

BETRIFFT: Entwurf der Ausführungsordnung zum EPÜ 2000
- Stellungnahmen
SUBJECT: Draft Implementing Regulations under the EPC 2000
- Comments
OBJET: Avant-projet du nouveau règlement d'exécution de la CBE 2000
- Commentaires

VERFASSEN: Ratssekretariat
DRAWN UP BY: Council Secretariat
ORIGINE: Le secrétariat du Conseil

EMPFÄNGER: Ausschuß "Patentrecht" (zur Unterrichtung)
ADDRESSEES: Committee on Patent Law (for information)
DESTINATAIRES: Le comité "Droit des brevets" (pour information)

Eingegangene Stellungnahme von:
Comments received from: AIPPI
Commentaires reçus de :

Das Dokument wird als **Faksimile** des übermittelten Originals gespeichert und liegt nur in **elektronischer Form** vor.

Document is being submitted in **original facsimile form** and is available in **electronic form** only.

Le document est diffusé comme **fac-similé de l'original** reçu et n'est disponible que sous **forme électronique**.

COMMENTS OF AIPPI TO EPO

COMMENTS ON THE DRAFT IMPLEMENTING REGULATIONS FOR THE EUROPEAN PATENT CONVENTION AS REVISED IN 2000 (EPC 2000)

The Association Internationale Pour la Protection de la Propriete Intellectuelle (hereinafter "AIPPI") has considered the Draft of the Implementing Regulations under the European Patent Convention as revised in 2000 (EPC 2000), published by the EPO on the EPO-Website on June 7, 2002.

AIPPI principal decision body as provided by article 6 of our Statutes, is the Executive Committee who meets once a year. Given the fact that EPO has informed AIPPI that there is urgency in providing comments on the above-mentioned Draft Implementing Regulations, the Bureau of AIPPI, having heard the opinion of Special Committee Q176 "Implementing Regulations for the amended EPC", express the following comments that will have to be submitted for ratification to the members of the Executive Committee in Seoul, next October:

In the first place, the AIPPI would like to thank the European Patent Office for having drawn up a very complete text of draft Implementing Regulations, with detailed explanatory notes. However, the AIPPI regrets that the period for lodging comments is so short since these Regulations form an essential document for the future operation of the European patent system. It should be highlighted, in fact, that the text of the European Patent Convention, as revised on 24 November 2000, refers on numerous points to the Implementing Regulations according to the decisions of the Diplomatic Conference.

In the following, the AIPPI will restrict itself to studying the most important rules, while leaving aside formal questions. The following exposé is presented following the order of numbering of the rules.

PART I

Rule 6

The new paragraph 1 is more restrictive than the old one, since a term of one month is now contemplated for lodging the translation of a European patent application not filed in an official language of the EPO. The explanatory notes rightly highlight that the provision, in principle, is in conformity with the PLT. But the question of the length of the term for providing the translation is still unanswered. The old text contemplated a term of three months after the filing of the application, with the term, nevertheless, not to be less than thirteen months from the priority date. The explanatory notes refer to Rule 41 (1), but this is also imprecise, since it does not indicate the term for remedying a defect noted by the Office. Here again, would not the old version of Rule 6 be preferable?

PART II

Rule 23b-j

The AIPPI, which has always expressed itself in favour of the patentability of biotechnological inventions, is pleased with the draft Implementing Regulations which explicitly take into account the European Directive of 6 July 1998, as also the Treaty of Budapest.

PART III

Rule 25 (3) second sentence

We believe the second sentence of Rule 25 (3) can be deleted, since the content is already included in Art. 78 paragraph 2, second sentence (basic proposal, page 72).

Rule 25 (4)

The case that no designation fee is paid is not mentioned here (cf. new rule 25c (3)). A reference to Rule 25c could sufficient here: The second sentence could be replaced by "Rule 25c (2) and (3) is applicable".

Rule 26 (2) h)

According to Rule 26 (2) h) the request shall contain the designation of the contracting state or states in which protection of the invention is desired. According to Art. 79 (1), however, all the contracting states shall be deemed to be designated in the request. For this reason Rule 26 (2) h) should be deleted.

Rule 31 (2)

According to new Rule 25d) an application may contain no claims at the date of filing. This is different from the prior situation. Consequently, new Rule 31 (2) determines that the claim fees shall be paid within one month of filing the claims. This wording could be misleading. If new claims are filed during the course of the examination procedure we assume that claims fees are not to be paid. We believe that claim fees shall be paid – as previously – at two instances: At the time, the original claims are filed and at the time the European patent application is ready for being granted, cf. Rule 51 (6). Rule 31 (2) does not define this understanding sufficiently clear.

Rule 35 (3)

Reference to paragraph 11 of Rule 35 appears to be incorrect. The correct reference is probably Rule 35 (10).

Rule 38 and Rule 38a

The new provisions of Rules 38 and 38a harmonizing the EPC with the PLT can only be approved.

Rule 38(1)

- i) *The term “date” in Rule 38(1) should be exchanged by the term “filing date”.*
- ii) *The second paragraph of Rule 38 should be clarified by adding a further sentence like: “Within the same term, corrections of previous declarations of priority may be made”.*
- iii) *Further, it should be clarified that the declaration of priority still can be made until filing a request under Art. 93, paragraph 1 (b). Otherwise Rule 38 (2) could be understood in that way that the declaration of priority must be made on filing the European patent application in case a request under Art. 93 (1) b) is filed after the filing date of the application.*
- iv) Article 87(1)(b) introduces the possibility to claim priority from a first application filed in or for any Member of the WTO. In practical terms, this concerns territories which are not Parties to the Paris Convention but which are Members of the WTO.

For example, Taiwan is not a party to the Paris Convention. However, since January 1, 2002, Chinese Taipei, that is Taiwan, is Member of the WTO.

For sake of legal clarity concerning the right to claim priority from a first application filed in a Member of the WTO, we suggest that Rule 38(1) be amended by replacing the wording “...the State in or for which it was filed...” with the following wording

“...the State, or Member of the WTO, in or for which it was filed...”

PART IV

Rules 39 and 39a have been drawn up to conform them to the PLT. Particular attention should be drawn to Rule 39a (3) authorizing the incorporation in an incomplete text of the parts of the application which had been omitted at the time of application and which were fully supported by a priority-giving application. This measure, favourable to the applicant, should be approved.

On the other hand, Rule 41a relating to the defect of priority claim according to Rules 38 and 38a should be studied closely. In fact, the proposed text seems to be satisfactory, but the explanatory notes indicate that the EPO will not systematically send the applicant a communication stating a defect in the priority claim. The notes state that this corresponds to the present situation, but this has changed with the supplementary term that is now contemplated according to Rule 38. It is true that the notes add that the Restitutio In Integrum is then possible. But everyone knows that the conditions to be met to obtain such restitution are extremely severe in the present state of the EPO case law.

Rule 39

Rule 39 apparently assumes that Rule 25d (b) is fulfilled, i. e. that information is available allowing the applicant to be contacted, because otherwise the European Patent Office cannot inform the applicant of any deficiencies. So Rule 39 deals with the case of Rule 25d (1) (a) and (c), i. e. cases where no indication that a European patent is sought is included or cases where a description or a reference to a previously filed application is missing. In such cases it does not make sense at all to set a particular term to remedy the deficiencies. Meeting the term does not provide any benefit for the applicant. The applicant should in such cases file a new application; the previously paid fees – if any - will be refunded anyhow. So we propose to delete “... *unless such deficiencies or remedied within a two months. If the applicant does this, he shall be informed of the date of filing accorded by the Office*”.

Rule 39a

- i) According to Rule 39a (1), the applicant is invited to file missing parts of the application. According to paragraph 2 the applicant is informed after filing the missing documents, that the application shall be re-dated to the date on which the missing parts were filed. He is then invited to withdraw the missing parts within a further term, which he was just asked to file.

It appears that this procedure is not straight forward. We therefore propose to include the sentence “*In this case the application shall be re-dated to the date on which those parts were filed*” between the two sentences of Rule 39a (1). Subparagraph 2 of Rule 39a can then be deleted.

As to subparagraph 4: if the applicant doesn't file missing parts of the application documents they are actually missing. Therefore it is not necessary to define that they shall be deemed not to have been filed. Subparagraph 4 possible could read as follows:

If the applicants fails to file the missing parts of the description or missing drawing in due time, any references to such missing parts of the description or missing drawings shall be deemed to be deleted”.

- ii) Further, Rule 39a (1) last sentence is not in compliance with Art. 5 (5) PLT. According to Art. 5 (5) PLT the receiving office is committed to inform the applicant immediately, if certain application documents are obviously missing. In order to harmonize the Implementing Regulations with the wording and the purpose of the PLT, we proposed to delete the last sentence of Rule 39a (1).

Rule 40

The European Patent Office shall examine in accordance with Art. 90 also if the European patent application contains prohibited matter as defined in Rule 34. This should be included in the list of activities as defined in Rule 40. One possibility would be to amend subparagraph (h) to read: “[...] *the application meets the [...] requirements [...] laid down in Rules 23f, 32, 34, 35 and 36*”.

Rule 41a

Why not obtain from the Office, in application of Rule 41a, a communication in all proven cases of defect in a priority claim?

Rule 46 (1)

There is nothing stated in the Explanatory Remarks about this amendment. According to previous Rule 46 (1), the European Patent Office shall draw up a partial European search report on those parts of the European patent application which relate to the invention, or the group of inventions within the meaning of Art. 82, first mentioned in the claims. According to the proposed new Rule 46 (1), it will be up to the search examiners to determine for which part of the application a partial European search report will be drawn up. It is actually not possible for search examiners to determine which parts of the application **“appear to represent the main invention”**. We are afraid that – in practice – the search examiner just looks for those parts of the application, which are easiest to be handled. These are possibly those parts, where he is aware of that relevant prior art exists.

We propose to stick to the previous wording of Rule 46 (1). The applicant has the right, that in case the European patent application does not comply with the requirement of unity of invention, the search report shall be established for those parts which are mentioned first in the claims. Typically, these are the aspects of the invention, which are of major importance for the applicant.

Rule 54 (2)

We cannot understand why Rule 54 (2) shall be deleted. We believe that the patentee shall have the possibility to receive duplicate copies of the European patent certificate upon payment of administrative fee. The patentee should have the possibility, e. g. to hand over further certificates to the inventors in order to acknowledge their work. The explanatory notes do not provide any justification on this point.

PART V

CHAPTER I – Opposition

The majority of the proposed provisions applies the revised EPC 2000 text or recovers the provisions of the 1973 version. They seem acceptable.

Rule 55b (1)

It should be clarified that an opposition may be filed in electronic form. It should be added that Rule 24 (2) is applicable *mutatis mutandis*.

Rule 56 (1)

According to Rule 56 (1) an opposition is rejected as inadmissible, if the notice of opposition does not comply with the provision of Rule 55b paragraph 2 (b). We understand this wording in that way that the opposition is rejected, if any of the three indications of Rule 55b) (2) b) is missing.

We believe that this requirement is too strict.

A notice of opposition – in order to avoid being rejected as inadmissible – should include an indication which enables the European Patent Office to unambiguously identify the European patent against which opposition is filed. If the notice of opposition e.g. contains the application and/or publication number of the European patent against which opposition is filed, the remaining indications (name of the proprietor and title of the invention) is not strictly necessary.

CHAPTER II – Centralized limitation or revocation procedure

Rule 63 b, c, d, e, f, g, and h

This is a very important part, since it is based on the provisions revised at the time of the Diplomatic Conference in November 2000, namely new Articles 105a, b, and c. The new Rules 63b to 63h confirm in the first place that the role of the Examination Division shall be limited to checking whether the petition for amendment or revocation is justified. It is the text of the claims that will serve essentially as basis for the petition, with the applicant, however, being able to amend the description correspondingly. It is also contemplated that the petition may not be received if there is an opposition procedure pending, this taking primacy, as results from the texts issuing from the Diplomatic Conference.

Concerning the Draft Rules 63 c, d, e, f, and g, we have the following general comments.

The suggested handling by the Examining Division means that apparently there will be no communications at all with the Requester in the handling of the request. This is clearly expressed in the Explanatory Notes. The substantive examination is not re-undertaken.

However, we believe there are good grounds that the Requester should have an opportunity to file comments. For example, an Examiner may have obtained a possibly ill-founded understanding of the requested amendment. And even if it will always be possible to file a new request for limitation, the existence of an earlier, rejected request certainly has the potential to complicate possible legal actions based on the patent in a State for which it was granted, and also to create complications in legal actions under corresponding patent in other countries, such as the US.

In fact, since the substantive examination is not re-undertaken, except under exceptional circumstances, the request is either accepted or rejected. According to the explanatory notes, the Requester will be limited to the text of the amended claims submitted at the time of the request. If the slightest problem arises for the acceptance of the amendment, the requester will, it seems, be obliged to introduce a new amendment procedure, which is extremely rigid and may have unfavourable consequences, for example, if the amendment has been required within the framework of a legal action in a State. The rejection of the requested amendment might be misunderstood by the National Court or, in any case, delays its decision. Is there no possibility of dialogue with the Examination Division to reach an acceptable solution within the framework of a first petition? Can the Requester lodge another request when the first is pending? It is true that an appeal may be taken to the refusal of the petition pursuant to Article 106 (1) EPC 2000. But it would be really regrettable to impose an appeal procedure on the petitioner when it is a matter, perhaps, of providing a simple modification of form to a petition for amendment of claims.

There is also in the Explanatory Notes, in the last paragraph concerning Rule 63f, an indication that the Examining Division may indeed consider the patentability of the amended claims in individual cases, "for example where there are indications that the requested amendment of the claims would lead to the protection of subject matter which is excluded from patentability". We believe that such an examination is actually contrary to Art. 105 a, b and c. In the above mentioned example taken from the Explanatory Notes the granted claim would likewise have protected subject matter which is excluded from patentability. If an amendment to a claim just limits the scope of the claim, it is impossible that the scope of protection extends towards subject matter of the claim as granted. For this reason we believe that substantive examination should not be reopened and the examination should be clearly limited to the examination of the requirements of Art. 84 and Art. 123, paragraphs 2 and 3.

We have sympathy for the manner of dividing the subject matter into separate paragraphs as has been done in the Draft. It is obviously important to try to obtain a clear presentation of the Rules. However, we believe this can be achieved in a more clear manner by the following suggested amendments to Rules 63 c, d, e, f, and g:

Rule 63c

Subparagraph (2) (b) should be clarified, possibly as follows: "the application or publication number of the patent whose limitation or revocation is requested, and [...] the Contracting States in which the patent has taken effect;"

Rule 63 d, f and g

We propose to concentrate proposed Rules 63d, 63f and 63g in one Rule 63d. The headline could be "Examination of the request".

Rule 63d (3) (former Rule 63f) should read: "*If the request for limitation is admissible, the Examination Division shall examine whether the amended claims comply with the requirements of Article 84 and Article 123, paragraphs 2 and 3*". The deleted passages in this subparagraph are not necessary since they just repeat the requirements of Art. 123 paragraph 3.

Subparagraphs (4) and (5) (former Rule 63g (1) and (2)) should read as follows:

- (4) *"If the examination of a request for revocation reveals that the request is admissible, the Examining Division shall revoke the patent and inform the requester accordingly"*
- (5) *"If the examination of a request for limitation reveals that the request is allowable, the Examining Division shall invite the requester to pay the prescribed fee and ..."*

PART VI

CHAPTER I – Appeal procedure

Rule 64a

This rule, particularly paragraph 2 thereof, requires that all the arguments be given in the appeal brief. The explanatory notes indicate that the Board of Appeal has discretionary powers to invite the parties to the procedure to lodge comments. In paragraph 2 of Rule 64a, the introduction of the words "where necessary" is new over the old text. Article 110 EPC 1973 was better, since it obliged the Board of Appeal to request comments from the parties. It would be necessary to revert to the old text and delete "where necessary".

In this respect, it should be noted that Rule 65 is much more satisfactory.

CHAPTER II – Revision by the Enlarged Board of Appeal (Article 112a EPC 2000)

This Chapter is entirely new.

Rule 67a

Rule 67a defines the notion of fundamental vice of procedure contained in Article 112a (2) (c) and (d).

Paragraph (a) of Rule 67a is acceptable. On the other hand, if the wording of paragraph (b) seems to be vague, the explanatory note is, on the contrary, very restrictive. The appreciation of the notions of "fundamental" or "relevant request" is completely left arbitrarily to the decision of the Enlarged Board of Appeal. A fundamental vice is recognized if a petition has been lodged in writing and has been ignored. This is quite normal. But in the case of an orally lodged petition which has not been noted down in the minutes of the oral procedure, it is much more problematical to obtain revision by the Enlarged Board of Appeal. It is well known that the minutes do not fully reflect the content of the discussions of the oral procedure. For the rest, it is quite understood that the Enlarged Board of Appeal does not want to be burdened with matters of the type of reimbursement of fees, etc.

Thus, the text of Rule 67a could be approved, but the explanatory note is worrying.

Further, we recommend to amend the list of fundamental procedural defects in accordance e.g. with § 100 (3) no 4,5 and 6 PatG (German Patent Act) as follows:

- (c) decided on the appeal, although a party to the proceeding was not properly represented,
- (d) decided on the basis of a hearing in which the provisions of the publicity of proceedings were violated, or
- (e) failed to provide a decision which states the written grounds therefore.

Rule 67b

In Rule 67b, is it not sufficient that the criminal act has been unappealably established by a court or competent authority? Why add the last phrase "a conviction is not necessary"? Deletion of this phrase would furthermore be in accord with the explanatory notes.

It may take a fairly long time until the criminal act has been unappealably established. Has this been taken into consideration?

Rule 67c

The difficulty pointed out with regard to Rule 67a is to be found again in Rule 67c. The exception ending the text of Rule 67c can only be approved.

In a word, the Rules confirm that it is a matter of a traditional cassation procedure with remittance to the Board of Appeal, eventually with a different composition. It should also be noted that it is a matter of an entirely written procedure and that no other intervention is possible before the Enlarged Board of Appeal. These provisions may be approved.

Rule 67c :We proposed to delete this Rule. There is no reason to limit the provision under Article 112a in this way.

Rule 67f (3)

We proposed to delete Rule 67f (3). This Rule is not in compliance with Art. 116 EPC and with Art. 113 EPC.

Rule 67g

Rule 67g deals with the reimbursement of the revision fee. Paragraph (b) introduces a high degree of uncertainty on contemplating that, even if the revision process has been initiated, the Enlarged Board of Appeal has the power of not ordering reimbursement of the fee where this is inequitable. This is confirmed by the explanatory notes. This provision is inopportune: in fact, if the decision of the Enlarged Board of Appeal overturns that of the Board of Appeal, it is precisely because there has been a fundamental vice of procedure. Consequently, the fee should be reimbursed in all cases.

Rule 69 (2)

The term “person” in paragraph 2 (“...*does not share the opinion of the person requesting it....*”) should be replaced by the term “party”.

PART VII – CHAPTER III

Rule 72d

No comment, except to say that, contrarily to what the explanatory note says, there is no Rule 72d.

CHAPTER V

Rule 85a

We propose to amend the second subparagraph as follows:

“Further processing shall be ruled out in respect of the time limits mentioned in Article 121, paragraph 4, and in addition in respect of the time limits under Rule ..”

Rule 85a deals with the important question of the prosecution of the procedure, in application of Article 121 EPC 2000. The text results clearly from the Diplomatic

Conference that had decided that numerous measures of the Convention would be referred to the Implementing Regulations.

No comment is to be made on the principle expressed in Rule 85a (1): following a notification opening a term of two months, it is sufficient to pay a fee on fulfilling the omitted act.

But, further to the terms already excluded in Article 121 (4) of EPC 2000, Rule 85a (2) adds further exclusions.

Generally speaking, the agent and the applicant should obtain as favourable a treatment as possible from the Office, so as to be able to prosecute the procedure in a simple way, without having to go through the Restitutio In Integrum of Rule 85b, which is extremely rigid and problematic.

Particularly excluded are the following terms:

R6(1) : provision of the translation from another language.

R14(a): recognition of ownership of the patent, after a decision of a national authority.

R25(d): obtaining of a filing date by reference to another previously filed application.

R37: payment of annual fees after the six months term of grace.

R38: time limit for claiming priority.

R41: correction of deficiencies in application documents.

R41(a): correction of deficiencies concerning the priority claim.

R69(2): ascertainment of loss of rights in case of a response not formed in the term of two months.

The explanatory notes concerning Rule 85a are very explicit.

On the questions concerning the priority right and annual fees, i.e. Rules 37, 38 and 41a, these exclusions seem to be reasonable.

But is it the same for the others? For some of them, the notes explain that Rule 41 might be applicable. Is there not a contradiction when, for example, where the exclusion of Rule 6(1) is concerned, it is indicated that one can then have recourse to Rule 41, but this latter is itself excluded from possibilities of continuation of the procedure.

Thus, the exclusions of Rules 6(1), R25(d) and R41 should at least be deleted. They are not according to the spirit of the PLT.

Rule 85(b) Restitutio In Integrum

The explanatory note deals first with the annuity system and indicates that the period of grace of six months does not count for initiating the procedure according to Rule 85(b). In other words, the term for initiating the restitution runs as from the end of the period of grace. We can only approve this measure.

Where the priority right is concerned, a maximum term of two months is imposed so as to ensure the security of third parties. Practical experience shows that at times it is difficult to obtain priority documents. Could it not be contemplated to extend the term to three months, instead of two?

Paragraph 3 confirms that the restitution procedure is not applicable in cases where a petition for prosecution of the procedure can be filed. This makes it even more necessary to revise the exclusions named in Rule 85(a).

Rule 89(a)

This is an important Rule relating to the new Article 121(1) of the PCT 2000 concerning the information to be communicated to the EPO on the state of parallel procedures. According to the new Rule, the applicant must lodge under penalty of refusal of his application, not only the search reports, but also all other prior art that has been taken into account during a parallel examination. The text is very general. It could be a matter, for example, of a prior disclosure declared during the course of the US examination. What is it exactly? Should it be clarified that only written documents extracted from parallel procedures should be communicated? It is absolutely necessary that the Rules, at least, provide clarifications.

CHAPTERS VIII – IX

Rule 96

It is proposed to delete it. However, the new Article 128(5) remits to the Implementing Regulations. If Rule 96 were deleted in full, it would seem contradictory with EPC 2000. Furthermore, if the President of the Office is authorized, in principle, to make certain information available to the public prior to publication of the application, to what type of information does it refer? What happens if the Implementing Regulations say nothing? Everybody knows that a communication of even a simple title of a patent application can be damaging for the applicant. Thus, the importance of this question should not be underestimated.

Chapter XI - Representation

Rule 101(a), Attorney/Client Privilege

The privilege of the agent is now contemplated in Article 134(a)(1) EPC 2000.

The explanatory notes are very clear. It is necessary to integrate the same privileges that the U.S. attorneys have vis-à-vis third parties into the European system.

The AIPPI can only approve this measure that balances the situations in Europe and the U.S.

Article 134a(1)d introduces the new element of Attorney/Client Privilege in proceedings before the EPC. The Attorney/Client Privilege concept and its interpretation under US law is, as we all know, extremely important for patent litigation in the US. And especially for litigants from outside the US, when it comes to an evaluation by the US Court whether that concept can or cannot be applied on communications between the client and his patent representation. A critical element in that evaluation is whether the law in the respective country affords such privilege in the same way as the US law does.

The Explanatory Notes say that the language for R101a(1)(d) has been taken from the one specific US case: *Bristol-Myers Squibb v. Rhone Poulenc Rorer*, Southern District of New York, April 19, 1999. What advice does the wording: ... the professional representative "in his capacity as such"... seek to exclude? Could not the wording "in his capacity as such" be deleted? Article 134a(1)(d) has no such wording.

Rule 102

Concerning Rule 102, which takes into account notably the situation of the agents of countries recently acceding to the EPC, the AIPPI that has representatives of these countries among its national groups, approves the proposed measures.

Rule 105 (3)

This Rule concerns the activity of the EPO as Office entrusted with the PCT search. It deals with the problem of applications deemed to be lacking in unity, the fees to be paid, the reservations made by the applicant, etc.

Although these points are very specific, the AIPPI cannot ignore them completely. The problem of unity of invention arises recurrently and is presently being discussed within the framework of the SPLT.

More particularly, paragraph 3 of Rule 105 ends with a very vague phrase, leaving it up to the President of the EPO to regulate the complementary details. This provision can be arbitrary. What are these details? They should be clarified, at least in the Rules.

We prefer the old wording of this paragraph for the following reason: According to the new wording of Rule 105 (3) the protest shall be referred to a panel composed of three members for a decision. According to the old wording, a Board of Appeal decides on the protest. The latter possibility is preferable in order to ensure a sufficient separation between those people who "uphold its view" and those who decide on the protest. It must be avoided that the protest is decided by people within the same divisions, possibly colleagues of the examiner who issued the decision under protest.

It goes without saying that the additional fee will be refunded if the European Patent Office does not uphold its view. This was expressly mentioned in the old version of this paragraph ("*.... if it is does not so find, shall refund the additional fee*"). In order to avoid any misunderstandings, this deleted passage should be included again.

Rule 108

The explanatory note indicates that the deletion of the last phrase from paragraph 3 is explained by the transfer of this measure to the new Rule 85(a). Does this mean that the loss of rights involved in the old paragraph 3 opens the possibility of a petition for continuing of the procedure? This should be confirmed by the EPO.