within the priority period, [20 February 2015 + 12 months (Article 87(1) EPC, Rule 131(4) EPC) = 20 February 2016, extended to Monday, 22 February 2016 (Rule 134(1) EPC)]. A declaration of priority can be made within sixteen months from the earliest priority date claimed, Rule 52(2) EPC. For Werner to be considered the successor in title according to Article 87(1) EPC, the transfer of the application (or of the priority right as such) must have taken place before the filing date of EP-W. However, proof of this transfer can be filed later, Guidelines, A-III, 6.1.

7.1 - True

7.2 - False

7.3 - False

7.4 - True

Question 8

The subject-matter of claim 2 lacks novelty, since product P is known in the art, Article 54(2) EPC. The process is stated to be more efficient and ecological, but it is not stated to provide a product with different features, Guidelines, F-IV, 4.12. According to Article 64(2) EPC, if the subject-matter of a European patent is a process, the protection conferred by the patent extends to the product directly obtained by such process. Even if a claim directed to a production process is inventive, no conclusion can be drawn regarding a product obtained by the same process: the product may be not even novel, as is presently the case. The terms "obtainable", "obtained" or "directly obtained" are used in the product-by-process claim to define the product *per se*, Guidelines, F-IV, 4.12. Therefore, in proceedings before the EPO it makes no difference for the claim interpretation whether in claim 2 the term "obtainable" or "directly obtained" is used.

8.1 - True

8.2 - True

8.3 - False

8.4 - False

Question 9

On 1 February 2016 it was possible to validly pay the renewal fee for EP-N together with the additional fee [31 July 2015 + 6 months (Rule 51(2) EPC and Rule 131(4) EPC) = 31 January 2016, extended to Monday, 1 February 2016 (Rule 134(1) EPC)]. Further processing is ruled out in respect of the period referred to in Rule 51(2) EPC, Rule 135(2) EPC. In the present case, the omitted act that has to be completed (Article 122(1) EPC and Rule 136(2) EPC) includes the payment of the renewal fee for the third year (Article 86(1) EPC, Rule 51(1) and (2) EPC). The applicant must show that he had exercised all due care required by the circumstances, Article 122(1) EPC and Rule 136(2) EPC.

9.1 - True

9.2 - False

9.3 - True

9.4 - True

Question 10

Under the EPC, opponents are not entitled to a reduction of the opposition fee, see Rule 6(3) and (4) EPC. Natural persons having their residence within a Contracting State having a language other than English, French or German as an official language (such as Paco), may file documents which have to be filed within a time limit (in this case a notice of opposition) in an official language of that State (in this case Spanish) (Article 14(4) EPC). A translation must be filed within one month of filing the notice of opposition, Rule 6(2) EPC, that is on 29 March 2016 [28 February 2016 + 1 month (Rule 131(4) EPC) = 28 March 2016, extended to Tuesday, 29 March 2016 (Rule 134(1) EPC)]. Any party to oral proceedings before the EPO may use one of the other official languages of the EPO, on condition that such party gives notice to the EPO at least one month before the date

laid down for such oral proceedings. Alternatively, the party may make provision for interpreting into the language of the proceedings, English, Rule 4(1) EPC.

10.1 - True

10.2 - False

10.3 - True

10.4 - True

Question 11

11.1 – False : The open wording of claim I.1 (“comprising ...”) does not exclude the presence of a pouring zone. [Note that the containers described and shown in the application all have an upper opening; the upper opening is a pouring zone, since the pouring from the upper opening is described in [002] and [017] of the application.]

11.2 – True : The saucepan as shown in Fig. 1 has a container 10 and a lid 15 for closing the container, wherein the lid has at least two perforations of the same size ([005]), the lid further comprises a skirt 40, the perforations being arranged in the skirt.

11.3 – True : The skirt 40 of the lid 15 shown in Fig. 2 is made of a narrow ring and protrusions, one of the protrusions having the perforations ([011]).

11.4 – False : A lid for closing a container relates to a lid suitable for closing a container and not to a combination of a lid and a container. The system in accordance with claim I.1 is limited to include also a container; a lid without a container does not fall within the scope of claim I.1.

Question 12

12.1 - True : The embodiment of the saucepan shown in Fig. 3 has a securing means of the bayonet type ([015]).

12.2 - False : The embodiment of the saucepan shown in Fig. 2 shows not a spout, but only a circular opening 35. The spout 30 is explicitly defined in [006] as a lip protruding from the side wall 25 of the container 10.

12.3 - True : The embodiment shown in Fig. 3 also has an upper opening 70 which is circular and through which the contents can be poured, see [017].

12.4 – False : Claim I.6 is dependent on I.1 which requires a lid as part of the system.

Question 13

13.1 – True : The dependency of claim I.5 is wrong: The securing means is defined only in claim I.3.

13.2 – True : The saucepan as shown in Fig. 2 has open spaces (openings 55) between the protrusions which represent the pouring opening of the lid in the pouring position, see [011] and [012].

13.3 – True : The saucepan as shown in Fig. 3 has the opening 55 in the lid being larger than the size of one of the at least two perforations and being a pouring opening ([014]).

13.4 – False : The wording of claim I.10 defines that the lid comprises an opening for pouring in addition to at least two perforations of the same size. There is no contradiction between claims I.1 and I.10; thus the dependency of claim I.10 is correct.

Question 14

14.1 – False : D1 discloses a system comprising a container 1 and a lid 2 for closing the container, wherein the lid has at least two perforations 25 of the same size [002] and securing means 12, 27 for securing the lid to the container [003].

14.2 – False : D1 discloses a system comprising a container 1 and a lid 2 for closing the container, wherein the lid has at least two perforations 25 of the same size [002], wherein the container comprises a circular opening for pouring [005].

14.3 – False : D2 discloses a system comprising a container 2 and a lid 3 for closing the container, wherein the lid has at least two perforations 19 of the same size [002] (“perforations of one size” means that at least two perforations have that specific size) with the lid having a skirt 4, said perforations being arranged in the skirt [002].

14.4 – True : D2 does not disclose a container comprising a spout.

Question 15

15.1 – False : Claim I.11 not only defines a first entity, i.e. the system, but also specifies its relationship to a second entity, i.e. the food pieces, which is not part of the claimed entity. Food pieces are not standardised and vary in size. Therefore the size of the perforations is not clearly defined (Guidelines, F-IV, 4.14).

15.2 – False : The term “large” is an undefined relative term (Guidelines F-IV, 4.6).

15.3 – True : The mathematical relationship between the two sizes (the size of a perforation and the size of the opening) is clear (Guidelines, F-IV, 4.14). (Note also: Both the perforations and the opening are features of the claimed entity.)

15.4 – False : D2 discloses a system comprising a container 2 and a lid 3 for closing the container, wherein the lid has at least two perforations of the same size (“perforations of one size” means that at least two perforations have that specific size), wherein the lid further comprises an opening for pouring (“larger perforations [...] dimensioned such as to allow to pour out solid contents”) [002]. D2 further discloses a first straining zone with perforations of one size and a second straining zone with perforations of a larger size for pouring ([002] of D2).

Question 16

16.1 – False : This claim is an unallowable generalisation, since the lid is not defined to have at least two perforations of the same size (for straining). There is no disclosure of a lid without any perforation. The perforations are an essential part of the invention to provide the straining (Note: Even if the L-shaped slots could be considered as perforations, the perforations in the description have always been disclosed as perforations that are suitable for straining water. The slots are never described in the description to function as straining perforations, especially when the slots interlock with the pegs.).

16.2 – False : The feature “at least two perforations of the same size” was present in claim I.1 and is emphasized in [005]. Further, all embodiments show multiple perforations of the same size. That feature is therefore considered an essential feature of the invention, which may not be removed from the claim. The application does not contain any direct and unambiguous disclosure for a skilled person of a spout in combination with a single perforation.

16.3 – False : This claim is an unallowable generalisation, since only an engraved arrow on the upper surface of the lid 15 is disclosed [016], and not any other pointing means.

16.4 – True : All the embodiments shown in the figures of the application have a handle, therefore this amendment is allowable.

Question 17

17.1 – True : This technical effect is explicitly disclosed in the application [008] and [017].

17.2 – False : Securing the lid to the container requires the presence of securing (or locking) means, see application [010], [013] and [015].

17.3 – False : The lid of D3 is rotatable around the vertical axis, and any position is a straining position, i.e. D3 does not provide a position where straining is not possible.

17.4 – False : D4 discloses a saucepan which can function as a pressure cooker ([002] of D4). Claim II.1 does not define features which exclude a pressure cooker from the scope of claim II.1.

Question 18

18.1 – False : D1 does not disclose a saucepan, since the kitchen utensil for washing vegetables of D1 is not suitable for cooking ([002] of D1). A saucepan, however, must be suitable for cooking, which may involve boiling liquids [007].

18.2 – True: D2 is the closest prior art, since it discloses a saucepan with a lid being positionable in two positions, one of them allowing straining.

18.3 – False: Despite D4 having locking means and at least one perforation, this perforation is not suitable for straining. D4 only discloses an opening closed by a cap for permitting the vapour to escape from the saucepan.

18.4 – True: Claim II.3 encompasses all the features of claims II.1 and II.2. In addition to a lid being positionable in two positions, one of them allowing straining, D2 also discloses that the lid comprises a cylindrical skirt, at least one perforation arranged in the skirt, and that the container comprises an opening for pouring (upper opening 8), the liquid being strained through said opening for pouring ([004] of D2). (Note: D3 is not the closest prior art, since it always strains in each rotational position, i.e. there are no two different positions of the lid.)

Question 19

19.1 – True: [009] of the application. D3 has no means for impeding the lid from coming off while straining. The device of D3 is therefore less safe.

19.2 – False: Claim II.6 differs from D3 by a means for indicating the position of the at least one perforation. This distinguishing feature has no function for adapting the lid to different containers.

19.3 – False: The securing means of the bayonet type disclosed in D4 allows only a rotational movement, and this mechanism cannot be combined in an obvious manner with the tilting securing means of D2.

19.4 – False: Claim II.5 depends on claim II.2, and therefore contains its additional features. The locking of the lid to the container in D4 has a different purpose, i.e. not for straining. D3 does not have a non-straining position. The teaching of D3 and D4 neither could nor would lead a person skilled in the art to the subject-matter of claim II.5.

Question 20

20.1 – True: This technical effect of the distinguishing features is explicitly disclosed in [009] of the application.

20.2 – False: None of the identified distinguishing features lead to the effect that the lid stays on the container during cooking. The identified distinguishing features specify that the lid stays on the container during straining.

20.3 – False: This argument does not address the fact that the teaching of D4 is different, i.e. to secure the lid to the container against pressure build-up during cooking. Therefore, the locking means of D4 are not used to solve the problem of securing the lid in the position for straining liquid.

20.4 – True: This argument does not address the fact that neither D1 nor D3 suggest the provision of the second position where the liquid cannot be strained.

Antwortblatt / Answer sheet / Feuille de réponses



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