

Part 1

Question 1

Francesca has filed a European patent application EP-F before the EPO. Francesca did not develop the invention which is the subject of EP-F. In drafting EP-F Francesca used information in Andrew's laboratory notebook, without Andrew's consent. EP-F was published in December 2017 and is still pending.

- 1.1 Andrew can seek a stay of proceedings if he provides evidence that he has instituted proceedings against Francesca seeking a decision that Andrew is entitled to the grant of the European patent based on EP-F.

TRUE: Andrew can seek a stay of proceedings if Andrew proves that he has instituted proceedings against Francesca seeking a decision that Andrew is entitled to the grant of the European patent based on EP-F, Article 61(1) EPC and Rule 14(1) EPC.

- 1.2 Francesca can withdraw EP-F at any time from the date on which Andrew provides evidence to the EPO that he has instituted proceedings against Francesca seeking a decision that Andrew is entitled to the grant of the European patent based on EP-F.

FALSE: From that date and up to the date on which the proceedings for grant are resumed, neither the European patent application nor the designation of any Contracting State may be withdrawn, Article 61(1) EPC and Rule 15 EPC.

- 1.3 No renewal fee has to be paid during a stay of proceedings.

FALSE: All periods other than those for the payment of renewal fees, running at the date of the stay of proceedings, shall be interrupted by such stay, Rule 14(4) EPC and Guidelines A-IV, 2.2.4: hence renewal fees must be paid even during such stay.

- 1.4 Andrew can validly request that EP-F be refused no later than three months after the decision recognising his entitlement to EP-F has become final.

TRUE: Andrew has three months after the decision recognising his entitlement has become final for requesting that the European patent application filed by Francesca is refused, Article 61(1)(c) EPC and Rule 16 (1) EPC.

Question 2

Hans filed an admissible notice of opposition against European patent EP-1, which was granted with two independent claims, namely claim 1 and claim 2 relating respectively to two different parts of the patent. The only ground for opposition that he raised was lack of inventive step in respect of claim 1. The opposition is not filed against the patent as a whole, but only against claim 1. In particular, he argued in the notice of opposition that the subject-matter of claim 1 lacked inventive step over the combination of D1 and D2, both published before the effective date of EP-1. Theresa filed third-party observations during the pending opposition proceedings, arguing that claim 2 lacked novelty over D3, a Japanese patent application published before the effective date of EP-1.

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.

- 2.1 If the opposition division considers that the subject-matter of claim 1 lacks novelty over D1, the opposition division may revoke EP-1 for lack of novelty of the subject-matter of claim 1.

True: Novelty and inventive step are separate grounds for opposition. However, novelty as a new ground may be considered in view of the same document used for deciding upon the ground of lack of inventive step (Article 114(1) EPC, Rule 81(1) EPC, G7/95).

- 2.2 If the opposition division considers that the subject-matter of claim 2 lacks inventive step over D2 in combination with D3, the opposition division may revoke EP-1 for lack of inventive step of the subject-matter of claim 2 over D2 in combination with D3.

False: The extent of the opposition defines the competence of the opposition division. Subject-matter of a claim not covered by the extent of the opposition may not be subject of the opposition (G9/91).

- 2.3 If the opposition division considers that the subject-matter of claim 1 is not sufficiently disclosed, the opposition division may revoke EP-1 because the

subject-matter of claim 1 is not disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

True: The opposition division may of its own motion raise a ground for opposition within the extent of the opposition (Article 114(1) EPC, Rule 81(1) EPC, G10/91, reason 16).

- 2.4 After the opposition division has considered Theresa's third-party observations, the opposition division may revoke EP-1 based on lack of novelty of the subject-matter of claim 2.

False: The competence of the opposition division is limited to independent claim 1 (G9/91). Only subject-matters of claims depending on an independent claim, which falls in opposition proceedings, may be examined as to their patentability even if they have not been explicitly opposed (G9/91). This means that the independent claim 2 is not within the competence of the opposition division and can not be examined by it. Furthermore, third parties are not party to the opposition proceedings.

Question 3

A board of appeal ...

3.1 ... may decide in a three-member composition without a legally qualified member.

FALSE: The board of appeal requires the presence of at least one legally qualified member (Article 21(2), (3) and (4) EPC).

3.2 ... may exercise any power within the competence of the department which was responsible for the decision appealed.

TRUE: The board of appeal may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution (Article 111(1) EPC).

3.3 ... may remit a case to the department which was responsible for the decision appealed for further prosecution.

TRUE: The board of appeal may remit the case to that department for further prosecution in accordance to Article 111(1) EPC.

3.4 ... may base its decision on a fresh ground for opposition only submitted during the appeal proceedings without the consent of the patentee.

FALSE: The board of appeal can not base their decision on a fresh ground for opposition during appeal proceedings without consent of the patentee (G10/91).

Question 4

Company A has filed a European patent application EP-A with the EPO. Company B has negotiated with Company A the transfer of European patent application EP-A to Company B.

- 4.1 It is possible to validly transfer EP-A from Company A to Company B only for the designated contracting states FR and DE.

TRUE: According to Article 71 EPC, a European patent application can be transferred for one or more designated Contracting States (two or more applicants may be designated for different Contracting States, see also Article 59 EPC).

- 4.2 The transfer of EP-A may be recorded in the European Patent Register at the request of Company B, upon production of documents providing evidence of such transfer and payment of an administration fee.

TRUE: For recording the transfer of right, Rule 143(1)(w) EPC, the EPO requires the submission of a request by an interested party, e.g. Company B, the payment of an administrative fee (Rule 22(2) EPC and also evidence of such transfer, Rule 22(1) EPC (e.g. an assignment, Article 72 EPC, which requires the signature of both parties to be effective).

- 4.3 The transfer of a European patent application becomes effective vis-à-vis the EPO only when it is published in the European Patent Register.

FALSE: The transfer is effective vis-à-vis the EPO as soon as the documents according to Rule 22(1) EPC have been produced, Rule 22(3) EPC.

- 4.4 The transfer of a European patent may be recorded in the European Patent Register during the opposition period.

TRUE: A European patent can validly be transferred and the transfer can be recorded in the European Patent Register even during opposition period or during opposition proceedings, Rule 85 EPC in conjunction with Rule 22 EPC.

Question 5

Roberto and Mario are Brazilian citizens living in São Paulo, Brazil. They are the applicants for European patent application EP1, which has been filed today in Portuguese together with a French translation. EP1 claims the priority of a previous Brazilian application P1.

For each of the statements 5.1–5.4, indicate on the answer sheet whether the statement is true or false:

5.1 Roberto and Mario are entitled to a reduction of the filing fee.

False: Roberto and Mario are not entitled to a reduction of the filing fee. Roberto and Mario do not have their place of residence or place of business within a contracting state and are not nationals of a contracting state being resident abroad (Article 14(4) EPC, R. 6(3) EPC).

5.2 EP1 will be accorded by the EPO a filing date, only if the content of EP1 does not extend beyond the content of P1 as originally filed.

False: EP1 can contain additional subject-matter which is not included in P1 (Article 80 EPC, Rule 40 EPC). In that case, the right to priority shall, however, cover only the subject-matter of EP1 which is included in P1 (Article 88(3) EPC).

5.3 If the French translation had not been filed in due time, EP1 would be deemed not to have been filed.

False: The legal consequence is that EP1 is considered to be withdrawn (Article 14(2) EPC, last sentence), and not that it is deemed not to have been filed.

5.4 If EP1 is assigned to a British company, the language of the proceedings may be changed to English after registration of the transfer.

False: The language of the proceedings cannot be changed during the proceedings concerning an application, because this is not provided for in the EPC (G4/08).

Part 2

Question 6

Roberto and Mario are Brazilian citizens living in São Paulo, Brazil. They are the applicants for European patent application EP1, which has been filed today in Portuguese together with a French translation. EP1 claims the priority of a previous Brazilian application P1. Assuming now that Roberto and Mario intend to file a divisional application EP1-DIV relating to the pending patent application EP1, indicate whether the following statements are true or false.

6.1 EP1-DIV may be validly filed with the EPO at the filing offices in Munich, The Hague and Vienna.

False: Rule 36(2) EPC, last sentence mentions the EPO in Munich, The Hague or Berlin as places where to validly file a divisional application, but not Vienna.

6.2 EP1-DIV may be validly filed in Portuguese.

True: Rule 36(2) EPC, second sentence states that if the earlier application was not in an official language of the EPO, the divisional application can be filed in the language of the earlier application, i.e. in the present case in Portuguese,

6.3 EP1-DIV may be validly filed in English.

False: Rule 36(2) EPC, first sentence only allows the divisional application to be filed in the language of the proceedings for the earlier application, i.e. in the present case in French, but not English.

6.4 EP1-DIV must be filed within 12 months from the filing date of EP1.

False: There is no time limit for filing a divisional application other than the requirement that the parent application must be pending (Article 76 EPC and Rule 36(1) EPC).

Question 7

The dimethyl fumarate molecule (DMF) is known from the prior art in the following respects:

Document **D1** discloses DMF as a biocide for the treatment of clothing, shoes and furniture against mould growth.

Document **D2** concerns a patent which discloses DMF for the treatment of the skin disease psoriasis and of multiple sclerosis.

The prior art does not disclose any further disease that can be treated with DMF.

7.1 The subject-matter of the claim “DMF for use as a medicament” in a European patent application filed today is novel over the above-mentioned prior art.

False: A first medical use of DMF cannot be claimed, since DMF is already known as medicament.

7.2 The subject-matter of the claim “DMF for use in the treatment of cancer” in a European patent application filed today is novel over the above-mentioned prior art.

True: The second medical use of DMF is new over the prior art documents mentioned above, since DMF is not known as a medicament for the treatment of cancer.

Guidelines G-VI. 7.1

7.3 The following claim wording is allowable in a European patent application filed today: “Use of DMF for the manufacture of a medicament for the treatment of cancer”.

False: The so-called Swiss-type claims are not allowed in applications having an effective date of 29.01.2011 or later (G2/08). Guidelines G-VI, 7.1

7.4 The subject-matter of the claim “DMF for use in the treatment of skin diseases” in a European patent application filed today is novel over the above-mentioned prior art.

False: DMF is already known for the treatment of psoriasis (a skin disease).

Question 8

Jan, a national and resident of the USA, filed an international application PCT-J with the USPTO on 10 January 2022. On filing, Jan indicated the EPO as one of the designated Offices. The EPO was immediately informed of its designation.

The USPTO charges the late payment fee for a delayed payment of the international filing fee as allowed under the PCT.

8.1 Jan must pay the international filing fee to the International Bureau.

FALSE: For international application the fees have to be paid to the receiving Office, not to the International Bureau (Rule 15.1 PCT).

8.2 If the international filing fee is not paid in due time, Jan can validly pay the international filing fee together with the late payment fee within a time limit of one month from the date of the invitation sent by the receiving Office.

TRUE: If the filing fee is not paid in due time, then Jan can validly pay the filing fee with a late payment fee within a time limit of one month from the date of the invitation sent by the receiving Office (Rule 16*bis*.1 (a) PCT and Rule 16*bis*.2 PCT).

8.3 A consequence of not paying the international filing fee with the late payment fee within the prescribed time limit is that the USPTO will declare that PCT-J is considered to be withdrawn.

TRUE: If the USPTO concludes that it did not receive the international filing fee with the late payment fee within the time limit, the USPTO will issue a declaration that PCT-J shall be considered withdrawn, Rule 16*bis*.1 (c) PCT and Article 14(3)(a) PCT.

8.4 A consequence of not paying the international filing fee with the late payment fee within the prescribed time limit is that the USPTO will notify the EPO as the designated Office that PCT-J is considered to be withdrawn.

FALSE: It is the International Bureau that informs the designated offices of a declaration of withdrawal of the application and not the receiving Office (Rule 29.1 (ii) PCT).

Question 9

9.1 The EPO will accord a date of filing to a European patent application filed by an identifiable applicant using EPO Form 1001, even if the description is filed in Chinese.

TRUE: The date of filing is accorded irrespective of the language of the application documents, provided that the requirements of Rule 40(1)(a) to (c) EPC are complied with. It is not required to file the description in any particular language (Article 14(2) EPC).

9.2 If a request for grant is not filed on a form drawn up by the EPO, an application filed together with that request will not be dealt with as a European patent application.

FALSE: According to Rule 41(1) EPC, the request for grant must be filed on a form drawn up by the EPO. If the request for grant does not satisfy the requirements of Rule 41 EPC, then the applicant is invited to correct the deficiency within two months from notification. This is done after the European application has been accorded a date of filing (Rule 57 (b) EPC, Rule 58 EPC, Article 90 (3) to (5) EPC).

9.3 If an international application contains no part which on the face of it appears to be a claim or claims, a date of filing will not be accorded to that international application.

TRUE: According to Article 11(1)(iii)(e) PCT, a part, which is on the face of it appears to be a claim or claims, is required for obtaining a filing date for an international application.

9.4 A Japanese citizen resident in Japan may validly file a European patent application without being represented by a professional representative.

TRUE: According to Article 133(2) EPC, natural or legal persons not having their residence or principal place of business in a Contracting State shall be represented by a professional representative and act through him in all proceedings established by this Convention, other than in filing a European

patent application. So filing of a European patent application can be done without requiring a professional representative.

Question 10

A communication pursuant to Rule 71(3) EPC has been issued for a European patent application. The applicant has fulfilled all the necessary requirements. The related decision to grant a European patent has been despatched on the basis of the documents (Druckexemplar) transmitted to the applicant with the communication under Rule 71(3) EPC. The mention of the grant of the European patent has been published in the European Patent Bulletin.

However, in the course of the preparation of the publication of the specification of this European patent an error arose, whereby page 2 of the description is missing in the published specification of this European patent. As a result of this error, the published specification of this European patent as a whole does not disclose the claimed invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

10.1 This error in the published specification of this European patent may be corrected at any time.

True: Errors in publication occur where the content of the printed specification differs from the documents transmitted to the applicant with the communication under Rule 71(3) EPC, which form the basis of the decision to grant. Errors of this kind can be corrected at any time (Guidelines C-V,10 and H-VI,6).

10.2 The European patent could be revoked on the basis of an opposition based on the ground of Art. 100(b) EPC because in the published specification of this European patent the invention without page 2 of the description is not disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

False: Mistakes in the specification of a European patent arising in the course of its production (such as printing of the B publication) have no effect on the patent granted (Guidelines C-V, 10 and H-VI,6). The decisive text is the text forming the basis of the decision of the grant.

10.3 If the language of the grant proceedings for this European patent was English, a notice of opposition may be validly filed in German.

True: In written proceedings before the EPO, any party may use any official language (Rule 3(1) EPC, first sentence).

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.

False: Oppositions are not transferrable, but may be inherited or succeeded to as part of an overall succession in law (Guidelines D-I, 4, G4/88, G2/04)

Part 3

Remark: There is a translation error in the German version [005] of the description, second line. It should read Poly-Y and not Poly-X.

Due to this translation error the Examination Board decided to award full marks to all candidates for questions 11 to 15.

Question 11

11.1 A yoga mat consisting of poly-X is covered by the scope of claim 7.

FALSE: If the mat consists of poly-X, poly-X is the only material. However, claim 7 requires the presence of an antibacterial material and Poly-X is not described as antibacterial.

11.2 The material of claim 5 is defined by means of a functional feature.

TRUE: The material of claim 5 is defined in terms of its function, i.e. as a functional feature, rather than by using a structural definition, Guidelines, F-IV, 6.5.

11.3 The features of claim 11 imply a limitation of the dimensions of the textile bag

TRUE: A textile container for completely covering and for transporting a yoga mat requires certain minimum dimensions (Guidelines F-IV, 4.14.2). The dimensions of a yoga mat are mentioned in [001] of the description. For example, a textile case, which cannot be extended to one of the dimensions of a yoga mat mentioned in [001] of the description, would not be covered by claim 11.

11.4 The subject-matter of claim 13 lacks clarity.

TRUE: The expression “grows relatively slowly” is a relative expression without a generally recognised meaning, Guidelines F-IV, 4.6.

Question 12

12.1 The subject-matter of claim 2 is novel over D3.

FALSE: The yoga mat of D3 has two distinguishable faces, one side bearing a name and the other side not bearing a name.

12.2 A valid argument that the subject-matter of claim 4 is novel over D3 is that in D3 the first face is the face that is in contact with the athlete.

FALSE: The fact that a different “numbering” or labelling of the faces is used in D3 does not bring about any technical distinguishing feature. Claim 1 from which present claim 4 depends does not include any other technical feature that would further be characterized by the “first” face and the “second” face.

12.3 A valid argument that the subject-matter of claim 6 is novel over D2 is that in D2 the yoga mat is only partially coated with a layer of poly-X.

FALSE: Claim 6 does not specify that the coating is full or completely covering the face – this is also confirmed by claim 9 and the description paragraph [003].

12.4 The subject-matter of claim 8 is novel over each of D1, D2, D3 and D4.

TRUE: Yoga mats, wherein at least one face contains silver ions, are not disclosed in any of the documents D1 to D4.

Question 13

Claim 10 specifies that the material of the second face reduces the generation of sweat on the athlete's body. This functional feature is clear from reading the claim per se. Poly-Y is not a limiting feature of claim 10. Accordingly the translation error in the German version of the paper does not impact interpretation of claim 10.

13.1 The subject-matter of claim 10 is novel over D1.

FALSE: A yoga mat having a first face and a second face, wherein the yoga mat is entirely made of poly-Y is disclosed in D1. A different use of one and the same material ("wherein the material is such that upon contact with the athlete's body it reduces the generation of sweat in the athlete's body") does not render the product novel, see Guidelines, F-IV, 4.13).

13.2 The subject-matter of claim 10 is novel over D2.

FALSE: A yoga mat having a first face and a second face, wherein one face contains a material wherein the material is such that upon contact with the athlete's body it reduces the generation of sweat in the athlete's body is disclosed in D2. The material poly-Z is suited to reduce the generation of sweat in the athlete's body, as can be confirmed from the present application, see paragraph [005], penultimate sentence).

13.3 The present application indicates that a yoga mat made of poly-Y is more effective than a yoga mat made of poly-X or poly-Z in reducing sweat generation on the body of the athlete while the athlete is in contact with the yoga mat.

TRUE: The advantages of poly-Y are disclosed in the fourth embodiment of the invention, see paragraph [005], penultimate sentence, in which the SVR of Poly-Y is higher (i.e. better) than that of both Poly-X and Poly-Z.

13.4 The subject-matter of claim 13 is novel over D2.

TRUE: D2 does not disclose a textile container containing a yoga mat.

Question 14

14.1 A modified single claim 1 which reads “Yoga mat having a first face and a second face, wherein the yoga mat has an SRV of 90 or more.” would be allowable under Article 123(2) EPC.

TRUE: The modified claim is directly and unambiguously derivable from the combination of the subject-matter of claim 1 with the last sentence of paragraph [005].

14.2 A modified single claim 1 which reads “Yoga mat having a first face and a second face, wherein the yoga mat has an SRV of 90 or more.” would be clear under Article 84 EPC.

FALSE: The SRV is established according to a “new, special test protocol”. Thus, it appears that the test protocol does not relate to a parameter generally known in the art. According to Guidelines, F-IV 4.11, “Cases in which unusual parameters are employed or a non-accessible apparatus for measuring the parameter(s) is used are *prima facie* objectionable on grounds of lack of clarity, as no meaningful comparison with the prior art can be made.

14.3 A modified single claim 1 which reads “Yoga mat having a first face and a second face, wherein the first face has a coating of poly-X, the poly-X covering 100% of the first face.” would be allowable under Article 123(2) EPC.

TRUE: This amended claim is based on claims 1, 4, 5, 6 and 9 as filed. Claim 6 depends on claim 5 so it is inherent that Poly-X is the material providing secure but reversible adhesion of the mat onto the floor (see also [003] of the description). The 100% corresponds to the end of the range defined in claim 9..

14.4 A modified single claim 1 which reads “Yoga mat having a first face and a second face, wherein the first face and the second face contain silver ions.” would be allowable under Article 123(2) EPC.

FALSE: Whereas the application discloses in paragraph [004] that the yoga mat contains antibacterial material, such as silver ions and that the antibacterial material may be present only on the second face, this does not necessarily mean that the antibacterial material, or the silver ions, will be present on the first face. The sentence “The antibacterial material may be present only on the second face.” could

simply mean that the silver ions may only be found on the second face and within the mat (but only a few millimetres below the second face). There is no clear and unambiguous disclosure of silver ions onto the first face.

Furthermore, there is no disclosure of an antibacterial material on both faces.

Question 15

15.1 In D2 and in the present application the material poly-X has essentially the same purpose.

TRUE: The material poly-X provides according to the present application (see paragraph [003]) secure but reversible adhesion of the yoga mat onto the floor. The teaching of D2 is that poly-X provides a strong adhesion of the yoga mat onto the floor while the athlete performs exercises and that after use, the mat can be easily removed from the floor. Both applications discuss essentially the same property of poly-X and consequently the same use.

15.2 The additional features defined in claim 8, whereby the second face of the yoga mat contains silver ions, has the technical effect of reducing bacteria growth.

TRUE: The silver ions comprised in the yoga mat of this claim have an antibacterial effect, see paragraph [004].

15.3 The subject-matter of claim 13 solves the objective technical problem of providing an organic, sustainable yoga mat with respect to D1 as closest prior art.

FALSE: Claim 13 does not define an organic, sustainable yoga mat.

15.4 The subject-matter of claim 14 is novel over D1.

FALSE: D1 discloses a yoga mat made entirely of poly-Y. This means that in D1 poly-Y is used to produce yoga mats. Thus, the use of poly-Y in the production of yoga mats is not new over D1.

Part 4

Question 16

16.1 D13 destroys the novelty of the subject-matter of claim II.1.

False: D13 only discloses a method for preserving liquids, but does not mention wine.

16.2 D12 destroys the novelty of the subject-matter of claim II.1.

TRUE: In D12 air is also pushed out of the bottle's headspace by the addition of carbon dioxide.

16.3 D11 destroys the novelty of the subject-matter of claim II.2.

TRUE: In D11 air and therefore also oxygen from within the bottle are evacuated thus reducing the amount of oxygen in the headspace.

16.4 D12 destroys the novelty of the subject-matter of claim II.2

TRUE: In D12 the addition of carbon dioxide pushes air and therefore also oxygen out of the bottle thus reducing the amount of oxygen in the headspace.

Question 17

17.1 D11 destroys the novelty of the subject-matter of claim II.3.

False: D11 does not disclose a method wherein an inert gas is introduced into the headspace of the bottle.

17.2 D12 describes that wine can have a chemical reaction with a gas.

TRUE: In D12 it is described that a reaction occurs when carbon dioxide is added to water. D12 describes a similar reaction when carbon dioxide is added into the wine, in order to improve the wine's properties and to preserve the wine.

17.3 D12 destroys the novelty of the subject-matter of claim II.4.

False: D12 discloses to inject carbon dioxide into the wine, and not directly into the headspace as required by claim II.3, from which II.4 depends.

17.4 D13 destroys the novelty of the subject-matter of claim II.5.

True: D13 discloses in paragraphs [002] and [003] a method for preserving an alcoholic beverage (beer) wherein the concentration of oxygen in the headspace of the bottle is reduced, wherein an inert gas is introduced into the headspace of the bottle, and wherein the inert gas is only nitrogen.

Question 18

18.1 The EPO may issue a communication under Rule 62a EPC in the search phase for the present set of claims.

TRUE: Yes, claim II.1 and claim II.2 are independent method claims and relate to alternative subject-matter, i.e. Rule 62a EPC applies.

18.2 The subject-matter of claim II.5 is clear.

FALSE: Claim II.5 is unclear since on the one hand the inert gas is specified as being only nitrogen, but on the other hand claim II.5 is dependent on claim II.4 wherein the inert gas is carbon dioxide.

18.3 The presence of an inert gas is described in the application documents as an essential feature.

FALSE: The presence of an inert gas is only a preferred feature and not an essential feature (see paragraph [003] of the description).

18.4 The subject-matter of claim II.6 can be introduced into the description without contravening Article 123(2) EPC.

TRUE: The subject-matter of claim II.6 is part of the application as filed and can be added to the description without contravening Article 123(2) EPC.

Question 19

19.1 Amending claim II.7 to recite “Method for preserving an alcoholic beverage according to claim II.3, wherein the inert gas is a noble gas” would not be allowable under Article 123(2) EPC.

TRUE: There is no reference to a noble gas in the application. As such claim 6 cannot be directed to noble gases without contravening Article 123(2) EPC.

19.2 Although argon is described as the most preferred inert gas, deleting all references to argon from the claims would be allowable under Article 123(2) EPC.

TRUE: Deletion of a preferred option does not add subject-matter, in particular if the description shows other ways to achieve the claimed subject-matter.

19.3 Amending claim II.3 to recite “Method for preserving an alcoholic beverage according to claim II.2, wherein an inert gas is directly injected into the headspace of the bottle to create a gas cap on top of the wine level” would be allowable under Article 123(2) EPC.

False: The amendment in claim 3 is an intermediate generalisation, since the gas cap is disclosed only for argon, and not for all other inert gases.

19.4 Amending claim II.2 to recite “Method for preserving an alcoholic beverage having 10 vol.% alcohol or more, wherein the amount of oxygen in the headspace of the bottle is reduced” would be allowable under Article 123 (2) EPC.

TRUE: The amendment in claim 2 “including 10 vol% alcohol or more” is based on paragraph [001] of the present application. Although the amended claim II.2 omits the expression “in the bottle”, this does not violate the requirements of Article 123(2) EPC. Amended claim II.2 still references a bottle in the second part of this claim with reference to its headspace.

Question 20

Since the following sentence was missing on WiseFlow:

“Assume in the following that inventive step has to be assessed in respect of claim II.9.”

the Examination Board decided to award full marks to all candidates for question 20.

20.1 One valid argument as to why D11 is not the closest prior art is that D11 does not require the addition of gas.

TRUE: A valid argument as to why D11 is not the closest prior art, is that it works according to a different principle (extraction of air) contrary to the invention (addition of gas).

20.2 If D12 is selected as the closest prior art, a possible objective technical problem can be formulated as how to preserve an alcoholic beverage by injecting an inert gas directly into the headspace of the bottle.

FALSE: An inert gas being injected directly into the headspace of the bottle is the solution in order to preserve the alcoholic beverage. The solution must not be used for the formulation of the objective technical problem (Guidelines G-VII, 5.2).

20.3 One valid argument as to why D13 is not the closest prior art is that D13 deals only with the preservation of fish oil.

FALSE: D13 does not only relate to preserving of fish oil, but also to “beer”, see paragraph [003] of D13.

20.4 Assuming that D13 is considered to be the closest prior art, an objective technical problem to be solved may be regarded as how to reduce the amount of gas required to remove air from above the wine level.

TRUE: This technical problem is derivable from the last sentence of [004] of the description of the application (stating that “a very small amount of argon gas is sufficient to create the gas cap and prevent the oxidation process”). In contrast thereto, [002] of the description of D13 states that a volume of nitrogen gas equal to 20

times of the volume of the headspace is needed to expel all oxygen gas from the headspace.