

BR/GT I/152 e/72

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Comment:

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INTER-GOVERNMENTAL CONFERENCE
FOR THE SETTING UP OF A EUROPEAN
SYSTEM FOR THE GRANT OF PATENTS

Luxembourg, 28 February 1972
BR/GT I/152/72

- Secretariat -

N O T E

Subject: Article 9, paragraph 2(c) of the Draft Convention

Drawn up by: the French delegation

NOTE

from the French Delegation
on Article 9, paragraph 2(c)
of the Draft Convention

Several of the organisations belonging to the interested circles, and in particular AIRMA, UNICE and IAPIP, have stated, either during the hearing or in documents submitted to the Conference, (BR/149/72, BR/146/71 and BR/158/72 respectively), that the provisions of Article 9, paragraph 2(c) run the risk of being interpreted as excluding medicaments or pharmaceutical products from patentability.

The French delegation also feels that the drafting of this provision is ambiguous on this point, although the protection of medicaments, as opposed to chemical products as such, has always been implicit in the meaning of this Draft Convention and such protection is considered as essential to the interests of pharmaceutical research.

In order to remove the ambiguity that has been noted, it would seem that therapeutic and diagnostic methods should be distinguished from products, substances or compounds intended for such therapeutic or diagnostic uses. It may be pointed out that the following may form the subject-matter of a valid patent:

1. an entirely new product;
2. a known product when used for the first time in therapy;
3. a compound with properties different from those of the sum of the properties of the constituent parts;

4. an active principle known in therapy but used for the first time in such conditions as give it a different or superior effect, as, for example, in the case of a cure which is unreliable or dangerous but ceases to be so when dissolved or given a particular physical treatment.

It remains to be seen whether a new therapeutic application of an active principle known in therapy should be added to this list or whether a patent taken out for a given application will cover all applications subsequently discovered.

The patentability solution is intellectually satisfying, provided that the new application in no way derives from the known pharmacological properties of the envisaged body. The discovery of such an application constitutes the culmination of an entirely new investigation and is in this respect worthy of a form of protection, one of the main advantages of which would be to stimulate pharmacological research. Nevertheless, this solution must be rejected as impracticable for reasons inherent in the practice of medicine. Moreover, research aimed at finding a new therapeutic application is extremely intricate work, and the conclusions to which it leads are frequently illusory. Finally, the number of cases in which such patentability would be desirable - i.e. in which the same medicament may be given two entirely different therapeutic applications, is too limited for the advantages of the patentability solution to outweigh the practical disadvantages.

In order to take these considerations into account, the French delegation proposes that rather than these methods of therapeutic or diagnostic treatment not being considered as inventions even though they may be by virtue of meeting the conditions laid down in Article 9, paragraph 1, they should be included in the list of exceptions to patentability in a new subparagraph (c) to Article 10 of the Treaty, which would then read as follows:

Article 10
Exceptions to patentability

European patents shall not be granted in respect of:

- (a) +
- (b) +
- (c) methods for treatment of human beings or animals by therapy and diagnostic methods practised on human beings or animals; this provision shall not apply to inventions of substances or compounds, whether or not known, presented for the first time as being intended for the purposes stated above.

The drafting of this new sub-paragraph (c) also has the advantage of extending the exclusive right conferred by the patent to cover the manufacture or sale of the pharmaceutical product itself.
