Intervention of D. Heller 24/03/2009

Ladies and gentlemen,

In this Council we often talk about the production and productivity of the EPO, in particular those of the examiners. We have heard your views and the views of the administration on the issue. The staff representation has been given an opportunity to comment on those views. We nevertheless feel that the perspective of those directly concerned has not been sufficiently heard and understood. And it is essential that the views of the staff concerned are heard and understood because these are the people who ultimately have to implement the policies for increasing production and productivity decided by the Council and by Management. How can these policies be implemented? Can they be implemented at all? In our opinion, some can't and that is why we submitted the document CA/53/09 entitled "examiner productivity landscape". I presume that you have read the document so I will not go into detail, but only repeat the key points.

The key elements of the examiner productivity landscape are:
- the documentation
- the procedures,
- the applicant
- the production targets set by the Office

I will briefly comment on each of those and on the way these changed during the last decade.

1. The documentation

Like in your national offices, some 10-15 years ago the documentation consisted of a well-**classified** collection of paper documents in little boxes. Incoming applications would normally fall in one or two of those classes. Sometimes neighbouring classes may have had to be searched as well. But what is important to realize is that, at the time, the amount of material that had to be searched was **finite**. Once the relevant classes were searched the examiner would know that the search was finished.

This situation has changed dramatically with the introduction of electronic databases and electronic search tools. Searching the original well-classified paper collection has become easier through the introduction of electronic search tools. But these days an immense array of technical databases are also available that are likely to contain

relevant material and hence need to be searched. For many technical fields the Internet may further also hold relevant information. Almost all these new sources of prior art need to be searched individually. This means that for a single application 3-4 searches, each with their own strategy adapted to the structure of the particular database or group of databases, needs to designed and executed. And all of these databases are growing rapidly. In other words: the amount of material that has to be searched has, for all practical intents and purposes, become **infinite**.

The external databases and certainly the Internet are further **not classified** in a way that helps the examiner limit the search to a reasonable number of documents. I suppose that you all are familiar with Google. Imagine trying to find on Google a method, consisting of known steps in a different order. Keywords (if available at all) will return all the documents having the known steps, and that is a lot. How many documents would you need to read to find out whether the method steps are in the right order? Imagine trying to find out a composition that differs from what was known only in the relative quantities. How many documents would you need to check on the percentage of the relative components? Imagine trying to find out a mechanical construction characterized by spatial relations. What keywords would you use?

Finding an invention in such an enormous amount of data is like finding a needle in a hay-stack. Apart from requiring a lot of thinking and being a lot of work, it is furthermore stressful because no search can ever be "complete", and there will always be the nagging doubt that "something" may still be hiding out there.

When I talk with colleagues from the Controlling Office or IM I sometimes get the question why examiners have not become more efficient despite the massive improvement in electronic search tools. The answer is above: whilst these tools are certainly powerful, the amount of, and the diversity of the data that needs to be searched has increased more rapidly than the power of the tools. And the nature of the job - after all inventions are supposed to be new and **inventive** - is such that it is unlikely that electronic tools can ever effectively replace human analysis.

2. The procedures

Turning to the procedures, you are aware that one of the major changes was the introduction of a search opinion. It is clear that

producing a search + a search opinion is more for the examiner than just producing a search. It is important to realize that this extra work is not accounted for in any way. The extra work is obviously recovered if the application comes back for examination. But if the file doesn't come back, which is the case for some 30-35% of the PCT files and 13% of the EPO files, it is lost, both for the examiner and for the Office. In fact, such files are doubly disadvantageous from a productivity point of view because previously when a file was withdrawn after a search and a first opinion (which is the equivalent of a search + search opinion) the file would count as production both for the Office and for the examiner. This is no longer the case. So if a file doesn't return, the Office not only loses the extra investment in the search but also fails to count the withdrawal as production.

Please note: we do not question the wisdom of the decision to introduce search opinions that provide an extra service to the applicant. However, the effect on the Office is more work for less apparent production.

The introduction of the search opinion is certainly the change in procedure that had the biggest negative impact on examiner productivity, there are others mentioned in our document.

3. The applicant

Here I can be short. You are all familiar with CA/73/05: we had a 50% increase in the number of claims between 1994 and 2004. Your recent decision not to charge extra fees for the first 15 instead of (previously) the first 10 claims has no doubt further worsened the situation.
The increase in size and complexity of the files is not an isolated phenomenon, but a symptom of changed applicant behaviour.
Patents are now, more often than previously, key elements for funding and competitiveness. Applicants have not only become more assertive in what they claim but also more tenacious in defending those claims. This is in particular the case for Anglo-Saxon applicants, of which you may see fewer in your national patent office.

4. The reporting system

Against such a background of increasing volumes of prior art, increasing volume of work, and increasing file complexity it would seem reasonable to expect the examiner to be given more time. But as you all know the contrary has been the case. Over the last 15 years, up to 2006, the output demands on examiners have almost doubled.

The output has increased, but the demands have increased even faster. The consequence is that the **productivity**, which is counted as a percentage of the demanded output, has **decreased**. The examiners never managed the ultimate “Pro-Pro” figures. But if the targets sets are constantly increased, who is to blame for failing to meet them: the examiners who have increased their production, or those who have set apparently unrealistic targets?

Our management has already given their answer: in response to the recent allegedly negative developments in the Office’s finances, Mr. Hammer (VP1) has once more asked the examiners to make an extra effort and do two more files this year. And our chief financial officer has suggested that maybe we could increase examiner output not by working harder, but by working smarter. "Work smarter, not harder": You are no doubt familiar with the famous Dilbert cartoons. Dilbert’s answer to that remark was: "Thank you, I look forward to spontaneously developing an I.Q. of 200%".

The examiners have heard it all before. Starting with Mr. Braendli who raised the minimum standard, via Mr. Kober who asked an extra 5% in 1998 to be maintained thereafter, and improved by another 1% extra each year. Our answer to such demands is clear: **it cannot be done**. Search and examination are very, very intense in the concentration and effort they require. When the IIB was set up 32 hours a week were considered a maximum for such work, and that was before the introduction of computers that intensified the work. Today we start to see the consequences: more and more sick leave is caused either by upper-limb disorders due to the long hours on the computer, or by psychological disorders due to the stress.

DG1 is not alone in this respect. Patent administration (DG2) (formalities) has been forced to follow the increasing pace of DG1 without corresponding increases in personnel. Better software support has been promised, not delivered, but staff level cuts to account for that undelivered better software are already discussed. We can already predict that this will **not** work. The same problem arises in many more areas throughout the Office, for the same reasons.

There is also the subject of contractors. Contractors need to be trained, like everyone else. Many areas of the Office have been suffering from an increased staff turn-over due to increased us of non-permanent employment. Experienced colleagues need to take time to train their new colleagues. New colleagues are not as efficient as experienced ones, and by the time the contractors and temps have

gained experience they usually leave, either of their own volition or because their contract ends. The training investment is lost.

Ladies and gentlemen,
We are faced with ever more applications, more complex applications, more complex prior art and we have an obligation to the general public to insure a high level of quality. These are the challenges that the Office faces. Please take them into account when making your plans.

Ladies and gentlemen,
I thank you for your attention.