

M I N U T E S

of the
6th meeting of the

COMMITTEE ON PATENT LAW

(Munich, 27 and 28 January 1998)

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A. OPENING ITEMS

1. The 6th meeting of the Committee on Patent Law, chaired by Mr Mühlens (DE), took place on 27-28 January 1998 in Munich. The list of participants is annexed hereto.
2. The Chairman welcomed those attending, drawing special attention to the new observer delegation from the Former Yugoslav Republic of Macedonia, which became an extension state as of 1st November 1997, as well as to the Vice-President of DG 5, Mrs Renate Remandas, who would be henceforth attend the meetings of the Committee.
3. The Chairman informed the Committee that the Administrative Council had decided to transfer the Secretariat of the Committee to the Council Secretariat.
4. The Chairman announced that at their last meeting, the Heads of Delegation had discussed possible points for a revision of the EPC, and identified a long list of points of a legal, technical nature, which would be referred to this Committee for detailed study. Examples included the implementation of BEST, the alignment of Art. 53(a) with TRIPs, the patentability of computer programs and other points discussed within the framework of the Commission's *Green paper*. This Committee would be asked to develop proposals on how to deal with these points as well as on how the EPC might be revised as a consequence, and to report their findings to the Administrative Council. The Heads of Delegation had asked the Office to draw up a document containing this list of points for the next meeting of the Administrative Council, so as to enable it to reach a decision and formally give the Committee a mandate to deal with these items. Further points would be referred to this Committee by the Administrative Council in due course, thereby considerably increasing its workload.

I. ADOPTION OF THE AGENDA (CA/PL 1/98)

5. The Committee adopted the agenda as set out in CA/PL 1/98. The Portuguese delegation, supported by the Finnish, Hellenic and Spanish delegations, doubted whether point 4 of the agenda, dealing with the language issue, was suitable material for the Committee to study at this time, as it was essentially of a political nature.
6. The Chairman reminded the Committee that it had received a clear mandate from the Administrative Council to find possible alternatives to the package solution and to assess whether the proposed centralised filing of translations at the EPO was compatible with the EPC. Its role was not to reach political decisions on these matters, but to confine itself to analysing technical, legal issues.

7. Upon request of the Austrian delegation, 3 points were added to the agenda under "other business": 1. Mutual recognition of priority rights with Taiwan; 2. Implementation of Art. 63 EPC and 3. Implementation of TRIPs Art. 27(2).

II. APPROVAL OF THE MINUTES OF THE 5TH MEETING (CA/PL 5/97)

8. The Committee approved the draft minutes of the 5th meeting (CA/PL 5/97), along with amendments proposed by the Austrian, Belgian, Danish, Finnish and Portuguese delegations and the *epi* representatives.

B. LEGAL AND INTERNATIONAL AFFAIRS

III. REVISION OF THE EPC: BEST (CA/156/97, CA/PL 2/98)

9. The Chairman recalled that at the 69th meeting of the Administrative Council, in December 1997, the delegations expressed their general support for the BEST project. Although it constituted just one item in a lengthy "EPC revision catalogue", the Administrative Council decided to give it priority and referred the point immediately to this Committee (See CA/169/97, no. 8) with the mandate of formulating a proposal for the revision of the EPC on this point, in view of an upcoming Diplomatic Conference.
10. The EPO introduced CA/PL 2/98, which contained preliminary proposals for the revision of the EPC with regard to the Office-wide implementation of BEST, meant to form the basis of a first round of discussions on this point. The document contained only the concrete proposals for a revised text. Explanations as to why these particular changes were suggested were to be found in CA/156/97. Two types of amendments to the EPC were proposed in CA/PL 2/98: those eliminating geographic references to specific organs of the EPO (Art. 16, 17 EPC; Sec. I Protocol on Centralisation) necessary to implement BEST Office-wide, and those permitting greater flexibility in determining the competent department within the Office (Arts. 16, 18, 91 EPC).

The latter were considered desirable in the wake of the amendment of Art. 79(2) EPC extending the time limit for the payment of designation fees. Currently, the responsibility for formal examination passed from the receiving section to the examining division at the time the request for examination was made. However, in Art. 91, the receiving section remained responsible for the examination of the payment of fees without any time limit. Where the payment of designation fees occurred after the request for examination had been filed, a contradiction existed within the EPC.

The removal of provisions attributing specific functions to geographically specified branches of the Office had implications for both Germany and the Netherlands. In fact, Art. 17 EPC in its present form was a clause guaranteeing the continued existence of a branch of the EPO in The Hague. It was therefore necessary to ensure that the removal of geographical references did not lead to the elimination of this guarantee. Therefore, it was considered necessary to provide for a weighting of the share of work to be attributed to the Office in Munich and to its branch in The Hague. Here, two possibilities existed in order to effect such an apportionment. Either a clause could be inserted in the EPC, or a binding Agreement containing the relevant provisions could be concluded between the two states and the Organisation. However, this was a political matter which should be discussed first by the two states concerned. The Office did not touch upon these matters in CA/PL 2/98, nor was it appropriate for the Committee to examine this issue at this time.

11. The Chairman suggested a two-step procedure to deal with this document. The Committee would focus on: 1. Amendments proposed for the sole purpose of implementing BEST; 2. Amendments aimed at increasing the flexibility in determining the competent department within the EPO.
12. The EPO explained what BEST was: "Bringing Examination and Search Together". In practice, BEST meant that the examiner of the search division was also the first examiner of the 3-member examining division, thus rationalising work which at present was duplicated due to the complete separation of the two divisions.

Nevertheless, the fact that one examiner would be wearing two hats did not impair the functional separation between the two divisions. In particular, the EPC's two-step procedure for the grant of a patent requiring first a search report and then the substantive examination on request would remain as it was. Thus, the examiner prepared simultaneously the search report and the first communication, only the latter was put away in a drawer. The search report was published along with the application as an A1-Document, whereupon the applicant had a period of 6 months within which he could trigger the second phase of the procedure by filing a request for substantive examination. Only then would he receive the first communication.

It was further pointed out that the bestowing of a plurality of functions upon a single individual was not unusual within the EPC. For example, the examining division and the opposition division were two separate organs of the Office, yet in practice, if possible, the first examiner of an examining division became the first examiner of the 3-member opposition division, thereby increasing the efficiency of the proceedings.

At its last meeting, this Committee had concluded that a revision of the EPC would be necessary in order to place the Office-wide implementation of BEST on a secure

legal footing. From the geographical references in Arts. 16 and 17, as well as Sec. I of the Protocol on Centralisation, it was possible to conclude *eg* that searches were to be performed only in The Hague and not in Munich. It was therefore proposed to revise the EPC by eliminating geographical references in the aforementioned articles. It was underscored that neither Art. 6, dealing with the seat of the organisation, nor Art. 15 which listed the various departments of the Office, would be affected by the revision.

13. The Chairman asked the Committee whether it would suffice to strike the geographical references from Arts. 16 and 17 as well as from the Protocol on Centralisation in order to implement BEST Office-wide.
14. The Hellenic delegation expressed its agreement in principle with the proposal of replacing references to specific departments by references to the Office. However, the Implementing Regulations would have to be amended to reflect these proposed changes, particularly those affecting Art. 91, and it was queried whether the full impact of these proposed changes should not be assessed by the Committee before it came to any conclusion on this point. Finally, the delegation reserved its position regarding the proposed deletion of Sec. I (3)(b) to (d), as it felt that it raised political rather than technical issues which should be left to the Administrative Council.
15. The EPO agreed that the Implementing Regulations would have to be amended. However, it was unclear whether this exercise should occur concurrently with the revision of the EPC, or dealt with later. It was premature to address this issue.
16. The Netherlands delegation observed that under the current EPO proposal, geographical references would be deleted, but search and examining divisions would continue to exist as separate entities. Supported by the Portuguese and Danish delegations, the Netherlands delegation suggested that, without changing the procedure itself, the Committee might consider both abolishing references to search and examining divisions, and expressly stating that the same person could perform both the search and the substantive examination. The Austrian delegation proposed that the EPO examine these issues.
17. The EPO replied that it was not the meaning of BEST, nor was it the proposal of the Office that the structure of the procedure or the competences of the departments enumerated in Art. 15 EPC be changed.

Under the present proposal, the separate divisions kept their respective competences and distinct procedures. BEST would introduce only two differences: search and examination could occur in both Munich and The Hague, and the same person could be a member of both the search and the examining divisions.

However, since search and examination were two steps of a single granting procedure, it was not thought necessary to expressly state this second difference in the Convention.

18. The Swedish delegation agreed with the Netherlands delegation, but was willing nonetheless to consider the approach taken by the Office.
19. The Chairman reminded the Committee that its mandate was to discuss the implementation of BEST in its present form. Without anticipating the Committee's decision, it was possible that the mere striking of geographic references would suffice to do so. Nevertheless, the Committee could make additional proposals and ask the EPO to study them.
20. The *epi* representative voiced its concern that the removal of geographic references might eventually lead to a further dissemination of the locations of the Office and proposed that present geographic references be replaced by "The Hague or Munich". The *epi*'s objections to the BEST system were reiterated. It was feared that the quality of both search and examination would be reduced and that further modifications would be brought to a system which currently gave its users full satisfaction.
21. The Chairman remarked that a revision of Art. 6 was not contemplated and that the present discussion focused on a well-defined, specific project. The fears of the *epi* in this respect were therefore unfounded.
22. The German delegation believed that the Committee should strictly confine itself to fulfilling the mandate it received from the Administrative Council, which was to verify which legal measures were necessary to implement BEST Office-wide. This entailed nothing more than eliminating the geographical references contained in Arts. 16 and 17 EPC, and the Committee should not be considering whether to overhaul the entire structure of the granting procedure. Only once BEST was implemented Office-wide and produced its effects on the work of the EPO would any further need for reform become apparent.
23. The Netherlands delegation stated that it had never intended to put into question the current grant procedure. However, it felt that there were 3 levels of thinking in the present discussion: 1. the granting procedure, with its specific stages: search, examination, opposition; 2. the actual organisation within the Office, reflected in the structure of DG1/DG2; and 3. the "divisions", which in fact referred to persons carrying out particular tasks, such as search or substantive examination. The difficulty was that "search divisions" and "examining divisions" did not refer to

organisational departments within the Office but to persons who at that moment were entrusted with specific tasks. It was not suggested to change the fact that the search was carried out by one person, and the examination by a three-person division, but rather perhaps to have the EPC reflect the reality of the organisational structure.

24. The Portuguese delegation stated that since the present exercise was in fact a prelude to the preparation of a Diplomatic Conference, advantage should be taken of the opportunity to make all the necessary amendments to the EPC, rather than proceed overcautiously and discover later that some desirable changes had not been effected.
25. The Swiss delegation supported the proposal of the Office as contained in CA/PL 2/98. It was convinced that BEST only brought geographical and organisational changes, that the division of competences within the Office should not be modified, and that the Committee's mandate was confined to the implementation of BEST. Certainly, further issues of detail or amendments to the Regulations might still need to be considered, but under no circumstances would the Swiss delegation support a proposal to modify the fundamental structure of the European granting procedure and it would oppose any attempt of the Committee to ask the EPO to study the issue.
26. The Belgian delegation agreed that the Committee should remain focused on its mandate. Nevertheless, if it was decided to integrate BEST into the EPC, it would be logical to go further and study the proposal of the Netherlands. Even though no provision excluded the performance of searches by substantive examiners, clarity might dictate that the EPC contain a specific enabling provision in this respect.
27. The Finnish delegation supported the BEST proposal as formulated by the Office.
28. Summing up, the Chairman observed that the majority of the delegations agreed that the elimination of geographical references in Arts. 16 and 17 EPC would suffice to implement BEST Office-wide. The Netherlands might present a proposal for an express provision stating that the same person could perform both the search and the substantive examination, but the Committee would not consider any proposals pertaining to a far-reaching structural reform of the granting procedure which were of a highly political nature and clearly lay outside the purview of its mandate.

The Chairman then turned to the proposals contained in CA/PL 2/98 affecting Arts. 16 and 18 EPC, aimed at increasing the flexibility of the Office in determining the competent department within the EPO, but wholly unrelated to the implementation of BEST. The issue was whether these suggested changes should be retained.

29. The EPO explained that there were 2 proposals with respect to Art. 16. The first was that of removing the geographical reference specifying that the receiving section would be in The Hague. This clause was not directly relevant to BEST although as framed, it clearly went against the BEST philosophy. If the search and examination both took place in Munich, it seemed logical that a receiving section also be located in Munich. At present, there was a receiving section in Munich, but it was formally dependent on the branch in The Hague. The purpose of eliminating all geographical references was to enable the whole process up to grant to take place entirely either in The Hague or in Munich without any fictions, which would have the effect of rationalising the procedure.
30. The Netherlands delegation opposed the inclusion of the proposed changes to Art. 16 EPC which were not related to the implementation of BEST.
31. The Austrian delegation originally had the same doubts as the Netherlands delegation, and although the mandate of the Administrative Council seemed to be limited to what was necessary to implement BEST, the EPO's arguments were convincing. It was reasonable to interpret the mandate in a broader sense so as to accept this first proposed change with regard to Art. 16 as well.
32. The Chairman proposed that this change pertaining to Art. 16 should be taken on board and this was agreed to.
33. The EPO turned to the second change proposed: increasing the flexibility in determining the competent department within the EPO, by ensuring that the transfer of competence between the receiving section and the examining division was no longer dependent on the filing of the request for examination. When Art. 79(2) was amended and the due date for the payment of the designation fees postponed, it was inadvertently overlooked that pursuant to Art. 91 (1)(e) EPC, it remained incumbent upon the receiving section to examine whether the designation fees had been paid, at a time where under Art. 16 EPC, it was no longer competent to do so. Therefore, it was proposed to amend Arts. 16 and 91 (1) EPC so as to establish the division of competences along substantive rather than chronological lines, thereby eliminating the current contradiction within the EPC.

The EPO further proposed that since this issue pertained to the deadline for payment of designation fees rather than to BEST, it might be discussed separately

at a later meeting, on the basis of a new document and an express mandate from the Administrative Council.

34. The Chairman concluded that the first change to Art. 16 "The Receiving Section shall be [-] responsible for the examination on filing" as well as the proposed change to Art. 17 were acceptable. However, the other amendments proposed for Arts. 16, 18 and 91 would be deferred to a later stage.

This brought the Committee to another important point: the proposed change to Sec. I(1)(b) of the Protocol on Centralisation, to replace a reference to the branch at The Hague by a reference to the EPO, which seemed logical in light of BEST.

35. The EPO explained that Sec. I (1)(b) stipulated that the branch at The Hague would take over the tasks incumbent upon the International Patent Institute (IIB). This referred in particular to the searches performed by the IIB for national applications in its member states. This was not directly linked to BEST. Nevertheless, should this section remain unchanged, it would render a rationalisation of the search and examination procedure between Munich and The Hague eg along the lines of classes of technology difficult. It would mean that all searches performed for ex-IIB member states would have to be performed in The Hague, even if the application in question belonged to a particular class whose specialists might be in Munich. Therefore, in order to maintain standards for these types of searches in the future, it might become essential that they be susceptible of being carried out either in The Hague or in Munich. One final precision: this proposed change did not mean that some of these searches would definitely take place in Munich, merely that this option was open.
36. The Chairman stated that the Administrative Council should be appraised that the possible consequence of amending Section I(1)(b) of the Protocol on Centralisation was that searches performed for national applications in ex-IIB member states, could in the future be performed either in The Hague or in Munich.
37. The EPO explained that the proposed modification to Sec. I (3) (a) of the Protocol on Centralisation was intended to allow BEST to be implemented in the sub-office in Berlin as well, ie allow it to perform examinations as well as searches. The proposed change would have the effect of giving the sub-office in Berlin a permanent character. As before, the Federal Republic of Germany would bear any additional costs incurred thereby, which meant that the German delegation should be consulted about its position in this respect. Paragraphs (b)-(d) should be deleted. As to para. (b), insofar as the sub-office in Berlin was of a permanent

nature, and no longer limited to search, it should fall under the general management and organisational powers of the President. Paragraph (c) was a transitional provision which was now obsolete, and the substance of para. (d) was included in the proposed new para. (a).

38. The Chairman, a longtime member of the German delegation, reminded the Committee on the German delegation's behalf, that the existence of the Berlin sub-office was always politically motivated, so that this particular issue should be dealt with by the Administrative Council.
39. The Greek delegation expressed its agreement with changes allowing the Berlin sub-office to perform examinations, but opposed the proposal made by the EPO insofar as it ventured into purely political matters. The proposed change would make the Berlin sub-office permanent, which had nothing to do with BEST and went beyond the Committee's mandate. Furthermore, it was chronologically problematic to amend the Protocol on Centralisation, which referred to the future and was agreed to prior to the entry into force of the EPC, by replacing a provision dealing with the present, insofar as the revised article would be out of context with regard to the rest of the text. In order to modify the terms of what was agreed to under the Protocol, it would be necessary to draw up a new article referring to the Protocol and modifying it. Finally, the revision of Sec. I (3) (b) was opposed insofar as it removed the Berlin sub-office from the purview of the Administrative Council's competence.
40. The Netherlands delegation observed that if all chronologically obsolete references in the Protocol were to be cleaned up, this would be a major operation, whereupon the EPO, thanking the Hellenic delegation for its input, declared that an alternative method of amendment which involved the adding of a new Article modifying the Protocol might be worth considering.
41. The Chairman concluded that the proposed amendment was felt to go too far. Section I (3)(a) and (b) should be purged respectively of their geographic reference and the limitation to search work, but no further changes should be proposed at this time. Whether the sub-office should acquire permanent status or whether Germany should remain responsible for the costs incurred were issues which should be left to the Administrative Council.

IV. LANGUAGE ISSUE

IVa. ALTERNATIVES TO THE PACKAGE SOLUTION (CA/PL 3/98)

42. The Chairman reminded the Committee that its mandate with regard to this point on the agenda was to propose alternatives to the package solution with a view to reducing patenting costs.

43. The EPO presented CA/PL 3/98, which collated the alternative proposals forwarded to it by the delegations. The Addendum to this document contained a first section consisting of the papers received from the delegations. The second part comprised position papers of interested circles and NGOs which had come to the attention of the EPO. Most had been produced in reaction to the *Green Paper*. The positions of the users of the system and their representatives were not uniform. Nevertheless, they were brought to the attention of the delegations in order to ensure that discussions would not be shaped exclusively by the points of view of their respective governments. Users generally felt that translation requirements should be reduced, in order to decrease costs accordingly.

No translation of the specification

44. The Chairman presented the "radical solution", whereby no translation was required for validation of the patent in a contracting state, as was the case in the past in Germany as well as in the United Kingdom.
45. The German delegation announced that it was prepared to return to a system where no translation would be required, provided other contracting states were willing to follow suit.
46. The delegations of Luxembourg and Monaco observed that they already practiced this "radical solution", since their national law did not contain the requirement of translating the patent specification, although Luxemburg required that claims be translated to secure provisional protection.
47. The Swiss delegation had formulated this proposal and therefore supported it, as it would support any solution leading to a measurable reduction of translation costs. The package solution should be kept as a possible fall-back position for a group of states willing to make progress on this issue, should the abolishment of translation requirements prove impossible.
48. The United Kingdom delegation could not commit itself on these issues, as it was still consulting user interests, but it would only support a solution bringing a measurable cost reduction and attracting at least a significant consensus of other contracting states.
49. The French delegation opposed this "radical solution". Nevertheless, it was open to discussing the alternative described in point 7 of CA/PL 3/98 (hereinafter the "BE/EPO solution"), *ie* translation in one other official language of the EPO. Subject to certain conditions, it might be prepared to support this solution.

50. The Irish delegation regretted that it might not be able to dispense with its present translation requirements on constitutional grounds.
51. The Chairman concluded that aside from Luxembourg, Monaco and Switzerland, as well as possibly the United Kingdom and Germany, the "radical solution" had not attracted broader support.

The "BE/EPO proposal"

52. The Belgian delegation was not in a position to support this proposal, insofar as it construed the EPO formulation as forcing Belgium to choose French over another language, which could pose problems at the national level. Its suggestion, not a full-fledged proposal, but rather intended as "food for thought" had been that contracting states which did not have an official EPO language - eg Portugal - would have to accept the validity on their territory of a patent granted in the EPO language of their choice. However, contracting states having an official language as a national language - eg Germany - would have to accept, in addition to patents granted in their national language, patents granted in another official language of the EPO. The practical effect of this system would be that the holder of the patent would only need to translate his patent into the 2 other official languages of the EPO.
53. The Portuguese delegation submitted that part of the answer might lie in the procedure employed to achieve progress on the language issue, and suggested that an optional protocol on languages would allow momentum to develop. If the contracting states having one of the official EPO languages as a national language signed the protocol, the political pressure would mount on the other contracting states to join.
54. The EPO thanked the Portuguese delegation for its intervention. The EPO's view was that pursuant to Art. 65 EPC, every contracting state had the right to require a full translation of the European patent. Therefore, there was no basis in the EPC requiring a uniform solution throughout the contracting states regarding translations. This was not a point for revision of the EPC, but an area in which each contracting state could exercise its sovereignty and independently decide which path it chose to follow and under which conditions.

Further, the explanations given by the Belgian delegation led the EPO to believe that both Belgium and the EPO were discussing the same essential concept. Taking Denmark as an example: its national language was Danish. If it chose to accept patents granted in English, an official EPO language, that would mean that to be valid in Denmark, a European patent would have to be translated into either Danish

or English. Taking now the example of Germany, having an official EPO language as a national language, it would have to choose to accept another EPO language - for example English - and therefore, to be valid in Germany, a European patent in another language would have to be translated into either English or German.

55. The Portuguese delegation opined that there would be great savings for users if the contracting states which had as one of their national languages an official language of the EPO relinquished their translation requirements.
56. The *epi* representative declared that the elimination of translation requirements would never be accepted by the *epi* insofar as it would lead to a discrimination between languages and a greater concentration of work in the main languages, rather than a more equal division of work amongst attorneys.
57. The German delegation declared that as it was prepared to abandon its translation requirement, it could also support the BE/EPO proposal.
58. The Danish delegation recalled that it had endorsed the package solution in the past and was still in favour of it. Whilst unable to commit at this point, the Danish delegation, supported by the Netherlands and Swedish delegations, nevertheless expressed sympathy for the BE/EPO proposal, which it found very interesting and worth exploring further.
59. The Swedish delegation added that it could not commit itself, but explained that consultations in Sweden indicated that users wished to have access to the full text of patents in a language intelligible to the Swedish public, which would in fact mean Swedish or, possibly, English. One of the reasons why Sweden had been reluctant to accept the package solution was that it did not guarantee that full specifications would be available in English. Insofar as the BE/EPO proposal would give access to every European patent in the 3 official languages of the EPO, it would offer a better option. The latter variant had been suggested by some user circles in Sweden.
60. The Slovenian representative suggested that some proposals might be combined and should not be considered to be mutually exclusive alternatives.
61. The Luxembourg delegation stated that it already more or less implicitly practised this BE/EPO solution in that both of its official languages were official languages of the EPO. Since English too was widely understood in Luxembourg, a translation of the full specification was not required.

62. The Swiss delegation observed that this proposal was most interesting, albeit only if all contracting states were to adopt it. Furthermore, if a Protocol procedure such as that suggested by the Portuguese delegation were to be followed, then a stricter approach involving a greater cost reduction should be aimed at.
63. The Commission representative reminded the Committee that a Europe-wide process of consultation on the language issue was underway and that there was an interface between the present exercise and the activities of the Commission. An increasing number of European Parliament members were finding the current situation intolerable. The Commission was soon going to take the initiative of proposing a solution within the context of the Community Patent pursuant to its powers under Art. 235 of the Rome Treaty, which of course required unanimity. However, the political margins of manoeuvre were considered to be wider in that context than they might be within the Administrative Council of the EPO.
64. The Chairman concluded that several delegations had expressed cautious sympathy for the BE/EPO proposal and therefore that this proposal showed some promise and should be pursued further.

Translation arrangements as per CPC1975

65. The Chairman turned to the "CPC 1975" solution, *ie* a translation of the claims upon grant pursuant to Art. 33 CPC, or, subject to a contracting state invoking the reservation under Art. 88 CPC, a translation of the complete specification, with the patent having full effect only upon filing of this translation (see CA/46/96, p. 11).
66. The Austrian delegation announced that it was not in favour of either the radical solution or the BE/EPO proposal. As it was still consulting users in Austria, it could not commit itself on this point, but nevertheless, it favoured the "CPC 1975" solution, which it believed might be capable of eliciting a consensus.
67. Despite Belgium's ratification of the CPC 1975, the Belgian delegate declared that this was a bad solution. Belgium had proposed a simplification of this solution, that patents would become enforceable only upon filing of a translation, which meant that patents would exist in a virtual state until that time. The assumption was that no potential infringer would invest in a technology which had such a Damocles sword hanging over it.
68. The Commission representative intimated that solutions which did not apply uniformly throughout the European Community, and were therefore susceptible of constituting an obstacle to the freedom of movement of goods within the internal

market, were not considered to be viable options by the Commission, and the "CPC 1975" alternative would not be included in any further proposals emanating from the Commission. Furthermore, the language solution should be the same for the European and the Community patents.

69. The EPO observed that the beauty of this solution was that those states who felt they could give up translations altogether or limit their requirement to translation of the claims, could do so. Art. 88 CPC provided a safety valve for those states limited by their constitutions, who could stipulate that until the translation was filed, the rights flowing from the patent would be merely equivalent to the provisional protection granted by published applications whose claims had been translated. This solution was accepted today by all contracting states within the framework of Art. 67 EPC. Thus, for those states, the CPC 1975 system would simply imply a prolongation of the protection granted under Art. 67 EPC, with renewal fees being payable even if the translation had not been filed. However, the CPC 1975 solution, which was a combination of 2 formulas, only remained interesting if those contracting states which felt they could give up translation of the full specification did so. A uniform solution based on Art. 88 CPC would be of no utility whatsoever.
70. The Belgian delegation stated that patent holders tend to be extremely prudent and if they all filed the translation immediately in order to get full protection, little would be gained under such a system.
71. The Netherlands delegation, supported by the Danish delegation, proposed that the logical flow of this exercise should be for delegations to 1. Decide which solutions might be possible 2. Whether a uniform or a multi-level solution should be attempted and 3. If a multi-level solution were to be chosen, which elements it should contain.
72. The *epi* representative stated that he failed to understand how the CPC 1975 language solution, which entailed that the patent did not have full effect until the translation had been filed, could constitute an obstacle to the free movement of goods. Secondly, should translation requirements be abandoned, it was queried whether courts might not *de facto* apply the CPC 1975 solution for constitutional reasons, should a third party claim that it should not be forced to pay damages for infringing a patent it could not understand.
73. The Commission explained that if a unitary Community patent was created in order to have a uniform effect throughout the European Community, it would be paradoxical to accept that this patent could be effective in some member states and

ineffective in others, depending on the translation requirements in each member state and whether these had been fulfilled by the patentee.

- 74. The Slovenian representative referred to the study prepared by Professor Straus for the European Commission last year, which dealt with the language issue quite extensively, and could be distributed to the members of the Committee.
- 75. The Portuguese delegation requested that the EPO prepare a document setting forth the pros and cons of the "CPC 1975" language solution in more detail. This was taken up by the Chairman, who commented that this solution had generated a considerable amount of interest on the part of the delegations.

Translation on demand

- 76. The Chairman introduced the next alternative, translation on demand, which appeared attractive at first blush, but was in fact riddled with problems.
- 77. The German delegation, supported by the Swiss delegation, recalled that this proposal had already been discussed and that the conclusion had been that it was potentially dangerous, insofar as translations could be abusively requested to the point where the system would no longer be financially viable.
- 78. The EPO reported that the issue of translation on demand had been raised in the *Green Paper* but had elicited little interest amongst the users at the hearing recently held in Luxembourg.
- 79. The Commission representative reported that within the framework of the *Green Paper* consultations, many users representing industry favoured a radical solution, whereas other groups insist on all 12 languages being used. Ultimately, the Commission would propose something in between.
- 80. The EPO pointed out that it was implicit in this proposal of translation on demand, that a patent for which no translation had been requested would nevertheless have full effect. It was difficult to imagine how this would be acceptable to contracting states which raised constitutional objections to the principle of untranslated patents enjoying full effect vis-à-vis third parties. Thus, it was queried how useful it was to consider this proposal in depth.
- 81. The Belgian and Luxembourg delegations pleaded against such a hasty rejection of this proposal. The Luxembourg delegation referred to the consultation rate of translations - less than 1% of translated patents - whereas the Belgian delegation observed that CIPA supported this alternative and the International Chamber of Commerce had also endorsed it at the Hearing in Luxembourg. Perhaps an effort

should be made to find solutions to stem possible abusive practices, such as translators requesting translations in order to create work for themselves, or students asking for all patents in their field to be translated. Where translations were being paid out of a fund bankrolled by fees or an insurance system, there would be no abuse by competitors aiming to hurt the patentee financially by demanding translations.

82. The Portuguese and Hellenic delegations proposed that this solution be abandoned.
83. The Chairman asked for a vote and concluded that the Committee did not support the alternative of translation on demand. This proposal would not be forwarded to the Administrative Council.

Abridged version of the patent specification

84. As far as the "compact solutions" were concerned, the German delegation, supported by the Luxembourg delegation, observed that they might be considered if the shortened specification only served information purposes. However, it was clear that the shortened version of the specification was intended to form the legal basis for protection. Thus, the applicant would bear the consequences of the shortening of the specification. If so, these solutions held unacceptable dangers for patentees, in terms both of sufficiency of disclosure as well as determining the scope of protection in light of the doctrine of equivalents. At any rate, the applicant could not be forced to shorten his specification. These "compact solutions" should therefore be rejected.
85. The Portuguese delegation, supported by the Belgian and Swiss delegations, stated that this solution was interesting in theory but dangerous for the patentee in practice. In particular, no solution should be adopted which would restrict the freedom of the patentee by forcing him to shorten his specification.
86. The Austrian delegation, supported by the Slovenian representative, asked the Office whether it would be possible to shorten the specification through a stricter observance of Rule 34(1)(c) EPC, which set forth that an application shall not contain obviously irrelevant or unnecessary statements, without a reduction in productivity.
87. The EPO replied that in practice, it was easy to identify and persuade the applicant to eliminate irrelevant matter under Rule 34(1)(c), but that unnecessary statements were more difficult. A stricter application of the Rule would not yield a reduction important enough to produce a significant financial gain, and the extra work could affect the efficiency of the Office.

88. The *epi* representative opined that there should be no mandatory provisions forcing the applicant to shorten his specification. Any such reduction should be voluntary. On the other hand, regardless of whether the advice as to how the applicant should shorten his specification came from the Office or from a patent attorney, this would entail additional costs, and any savings resulting from the exercise would be marginal.
89. The Netherlands delegation favoured the "compact solution", which did not necessitate either a revision of the EPC or an amendment of national legislation, but which remained entirely within the control of the applicant. The problem was that neither the Office nor the patent attorneys had any incentive to advise the applicant on how to shorten his specification. Therefore, the compact solution should be combined with internal instructions to the examiner to recommend shortenings of the description and claims.
90. The Slovenian representative observed that point 14 of CA/PL 3/98, summarising his proposal, was slightly misleading. His proposal was that the description of the invention should be divided into 2 parts. The first part would serve the purpose of understanding the invention and supporting the interpretation of the claims, and the second part would be an annex containing the detailed disclosure of the invention. The first part would be translated with the claims.
91. The Spanish and Hellenic delegations found none of the alternatives enumerated in CA/PL 3/98 acceptable, and insisted on full translation of patent specifications
92. The Irish delegation made a new proposal which comprised 4 features: 1. The patent specification would be published by the EPO in its 3 official languages; 2. An abstract of the invention should be published in all other languages of the contracting states; 3. The proprietor should have the option of translating either the whole specification or the claims only into other languages; 4. Users would not have to pay damages for use in countries where no translations have been filed, but would have to satisfy the court that their lack of knowledge in English, German or French was a contributory factor in the infringement.
93. The Chairman stated that it was the clear understanding of the Committee that the applicant could not be forced to shorten his specification. Shortening the specification was a measure which applicants could choose to implement voluntarily, but the compact solutions otherwise did not constitute alternatives to the present system, and therefore should not be pursued any further in this perspective.

IVb. CENTRALISED FILING OF TRANSLATIONS AT THE EPO (CA/157/97)

94. The EPO introduced CA/157/97, and insisted on the fact that the centralised filing of translations was not an alternative to the reduction of translation requirements, but

a fully independent administrative measure meant to simplify the filing of translations and seriously reduce costs. The possible yearly savings for European industry would be around DEM 170 Million, twice the amount effected by the Office's 20 % fee reduction of 1 July 1997. The reduction in costs computed in relation to this proposal was composed strictly of the costs arising from national fees and fees charged by representatives who had in many contracting states a monopoly on filing those translations at the national offices, which amounted to approximately 50% of validation costs. The proposal had no bearing on the cost of the actual translation itself nor on who would perform the work.

The main concept was to complete national provisions by stipulating that the filing of a translation at the EPO within 3 months of grant would be deemed to fulfill national requirements. This could be done either on the basis of Agreements between the EPO and the respective contracting states, or simply by amending the national law of the contracting states. Germany had agreed to put together a model implementing such a system for itself.

The main issue at the level of the Heads of Delegation and the Administrative Council was whether the central filing of translations was compatible with the EPC. Some delegations shared the view of the EPO that it was, but others were convinced that it was not. Article 65 stipulated that a contracting state could require a translation of the specification to be filed at the national office. This was a simple enabling provision. A contracting state could decide to require such filing of a translation, or not to do so. Since Art. 65 EPC clearly fell within the category of provisions which created either a right or an obligation vis-à-vis other contracting states, it raised the matter of whether, should a contracting state pass a provision in national law stipulating that the filing of the translation at the EPO would be equivalent to a filing at the national office, another contracting state could accuse it of breaching the EPC, and set off a dispute which would have to be settled according to the procedure contained in Art. 173 EPC.

A further issue arose: that of the role of the EPO. Any such system would be optional and function on the basis of bilateral agreements between the Office and the contracting states concerned, which would be subject to the approval of the Administrative Council pursuant to Art. 33(4) EPC. As stated in its preamble, the EPC laid the foundation for cooperation between the contracting states, occurring through the EPO. There existed many examples of such cooperation which were not provided for expressly in the EPC, such as in the realm of patent information.

Assuming that the required majority existed in the Administrative Council to approve such a scheme, the issue at hand was thus whether one contracting state not

wishing to implement this system could oppose its adoption by another contracting state on the basis of lack of conformity with the EPC.

95. The Austrian delegation stated that it was not its intention to cause difficulties for other contracting states, but it disagreed with the EPO's interpretation of Art. 65 EPC, which it believed offered only 2 possibilities: either not to require a translation at all, or to require a translation, but only under the prescribed conditions.
96. The Swedish delegation, supported by the Danish and Spanish delegations, agreed with the Austrian's analysis that Art. 65 EPC did not provide a legal basis for just any arrangement, including the central filing of translations. Furthermore, the EPO could not merely assume a post-office function, but would have to examine on behalf of the contracting state whether eg the time limit for the filing of this translation had been respected. Thus, very strict guidelines would have to be established for the exchange of information between the EPO and the national offices. Secondly, the handling of translations by the EPO would suppose a delegation of powers to the EPO which would involve the Swedish Parliament.
97. The EPO, supported by the German and Hellenic delegations, emphasised that the system only entailed a transfer of administrative duties, not one of sovereign powers. The EPO would indeed function as a post-office, which received a letter and immediately informed the addressee of its arrival. If the translation was not duly filed at the EPO within the time limit, the consequences provided for under national provisions would apply.
98. The Swiss delegation supported the proposal of central filing of translations and did not think that Art. 65 should be interpreted as requiring the translation to be filed necessarily at the national office. Switzerland would be prepared to amend its national law to implement such a system.
99. The Belgian delegation also supported the proposal of central filing of translation, observing that this system was probably more attractive for contracting states which shared a common language with other contracting states. It opined that nothing prevented some contracting states from embracing the central filing of translations even if others were against it. Finally, 2 other matters should not be forgotten: the issue of representation requirements for filing translations and the fact that some states levied a fee for the filing of translations.

100. The Spanish delegation stated that it could not consider the adoption of a system of central filing of translations for constitutional reasons.
101. The Hellenic delegation reserved its position but agreed with the EPO that Art. 65 EPC permitted the adoption of such a system of central filing of translations and was sympathetic to the approach proposed. There was another angle under which one could envisage the issue: that of exchange of information pursuant to Art. 130 EPC. Finally, it might be possible to alleviate the constitutional difficulties of some states by not providing for a centralised publication of the translations by the EPO.
102. The Netherlands delegation stated that the issue at hand was political and not legal, and as such, should perhaps be put on the agenda of the Administrative Council, so that those contracting states opposing the central filing of translations could declare themselves explicitly on the question of whether they would actively impede others who wished to implement such a system.
103. The German delegation declared that although it had adopted a critical stance with respect to the conformity of central filing of translations with Art. 65 EPC at the last meeting, it emphasised that such was no longer the case. Reference was made to Part IX of the EPC containing provisions on special agreements which were included in view of the CPC, and in particular to Art. 143 EPC, which expressly provides that the contracting states may give additional tasks to the EPO, so that Art. 4 EPC should not be construed as being exhaustive.
104. The Portuguese delegation regretted that it could not support the central filing of translations.
105. The *epi* representative stated that industry, as well as *epi* members working in industry were in favour of centralised filing of translations. Attorneys in private practice, however, were very much against this proposal. Also, the *epi* feared that translation bureaus would be set up in Munich, and therefore disagreed with the EPO on this point.
106. The Luxemburg delegation supported the EPO proposal. Although it was not itself concerned, since it did not require translations to be filed at the validation stage, it encouraged other contracting states to adhere to such a system.
107. In principle, the Irish delegation was not against the proposed system. Implementing it in Ireland would signify amending the Irish Patents Act.

108. The Chairman found that there had been no real answers given to the question put forth to the Committee as to whether a contracting state denying the compatibility of this proposal with Art. 65 EPC would attempt to block its implementation by other contracting states. In any event, this was a political question. When the German delegation had put together its model agreement, the Committee would consider these matters once again, and the delegations would be asked to take a firm stand regarding the proposal and, if against it, whether they would try to block the adoption of such a system by others.

V. IMPACT OF NEW RULE 23A EPC ON NATIONAL LAW (CA/PL 4/98)

109. The United Kingdom delegation presented their document. Pursuant to Rule 23a EPC, it was clear that for a European patent application to be included in the state of the art vis-à-vis a later application, the designation fee had to be paid. This was not the case in United Kingdom national law. It was important that national laws should be consistent not only with the EPC, but they should also be internally consistent in their treatment of patents valid nationally regardless of whether obtained by the national or the European route.
110. The Austrian, German and Netherlands delegations reported that bills dealing with this point were already under way in their countries, which would align national law with Rule 23a.
111. The *epi* announced its reservations as to the legality of Rule 23a, which appeared on the surface to be in contradiction with Art. 54 EPC, which did not refer to the necessity of paying a fee for a designation to be effective as prior art. This point should be kept in mind upon revising the EPC.
112. The Chairman responded that the Committee had already discussed this point and concluded that there was a lacuna in the EPC which had to be filled. The solution introduced by Rule 23a, similar to that provided in the PCT, was legally sound. This would not preclude addressing this point upon revision of the EPC. The matter would again be put on the agenda of a future meeting. The delegations could then send the proposed text of their respective amendments to the Office, to serve as a basis for discussion by the Committee.

VI. PROGRESS REPORT ON THE WIPO PATENT LAW TREATY

113. The WIPO representative reported on the progress made at the fifth session of the Committee of Experts on the Patent Law Treaty, from 15-19 December 1997. There was a general agreement on many provisions of the draft treaty, although model forms and certain administrative provisions still needed to be discussed. Most

delegations wished to resume work on the harmonisation of substantive law. A reorganisation was underway at WIPO, which would turn the Committee of Experts into a "Standing Committee" on patent law. The draft program and budget contained a recommendation that the Standing Committee complete the work on the draft Treaty and undertake preparatory work for a diplomatic conference which was tentatively expected to be convened as early as the year 2000.

VII. LIKELY ENTRY INTO FORCE OF THE EU DIRECTIVE ON THE PROTECTION OF BIOTECHNOLOGICAL INVENTIONS

114. The representative of the European Commission reported on the progress of the EU Directive on the Protection of Biotechnological Inventions. The remarkable collaboration which had existed at all levels between the European Council, the Commission and the EPO in the preparation of this Directive was lauded. In all likelihood, the Directive would be adopted in the course of 1998 and would immediately enter into force on the day of its publication in the Official Journal of the European Communities. From this day onward, this area would become a field of exclusive European competence. The members of the European Union would have to implement the Directive by aligning their national legislation within 2 years from its entry into force.

Within the framework of the Directive, the Commission would have to produce: 1. One report every 5 years on the relationship between patent law and international human rights conventions; 2. An annual report on the evolution of patent law and its consequences; and 3. Within 2 years of the Directive's entering into force, a report on the effect of patent law on the free circulation of scientific information.

115. The Netherlands delegation asked the Commission how it envisaged negotiations would be conducted between EC and non-EC member states leading to an amendment of the EPC on this point once exclusive European competence existed.
116. The representative of the Commission replied that the Directive was compatible with the EPC, and therefore, no revision of the EPC would be needed. However, in international negotiations pertaining to TRIPs Art. 27(3)(a), the Commission would assume its exclusive competence, and EC member states would not longer be able to adopt an individual position.

C. MISCELLANEOUS

VII. OTHER BUSINESS

VIIIa. MUTUAL RECOGNITION OF PRIORITY WITH TAIWAN

117. Regarding the mutual recognition of priority rights with Taiwan, the EPO reported that there were no concrete results as yet. The Office had been in contact with the

Commission on this matter generally, regarding not only Taiwan but other countries which posed similar problems such as India and Thailand. The European Commission was the appropriate party to pursue this complicated matter. In the past, a representative of the Commission had already discussed this issue with the Taiwanese authorities, indicating an interest in a mutual recognition of priority rights. However, Taiwan had not responded.

3 EPC contracting states recognised priority rights in respect of Taiwan: France, Germany and Switzerland, with the corresponding recognition from Taiwan limited to national applications and not extended to EP first filings. If there were any other states which had either concluded agreements with Taiwan or obtained *de facto* mutual recognition, the Office was very interested to hear from those countries.

118. The Spanish delegation reported that its government was currently engaged in talks with Taiwan, focusing *inter alia* on priority rights. However, a concerted action of all contracting states, involving perhaps the European Commission, would be welcomed by the Spanish and Luxembourg delegations.
119. The Netherlands and Luxembourg delegations informed the Committee of the great interest which existed in their countries with respect to the mutual recognition of priority rights with Taiwan. In the Netherlands, a bill was being prepared to allow such recognition to be afforded. In Luxembourg, this issue was currently being investigated by the Ministry of Foreign Affairs.
120. The Chairman asked that the EPO write to the Commission regarding this matter, mentioning the present discussion within the Committee in order to emphasise the importance which the delegations attached to the resolution of this issue on behalf of the users of the system.

VIIIb. IMPLEMENTATION OF ART. 63 EPC

121. At the last meeting, the delegations were asked to send their national implementing legislation with respect to Art. 63 EPC to the EPO, pursuant to the Resolution on Mutual Information passed during the diplomatic conference revising Art. 63 EPC. To date, only 4 delegations had done so. Consequently, the EPO reiterated this request.

VIIIc. IMPLEMENTATION OF TRIPS ART. 27(2)

122. The Austrian delegation announced that it wished to discuss the implementation of TRIPs Art. 27(2), dealing with the exclusion from patentability of inventions against *ordre public* or morality as it was contemplating preparing a bill dealing with the matter.

123. The EPO recalled that it had collated the implementing measures of the contracting states in CA/PL 3/97, which still accurately reflected the actual situation of the contracting states. Aside from Belgium and Switzerland, which had amended their national law as a consequence of TRIPs Art. 27(2), all the contracting states took the view that their national law was in line with that provision.

Moreover, once the EU Biotechnology Directive, touching upon the same issue, came into force, the contracting states would have to align their national law on the Directive. While the latter was compatible with the TRIPs Agreement, it was far more detailed, and the EU member states would be faced with the task of ensuring that their national legislation was aligned with the wording of the Directive. The contracting states should take a uniform approach in these matters, and it was therefore desirable to wait until the adoption of the Directive before amending national legislation. At any rate, it would only be a matter of a few months.

124. The Chairman concluded that it might be preferable for the contracting states to wait for the Directive to be adopted before amending their national law in this respect.

IX. WORK PROGRAMME, DATE AND VENUE OF THE NEXT MEETING

125. The Committee agreed to include the following items in its work programme for the next meeting: 1. Implementation of BEST; 2. Alternatives to the package solution.
126. In view of the pending EPC revision work, the Committee agreed to hold 3 meetings in 1998, lasting as a rule 3 days at a time in order to deal with the additional work load. The next meeting was scheduled for 12-14 May 1998. In order to make allowance for flight schedules, it was agreed that the meeting would begin at 11:00 on 12 May.
127. The Chairman thanked the delegations, the colleagues from the EPO as well as the interpreters and closed the meeting.
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Stand: 29.01.1998

**6. Sitzung des Ausschusses "Patentrecht"
6th Meeting of the Committee on Patent Law
6ème réunion du comité "Droit des brevets"**

München, 27.-28.1.1998

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List of participants
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