

# **MINUTES**

of the

30th meeting of the

## **COMMITTEE ON PATENT LAW**

Munich, 19 to 21 September 2006

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The Committee on Patent Law held its 30th meeting in Munich on 19 to 21 September 2006, with Mr Mihály FICSOR (HU) in the chair. The list of participants is annexed. The chairman welcomed the participants, in particular the newcomers on various delegations: Mr Mehmet Ekiz (TR), Ms Maria Helena Augusto Nunes da Silva (PT) and Ms Lidija Knaus Smolar (SI).

The committee observed a minute's silence in memory of the late Bob van Benthem, first President of the European Patent Office.

<b>1. Adoption of the provisional agenda (CA/PL 14/06 Rev. 1)</b>
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| <p>1. The committee <u>adopted</u> the provisional agenda set out in CA/PL 14/06 Rev.1, subject to combining items 4 and 5. Under Article 9(5) of the Administrative Council's rules of procedure, which apply mutatis mutandis to the committee, it <u>decided</u> that CA/PL 16/06, CA/PL 23/06, CA/PL 24/06 and CA/PL 25/06, which were received late, would stay on the agenda.</p> |
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<b>2. Approval of the draft minutes of the Committee's 29th meeting (CA/PL 13/06)</b>
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| <p>2. The committee <u>approved</u> the draft minutes of its 29th meeting set out in CA/PL 13/06 subject to editorial amendments to points 51 and 52 requested by the chairman as well as amendments to points 61 and 63 requested by the Danish and UK delegations respectively.</p> |
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<b>3. Election of the Deputy Chairman of the Committee</b>
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| <p>3. By secret ballot, the committee <u>elected</u> Mr Per HOLMSTRAND (SE) as deputy chairman of the committee for a three-year term with immediate effect, such term expiring on 18 September 2009.</p> |
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<b>4. SPLT - progress report (CA/PL 16/06) and</b>
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| <b>5. <i>epi</i> position paper - SPLT - Views on further work (CA/PL 18/06 e), FICPI comments on the "Grace Period" (CA/PL 23/06), AIPPI comments on the "Grace Period" (CA/PL 24/06), UNICE views on further work regarding SPLT (CA/PL 25/06)</b> |
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4. The chairman introduced the item.
5. The chair of the Working Group I (Group B+), Ms Anne REJNHOLD JØRGENSEN (DK) (the "WG I chair") reported that the US, Japan and Canada had generally accepted the so-called "chair proposal for a package solution" set out in CA/PL 16/06. Even if it were to be agreed upon in the near future, it would take

five to ten years to transform it into national legislation. It would be difficult to make major changes to the chair proposal as it was generally accepted by the negotiating partners. Although it contained some in-built flexibility, it should be regarded as a package. Europe had to consider the political signals which it was sending out in other fora (a view endorsed by the European Commission and IS). The harmonisation exercise had to be viewed in a wider context as reaching agreement among the members of the Group B+ would facilitate further work in WIPO and the Trilateral. Failure to agree would weaken the EPO and Europe. Some member states might conceivably embark upon separate negotiations. Delegations were invited to consult their stakeholders so that a decision could finally be taken.

6. The Finnish delegation, representing the state holding the EU Presidency in the second half of 2006, reported on the meeting of the Working Party of the EU Council held on 12 September 2006. The purpose had been to co-ordinate views on the chair proposal. The compromise package had not been rejected as a possible basis for further negotiations. The EU member states realised that at present an exceptional opportunity existed to obtain global harmonisation. The WG I chair's timetable was regarded as ambitious but not unrealistic. The EU member states were committed to achieve harmonisation but many were still consulting their national stakeholders and were not in a position to give definitive views. Positive signals had been received on central issues such as the "grace period", the elimination of the "Hilmer doctrine" and the "first-to-file principle". Some reservations did exist, though, on the details of the "grace period". The EU had not abandoned its position on the "grace period". The discussion had not been conclusive on "third party rights" and "conflicting prior art".
7. The representative of the European Commission believed that Europe needed to reach a unified position. The chair proposal could be regarded as a good basis. Some items had some in-built flexibility for further negotiation. The EU might have to make concessions on its common position on the "grace period" in order to obtain a harmonised "first-to-file principle".
8. The Office, whose views were endorsed by the German delegation, agreed that Europe had to highlight clearly which concepts it could or could not accept within the framework of an overall package. It hoped that the European position could be agreed in time for the upcoming September 2006 Group B+ meeting. The chair proposal was a good basis except for three areas:
  - a diplomatic conference could decide whether the "grace period" should be six or twelve months (agreed by HU);

- "third party rights" should follow the existing European model - at least in Europe. Recognising that harmonisation was not presently possible would allow progress. Alternatively, "third party rights" could be made mandatory in the Treaty and interim periods could be introduced;
- by way of compromise, international applications could be accepted as "conflicting prior art" even if they had not entered the regional phase yet. "Conflicting applications" made up a very small part of applications with the Office. Therefore not achieving harmonisation was also acceptable.

The compromise package largely reflected the state of negotiations of 1991. Europe had an opportunity to persuade the US to adopt the first-to-file system. Negotiations should therefore be brought to a quick end.

9. The chairman highlighted the objectives of the harmonisation exercise. He agreed that the focus should be on how to deal with items which could not realistically be harmonised for the time being (agreed by DE).
10. The representative of WIPO reported that there was no indication of a major breakthrough or change in positions. Consultations were being held. A possible option was to put on hold harmonisation efforts in the Standing Committee on the Law of Patents.
11. The UK delegation regarded the chair proposal as a good basis. While it had some reservations, e.g. on "third party rights" and the "grace period", it recognised that Europe had to be flexible, including on the EU common position, in order to make progress (agreed by DE). If Europe failed to agree among itself, it stood to lose a lot. "Inventive step" and "novelty" applying to "secret prior art" was an important modernising proposal. Creating a standard regime of what constituted "prior art" would be beneficial, e.g. for utilisation. All negotiation partners had a responsibility to create a patent system designed to meet the purposes for which it had been intended.
12. The Finnish delegation agreed with the UK delegation. National consultations had identified a high level of flexibility among its users, who felt that there was at present a real opportunity to create a harmonised "first-to-file" system and to eliminate the "Hilmer" doctrine. The price to pay resulting from a failure to agree on harmonisation would be disproportionately high. The compromise package needed some clarifications but was a good basis for further work in Working Group I.

13. The German delegation, commenting provisionally, identified two clearly opposing views. The Office, like the German delegation, wished to exclude "secret prior art", the duration of the "grace period" and "third party rights" from the chair proposal, while other delegations were willing to accept the proposal as a package. The German delegation would, if the package stayed intact, have to reject it. It believed that the US would be willing to accept a harmonised "first-to-file" system without the "Hilmer" doctrine but with a "grace period" without a "declaration requirement".
14. The Swedish delegation endorsed the German delegation's views. Europe should consider how the compromise could be brought back to WIPO. It should prepare itself to live with a "reduced package".
15. The French, Icelandic, Latvian, Hungarian, Polish, Netherlands, Spanish, Belgian (which was commenting provisionally) and Romanian delegations regarded the compromise proposal as a good basis. The French delegation added, however, that a more balanced approach was needed. Harmonisation must consist of improving the global patent system and should encompass as wide an area as possible. The Hungarian, Polish, Netherlands and Spanish delegations had reservations on certain items in the proposal. The Polish and the Netherlands delegations listed the (duration of) the "grace period", "third party rights" and "treatment of conflicting PCT applications/"secret prior art". The Polish delegation added that its reservations could be overcome and that the whole package could be accepted. The Netherlands delegation stressed that the negotiation process had to be transparent, including vis-a-vis third parties (agreed by SE). It could help Europe if the Group B+ was able to bring back the results to WIPO. The Spanish delegation had reservations on the term "first-inventor to file" as well as "secret prior art" being taken into account for "novelty" and "inventive step". It would show the necessary flexibility, if needed, in order to arrive at a possible compromise solution. It could agree on a 12 months' "grace period". The Romanian delegation was flexible on pending matters. An opportunity to abandon the "Hilmer" doctrine should be seized.
16. The UNICE representative introduced CA/PL 25/06. UNICE was aware of the need to be flexible (agreed by *epi*). It could not accept the compromise proposal as a package though (agreed by *epi*).
17. The *epi* representative, commenting provisionally, said that it was not clear whether the chair proposal would be used for the SCP or become part of a stand-alone treaty. The member states should have the courage to reject proposals which would lead to bad practice. Harmonisation attempts had started in the middle of the 19th century. Harmonisation efforts would continue, even if the chair proposal was not agreed.

18. The chairman summarised:

- the chair proposal generally constituted a good basis for further negotiations. While some delegations could accept the whole proposal with some reservations, others wished the proposal to be open-ended with the possibility of taking out certain elements;
- concerns were voiced in particular with respect to the duration of the "grace period", the protection of "third party rights", the new concept of "first-inventor-to-file", "secret prior art" and "anti-self-collision";
- Europe's commitment to continue with harmonisation talks within Group B+ was unequivocally reaffirmed, although it was also stressed that harmonisation was not an end in itself and that the bottom-line of compromises should show a positive balance for European interests;
- all delegations had shown a willingness to be flexible;
- there was agreement that a balanced package was needed which should contain as far as possible harmonised solutions, which could be considered international best practice and which could globally improve quality and efficiency in patent matters;
- the compromise package seemed largely acceptable to the non-European members of the Group B+, which provided a certain momentum. However, it had also been stressed that harmonisation implied a long way and what could not be achieved at the present stage, could be achieved later.

19. The WG I chair introduced CA/PL 16/06.

### **"First-to-file" and published applications**

20. The WG I chair explained that "first-inventor to file" equalled the European "first-to-file" concept. The French, Spanish and Polish delegations warned that this term could give rise to unnecessary ambiguities. The chairman added that it was just a "marketing label", which could admittedly create difficulty. The WG I chair agreed that the term would require explanatory remarks. The German delegation pointed out that the draft Treaty would not be put into question by terms used in the chair proposal. It was acceptable to keep the term, duly explained. The Romanian delegation recalled the definition of "inventor" for the purposes of the draft Treaty (Article 9 (b), point (c)). The Serbian delegation stressed that the Treaty should

make the concept of the "first-to-file" principle crystal clear; otherwise the interpretation given to an unclear term by the courts could have negative consequences. The *epi* representative endorsed the remarks made by the German, Romanian and Serbian delegations.

### **"Grace Period"**

*The following references to "points" refer to the numbering used under the heading "Grace Period" in CA/PL 16/06.*

21. The German delegation wished to leave the duration of the "grace period" open in order to retain flexibility. It endorsed the safety net idea set out in point 2 (agreed by FR, AT, HU, UNICE and *epi*) and could accept point 3 (no "declaration requirement"). The proposal in point 4 on "third party rights" would not lead to true harmonisation and Europe would thus not gain anything from making this concession. The item should be left open until full harmonisation could be obtained (agreed by GR, ES, *epi* and the European Commission). The Hellenic delegation wished to have the shortest possible "grace period" in the interests of legal certainty. The strictest possible "declaration requirement" should be opted for. The Finnish delegation believed that the EU common position on the "grace period" might need to be revisited in order to allow proper negotiations. The Swedish delegation agreed with previous speakers. It warned that a restricted agreement within the Group B+ on the "grace period" could lead to domestic applicants being denied rights internationally due to conflicting domestic grace periods. The French delegation could, by way of compromise, accept a 12 months' "grace period" (agreed by ES) and non-mandatory "declaration requirements". It preferred a mandatory provision on "third party rights" (agreed by AT, ES, NL, with NL alternatively suggesting to leave the issue for decision at a diplomatic conference). The Austrian delegation, commenting provisionally, believed that inexperienced applicants in particular would benefit from a non-mandatory "declaration requirement". The "grace period" should be conceded without restrictions in return for the US adopting the "first-to-file" principle. The Polish delegation agreed with points 1-3 (agreed by ES). If a 12 months' time period were to be accepted, "third party rights" should be made mandatory in return. The Hungarian delegation preferred a mandatory "declaration requirement" but could be flexible. An optional clause allowing third party rights in the circumstances set out in the chair proposal would not meet the requirements of legal certainty. The UNICE representative explained that UNICE preferred a 6 months' "grace period", pointing out that thirty-seven out of thirty-eight countries in the world had a 6 months' grace period. However, points 1 and 3 were not "dealbreakers". UNICE added the arguments set out in CA/PL 25/06. "Third party rights" should be maintained in Europe, even



at the cost of non-harmonisation. The *epi* representative was opposed to the "grace period" concept. The longer the period was, the greater the concession which Europe was making. Mandatory "third party rights" were particularly needed if a "grace period" was introduced. Lastly, Japan had not experienced any problems with a mandatory "declaration requirement". The Serbian delegation shared the positions of UNICE and the *epi*. Sooner or later Europe would probably have to accept a grace period, as was the case with the EU Design Regulations 2005.

22. The chairman summarised:

- "third party rights": unanimous agreement on the need to protect "third party rights" in Europe; no unanimous agreement on how to deal with "third party rights" outside Europe and on whether to agree to the "mixed system" set out in point 4;
- safety net character of the "grace period": unanimous agreement, with reservations expressed by UNICE, the *epi* and the Serbian delegation;
- duration of the "grace period": the shorter, the better for legal certainty. Some delegations could accept 12 months, others wished to keep aligned to the EU common position of 6 months or wished to agree the question at a diplomatic conference;
- the "declaration requirement" enjoyed the widest flexibility, although some delegations wished to see the declaration requirements as part of the Treaty.

23. The chairman agreed with the German delegation that Europe's position on "third party rights" should be made clear. The way to present "third party rights" outside Europe was tactical. Mandatory worldwide third party rights should be asked for in the first instance. Concessions could then follow. "Third party rights" could also be linked to the "grace period". Alternatively, no provision was made in the Treaty while Europe maintained its third party rights. Showing that Europe was divided on this issue should be avoided.

24. The UK delegation believed that "third party rights" could not be conclusively settled as the EU had to review its position on the "grace period" first.

25. The *epi* representative distinguished between two types of "third party rights". Europe should insist on worldwide protection in the case of an individual inventor, who would otherwise have to file a patent everywhere or face having no protection at all. In the case of a third party using information distributed by the applicant, Europe could perhaps compromise.

26. The Office remarked that the US regarded "third party rights" as an infringement matter, which thus did not belong in the Treaty. A global "grace period" would entail different consequences in different countries. "Third party rights" could be kept out of the Treaty. If they were to be included, they should be viewed as best practice by the majority of the signatory states.
27. The WG I chair agreed. In the US, the Europeans were mostly rightholders, who did not have to rely on third party rights. Non-harmonisation was thus acceptable as long as Europe continued protecting third party rights.

### **"Treatment of conflicting PCT applications"**

28. The UK delegation had a reservation based on politics, not substance. The provision would be sensitive for developing countries in particular. It favoured heavy users of the PCT system, enabling them to get patent protection in the countries of their choice and to defeat later unpublished patent applications in other countries where they perhaps did not wish to seek patent protection for themselves. The proposal could be supported if SPLT issues could not be brought back to WIPO in the near future.
29. The French delegation had concerns about the effects of including PCT applications in the "prior art" as at the priority date. This would give PCT applications an unfair advantage over regional or national applications. However, it was preferable to have a clear proposal.

### **"Provisions concerning prior published applications"**

30. The Office believed that the issue should remain open for the time being as no compromise was in sight.
31. The UK delegation supported the compromise proposal on "secret prior art", which should apply to the grant of all patents, independently of the applicant. Patents should be granted for real inventions, not slight improvements on existing ones. The UK delegation might be prepared to concede an "anti-self collision clause".
32. The German delegation preferred to keep the issue open. It favoured a "novelty only" test (agreed by FR) but was prepared to compromise. Patent thickets indeed had to be avoided.

33. The French delegation drew attention to the practical consequences of the proposal: the quality of applications filed and the effect on applicants, such as reduced legal certainty. These consequences should be considered before new principles were introduced into European patent law. It did not think that the proposal led to improvements of the system. The proposal on "inventive step" would lead to non-harmonisation of "prior art".
34. The UNICE representative considered that "novelty" and "inventive step" were non-harmonised concepts even within Europe. They should first be defined and then be harmonised at a later stage.
35. The *epi* representative believed that every effort should be made to harmonise the definition of "prior art". "Anti-self collision" increased the risk of patent thickets. The *epi* could not approve the proposal, particularly if the additional requirements listed were to be optional.
36. The chairman summarised:
- there was no common position and no conclusion on whether to leave this item for a "second basket";
  - all delegations opposed the introduction of "anti-self collision".
37. The committee discussed the SPLT timetable and in particular whether certain parts, or at least the second half of the chair proposal, should be discussed at a later stage, following further internal consultations.
38. The chairman summarised the discussion:
- the EU had not been able to agree on the WG I chair's proposal. The committee could not make up for that failure;
  - there was no mandate to represent the European Patent Organisation in international fora. Europe had to resort to co-ordination meetings. The WG I chair was responsible for conducting the work of Group B+. In that capacity she could understandably not represent the European interests;
  - the committee had reached the limits of its competence as the SPLT timetable issue was clearly political. Harmonisation might not be fully reached on three items in the chair proposal identified by the Office. The proposal was otherwise welcomed.
39. The Swedish delegation shared the concerns of the German and French delegations. The inherent risks of proceeding to attend the upcoming Tokyo meeting with the chair proposal had become obvious.

- 40. The committee noted the oral progress reports given by the chair of Working Group I (Group B+), Ms Anne Rejnhold Jørgensen, and the Finnish delegation, representing the state holding the EU Presidency in the second half of 2006.
- 41. The committee endorsed the chairman's summaries on CA/PL 16/06.
- 42. The committee noted CA/PL 18/06, CA/PL 23/06, CA/PL 24/06 and CA/PL 25/06.

<b>6. USPTO - proposal on Triway (CA/PL 20/06)</b>
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- 43. The Office introduced the document.
- 44. The UK delegation supported any initiative aimed at improving services available to applicants including the speed of such services. However, it shared the Office's concerns on the Triway proposal, which seemed to offer considerably greater benefit to the US than Europe.
- 45. The German delegation, commenting provisionally, supported proposals designed to increase the efficiency of the international patenting system. It shared the Office's concerns, particularly with regard to the PCT system (agreed by GR). It wished to hear more about the proposal (agreed by GR).
- 46. The French delegation agreed with the previous speakers. The implementation of the proposal might be affected by a lack of harmonisation. The concept of unity of invention would have to be harmonised. The Office agreed.
- 47. The Spanish delegation believed that the proposal's compliance with the Paris Convention needed studying. The Office pointed out that there was no legal obligation on the applicant to participate in the Triway programme.
- 48. The Swedish delegation agreed with previous speakers, doubting that the proposal was an effective tool to meet the intended objective.
- 49. The *epi* representative believed that three independent searches delivered better results than searches building on each other (agreed by UNICE). The proposal was not designed to reduce the workload. It was incompatible with the PCT and would negatively affect it. It was unclear (i) whether the "first filing" was a 12 months Paris Convention filing; (ii) how Japan with its backlog would be able to participate as envisaged and (iii) what was meant by stating that "the application had to be ready for examination". It added that in Europe, EC nationals mainly filed national applications. In the US, however, they tended to do so less. The sets of claims, rightly so, differed considerably between Europe, the US and Japan. Lastly, PCT reform proposals should be given preference over reform proposals outside the PCT system.

50. UNICE favoured measures designed to provide better searches. The general idea behind the proposal had its merits. However, UNICE had doubts about the actual implementation of the proposal. It also pointed out that claims for examination in the Office of Second Filing were often amended after the results of the first search had become known.
51. The staff representatives agreed with the Office, the *epi* and UNICE. No efficiency or quality gains would result from the proposal in the Office. It was thus unclear how the proposal could help enhance the quality of examination.
52. The Office wished to focus on the PCT reform proposals while remaining open to all other proposals. It explained at which stage the Trilateral offices considered an application to be ready for examination. It would report the committee's discussion to the USPTO and inform the committee in due course.
53. The chairman summarised:
- the Triway proposal set out CA/PL 20/06 had found no support. The possible negative effect of its implementation on the PCT was a major source of concern;
  - it had been underlined that whilst the proposal was aimed at the promotion of work sharing, its merits, if any, would rather lie in the enhancement of the quality of work done by the Trilateral Offices.
54. The committee gave a unanimous unfavourable opinion on CA/PL 20/06 (delegations present: 28; against: 28).

<b>7. Amendments to the Implementing Regulations to the EPC 2000 (CA/PL 17/06 + Add. 1 + CA/PL 22/06)</b>
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55. The Office introduced the various rules.
56. In the discussions, particular attention was given to issues such as (i) adaptations allowing the possibility of electronic filing, (ii) time limits serving to add or correct priority claims, (iii) missing parts of the description or missing drawings, (iv) extension of periods and (v) exclusion of further processing in respect of certain periods.
57. *The following overview sets out the salient points which were raised. Suggestions made by observer delegations were, unless expressly indicated, not endorsed by the delegations.*

**Rule 1**  
**("Written proceedings")- *drafting later changed in Office non-paper* /**

**Rule 2**  
**("Filing of and formal requirements for documents")**  
**- *drafting later changed in Office non-paper***

58. SE: R.1 may be seen to overrule R.2. R.1 should make reference to R.2 or use "without prejudice to Rule 2" language. We welcome transfer of wording from ex R.24(2) to R.2.
59. PT: we agree with SE. R.1 and R.2 share the same purpose. R.2 should use "proceedings" as heading.
60. RO: delete "on paper or on screen" in R.1. Using "on screen" only would include a text message on a mobile phone and is unacceptable. Using "on paper" only would not take account of future developments.
61. FR: adapt R.1 to wording of R.49(2).
62. Staff representatives: "or on screen" has no added value as all documents can always be reproduced on paper. Reproducibility on screen only would be harmful to the staff's health. Wording is "can be reproduced", not "has to be reproduced".
63. epi: we agree with staff representatives. All documents have to be reproducible on paper as otherwise attorneys and examiners would be unable to work. Three dimensional images can easily be reproduced on paper. Online filing of documents which cannot be printed is unacceptable.
64. Office: will consider cross-referencing in R.1 to R.2 but issues not necessarily linked. Cross-references are normally backward-looking only. "On screen" wording would allow for use of new technology. At present "on paper" and "on screen" produce same results. "Or on screen" sensible in cases in which printing not possible, e.g three dimensional images. It is of course always possible to present on screen what was on paper. R.1 and R.2 not intended to change the current practice.
65. Chairman: R.1 and R.2 cover different issues. R.1 concerns the written form of a document, R.2 the technical means of communication.
66. TR: R.1 and R.2 do not impede filings which require running of non-proprietary applications, which the Office might not possess.

67. Office: R.2(1) gives President the competence to permit certain technical means of communication. Office thus keeps control. Do not read R.1 in isolation but in combination with new R. 2.
68. DE: we put in scrutiny reservation as Office non-paper is in English only.
69. Serbian delegation: text in Office non-paper (R.1) does not exclude reproducibility on screen only. Replace "reproduced" with "printed". This takes into account concerns of staff representatives and does not limit future developments.
70. Chairman sympathises with staff representatives' concerns. Reproducibility on screen only has to be avoided.
71. epi: empowerment of President of the European Patent Office in R.2 allows him to change R. 1.
72. Discussion on competencies of President and Administrative Council ensues between epi, staff representatives, chairman and Office.
73. Indicative vote on Office non-paper. (Delegations present: 24; for: 18; against: 5; abstentions: 1).

### **Rule 3 ("Language in written proceedings")**

74. FR: interrelationship of R.3(1) ("documents") and R.3(3) ("documentary evidence") is unclear. Needs cross-referencing (endorsed by staff representatives and epi).
75. Staff representatives: interrelationship with R.5 ("translation of a document") unclear.
76. Office and Serbian delegation: there is no connection between R.3 and R.5 and between R.3(1) and R.3(3). "Documentary evidence" refers to patent documents.
77. Chairman: R.3(1) has first-time reference to "documents" but R.5 is a "may" rule.
78. epi: if R.5 refers to any document, it has to be made clear in R.3 what the term "document" means. R.3(3) in fact uses "documentary evidence" and "document".
79. Office: R.3 should remain unchanged so as not to open discussion on meaning of the term "documents". "Document" is used in R.1 and this use is consistent throughout. German, unlike English, uses different expressions for the word "document".

**Rule 6**  
**("Filing of translations and reduction of fees")**  
**- drafting later changed in Office non-paper**

80. epi: insert "petition for review" in R.6(2) and (3). Insert "request for revocation or limitation" in R.6(3).
81. Office: we agree, subject to consulting the Finance Department on R.6(3).

**Rule 10**  
**("Transition of Responsibility from the Receiving Section  
to the Examining Division")**

82. RO: title needs changing as subject of rule is not transfer of responsibility. Office agrees.
83. Staff representatives: Articles 16-18 EPC should have been amended. Who is responsible under new Rule 14(2) RFees for determining whether correct amount of examination fee has been paid? If fee is not paid correctly, no request for examination is filed.
84. epi: use of "responsibility"/"competence" questionable. Office: rule uses EPC terminology. Existing legal basis of rule remains unchanged.

**Rule 11(3)**  
**("Allocation of duties to the departments of first instance")**

85. Staff representatives: include the Search division in R.11(3) to bring provision in line with Office practice. Office agrees to consider this.

**Rule 12 ("Presidium of the Boards of Appeal")**

86. Office confirms to chairman that the extension of the time period set out in R.12(2) does not affect the time periods set out in R.12(4) and R.13(1).

**Rule 13**  
**("Business distribution scheme for the Enlarged Board  
of Appeal and adoption of its Rules of Procedure")**

87. Following comments from BE and epi, Office explains that, given the expected rise in workload, it is necessary to designate members for work involving new procedure under Article 112a EPC. This explanation is accepted.



**Rule 30**  
**("Requirements of European patent applications  
relating to nucleotide and amino acid sequences")**

88. DE: ensure that R.56 is not applicable by defining "sequence listing" in R.30(2) as sequence listing complying with R.30(1). Office: this point is likely to be explained in Guidelines for Examination.
89. UK, RO, NL and epi: sanction (refusal of application) in R.30(3) is too harsh. Alternative wording: "The application shall be considered as undisclosed./The application is deemed to be withdrawn". Or stipulate that application will not be searched.
90. Staff representatives: application would be refused for lack of sufficient disclosure. This would shift work from formalities officers to examiners. If application is refused, then the early refusal by formalities officers is appropriate. Sequence listings have importance for future searches.
91. RO: split the double condition "does not furnish [...] and pay" in R.30(3) into two parts as wording is confusing.
92. Office: further processing is available. Office refers to provisions of Art.90(5) EPC in the context of refusal of applications by the Receiving Section in response to a formal defect.
93. epi: it is sometimes difficult to find the electronic sequence listing at time of drafting application. We maintain our objections.

**Rule 35 ("General provisions")**

94. Staff representatives: contradiction between R.35(1) and R.2(1). Add language of R.2 after "directly" and "by post".
95. epi: delete "either directly or by post" as R.2(1) covers this.
96. Office explains rule in more detail.

**Rule 37**  
**("Forwarding of European patent applications")**  
**- *drafting later changed in Office non-paper***

97. NL, supported by epi: include penalty fees (e.g. for late filing of a sequence) in R.37(2). Some national laws require filing on a national basis for national security reasons.

98. Office: penalty fees are in practice only paid according to R.30 once we invite applicant to do so. Therefore problem does not arise in practice. Art. 75-77 EPC deal with security issues.
99. epi: there is possibility that penalty fees might be paid before invitation from Office.
100. Office: agree to change wording in R.37(2) to "any fees paid in respect of this application". This wording includes surcharges.

**Rule 39**  
**("Designation fees")**  
**- drafting later changed in Office non-paper**

101. Office: R.39(4) covers cases in which the application has reached the Office while R.37(2) deals with cases in which it has not. Rules do not contradict each other (endorsed by Serbian delegation). Context of R.39 makes its scope clear.
102. Following comments from FR and epi, Office agrees to insert in R.39(4) "without prejudice to R.37(2), second sentence"....

**Rule 40**  
**("Date of filing")**  
**- drafting later changed in Office non-paper**

103. DE, UK, FR, BE and epi: time limit in R.40(3) should be made PLT compliant.
104. Office: separate time limits for copies and certified copies would be difficult to implement. [*R. 6(1) is later adapted*]. We will ensure that provision is PLT compliant. In practice it already is.

**Rule 41(1) ("Request for grant")**

105. NL: use "form drawn up by the European Patent Office" or PLT form.
106. Office: we hope that new PCT form is acceptable to us. PLT refers to PCT form. There is no special PLT form.
107. Chairman suggests replacing "drawn up by" with "prescribed by".

**Rule 51 ("Payment of renewal fees")**

108. Office confirms to FR that if payment made within four months, no surcharge is payable (R.51(4)).

109. epi: a new Rule 156a is needed. Provisions in R.51(4) and R.51 (5) only apply to pending European applications, while re-establishment of rights under Art.122 EPC or reopening of proceedings before the Board of Appeal under Art. 112a (5) EPC can also apply to patents. In the absence of national legislation, problems will occur.
110. Office: this issue is for national legislators.

### **Rule 52 ("Declaration of priority")**

111. UK and SE: we query whether R.52(3) complies with PCT wording (R.26bis PCT)
112. Office: PCT and EPC use different terminology. R.52 distinguishes between two possible scenarios, both of which need to be covered, just as in the relevant PCT regulation. The PCT Working Group did not discuss this rule (confirmed by Serbian delegation).
113. epi asks Office to reconsider its position.

### **Rule 55 ("Examination on filing")**

114. epi: indicate the starting point of the time limit.
115. Office: explanatory notes to the Implementing Regulations will deal with general provisions applying to time limits.

### **Rule 56 ("Missing parts of the description or missing drawings")**

116. Office explains to UK that "of" was deleted in R.56(1) to ensure that rule refers to whole drawings, not parts thereof.
117. RO raises a drafting point (repetition of "The European Patent Office shall inform the applicant accordingly" in R. 56(2).
118. Serbian delegation: discrepancy between R.56 and R.30, in connection with Art. 34 PCT and R.5 PCT.
119. epi: we suggest major redrafting as rule is unclear. Amend wording in R.56(1) to ensure that references to entire drawings are not removed due to parts of a drawing being missing. *[For further epi comments see CA/PL 30/06].*

120. Staff representatives: R.56(3)(b): language of proceedings may not be clear at the time in question; EPC structure foresees that translations may be filed in any of the three languages.

#### **Rule 57 ("Examination as to formal requirements")**

121. FR, supported by UK: R.57(1) is not in conformity with Office's explanatory note.
122. BE asks if users' views are known on this rule.

#### **Rule 60 ("Subsequent designation of the inventor")**

123. Office confirms to BE that users have been consulted.
124. NL, supported by epi: add "whichever time limit expires later" in R.60(1). Unclear what happens if applicant only receives information from Office after 16 months' period set out in R.60(1).
125. PT: delete reference to technical preparations in R.60(1).
126. Chairman: R.67 defines completion of technical preparations. Therefore no additional text is needed.
127. Office: this is not a new concept but standard PCT wording.

#### **Rule 62 ("Extended European search report")**

128. epi: amend R. 62(1) to read "unless it is accompanied by a communication ...". Rule covers case where applicant, in the interests of speed, has waived his right under R.70(2).
129. Chairman: R.62 reflects a decision of the Administrative Council. At its last meeting the committee provisionally closed its discussion on this rule.
130. Staff representatives: search report and communication are sent out by different Office entities.
131. Office: there should be two reports so that the first one is not held up.
132. Committee agrees to leave rule unchanged.

#### **Rule 68** **("Form of the publication of European patent applications** **and European search reports")** **- drafting later changed in Office non-paper**

133. Staff representatives/epi: "as filed" in R.68(1) does not take into account possible

amendments in the application documents under R.58., missing parts added under R.56(3) and claims added under R.58 in combination with R.57(c).

- 134. Office: abstract may also be published separately.
- 135. Office non-paper does not address concerns of Staff representatives and *epi*.

#### **Rule 69 ("Information about publication")**

- 136. *epi*: R.70(2) and Art. 94(2) EPC should be alternatives as they cover situations which are mutually exclusive.

#### **Rule 71(4) ("Examination procedure")**

- 137. Staff representatives: R.71(4) leads to applicant incurring unnecessary expenses. Examiners are obliged to be careful with all amendments. Procedure could be sped up if applicant were not obliged to file a translation of claims as amended or corrected.
- 138. Office: provision is relatively new and our experience with it is less than satisfactory. Might need to be improved, but only after entry into force of EPC 2000.
- 139. *epi*: we hope that this unsatisfactory rule will be changed in the long-term.

#### **Rules 76(3), 86, 92(1), 99(3), 107(3) ("Form and content of the opposition"/ "Documents in opposition proceedings"/ "Requirements of the request"/ "Content of the notice of appeal and the statement of grounds"/"Contents of the petition for review")**

- 140. Staff representatives/epi: *mutatis mutandis* references are too wide.
- 141. Office: detailed references in isolated cases would be less safe to use. *Mutatis mutandis* refers to formal requirements. In both case law and EPC, we have made good experience with wide references.
- 142. FR: *mutatis mutandis* is not used in French legal texts.

#### **Rule 78 ("Procedure where the proprietor of the patent is not entitled")**

- 143. *epi*: R.14(4) must apply *mutatis mutandis*. Preferably insert content of R.14(4) in R.78.

**Rule 99**  
**("Content of the notice of appeal  
and the statement of grounds")**

144. epi: R.99(1a): requiring name and address of appellant for notice for appeal is unnecessary formality, especially if these cannot be corrected under R.101. Use "information identifying the appellant or allowing the appellant to be contacted".
145. Office: there is case law to the effect that name of appellant may be corrected. Provision reflects normal practice and it is not too burdensome.

**Rule 109**  
**("Procedure in dealing with petitions for review")**

146. epi: R.109(1) time limit for summons should be one month at a minimum, with two weeks for R.4(1) first sentence, unless the parties agree.
147. Office: Enlarged Board of Appeal should set time limit, giving all interested parties right to be heard.

**Rule 114**  
**("Observations by third parties")**  
**- drafting later changed in Office non-paper**

148. Office non-paper is accepted.

**Rule 124**  
**("Minutes of oral proceedings and of taking of evidence")**

149. epi: R.124(1): minutes should also be drawn up for oral proceedings before Boards of Appeal.
150. Office: such minutes are minutes within meaning of R.124, which is flexible enough to allow various forms of minute taking. Boards of Appeal are considering whether to review minute taking practices in light of EPC 2000.

**Rule 135**  
**("Further processing") - drafting later changed in Office non-paper**

151. UK (supported by epi): do not exclude further processing in respect of R.60(1) period as sanction would be disproportionately harsh, nor in respect of R.31(2) period for which English law allows further processing.

152. Office: we agree regarding R.60(1) period. However, R.31(2) implements Art. 83.
153. UK: we provisionally agree, subject to further consultations.
154. epi: exceptions should be kept to a minimum.
155. Various *epi* arguments then follow (including Paris Convention and PCT, need for time to find out who the inventor is etc) as to why several other rules should not be excluded either.
156. Chairman: discussion should not be reopened on rules not affected by EPC 2000 changes.
157. Office lists various general criteria to explain rule.
158. DE: we agree with UK and, concerning remaining rules, with Office.

**Rule 136 (1)**  
**("Re-establishment of rights")**

159. epi: Art. 87(1) EPC and Art.112a(4) EPC: justifications given for the shortened time periods are not convincing.
160. Office notes the comment.

**Rule 158**  
**("The European Patent Office as an  
International Searching Authority  
or International Preliminary Examining Authority")**

161. epi: the three members do not appear to have the impartiality required under Art. 6 ECHR.

**Rule 163**  
**("Examination of certain formal requirements  
by the European Patent Office")**

162. epi: time limit given in R.163(4) is too long if R.163(4) leads to application of R.163(5). Insert "and, if necessary to meet the requirements under Article 133, paragraph 2, to appoint a professional representative".
163. Office : our practice is in line with *epi* suggestion. In practice, all points raised would be dealt with in one communication.
164. The committee noted CA/PL 17/06 Add. 1.

165. It gave a unanimous favourable opinion on CA/PL 22/06, subject to an editorial amendment in Rule 154 suggested by the Turkish delegation (delegations present: 29; for: 29).
166. The committee gave a unanimous favourable opinion on CA/PL 17/06 (delegations present: 29; for: 29), closing its discussions on the substance of the Implementing Regulations to the EPC 2000.
167. The committee agreed to revisit the Implementing Regulations to the EPC 2000 at its November 2006 meeting for a final check.

<b>8. Amendments to the Rules relating to Fees (RFees) in view of the EPC 2000 (CA/F 13/06)</b>
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168. The Office introduced the document.

**Article 2(12)**  
**("Fees provided for in the Convention**  
**and in the Implementing Regulations")**

169. The *epi* representative pointed out that in cases of accumulated requirements such as supplying a procedural document *and* paying a fee, a fee for further processing might have to be paid twice. It was unfair to doubly punish applicants for what was essentially a single mistake. In the absence of pre-printed forms, mistakes were likely to happen. The *epi* asked the Office to confirm that the maximum fee payable in the cases mentioned was EUR 210.
170. The Office could not confirm future Office practice but would ensure that double fees were avoided. Where an applicant forgot to enter a written request for examination in a situation where a fee was also paid late, a fee of EUR 210 would not become payable in addition to 50% of the relevant fee.
171. The *epi* requested that the wording of Article 2(12) be amended accordingly. It asked the Office to re-examine the situation in which neither a fee had been paid nor a written request for examination entered.
172. The chairman remarked that this issue was a drafting issue for the Office.

**Article 14(2) ("Reduction of fees")**

173. The Office agreed with the staff representatives' comments on Article 14(2). It would be more logical to use a refund rather than a reduction mechanism in the situation described therein. However, a proposal made by the Office in this regard had not found favour in SACEPO. The practical implications of the provision were limited. The Office would not change its practice for the EPC 2000 but might revisit



this point at a later stage. The RFees, in common with the Financial Regulations of the European Patent Organisation, did not form part of the EPC and could be revised by decision of the Administrative Council.

174. The committee gave a unanimous favourable opinion on CA/F 13/06 (delegations present: 28; for: 28).

**9. Proposed amendments to the Rules of Procedure of the Enlarged Board of Appeal (RPEBA) which the Enlarged Board of Appeal intends to adopt under Rule 11(2) EPC (CA/PL 21/06)**

175. The Vice-President DG 3 introduced the document.

**Article 2**  
**("Business distribution and composition")**

176. The staff representatives wished this Article to be consistent with Rule 13. Article 2(1) RPEBA should thus refer to Article 22(1)(a) -(c) EPC instead of Articles 112 and 112a EPC.
177. The *epi* representative questioned whether Article 2(2) RPEBA was in conformity with Article 6 of the European Convention on Human Rights. The business distribution scheme should ensure that the Board's composition was established automatically.
178. The Vice-President DG 3 explained that the whole of the Enlarged Board of Appeal, rather than its Chairman only, adopted the business distribution scheme. The procedure was in fact almost automatic. The Chairman was bound by the provisions of the scheme. This type of system was commonly used in courts.
179. The delegations did not support the *epi*'s proposal.
180. The *epi* representative was satisfied with the explanations given by the Vice-President DG 3.

**Article 4**  
**("Exclusion and objection")**

181. The staff representatives pointed out a typographical error in Article 4(1) RPEBA.

**Article 5 ("Rapporteurs")**

182. The Office, in reply to a question from the French delegation, explained that the rapporteur would be exchanged in the typical cases in which a Board member needed to be replaced, such as illness.

183. The *epi* representative believed that clarity could be gained by replacing the wording "shall generally go on to be the rapporteur" with "is generally the rapporteur". The term "shall" expressed an obligation, whereas "is generally" implied that exceptions were possible.
184. The delegations did not support the *epi*'s proposal.

#### **Article 6 ("Registry")**

185. The German delegation remarked that the term "Niederschrift" in Article 6(3) had remained unchanged in Rule 124. The term should be used consistently.
186. The Vice-President DG 3 agreed.

#### **Article 7 ("Change in the composition of the Board")**

187. In reply to a question from the French delegation on Article 7(2), the Vice-President DG 3 explained that in the circumstances described therein, there was no need to request oral proceedings separately.
188. The French delegation was satisfied with this explanation.

#### **Article 14(3) ("Oral proceedings")**

189. The *epi* representative believed that the wording "who shall as promptly as possible inform" did not make clear to which use the Board would put the information provided. It was also unsatisfactory that no time limit for informing the Board was stipulated. A time limit of one month from notification to the other eligible parties of the receipt of a request for a change of date should be used. Additionally, the words "such information also being considered in the exercise of the Board's discretion" should be added.
190. The Vice-President DG 3 explained that the drafting used was not new. In the past, it had not given rise to any problems. A one month's time limit was not efficient as it risked prolonging the proceedings. The whole sentence could be deleted but it should preferably remain unchanged as it worked well in practice. The term "agree" in the wording "whether or not they agree" did not imply a binding commitment. It was simply a practical indication of whether or not a suggested replacement date was convenient.
191. The chairman remarked that the provision in question governed a case in which the Board exercised a discretionary power. Flexibility was rightly needed.

192. The delegations did not support the *ep*'s proposal.
193. The committee gave a unanimous favourable opinion on CA/PL 21/06 (delegations present: 29; for: 29).

<b>10. Any other business</b>
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194. The committee agreed to hold its 31st meeting in Munich on 2 November 2006.
195. It noted the request of the German delegation to include "SPLT" on the agenda of such meeting.

The Committee on Patent Law approved the minutes contained in this document on 7 May 2007.

Munich, 7 May 2007

For the Committee on Patent Law  
The Chairman

A handwritten signature in black ink, appearing to read 'FICSOR Mihály', written in a cursive style.

Mihály FICSOR

## ANNEX 1 LIST OF PARTICIPANTS

CA/PL 15/06 Rev. 2

Orig.: de, en, fr

München/Munich, 27.09.2006

BETRIFFT: Teilnehmerliste der 30. Sitzung des Ausschusses "Patentrecht"  
(München, 19. bis 21. September 2006)

SUBJECT: List of participants of the 30th meeting of the Committee on Patent  
Law (Munich, 19 to 21 September 2006)

OBJET : Liste des participants de la 30<sup>e</sup> réunion du comité "Droit des brevets"  
(Munich, du 19 au 21 septembre 2006)

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)

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