Article 156 E

Travaux Préparatoires (EPC 1973)

Comment:

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Art. 156
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Das Europäische Patentamt als ausgewähltes Amt

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provision was also adopted to authorise the national authorities of the host country to withdraw the right to a place of business for reasons of "ordre public".

(d) Deletion from the list of professional representatives

The Main Committee examined the grounds for deletion of professional representatives from the list and re-arranged them in Rules 103 (permanent solution) and 107 (transitional period). No difficulties were presented by the three grounds for deletion which apply both in the transitional period and in the permanent solution, namely, death or legal incapacity of the representative, his ceasing to be a national of one of the Contracting States, where the President does not grant or is not required to grant exemption from this requirement, or his ceasing to have a place of business or employment in any of the Contracting States. There was unanimous agreement that, in respect of representatives during a transitional period, the national central industrial property office in question must, in these three cases, withdraw the certificate which it has issued and the representative must be deleted from the list. There was, however, disagreement as to whether the mere surrender of the place of business in the State in which the certificate was granted should result in the withdrawal of the certificate, if the representative establishes another place of business in another Contracting State. The Committee's answer was in the negative. The majority adopted the viewpoint that it would be unfair and unjustifiable to make representation before the European Patent Office during a transitional period dependent on a merely national requirement of any State that the place of business should be within its territory. This restriction on the national central industrial property offices was incorporated in Rule 107 relating to the transitional period, while at the same time it was laid down that the national offices could withdraw the certificate, apart from on one of the three above-mentioned grounds, pursuant to other conditions of national law and, in particular, on disciplinary grounds.

Subject to these limitations, representatives entered on the list during the transitional period will, throughout this period, be required to have a certificate issued by the national central industrial property office of a Contracting State. This requirement will, however, cease to apply on the expiry of the transitional period after which the certificate will be devoid of all effect. Thus, representatives during the transitional period and representatives newly authorised after having taken the European qualifying examination will have equal status under the permanent solution. Both kinds of representative will therefore be subject to the disciplinary power decided upon by the Administrative Council pursuant to Article 134, paragraph 7(c); in order to avoid a situation where there would be no disciplinary supervision, the disciplinary power should begin to apply not later than on the expiry of the transitional period.

The Main Committee also remedied other defects in Rules 103 and 107 by including in them provisions laying down that, when the ground for deletion no longer obtains, a representative deleted from the list may be re-entered on it.

13. Conversion procedure (Articles 135-137/Rule 104)

Article 135, paragraph 1, sets out the grounds for the conversion of a forfeited European patent application into a national application. It was proposed to delete the possibilities for conversion under the national laws of the Contracting States in paragraph 1(b). It was maintained that, firstly, Articles 120 and 121 protected the applicant sufficiently against the consequences of omissions and, secondly, that there were no grounds to justify pursuit at national level of European patent applications refused or European patents revoked on material grounds. The principal objection raised against this proposal for deletion was that it was a matter for the national laws whether conversion should be permissible in cases other than those compulsorily prescribed, i.e. in cases where national law provided for forms of protection such as utility models, the grant of which was conditional on less exacting requirements than those applicable to the grant of patents for invention. The great majority of the Committee subsequently rejected the proposal, so that the existing solution was retained.

14. Revocation and prior rights (Articles 138-139)

With regard to the grounds on which, pursuant to Article 138, a European patent may be revoked, the Main Committee made it clear that extension of the protection conferred can be a ground for revocation, irrespective of whether the extension occurs during opposition proceedings or national proceedings. This clarification takes account of the fact that a change in the claims of a European patent during national revocation proceedings or during national proceedings for partial surrender may result in an inadmissible extension of protection. Moreover, the Committee refused to impose, in paragraph 2 of the same Article, any restrictions on national laws in respect of the form in which limitations of European patent claims can be made in cases of partial revocation.

A further proposal, in connection with the rules laid down in Article 139 governing the relationship between European and national patents, to provide that, in cases of collision, the European patent should always take precedence was also unsuccessful. The Committee, by a great majority, rejected this solution which would have been a further step towards adopting a maximum solution, principally in the belief that, in the interests of flexibility, the national laws of the Contracting States should be left to adopt such collision rules as they considered justified.

15. Relationship between the Convention and the PCT (Articles 150-157/Rules 105-106)

The Main Committee re-examined the provisions of Articles 150-157, linking the Convention and the Patent Cooperation Treaty/PCT, i.e., the provisions governing the procedure for international applications which are the subject of proceedings before the European Patent Office. In the course of this examination, it remedied the remaining defects and, where necessary, removed discrepancies between the provisions of the Convention and those of the PCT.

With regard to material content, the amendment made by the Main Committee to Article 157 concerning the effects of the publication of the international application on proceedings before the European Patent Office should be noted. A consequence of the previous text of paragraph 1, according to which publication of the international application by the International Bureau of WIPO takes the place of the publication of a European patent application, would have been that, in each case, the published international application would have formed part of the state of the art, pursuant to Article 52, paragraph 3. This legal consequence was regarded as unjustified where an application, which has not been published in an official language of the European Patent Office, is withdrawn before its communication to the European Patent Office. Therefore, the Committee, after a thorough examination of the relevant provisions of the PCT, decided by a large majority to take account of this case by providing that an international application published pursuant to Article 21 of the
ANNEX I

REPORT

by Mr. Paul Braendli, Lic. iur.
Vice-Director of the Federal Intellectual Property Office (Switzerland)

on the results of Main Committee I's proceedings

ANNEX II

REPORT

by Mr. R. Bowen
Assistant Comptroller, British Patent Office

on the results of Main Committee II's proceedings

ANNEX III

REPORT

by Mr. Fressonnet
Deputy Director of the Institut National de la Propriété Industrielle (France)

on the results of Main Committee III's proceedings

ANNEX IV

REPORT

by Mr. A. Fernandez Mazarambroz
Head of the Spanish Patent Office

on the results of the Credentials Committee's proceedings
with regard to full powers for signing the Convention
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MINUTES
OF THE
MUNICH DIPLOMATIC CONFERENCE
FOR THE SETTING
UP OF A EUROPEAN SYSTEM
FOR THE GRANT OF PATENTS

(Munich, 10 September to 5 October, 1973)

published by the
Government of the Federal Republic of Germany
had agreed on the French delegation's proposal in M/59 for the inclusion in the Convention of a provision covering the Directorate-General for Searching. Main Committee I was now faced with the problem of what this implied for certain other Articles in the Convention. He held that as the basic issue had already been decided, the Committee could confine itself to referring to the Drafting Committee the problem of how to word the relevant provisions.

The Chairman noted that the Committee agreed to refer this problem to the Drafting Committee.

**Article 156 (157) — International search report**

913. The Committee agreed to instruct the Drafting Committee to make the appropriate amendments to this Article, following the decision to delete Article 124 (see point 664) and the decision by Main Committee II on the incorporation of the IB in the European Patent Organisation, in the form of the Directorate-General for Searching.

914. While the results of the Drafting Committee's work (see M/136/LR, p. 23) were being examined, the FICPI delegation wished to know from which the date the time allowed for filing a request for examination would run in the case of international applications for which an international search report had been drawn up.

915. After the matter had been discussed, the Chairman noted that the Committee was unanimously of the opinion that in the case of the international applications referred to in this Article the time allowed for submitting a request for examination started to run from the day on which the international application was published by WIPO.

**Article 157 (158) — Publication of the international application**

916. The Committee examined the proposed amendments to this Article: a proposal by the Norwegian delegation (see M/71, page 4), a proposal by the Netherlands delegation (see M/52, page 15) and a proposal by the Member States of the European Communities (see M/14, point 13).

917. The Chairman pointed out that the proposal of the Norwegian delegation concerning paragraph 1 was in two parts. He considered the first of these, whereby the words "or selected" would be inserted between the words "designated" and "Office", superfluous since under the last sentence in Article 31, paragraph 4(a), of the Patent Co-operation Treaty: "Electoral may relate only to Contracting States already designated under Article 4".

918. The Norwegian delegation agreed with the Chairman and accordingly withdrew the first part of its proposal.

919. The Norwegian delegation stated that it attached much greater importance to its second proposal whereby paragraph 1 would be supplemented by a provision excluding the content of international applications which were not maintained as European patent applications from the state of the art referred to in Article 52, paragraph 3.

920. The Chairman did not consider that this proposal coincided with the intentions of the authors of the preparatory work. According to Article 157, paragraph 1, as it stood, an international application, published by WIPO under Article 21 of the PCT, which was deemed to be an application for a European patent, became part of the state of the art from the date of filing or the date of priority, regardless of whether it had been forwarded to the European Patent Office or the national fee had been paid.

921. The Netherlands delegation pointed out that this question depended on the interpretation given to Article 24 of the PCT on the possible loss of effect in designated States. This Article stipulated that the effect of the international application ceased in any designated State with the same consequences as the withdrawal of a national application. This would appear to mean that the application would be deemed to have been withdrawn and that the effects provided for in Article 52, paragraph 3, would apply.

922. The Chairman said that the situation seemed to be exactly the same as that of a European patent application withdrawn after publication. In such a case the effects described in Article 52, paragraph 3, would apply in spite of the withdrawal of the application.

923. The United Kingdom delegation agreed with the Chairman's interpretation but pointed to the disadvantages of such a situation.

924. The WIPO delegation did not think that this question could be settled on the basis of Article 24 of the PCT, since that Article referred to the loss of effect, referred to in Article 11, paragraph 3, of the PCT, of the international application. This effect was "the effect of a regular national application". The situation was different for regional patent applications. The system adopted in the present Convention was that even if a European patent application was withdrawn, the effects on the state of the art would continue to apply. Applying this system to Article 24 of the PCT, the loss of effect provided for in Article 11, paragraph 3, of the PCT would certainly not mean that the content of the application would cease to be part of the state of the art since the withdrawal of the application would not have any effect as regards regional patent applications either.

925. The Netherlands delegation felt that the Norwegian delegation's proposal would counter the disadvantages of an excessively rigorous interpretation to the effect that an international application for which no translation in an official language of the European Patent Office was produced or for which no fee had been paid would be considered to form part of the state of the art. This delegation then asked whether the provisions of the PCT would allow the insertion in this Convention of a provision taking account of its wishes and those of the Norwegian delegation. Article 24 of the PCT did not in fact say that the application was deemed not to have been filed but that it ceased to have effect.

926. The WIPO delegation confirmed that Article 24 did not support the Norwegian delegation's proposal but rather the contrary.

927. The United Kingdom delegation asked the WIPO delegation whether, for the purposes of the application of Article 52, paragraph 3, it would be possible to have access to the priority documents of an international application.

928. The Swedish delegation pointed out that the problem being discussed had been debated at length during the preparatory proceedings for the Washington Conference because of the importance attributed to it by the Scandinavian countries. The Swedish delegation thought that the minutes of the preparatory proceedings would show that it had been agreed that the arrangement now being requested by the Norwegian delegation was not incompatible with the PCT.

929. In reply to the question raised by the United Kingdom delegation, the WIPO delegation pointed out that Rule 17, paragraph 2, of the PCT stipulated that "the International Bureau shall, at the specific request of the designated Office. . . furnish a copy of the priority document to that Office". Offices also had the right to request translations of priority documents from the applicant after expiry of the twenty month period. Before the expiry of that period, access was therefore possible to priority documents only in the original language.

930. As regards the Swedish delegation's statement, the
of the other States as well. Furthermore, if the application were forwarded on two different dates the question would arise of whether it should be published twice in one of the official languages of the European Patent Office, because provisional protection began to take effect as from the date of publication in one of these languages. In conclusion, the only reasonable solution seemed to be to consider that Chapter II of the PCT took precedence.

902. The WIPO delegation subscribed to the point of view expressed by the United Kingdom delegation. The provision suggested by the Norwegian delegation appeared not only superfluous but also dangerous in that, where Chapter II of the PCT applied, the fact of receiving the translation of an international application after only twenty months, whereas the procedure would not commence until after twenty-five months, could amount to a sizeable administrative burden.

903. The Chairman said that two different situations were possible. The first hypothesis was that all the Contracting States to the present Convention had accepted Chapter I of the PCT, and one State, Norway for example, had in addition also accepted Chapter II. The consequence of accepting Chapter II was to extend the period for forwarding the translation of the international application from twenty to twenty-five months. If a European application filed via the PCT specified Norway as an elected State within the meaning of the PCT, the provisions of the PCT would prevail pursuant to Article 150, paragraph 2, third sentence. This would mean that, notwithstanding the fact that only one of the Contracting States had accepted Chapter II, the entire procedure before the European Patent Office would have to be geared to the procedure applicable to the State which had accepted Chapter II. This solution did not necessitate any amendment to the present wording. The second hypothesis was that not only Norway but other States as well had accepted Chapter II and that one State, Norway for example, had availed itself of the reservation option provided for in Article 64, paragraph 2, whereby the application would have to be forwarded after twenty and not after twenty-five months. In this case, since the procedure could not be other than unitary, the effect of the reservation would be that the applicant would have to forward the application to the European Patent Office after twenty months. This conclusion would however be arrived at on the basis of the existing text, without there being any need to include a specific provision in Article 155.

904. The WIPO delegation could only agree with the Chairman’s arguments if the proposal put forward by the Norwegian delegation were adopted in the text of the Convention. As long as a provision of this sort did not appear in the Convention, Article 150, paragraph 3, last sentence, quoted by the Chairman, meant that the period laid down in Article 39 of the PCT would be applicable in the procedure before the European Patent Office, even if one of the States which had accepted Chapter II of the PCT had availed itself of the reservation under Article 64, paragraph 2. The reservations made by a State are to be considered as applicable only under its national legislation and not as far as the European Convention was concerned.

905. The Chairman announced that following the WIPO delegation’s latest remark he was constrained to rethink his argument, in the sense that a reservation based on Article 64, paragraph 2, of the PCT could affect the national procedure only, and not the procedure before the European Patent Office. He then went on to summarise the discussion so far for the Committee’s benefit. On the basis of Article 155 as currently worded, for a PCT application specifying the European Patent Office both as a designated Office and as an elected Office, Chapter II of the PCT would apply irrespective of the fact that the national office elected in the application was that of a State which had made use of the reservation option provided for in Article 64, paragraph 2. The Norwegian delegation’s proposal was intended to extend the scope of this reservation to the procedure before the European Patent Office, with the result that the time allowed for forwarding the translation of the application would be reduced from twenty-five to twenty months. The Chairman expressed misgivings on whether this proposal would be such as to arrive at what seemed to be the aim of the Norwegian delegation, namely to obtain a Norwegian translation of the international application in a shorter space of time. Pursuant to the European Patent Convention, the applicant was not obliged to submit a translation of his application in Norwegian, but only in one of the official languages. It was only for the purposes of provisional protection that a State could request a translation of the claims in its national language.

906. The WIPO delegation made the point that as the European Patent Convention was the first convention that could be considered as a sort of instrument for implementing the PCT, it would set an example for other similar conventions. Accepting the Norwegian delegation’s proposal would deprive the applicant of one of the few advantages afforded him by Chapter II of the PCT, namely the possibility of having a further five months in which to submit the translation of his application.

907. The Norwegian delegation, concurring with the Chairman’s remark on the problem of the translation of the application in Norwegian, said that it was able to accept the interpretation which seemed to emerge from the discussion, namely that the consequence of just one State having accepted Chapter II of the PCT would be to extend to all the other Contracting States the procedure laid down in that Chapter and in particular the longer time allowed — twenty-five instead of twenty months — for supplying the translation of the application.

908. The Netherlands delegation subscribed to the interpretation that if just one of the Contracting States accepted PCT Chapter II, this would be enough to extend the period for providing the translation of the application from twenty to twenty-five months for all the other Contracting States. Extending this period by five months did not seem too detrimental to the speed of the procedure, and it also meant that the European Patent Office would be able to have the international search report. On the other hand, the Netherlands delegation was not in favour of the Norwegian delegation’s proposal, which would mean that if one Contracting State accepted Chapter II, but with the reservation provided for in Article 64, paragraph 2, the period would once more be reduced to twenty months, notwithstanding the unqualified acceptance of this Chapter by other Contracting States.

909. The Norwegian delegation stated that in view of the Committee’s discussions, it withdrew its proposal.

910. The Belgian delegation said that if Main Committee II agreed to the French delegation’s proposal for the incorporation of the IIB in the European Patent Organisation, the necessary inferences would have to be drawn as regards the wording of Article 154 and 155, by allocating to the European Patent Organisation the tasks originally envisaged for the IIB.

911. The French delegation and the WIPO delegation agreed with this comment by the Belgian delegation.

912. The Chairman proposed that the Committee should await the outcome of Main Committee II’s discussions before considering whether a new provision was required on this point.

At a subsequent meeting the Chairman drew the Committee’s attention to the fact that as Main Committee II
888. The Chairman noted the Committee's agreement to the Norwegian delegation's proposal on the grounds that Article 153 referred to the European Patent Office in its capacity as a designated Office and that it was therefore not appropriate for there to be a provision referring to the European Patent Office as an elected office.

**Article 153a (154) — The European Patent Office as an International Searching Authority**

889. The Committee examined the proposal for a new Article 153a submitted by the French delegation in M/101.

890. The French delegation stated that following the decisions taken by Main Committee II a new Article ought to be included to cover the eventuality of the European Patent Office acting as an International Searching Authority.

891. The Chairman noted that the French delegation's proposal met with support.

892. After congratulating the French delegation on this proposal, the WIPO delegation made two comments. Firstly, it wondered whether this provision should not be made clearer so that it would also apply in an eventuality which did not appear to be covered in paragraph 2 of this new Article. Paragraph 1 covered the eventuality of the European Patent Office acting as PCT searching authority on behalf of nationals and residents of Contracting States to the Convention and paragraph 2 enabled the European Patent Office also to act as a searching authority for applicants who were nationals or residents of States other than PCT Contracting States. However there was an intermediate group, namely those States (and their nationals and residents) which were not Contracting States to the Convention, although they were Contracting States to the PCT. It should be possible to cover this case as well by a suitable provision. The WIPO delegation's second remark was on the wording of paragraph 2 of this Article, which made reference to the Office being appointed as a competent International Searching Authority by the Assembly of the International Patent Co-operation Union. In the sort of case referred to in Rule 19.1 of the PCT, it seemed more appropriate to speak of a receiving Office.

893. The French delegation was in favour of the first suggestion put forward by the WIPO delegation.

894. The Committee agreed to the French delegation's proposal as amended in the manner suggested by the WIPO delegation. This Article was referred to the Drafting Committee.

**Article 155 (156) — The European Patent Office as an elected Office**

895. The Committee examined the Norwegian delegation's proposal (see M/71, page 3) for the addition of a new paragraph 2 to this Article.

896. The Norwegian delegation said that its proposal was the logical corollary to the proposal adopted by the Committee with regard to Article 153, paragraph 2. The final sentence in this new paragraph was designed to meet the eventuality of an "elected" State making use of the option of making a reservation, as provided for in Article 64, paragraph 2, of the PCT.

897. The Chairman proposed that the Committee approach these two problems separately. The first problem was the inclusion in Article 155 of a provision corresponding to Article 153, paragraph 2, laying down that the application must be filed in one of the official languages of the European Patent Office and that the national fee specified in Article 39, paragraph 1, of the PCT must be paid. The second problem was where one of the elected States had availed itself of the reservation provided for in Article 64, paragraph 2, of the PCT.

898. The WIPO delegation said that, with regard to Chapter II of the PCT, the effect of the Norwegian proposal would be to do away with the uniformity of treatment between European patent applications based on a PCT application. Under the new wording proposed by the Norwegian delegation, the European States would be given the opportunity to decide, each on their own account, whether or not to avail themselves of the reservation provided for in Article 64, paragraph 2. If a State availed itself of this option, the practical consequence would be that even under Chapter II the applicant would have to produce the translations after twenty months and not after twenty-five months as laid down in Chapter II. Thus, if a European State so decided, the European Patent Office would receive the translations after twenty months and would examine the application at that time; this would mean that a decision by one State would automatically apply to all the other States. The WIPO delegation pointed out that although compatible with the PCT, this measure represented an important decision on which the Committee ought to conduct a searching examination.

899. The Norwegian delegation pointed out that the problem had a much broader scope, since the present text of the Convention did not prevent a Contracting State from making use of the right to enter reservations as provided for in Article 64, paragraph 2. Furthermore, a State could also avail itself of the option to make a reservation under Article 64, paragraph 1, and declare that it was not bound by the provisions of Chapter II of the PCT. As for the more specific problem mentioned by the WIPO delegation, the Norwegian delegation thought it was correct that if a PCT international application designated the European Patent Office and a European State which had only accepted Chapter I of the PCT the translation of the international application would have to be submitted within twenty months, in order to obtain a European patent for that State. However, if the applicant submitted the translation of his application four months afterwards, he could nevertheless obtain a European patent in respect of the other States which had accepted both Chapter I and Chapter II of the PCT.

900. The delegation of the Federal Republic of Germany considered that this problem was rather theoretical and wished the existing wording to be maintained. Bearing in mind the fact that Chapter II was designed to facilitate the work of the offices in the elected States, by making provision for a preliminary international examination, it was hardly likely that the European Patent Office or a number of European States would forgo the advantages conferred upon them by Chapter II. The German delegation was of the opinion that even if a State availed itself of the reservation under Article 64, paragraph 2, this would not have any effect either upon the other States or the European Patent Office since a reservation under Article 64, paragraph 2, merely implied that the national office was not obliged to wait before proceeding with the examination of the international application; it did not mean that the national office of an elected State was obliged to start examination straight away.

901. The United Kingdom delegation shared the point of view of the delegation of the Federal Republic of Germany. The new paragraph proposed by the Norwegian delegation was not acceptable, in that it was not advisable to lay down a provision the effect of which would be that translations of an international application would be sent at two different times. If, in order to take account of the fact that certain States had acceded to Chapter II of the PCT, examination of international applications had to be postponed until expiry of the twenty-five month period, examination should also be deferred in the case...
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MINUTES
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(Munich, 10 September to 5 October, 1973)

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The European Patent Office as an elected Office

The European Patent Office shall act as an elected Office within the meaning of Article 2(xiv) of the Cooperation Treaty if the applicant has elected any of the designated States referred to in Article 153, paragraph 1, or Article 149, paragraph 2, for which Chapter II of that Treaty has become binding. Subject to the prior approval of the Administrative Council, the same shall apply where the applicant is a resident or national of a State which is not a party to that Treaty or which is not bound by Chapter II of that Treaty, provided that he is one of the persons whom the Assembly of the International Patent Cooperation Union has decided to allow, pursuant to Article 31, paragraph 2(b), of the Cooperation Treaty, to make a demand for international preliminary examination.
MUNICH DIPLOMATIC CONFERENCE
FOR THE SETTING UP OF A EUROPEAN SYSTEM FOR THE GRANT OF PATENTS

- 1973 -

Munich, 30 September 1973
M/ 146/R 6

Original: English/French/German

CONFERENCE DOCUMENT

Drawn up by: General Drafting Committee

Subject: Convention: Articles 140 to 166
Article 155

The European Patent Office as an elected Office

The European Patent Office shall act as an elected Office within the meaning of Article 2(xiv) of the Cooperation Treaty if the applicant has elected any of the designated States referred to in Article 153, paragraph 1, or Article 149, paragraph 2, for which Chapter II of that Treaty has become binding. Subject to the prior approval of the Administrative Council, the same shall apply where the applicant is a resident or national of a State which is not a party to that Treaty or which is not bound by Chapter II of that Treaty, provided that he is one of the persons whom the Assembly of the International Patent Cooperation Union has decided to allow, pursuant to Article 31, paragraph 2(b), of the Cooperation Treaty, to make a demand for international preliminary examination.
MUNICH DIPLOMATIC CONFERENCE
FOR THE SETTING UP OF A EUROPEAN SYSTEM FOR THE GRANT OF PATENTS

- 1973 -

Munich, 27 September 1973

M/ 136/I/R 10

Original: English/French/German

TEXTS DRAWN UP BY
THE DRAFTING COMMITTEE OF MAIN COMMITTEE I
AT THE MEETING ON 26 SEPTEMBER 1973

Articles of the Convention:

Articles 14
52
79
89
90
91
95
101
105
121
124
133
134
148
150
151
152
153
153a
154
155
156
157
161
PROPOSALS ON ARTICLES 153 AND 155

Article 153, paragraph 2, should read:

(2) The international application shall be supplied to the European Patent Office in one of its official languages. The applicant shall pay to the European Patent Office a national fee provided for in Article 22, paragraph 1, of the Co-Operation Treaty.

Article 155 should read:

(1) (Article 155 of the draft)

(2) If the applicant has not previously supplied the application in one of the official languages of the European Patent Office, and paid the national fee according to Article 153, paragraph 2, he shall do so as provided in Article 39, paragraph 1, of the Co-Operation Treaty. However, in respect of elected States having made use of the reservation under Article 64, paragraph 2, of the Co-Operation Treaty, the furnishing of the application in one of the official languages of the European Patent Office shall take place as provided for in Article 22, paragraph 1, of the Co-Operation Treaty.
MUNICH DIPLOMATIC CONFERENCE
FOR THE SETTING UP OF A EUROPEAN SYSTEM FOR THE GRANT OF PATENTS

1973

Munich, 12 September 1973

M/71/1

Original: English

CONFERENCE DOCUMENT

Drawn up by: Norwegian delegation

Subject: Proposals for amendments to Articles 124, 139, 153, 155 and 157 of the Convention and Rules 55, 67, 69 and 97 of the Implementing Regulations
Europäische Patentamt eine Anmeldung als zurückgenommen ansehen können, wenn der Anmelder einer Aufforderung nicht nachkommt.


14 Es sei auf den Fall aufmerksam gemacht, in dem der Anmelder einen oder mehrere europäische Staaten auswählt, die von dem Vorbehalt nach Artikel 64 Absatz 2 Buchstabe a des Zusammenarbeitvertrags Gebrauch gemacht haben. In diesem Fall muß die von einem solchen Staat abgegebene Erklärung zusätzlich zu den Bestimmungen des Zusammenarbeitvertrags berücksichtigt werden. Dem Artikel 155 sollte ein Absatz 3 hinzugefügt werden, der diese Variante erfaßt.

15 Nach Artikel 157 Absatz 1 tritt die Veröffentlichung einer internationalen Anmeldung nach dem Zusammenarbeitvertrag, in der das Europäische Patentamt benannt ist, an die Stelle der europäischen Veröffentlichung. Diese Bestimmung dürfte in Verbindung mit Artikel 150 Absatz 2 zur Folge haben, daß eine solche internationale Anmeldung unabhängig davon, ob sie nach Einreichung einer Übersetzung und Einrichtung einer nationalen able to deem an application to be withdrawn if the applicant fails to reply.

11 In connection with Art. 125 the sixth meeting of the Inter-Governmental Conference “established that the European Patent Office may not grant more than one European patent to the same person for the same invention being the subject of applications filed on the same date” (Minutes par. 49). However, in the Norwegian opinion, it follows from Art. 52(3) that applications filed on the same day do not at all constitute novelty hindrance against each other and that an applicant may thus without detriment to himself file several applications on the same day. Under the circumstances, a possible restriction as established at the sixth meeting should be expressly stated in the Convention.

12 According to Art. 139(3) the contracting states may prescribe whether an invention disclosed in both a national patent and a European patent having the same date of filing, may be protected simultaneously by both patents. The Norwegian Government questions whether it is right to allow the states to revoke the European patent in these cases. This seems particularly doubtful where the European patent and the national patent belong to different inventors.

13 As Art. 153 only deals with the European Patent Office as a designated office under the Patent Cooperation Treaty, the reference in paragraph 2 to Art. 39(1) of the Cooperation Treaty should be omitted. To Art. 155 should, on the other hand, be added a second paragraph corresponding to Art. 153(2), yet with reference to the national fee provided for in Art. 39(1) of the Cooperation Treaty.

14 Attention is drawn to the case where the applicant elects one or more European states which have made use of the reservation under Article 64(2)(a) of the Patent Cooperation Treaty. In this case the declaration made by such state must be applied in addition to the provisions of the Cooperation Treaty itself. A third paragraph ought to be added to Art. 155 to cover this alternative.

15 According to Art. 157(1) publication under the Cooperation Treaty of an international application in which the European Patent Office is designated, shall take the place of the European publication. This provision, together with Art. 150(3), seems to entail that such international application will become prior art pursuant to Art. 52(3) irrespective of whether it is carried on with the European Patent Office by furnishing of a translation and a national
STELLUNGNAHME

DER NORWEGISCHEN REGIERUNG

COMMENTS

BY THE NORWEGIAN GOVERNMENT

PRISE DE POSITION

DU GOUVERNEMENT NORVÉGIEN
MÜNCHNER DIPLOMATISCHE KONFERENZ
ÜBER DIE EINFÜHRUNG EINES EUROPÄISCHEN
PATENTERTEILUNGSVERFAHRENS 1973

(München, 10. September bis 6. Oktober 1973)

MUNICH DIPLOMATIC CONFERENCE
FOR THE SETTING UP OF A EUROPEAN SYSTEM
FOR THE GRANT OF PATENTS, 1973

(Munich, 10 September to 6 October 1973)

CONFÉRENCE DIPLOMATIQUE DE MUNICH
POUR L'INSTITUTION D'UN SYSTÈME EUROPÉEN
DE DÉLIVRANCE DE BREVETS
(1973)

(Munich, 10 septembre - 6 octobre 1973)

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STELLUNGNAHMEN
zu den vorbereitenden Dokumenten
herausgegeben von der
Regierung der Bundesrepublik Deutschland

_________________________

COMMENTS
on the preparatory documents
published by the
Government of the Federal Republic of Germany

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PRISES DE POSITION
sur les documents préparatoires
publiées par le
Gouvernement de la République fédérale d’Allemagne

_________________________

1973

Artikel 156
Internationaler Recherchenbericht


(2) Vorbehaltlich der Beschlüsse des Verwaltungsrats nach Absatz 3
a) holt das Europäische Patentamt beim Internationalen Patentinstitut einen ergänzenden europäischen Recherchenbericht zu jeder internationalen Anmeldung ein;

b) hat der Anmelder die Rechengebühr zu zahlen, die gleichzeitig mit der nationalen Gebühr nach Artikel 22 Absatz 1 und Artikel 39 Absatz 1 des Zusammenarbeitsvertrags zu entrichten ist. Ist die Rechengebühr nicht rechtzeitig entrichtet worden, so gilt die Anmeldung als zurückgenommen.

(3) Der Verwaltungsrat kann beschließen, unter welchen Voraussetzungen und in welchem Umfang
a) auf einen ergänzenden europäischen Recherchenbericht verzichtet wird;

b) die Rechengebühr herabgesetzt wird.

(4) Der Verwaltungsrat kann die nach Absatz 3 gefäßen Beschlüsse jederzeit ändern.

Vgl. Regel 70 (Feststellung eines Rechtsverlusts)

Artikel 157
Veröffentlichung der internationalen Anmeldung

(1) Die Veröffentlichung einer internationalen Anmeldung nach Artikel 21 des Zusammenarbeitsvertrags, für die das Europäische Patentamt Bestimmungsamt ist, tritt an die Stelle der Veröffentlichung der europäischen Patentanmeldung.

Article 156
International search report

(1) Subject to the provisions of Article 124, the international search report under Article 18 of the Co-operation Treaty or any declaration under Article 17, paragraph 2(a), of that Treaty and their publication under Article 21 of that Treaty shall take the place of the European search report and the mention of its publication in the European Patent Bulletin.

(2) However, subject to the decisions of the Administrative Council referred to in paragraph 3,
(a) the European Patent Office shall request the International Patent Institute to supply a supplementary European search report in respect of all international applications;

(b) the applicant shall pay the search fee, which shall be paid at the same time as the national fee provided for in Article 22, paragraph 1, and Article 39, paragraph 1, of the Co-operation Treaty. If the search fee is not paid in due time the application shall be deemed to be withdrawn.

(3) The Administrative Council may decide under what conditions and to what extent:
(a) the supplementary European search report is to be dispensed with, and

(b) the search fee is to be reduced.

(4) The Administrative Council may at any time rescind the decisions taken pursuant to paragraph 3.

Cf. Rule 70 (Noting of loss of rights)

Artikel 157
Publication of the international application

(1) Publication under Article 21 of the Co-operation Treaty of an international application for which the European Patent Office is a designated Office shall take the place of the publication of a European patent application.

(3) Für Entscheidungen, die das Europäische Patentamt als Bestimmungsamt nach Artikel 25 Absatz 2 Buchstabe a des Zusammenarbeitsvertrags zu treffen hat, ist die Prüfungsabteilung zuständig.

**Artikel 154**

Das Europäische Patentamt als mit der internationalen vorläufigen Prüfung beauftragte Behörde


3. Für Entscheidungen über einen Widerspruch des Anmelders gegen eine vom Europäischen Patentamt nach Artikel 34 Absatz 3 Buchstabe a des Zusammenarbeitsvertrags für die internationale vorläufige Prüfung festgesetzte zusätzliche Gebühr sind die Beschwerdekammern zuständig.

**Artikel 155**

Das Europäische Patentamt als ausgewähltes Amt

Das Europäische Patentamt wird als ausgewähltes Amt im Sinn des Artikels 2 Ziffer xiv des Zusammenarbeitsvertrags tätig, wenn der Anmelder einen der benannten Staaten, auf die sich Artikel 153 Absatz 1 oder Artikel 149 Absatz 2 bezieht, ausgewählt hat und für diesen Artikel 154

The European Patent Office as an International Preliminary Examining Authority

1. The European Patent Office shall act as an International Preliminary Examining Authority within the meaning of Chapter II of the Co-operation Treaty for applicants who are residents or nationals of a Contracting State bound by that Chapter subject to the conclusion of an agreement between the Organisation and the International Bureau of the World Intellectual Property Organization.

2. Subject to the prior approval of the Administrative Council, the European Patent Office shall also act as an International Preliminary Examining Authority for an applicant who is a resident or national of a State not party to the Co-operation Treaty or not bound by Chapter II of that Treaty in respect of which the Assembly of the International Patent Co-operation Union has, in accordance with an agreement concluded between the Organisation and the International Bureau of the World Intellectual Property Organization, specified the European Patent Office as a competent International Preliminary Examining Authority.

3. The Boards of Appeal shall be responsible for deciding on a protest made by an applicant against an additional fee charged by the European Patent Office under the provisions of Article 34, paragraph 3(a), of the Co-operation Treaty.

**Artikel 155**

The European Patent Office as an elected Office

The European Patent Office shall act as an elected Office within the meaning of Article 2(xiv) of the Co-operation Treaty if the applicant has elected any of the designated States referred to in Article 153, paragraph 1, or Article 149, paragraph 2, for which Chapter II of that Treaty has become binding. Subject to the prior
DRAFT CONVENTION
ESTABLISHING A EUROPEAN SYSTEM FOR THE GRANT OF PATENTS

PROJET DE CONVENTION
INSTITUANT UN SYSTÈME EUROPÉEN DE DÉLIVRANCE DE BREVETS
MÜNCHNER DIPLOMATISCHE KONFERENZ
ÜBER DIE EINFÜHRUNG EINES EUROPÄISCHEN
PATENTERTEILUNGSVERFAHRENS 1973
(München, 10. September bis 6. Oktober 1973)

MUNICH DIPLOMATIC CONFERENCE
FOR THE SETTING UP OF A EUROPEAN SYSTEM
FOR THE GRANT OF PATENTS, 1973
(Munich, 10 September to 6 October 1973)

CONFERENCE DIPLOMATIQUE DE MUNICH
POUR L'INSTITUTION D'UN SYSTÈME EUROPÉEN
DE DÉLIVRANCE DE BREVETS
(1973)
(Munich, 10 septembre - 6 octobre 1973)

VORBEREITENDE DOKUMENTE
ausgearbeitet von der
Regierungskonferenz über die Einführung eines europäischen Patenterteilungsverfahrens
herausgegeben von der
Regierung der Bundesrepublik Deutschland

PREPARATORY DOCUMENTS
drawn up by the
Inter-Governmental Conference for the setting up of a European System for the Grant of Patents
and published by the
Government of the Federal Republic of Germany

DOCUMENTS PRÉPARATOIRES
élaborés par la
Conférence intergouvernementale pour l'institution d'un système européen de délivrance de brevets
et publiés par le
Gouvernement de la République fédérale d'Allemagne

1972
drawings within the prescribed time limit, the question arose as to whether the Convention is as liberal or whether Article 88, paragraph 3, and Article 95, paragraph 1, do not to some extent give rise to a limitation. The Working Party found that in fact the conclusion may be drawn from these two provisions of the Convention that there was only a limited opportunity to amend the claims, description and drawings. It agreed however that the Convention must be aligned on the PCT in this matter; the danger was nevertheless pointed out that shortly before the intended grant of a patent, the applicant might amend those features of the application referred to, thereby delaying grant of the patent for a long time.

The Working Party finally agreed on the following solution: after the request for examination has been filed, the application (claims, description and drawings) may in principle be amended up to the time when the European Patent Office informs the applicant of the text in which it intends to grant the patent (Article 97, paragraph 1); the Examining Division may however set the applicant a time limit for such amendments. In laying down the period it will, when dealing with applications under the PCT, have to take into account the time limits prescribed in the PCT. This solution was laid down in the new Article 95a.
42. Regarding the case in which the International Searching Authority has without justification found the invention lacking in unity (case (b)), the vast majority was of the opinion that this case was covered by Article 137 of the Convention.

43. The Working Party therefore agreed not to insert into the Convention any provisions making use of the authorisation given in Article 17, paragraph 3(b) of the PCT. However, it instructed the German delegation to re-examine the question and if necessary to report back at a later meeting.

44. The Working Party also discussed whether use should be made in the Convention of the authorisation given in Article 34, paragraph 3(b) of the PCT. Under this provision the national law of an elected State may provide that those parts of the application which, as a consequence of the restriction of the claims, are not to be the subject of international preliminary examination are to be considered withdrawn unless a special fee is paid by the applicant to the national Office of that State.

The Working Party considered that as this fee could only be small it was not worth making provision for it in the Convention.

45. With reference to Article 28, paragraph 1, of the PCT, under which in proceedings before designated Offices the applicant may amend the claims, the description and the
certain conditions, to be considered withdrawn, the Working Party discussed whether the Convention should provide for use to be made by the European Patent Office as a designated Office of this authorisation given under the PCT.

In this connection it was pointed out that a differentiation should be made between two subsidiary cases:

(a) where the International Searching Authority finds with justification that the invention lacks unity;

(b) where this finding is is unjustified.

41. Regarding case (a), the majority of the delegations thought that this case was already covered by Article 79, paragraphs 5 and 6 of the Convention, under which the applicant has the option of restricting the application to one part of the invention or paying a fee for an additional search report. Thus there is no need for a special provision to the effect that Article 79, paragraphs 5 and 6, are applicable.

Some delegations on the other hand thought that Article 137, paragraphs 2 and 3, come into play in such cases. However, this would involve excessively severe legal consequences for the applicant as he would not be able to limit his application to one part of the invention. If necessary the question of whether this legal consequence should be attenuated will have to be examined.

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contested, the Working Party considered that the Boards of
Appeal should be responsible for deciding on the protest.

Article 121b (new) - The European Patent Office as an
elected Office

39. The Working Party transferred the former paragraph 3
of Article 121 to the new Article 121b; it drew up this
Article also to cover two different cases in which the
European Patent Office is to act as an elected Office
within the meaning of Article 2(xiv) of the PCT:

(a) where the applicant has elected a designated State
bound by Chapter II of the PCT (first sentence; the
content corresponds to the deleted Article 118, para-
graph 3).

(b) where the applicant is a resident or national of a
State which is not a party to the PCT or which is not
bound by Chapter II of the PCT; in this event the
European Patent Office may, subject to certain limiting
conditions, act as an elected Office. This does however
require the prior approval of the Administrative Council
(second sentence; this sentence takes Article 31,
paragraph 2(b) and paragraph 4(b), second sentence, of
the PCT into account).

40. In connection with Article 17, paragraph 3(b) of the
PCT, under which the national law of any designated State
may provide that those parts of the international appli-
cation in respect of which the International Searching
Authority has not established a search report on the
grounds of lack of unity of invention, are, subject to
MINUTES

of the 7th meeting of Working Party I
held at Luxembourg from 26 to 29 January 1971

Item 1 on the agenda (1) : Opening of the meeting and adoption of the provisional agenda

1. The Working Party held its seventh meeting at Luxembourg from Tuesday 26 to Thursday 28 January 1971 with Dr. HAERTEL, President of the German Patent Office, in the Chair.

The meeting was attended by representatives of the Commission of the European Communities, WIPO/OMPI and the International Patent Institute (2). The representative of the General Secretariat of the Council of Europe sent his apologies for being unable to attend.

2. The Drafting Committee, under the Chairmanship of the President of the Netherlands "Octrooiraad", Mr J.V. VAN BENTHEM, held its meetings directly after the deliberations of the Working Party, and also on the morning of 29 January 1971.

(1) For the provisional agenda (BR/GT I/101/71), see Annex I.
(2) For the list of those attending the meeting of the Working Party, see Annex II.

BR/94 e/71 son/KM/prk
Article 121b

The European Patent Office as an elected Office

The European Patent Office shall act as an elected Office within the meaning of Article 2(xiv) of the Co-operation Treaty if the applicant has elected any of the designated States referred to in Article 121, paragraph 1 or 2, for which Chapter II of that Treaty has become binding. Subject to the prior approval of the Administrative Council, the same shall apply where the applicant is a resident or national of a State which is not a party to that Co-operation Treaty or which is not bound by Chapter II of that Treaty, provided that he is one of the persons whom the Assembly of the International Patent Co-operation Union has decided to allow, pursuant to Article 31, paragraph 2(b), of the Co-operation Treaty, to make a demand for international preliminary examination.
FIRST PRELIMINARY DRAFT OF A CONVENTION

ESTABLISHING

A EUROPEAN SYSTEM FOR THE GRANT OF PATENTS

- Stage reached on 29 January 1971 -
36. The Working Party finally discussed the question of which department of the European Patent Office in its capacity of designated Office is to be responsible for the decision under Article 25, paragraph 2(a) of the PCT; this provision states that a designated Office is to decide whether a refusal, declaration or finding was justified under the provisions of the PCT.

In view of the fact that such a decision may give rise to difficult questions regarding the interpretation of the PCT, the Working Party considered it advisable to make it the responsibility of the Examining Divisions and not the Examining Sections of the European Patent Office; the Boards of Appeal could then be called upon as a second authority if their decisions were challenged. A new paragraph 3 was added to this effect.

**Article 121a (new) - The European Patent Office as an International Preliminary Examining Authority**

37. The Working Party transferred the former Article 118, paragraph 2, to this new Article, and drafted it to cover two different cases:

(a) the European Patent Office is to act as an International Preliminary Examining Authority for applicants who are residents or nationals of a Contracting State bound by Chapter II of the PCT, subject to the conclusion of an agreement between the Administrative Council and the International Bureau of the WIPO/OMPI (*Paragraph 1*; the content corresponds to the deleted Article 118, paragraph 2);
33. In connection with the provision referred to under point 32, the Working Party adopted a special provision in the new second sentence of paragraph 2, to cover the eventuality of a group of Contracting States having made use of the authorisation under Article 8 of the Convention and the international application designating one of the States in the group, whose law provides that the designation of that State always has the effect of an application for a European patent: in this case the group of States may prescribe that designation of this State is to be taken as designation of all the Contracting States of the Group.

34. The German delegation proposed that at the time of filing a PCT-application the designation fee under Article 67, paragraph 2, should not be levied for the first designated State, but only for the second and any subsequent designated States, so that the international applicant would not have to pay a further fee for the first designation in addition to the designation fee payable under the PCT. The Working Party rejected this solution as being too complicated and decided in favour of levying a designation fee for each designated State, provided both fees were relatively low. Paragraph 4 of Article 121 was accordingly deleted.

35. The Working Party was also unable to agree to a further proposal by the German delegation to reduce the filing fee (Article 66, paragraph 3) for a PCT-application, on the grounds that the European Patent Office would benefit from a certain saving in the volume of work as a result of the examination under the PCT procedure.

BR/94 e/71 aut/KM/prk
Article 120 - Filing and transmittal of the international application

29. The Working Party agreed to stipulate in a new paragraph 3 that the transmittal fee referred to in Rule 14.1 of the Regulations under the PCT should be payable for PCT-applications. This fee would be payable on filing the application; the amount will be prescribed in the Rules relating to Fees.

Article 121 - The European Patent Office as a designated or elected Office

30. The Working Party confined this Article to defining the function of the European Patent Office as a designated Office. The European Patent Office as an elected Office is dealt with in the new Article 121b.

31. In paragraph 1 the Working Party decided to undertake, apart from a textual correction, an alignment on Article 4, paragraph 1(ii) of the PCT, according to which the applicant now had to notify on the international application itself that he required a European patent for the Contracting States designated, instead of being given a period of 12 months as from the date of priority.

32. Furthermore, the Working Party laid down in paragraph 1 the legal consequence in the event of a Contracting State specifying pursuant to the last provision contained in Article 4, paragraph 1(ii), of the PCT, that its being designated had the effect of an application for a European patent: the European Patent Office would also be a designated Office in this instance.

BR/94 e/71 aut/KH/prk .../...
INTER-GOVERNMENTAL CONFERENCE
FOR THE SETTING UP OF A EUROPEAN
SYSTEM FOR THE GRANT OF PATENTS

- Secretariat -

Brussels, 6th April 1971
BR/94/71

MINUTES

of the 7th meeting of Working Party I
held at Luxembourg from 26 to 29 January 1971

Item 1 on the agenda (1) : Opening of the meeting and adoption of the provisional agenda.

1. The Working Party held its seventh meeting at Luxembourg from Tuesday 26 to Thursday 28 January 1971 with Dr. HAERTEL, President of the German Patent Office, in the Chair.

   The meeting was attended by representatives of the Commission of the European Communities, WIPO/OMPI and the International Patent Institute (2). The representative of the General Secretariat of the Council of Europe sent his apologies for being unable to attend.

2. The Drafting Committee, under the Chairmanship of the President of the Netherlands "Octrooi Raad", Mr J.V. VAN BENTHEM, held its meetings directly after the deliberations of the Working Party, and also on the morning of 29 January 1971.

(1) For the provisional agenda (BR/GT I/101/71), see Annex I.
(2) For the list of those attending the meeting of the Working Party, see Annex II.

BR/94 e/71 son/KM/prk
Article 120 (former Article 113d)
Filing and transmittal of the international application

(1) If the applicant chooses the European Patent Office as a receiving Office for his international application, he shall file it directly with the European Patent Office. Article 64, paragraph 2, shall nevertheless apply mutatis mutandis.

(2) In the event of an international application being filed with the European Patent Office through the intermediary of the competent national central industrial property office, the Contracting State concerned shall take all necessary measures to ensure that the application is transmitted to the European Patent Office in time for the latter to be able to comply in due time with the conditions for transmittal under the Co-operation Treaty.
INTER-GOVERNMENTAL CONFERENCE
FOR THE SETTING UP OF A EUROPEAN SYSTEM
FOR THE GRANT OF PATENTS

- Secretariat -

Brussels, 21 December 1970
BR/70/70

FIRST PRELIMINARY DRAFT
OF A CONVENTION ESTABLISHING
A EUROPEAN SYSTEM
FOR THE GRANT OF PATENTS

(Articles drafted by Working Parties I, II, III and IV)
had to be obvious to a person skilled in the art, did not, however, need to be defined any more precisely, since it was self-evident from the references to Article 11, paragraph 2 in Articles 13 and 74 that it was the filing date on the date of priority as the case may be.

**Article 14 - Industrial application**

26. After the German delegation had withdrawn its proposed amendment (BR/GT I/74/70, page 6), the Working Party decided against undertaking an alignment in Article 33, paragraph 4 of the PCT.

**Article 118 - Functions of the European Patent Office in the context of the Patent Co-operation Treaty**

27. The Working Party agreed to delete this Article, since its provisions were repeated individually in the following Articles: paragraph 1 was unnecessary because of the already existing Articles 119 and 121; in place of paragraph 2, a new Article 121a would be adopted, and in place of paragraph 3, a new Article 121b.

**Article 119 - The European Patent Office as a receiving Office**

28. Apart from a textual correction in paragraph 1, the Working Party, on the basis of Article 9, paragraph 2, of the PCT, limited the possibility of the European Patent Office acting as a receiving Office pursuant to paragraph 3 to instances in which the applicant is a resident or national of a State party to the Paris Convention.

BR/94 e/71 aut/KM/prk .../...
INTER-GOVERNMENTAL CONFERENCE FOR THE SETTING UP OF A EUROPEAN SYSTEM FOR THE GRANT OF PATENTS

Brussels, 6th April 1971

- Secretariat -

MINUTES

of the 7th meeting of Working Party I

held at Luxembourg from 26 to 29 January 1971

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Item 1 on the agenda (1): Opening of the meeting and adoption of the provisional agenda

1. The Working Party held its seventh meeting at Luxembourg from Tuesday 26 to Thursday 28 January 1971 with Dr. HAERTHEL, President of the German Patent Office, in the Chair.

   The meeting was attended by representatives of the Commission of the European Communities, WIPO/OMPI and the International Patent Institute (2). The representative of the General Secretariat of the Council of Europe sent his apologies for being unable to attend.

2. The Drafting Committee, under the Chairmanship of the President of the Netherlands "Octrooiraad", Mr J.V. VAN BENTHEM, held its meetings directly after the deliberations of the Working Party, and also on the morning of 29 January 1971.

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(1) For the provisional agenda (BR/GT I/101/71), see Annex I.
(2) For the list of those attending the meeting of the Working Party, see Annex II.

BR/94 e/71 son/KM/prk
Article 118 (former Article 113b)
Functions of the European Patent Office in the context of the Patent Co-operation Treaty

(1) Subject to the provisions set out below, the European Patent Office shall act as a receiving Office and as a designated Office within the meaning of Chapter I of the Co-operation Treaty, once that Chapter has entered into force for at least one Contracting State to this Convention.

(2) Subject to the provisions set out below, the European Patent Office shall act as an International Preliminary Examining Authority within the meaning of Chapter II of the Co-operation Treaty, once that Chapter has entered into force for at least one Contracting State to this Convention, and all other conditions laid down by the Co-operation Treaty and by this Convention for the performance of the functions of an International Preliminary Examining Authority have been met.

(3) Subject to the provisions set out below, the European Patent Office shall act as an elected Office within the meaning of Chapter II of the Co-operation Treaty, once that Chapter has entered into force for at least one Contracting State to this Convention.

BR/70 e/70 gc
INTER-GOVERNMENTAL CONFERENCE
FOR THE SETTING UP OF A EUROPEAN SYSTEM
FOR THE GRANT OF PATENTS

- Secretariat -

FIRST PRELIMINARY DRAFT
OF A CONVENTION ESTABLISHING
A EUROPEAN SYSTEM
FOR THE GRANT OF PATENTS

(Articles drafted by Working Parties I, II, III and IV)
which accepted Chapter II would also accept that their patent offices would act as an International Preliminary Examining Authority.

38. The Conference had a broad discussion on whether Article 113f proposed by Working Party I was necessary and, if so, on the wording to be adopted.

(a) As regards the first question, the Conference recognized the need for the Article since it provides an essential link between the Convention and the PCT. Some delegations pointed out that it might be useful, before adopting any final wording in the Preliminary Draft Convention, to discover the views third countries might take as regards the international search. Other delegations, however, felt that the European States might be in a better position if Article 113f clearly stated their intention to place all international searches on an equal footing, in order to avoid giving third countries the impression that the search carried out by the IIB would have a privileged status among the Contracting States to the Convention.
Articles 113a to 113g

International application pursuant to the Patent Co-operation Treaty (PCT)

(Report by the German delegation: ER/24/69)

37. On the subject of Article 113b, the French delegation observed that, pursuant to paragraph 2, the European Patent Office would act as an International Preliminary Examining Authority. In view of the intentions expressed by a number of patent offices from States which were to take part in the European system for the grant of patents, these offices would also be International Preliminary Examining Authorities under the PCT. Such a situation was no doubt perfectly compatible with the PCT draft, but it would nonetheless mean that several routes would be open for applicants to obtain an international preliminary examination. This might present certain disadvantages. The French delegation thought it would be desirable to achieve a certain concentration of the search capacity of the various States taking part in the European Patent Office.

The Conference observed that no answer could be given to this question at the present stage, since it was not yet known which States would accept Chapter I and which would accept both Chapter I and Chapter II of the PCT draft and, furthermore, it was not known whether those States
INTER-GOVERNMENTAL CONFERENCE FOR THE SETTING UP OF A EUROPEAN SYSTEM FOR THE GRANT OF PATENTS

Brussels, 30 January 1970
BR/26/70

- Secretariat -

MINUTES of the 2nd MEETING

held at Luxembourg on 13 to 16 January 1970

Item 1 on the agenda (BR/14/69) (1)

OPENING OF THE MEETING

1. The Conference began its work at 10.00 a.m. on Tuesday 13 January at the Kirchberg European Centre, Luxembourg, with Dr. HAERTEL, President of the German Patent Office, in the Chair (2).

Item 2 on the agenda

ADOPTION OF THE PROVISIONAL AGENDA

2. The Conference adopted the provisional agenda submitted by the President.

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(1) The agenda is given in Annex I
(2) The list of those attending the 2nd meeting is given in Annex II.

BR/26 e/70 Kel/PA/mk .../...
Article 113b
Functions of the European Patent Office in the context of the Patent Co-operation Treaty

(1) Subject to the provisions set out below, the European Patent Office shall act as a receiving Office and as a designated Office within the meaning of Chapter I of the Co-operation Treaty, once that Chapter has entered into force for at least one Contracting State to this Convention.

(2) Subject to the provisions set out below, the European Patent Office shall act as an International Preliminary Examining Authority within the meaning of Chapter II of the Co-operation Treaty, once that Chapter has entered into force for at least one Contracting State to this Convention, and all other conditions laid down by the Co-operation Treaty and by this Convention for the performance of the functions of an International Preliminary Examining Authority have been met.

(3) Subject to the provisions set out below, the European Patent Office shall act as an elected Office within the meaning of Chapter II of the Co-operation Treaty, once that Chapter has entered into force for at least one Contracting State to this Convention.

BR/11 e/69 mk
INTER-GOVERNMENTAL CONFERENCE
FOR THE SETTING UP OF A EUROPEAN SYSTEM FOR THE GRANT OF PATENTS

- Secretariat -

PRELIMINARY DRAFT CONVENTION
FOR A EUROPEAN SYSTEM FOR THE GRANT OF PATENTS

Articles 88 to 152
prepared by Working Party I
(24 to 28 November 1969)

compared synoptically with
- the 1962 and 1965 versions of the Draft Convention as established by the EEC "Patents" Working Party and
- the Draft of an open European Patent Convention drawn up by the Member States of the European Free Trade Association

BR/11 e/69 mk
designated and the applicant has not expressly asked for national patents. However, the Working Party did not think it advisable to follow this suggestion. Consequently it chose for paragraph 1 a wording according to which the European Patent Office is not automatically regarded as the designated Office when the applicant fails to make the appropriate statement within the prescribed period.

67. During the discussion of paragraph 2 it was asked whether it was consistent with the PCT in its present form that the designation of one EEC State should be taken as the designation of all the EEC States. The Working Party determined that a provision of this type was necessary for the purposes of the special agreement prepared by the EEC States (the "second Convention"), and that such a provision did not in fact conflict with the PCT if the applicant was allowed the possibility of changing the European application into a national application for the EEC States which he had designated.

68. In paragraph 3 the Working Party has dealt with the case in which Chapter II of the PCT has already entered into force for some of the designated States, while for other designated States only Chapter I of the PCT is in force. Since the European application forms a whole and can therefore only be treated by a unitary procedure, it had to be laid down that in this case the European Patent Office must act as the designated Office for all the designated States.
with Article 113e, paragraph 1:

- At what time must the applicant state whether he wants a European patent or national patents? (see point 65).

- Which provisions are to apply in the event of the applicant failing to state this? (see point 66).

65. As regards the time limit for stating that the application is for a European patent, the Working Party considered that it was desirable to prescribe the latest possible time. The time of publication of the international application seemed to be obviously too late, since it had to be clear from the international publication whether the European Patent Office has been chosen as the designated Office. It was not possible to adopt the suggestion that the time of transmittal of the international search report should be chosen since this time is not clearly defined. The Working Party finally came to the conclusion that a period of twelve months from the priority date is the safest, and agreed unanimously upon this time limit.

66. As to how the application is to be dealt with when the applicant does not make the required statement within the specified period, it was suggested that the European Patent Office should always be regarded as the designated Office when Contracting States to the European Convention are...
too. In this way advance provision would also be made for the eventuality of the national patent offices of certain Contracting States being wound up in the course of time. The European Patent Office could then take over the function of receiving Office in place of the national office. For these reasons, the Working Party in no way restricted the possibility of the European Patent Office being chosen as a receiving Office.

63. The Working Party finally discussed whether, on filing an international application for which the European Patent Office could be the receiving Office, the applicant must file the application directly with the European Patent Office, or whether he can forward it to the European Office via a national office. The Working Party decided in favour of providing only for direct filing with the European Patent Office (2nd variant of paragraph 1), in order to enable the short time limit for the transmittal of the documents to the International Bureau to be met. It was in any case agreed that it must be open to every Contracting State to prescribe that international applications intended for filing with the European Patent Office must be introduced via its own national office. It is for this reason that the last sentence of paragraph 1 refers to Article 66, paragraph 2. In this case too, the European Patent Office would be responsible for examining whether the formalities of the PCT have been met.

Article 113e - The European Patent Office as a designated or elected Office

64. The following questions were discussed in connection
MINUTES
of the meeting of Working Party I
(Luxembourg, 24 to 28 November 1969)

I.

1. The third working meeting of Working Party I was held at Luxembourg from Monday 24 to Friday 28 November 1969, with Dr. HAERTEL, President of the German Patent Office, in the Chair.

The Commission of the European Communities, BIRPI, the General Secretariat of the Council of Europe and the International Patent Institute took part in the meeting (1).

2. The Working Party agreed to appoint the following as rapporteurs:

- a member of the German delegation for Articles 88 to 96 c (Examination procedure) (2),

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(1) See Annex for list of those attending the meeting of the Working Party.

(2) It was originally agreed at the October meeting that the German delegation should produce a report for Articles 88 to 104.

BR/12 e/69 kel/PA/mk
Article 113e
The European Patent Office as a designated or elected Office

(1) The European Patent Office shall act as a designated Office within the meaning of Article 2(ii) of the Co-operation Treaty for those Contracting States to this Convention which are designated in the international application if the applicant informs the receiving Office or, where appropriate, the International Bureau provided for in that Treaty, within twelve months of the priority date, that he wishes to obtain a European patent for these States.

(2) In so far as any group of Contracting States has made use of the authorisation under Article 8a, such group may prescribe that it may only be designated as a whole and that the designation of some only of the States in the group shall be taken as the designation of all of these States, if the applicant has indicated that he wishes to obtain a European patent for the designated State or States of the group.

(3) The European Patent Office shall act as an elected Office within the meaning of Article 2(iii) of the Co-operation Treaty if the applicant has elected any of the designated States referred to in paragraph 1 or 2 for which Chapter II of that Treaty has entered into force.

(4) The fee provided for in Article 68a, paragraph 2, shall not be payable for international applications.
INTER-GOVERNMENTAL CONFERENCE
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— Secretariat —

PRELIMINARY DRAFT CONVENTION
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Articles 88 to 152
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compared synoptically with

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BR/11 e/69 mk
is available to act as an elected Office. The requirements to be met for the European Patent Office to act as an elected Office in an individual case are set out in Article 113e, paragraph 3.

Article 113c - The European Patent Office as a receiving Office

60. No comment.

Article 113d - Filing and transmittal of the international application

61. The Working Party agreed unanimously that, for an international application, the applicant has the choice of using either the European Patent Office or a national office as the receiving Office within the meaning of the PCT. The Working Party has expressed this in the opening words of paragraph 1. In the Working Party's opinion this does not pre-judge the question for which countries protection can be requested via an international application having the European Patent Office as receiving Office.

62. The Working Party discussed whether the European Patent Office can also be a receiving Office when the applicant does not want a European Patent, but only desires protection in States which are not Contracting States to the European Convention, and gave an affirmative answer. The Working Party did not wish to exclude this possibility, but desired instead to leave the applicant the choice between the national patent office and the European Patent Office in this case.
CHAPTER III\textsuperscript{bis}

INTERNATIONAL APPLICATION PURSUANT TO THE PATENT CO-OPERATION TREATY

57. The Working Party noted, as regards Chapter III\textsuperscript{bis} as a whole, that it could only lay down the principles for the relations between the Convention and the PCT. Further details could not be worked out until later, when the text of the PCT has been finally adopted. This would be particularly true if the PCT were to allow the Contracting States the possibility of adopting additional rules in certain cases. It would then have to be examined whether these additional rules should be included in the Convention itself, or in the Implementing Regulations.

Article 113a - Application of the Patent Co-operation Treaty

58. No comment.

Article 113b - Functions of the European Patent Office in the context of the Patent Co-operation Treaty

59. The Working Party agreed that paragraph 3 simply sets out the conditions under which the European Patent Office
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of the meeting of Working Party I
(Luxembourg, 24 to 28 November 1969)

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Functions of the European Patent Office in the context of the Patent Co-operation Treaty

Working Party text

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(3) Subject to the provisions set out below, the European Patent Office shall act as an elected Office within the meaning of Chapter II of the Co-operation Treaty, once that Chapter has entered into force for at least one Contracting State to this Convention.
INTER-GOVERNMENTAL CONFERENCE
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BR/11 e/69 mk
PCT, for which the European Patent Office is a designated Office, shall be deemed to form part of the state of the art only if it is confirmed, i.e. if it is communicated to the European Patent Office in one of its official languages and the national fee prescribed is paid. In order to create better information facilities for third parties, the Committee provided for a mention to be made in the European Patent Bulletin of the publication by the International Bureau of WIPO of the international application, and, where the publication by the International Bureau is not in one of the official languages of the European Patent Office, for the compulsory publication of the international application communicated to the European Patent Office.

The Committee then inserted a new Article 153a, which empowers the European Patent Office to act as an International Searching Authority within the meaning of the PCT, pursuant to an agreement to be concluded with WIPO at the appropriate time.

16. Activities of the European Patent Office during a transitional period (Article 161/Rule 106)

The principle, laid down in Article 161, that the European Patent Office will, after opening, only be able to assume its activities progressively was not questioned. The Main Committee was also of the unanimous opinion that, during the transitional period, searches should be carried out in all areas of technology, a task which the European Patent Office should easily be in a position to perform after taking over the capacity of the IIB and the Berlin sub-office. This unequivocal declaration of intent was, like other general opinions expressed by the Main Committee, included in the Minutes. Nevertheless, in order to be able to meet difficulties, at present unforeseeable, which might subsequently arise, the Committee decided not to incorporate this principle in any binding form in Article 161. On the other hand, it was considered a firm principle that the Administrative Council should not be able to rescind decisions on the extension of the system once they had been adopted. Article 161 was re-worded accordingly.

17. Adjustment of the Convention to take account of the decisions of Main Committees II and III

The textual amendments adopted by Main Committee III did not affect the provisions dealt with by Main Committee I. Adjustments were, however, necessary in respect of two decisions of Main Committee II, relating to the inclusion of Search Divisions as departments in the proceedings (Article 15), a measure by which the Convention was adjusted to take account of the integration of the IIB provided for in the Protocol on Centralisation, and to the setting up of a Legal Division as a further department in the proceedings (Article 15) competent for certain decisions. These adjustments entailed purely drafting amendments (Articles 91, 103, paragraph 1, 109, paragraph 3, Rules 44-47), deletion of provisions which had become superfluous (Article 124, Rules 48, 67, paragraph 2) and new provisions such as the Article 153a referred to under point 15 above.

III Protocol on Recognition

The Protocol on Recognition, which lays down rules governing jurisdiction and the recognition of decisions of courts and other authorities of the Contracting States in respect of the right to the grant of a European patent required an amendment as to substance only in one point. With respect to the provision on jurisdiction in the Draft Protocol (Article 5), it was pointed out that a plaintiff residing in a Contracting State claiming the right to the grant of a European patent vis-à-vis an applicant not residing within the territory of a Contracting State would always have to bring proceedings before the German courts and not, as would be desirable, before the courts of his place of residence. The Main Committee agreed that this was a valid point and supplemented Article 5 to the effect that the courts of the plaintiff's place of residence shall also have jurisdiction in such cases, with, however, the subsidiary jurisdiction of the courts of the Federal Republic of Germany being retained.

IV Recommendation on Preparations for the opening of the European Patent Office

The Main Committee approved the Recommendation which provides for the setting up of an Interim Committee responsible for preparatory work for the opening of the European Patent Office. In addition, in the interests of a clear delimitation of responsibilities the preparation both of the five-year plan mentioned in the Protocol on Centralisation and of the study on the extension of searches to the documentation of the Contracting States, introduced into that Protocol by Main Committee II, was assigned to the Interim Committee. With regard to the point that the Working Parties of the Interim Committee should, as a general rule, each be composed of six signatory States, the Committee decided that the Federal Republic of Germany and the Netherlands, as the countries in which the European Patent Office was based, should always be admitted as observers at meetings of Working Parties of which they were not members, and that other States should be admitted as observers at meetings where problems of special interest to them were dealt with. Furthermore, it was made clear that not only inter-governmental but also private international organisations could be invited as observers.

V Resolution on training staff for the European Patent Office

Finally, as the last item of the negotiations the Main Committee approved without discussion the draft Resolution on training staff for the European Patent Office contained in M/37 which essentially provides for the formation of an Interim Committee responsible for the training and recruiting of examiners.

D Final remarks

Here a report closes which has, perhaps, been too detailed, but which has attempted to summarise in the space of scarcely one hour the results of three weeks of extensive negotiations. The report may also have succeeded in showing that, in spite of the multitude of individual problems, which were usually resolved, those parts of the Draft Convention and the Draft Implementing Regulations which were the subject of the Main Committee's deliberations have been retained without any substantial changes. This is a happy state of affairs and demonstrates how thoroughly theDrafts were prepared.

The rapporteur feels he should not finish without paying tribute to the Chairman of the Main Committee, Dr. Kurt Haerel, for the efficient but gentle manner in which he has guided the negotiations, thus enabling the Main Committee to deal with such a multitude of problems. Main Committee I is also indebted to Mr. van Bentheim, the indefatigable Chairman of Drafting Committee I, and his colleagues on that Committee, to the Secretariat staff, the interpreters and all the silent helpers whose selfless work has enabled the newly completed Drafts to be submitted today to the Committee of the Whole.