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SUBJECT: Activities report of the President of the European Patent Office

SUBMITTED BY: President of the European Patent Office

ADDRESSEES: Administrative Council (for information)

SUMMARY

This activities report focuses on the strategic aspects of the period under review (first half of 2010). In order to reduce the volume of information in the report itself, a list of documents containing further details has been appended.

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I. INTRODUCTION

This activities report - the last of six during my term in office - follows on seamlessly from the preceding ones. Over the past few years, I have been able to report a positive trend in the use of our available funds and this trend is continuing - although the economic crisis continues to worry us.

I can nevertheless again give a positive report. Details will follow later, but for now, I would just like to say that the efforts to improve things on the expenditure side, but above all to increase our productivity and efficiency, have continued to be made in the period under review.

As far as strategic renewal is concerned, we have kept up our work on this too and achieved some tangible success. A few words on social partnership: as will be reported more thoroughly later, the staff representatives abandoned the initiative in spring. I will not go into details here or apportion blame. But let me just say: the serious attitude displayed once again by our staff during the period under review, and the production resulting from it, appears to contrast with the ability of the staff representatives and the management to find appropriate forms of dealing with one another and developing structures for effective social co-operation. That is not just sad; it cannot be good for the Office as such and, indirectly, those who work here and depend on it. We cannot collectively continue to ignore what is going on in the world around us, not least in the member states. Put simply, it is naïve to believe that, like some kind of island, the Office will remain untouched by these enormous changes. We, starting with the Council, but also the management and the staff representatives, bear a joint responsibility not only in terms of our social mission, but also towards those who ultimately fulfil it - our staff.

No substantive action was taken during the period under review to put the political declaration on the EU patent into practice. Not that we had necessarily expected any, but I personally would have welcomed it. We need a better patent system in Europe. From a broader perspective, IP as a whole must be given an enhanced economic, social and, especially, political status in Europe if we are serious about the knowledge society and Europe's role in an increasingly competitive international environment. It is a joint task for the EPO and, to a large extent, the national offices to support the European innovation agenda. We cannot simply pay lip service; it must become economic reality.

II. PRIORITIES FOR 2010

Here are the developments to date on the priorities I committed to for the remainder of my mandate.

A. SOCIAL PARTNERSHIP

As reported to you in CA/145/09, management and staff representatives embarked on a two-headed initiative. Whilst we agreed to start by addressing behaviours and process, the management also wanted more emphasis to be put on structures and machinery. The two have to go together and indeed both sides made real efforts to progress along these twin paths. We in the management felt, and indeed still do, that a more cohesive structure for staff representation combined with a redistribution of powers between the parties is urgently needed in order to resolve our differences within a reasonable time frame.

The Central Staff Committee was not comfortable with this emphasis on structure, and so it was that a gradual withdrawal from the discussions set in last autumn. We were still signalling the will to continue dialogue right into the beginning of this year. On 4 February 2010, the CSC published an open letter in which they said *inter alia* that "no time should be wasted any more on structures up front, which is why we withdraw from the social partnership process as it is currently unilaterally defined and designed."

So what should happen now? May I say that, whilst I am of course disappointed at the way things have developed, it has not all been for nothing. The production figures continue reflecting, as was the case last year, relative harmony between staff and management. Senior management believes that its position has broad support in the general body of staff. I and my management team agree with the view expressed by our industrial relations adviser that changed structures are not enough unless they are accompanied by better process and behaviour. The EPO is more than just an employer. Changes in the rules and conditions will always be sensitive. And clear well-thought-out communication will be essential. Doing nothing is not an option, and my management team is exploring the possibilities for a new dialogue.

B. FINANCES

Before addressing the (positive) substance of this chapter, allow me to stress the following: due to the further improvements introduced into the year end-process, Finance was able to accelerate even further the preparation of the IFRS Financial Statements and for the first time was in a position to present all the 2009 official financial reports to the spring meetings of the BFC and AC and not to the autumn ones, as was customary. Such reports include notably the Audited Accounts for the 2009 period, and the results of the Unit Costs for 2009.

The Office obtained again in 2009 a positive IFRS operating result. Furthermore it also achieved a substantial improvement in the evolution of its unit costs: starting from a cost performance index of 100 in 2006, the index improved from 98.2% in 2008 to 95.4% in 2009. Both these results are a clear demonstration of the strong commitment of the Office management to a strict budget execution and to the implementation of efficiencies in its processes. As these issues are the subject of other agenda items of today's meeting, I will not dwell further on them.

The Office is also placing a lot of emphasis on its policy of early communication of its financial planning to the Member States. It presented to the BFC in June the basic assumptions for its 2011 Budget, as well as its first preliminary draft budget for 2011, including the IFRS Forecast Statement. The Office's proposal takes due account of the current financial crisis and, as was the case in previous years, the budgetary credits have been restricted wherever possible, in order to ensure that the negative IFRS Budget Operating Result is limited to an amount that could be compensated during the budget execution, with the aim of delivering a final positive result for 2011.

Considering that the financial crisis is not yet over, the management of the Office is committed to ensuring that its financial strategy is kept closely in line with prevailing circumstances. In this light, the Office has prepared for the BFC and the AC a detailed status report on the current status of implementation of its Financial Strategy adopted by the AC in 2007. This report should serve as the first building block of further analysis and studies on the adaptations to be introduced in the Office's financial strategy for the years ahead.

In matters of internal financial regulation, the Office has delivered a proposal for a substantial adaptation of the procurement rules which are included in the Financial Regulations. These changes, which would take effect as from 1 January 2011, are in line with the recommendations formulated by the auditors. They are aimed at improving the internal management of these processes, by creating a Central Procurement Unit for the Office, and at ensuring the realisation of best value for public procurement. Preparatory work will continue in the second half of 2010, including an adaptation of the Tender Guidelines, which will be submitted to the October meeting of the Budget and Finance Committee.

The Office also pursued in the first months of 2010 the discussions on fee reform and sustainable financing with member states, with the presentation of a series of documents to the March and June AC. Further steps in this process should pave the way for future developments geared to ensure the efficient functioning and the long term financial sustainability of the patent system in Europe.

C. CONTINUATION OF THE STRATEGIC RENEWAL PROCESS

Strategic Renewal is the framework which covers all our change activities. Progress has continued and the changes are steadily becoming more concrete:

a) Co-operation with European partners and global IP5

Activity in this area has increased accordingly with growing realisation around the globe that the only practicable solution to workload problems is through effective relationships and processes enabling the efforts of other patent offices to be reliably re-used and thus sharing the task of managing the global patent system.

In terms of **utilisation** of work within Europe, a major step was taken in December last year with the revision of EPC Implementing Regulations (revised Rule 141 EPC, new Rule 70b EPC). As from 01.01.2011 applicants will have to submit to the Office a copy of the search report established by the Office of first filing with the European patent application or as soon as such a report is available to them. Applicants will not be required to do so if the national search reports are available to the Office electronically. Significant progress has been made with regard to the internal implementation of the new Rules (changes to the IT-systems, preparation of the relevant legal texts). Our focus is now turning to a project with member states to complement these first utilisation measures.

In April, the **IP5** process received a significant boost at the meeting of the heads of office in Guilin (China), where the "green light" was given to execute the mandates of all ten Foundation Projects to deliver the IP5 vision, namely "*the elimination of the unnecessary duplication of work among the offices, enhancement of patent examination and efficiency and quality, and guarantee of the stability of patent right*". In total, the IP5 offices will invest some 210 full-time equivalents (or person-years of work) in 2010 and 2011 to achieve agreed short-term goals.

In terms of the foundation projects led by the EPO (Common Documentation and Common Hybrid Classification), progress has been made through pilot projects in two technical areas resulting in classification changes to be forwarded to WIPO for introduction in the IPC. This represents the first tangible production result among the IP5 Foundation projects.

Trilateral co-operation continues to be pursued in parallel to the IP5 programme, although steps are being taken to combine activities where possible. Concrete examples of the latter include the Four Offices Statistical Report, which for the first time in 2009 included data from KIPO (SIPO contributed as an observer), and the

inclusion of both KIPO and SIPO in the Technical Data and Standards Area working group. During the first half of 2010, the Office also extended its Patent Prosecution Highway pilot programme with the USPTO and launched a further pilot with the JPO. The EPO was, furthermore, instrumental as regards the conclusion of the Trilateral PCT - PPH pilot which was also launched earlier this year.

b) Single Patent Process programme (SPP)

As reported in CA/44/09, an overhaul of our patent-examination processes is currently underway through SPP. Careful preparations were subjected to an external review which recommended that the programme move to the next phase. A first tranche of projects were therefore approved in the first quarter of this year and work has begun. The programme is being led by VP 1, supported by a Programme Board made up of representatives of the key stakeholder groups at the EPO and an external stakeholder representative. To accompany the first projects stakeholder-engagement efforts have been launched, with presentations to staff and national offices, as well as to the External Focus Group. The first project outputs will be on the desks of examiners and formalities officers by the end of the year.

c) Raising the bar (RTB)

In order to further increase the efficiency of our procedures and the quality of incoming applications, a series of measures have been taken in the framework of RTB. A first package of these measures entered into force on 1 April 2010. The rules now in place: enable patent examiners to focus the search on the subject-matter for which protection is sought; put more emphasis on the search opinion thereby streamlining examination; and restrict the filing of divisional applications by providing for appropriate time limits for filing them.

All examiners and formalities officers have been trained on the new procedures. PCT procedures related to RTB are currently under implementation while approval is being sought for a proposal to amend the final stage of grant procedure. A campaign to encourage more good quality third party observations is being prepared. A proposal to publicise the reasons for grant is being prepared following consultation as to the merits and drawbacks of providing such information.

As regards inventive step, the Guidelines for Examination were adapted to the more recent case law of the EPO's Boards of Appeal in order to ensure that examiners apply the current EPO standards in an efficient and consistent manner across all technical fields.

III. PERFORMANCE AND PRODUCTION

A. PATENT PROCESSING

In 2009, we experienced one of the few drops in filings in the EPO's history. With 8% fewer European applications filed, we ended the year at the 2006 level. However, the preliminary figures for the first four months of 2010 show that the worst may be behind us. At the end of April, applications filed were 2% up on the 2009 figures, although this is still below the level of 2008 and considerably less than the numbers used in CA/40/09 (the MTBP).

Compared to the same period of 2009, during the first quarter of 2010, the EPO received slightly more search requests (fewer PCT international search requests, but many more national search requests), and a stable number of EP examination requests.

In the first quarter of 2010, the EPO completed 2% more search cases than in Q1 2009 and about 22% more examination cases. In early June, DG 1's internal clock indicated that DG 1 production in terms of examiner products was 4% over the MTBP. However, the number of published patents is still well below the MTBP, despite an 18% increase compared to the same period of 2009. The pending workload (search, examination and opposition) has been kept in check since March 2009, increasing minimally by 3 000 files to reach 708 500 cases.

The drop in filings has resulted in overcapacity in Patent Administration. Measures to deal with the supernumerary situation are being developed. In the view of management the situation is manageable. In the examination area the number of examiners in post has been kept constant at 3 990. For the Office as a whole, the number of person/months paid is being monitored on a monthly basis and remains constant.

B. DOCUMENTATION AND IT SUPPORT

The EPO is extending its activities.:

The launch of the second full-text MT (machine-translated) collection covering the frontfile of the Korean patent collection. As such, the EPO is pursuing an aggressive data acquisition policy to cover the oriental patent collections representing today half of the patent data collections.

In the non-patent literature (NPL) field, the EPO is enforcing a quality strategy to ensure better comprehensiveness of the NPL databases covering standards like the 3GPP database. This collection relevant to the telecommunication field is the third most cited NPL collection one year after its launch.

On the search tools side, the Query Builder Assistant, a new application in the Suite of Examiner Applications (SEA) was successfully deployed to all EPO users, enabling knowledge sharing across examiners. Queries, synonyms and translations set-up and tuned in EPOQUE by one user are suggested and recommended to other users.

C. PATENT INFORMATION

In a repeat exercise of the major survey carried out in 2003, the Office commissioned a new study of how patent information is used in Europe. The results include some worrying messages. For example, awareness of patent information within innovative industry has not increased since 2003. A detailed analysis will be published shortly.

As part of its efforts to improve understanding on how patent data can support business decisions, the Office has been developing a new "visualisation tool", which will be available via the internet and will display patent statistics in a graphical and easily comprehensible way.

The EPO has established a new classification scheme in order to produce sector-related technological information in the field of climate change mitigation, which will be released in June 2010 to the relief of researchers and analysts working in this area. This delivery was part of the joint project run by the EPO, UNEP and ICTSD to examine the role of patents in the development and transfer of environmentally sound technologies, in particular in the field of energy generation. The report, which will be published in autumn, partly confirms findings of other parallel studies and provides further important insights, particularly concerning licensing activity. Areas for further research are also identified. These activities have been the focus of the EPO Annual Report for 2009 and the European Patent Forum in Madrid, which took place at the end of April.

The Office also released a new version of its free patent portfolio evaluation software, IPscore. The first half of 2010 saw, among other things:

- the PATLIB conference, held in Dresden in co-operation with the German Patent and Trade Mark Office, which focused on the use of patent information as a tool for business
- the 8th East meets West Forum on patent information from Asia regrettably had to be cancelled to the travel chaos caused by the cloud of volcanic ash from Iceland.

D. BOARDS OF APPEAL

At the end of April 2010, the Boards of Appeal had received 919 technical appeals, 3% less than in the same period of 2009. In the same period, the number of cases settled was 667. Currently, 5 639 cases are pending before the Technical Boards of Appeal.

At the end of April the Enlarged Board of Appeal had received 3 petitions for review (same period of 2009: 7) under Article 112a EPC. In the same period the Enlarged Board of Appeal handed down 4 decisions on petitions for review (same period of 2009: 5).

In spring of this year, the Enlarged Board of Appeal handed down four decisions on referrals. In **G 1/07** the Enlarged Board held *inter alia* that a claimed imaging method, in which, when carried out, maintaining the life and health of the subject is important and which comprises or encompasses an invasive step representing a substantial physical intervention on the body which requires professional medical expertise to be carried out and which entails a substantial health risk even when carried out with the required professional care and expertise, is excluded from patentability as a method for treatment of the human or animal body by surgery pursuant to Art. 53(c) EPC.

On the issue of dosage regimen, the Enlarged Board held in **G 2/08** that where it is already known to use a medicament to treat an illness, Art. 54(5) EPC does not exclude that this medicament be patented for use in a different treatment by therapy of the same illness. Such patenting is also not excluded where a dosage regime is the only feature claimed which is not comprised in the state of the art. The Enlarged Board ruled that where the subject matter of a claim is rendered novel only by a new therapeutic use of a medicament, such claim may no longer have the format of a so-called Swiss-type claim.

In its opinion **G 3/08** concerning the patentability of programs for computers the Enlarged Board held a referral by the President of the EPO inadmissible as there was no divergence in the case law which would make the referral admissible.

In **G 4/08** the Enlarged Board ruled that if an international patent application has been filed and published under the PCT in an EPO official language it is not possible, on entry into the European phase, to file a translation of the application into one of the two others which would then become the language of the proceedings.

Three referrals are pending before the Enlarged Board of Appeal. The case **G 2/07** relates to the exclusion from patentability of essentially biological processes for the production of plants. This referral has been joined with **G 1/08**, which is concerned with similar issues. Finally, case **G 1/09** is concerned with the question whether an application refused by the Examining Division remains pending until expiry of the period for filing an appeal where no appeal has been filed.

IV. SUPPORT FOR OPERATIONS

A. INFORMATION MANAGEMENT

Information Management (IM) made progress in its contribution to the SPP Programme, in the definition of the mandate of key projects that are going to be launched in Tranche 1, and in the set up of the SPP Capability Group. IM is also busy with preparing the future in order to assure business continuity in parallel with the implementation of future changes. Among other things, IM worked closely with DG 4 on the study of the refurbishment of two computer rooms in The Hague and in Munich.

Furthermore, a new version of Madras, the software for Formalities Officers, was released in March 2010. This included support for the 1st basket of Raising the Bar changes, the PCT-SIS (Supplementary International Search), PCT refunds and the 2010 fee changes, as well as an important new ergonomic feature in the form of a voice command module. The latest version 5 of the Online Filing application contained significant maintenance fixes in addition to support for the 2010 fee and Raising the Bar changes.

On the machine translation programme, German, Spanish, French and Italian are available with full technical dictionaries. Work is ongoing to improve the quality of the current French and Italian translations. In addition, other translation engine providers are being evaluated due to the fact that the market is moving and engines are improving. The evaluations include Portuguese and Swedish.

B. QUALITY

The ISO9001 Implementation Project is in the initiation phase. A project plan including descriptions of the deliverables is in preparation. To facilitate the drafting of a project business case, an ISO9001 User Workshop was arranged to assist the Senior Users to understand and define the benefits of implementing ISO9001 and how the realisation of these benefits can be assured, measured and managed.

The EPO has taken an important step forward as regards managing search quality. As from the middle of 2010, for all searches performed, examiners will provide a record of what they searched, where they searched and how. This will underpin the EPO's ability to build on the expertise of its examiners, by managing and improving the quality of the searches produced. It is also central to effective reduction of unnecessary duplication.

The contents list for the Manual of Best Practice has been finalised. The manual will provide guidance to improve the co-operation between applicants/representatives and examiners/formalities officers at the EPO.

A further important development in the quality area has been agreement by the Trilateral Offices on the items to be covered in the Catalogue of Differing Practices. This will support work sharing activities by the trilateral partners. The Catalogue will also provide a basis for the IP5 Foundation project "Common Rules for Examination Practice and Quality Control"

Following an international open tender, the Office has started the implementation of a new 2-year cycle of user surveys, covering each Joint Cluster. Applicants and representatives will be interviewed regarding their satisfaction with many aspects of the search and examination services of the Office.

C. INTERNATIONAL AND LEGAL AFFAIRS

Albania became the 37th EPC Contracting state on 1 May 2010 and the extension agreement with Montenegro entered into force on 1 March 2010. The EU and the EPO are intensifying their support for these two countries and negotiating new EU funded projects. Serbia is likely to follow in the second half of 2010 or in 2011. On the basis of the mandate granted by the Administrative Council in December 2009 (CA/161/09), the Office opened the official negotiations with Morocco on a validation agreement.

Despite the economic crisis, most of the co-operation projects with member states have continued to be implemented successfully, such as the pilot projects on IP pre-diagnosis services to SMEs and on technology transfer from university to industry. A new e-governance model based on common standards was developed and approved. The concept of EPN workshops with member states continued identifying, defining or stepping up those projects which particularly aim at harmonising the European patent system (e.g. the future of PATLIB centres and of the European Machine Translation Programme) and strengthening the capacity of national patent offices.

The meeting of the Standing Advisory Committee before the EPO (SACEPO) took place on 21 June and was honoured by the presence of the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, Mr David Kappos. Participants had an extensive exchange of views on current issues affecting the development of the European and the global patent system, with particular reference to utilisation of work and the progress in the area of IP5 co-operation.

The Information Office Munich, together with the Electronic Library, held an open day on 16 March to inform the public about the legal and procedural changes entering into force at the beginning of April. This free event attracted close to 200 patent professionals, who gave positive feedback on the event.

The Legal Division was again faced with a constant high level of files concerning interruption of proceedings due to bankruptcy of the applicant. The main reason for this situation seems to be the still ongoing effect of the economic crisis.

With 9 600 entries at the end of May 2010, the number of registrations on the list of professional representatives remains at a stable level.

As part of the "strengthening the PCT" exercise we have completed the preparations for offering a new service as of 1 July 2010, the Supplementary International Search (SIS). So far applicants have shown very little interest in the system, and we are very curious to see whether this will change now that for the first time a large PCT authority starts to offer the service.

D. BUILDING MATTERS

Progress with the renovation work on the Isar building is on your agenda today and you have received a detailed report.

Further deterioration in the facade during this year's particularly severe winter has lent added urgency to tackling the problems with the tower building in The Hague. All the possible options are currently being explored and you can expect a detailed report with proposals later in the year.

E. COMMUNICATION

The European Inventor Award and the European Patent Forum 2010 were held on 28 and 29 April. Over 300 delegates from a large number of member states and beyond - researchers, technology transfer experts, administrators and policy makers, lawyers and IP experts - joined hands in Madrid to honour European inventors and to discuss the role of patents in responding to the threats of climate change. For two days, Spain's capital became Europe's intellectual property capital, attracting high-level attendance from the Royal Family, representatives of the Spanish government (which currently holds the EU Council Presidency) and from the European Commission, as well as from other institutions and bodies. The huge positive press coverage across Europe and even beyond demonstrated how IP contributes to the European innovation agenda.

The Annual Report 2009 was made available on the EPO website on 26 April on the occasion of the World Intellectual Property Organization's 10th World IP Day, whose theme "Innovation - linking the world" is also a central part of a study on patents and clean energy which is mentioned under the patent information section of this report.

V. RELATED CA DOCUMENTS

Finances

CA/33/10, CA/34/10, CA/36/10, CA/38/10, CA/39/10 - Fee Reform and Sustainable Financing

CA/35/10 - Basic assumptions for the business plan, the budget 2011 and the financial estimates 2012-2015

CA/45/10 - Performance management - Unit Cost results for 2009 and Cost Coverage

CA/76/10 - Amendment of the Financial Regulations relating to procurement

Strategic Renewal Process

CA/56/10 - Single Patent Process - status report

Performance and production

CA/18/10 - General EPO statistics

CA/19/10 - Filing figures as at 03/2010

CA/35/10 - Basic assumptions for the business plan, the budget 2011 and the financial estimates 2012-2015

CA/35/10 Add. 1 - Basic assumptions for the 2011 plan

CA/40/09 - Business Plan 2010-2014

Legal / International

CA/80/10 - Final phase of patents and climate change project

CA/84/10 - Progress report on Trilateral and IP5: 3rd meeting of IP5 heads

CA/161/09 - Opening of official negotiations with Morocco on a validation agreement

General administration

CA/87/10 - Progress report on the Isar building renovation