

BR/GT II/23 e/72

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

Brussels, 18th April 1972
BR/GT II/23/72

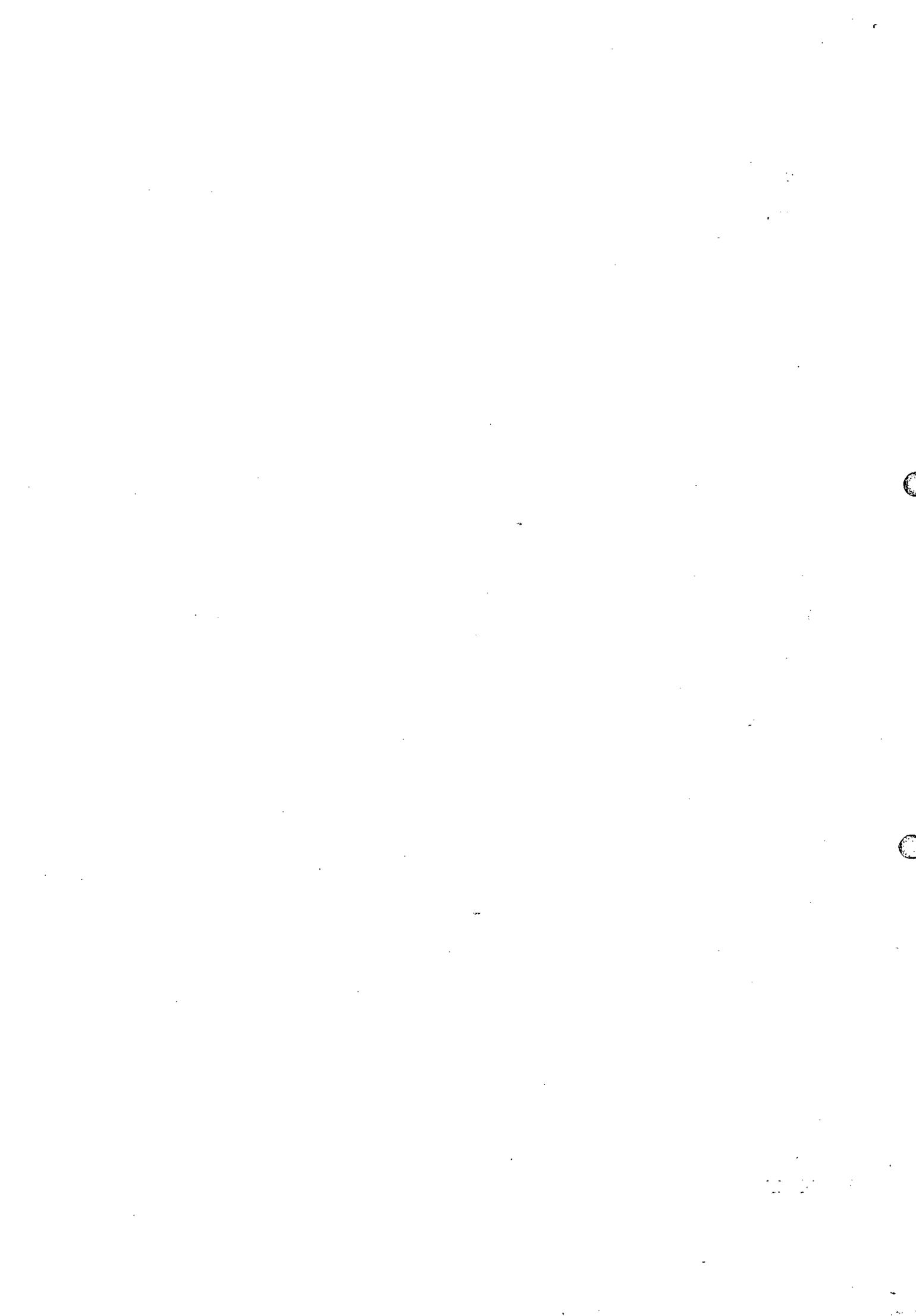
- Secretariat -

NOTE

Subject: Proposal on institutional structure

Submitted by: The Netherlands delegation

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Proposal from the Netherlands delegation
on institutional structure

From the point of view of public international law, the provisions of the Second Preliminary Draft of a Convention establishing a European System for the Grant of Patents are not clear as regards the position which should be held by the Administrative Council within, - or in relation to - the organisation as a whole.

The Draft Convention provides for the setting up of an international organisation. Article 4 of the Draft states that "This Convention hereby establishes a patent office ... etc.". From this provision it is clear that the entire international organisation established under the Convention will be called the "European Patent Office". This concept is confirmed by the first paragraph of Article 30: the European Patent Office is to be an "organisation common to the Contracting States".

The Administrative Council itself is not "set up" specifically by this Convention. Nowhere in the text is there a provision to such effect. However, the second paragraph of Article 30 states that the European Patent Office will be supervised by the Council. This places the Administrative Council outside the European Patent Office. The question therefore arises as to the legal status of the Council from the point of view of public international law. In theory there are three possibilities:

- (i) the Administrative Council could be a section of the international organisation called "the European Patent Office";
- (ii) the Council could be a separate international organisation, independent of that known as "the European Patent Office";

(iii) the Council could be a kind of inter-governmental conference without legal personality.

The Netherlands delegation had previously voiced this misgiving with regard to the lack of clarity in the institutional provisions at the 4th meeting of the Inter-Governmental Conference for the setting up of a European System for the Grant of Patents, held from 20 to 28 April 1971 (cf. the note (BR/104/71) that it submitted and the minutes of the Meeting (BR/125/71), point 94). Following an initial exchange of views the Conference had decided that it would be advisable to examine this question further.

At their 10th meeting, held from 22 to 26 November 1971, most of the delegations to Working Party I were still unable to come to a decision on this point (BR/144/71, point 121).

The 5th meeting of the Inter-Governmental Conference, held from 24 January to 4 February 1972, instructed Working Party II to examine the question (BR/168/72, point 169).

The third of the abovementioned possibilities which sees the Administrative Council as an inter-governmental conference without legal personality runs counter to the aim of the Convention and to several of its provisions which invest the Administrative Council with powers far in excess of the duties that it would be possible for an inter-governmental conference to undertake.

The Netherlands delegation bases its argument on the principle that the Inter-Governmental Conference for the setting up of a European System for the Grant of Patents is preparing for the establishment of a single international organisation (the first of the possibilities listed) and not of two distinct organisations, one of which would be called the European Patent Office and the other the Administrative Council (second possibility). Therefore, the Administrative Council must be considered to be a section of the international organisation set up under the Convention.

The Netherlands delegation believes that the reason for the vague nature of the texts drawn up so far for the Draft Convention lies in the use of the title "European Patent Office" to cover two different entities:

- (i) sometimes this title refers to the organisation as a whole, i.e. including the Administrative Council (e.g. Articles 4 and 30, paragraph 1, already cited; Article 32, paragraph 1 on the legal personality of the organisation; the inclusion of provisions concerning the Administrative Council in Part III, entitled "The European Patent Office", of the Convention);
- (ii) but sometimes it also seems to be applied solely to the executive body of the organisation, i.e. excluding the Administrative Council (e.g. Article 30, paragraph 2, already mentioned, and Article 35p; the European Patent Office is to place at the disposal of the Administrative Council the necessary means).

Thus, the text of the Preliminary Draft is ambiguous as to the nature of the European Patent Office; it refers to the European Patent Office both "in the broad sense of the term" (the international organisation) and "in the restricted sense of the term" (the executive body). Basically there are two ways in which this problem can be solved: the Inter-Governmental Conference can give another title either to the international organisation or to its executive body.

Whichever solution is chosen, a new provision will in any case have to be worked out to determine the Administrative Council's position within the organisation.

During Working Party I's 10th meeting, the Netherlands delegation suggested applying the first of these two solutions, and proposed that the European Office as such, together with the Council, should form the two sections of a "European Patents Union". This title, in particular the word "Union", seems however to have given rise to some misunderstanding as to the scope of the Netherlands proposal (cf. also the note to Article 30, on page 45 of the printed text of the Second Preliminary Draft). To avoid this misunderstanding, other names could be chosen.

The other solution, that is to give another name to the European Patent Office as such (the executive body), may, for instance, lead to this body being called the Secretariat.

Without wishing to rule out the other possibilities, the Netherlands delegation felt it preferable to preserve the title "European Patent Office" for the executive body, and proposed that the organisation be termed the "European Patents Organisation".

On the basis of this choice, the provision designed to clarify the Council's position may now be drawn up and inserted into Article 4 as follows:

Article 4

"(1) This Convention hereby establishes a European patents organisation, hereinafter termed "the Organisation".

(2) The tasks entrusted to the Organisation shall be carried out by:

(i) an Administrative Council,

(ii) a European Patent Office.

(3) The European Patent Office shall grant European patents. The Administrative Council shall conduct the work of the European Patent Office."

Consequential amendments

Article 30

The first paragraph may be deleted. It adds nothing to what already ensues directly from the fact of setting up the international organisation.

Paragraph 2 may be deleted. Its content has been inserted into Article 4, paragraph 3, as proposed above.

Article 31

The expression "the European Patent Office" in the first sentence should be replaced by "the Organisation". The second sentence would remain unchanged.

Article 32

The expression "the European Patent Office" in paragraphs 1 and 2 should be replaced by "the Organisation".

Paragraph 3 should read:

"(3) The President of the European Patent Office shall exercise the legal capacity of the Organisation."

Article 33

The first paragraph should read:

"(1) The Organisation shall be located at ..."

Paragraph 2 would remain unchanged.

Article 35

This Article should read (amendments underlined):

A separate Protocol shall define the conditions under which the Organisation, the members of the Administrative Council, the officials of the European Patent Office and such other persons specified in the Protocol, taking part in the work of the Organisation, shall enjoy ... of their duties."

Other Articles will have to be amended to distinguish between the European Patent Office proper and the Organisation.
