

# **M I N U T E S**

of the  
15th meeting of the

## **COMMITTEE ON PATENT LAW**

(Munich, 2 to 4 May 2001)

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The Committee on Patent Law held its 15th meeting from 2 to 4 Mai 2001 in Munich, with Mr P. LAURENT (BE) presiding. The list of participants is annexed.

**I. ADOPTION OF THE PROVISIONAL AGENDA (CA/PL 1/01)**

1. The provisional agenda set out in CA/PL 1/01 was adopted with one amendment. Point 6, the discussion of Rules 10 and 11 EPC (CA/PL 4/01), was taken as point 2.
2. The chairman welcomed the new Vice-President DG 5, Mr M. DESANTES, who greeted the members of the Committee.

**II. AMENDMENT OF RULES 10 AND 11 EPC (CA/PL 4/01)**

3. The Office tabled its proposals.
4. The Hellenic delegation asked whether, as a matter of principle, the creation of a Presidium as an autonomous organ of the boards of appeal was consistent with the EPC, as this would establish a new body under the Convention. Further questions concerned the term of office of Presidium members (NL), the need to give the Presidium a right of initiative and the administrative autonomy of the Enlarged Board of Appeal (staff representatives), the raising of the quorum for the Presidium (CH), and the appointment of the regular members of the Enlarged Board (FR).
5. Responding to these points, the Office explained, in particular, that the new rules for the Presidium did not entail the creation of a new body: the Presidium on the basis of the present Rule 10 had been in existence ever since the boards of appeal were first set up. The new version of Rule 10(1) EPC simply harmonised the terminology in the three languages by inserting the term "Presidium", which was already in the German version and had been used for many years in the other two languages, in the legal text. In substantive terms, the amendment particularly affected the composition of the Presidium.

The absence of any provision in Rule 10 governing the term of office of Presidium members ensured greater flexibility in laying down the rules of procedure for the election of members; however, any misgivings on this issue could be resolved by specifying the term of office in the Implementing Regulations. The appointment of the regular and alternate members of the Enlarged Board of Appeal was a matter of internal allocation of duties, which should be the Board's own responsibility. The seven-member quorum for the enlarged Presidium had been proposed for practical reasons, but the Office was willing to increase the number to nine. Regarding the idea of giving the Presidium a right of initiative, the Office referred to the "Sedemund-Treiber" report, which did not contain any such proposal.

6. The Office submitted a revised draft (CA/PL 4/01 Rev. 1) taking account of the concerns expressed by the delegations and their suggestions for rewording. The Committee unanimously approved the proposed amendment in the revised version.

### **III. AMENDMENT OF RULE 107 EPC (CA/PL 5/01)**

7. The Office introduced the document.
8. The WIPO representative gave a brief report on the current situation of the patent offices entrusted with procedures under Chapters I and II PCT, and said that the International Bureau appreciated the reasons for the EPO's move to ease its workload by the proposed measure.
9. The United Kingdom delegation emphasised that it understood the problems facing patent offices as a result of the PCT's success. However, it could not support the EPO's proposal. First, any change in the system had to consider not only the interests of applicants and patent offices, but also the interest of the general public in being able to obtain clear information in reasonable time about the existence of intellectual property rights. Second, this was not the appropriate time for a debate on such a change in the law, so as not to preempt the forthcoming discussions on PCT reform.
10. The Swedish delegation also rejected the proposed measure, on the ground that extending the time limit for entry into the European phase before the EPO as designated Office would substantially impair legal certainty for third parties. The proposal was also out of line with the aim of global harmonisation.

11. The Austrian, Danish, Finnish, Netherlands and Portuguese delegations rejected, at least for the time being, an amendment of Rule 107 EPC on the basis of the Office's proposal.
12. The Spanish delegation also expressed reservations, since the protection of the rights of third parties was insufficiently guaranteed. The German and Turkish delegations said they could not decide on the issue at present, as the proposal contained substantive benefits and drawbacks which had not yet been fully evaluated.
13. The *epi* and UNICE representatives supported the proposed amendment of Rule 107 EPC, which would enable the EPO to concentrate on its core tasks. Resources would be freed up to clear backlogs, and it would become possible to prepare search reports in time, which would have an important positive impact for applicants and third parties.
14. Several delegations (BE, CH, CY, FR, IE, IT and LU) supported the proposal in view of the sharp increase in the number of PCT procedures before the EPO. The proposal was a suitable measure for achieving an immediate and sustainable reduction in the Office's workload. The staff representatives had reservations about the proposed measure's efficacy, since it would not really reduce the backlog but merely defer it to the regional phase; moreover, any BEST effect would be lost, since the examiner would no longer draft his communication at the search stage; it could therefore at most be seen only as a provisional and short-term measure.
15. Replying to the delegations' comments, the Office said that implementing the proposal would increase the efficiency of the European Patent Organisation. The existing situation posed a structural problem, since the workload would continue to grow in future, and it was therefore necessary to make the necessary adjustments now to ensure that the EPO could carry on functioning as a European patent granting authority. The legal certainty argument was unconvincing: in the current situation, the examination of European patent applications was severely restricted by the processing of PCT applications, which had to be given priority, and this created far more uncertainty for European applicants and third parties. The Office also pointed out that the proposed measure was not designed to establish deferred examination in proceedings under the PCT.
16. Summing up, the chairman observed that none of the delegations saw the Office's proposal as posing any legal problems. Instead, the main issue was the appropriateness of the measure at this particular moment. Several of the delegations

had felt that the amendment of Rule 107 EPC should be considered in the context of the forthcoming negotiations on PCT reform. Eight delegations (BE, CH, CY, FR, GR, IE, IT, LU) had supported the Office's proposal, and eight (AT, DK, ES, FI, GB, NL, PT, SE) had expressed opposition to it. The German and Turkish delegations had not yet arrived at a final view. The compromises put forward for discussion by the Hellenic delegation (inserting a transitional provision in the legal text) and the staff representatives (highlighting the provisional character of the measure by limiting the period of applicability) had not been favourably received by the other delegations.

#### **IV. AMENDMENT OF RULE 108 EPC INTER ALIA - SIMPLIFICATION OF THE EURO-PCT PROCEDURE (CA/PL 2/01)**

17. The Office introduced CA/PL 2/01, containing a proposal to amend Rules 108, 85a(1) and 85b EPC and Article 2 of the Rules relating to Fees.
18. In reply to the doubts expressed by the WIPO representative about the compatibility of the new rules with the provisions of the PCT, since the filing of a written request for examination was a requirement for entry into the national phase, the Office explained that the existing legal position would remain unchanged in this respect. On a basis of agreement between the EPO and WIPO, the text could be amended as proposed, with only a slight modification of the heading (deleting the words "for entry into the European phase").
19. The chairman observed that the delegations had raised no objections to the Office's proposal. The proposal as set out in CA/PL 2/01 was unanimously adopted, subject to the deletion of the words "for entry into the European phase" from the heading of Rule 108.

#### **V. PCT REFORM - EPO PROPOSALS (CA/PL 7/01)**

20. The Office introduced the document. At the chairman's suggestion, the proposals were discussed one by one.
21. The delegations wanted it to be made quite clear that the document was a position paper drawn up by the Office, not a joint statement by the member states.

22. Regarding the possible *restriction of the EPO's ISA and IPEA competence*, the delegations said, on a mainly provisional basis, that they agreed with the general aim of the proposed measure. However, some of the delegations (AT, DK, GB, NL, SE) criticised the specific proposals, on the grounds that the "place of business" criterion could not guarantee that an application would have any direct connection with Europe; that the proposal involved a risk, on an unknown scale, of reprisals against the European Patent Organisation - for example, in connection with the negotiations on PCT reform; and also that not enough research had been done to assess the likely response of applicants to a change in the system. Finally, some delegations took the view that ISA and IPEA competence was a political issue for which the Committee was not the appropriate forum.
23. The proposal to *extend the time limit for entry into the national/regional phase to 30 months* was approved by a majority of the delegations. The use of time limits to reduce the PCT Chapter II workload was opposed by four delegations (DK, GB, NL, SE) because of the need to safeguard legal certainty for third parties. The Swedish and Netherlands delegations stressed that they would prefer a multilateral solution to a unilateral approach. Three delegations (ES, FI, PT) were unwilling to comment at present.
24. The proposal to make *time limits for performing ISA/IPEA work more flexible* was not supported by the UK, Swedish and Austrian delegations, which said it was essential to uphold the principle that a clear picture of a patent application's legal fate should be available to the applicant and the public as quickly as possible. The German delegation agreed with this as far as the international search report was concerned, but took a different view of the time limit for establishing the international preliminary examination report, where a degree of flexibility could be allowed. This view was shared by several other delegations (DK, IE, NL, PT).
25. The Office expressly agreed with the view that the search report should in principle be established by the date of publishing the application, but pointed out that, because of workload problems, the Offices acting as ISAs were finding it increasingly difficult to meet this requirement. To enable applicants to make an informed decision, based on the results of the search report, about whether to request preliminary examination, the time limit at least for filing the request for preliminary examination should be linked to the publication of the search report. This approach was expressly endorsed by the French and Luxembourg delegations.

26. The chairman observed that the proposal was welcomed in principle by most of the delegations, but was rejected by the UK, Swedish and Netherlands delegations.
27. Regarding the *simplification of the protest procedure*, the Netherlands and UK delegations said it would make more sense for non-unity issues between the applicant and the ISA/IPEA to be clarified at this level instead of being deferred to the national phase. The Swedish delegation reserved the right to vote against the proposal, which seemed - at least on the basis of the information currently available to the delegation - to involve more drawbacks than advantages.
28. Summarising the discussion, the chairman said the delegations had largely supported the Office's proposal. The only objection had been raised by the Swedish delegation.
29. The Committee unanimously approved the proposal on the handling of *sequence listings*.
30. On the issue of *moving requirements from the Articles of the PCT to the Implementing Regulations*, the delegations indicated their unanimous approval.
31. Regarding *PCT membership of international organisations such as the European Patent Organisation*, the opinion was expressed that this issue should be discussed first by the Administrative Council, as it did not primarily concern patent law.
32. The Turkish delegation objected to the proposal to *merge the Chapter I and II procedures*, on the ground that Turkish patent law provided for the grant of an unexamined patent with a shorter term of protection. Combining search and examination would deprive applicants of this option.
33. The UNICE representative pointed out that the proposed measure could improve the efficiency of the authorities acting as ISA/IPEA. In conjunction with the proposed introduction of a standard-type international preliminary examination report, the measure was particularly significant.
34. In response to the WIPO representative's suggestion that the wording of point 9, third sentence, be modified to make it clear that the proposed procedure was not optional for the applicant, the UK delegation said it would only support a procedure



which provided for the optional combination of search and examination. An obligatory merging of these two parts of the grant procedure would completely alter the character of the proposal. Such a procedure could not be accepted, as it would deprive the applicant of an option.

35. The delegations raised no objections to the proposal to *introduce a standard-type international preliminary examination report*.
36. The delegations unanimously approved the proposal to *abolish the non-unity procedure*.
37. The substance of the Office's comments on the *mutual recognition of search and examination results* met with the Committee's unanimous assent. However, some delegations (DK, GB and AT) considered that a formulation holding out a clearer prospect of mutual recognition as a long-term objective would be more appropriate.
38. With the exception of the Belgian delegation, which expressed misgivings on grounds of legal certainty about the proposal to *eliminate the designation of states*, the delegations shared the Office's view on this issue.
39. The Committee unanimously approved the Office's position on the *elimination of all residency and nationality requirements* and on the harmonisation of requirements for the accordance of a date of filing. The Committee unreservedly endorsed the Office's comments on the proposals concerning the deletion of the demand requirement under Article 31 PCT, fee reassessment, the reduction/elimination of formalities review and/or the increased use of electronic tools in handling applications.
40. The Austrian delegation wanted to reserve its position on the proposal concerning the availability of multiple searches and examinations (Stage 1/5). The remaining delegations supported the Office's view that discussion of this issue should be postponed until the workload problem had been solved.
41. With the exception of the Austrian, Danish, Netherlands, Swedish and UK delegations, the Committee endorsed the Office's comment on the proposal to *eliminate the 20-month deadline under Article 22*.

42. The proposal for *further deferral of entry into the national phase beyond the 30-month deadline* was opposed by the delegations mentioned in point 41 above, together with the German, Spanish and Swiss delegations and the representatives of UNICE and the *epi*.
43. The Office tabled a revised version of the proposals and comments on PCT reform (CA/PL 7/01 Rev. 1), incorporating a number of suggestions from the delegations and taking account of the misgivings expressed by some delegations.

## **VI. EPC REVISION**

### **VIa. TRANSITIONAL PROVISIONS (CA/PL 3/01)**

44. The Office introduced the document and proposed that Article 60 be deleted from Article 1.1 of the draft decision and that the sentence "However, in the case of Article 54(4), the previous version of the Convention shall continue to be applied to these applications and patents" be inserted at the end of the paragraph.
45. The UK delegation emphasised the fundamental importance of transitional provisions. With regard to pending patent applications, and in particular where patents had already been granted, amending provisions with retroactive effect was highly questionable. In particular, there was a need for very strict limits on the extent to which any amendment of the substantive requirements for patentability could apply retroactively to granted patents. Therefore, Articles 52, 53, 54(3) and (4) should be excluded from Article 1.1. This also applied to Article 69 and to the Protocol on Interpretation. The UK delegation also criticised the absence of any provision for patents granted in respect of applications pending at the time when the revised version entered into force. Article 1.2 of the draft decision should be supplemented accordingly - provided that Article 7 of the Revision Act offered a sufficient basis for deciding this.
46. The *epi* representative referred to the statement at the SACEPO meeting criticising the fact that Article 1.1 of the draft decision listed a number of provisions which involved changes in substantive patent law. These amendments must not be allowed to interfere with existing rights - for example, by the application of newly established grounds for revocation. Nor should subject-matter which previously fell outside the extent of protection be included in the extent of protection under the new version of the EPC. Articles 52 to 54, Article 69 and the Protocol on its interpretation, and Article 14(1) should be deleted from Article 1.1. Regarding the amendments to Articles 69 and 138, it should be specifically mentioned that the purpose of amending the law was only to clarify, and not to change, the existing legal position. The inclusion of a note to this effect could help to prevent misinterpretation.

47. The Irish delegation agreed with the UK delegation. It also mentioned the particular situation which would arise in Ireland from the amendment of Article 54(4) EPC. Until 1999, Ireland had only been designated in a relatively small proportion of European patent applications, which had therefore not been included in the assessment of novelty for subsequent applications.
48. The German delegation also emphasised the importance of protecting legitimate expectations, which required particular caution in connection with transitional provisions. The Revision Act provided in principle that the amended provisions should not have retroactive effect and that the revised version of the EPC should not apply to existing patents and pending applications, unless otherwise decided by the Administrative Council. This principle had been properly observed in the draft decision, which endeavoured to strike a balance of interests, bearing in mind the aim of revision - ie to establish a uniform patent law as quickly as possible. The solution for the application of Articles 52 to 54 EPC was unproblematic, as it merely complied with existing legal practice. The German delegation therefore considered that the Committee should approve the draft decision as it stood.
49. The French delegation expressed reservations about the draft decision (application of Article 52 ff.). It also suggested some minor editorial changes (delete Article 14(1) in 1.1, and in 1.2 include mention of patents granted in respect of applications pending at the time of entry into force).
50. The Austrian delegation said that its substantive misgivings had been dispelled by the Office's proposal for amending the draft decision with regard to Articles 54 and 60 EPC, and that it could therefore accept the draft.
51. The Swiss delegation shared the view of the German delegation.
52. The Swedish delegation emphasised the particular importance of preserving legal certainty. Consideration should therefore be given to the possible deletion of the references to Articles 97, 106(3), 108, 110, 115, 117, 119 and 128(5) from Article 1.1 of the draft decision, so that, here, the rule in the Revision Act would continue to apply. With regard to the legal consequences of central limitation, the application of the revised Articles 68 and 69 should be clarified. Article 68, furthermore, should be listed in 1.2. instead of 1.1, as it only concerned patents which had already been granted.

53. The Netherlands delegation said it was satisfied with the draft, but suggested replacing the passive "shall be applied" with an active construction ("shall apply") and requested that the explanatory note on Article 1.4 be expanded to make it clear that Article 112a applied "...to all decisions taken after the entry into force, irrespective of whether these decisions refer to old applications and patents or to new applications and patents".
54. The chairman asked for an informal vote on the application of Articles 52 to 54 and 69 EPC. Ten delegations (AT, BE, CH, DE, ES, FI, IT, LU, NL, TR) voted for the Office's proposal. Eight delegations (DK, CY, FR, GB, GR, IE, PT, SE) took the view that these articles should apply only to applications filed and patents granted after the entry into force of the revised version of the EPC.
55. The Office submitted an amended version of the draft decision (CA/PL 3/01 Rev. 1), incorporating most of the results of the discussion. The explanatory notes would be expanded accordingly in the document for the Administrative Council, in order to clarify why Articles 52 to 54 and 69 EPC and the Protocol on Interpretation were included in Article 1.1. The possibility also remained that the Administrative Council would adopt special transitional provisions for particular rules in the Implementing Regulations, where this proved necessary in specific cases.
56. The UK and Irish delegations regretted that their objections to the application of Articles 52 to 54 and 69 and the Protocol on Interpretation had not been taken into account in the new version of the draft decision. At the chairman's invitation, the UK delegation said it could imagine a compromise solution whereby at least the Protocol on the interpretation of Article 69 EPC would be omitted from Article 1.1. The German and Austrian delegations indicated that they were willing in principle to support such a compromise; for the time being, however, the existing version of the text should serve as the basis for the deliberations of the Administrative Council.
57. Summing up, the chairman noted that the draft decision set out in CA/PL 3/01 Rev. 1 had been approved by most of the delegations and that the deletion of the Protocol on the interpretation of Article 69 EPC from Article 1.1. was seen as a possible compromise solution.

#### **Vib. REVISED VERSION OF THE EPC (CA/PL 6/01 and CA/PL 8/01)**

58. The Office tabled CA/PL 6/01.

59. The UK delegation then presented its comments, set out in CA/PL 8/01, on a number of the Office's specific amendment proposals. The delegation emphasised that its criticisms were not primarily directed at the wording of individual provisions; instead, the key issue was one of principle, regarding the general extent to which the text should be amended at this stage. The delegation also listed a number of editorial changes on which the Office was free to exercise its discretion.
60. In the subsequent discussion, the other delegations only endorsed the UK delegation's opinion regarding the new version of Article 49 EPC. The other amendments singled out by the UK in CA/PL 8/01 were not considered so major as to fall beyond the scope of the mandate conferred by the Diplomatic Conference. Since the Swiss delegation, in particular, was expressly in favour of the version of Article 54(5) EPC proposed by the Office, none of the other delegations voiced any doubts on this issue.
61. The Swiss delegation explained its proposal in CA/PL 8/01 on the wording of Articles 64(1), 86(2) and 141(2). Its concern was to find a user-friendly form of words which defined the relevant time limits in a readily comprehensible way. In response to this, the Office suggested replacing the existing wording with "from the date specified in Article 97(3) EPC". Several delegations (AT, CY, DE, DK, ES) shared the misgivings of the Hellenic delegation, which felt that this change was not covered by the Conference's mandate and that the possible implications for other provisions were difficult to gauge. The Swiss delegation thereupon proposed a new version reading: "from the date on which it is validly granted under Article 97(3)". Summing up, the chairman observed that neither the proposals of the Swiss delegation nor the alternative suggested by the Office were supported by the delegations.
62. The Swedish delegation commented on the wording of Article 70(3) EPC (insertion of a reference to Articles 65 and 67 EPC) and Article 70(4)(b) EPC (use of the past tense).
63. The Swiss delegation commented on the amendment of Article 12 EPC (weaker formulation in German with "dürfen", restore original text), Article 30(1) EPC (should read: "... the World Intellectual Property Organization shall be represented at the meetings of the Administrative Council in accordance with an agreement concluded between the European Patent Organisation and the World Intellectual Property Organization"), Article 33 EPC (in the German version, amend the wording

of paragraph 2 to bring it into line with paragraph 1: - "... der Verwaltungsrat ist in Übereinstimmung mit diesem Übereinkommen befugt, folgende Vorschriften zu erlassen und zu ändern: ...") and Article 116(4) EPC (replace, in the German version, "eine am Verfahren beteiligte Partei" with "Verfahrensbeteiligte").

64. Replying to questions from the French and German delegations about the reasons for amending Article 90(5) EPC, the Office explained that this was for the sake of clarity because of the conflicting legal consequences of Articles 90(3) and 78(2) EPC. The Irish delegation suggested deleting the word "after" from the English version of Articles 99(1), last sentence, and 135(3) EPC.
65. The chairman proposed that the delegations be given an opportunity to comment in writing by 20 May 2001 on the draft new version of the EPC and the suggestions which had emerged during the discussion. Abstention from further comment would be taken as signifying approval of the text in CA/PL 6/01. The Office would then prepare a revised version for submission to the Administrative Council, and the new version of the EPC could be produced soon after the Council's June meeting. The delegations approved this proposal.

## **VII. SUBSTANTIVE PATENT LAW TREATY (SPLT) - EXCHANGE OF VIEWS** (SCP/5/2 Prov.)

66. The WIPO representative introduced the document.
67. The Office commented on the document. The draft texts under the heading Alternative A were generally preferred to Alternative B, not only because they were based on the results of the PLT 1991 negotiations, but also because they corresponded more closely to European patent law practice and to PLT 2000, the PCT and TRIPs. Looking at the specific proposals in Alternative A, the Office set out its view as follows:
  - Article 2            approved, despite the lack of any provision for cases where two persons arrive at the same invention independently and simultaneously;
  - Article 3            superfluous, as issue already covered by Article 6 PLT 2000 and the PCT;

- Article 4 criteria for a "lengthy application" to be defined more clearly; Rule 8(1)(d) PLT 2000 could also be developed further along these lines;
- Article 7 corresponded to PLT 2000 standard and standard agreed at Trilateral level with regard to unity of invention;
- Articles 8, 9, 11, 14 and 18 mainly supported;
- Article 10 acceptable; EPO was generally receptive to the idea of introducing a grace period;
- Article 15 had to be compatible with Article 27 TRIPs;
- Article 16 supported, in view of developments in patent protection for biotechnological inventions, although the industrial applicability requirement had not yet played a significant role at the EPO;
- Article 17 supported in principle, although the question arose whether purpose-related production for first and further therapeutic uses of a known substance could continue to be upheld under this provision;
- Article 19(2) supported in principle, with a view to efficient harmonisation.

68. The Swedish delegation and the *epi* representative also expressed a preference for Alternative A. The Swedish delegation warned against transferring provisions of substantive importance to the Regulations.

#### **VIII. INTRODUCING THE EURO AS THE SOLE EPO CURRENCY, AND AMENDING THE RULES RELATING TO FEES (CA/36/01)**

69. The Committee noted CA/36/01, introduced by the Office.

#### **IX. ANY OTHER BUSINESS**


70. The chairman informed the delegations of a forthcoming (28 to 30 November 2001) conference on the Community patent, in connection with the Belgian EU Presidency, and outlined the programme of events, while emphasising that the delegations would receive separate invitations.

71. The WIPO representative promised to inform the Council Secretariat of the date of the next meeting of the Standing Committee on the Law of Patents as soon as it was finalised (for information: 5 to 16 November 2001).
72. The Committee's next meeting was scheduled for **25 and 26 September 2001** (for information: changed to 1 and 2 October 2001). A further meeting would probably be held in Liège on **30 November**.

The Committee on Patent Law approved the draft minutes contained in this document on 1 October 2001.

Berlin, 1 October 2001

For the Committee on Patent Law  
The Chairman

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom.

Paul LAURENT



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**Info 1 Rev. 1**

15. Sitzung / 15th meeting / 15ème session (München/Munich, 2.-4.5.2001)

München/Munich, 11.05.2001

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:	Ausschuß "Patentrecht" (zur Unterrichtung)
ADDRESSEES:	Committee on Patent Law (for information)
DESTINATAIRES:	Le comité "Droit des brevets" (pour information)

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