

M I N U T E S

of the
81st meeting of the

ADMINISTRATIVE COUNCIL

(Munich, 5-7 September 2000)

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1. The Administrative Council of the European Patent Organisation held its 81st meeting in Munich from 5 to 7 September 2000 with Mr. Grossenbacher (CH) presiding.
2. The Chairman of the Council and the President of the Office extended special greetings to the representative of Turkey, on the occasion of Turkey's forthcoming accession on 1 November 2000 as the 20th Contracting State to the EPC. The Turkish representative responded in kind and gave a brief presentation of his office.

I. ADOPTION OF THE PROVISIONAL AGENDA (CA/79/00 Rev. 1)

3. The Council adopted the provisional agenda set out in CA/79/00 Rev. 1 with the addition under agenda item 3(d) "Rules of procedure of the Diplomatic Conference" of CA/26/00 Rev. 1 and under agenda item 5 "Any other Business - production and productivity of examiners in DGs 1 and 2" of Info 2/AC 81.

II. APPROVAL OF THE DRAFT MINUTES OF THE COUNCIL'S 80TH MEETING (CA/78/00)

4. The Council approved the draft minutes of its 80th meeting with an amendment to paragraph 11 requested by the Finnish delegation and a grammatical correction to paragraph 9 of the French language version requested by the French delegation.
5. The approval was distributed as CA/PV 80.
6. The Spanish delegation made the following statement in respect of item XXVa of CA/PV 80: "The Spanish delegation highlights the importance of the non-coincidence of the nationality of candidates with members of the committee in order to keep due objectivity in the procedure and would have preferred to postpone the appointment of the members to the end of the period for filing applications."

IIIa. PREPARATION OF THE DIPLOMATIC CONFERENCE - REPORT OF THE CHAIRMAN OF THE COMMITTEE ON PATENT LAW ON ITS 14TH MEETING

7. The Chairman of the Committee on Patent Law gave an oral report concerning the Committee's 14th meeting [see draft minutes CA/PL 32/00].
8. The Council noted the oral report.

**IIIb. PREPARATION OF THE DIPLOMATIC CONFERENCE - BASIC PROPOSAL;
AMENDMENTS TO THE EPC (CA/100/00 + Add. 1 and Add. 2 + CA/118/00)**

9. The Chairman of the Council introduced CA/118/00, explaining that for the discussion of CA/100/00, delegations could place items identified as Category A items in CA/118/00 into a Category B so as to enable substantive discussion of the desired item.
10. In conclusion, the Council unanimously decided to follow the procedure for discussion set out in CA/118/00 (present 19; for 19).
11. Taking account of requests and proposals from delegations the consolidated list of Category B items within the meaning of CA/118/00, that is to say those of fundamental importance or, in view of the Committee on Patent Law's discussions, requiring finalisation by the Council, was as follows:

Articles numbered according to the "revised wording" text of CA/100/00 + Add. 2).

EPC Articles: 14;
22 together with 112a;
33 together with 35;
37;
52(2);
54(4);
69 - new provisions supplementing the Protocol on the interpretation of Article 69;
80;
87;
94 to 96;
105a to 105c together with 21(3)(a) and 68;
134a(1)(d);
149a;
164;

Protocol on Centralisation;

Draft Revision Act Article 4.

ARTICLE 14 EPC

12. The German delegation, which had requested substantive discussion of this provision, wondered why paragraphs (8) and (9) were to be deleted in the revised wording version of the EPC. The German delegation considered that the obligation to publish the Bulletin, the Official Journal and the Register in the three official languages should be set out in the EPC rather than the Implementing Regulations.
13. The Office explained that it was not necessary to retain the provisions set out in Article 14(8)(9) in the EPC, since the obligation to publish the Bulletin, Official Journal, and Register in the three official languages followed from the text of Article 14(1) of both the present and the revised wording texts.
14. Following a question from the Chairman of the Council, it emerged that there was no general support for an amendment to the text proposed in CA/100/00 aimed at retaining the provisions of Article 14(8)(9) EPC in the basic proposal.
15. The Spanish delegation considered that the proposed text of Article 14(2) was not in conformity with the Patent Law Treaty, in particular because the proposed wording of Article 14(2) did not reflect the option of filing an application in a non-official language.
16. The Netherlands, Finnish, Hellenic, Austrian and Portuguese delegations expressed support for the view of the Spanish delegation.
17. The Office considered that Article 14(2) set out conditions for treating an application as a European application; if the conditions were not met, the application was deemed withdrawn. The question of whether applications should be accorded a filing date was a different matter and was treated under Article 80.
18. The Spanish delegation considered the present wording of Article 14(1)(2) preferable to the proposed revised wording, since the present wording made specific provision for filing in a language of a contracting state which was not an official language.
19. The Office explained that the present wording of Article 14(2) was not in conformity with Article 5 of the Patent Law Treaty, since the present text restricted the right to file and thus to obtain a date of filing to certain languages. By contrast, the proposed revised wording would allow a filing date to be accorded under the proposed revised

Article 80, in accordance with Article 5 PLT, while proposed Article 14(2) set out the language requirements for a European patent application and the legal consequences of the failure to file a translation.

20. The Austrian delegation submitted a written proposal jointly with the President of the office for amendment, attached as Annex II to these minutes.
21. The Council approved by fifteen votes to none with four abstentions the inclusion in the basic proposal of the amendment to Article 14(2) proposed by the Austrian delegation and the President of the office (present 19; for Belgium, Cyprus, Denmark, Germany, France, Ireland, Italy, Liechtenstein, Luxembourg, Monaco, Netherlands, Austria, Switzerland, Sweden, United Kingdom; against none; abstentions Ellas, Spain, Finland, Portugal).
22. The Council rejected by fifteen votes to three with one abstention a proposal from the Spanish delegation to leave the text of Article 14 of the current version of the EPC unamended in the basic proposal (present 19; for Ellas, Spain, Portugal; against Belgium, Cyprus, Denmark, France, Ireland, Italy, Liechtenstein, Luxembourg, Monaco, Netherlands, Austria, Switzerland, Sweden, United Kingdom; abstention Finland).

ARTICLE 21(3)(a) EPC

23. The Office tabled CA/100/00 Add. 2.
24. The Council unanimously approved the inclusion in the basic proposal of the text of Article 21(3)(a) set out in CA/100/00 Add. 2 (present 19; for 19).

ARTICLES 22 AND 112a EPC

25. The Office introduced the proposed amendments.
26. The Chairman of the Committee on Patent Law gave an account of the Committee's discussions of the proposals, in particular at its 13th and 14th meetings [see minutes CA/PL PV 13 and CA/PL PV 14].
27. The Swedish delegation, while not against the proposals going forward to the diplomatic conference in November, would have preferred to deal with this matter as part of the so-called "second basket" of changes to the EPC to be discussed during a further revision conference.

28. The German delegation agreed with the broad thrust of the proposals but considered that some essential elements were wrongly to be consigned to the Implementing Regulations. In particular, the German delegation did not support the definition of an exhaustive list of grounds for review in the Implementing Regulations. The latter should contain, if any, only a non-exhaustive list of grounds for review based on a general clause in Article 112a EPC; it would be up to the Enlarged Board of Appeal to interpret appropriately this general clause. Similarly, the German delegation considered that the composition of the Enlarged Board should be laid down in the EPC, rather than the Implementing Regulations.
29. The Swiss delegation was in favour of the proposed provisions but disagreed with the explanatory note numbered 19 to Article 112a in so far as the Swiss delegation considered that decisions rejecting a petition should be reasoned in the light of the principle of the right to be heard. The Swiss delegation agreed with the remarks made by the German delegation that a general clause on grounds for review in Article 112a EPC to be interpreted by the case law of the Enlarged Board of Appeal would be preferable to an exhaustive list in the Implementing Regulations.
30. Responding, the Office explained that provision of an exhaustive list of grounds for review helped ensure legal security by limiting the possibility of speculative appeals. Moreover, placing the list of grounds for review in the Implementing Regulations would allow the Council to supplement the list if experience showed this to be desirable. Moreover, from the point of view of procedural law it was desirable that the grounds for revision be defined in a source of legal authority such as Implementing Regulations, rather than, for example, being derivable only from jurisprudence. In the case of criminal acts, the Enlarged Board would be able to take into account only those acts subject to decisions having the force of *res judicata*. Regarding the obligation to reason decisions rejecting petitions, practice differed between contracting states; the obligation to provide reasoned decisions within the context of the EPC was defined in the Implementing Regulations.
31. The Netherlands, Italian and Belgian delegations supported the remarks made by the Swiss delegation in respect of explanatory note number 19 to Article 112a.
32. In conclusion, the Council unanimously approved of the inclusion in the basic proposal of the texts of Articles 22 and 112a set out in CA/100/00 (present 19; for 19).

ARTICLES 33 AND 35 EPC

33. The Office introduced the proposed amendments to Articles 33 and 35.
34. The Chairman of the Committee on Patent Law gave an account of the Committee's discussions of the provisions, in particular at its 14th meeting [minutes CA/PL PV 14].
35. The Danish delegation underlined the importance of the amendment to Article 33 for ensuring conformity with international treaties. The proposed text of Article 35(3) ensured the contracting states' right to be heard.
36. The Netherlands delegation generally supported the proposed amendments to Articles 33 and 35, but wondered why the period of 12 months mentioned in Article 35(3) was necessary.
37. The Swedish delegation considered that the proposed text of Article 33 raised constitutional problems.
38. Responding to a question from the Irish delegation the Office explained that the date of decisions taken pursuant to proposed Articles 33(1)(b) would be fixed by the Council. The possibility of incorporating international treaties by way of Article 172 would remain, but would be much more complicated.
39. The Belgian delegation observed that the term "relating to patents" should be interpreted broadly and would include, for example, TRIPS.
40. The staff representative considered that only the conversion of the EPC into an EU Directive under Article 308 or, more preferably, Article 95 EU Treaty would ensure the best possible conformity with EU law. Such a conversion would provide more transparency and direct democratic control of patent legislation. The staff hoped that the ministerial conference in London in October would mark a start in this direction.
41. The Swiss delegation said the period of 12 months mentioned in Article 35(3) was necessary because many states had expressed the fear that their parliaments could feel overruled. The Swiss delegation emphasised that each state was at liberty to decide for itself whether it wished to adopt such a decision or to withhold its approval, either by voting against the decision at the meeting or by making a declaration to this effect at a later date. The Swiss delegation further remarked that five EPC contracting states were not members of the EU.

42. In conclusion, the Council unanimously approved the inclusion in the basic proposal of the text of Articles 33 and 35 as set out in CA/100/00 (present 19; for 19).

ARTICLE 37(e) EPC

43. The German delegation expressed its opposition in principle to financing the budget of the Organisation by third-party borrowings.
44. In conclusion, the Council unanimously approved the inclusion in the basic proposal of the text of Article 37 as set out in CA/100/00 (present 19; for 18; against DE).

ARTICLE 52 EPC

45. The Office introduced the proposed amendments, explaining that the forthcoming Directive should not impact on the proposed revised wording of Article 52(2), which omitted reference to computer programs.
46. The Chairman of the Committee on Patent Law gave an account of the Committee's discussions.
47. The Chairman of the Council concluded that there were no objections to revised Article 52(1) going into the basic proposal.
48. Discussion turned to the proposed revised text of Article 52(2).
49. The French delegation considered that the matter required clarification. The proposed amendment would be better treated as part of the "second basket"; this would allow the taking into account of the forthcoming Directive and further public debate.
50. The UK, Swedish and Luxembourg delegations concurred with the remarks made by the French delegation.
51. The EU representative indicated that a proposal for a directive would be formulated as soon as possible.
- 51a. The Swiss delegation considered that the reference to computer programs should be deleted from Article 52(2) in order to clarify the text in view of the evolving jurisprudence. It was not necessary to await a directive from the EU, since the issue at stake was the granting of patents. Consequently, there was no need to delay discussion to the "second basket". The exclusion from patentability of computer

programs followed from their lack of sufficient technical character. This aspect was covered by the proposed wording of Article 52(1). The Swiss patent law did not contain a list of exclusions, since this was unnecessary.

52. The Netherlands delegation expressed support for the views expressed by the Swiss delegation to delete computer programs from Article 52(2), adding that placing the provisions of current Article 52(2)(3) into the Implementing Regulations could also be considered as a possible solution.
53. The Hellenic delegation concurred with the views expressed by the Swiss delegation, considering that the reference to computer programs should be deleted. This would correspond to discussions which took place at the IGC in Paris in 1999. There was no need to await legislation from the EU.
54. The Danish delegation observed that public debate was continuing and that the interested circles had some reservations on matters connected with Article 52. It was therefore preferable to discuss this matter as part of the "second basket".
55. The German delegation considered it premature to delete the reference to computer programs from the text of Article 52, considering it preferable to await EU legislation.
56. The Italian delegation considered that the reference to computer programs should be deleted from the text of Article 52(2).
57. The Austrian delegation observed that amendment of Article 52 was one of the elements which launched the revision process and consequently it was a matter which should be dealt with in the forthcoming conference. The Austrian delegation considered that the provisions set out in Article 52(2)(3) could be transferred to the Implementing Regulations, in order that further discussion could take place without awaiting the "second basket".
58. The Portuguese delegation considered that the matter was not yet ready to be placed in the basic proposal.
59. The Finnish delegation concurred with the French delegation that the question should be addressed as part of the "second basket".
60. The Belgian delegation observed that the Committee on Patent Law had expressed a favourable view of deleting the reference to computer programs. Moreover, such a deletion would be in line with the mandate given by the IGC in Paris in 1999. The

Belgian delegation was in favour of deleting the reference to computer programs from the text.

61. The Spanish delegation was in favour of dealing with the question of computer programs as part of the "second basket".
62. The Monegasque delegation was in favour of deletion of the reference to computer programs, remarking that patent ability depended in any case on novelty and inventive step. The list of matter excluded from patentability could be included in the Implementing Regulations.
63. The Liechtenstein delegation considered that the reference to computer programs should be deleted.
64. The Irish delegation considered that the reference to computer programs could be deleted during the forthcoming conference but had no objection to the matter being treated as part of the "second basket".
65. The UNICE representative spoke in favour of deleting the reference to computer programs either by deletion or, more pragmatically, by placing the exclusions from patentability in the Implementing Regulations. The requirements of novelty and inventive step would continue to safeguard public interest.
66. The *epi* representative concurred with the remarks made by the UNICE representative. The proposed text of Article 52(1) was supported strongly by the *epi*. Moreover, the Implementing Regulations could take account of any Directive issued by the EU.
67. The French delegation explained that, while basically in favour of deleting the reference to computer programs, it was preferable to await the Directive expected from the EU. Moreover, placing this question in the "second basket" of the revision process would adequately take account of the results of the IGC held in Paris. The French delegation considered that placing the provisions currently listed in Article 52(2)(3) into the Implementing Regulations would be a tactical error and would give a negative impression to the public.
68. Following further exchanges the Council proceeded to the following votes:
69. The Council rejected by fifteen votes to four the option foreseen in CA/100/00 of deleting entirely paragraphs (2) and (3) of Article 52 in the basic proposal (present 19; for Italy, Netherlands, Switzerland, Liechtenstein; against Belgium,

Cyprus, Denmark, Germany, Ellas, Spain, Finland, France, Ireland, Luxembourg, Monaco, Austria, Portugal, Sweden, United Kingdom).

70. The Council rejected by ten votes to eight with one abstention the option foreseen in CA/100/00 of deleting paragraphs (2) and (3) of Article 52 in the basic proposal and including equivalent provisions in the Implementing Regulations (present 19; for Belgium, Cyprus, Ellas, Italy, Liechtenstein, Netherlands, Austria, Switzerland; against Denmark, Germany, Spain, Finland, France, Ireland, Luxembourg, Monaco, Sweden, United Kingdom; abstention Portugal).
71. No delegation voting in favour, the Council rejected a further option, namely, the omission of any reference to computer programs in paragraph (2)(c) of Article 52 and the inclusion of such a reference in the Implementing Regulations (present 19; for none).
72. The Council approved by ten votes to eight with one abstention the option foreseen in CA/100/00 of deleting in the basic proposal the reference to computer programs in paragraph (2)(c) of Article 52 and keeping the remaining text of Article 52(2) and (3) unchanged (present 19; for Belgium, Cyprus, Ellas, Ireland, Italy, Liechtenstein, Monaco, Netherlands, Austria, Switzerland; against Denmark, Germany, Spain, France, Luxembourg, Portugal, Sweden, United Kingdom; abstention Finland).
73. The effect of the votes was thus to delete the square brackets spanning paragraphs (2) and (3) from the text of the revised wording of Article 52 set out in CA/100/00.

ARTICLE 54

74. The Office introduced the proposed amendments set out in CA/100/00.
75. The Chairman of the Committee on Patent Law gave an account of the Committee's discussions.
76. The Swiss delegation preferred the *epi* proposal, as discussed by the Committee on Patent Law, to that of the Office. The Swiss delegation favoured providing a paragraph dealing specifically with the question of second and further medical uses which, however, was not foreseen in CA/100/00. In its explanatory remarks, the Office had stated that putting the first medical use on a par with each further medical use in terms of novelty did not have to affect the scope of the claims for the first medical use. However, the Office's proposal itself said nothing about the scope of the claims. The Swiss delegation therefore feared that retaining the previous practice would prove impossible. It was necessary to prevent a situation where case law defined the same scope of claims for each indication.

77. The German delegation expressed a preference for retaining the existing text, since there had not been sufficient time to discuss the proposed changes.
78. The *epi* representative considered there was a need to distinguish between first and second medical uses, with a first medical use entitled to broader protection. It would therefore be preferable to have a paragraph specifically dealing with this issue.
79. The UNICE representative concurred with the remarks made by the Swiss delegation and the *epi* representative.
80. The Portuguese delegation expressed a preference for the present wording of Article 54(5).
81. Following further exchanges, the Swiss delegation tabled a proposal attached as Annex III to these minutes. The Swiss delegation explained that the aim of its proposed text was to clarify the extent of protection available.
82. The Netherlands delegation expressed support for the text proposed by the Swiss delegation.
83. The Office emphasised the importance of ensuring that the protection afforded by a patent was proportionate to the technical contribution made. This was a fundamental principle of patent law. Article 54 should not be amended to give specially advantageous protection for first medical indications. The aim of the proposed amendment was to provide a sound legal basis for second and further medical indications, making it clear that also a further medical use would enjoy purpose-limited product protection provided it was not disclosed in the prior art. The scope of protection for any such use, whether the first or a further one, was not a matter for Article 54, which concerned only the matter of novelty.
84. The UK delegation considered that the scope of protection granted should be proportionate to the technical contribution to the art. It was important that the EPC provide a clear basis for appropriate protection of first and further medical uses.
85. The *epi* representative considered the proposal made by the Swiss delegation to be a fair one, given the technical contribution involved in establishing, for example, non-toxicity for the first medical use. However, the text took account of existing jurisprudence.

86. The Swiss delegation explained the reasoning behind the text presented in its proposal. The Swiss delegation's sole concern was to ensure, in the interests of clarity and legal certainty, that existing jurisprudence concerning the first and second medical indications and each further medical indication was anchored in the EPC, making broad protection available for the first medical indication and protection for "specific uses", if they were not comprised in the state of the art, for second and further indications. For the latter, there was currently no legal basis whatever in the EPC. The EPO proposal was problematic in so far as it said nothing about the extent of protection. The various indications - first, second and further - were therefore conflated, which would lead to changes in case law. Clearly worded legislation was needed to prevent the courts from granting narrow protection for the first medical indication and broad protection for the second indication. The decisive aspect of paragraph 5 of the Swiss proposal was that protection would only be granted for a "specific use" if it did not yet form part of the state of the art. The aim, therefore, was to provide narrow protection for the second medical indication and broad protection for the first indication. The wording, with "patentability" and "specific use" referring to Articles 52 and 69 EPC respectively, did not directly involve novelty. However, these two articles should not be burdened additionally with the "second medical indication" construct.
87. The Italian delegation considered there was a need to clarify the present text of Article 54.
88. The Austrian delegation stressed that patents should only confer protection for what had actually been invented. This applied to pharmaceutical inventions too, so there was no reason to favour the first indication.
89. The UNICE representative expressed support for the proposal tabled by the Swiss delegation, considering that jurisprudence provided a basis for distinguishing between first and further medical indications. Depending on the facts of the individual case, broad protection should be available for the first medical indication.
90. In conclusion, the Council approved by nine votes to two with eight abstentions the inclusion in the basic proposal of an amendment to Article 54 proposed by the Swiss delegation attached as Annex III to these minutes (present 19; for Denmark, Germany, France, Italy, Liechtenstein, Netherlands, Switzerland, Sweden, United Kingdom; against Cyprus, Ellas; abstentions Belgium, Spain, Finland, Ireland, Luxembourg, Monaco, Austria, Portugal).

ARTICLE 68 EPC

91. This Article was discussed at the request of the Danish delegation within the context of proposed Articles 105a to c EPC discussed below. The Danish delegation explained that, in Denmark, the effects of revocation were *ex nunc*, rather than *ex tunc*.
92. The Office observed that the effects of limitation under proposed Article 68 EPC would not interfere with decisions taken by national offices.
93. In conclusion, the Council approved with one dissenting vote the inclusion in the basic proposal of the revised wording of Article 68 set out in CA/100/00 (present 19; for 18; against Denmark).

ARTICLE 69 EPC - A NEW PROVISION SUPPLEMENTING THE PROTOCOL ON THE INTERPRETATION OF ARTICLE 69 EPC

94. The Office introduced the proposed text. The Chairman of the Committee on Patent Law gave an account of the Committee's discussions.
95. The UK delegation was not convinced that the introduction of rules to interpret the Protocol on Article 69 was the way to simplify this important question. While the proposed texts had only recently been made available, the UK delegation kept an open mind on the matter and would not object to it going forward into the diplomatic conference in November, where further discussion could take place.
96. The Swiss delegation considered it important to deal with matters such as equivalents and prosecution history estoppel as part of the revision conference in November and therefore accepted the proposed text as part of the basic proposal.
97. The Austrian delegation queried the clarity of the terms "due account" in proposed rule (1) and "in particular" in proposed rule (3).
98. The Office commented that this language had been chosen in order to provide a desirable degree of discretion.
99. The Swedish delegation considered there was a need to discuss the substantive nature of the provisions, but had no objection to the proposed text going forward to the diplomatic conference in November.

100. The French and Irish delegations expressed similar views to the UK and Swedish delegations. The Netherlands and Belgian delegations expressed support for the proposed text.
101. The staff representative emphasised the importance of Article 69 and its Protocol to examiners and boards of appeal for determining the extent of protection. The staff representative considered that proposed rule (2) could give rise to difficulties in the future, as it seemed to contradict the so-called "novelty test" used to determine the scope of claims.
102. The *epi* representative expressed support for the proposed text.
103. The UNICE representative expressed support for the proposed text.
104. In conclusion, the Council unanimously approved the inclusion in the basic proposal of the new provisions set out in CA/100/00 (present 19; for 19).

ARTICLE 80 EPC

105. The German delegation considered that the conditions for according a date of filing were of importance for the grant procedure and therefore should be set out in the EPC itself rather than the Implementing Regulations.
106. The Office observed that the requirements for according a date of filing differed between patent systems and were often defined as a result of jurisprudence. It was important to ensure some flexibility in view of Article 5 Patent Law Treaty, which could become directly binding on the Office.
107. The Netherlands delegation expressed a preference for the existing text of Article 80.
108. The Hellenic delegation indicated its abstention on the question.
109. In conclusion, the Council approved the inclusion in the basic proposal of the revised wording set out in CA/100/00, the German and Netherlands delegation expressing a reserve and the Hellenic delegation formally abstaining.

ARTICLE 87 EPC

110. The Irish delegation commented in respect of paragraph (1) that not all WTO members were sovereign states. In respect of paragraph (5), the Irish delegation considered that the council rather than the President of the Office should be responsible for issuing the communication mentioned in the proposed provision.
111. In respect of paragraph (5), the Chairman of the Committee on Patent Law observed that the communication mentioned in the proposed provision would simply confirm the existence of bilateral recognition. This question had been discussed at the 8th and 13th meetings of the Committee on Patent Law [minutes CA/PL PV 8 and CA/PL PV 13].
112. The Office considered that the phrase "in or for" which appeared in Article 87(1) took account of the concerns raised by the Irish delegation. The communication mentioned in Article 87(5) of the proposed text would naturally only be issued after the necessary authorisation by the Council. In conclusion, the Council approved the inclusion in the basic proposal of the revised text set out in CA/100/00, the Irish delegation expressing a reserve.

ARTICLES 94 to 96 EPC

113. The Office gave a general introduction of the provisions.
114. The Danish delegation expressed its opposition to the proposed text, explaining that the IGC which took place in Paris in 1999 had specifically requested shortening of the grant procedure.
115. In conclusion, the Council approved by eighteen votes to one the inclusion in the basic proposal of the revised text set out in CA/100/00 (present 19; for 18 against Denmark).

ARTICLES 105a to c EPC

116. The Office introduced the proposed provisions.
117. The Chairman of the Committee on Patent Law gave an account of the Committee's deliberations, in particular at its 4th, 11th and 13th meetings [minutes CA/PL PV 4; CA/PL PV 11; CA/PL PV 13].
118. The Monegasque delegation queried the French text of Article 105a(2) EPC regarding the phrase "en instance".

119. The Danish delegation asked for confirmation that the proposed provisions would not affect the competence of national offices. The Danish delegation considered that the proposed provision could cause some confusion in Denmark, since Danish national law provided for limitation on request of a third party. The Danish delegation would have preferred to see the proposed provisions treated as part of the "second basket" of the revision procedure.
120. The Swedish delegation shared the reservations expressed by the Danish delegation.
121. Responding to the Monegasque delegation, the Office indicated that the precise phrasing of the article could be scrutinised by the drafting committee during the revision conference. To the Danish delegation, the Office emphasised that the proposed Articles 105a to c did not affect the competence of national offices, in view of Article 2(2). National proceedings initiated by third parties were essentially revocation procedures not affected by the proposed provisions. Moreover, a request made under the proposed provisions could only result in a limitation of the extent of protection and under no circumstances an extension thereof. To questions from the Irish delegation, the Office explained that the proposed provisions would allow *ex parte* limitation or revocation centrally, thus simplifying procedure and reducing cost. The effects would be *ex tunc* and therefore not strictly comparable to the surrender of a patent, which had *ex nunc* effect. The position of third parties such as a licensees would be a matter for the patentee rather than the EPO.
122. In conclusion, the Council approved by sixteen votes to three the inclusion in the basic proposal of Articles 105a to c set out in CA/100/00 (present 19; for 16; against Denmark, Ireland, Sweden).

ARTICLE 134a(1)(d) EPC

123. The Office introduced the proposed provision. The Chairman of the Committee on Patent Law gave an account of the Committee's discussions of the matter.
124. The *epi* representative welcomed the proposal as a pragmatic solution to problems encountered in countries with a system of common law. It was expected that the proposed provision would be recognised by the courts in the USA and would therefore be of use in discovery proceedings.
125. The French delegation expressed support for the proposed provision.
126. In conclusion, the Council unanimously approved the inclusion in the basic proposal of the text set out in CA/100/00 (present 19; for 19).

ARTICLE 149a EPC

127. The Office introduced the proposed provision.
128. The Chairman of the Committee on Patent Law gave an account of the Committee's discussions of the proposal, in particular at its 13th and 14th meetings [minutes CA/PL PV 13; CA/PL PV 14].
129. The Finnish delegation declared it would abstain in the following vote.
130. The Portuguese and Spanish delegations wondered whether it would be possible to retain proposed paragraph (1) and delete the sub-paragraphs (a) to (d). The Italian delegation expressed a certain reserve on the proposals.
131. The Swiss delegation observed that the Chairman of the Committee on Patent Law had explained why the sub-paragraphs (a) to (d) were necessary.
132. The Danish delegation commented in respect of paragraph (1) that the EPC system should remain coherent. In respect of paragraph (2) the Danish delegation considered that the court or common entity mentioned in the provision be institutionally isolated from the European Patent Office and from Civil Services.
133. The Austrian delegation wondered whether the Organisation should assume responsibility for the expenses mentioned in paragraph (2)(b).
134. The Office commented that it was highly preferable to retain sub-paragraphs (a) to (d) in the text of (1). Paragraph 2(b) provided the basis for authorisation for payment rather than an obligation to pay. The expenses mentioned could include all costs arising, including travel costs etc.
135. Responding to a remark from the Irish delegation, the Chairman of the Council doubted whether the Council would feel obliged to bear the costs of a hypothetical court set up by a small number of contracting states.
136. In conclusion, the Council approved by seventeen votes to one with one abstention the inclusion in the basic proposal of the text set out in CA/100/00 (present to 19; for 17; against Italy; abstention Finland).

ARTICLE 164 EPC

137. The French delegation expressed a preference for the existing text of the EPC over that proposed in CA/100/00.
138. The Office explained the reasoning behind the proposed revised wording set out in CA/100/00, emphasising the desire to achieve flexibility.
139. The Chairman of the Committee on Patent Law gave an account of the Committee's discussions of the question, in particular at its 13th and 14th meetings [minutes CA/PL PV 13; CA/PL PV 14].
140. A number of delegations expressed reservations on the proposed revised wording, considering the scope afforded by the text to be too broad. The German delegation considered the proposed revised wording would allow provisions relating to ethical value judgements to figure in the Implementing Regulations and further considered this to be undesirable.
141. Following further exchanges of views, the German delegation presented a written proposal for a revised text of Article 164 EPC attached as Annex IV to these minutes.
142. The President of the Office considered the effect of adopting the text proposed by the German delegation would be to take from the Council the power of interpreting the EPC. The consequence would be that the interpretation would take place elsewhere, for example, in jurisprudence. Moreover, if the text proposed by the German delegation were adopted, it could only be amended in the course of a further diplomatic conference.
143. The German delegation considered that the revised wording set out in CA/100/00 presented a certain risk.
144. The Belgian delegation disagreed with the German delegation, considering that the Council should determine the content of the Implementing Regulations.
145. It was agreed that the Council vote first on the proposal tabled by the German delegation against the proposals set out in CA/100/00 and then vote on a proposal tabled by the Portuguese delegation attached as Annex V to these minutes against the text winning the first vote.

146. The Council rejected by ten votes to seven with two abstentions the amendment proposed by the German delegation attached as Annex IV (present 19; for Belgium, Denmark, Germany, Finland, France, Ireland, Netherlands; against Cyprus, Ellas, Italy, Liechtenstein, Luxembourg, Monaco, Austria, Switzerland, Sweden, United Kingdom; abstentions Spain, Portugal).
147. The Council approved with thirteen votes to four with two abstentions the inclusion in the basic proposal of an amended text of Article 164 proposed by the Portuguese delegation attached as Annex V (present 19; for Cyprus, Germany, Ellas, Spain, Finland, France, Ireland, Italy, Liechtenstein, Monaco, Austria, Portugal, Switzerland; against Luxembourg, Belgium, Sweden, United Kingdom; abstentions Denmark, Netherlands).

PROTOCOL ON CENTRALISATION

148. The German delegation made a statement on this provision, attached as Annex VI to these minutes.

DRAFT REVISION ACT ARTICLE 4

149. The German delegation wondered whether it was desirable for a renumbering of Articles to be introduced after the Diplomatic Conference in November in view of the anticipated "second basket" of the revision process.
150. Following further exchanges, the President of the Office proposed an amendment to the text figuring in CA/100/00, set out in Annex VII to these minutes.
151. In conclusion, the Council approved by nine votes to six with four abstentions the amendment to Article 4 of the Draft Revision Act proposed by the President of the Office attached as Annex VII to these minutes (present 19; for Cyprus, Denmark, Ellas, Ireland, Italy, Luxembourg, Netherlands, Austria, Sweden; against Germany, Spain, Finland, Liechtenstein, Switzerland, United Kingdom; abstentions Belgium, France, Monaco, Portugal).

DRAFT REVISION ACT ARTICLES 1, 5, 7 AND 8

152. The Council unanimously approved the deletion of the passages within square brackets in texts of Articles 1, 7 and 8, second and third set of square brackets and the deletion of the square brackets from the texts of Article 5 and Article 8, first set of brackets (present 19; for 19).

DRAFT FINAL ACT

153. Responding to questions the Office explained that the Revision Act was the part which was open for signature by contracting states, whose representatives would need an authorisation to sign. On the other hand, the Final Act was essentially a confirmation that the conference had taken place and did not require representatives of states to have plenipotentiary powers.
154. The representative of the EU indicated that the EU might be able to sign the Final Act, but not the Revision Act.
155. In conclusion, the Council unanimously approved the deletion from CA/100/00 of the square brackets from the text of the draft Final Act (present 19; for 19).

COUNCIL DECISION

156. Taking account of all the above as well as the discussion of item IIIc "Conference of ministers of the contracting states" (CA/83/00 and CA/123/00) and item IIId "Rules of procedure" (CA/26/00 + Corr. 1 + Rev. 1) set out below the Council, unanimously approved the draft decision in Part IV of CA/100/00 and thus decided to submit to the revision conference the documents as set out in CA/100/00 + Add. 2 with the following amendments (present 18; for 18):

Part I: Basic Proposal (= MR/2/00)

- a. Art 4(4) as per CA/123/00
- b. Art 14(2) as per Annex II to these minutes
- c. Art 21(3)(a) as per CA/100/00 Add. 2
- d. Art 52 delete the square brackets spanning paragraphs (2) and (3) from the text of the revised wording of Article 52 set out in CA/100/00.
- e. Art 54(4) as per Annex III to these minutes
- f. Article 69 inclusion of the new provisions supplementing the Protocol on the interpretation of Article 69 by retaining the current Protocol as "Article 1" with the title "General principles", the proposed new rules being included as "Article 2" with the title "Equivalents" and "Article 3" with the title "Prior statements"
- g. Art 164 as per Annex V of these minutes

Part II: Draft Revision Act (= MR/3/00)

- h. Art 1 removal of text within square brackets
- i. Art 4 as per Annex VII to these minutes
- j. Art 5 removal of square brackets

- k. Art 7 removal of text within square brackets
- l. Art 8 removal of first set of square brackets and removal of text within the second and third sets of square brackets

Part III: Draft Final Act (= MR/4/00)

- m. Final Act removal of square brackets

IIIc. CONFERENCE OF MINISTERS OF THE CONTRACTING STATES (CA/83/00 and CA/123/00)

- 157. The Office introduced CA/83/00, which was presented for information only.
- 158. The UK delegation introduced CA/123/00.
- 159. The Chairman of the Committee on Patent Law explained that the Committee had examined the legal issues on this point, considering the least restrictive text preferable from a legal point of view.
- 160. The Danish delegation expressed support for the proposals set out in CA/123/00.
- 161. The Hellenic delegation opposed the proposal set out in CA/123/00, but would support a declaration of intent.
- 162. The Irish delegation proposed putting a resolution for the ministerial conference to be held in London in October 2000 requesting the Council to hold regular ministerial conferences in future. If this initiative did not succeed, the Irish delegation could support the proposal set out in CA/123/00.
- 163. The Belgian delegation did not consider the proposal set out in CA/123/00 to be necessary but if such a provision were to be introduced the Belgian delegation preferred using an Article, rather than a Protocol.
- 164. The Netherlands, Italian, Swiss and Swedish delegations supported CA/123/00.
- 165. The German delegation could support the five year period mentioned in the proposal.
- 166. Responding to a question from the German delegation, the President of the Office indicated that the Office would have to bear the costs of holding the conferences.

167. The French delegation preferred the passing of a resolution on the conferences, rather than incorporation into the EPC of such a requirement.
168. Following further exchanges, the Council rejected by eight votes to five with six abstentions a proposal from the Belgian delegation which foresaw the passing of a resolution on holding ministerial conferences rather than amendment of Article 4 EPC (for Belgium, Ellas, Finland, Liechtenstein, Luxembourg; against Denmark, Germany, Ireland, Italy, Netherlands, Switzerland, Sweden, United Kingdom; abstentions Cyprus, Spain, France, Monaco, Austria, Portugal).
169. In conclusion, the Council approved by eleven votes to two with six abstentions the inclusion in the basic proposal of an amendment to Article 4 EPC as set out in CA/123/00 (for Denmark, Germany, Spain, Ireland, Italy, Netherlands, Austria, Portugal, Switzerland, Sweden, United Kingdom; against Cyprus, Ellas; abstentions Belgium, Finland, France, Liechtenstein, Luxembourg, Monaco). The Council also noted CA/83/00.

IIId. RULES OF PROCEDURE OF THE DIPLOMATIC CONFERENCE (CA/26/00 + Corr. 1 + Rev. 1)

170. The French delegation introduced CA/26/00 Rev. 1 in its capacity as the delegation of the country holding the presidency of the Council of the EU.
171. The Office explained the background to the documents.
172. In conclusion, the Council unanimously approved the draft rules of procedures set out in CA/26/00 Rev. 1 with linguistic corrections to Article 2(1)(b) of the French text and Article 2(2)(b) of the German text (present 19; for 19).

IIle. PROGRESS OF ORGANISATIONAL ARRANGEMENTS FOR THE DIPLOMATIC CONFERENCE (CA/108/00)

173. The Council noted CA/108/00.

IV. INTERGOVERNMENTAL CONFERENCE (London 16/17 October 2000)

174. The UK delegation gave an oral report on preparations for the intergovernmental conference to be held in London on 16 and 17 October 2000.
175. The Swiss delegation wondered whether rules of procedure had been established for signing the proposed agreement relating to Article 65 EPC.

176. The UK delegation indicated that a letter had been sent out indicating a procedure and invited other delegations to transmit comments relating to procedure if they wished.

177. In conclusion, the Council noted the oral report.

**V. ANY OTHER BUSINESS - PRODUCTION AND PRODUCTIVITY OF EXAMINERS
IN DGs 1 AND 2 (Info 2/AC 81)**

178. The President of the Office introduced Info 2/AC 81, adding that the Office was taking measures to avoid an undesirable flood of applications entering the validation stage.

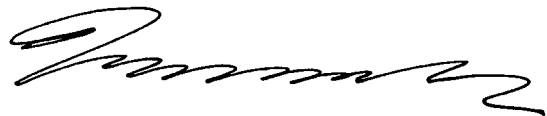
179. The staff representative made a statement expressing hope for the resolution of the current conflict and constructive relations in future.

180. In conclusion, the Council noted Info 2/AC 81.

The Administrative Council approved the draft minutes contained in this document on 5 December 2000.

Munich, 5 December 2000

For the Administrative Council
The Chairman



Roland GROSSENBACHER

EUROPÄISCHE PATENTORGANISATION - EUROPEAN PATENT ORGANISATION
- ORGANISATION EUROPEENNE DES BREVETS -

- Verwaltungsrat - Administrative Council - Conseil d'administration -

Info 1 Rev. 1

81. Tagung / 81st meeting / 81^e session (München/Munich, 05. - 08.09.2000)

München/Munich, 08.09.2000

Orig.: d,e,f

BETRIFFT:	Teilnehmerliste
SUBJECT:	List of participants
OBJET:	Liste des participants
VERFASSEN:	Ratssekretariat
DRAWN UP BY:	Council Secretariat
ORIGINE:	Le secrétariat du Conseil
EMPFÄNGER:	Verwaltungsrat (zur Unterrichtung)
ADDRESSEES:	Administrative Council (for information)
DESTINATAIRES:	Conseil d'administration (pour information)

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Direktor
Eidgenössisches Institut für Geistiges Eigentum
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CHAIRMAN OF THE COMMITTEE ON PATENT LAW
PRESIDENT DU COMITE "DROIT DES BREVETS"

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M. Geoffrey BAILLEUX	Conseiller adjoint Office de la Propriété Industrielle
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Herr Hans-Georg LANDFERMANN	Präsident Deutsches Patent- und Markenamt
Herr Dietrich WELP	Ministerialrat Bundesministerium der Justiz
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Stellvertretender Leiter des Amtes für
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Mr Francesco MACCHETTA

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Ms Gerry COLLINS	Supervisor
Ms Nuala QUINLAN	Assistant
Frau Gabi BALACI	Assistentin

Vorschlag der österreichischen
Delegation und des Präsidenten des
EPA:

Artikel 14

"(2) Eine europäische
Patentanmeldung ist in einer
Amtssprache einzureichen oder, wenn
sie in einer anderen Sprache eingereicht
wurde, nach Maßgabe der
Ausführungsordnung in eine
Amtssprache zu übersetzen."

Proposal by the Austrian delegation and
the President of the EPO:

Article 14

"(2) A European patent application
must be filed in one of the official
languages or, if filed in any other
language, translated into one of the
official languages, in accordance with
the Implementing Regulations."

Proposition de la délégation
autrichienne et du Président de l'OEB:

Article 14

"(2) Toute demande de brevet européen
doit être déposée dans une des langues
officielles ou, si elle est déposée dans
toute autre langue, traduite dans une
des langues officielles, conformément au
règlement d'exécution."

VORSCHLAG DER SCHWEIZERISCHEN DELEGATION

ARTIKEL 54

- (1) Unverändert
- (2) Unverändert
- (3) Unverändert
- (4) Gestrichen

(4) Entsprechend wie der derzeitige Absatz 5:

Gehören Stoffe oder Stoffgemische zum Stand der Technik, so wird ihre Patentfähigkeit durch die Absätze 1 bis 3 nicht ausgeschlossen, sofern sie zur Anwendung in einem der in Artikel **53 Buchstabe c** genannten Verfahren bestimmt sind und ihre Anwendung zu einem dieser Verfahren nicht zum Stand der Technik gehört.

(5) Unbeschadet der Absätze 2 und 3 wird die Patentfähigkeit der in Absatz 4 genannten Stoffe oder Stoffgemische zur spezifischen Anwendung in einem der in Artikel 53 Buchstabe c genannten Verfahren durch diesen Artikel nicht ausgeschlossen, wenn diese Anwendung nicht zum Stand der Technik gehört.

PROPOSAL OF THE SWISS DELEGATION

ARTICLE 54

- 1) unchanged
- 2) unchanged
- 3) unchanged
- 4) deleted

(4) same as current par(5), *mutatis mutandis* :

The provisions of paragraphs 1 to 3 shall not exclude the patentability of any substance or composition, comprised in the state of the art, for use in a method referred to in Article **53(c)** provided that its use for any method referred to in that paragraph is not comprised in the state of the art.

5) Without prejudice to paragraphs 2 and 3, the provisions of this article shall not exclude the patentability of any substance or composition referred to in paragraph (4) for any specific use in any method referred to in Article 53 (c), provided that such use is not comprised in the state of the art.

PROPOSITION DE LA DELEGATION SUISSE

ARTICLE 54

(1) Inchangé

(2) Inchangé

(3) Inchangé

(4) Supprimé

(4) Identique à l'actuel paragraphe (5), mutatis mutandis:

(4) Les dispositions des paragraphes (1) à (3) n'excluent pas la brevetabilité, pour la mise en oeuvre d'une des méthodes visées à l'article **53 c)**, d'une substance ou composition exposée dans l'état de la technique, à condition que son utilisation pour toute méthode visée audit paragraphe ne soit pas contenue dans l'état de la technique.

(5) Sans préjudice des paragraphes 2 et 3, les dispositions du présent article n'excluent pas la brevetabilité d'une substance ou composition visée au paragraphe (4) pour toute utilisation spécifique dans toute méthode visée au paragraphe 53 c), à condition que cette utilisation ne soit pas contenue dans l'état de la technique.

VORSCHLAG DER DEUTSCHEN DELEGATION
PROPOSAL OF THE GERMAN DELEGATION
PROPOSITION DE LA DELEGATION ALLEMANDE

Artikel 164 (1) c):

"Einzelheiten [...] zur Durchführung der Vorschriften dieses Übereinkommens [...]."

Article 164 (1) (c) :

"details [...] for the implementation of the provisions of this Convention."

Article 164 (1) c):

"aux précisions [...] pour l'application des dispositions de la présente convention."

Vorschlag der portugiesischen
Delegation:

Artikel 164

Ausführungsordnung und Protokolle

(1) Die Ausführungsordnung, das Anerkennungsprotokoll, das Protokoll über Vorrechte und Immunitäten, das Zentralisierungsprotokoll, [...] das Protokoll über die Auslegung des Artikels 69 **sowie das Personalstandsprotokoll** sind Bestandteile des Übereinkommens.

(2) **Bei** mangelnder Übereinstimmung zwischen Vorschriften des Übereinkommens und Vorschriften der Ausführungsordnung gehen die Vorschriften des Übereinkommens vor.

Proposal by the Portuguese delegation:

Article 164

Implementing Regulations and Protocols

(1) The Implementing Regulations, the Protocol on Recognition, the Protocol on Privileges and Immunities, the Protocol on Centralisation, [...] the Protocol on the Interpretation of Article 69 **and the Protocol on Staff Complement** shall be integral parts of this Convention.

(2) In the case of conflict between the provisions of this Convention and those of the Implementing Regulations, the provisions of this Convention shall prevail.

Proposition de la délégation portugaise:

Article 164

Règlement d'exécution et protocoles

(1) Le règlement d'exécution, le protocole sur la reconnaissance, le protocole sur les privilèges et immunités, le protocole sur la centralisation, [...] le protocole interprétatif de l'article 69 et **le protocole sur les effectifs** font partie intégrante de la présente convention.

(2) En cas de divergence entre **les dispositions** de la présente convention et **celles** du règlement d'exécution, **les dispositions de la convention prévalent**.

Statement on the Protocol on Centralisation by the German delegation:

"Regarding the proposed amendments to Section I(3) of the Protocol on Centralisation, the German delegation refers to the statement it made during the discussions on the Protocol on Staff Complement, concerning the financial obligations of the Federal Republic of Germany.

Although the connection between the Berlin sub-office and the branch at The Hague is to be retained, the removal of the provision allotting a specific range of tasks to the branch at The Hague - and therefore also to the Berlin sub-office - eliminates the existing point of reference for the calculation of costs that forms the basis for the Berlin Agreement and its complementary agreements. With this in mind, it is vital to ensure that the proposed amendment of the Protocol on Centralisation does not lead to a situation in which an extension of the tasks of the Berlin sub-office might entail a rise in the share of costs to be borne by Germany.

For these reasons, the German delegation intends to seek clarification of the principles underlying this issue in the proposed "second revision round", with the aim, in view of the new situation, of ending the above-mentioned financial obligations."

Draft Revision Act - Proposal of the President of the Office

Article 4

New version of the Convention

- (1) The Administrative Council of the European Patent Organisation is authorised to prepare a new version of the European Patent Convention at the suggestion of the President of the European Patent Office. In the new version, the provisions of the Convention are to be renumbered consecutively and the references to other provisions amended accordingly; where necessary, editorial changes are to be made to ensure agreement between the versions in all three official languages.
 - (2) The Chairman of the Administrative Council shall forward the draft of the new version of the Convention to the governments of the contracting states for approval.
 - (3) With the approval of three quarters of the governments of the contracting states, the new version of the Convention shall become part of this Revision Act.
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