



SUBJECT: **Amicus Brief filed at the EPO Board of Appeal : Written statement under Art.10 (1) of the Rules of Procedure of the Enlarged Board of Appeal in the case G 3/08**

AUTHOR: **Alexander Esslinger, Chair CET 7**

PURPOSE **For ratification**

DATE: **April 30, 2009**

REFERENCE: **EXCO/US09/CET/1701**

MEETING:: **ExCo Washington D.C., US**

MEETING DATE : **6 & 10 June, 2009**

TABLED TO : **All attendees**

EXECUTIVE SUMMARY

In a letter of October 22, 2008 the President of the EPO has referred under Art. 112 (1) (b) EPC four legal questions relating to the exclusion of computer programs as such under Art. 52 (2), (3) EPC to the Enlarged Board of Appeal for decision. The Enlarged Board of Appeal assigned the referral case number G 3/08 and invited the public to file written statements by April 30, 2009.

FICPI has submitted to the Enlarged Board of Appeal a written statement as amicus curiae brief tabled as paper EXCO/US09/CET/1701.

In FICPI's view all four questions raised in the referral are to be rejected as inadmissible for lack of divergence in the appeal board decisions cited in the respective legal questions. Such divergence, however, is a requirement for the procedure under Art. 112 (1) (b) EPC.

Moreover, contrary to the EPO President's view expressed in the referral the recent case law is seen as rather consistent. The decision **T 258/03** (*Auction method/HITACHI*) of April 21,

2004 can resolve most if not all of the purported divergences.

There is the impression that the referral is less concerned with the uniform application of the law within the EPO, but more with divergences between the EPO case law on the one hand and some national court decisions and public opinion on the other hand. This aspect becomes clear from section "1. Summary of the Referral":

"Currently there are concerns, also expressed by national courts and the public, that some decisions of the Boards of Appeal have given too restrictive an interpretation of the breadth of the exclusion."

It is, however, highly questionable whether the procedure of Art. 112 (1)(b) EPC is the appropriate forum to bring the EPO case law in line with national jurisprudence or concerns expressed by the public.

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