

M I N U T E S

of the
12th meeting of the

COMMITTEE ON PATENT LAW

(Munich, 1 and 2 February 2000)

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The Committee on Patent Law held its 12th meeting in Munich on 1 and 2 February 2000, with Mr LAURENT (BE) presiding. The list of participants is contained in Annex I.

I. ADOPTION OF THE PROVISIONAL AGENDA (CA/PL 1/00)

1. The committee adopted the provisional agenda as set out in CA/PL 1/00, adding CA/106/99 Add. 1 under item 3(a).

II. APPROVAL OF THE DRAFT MINUTES OF THE COMMITTEE'S 11TH MEETING (CA/PL 30/99)

2. The committee approved the draft minutes of the 11th meeting with the amendments to point 27 by the UK delegation and point 30 by the Austrian delegation. They have since been issued as CA/PL PV/11.

III. REVISION OF THE EPC

IIla. ARTICLE 11(5) (CA/106/99 + Add. 1)

3. The Vice-President DG 3 tabled CA/106/99 + Add. 1, pointing out that the proposed amendment to the wording of Article 11(5) set out in Add. 1 had been requested by the Austrian delegation at the December 1999 meeting of the Administrative Council on the grounds that, in Austria, bodies with judicial functions were not recognised per se as national courts.
4. The French delegation wondered if it might not be more appropriate to use the term "quasi-jurisdictional" instead of "quasi-judicial".
5. The Hellenic delegation said that deletion of the mention of national authorities was justified for external technically qualified members, but that for countries with no specialist patent courts a reference to national authorities was necessary to enable them to put forward legally qualified members as external members of the Enlarged Board of Appeal.
6. While supporting the proposal as set out in CA/106/99 Add. 1, the Belgian delegation proposed that countries with no specialist patent courts be empowered to nominate alternate external members of the boards of appeal, capable of being appointed members of the Enlarged Board after some years' experience.

7. The German delegation, while supporting the proposal at issue, questioned whether the exclusion of technically qualified members as proposed in the new Article 11(5) was entirely justified. Moreover the chosen wording, "... or quasi-judicial authorities", could be improved by inclusion of a reference to one or more international agreements which had dealt with such issues.
8. The UK delegation said it supported the proposal as set out in CA/106/99 Add. 1, given that the aim of this new subparagraph was to harmonise European patent law through the appointment of national judges.
9. The Vice-President DG 3 then pointed out that the wording "quasi-judicial authorities" had been adopted because those were the terms used in Article 62(5) of the TRIPs Agreement. Furthermore, one of the aims of the proposal at issue was to harmonise European and national case law, and only the legally qualified could make an effective contribution to the achievement of that aim. Technically qualified members were excluded because there was already enough technical expertise within DG 3, where there were 80 technically qualified members in all the technical fields in question.
10. The committee then gave a unanimous favourable opinion on the proposed amendment to the wording of Article 11(5) as set out in CA/106/99 Add. 1.

IIIb. ARTICLES 33 AND 35 (CA/PL 3/00)

11. The Office tabled CA/PL 3/00.
12. The Swiss and Monegasque delegations, not being members of the European Union, voiced reservations about these proposals.
13. The Hellenic delegation queried the use of the word "required" in Article 33(1)(c) and asked who would judge what was required. It proposed using "indispensable".
14. Replying to questions from the Monegasque and Danish delegations, the Office said that if a country's representatives were absent at the time of the vote, voting would have to be postponed; in other words, every country would have to be represented at the time of the vote. If one country blocked the move, the requirement for unanimity of the contracting states would not be met and the way out of the impasse would be EPC revision. Most of the delegations (AT, BE, DK, FR, GR, IE, LU, NL, UK) gave a favourable opinion on the proposed amendments to Articles 33 and 35 EPC, but some of these delegations (AT, DE, FR, IE, NL, UK) expressly stressed that there was still a need for internal consultations, in some cases with the

respective Foreign Affairs Ministries, and that their opinion therefore had to be seen as provisional.

15. The UK delegation thought it might be appropriate for Article 33(1)(c) to refer to other Parts of the EPC, in particular Part IX, and wondered if the restriction to patent-related matters provided for in the proposed wording of that subparagraph made its scope too narrow.
16. The Netherlands delegation also felt that thought should be given to extending the scope of Article 33(1)(c) to embrace all treaties binding on the countries and organisations; that would make the words "on patents" unnecessary. Moreover the requirement for unanimity allowed one country to block the decision-making process, when in other bodies (the European Union, for example) voting would have been by qualified majority. The Belgian delegation said it was in favour of the proposal, supporting the Netherlands and UK delegations with regard to limiting the scope of the provision to patent law.
17. The Austrian delegation wondered if indicating the articles within square brackets in Article 33(1)(c) was liable to negate the flexibility required in the application of this provision. It was in favour of "indispensable" and said all countries would have to be present at the time of the vote. It supported the Netherlands delegation with regard to pursuing reflections on qualified majority voting.
18. The Spanish, Finnish, Italian, Portuguese and Swedish delegations said they could not yet take up a position, even provisionally, on the proposals at issue, there still being a need for consultation with their authorities, in particular their Foreign Affairs Ministries.
19. The Luxembourg delegation was in favour of the aim behind amendment of the articles in question, but it had a reservation about the institutional aspect of the proposals in that national parliaments would no longer be empowered to amend certain articles, such as those relating to patentability. It emphasised that it attached great importance to the unanimity clause, but that the scope of the articles in question needed to be extended. The German delegation likewise stressed that it attached great importance to the unanimity clause.
20. The Irish delegation was in favour of the unanimity clause and of restricting the scope of the provision to patent-related matters.

21. The Office then stated its position on the various arguments put forward by the delegations.
22. The chairman then summarised the debate. It was agreed that these proposals required further discussion at the next meeting. Four issues would have to be examined in more detail:
 - Unanimity of the contracting states presupposes a favourable vote by all the contracting states; the word "represented" should be deleted from the new paragraph 3 of Article 35; but abstention would be no obstacle to approval.
 - Some delegations were in favour of indicating the parts of the Convention, in particular Part IX, in Article 33(1)(c).
 - The use of the word "required" in Article 33(1)(c) should be re-examined; some delegations would prefer "indispensable".
 - Four delegations (AT, BE, NL, UK) wanted the competence of the Administrative Council to be extended, proposing deletion of the words "... on patents" from Article 33(1)(c).

IIIc. ARTICLE 54(5) (CA/PL 4/00 + Info 2/PL 12 e)

23. The Office tabled CA/PL 4/00.
24. The *epi* tabled its proposed formulation of Article 52(5) as set out in Info 2/PL 12 e. In particular it pointed out that the purpose of revising this provision was, as the Office had stressed, to improve legal certainty in the associated field. One implication of the Office's proposal would be that the first medical indication could no longer be protected by a Swiss-type claim as allowed by the Enlarged Board of Appeal, but only by a use claim (eg medicaments designed to treat a specific disease), which would be unjust.
25. In reply to a question from the UK delegation, which had stated that it was in favour of protection for the second medical indication too, the Office said the likely outcome of deleting Article 54(5) would be the loss of protection for the first medical indication. In that respect it was pointed out that the exception provided for in Article 52(4) would have to be transferred to Article 53 EPC because these methods were exceptions to patentability and no longer to industrial application. The Office also referred to the debate at the committee's 9th meeting, during which the more extended proposal for making medical methods patentable had failed to receive sufficient support (see CA/PL PV 9).

26. The Austrian delegation felt the issue of the patentability of the second medical indication was a political matter and should therefore be referred to the Administrative Council. The German delegation supported the Austrian position, stressing the political nature of the proposal, protection for later indications constituting an encroachment on the therapeutic freedom of the medical practitioner in the performance of his duties.
27. In response to the Office's comments, the French delegation pointed out that the references to French case law were inaccurate and should be deleted (see point 6 in CA/PL 4/00). It said it was not yet able to take up a position on the proposals at issue, there still being a need for consultation.
28. The Austrian delegation also stressed that it was in favour of legal certainty and of maintaining the status quo regarding the patentability of medical indications, and this required a sound legal basis.
29. The Office then gave a potted history of protection for medical uses (French legislation, 1957, pharmaceutical patent; "travaux préparatoires" for the drafting of Articles 52(4) and 54(5); Enlarged Board decision allowing Swiss-type claims for a second medical use). The question was whether the same protection should be afforded to the various medical indications or whether it was preferable to give priority to the first such indication, given that protection for the second medical indication was dependent on the first indication. The Office's proposal aimed to reduce protection to two possible types of claim, thereby putting a stop to the current artificial construction of three types of claim and making it easier for examiners to perform their duties efficiently.
30. The *epi* delegation said it shared the Office's opinion as to the desire to increase legal certainty. The only problem was the limitation on the scope of protection for the first medical indication created by the Office's proposed reformulation of Article 54(5). The UNICE delegation supported the *epi* delegation's position.
31. The committee noted with considerable interest the Office's discussion of the proposal in CA/PL 4/00 and the *epi* representative's analysis (see Info 2/PL 12 e). It was agreed to return to this proposal at the committee's next meeting. With a view to enhancing the effectiveness of the work of the committee, the chairman asked the delegations to harmonise their efforts with their representatives on the Administrative Council.

IIId. ARTICLES 80, 90 AND 91 (CA/PL 5/00)

32. The committee, at the request of the Office, first debated the principle underlying the envisaged deregulation, ie that most of the applicable provisions would be transferred to the Implementing Regulations.
33. Nearly all the delegations were in favour of the principle of deregulation. Most stressed that this would provide greater flexibility if it proved necessary to adapt or amend provisions, because it would be possible to refer such matters to the Administrative Council. The Austrian delegation emphasised the need to find a balance between legislation in articles of the Convention and rules in the Implementing Regulations, thereby keeping the text readable. The Spanish and Belgian delegations stated a preference for assessing case by case whether or not a particular provision should be transferred to the Implementing Regulations. The Swedish delegation requested that the legal basis should be clearly stated in the articles of the Convention. The Luxembourg delegation supported the principle of transfer to the Implementing Regulations, emphasising the forthcoming introduction of electronic filing (*epoline*).
34. Replying to an intervention by the staff representatives, the Office said that Administrative Council decisions amending the Implementing Regulations had hitherto always been taken after broad consultation of the interested communities and at the recommendation of the Committee on Patent Law (formerly the ad hoc Working Party on Harmonisation), so it was wrong to conclude that transferring procedural provisions to the Implementing Regulations meant that the users would no longer be consulted.
35. Concluding this debate, the chairman noted that the delegations had all been in favour of the principle behind deregulation and that the transfer of the provisions to the Implementing Regulations would have to be examined either case by case (the UK approach) or on the basis of general criteria (the French approach), with the principles of deregulation being established in the Convention; for example, the procedural provisions might be transferred to the Implementing Regulations, while the substantive provisions (substantive law) remained in the Convention. Whatever solution was adopted, a legal basis for this deregulation would have to be clearly established in the Convention. The Office then said that a proposed amendment to Article 164 EPC establishing the legal basis for the envisaged deregulation would be submitted to the committee for opinion, along with a proposed amendment to Article 51 EPC under which a uniform legal system for fees (definition of the fee, time limits for payment, etc.) would be established in the Implementing Regulations.
36. At the proposal of the chairman, discussion then turned to CA/PL 5/00.

37. The Office began by tabling CA/PL 5/00.
38. The French delegation proposed that the requirements for according a date of filing be expressly included in the Convention. If an international treaty establishing different requirements had to be applied to the Organisation, it would be possible for the Administrative Council to adapt said requirements with the necessary degree of flexibility by applying new Article 33(1)(c). The Spanish and Hellenic delegations supported the French position, the filing date in the European grant procedure being an essential date which had to be established in the Convention. The Netherlands delegation felt that, for the sake of consistency with the PLT which had an article establishing the requirements for according a filing date, it would prefer to see these requirements defined within the Convention.
39. The *epi* representative noted a fundamental difference between the proposed Article 5 PLT and the present version of Article 80 EPC, pointing out that the *epi* was in favour of deleting the need for "claims" in order for a filing date to be accorded and proposing that, if the requirements for according a filing date were to be retained in the EPC, Article 80 be amended accordingly.
40. The Austrian, Danish and German delegations were in favour of the Office's proposal.
41. The Swedish delegation said it intended to reserve its final position, internal consultations still being required. It provisionally stated that in terms of Swedish constitutional law it appeared that the requirements for according a filing date needed to be part of the basic law, which in this case meant keeping them in the Convention.
42. Summing up the debate, the chairman concluded that the committee gave a favourable opinion on the proposal in CA/PL 5/00. Four delegations (ES, FR, GR, NL) said they would prefer to see the requirements for according a date of filing included in an article of the Convention.

IIIe. ARTICLES 94 to 97 (CA/PL 6/00)

43. The Office tabled CA/PL 6/00.
44. The French delegation, while supporting the Office's proposal, pointed out that the phrase "in due time" was rather vague and that editorial improvement was called for. It also said that transferring time limit definitions to the Implementing Regulations would entail deleting Article 33(1)(a).

45. Replying to the Danish delegation, the Office said that the extent to which it was appropriate to deal with legal consequences in the Implementing Regulations rather than in articles of the Convention depended on the legal situation at issue, and there was no systematic approach in that respect. The new wording of Article 94, for example, mentioned legal consequences in paragraph 1; in other cases they would be mentioned in the Implementing Regulations. To ensure the clarity and legibility of the provisions, the principle to be adopted was that both the action required by law and the legal consequences of failure to observe the time limits involved would be kept on the same "legislative" level.
46. The Monegasque delegation proposed replacing the words "in due time" with "within the required period".
47. Summing up the debate, the chairman concluded that the committee gave a unanimous favourable opinion on the proposal in CA/PL 6/00, subject to editorial improvements to the wording of Article 94(1), second sentence, as proposed by the French delegation.

III f. ARTICLE 142 FF (CA/PL 7/00)

48. The Office tabled CA/PL 7/00.
49. The Hellenic delegation proposed leaving Part IX of the Convention unamended and extending the competence of the Administrative Council, as envisaged in the new version of Article 33(1)(c), to cover Part IX (see CA/PL 3/00, p. 8). It stressed that if an agreement had to be concluded between the European Patent Organisation and the Commission, it could be drawn up on the basis of Article 33(4) EPC. It also felt it essential for a group of states to be able to meet as a select committee such as is currently provided for in Article 145 EPC. Finally, the envisaged deletion of Article 147 would eliminate renewal fee payments.
50. The European Commission delegation said this proposal had been referred to the Commission's Legal Service; a position paper would be supplied to the committee for its next meeting.

The UK delegation advocated adding this amendment to the agenda of the revision conference and stated its preference for the first option, although the wording of the proposed provisions would have to be adapted to the exact terms of the EU Regulation once this had been published.

51. The French delegation preferred the other solution, ie the alternative option, proposing that the wording of Article 142(2) be amended as follows: "... that a Community patent shall be granted, having a unitary character and having the same effects throughout the territory of the European Community, ..." instead of

"... that a European patent granted for its member states shall have a unitary character throughout the territory of the European Community ...". The Office then pointed out that the formulation used in paragraph 2 was in keeping in legal terms with the legal system set up by the EPC, which was that the European Patent Office granted European patents and it was up to the member states and, where appropriate, the European Community to define the effects that they had. The chairman said it was not appropriate to draw a parallel between these duties and those of the OHIM.

52. The Swiss delegation, like the UK delegation, was in favour of adding amendment of these provisions to the agenda of the revision conference and said it preferred the proposed first option. It also requested that one or more provisions be added to Article 142 ff to refer in particular to the Protocol on Litigation, as currently being discussed by the Working Party on Litigation.
53. The Office then said that the Committee on Patent Law at the present time had no mandate from the Administrative Council to examine the issue of enshrining the Protocol on Litigation in the articles of the EPC.
54. The Netherlands delegation established a link between the options set out in CA/PL 7/00, and in particular the proposed wording for Article 142, and the proposed amendment to Article 33(1)(c), and suggested returning to the proposed amendment to Article 142 ff once the final text of Article 33 had been defined. In any case, it would be advisable to amend Articles 142 to 149 as part of the ongoing revision exercise in the light of the EU Regulation once its substance was known.
55. At the chairman's proposal, the committee agreed to return to this proposal at its next meeting.

IV. BASIC PROPOSAL FOR THE PATENT LAW TREATY (CA/PL 2/00)

56. The committee discussed the provisions of the future PLT on the basis of the EPO's comments and suggestions as set out in CA/PL 2/00.
57. Regarding Article 3(1)(b) and Article 3(1)(b)(i) PLT (CA/PL 2/00, p. 6), the committee gave a unanimous favourable opinion (present: 18; for: 18) on the Office's comments and suggestions.
58. Turning then to Article 5 (CA/PL 2/00, pp. 8-12), the committee first gave a unanimous favourable opinion (present: 18; for: 18) on the Office's proposal for complete harmonisation of the filing date, ie deleting "[no later than]" from Articles 5(1)(a), 5(4)(a) and 5(6)(a), (b) and (c), replacing "may provide" with "shall

provide" in Article 5(4)(b) and replacing "may be" with "shall be" in Article 5(7)(b). With regard to allowing the description to be replaced by a drawing (Article 5(1)(b)) and the Office's comments (CA/PL 2/00, p. 8), six delegations (BE, GR, ES, FR, IT, MC) were against this option, while eight (DK, DE, IE, LU, NL, AT, SE, UK) were in favour of retaining the version set out in the Basic Proposal. It was therefore concluded that each delegation should express its own point of view on the issue at the Conference [see point 60 below, the compromise solution proposed by the chairman]. Regarding the Office's proposal to replace "as soon as practicable" with "promptly" (Article 5(3) in CA/PL 2/00, p. 9), it was agreed to retain the formulation used in the Basic Proposal.

59. The committee next examined Article 6(5), together with Rule 4 of the PLT Regulations and the Office's proposal (CA/PL 2/00, p. 14). The *epi* representative was against this proposal. Some delegations were in favour of the Office's proposal; others supported the *epi* position. It was concluded that each delegation should express its own point of view on the issue at the Conference.
60. Regarding Article 7(2) and the Office's proposal to remove the square brackets around items (iii) to (v) (CA/PL 2/00, p. 17), nine delegations (DK, DE, FI, FR, LU, MC, NL, SE, UK) were in favour of the Office's proposal, while four (GR, ES, IE, AT) had reservations. The Austrian delegation said the reason for its reservations was that consultation with user circles was still in progress. The Belgian delegation, while voicing reservations because it still needed to consult its user circles, said it would be able to support the majority. The *epi* representative was against this proposal, especially sub-paragraph (v) of Article 7(2). The UNICE representative supported the Office's proposal. With a view to fully harmonising the delegations' positions, the chairman then put forward a compromise proposal to the effect that there should be three actions for which appointing a professional representative would not be mandatory, ie paying maintenance fees (renewal fees), filing a translation and filing the priority document, but that any additions to this list would require amendment of the PLT. The Irish delegation said it could support this compromise proposal; three delegations (GR, ES, PT) voiced reservations; the Austrian delegation reiterated its previous position; and the Swiss delegation said it had not yet decided on its final position on the issue. It was therefore concluded that each delegation should express its own point of view on the issue at the Conference.
61. The committee next examined Article 11(1) and (2), together with Rule 12 of the PLT Regulations and the Office's proposal (CA/PL 2/00, pp. 24 and 25). Nine delegations (BE, DE, GR, ES, FR, IE, IT, MC, CH) were expressly in favour of the Office's

proposal, while four (FI, NL, SE, UK) had reservations. Following an intervention made by the Netherlands delegation, debate turned to the status of third parties and the possibility of imposing a strict time limit. The chairman then suggested a compromise with a view to achieving unanimity: he asked the delegations which were against the Office's proposal of starting the two-month time limit from the date of notification to support that proposal, and in return all delegations would support the proposal for allowing the description to be replaced by a drawing (see point 58 above). Five delegations (BE, ES, FR, IT, MC) said they would support the version set out in Article 5(1)(b) of the Basic Proposal if all the delegations backed the Office's proposal as to the starting point for the two-month time limit. The Swedish, Netherlands, Finnish and UK delegations then again voiced their opinions on the issue, emphasising (subject to confirmation) that at the Conference they would not oppose the Office's proposal as to the starting point for the two-month time limit. The Hellenic delegation expressly stated that it was not in favour of equating a drawing with the description. The chairman concluded the debate, noting that a very clear majority of the delegations was in favour of the proposal in Article 5(1)(b) and of the Office's proposal as to the starting point for the two-month time limit. He added that this majority was likely to turn into unanimity.

62. Regarding Article 11(3), together with Rule 12(5) of the PLT Regulations and the Office's proposal (CA/PL 2/00, pp. 25 and 26), all the delegations supported the Office's proposal with the exception of the Austrian, Finnish and UK delegations, which voiced reservations because further consultation was required.
63. Regarding Article 12(1) and the Office's comments on the principle stated in Article 2(1) (CA/PL 2/00, p. 27), it was concluded that the aim of this provision was to establish a system for the re-instatement of rights which was most favourable to the applicant.
64. Regarding Article 12(2), together with Rule 13(3) of the PLT Regulations and the Office's proposal (CA/PL 2/00, p. 28), it was concluded that no delegations would oppose the Office's proposal, the UK delegation voicing a reservation because further consultation was required.

V. OTHER BUSINESS

Va. DATES OF FORTHCOMING MEETINGS

65. The committee set the dates for its next two meetings.

- 13th meeting: 3-7 April 2000
- 14th meeting: 3-7 July 2000.

The Committee on Patent Law approved the minutes contained in this document on 3 April 2000.

Munich, 3 April 2000

For the Committee on Patent Law
The Chairman

A stylized handwritten signature in black ink, consisting of a large, sweeping 'L' shape with a diagonal stroke through it.

Paul LAURENT

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Info 1 Rev.1

12. Sitzung / 12th meeting / 12ème session (München/Munich, 01. - 02.02.2000)

München/Munich, 02.02.2000

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| BETRIFFT: | Teilnehmerliste |
| SUBJECT: | List of participants |
| OBJET: | Liste des participants |
| VERFASSEN: | Ratssekretariat |
| DRAWN UP BY: | Council Secretariat |
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Organisations intergouvernementales**

Europäische Union - European Union - Union européenne

Herr Carl-Erik NORDH

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World Intellectual Property Organization
Organisation Mondiale de la Propriété
Intellectuelle (WIPO/OMPI)

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| Mr Philippe BAECHTOLD | Head Patent Law Section Industrial Property Law Division |
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3. Nichtstaatliche Organisationen - Non-Governmental Organisations -
Organisations non-gouvernementales

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Institute of Professional Representatives before the EPO
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