

Never-ending amendments to the Implementing Regulation to EPC 2000 – What does the Administrative Council of the European Patent Organisation want?

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The third amendment to the Implementing Regulation to EPC 2000 since its entry into force on 13 December 2007, which is due to take effect on 1 April 2010, gives reason to question the frequency of amendments by the Administrative Council of the European Patent Organisation. These amendments relate primarily to the EPO-internal initiative “raising the bar”, whereby the procedural efficiency vis-à-vis the EPO is to be expedited and high-quality patents are to succeed in being granted. However, the latest amendments in particular result in a complicated and inefficient procedure and heavily restrict the applicants in their freedom of scope without thereby enabling positive effects to be expected in terms of high-quality patents. The authors conduct a critical discussion of the amendments and their implications.

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1 Introduction

The current decisions¹ of the Administrative Council of the European Patent Organisation (EPOrg) of 25 March 2009 have resulted in minimal understanding among applicants and authorized representatives. These decisions already constitute the third amendment to the Implementing Regulation to the European Patent Convention (EPC) 2000 since the latter’s entry into force on 13.12.2007. Since that point, not a year has gone by without amendments being made to the Implementing Regulation. The effect of this rapid sequence of amendments, particularly with regard to the amendments that enter into force in 2010, is that the extent and consequences of the amendments to the Implementing Regulation and the Rules relating to Fees can only become more difficult to comprehend by those involved in the procedures.

The implemented and proposed amendments to the Implementing Regulation relate primarily to the EPO-internal initiative “Raising the Bar”². This initiative is intended to drive the granting of high-quality patents. Closer scrutiny of the EPO Annual Report 2008 reveals another picture, however. The amendments are aimed at “enhancing procedural efficiency”³ and reducing opportunities for applicants to “circumvent efficient examination procedures”⁴. Its basic

¹ OJ 2009, 296-304

² EPO Annual Report 2008, Foreword by the President

³ EPO Annual Report 2008, Foreword by the President

⁴ EPO Annual Report 2008, p.9

principles are therefore restricting freedom of scope for applicants, and disciplining them. Whether such restrictions help improve the material quality and stability of patents is unclear and highly doubtful.

In this article, key points and consequences of the previous and approved amendments to the Implementing Regulation to EPC 2000 are critically highlighted.

2 EPC 2000 Legislation

2.1. Review

EPC 2000 was by no means completed with the conclusion of the revision conference in Munich from 20 to 29 November 2000 and the publication in 2001 of Special Edition No. 4 OJ EPO as per “Decision of the Administrative Council of 28 June 2001 adopting the new text of the European Patent Convention”. Since EPC 2000 made provision for a great many material and procedural points to be revised in the Implementing Regulation, EPC 2000 did not take any specific shape for all those involved in drawing up the Implementing Regulation until 2007. EPC 2000 then entered into force on 13 December 2007.

2.2. Effect of EPC Art. 33

The increased movement of material and procedural rules into the Implementing Regulation gives the EPORG Administrative Council greater opportunity to implement provisions in the Implementing Regulation itself (Art. 33(1)c). The Administrative Council was thus afforded extensive authority in terms of shaping the Implementing Regulation to EPC 2000. This extension of authority is explained as being due to practical considerations. They wanted to avoid the need to call a diplomatic conference regularly for minor amendments. Such extensive legislative authority conceals the risk that the body responsible will make amendments quickly and in its own interests. This is particularly problematic because the Administrative Council has no democratic legitimacy: its members are not

elected by the parliament of the Member State, but appointed by the executive. Moreover, the Administrative Council is actually a supervisory body which is intended to ensure that everything functions properly. In other words, from administrators selected by the executive has evolved – to the exclusion of the public – a body which assumes legislative authority and which is not subject to supervision. This neither corresponds to the principles of separation of powers, nor is it compatible with the judicial control of administration.

2.3. Unilateral legislative processes

Because even the Committee on Patent Law⁵, which prepares and advises on statutory amendments, comprises members of the Administrative Council and the president of the EPO (supported by EPO employees) as enfranchised persons, the Administrative Council has a free hand in terms of amendments to the Implementing Regulation. Other competent members of the Committee on Patent Law have only the status of non-enfranchised observers, such as – for example – the Institute of Professional Representatives before the European Patent Office (epi). If objections are raised by the observers, these may be taken into account but do not have to be. In any agreement about amendments, however, the enfranchised persons generally represent the interests of the Administrative Council or the Office management. This set of interests is then presented to the Administrative Council for decision. Critical opinions on the part of applicants or authorized representatives therefore carry no weight in the legislative procedures of the EPORG, because this group of persons has no voting rights either on the Committee on Patent Law or on the Administrative Council. Legislation is therefore carried out unilaterally by the Administrative

⁵ <http://www.epo.org/about-us/epo/administrative-council/council-bodies/patent-law.html>

Council, generally supported by the Office management.

3 Evaluation of the amendments of 1 April 2008

3.1 Claims fees

The amendment of R. 45 of 6 March 2008 and of further regulations based thereon had to be carried out consistently on the basis of the amendment to the Rules relating to Fees (concluded on 14 December 2007). This amendment incorporates the introduction of a claims fee of € 200.00 from the 16th claim, the first 15 claims being free of charge.

This new charging structure is proving to be particularly disadvantageous in particular for small and medium-sized businesses, if several independent claims in different categories are presented in one protective rights application. In such cases fifteen claims are not usually sufficient, for example, to enable a full claim set for a device, as well as for a method together with preferred embodiments, to be formulated.

Furthermore, it remains to be seen how the EPO will deal with patent claims in which a number of optional features from what used to be independent claims are combined using “and/or” or “preferably”, or similar connectives, in order to reduce the formal number of claims. A number of alternatives are then included individually within one independent claim.

In addition to criticism relating to the content, it is also difficult to understand the timing for implementation of these amendments, i.e. why they were not implemented immediately on 13 December 2007.

4. Evaluation of the amendments of 1 April 2009

The main amendments of 1.4.2009 relate to a standardized designation fee and the advancement of the due date for additional fees for extensive claims. In addition to the following criticism

relating to content, it should be noted that these amendments also would have been possible on 13 December 2007 with simplified transitional arrangements, i.e. without parallel application of two separate rules such as rule 38, 39 and 71.

4.1. Additional fee

From an overall perspective, in terms of processing costs at the EPO the advancement of the additional fee (as from the 36th page of the application) may be seen as a step in the right direction for the purposes of cause-related cost allocation. The page count is based on the version filed – whether in one or other language or in an official language. The page count according to any subsequently filed translation into an official language is irrelevant⁶.

4.2. Standard designation fee

A designation fee is legitimized by Art. 79. The introduction of a standard designation fee may simplify the process for the applicant, but for applicants who until now have restricted themselves to fewer than five designated countries at the start of the procedure, it means the process is more expensive. Both individual applicants and small/medium-sized enterprises are affected most heavily by this increase in costs.

Whilst any future amendment to Art. 79 will be taken into account in a diplomatic conference, it would be desirable for the designation fees to be completely canceled as a separate standard charge. The designation fee could just as easily be charged as part of the application fee when the application is filed or as part of the examination fee when the request for examination is presented. This would be a further procedural simplification for the applicant. A further simplification such as this also makes sense because, for Art. 54(3) EPC 2000, as a result of the discontinuation of R. 23a EPC 1973, the material significance of the payment of designation fees has likewise disappeared. This would then lead to an analogous

⁶ OJ 2009, 118, 3.2

arrangement with regard to the designation of countries such as in the PCT. Of course, this would also require a separate arrangement to be made for extension fees within the framework of a new extension regulation. Such an arrangement would need to be independent of the designation of contracting states to the EPC.

4.3. Claims fees

In addition to the introduction of a claims fee of €200.00 as from the 16th claim, it should also be mentioned that the Rules relating to Fees applicable since 1.4.2009 provides for further increased claims fees (€500.00) as from the 51st claim. In summary, with regard to the multi-level charging of claims fees applicable from now on, it should be noted that these could have been structured in a more applicant-friendly way especially for individual applicants and small/medium-sized enterprises, e.g. with lower charges (significantly less than €200.00) as from the 11th claim (similar to the situation prior to 31.03.2008) and increased charges as from the 30th claim (more than €200.00). This would have enabled the Office to protect its financial interests without any problems whilst at the same time taking any financially weaker applicants into account.

Whether the new fee structure for patent claims is advantageous for the EPO remains to be seen. In financial terms the five additional charge-free claims first represent a loss for the EPO. If this monetary loss cannot be balanced by the new claims fees, then further applicant-unfriendly charge increases may be expected elsewhere.

5. Evaluation of the amendments of 1 April 2010

Full information about the forthcoming amendments to the Implementing Regulation of 1 April 2010 may be obtained from the specified URLs⁷ or from the Official Journal⁸.

⁷ <http://www.epo.org/patents/law/legal-texts/decisions/archive/20090325.html>

In particular, the amendments to rules 36(1), 36(2); 137(4); 161 and to the introduction to the new rule 70a are dealt with below.

5.1 New procedure for divisional applications

The “divisional application” instrument was proposed by the Paris Convention Art. 4G(1). Since the EPC is a special agreement as per Paris Convention Art. 19, EPC provisions may not run contrary to the Paris Convention.

For reasons that are not comprehensible to outsiders, serious consideration has been given within the EPO to tightening the procedure for divisional applications. In the document CA/PL 8/08 of the Committee on Patent Law, Chapter IV “Abuse of Divisionals”, it was determined that any duplication of the examination procedure by filing divisional applications is an abuse of the patent system by the applicant. In order to curtail this abuse, on 25 March 2009 – to the surprise of applicants and representatives – rules 36(1) and 36(2) were amended by the Administrative Council decision which enters into force on 1 April 2010.

The following, on the subject of “abuses”, is quoted from Decision G 0001/05⁹ relating to divisional applications:

“If administrative measures, such as giving priority to the examination of divisional applications and bundling and speedily deciding co-pending divisional applications so as to minimize the possibility for applicants to keep alive subject-matter on which the Examining Division had already given a negative opinion in one application by means of refiling the same subject-matter again and again, are not adequate, it would be for the legislator to consider where there are abuses and what the remedy could be.”

<http://www.epo.org/patents/law/legal-texts/decisions/archive/20090325a.html>

⁸ OJ 2009, 296-304

⁹ OJ 2008, 271, § 13.5

Whether the filing of a divisional application constitutes an abuse is, therefore, discretionary to a large extent.

For the duplication of the examination process by filing divisional applications to qualify as abuse (CA/PL 8/08) is devoid of any foundation. The applicant pays an application and examination fee for each of these duplicates as well as annual charges that are already expired. From the economic perspective at least, the EPO does not suffer any disadvantage from the duplicates. On the contrary: processing is easier for a European application that has already been at least partially processed.

The abuse by duplication argument is supported by the EPO on the basis of the following figures (source CA/PL 8/08):

- 5% of all European patent applications are divisional applications;
- divisional applications of the second generation comprise 7% of all divisional applications; and
- divisional applications of the third or subsequent generation comprise 1% of all divisional applications.

Assuming that divisional applications of the second or subsequent generation are all based on “abuses”, then – on the basis of the application figures for 2007 of around 141,000 applications – this leaves a figure of around 550 “abusive” applications. Against this background it must be asked whether the normal processing of divisional applications of the second and subsequent generations (approx. 8% of all divisional applications or 4 in every thousand of all applications) costs less for all participants (applicants and their representatives, and Office) than the implementation, incorporation and monitoring of the new 24-month time limit. The selected regulation seems to benefit neither the Office nor the applicant, but results in an

unnecessary administrative cost for both sides. In addition, applicants are severely restricted in their freedom of scope. Resourceful applicants and representatives have already brought into circulation ways of circumventing the 24-month time limit, which enable a divisional application to be kept up their sleeve legitimately even after expiry of the 24 months¹⁰.

It will be interesting to see how the number of divisional applications in the first 6 months from 1.4.2010 will increase on the basis of the transitional arrangements incorporated in the Administrative Council’s decision¹¹. It should be expected that financially strong applicants will file at least one divisional application as a backup. This could also be a strategy of these very applicants in future before expiry of the new 24-month time limit. Since having such divisional applications in reserve could only be a realistic option for financially strong applicants, the new procedure represents a clear disadvantage for small and medium-sized enterprises and individual applicants. It may also be assumed that the number of divisional applications (in reserve) will increase, leading to a heavier burden on the EPO. In this regard, reference is made again to the Annual Report 2008: the Office “demands that resources are not squandered on systematically avoidable procedural matters”. This, however, is precisely what may be expected with the new procedure for divisional applications, because the applicant, if in doubt, will file at least one divisional application as a backup, which – if it is subsequently no longer needed – represents an avoidable additional procedural step which has its origin directly in the new regulations.

According to the transitional arrangements all applications still pending are also affected by the new procedure. This is a non-authentic retroactive effect in which the legal consequences of the amended Implementing Regulation do not enter

¹⁰ derived from US 2008/0221912 A1

¹¹ CA/D 2/09 Art. 3, OJ 2009, 296

into force until 1 April 2010, wherein the new arrangements are linked to current situations that have not yet been concluded (pending applications) with legal consequences for the future (time limit for filing a divisional application), with the result that the relevant legal position obtained in the past (divisional application possible as long as parent application pending) is retroactively invalidated. When weighing up all the interests at stake and taking protection of the applicant's legitimate expectations into account, the transitional arrangements would have to guarantee that the applicant's legitimate expectations are protected, since their confidence in the previous legal position, which is worthy of protection, takes precedence. Alongside this legal restriction, the transitional arrangements cause applicants and representatives to be additionally encumbered with a financial outlay amounting to tens of millions of euros (assuming the cost of a request for examination of only €80.00 per pending application, for example), in order to review the deadline situation with regard to divisional applications in each pending application and take steps accordingly.

In summary, it can be seen that the desired amendment to the procedure for divisional applications may be in keeping with the very general standards of the Paris Convention to the extent that divisional applications continue to be possible. However, with regard to procedural economics and administration, a poorly considered arrangement which – in particular – does not constitute “suitable rules” as publicized by the EPO¹², has been found for the applicant.

5.2 With regard to the introduction of R. 70a and the amendment of R. 161

The new R 70a relates to R. 70(1) and provides that the European Patent Office should request the applicant, if necessary, to rectify deficiencies in the application documents within a period of 6 months after notification of the search report

publication. The amended R. 161 provides for such deficiencies to be rectified within a period of 1 month.

On the surface these two rules give the appearance of direct EP applications and Euro-PCT applications being treated similarly. However, on closer scrutiny the amendments to these regulations have a quite different quality.

5.2.1 With regard to the new R. 70a

Even if, through the EPO's BEST program (Bringing Examination and Search Together), the same person carries out a search for an application, gives an opinion in the context of the extended European search report (EESR), and carries out the examination upon receiving the request for examination, in legal terms there is a separation in the EPC between search division (Art. 17) and examining division (Art. 18). This separation was not taken into account in this implementation of R. 70a. Articles 92 and 94 EPC stipulate what is to be carried out in the course of the search and/or examination by the legally separate divisions.

According to Art. 94(3) the examining division requests the applicant to amend the documents. The request provided for in the new R. 70a is made by the examining division responsible at this stage of the process (“the European Patent Office” as defined in R. 70a), but this, however, is not included in their responsibilities as defined in Art. 92, i.e. “drawing up and publication of the search report”. Since an opinion on the search report was introduced by R. 62 (EESR), the “drawing up of the search report” prescribed in Art. 92 may be assigned. However, a request for deficiencies to be rectified and documents to be amended goes beyond “drawing up and publication of the search report” as provided for in Art. 92. In this instance powers that are clearly assigned to the examining division according to Art. 94 are transferred to the search division, which is not responsible for them. At the time the EESR is issued, the application is not yet under the responsibility of the examining

¹² EPO Annual Report 2008, Foreword by the President p. 7

division. The examining division does not assume responsibility until the request for examination is submitted (R. 10(2)). This confusion of responsibilities and powers that are clearly legally
5 separate in the EPC can probably be directly attributed to the unity “perceived” in the Office between search and examination in the context of the BEST program. However, this unity is not incorporated into the EPC for legislative purposes.

10 If a request under R. 70a(1) is issued by a division that is not provided for this purpose according to the EPC, this also raises the question as to whether the legal consequences according to R. 70a(3) can actually have any effect. This will be clarified by
15 the future jurisdiction if an objection on this matter is to be handled.

The request in R. 70a will be enforced in the future if the search division finds deficiencies in the application documents. Moreover, advance
20 notice of this was already given in the 2008¹³ Annual Report which effectively makes reference to a “mandatory response [by the applicant] to the written opinion issued with the search report...”.

With regard to the introduction of R. 70a(1) it can
25 further be established that applicants make a decision based on their own assessment (in economic terms) of the application, which is in turn based on the results of the EESR, as to whether they wish to pursue the application. The
30 applicant pays the examination and designation fee accordingly. However, if the applicant decides not to pursue the application, the request according to R. 70a comes to nothing. From the internal perspective of the EPO, this is precisely
35 the opposite of “enhancing procedural efficiency”. Apparently, however, the EPO’s view concerning procedural efficiency is focused only on the applicant being enjoined to practice it.

5.2.2 With regard to the amended R. 161

40 According to the old and new Implementing Regulation, a communication according to R. 161

is issued only if the applicant has taken the necessary steps to initiate the regional phase in accordance with R. 159. This normally happens
45 with the 31-month time limit being fully exploited (R. 159). Generally speaking, the request for examination must also effectively be submitted once the 31-month time limit is reached. Effective submission of the request for examination means
50 that the relevant Euro-PCT application is transferred to the responsibility of the examining division (R. 10(2)).

The written communication or international preliminary examination report issued by the
55 ISA=EP or the IPEA=EP is comparable in terms of quality with a communication according to Art. 94(3). The quality of these two aforementioned documents/communications produced in the international phase is expressly recognized here.

60 The notification provided for according to R. 161 valid as from 1 April 2010 has two consequences:

- i) It is normally the first communication (= initiation of the regional European phase after 31 months), which has been issued by the examining division. The date of this communication subsequently triggers the new 24-month period for the filing of a divisional application (new R. 36(1), see section 5.1 above).
- 65 ii) The applicant must respond to a material office action within the statutory period of one month. No extension to this period may be requested according to R. 132(2), but further processing is possible if necessary
70 upon payment of a fee. In contrast, during the actual examination process the time limit for responding is generally 4 months, with the option to extend it provided sufficient notice is given.

80 The consequences described above result from an informed interpretation of the totality of the EPC regulations.

¹³ EPO Annual Report 2008, p. 10

5.2.3 Summing-up

The introduction of R 70a and the amendment of R. 161 with regard to the issuing by the search division of a request to amend the documents, appear to be poorly considered in the light of the above observations. This even leads one to ask, with reference to the new R. 70a, whether the Administrative Council has exceeded its authority in the amendments to the Implementing Regulation, since R. 70a does not present any development or specification of the relevant articles 17 and 92 of the EPC. Instead, any special competence of the search division not thus provided for in the EPC is defined in the Implementing Regulation, in order to make the unity of search division and examining division, as provided for internally through BEST, into law by insidious means. Implementing Office practice in the Implementing Regulation for legislative purposes in this way, contrary to the EPC, is simply not tolerable according to conventional understanding of the law. Unfortunately, however, there is no legal facility for taking action against Administrative Council decisions or having amendments to the Implementing Regulation reviewed by an independent entity.

The new R. 70a and the amended R. 161 compel the applicant, before an actual official communication is issued according to Art. 94(3), to state an opinion and rectify deficiencies in the documents by an earlier time limit than before. It remains to be seen how the EPO will deal with applications in which the applicant/representative provides only a brief statement of opinion in response to the communication according to R. 70a and/or R. 161, without making any amendments to the documents. According to R.70a(3) such a statement of opinion should be sufficient in order to avoid the fiction of withdrawal in R. 70a(3).

The enhanced efficiency that the EPO is allegedly striving for in its examination process can only be achieved if the Office itself also duly responds

within a few months (<6 months) to amendments or opinions submitted. If the Office allows itself more time, it would be also possible to retain the currently valid procedures including office action and extendable 4-month period. The authors doubt that the EPO has sufficient capacity to implement the desired enhancement in efficiency internally to the same extent that the EPO expects of the applicant. Whether any enhancement in efficiency in the Office's procedural management will be conducive to the quality of examination remains to be seen.

5.3 With regard to the amendments to R.137

The amendment of R. 137(2) is the logical consequence of the new R. 70a and R. 161.

In R. 137(3) the provision whereby the applicant, upon receiving the first communication from the examining division may change the description, the patent claims and the drawings once, provided the amendment is submitted at the same time as the response to the communication, has been deleted. According to the new R. 137(3) the examining division has the option of no longer giving applicants any opportunity to submit amendments if they have not responded to a request according to R. 70a or R. 161. This situation can occur even though the applicant has submitted the request for examination and even though the applicant is assured in Art. 94(3) that the examining division requests the applicant to submit amendments as often as is necessary. It is therefore possible that the examining division actually responsible for examination of the patent application, on the basis of the opinion on the European search report or on the basis of the written opinion of the international search authority or the international preliminary examination report, will issue an immediate refusal if it does not wish to approve any further amendments.

Fulfillment of the requirements according to the new R. 137(4) is now already a matter of course.

The existing set of instruments is sufficient, in the authors' view, to remind applicants of any unsatisfactory evidence in the disclosure of amendments they carry out, c.f. guidelines E II 1.

5 If there is insufficient evidence of amendments carried out, under current law a notice with a time limit of 2 months could be issued in accordance with Art. 94(3). The time limit of one month now established in the new R. 137(4), and which
10 therefore cannot be extended, is very limited so that it results in frequent further processing work for the EPO. With regard to the desired "procedural efficiency" the time gain of up to one month compared to a notice under Art. 94(3), is
15 negligible in relation to the length of the overall process. If the time limit for further processing is fully exhausted by the applicant in the event of an infringement against the new R. 137(4), i.e. 2 months after receipt of a corresponding
20 communication concerning loss of rights according to R. 112(1), it may be assumed that the period until the deficiency is rectified is at least 4 months, since the issuing of the notification according to R. 112(1) normally takes a few
25 weeks. This therefore raises the question as to whether it would not be (or have been) better, for the purposes of procedural economy, to retain the previous procedure with a time limit for the Office of two months, extendable up to a maximum of 4
30 months. The existing options, however, are far too applicant-friendly for the EPO and result in fee income (in the form of further processing fees) in very few cases.

35 6. Stability of the EPC as surety for applicant and EPO

Since the introduction of EPC 2000, amendments to the Implementing Regulation have been made by the Administrative Council in each successive year – up to and including 2010. This flood of
40 amendments gives rise to the question as to whether the EPO have accurately compared the costs incurred internally for implementation of the amendments, for example for adapting computer

systems, publishing the amendments, training the formalities officers and the examiners, and
45 adapting the examination guidelines, against the expected benefits and/or (time) gains resulting from the alleged increase in procedural efficiency in administration. It is feared that poorly considered amendments have been and are being
50 implemented under the pretext of enhancing efficiency, or by giving the impression of alleged abuse of the patent system by applicants and representatives. It is also impossible to escape from the impression that – particularly in the case
55 of the amendments due to enter into force in 2010 – impulsive action on the part of the EPO was the driving force, without the committees responsible appearing to be fully aware of the consequences.

60 According to the EPO, the amendments that are currently known about will not have been the last ones. Instead, the Office management and/or Administrative Council are discussing yet further adaptations of the Implementing Regulation, including processing of auxiliary requests,
65 creating a Manual of Best Practices¹⁴, requesting the lodging of national searches, and deferred examination, to name but a few. It should already be noted, at this point, that the interests of procedural efficiency would not be served if EPO
70 employees involved in the procedures are required to take into account yet another manual – and not even a legally binding one at that – in addition to the Implementing Regulation and examination
75 guidelines.

At the beginning of the article, it was suggested that the legislative authority incumbent upon the Administrative Council, which was increased as a result of the introduction of EPC 2000, can also be
80 dangerous. With the current frequency of amendments to the procedure vis-à-vis the EPO, the Administrative Council is corroborating this fear. Particularly with regard to the most recent amendments¹⁵, what matters is not just the speed

¹⁴ EPO Annual Report 2008, p. 11

¹⁵ OJ 2009, 296-304

of their implementation but also the fact that their implementation primarily serves the interests of the Administrative Council and/or the EPO management and excludes the interests of applicants.

It is regrettable that an overall system that works well per se (EPC) is subject to modifications in the form of quick-fix solutions that bring no actual benefit either for the Office or for the applicants.

The fact that applicants are placed under some kind of general suspicion of “circumventing efficient examination procedures”¹⁶ in order to justify these amendments is unacceptable, and is entirely unsubstantiated by the Office management or Administrative Council. The critical statements contained in the 2008 Annual Report relating to the alleged abusive conduct of applicants are fundamentally inappropriate for promoting the patent system. Instead, arguments for patent opponents are publicized there on the part of the EPO, something that is in the interests neither of the EPO nor of the applicants and representatives.

Amendments to the Implementing Regulation should always be judiciously geared toward being acceptable and reasonable for the majority of applicants. Impulsively attacking the issue with a legislative blunderbuss in order to curtail abuses that cannot be substantiated is something that ought to be avoided by the Office management and the Administrative Council. The hope remains that the Administrative Council will refrain from agreeing further such amendments to the Implementing Regulation and will permit discretion and restraint to prevail in legislative matters. Such restraint is all the more essential in view of the lack of judicial control over Administrative Council decisions.

It would also be desirable for the legislative process if the position of the applicants and representatives were to be strengthened, at least on

the advisory Committee on Patent Law. This group, which is affected by all amendments, should be granted voting rights. This requirement, in conjunction with the proposal for an amended composition of the Administrative Council, was also recently raised by the former Chief Economist of the EPO¹⁷.

The authors fear that the amendments to the Implementing Regulation on 1 April 2010 and further vaguely proposed amendments will bring about a creeping destabilization of what was, in the past, a highly successful EPC/EPO, and their intention with this paper is to stir up and stimulate discussion among a broader expert community.

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¹⁶ EPO Annual Report 2008, p.9

¹⁷ http://www.bruegel.org/fileadmin/files/admin/publications/blueprints/2009/patents_BP_050609.pdf, p. 45 ff.