Article 121 E

Travaux Préparatoires
(EPC 1973)

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**Art. 121**

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Weiterbehandlung der europäischen Patentanmeldung

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Fiction of the withdrawal of the application

Several organisations raised the question of whether provision should not be made, at least in some cases, for a possibility of remedying the situation which would result from the fiction of the withdrawal of the application, as provided for at various points in the Convention, following failure to observe time limits.

UNEPA in particular pointed out that although the Convention did ensure the possibility of re-establishment of rights in the event of failure to observe time limits, in the first place this had to be the result of force majeure, and secondly it could lead to lengthy proceedings, possibly before the Board of Appeal. An example worthy of emulation was furnished by the laws of certain Scandinavian countries, which allowed operations to be carried out after expiry of the time limit on payment of a fine. Of course, some distinction would have to be made between different cases of failure to observe time limits: although a loss of rights would be justified in cases of failure to pay renewal fees and in other cases in which it would be essential to avoid a delay in the proceedings, it would not for example be justified in the cases referred to in Article 92, paragraph 2, Article 95, paragraph 1b, or Article 150, paragraph 2; the cases referred to in Article 69, for example, would have to be re-examined in order to ascertain whether it would be possible to allow for an extension of the time limit, even if it were only a short one.

FIGPI also referred to the laws of some of the Scandinavian countries, which it considered to have solved this problem in a satisfactory manner. There were arguments in favour of a differentiated rule in this Convention. In general, it should not be possible to extend time limits occurring before the publication of the application (such as that referred to in Article 69), but there should be no objection after publication, as the European Patent Office
MINUTES

of the

5th Meeting of the Inter-Governmental Conference for the Setting up of a European System for the Grant of Patents

Part II

Hearing of the non-governmental international organisations on the Second Preliminary Draft of a Convention establishing a European System for the Grant of Patents

(Luxembourg, 26 January to 1 February 1972)
Article 141 (Time limits)

151. Certain organisations had, in another connection, expressed a general desire that the possibility might be created, as in Scandinavian law, of resuming proceedings for which a time limit was prescribed, after that time limit had expired, where necessary upon payment of a fee (cf. BR/169, point 73).

It was pointed out that the situation could be made easier in this connection, either by informing the person involved in the proceedings beforehand or by extending the time limit, upon payment of a special fee. In the latter case there would obviously have to be consideration as to which time limits could be individually extended.

The Conference decided that Working Party I should again consider and examine the problem of time limits which are not respected. In this connection the provisions of Article 142 (cf. point 153) and Re. Article 145, No. 11, should also be taken into account. The Swedish delegation was requested to inform the Working Party of the relevant rule in Swedish law.

Re. Article 141, No. 2 (Extension of time limits)

152. At the request of the United Kingdom delegation, the Conference decided to refer these provisions to Working Party I for examination, in the hope that a more general wording could be found which would make clear, in particular, that a time limit would also be extended in the event of a postal strike.
MINUTES

of the

5th Meeting of the Inter-Governmental Conference for the Setting up of a European System for the Grant of Patents

Parts 1 and 3

(Luxembourg, 24-25 January and 2-4 February 1972)
Article 121 (142; Re. 142, No. 1), paragraph 1, of the Convention

Restitutio in integrum

Chairman's proposal

(1) The applicant for or proprietor of a European patent who is prevented by force majeure from observing a time limit laid down in this Convention shall, upon application, have his rights re-established, if the non-observance in question has the direct consequence of causing the refusal of the European patent application, or of a request, or the deeming of the European patent application to have been withdrawn, or the revocation of the European patent, or the loss of any other right or means of redress.

BR/GT I/163 e/72 ley/KM/prk
Article 121 (142; Re. 142, No. 1, IR), paragraph 1, of the Convention

Restitutio in integrum

Drafting Committee Version

(1) The applicant for or proprietor of a European patent who is prevented by force majeure from observing a time limit shall, upon application, have his rights re-established if the non-observance in question has the direct consequence, by virtue of this Convention, of causing the refusal of the European patent application, or of a request, or the deeming of the European patent application to have been withdrawn, or the revocation of the European patent, or the loss of any other right or means of redress.
Article 120, 2nd Alternative, of the Convention

Further processing of the European patent application

Chairman's proposal

(1) If the European patent application is to be refused or is refused or is deemed to be withdrawn following failure to observe a time limit set by the European Patent Office, the legal consequence provided for shall not ensue or, if it has already ensued, shall be retracted if the applicant requests further processing of the application.

(2) The request shall be filed in writing, either, in the event of the refusal of the European patent application, within three months of the date on which the decision to refuse the application was notified, or in other cases, within two months of the date on which the communication that the application is deemed to be withdrawn is notified. The delayed action must be taken within this time limit. The request shall not be deemed to have been filed until the fee for further processing has been paid.

(3) The department competent to decide on the action referred to in paragraph 2 shall decide on the request.

Note:

The legal consequences referred to in paragraph 1 occur in the event of failure to observe the time limits provided for in the following provisions:
Article 90, paragraph 3, of the Convention in conjunction with Article 41, paragraph 1, of the Implementing Regulations;
Article 95, paragraphs 1 and 2, of the Convention;
Article 123, paragraph 1, of the Convention.

BR/GT I/163 e/72 ley/KM/prk
Article 120, 1st Alternative, of the Convention

Further processing of the European patent application

Chairman's proposal

(1) If the European patent application is deemed to be withdrawn following failure to observe a time limit set by the European Patent Office, this legal consequence shall be retracted if the applicant requests further processing of the application.

(2) The request shall be filed in writing within two months of the date on which the communication that the European patent application is deemed to be withdrawn is notified. The delayed action must be taken within this time limit. The request shall not be deemed to have been filed until the fee for further processing has been paid.

(3) The department competent to decide on the action provided for in paragraph 2 shall decide on the request.

Note:
The legal consequence referred to in paragraph 1 occurs in the event of failure to observe the time limits laid down in the following provisions:
Article 95, paragraphs 1 and 2, of the Convention
Article 123, paragraph 1, of the Convention.

BR/GT I/163 e/72 ley/KM/prk
12. The aim of the United Kingdom proposal was to introduce a provision to the effect that in the afore-mentioned case the time limit not observed as a result of an interruption in postal services would be extended without necessitating restitutio in integrum or another request requiring payment of a fee for retraction of a legal consequence. The proposals for Articles 120 and 121 of the Convention submitted in this working document take this desideratum into account.

Should the United Kingdom delegation maintain its proposal, the Chairman would draw its attention to Rule 82.2 of the Regulations under the PCT.
II. Extension of time limits in the event of interruption of postal services

11. In BR/GT I/151/72 of 25 February 1972, the United Kingdom delegation proposed that when dealing with the matter of time limits account should also be taken of the possibility of the interruption of postal services in any Contracting State other than that in which the European Patent Office is located or between any such State and the State in which the European Patent Office is located, and it submitted redrafts for Article 119 (141) of the Convention and Article 85 (Re. Article 141, No. 2) of the Implementing Regulations.

At the 5th Meeting of the Inter-Governmental Conference the United Kingdom delegation asked that its proposal should be referred to Working Party I for study. The Conference agreed to this request (cf. BR/168/72, point 152).

At the 11th meeting of Working Party I several delegations felt that the case referred to by the United Kingdom delegation could be covered by Article 121 (142) or the proposals still to be examined in connection with re-establishment. The Working Party did not therefore take a decision on the United Kingdom proposal; instead, it decided to examine it in connection with the redrafting of Article 121 and the introduction of the new Article 120 of the Convention (cf. BR/177/72, point 89).
there would be fewer cases of delayed publication of applications. The Chairman would also point out that according to BR/GT I/148/72 such a ruling would also be in conformity with Scandanavian patent law.

9. In the event of either of the Chairman's two proposals for Article 120 of the Convention being adopted, Article 2 of the Draft Rules relating to Fees would also have to be amended to include the fee for further processing.

10. The introduction of the legal expedient of further processing of the European patent application in the cases referred to above, should deviate the need to allow for restitutio in integrum in cases of failure to observe time limits set by the European Patent Office. The proposed redraft of Article 121 of the Convention therefore provides for re-establishment only in the event of failure to observe time limits laid down in the Convention and the Implementing Regulations (cf. in this connection Article 160, paragraph 1, of the Convention).

It is true that if this proposal is adopted, neither restitutio in integrum nor further processing of the European patent application come into play in the event of failure to observe some of the time limits set by the European Patent Office, but it should be possible to accept this disadvantage, as such delays do not result in immediate loss of rights. These are primarily time limits which, when not observed, result in the Board of Appeal or Opposition Division not being obliged to take into account any information that the parties might file after the time limit expires. It must be assumed that the Board of Appeal and the Opposition Division will use their discretion in the matter wisely.

BR/GT I/163 e/72 ley/KM/prk
8. Inclusion of the refusal of the application in Article 120 of the Convention raises the question of the time limit within which the applicant may request further processing of the application in such a case, since refusal of the application does not constitute commencement of the time limit provided for in Article 70, paragraph 2, of the Implementing Regulations.

The Chairman feels that it would be logical if the time limit were to be the same as the period within which the applicant may appeal against the decision to refuse the application, i.e. three months after notification of the decision (cf. Article 107 of the Convention).

The Chairman would like to point out that, as may be seen from paragraph 2 of the 2nd alternative for Article 120 of the Convention, such a ruling would result in two different time limits for filing the request for further processing of the application, the longer of which could have a disruptive effect on the procedure, as it would frequently, and always in the case of priority applications, involve a delay in the publication of the application (Article 92 of the Convention).

Should the Co-ordinating Committee come out in favour of the principle behind the second alternative, the Chairman suggests that it should study whether Article 90, paragraph 3, of the Convention should be rewarded to take account of the fiction of the withdrawal of the application. Such an adjustment would be advantageous in that firstly the time limit for the request for further processing of the application would be one and the same for all the cases referred to in Article 120 of the Convention, viz. 2 months after notification, and secondly
6. In order to speed up the procedure, the period for filing the request for retraction of the legal consequence should be shorter than that provided for in Scandinavian patent law (4 months after expiry of the unobserved time limit). The Chairman is of the opinion that the time limit should be of the same length as that within which the applicant may request revision of the noting of loss of rights pursuant to Article 70, paragraph 2, of the Implementing Regulations.

7. The 2nd alternative submitted for Article 120 of the Convention provides for the processing of the European patent application to be continued even in the event of failure to observe the time limit referred to in Article 41, paragraph 1, of the Implementing Regulations, which results in the refusal of the application pursuant to Article 90, paragraph 3, of the Convention.

The inclusion of this legal consequence in Article 120 of the Convention is put up for discussion should the Co-ordinating Committee share the Chairman's view that even though an applicant who has failed to observe the time limit concerned can appeal against the refusal of the application, the decision by the Board of Appeal can only confirm the refusal unless the applicant has in fact taken the prescribed action within the time limit in question. In this case the applicant would, unless Article 120 of the Convention is extended as proposed, have no possibility to recoup his lost rights, as, according to the proposal made in point 70, which is to restrict Article 121 of the Convention to the time limits laid down in the Convention and Implementing Regulations, even restitutio in integrum would be impossible.

BR/GT I/163 e/72 ley/KM/prk
Article 70, paragraph 2, of the Implementing Regulations entitles the applicant in both cases to apply for a decision by the European Patent Office as to the justification of the withdrawal fiction. However, unless the applicant has in fact taken the prescribed action within the time limit in question, this decision cannot do otherwise than confirm the withdrawal fiction.

4. The note by the Swedish delegation states that the Scandinavian system of restitutio in integrum is only applied in cases of time limits set by the Patent Office. The Swedish delegation has found from experience that it is particularly useful in connection with official actions (communications) concerning the examination for novelty and patentability.

For the purposes of the 1st Convention, this means primarily that the case referred to in Article 95, paragraph 3 (Article 92, paragraph 2, and Article 95, paragraph 1b) of the Convention requires the possibility of retracting the withdrawal fiction without restitutio in integrum on the grounds of force majeure. This also corresponds to the ideas of the international organisations, who made special reference both to this case and to that of Article 123, paragraph 2 (Article 150, paragraph 2) of the Convention, and did not consider an extension to cover the time limit for paying renewal fees and other cases where delays must be avoided as justified (BR/169/72, point 73).

5. The Chairman's proposed first alternative for Article 120 of the Convention takes account of the views expressed by the organisations and by the Swedish delegation. The further processing of the European patent application should be carried out on request, requiring payment of a fee, if the application has been deemed to be withdrawn following failure to observe a time limit set by the European Patent Office, that is to say pursuant to Article 95, paragraph 3, and Article 123, paragraph 2, of the Convention.
At its 11th meeting, Working Party I did not have sufficient time to make a conclusive examination of the consequences that would result should a provision corresponding to the patent laws of the Scandinavian countries be included in the Convention. It therefore decided to leave the decision on the international organisations' proposal to the Co-ordinating Committee. The Chairman undertook to draw up a working document dealing with this proposal before the 2nd meeting of the Committee, which is to be held from 15 to 19 May 1972 (cf. Minutes of the 11th meeting of Working Party I, point 88 - BR/177/72).

2. In this working document, the Chairman submits alternative proposals for Article 120, which was left open by the Conference Drafting Committee, and a proposed new drafting for Article 121 of the Convention.

3. Before going into these proposals in detail, it should be stated what possibilities are open to the applicant under the drafts of the Convention and Implementing Regulations, as drawn up by the Conference Drafting Committee, in the event of the European patent application being deemed to be withdrawn following failure to observe a time limit.

If the application is deemed to be withdrawn because of failure to observe the time limit for payment of the filing fee and search fee or all the designation fees, or for filing the request for examination, the fiction cannot be contested (cf. Article 121, paragraph 5, of the Convention). If the application is deemed to be withdrawn on other grounds, the fiction can only be retracted by restitutio in integrum, that is, only if the applicant has been prevented by force majeure from observing the time limit.
Introductory Note

I. Further processing of the European patent application upon payment of a fee

1. At the 5th Meeting of the Inter-Governmental Conference, the non-governmental international organisations expressed the wish that there should be some means of redress in some cases of the European patent application being deemed to have been withdrawn. They referred inter alia to the patent laws of the Scandinavian countries, which in certain cases allow delayed transactions to be carried out late upon payment of a fee and without proof of extenuating circumstances (cf. Minutes of the 5th Meeting of the Inter-Governmental Conference, Part 2, Point 73 - BR/169/72).

After hearing the international organisations, the Inter-Governmental Conference instructed Working Party I to look into the matter with reference to the provisions of Article 121 (142) of the Convention and Article 70 (Re. Article 145, No. 11) of the Implementing Regulations (1). It also asked the Swedish delegation to provide Working Party I with information about the relevant provision of Swedish patent law (cf. Minutes of the 5th Meeting of the Inter-Governmental Conference, Parts 1 and 3, Point 151 - BR/168/72). The Swedish delegation complied with this request in its note of 24 February 1972 (BR/GT I/148/72).

(1) The drafts of the Convention and Implementing Regulations are quoted in the version drawn up by the Conference Drafting Committee (cf. BR/184/72 and BR/185/72).

Wherever it is required for the purpose of understanding this working document, the new Article numbers are followed by the corresponding numbers of the Articles of the Second Preliminary Draft Convention or the First Preliminary Draft Implementing Regulations as contained in BR/139/71 and BR/176/72.
INTER-GOVERNMENTAL CONFERENCE
FOR THE SETTING UP OF A EUROPEAN
SYSTEM FOR THE GRANT OF PATENTS

- Secretariat -

**Working Document**

submitted by the Chairman of Working Party I

concerning the Draft Convention establishing a European System
for the Grant of Patents

**Proposals for Articles 120 and 121**

of the version drawn up by the Inter-Governmental Conference Drafting Committee

BR/GT I/163 e/72 ley/KM/prk
non-payment of the filing fee in which case the applicant gets an action according to section 15.

However, the system is most important in connection with actions concerning the examination of novelty and patentability. The figures from 1969-1971 show that on average about 6,000 applications a year were considered to be withdrawn since an action was not answered within the period given (6 months in the normal case). The possibility to reinstate was used in about one fifth of these cases.

As the total number of patent applications finally decided upon is about 20,000 a year the above-mentioned figures mean that about one fourth of the applications is finally decided by the withdrawal-fiction-system. As these decisions are very simple they can be taken by clerks thus saving money and work in the examination procedure.

The reinstatement fee is at present 75 Swedish crowns (the filing fee is 400 crowns and the appeal fee is 300 crowns). The reinstatement procedure can be applied several times during the procedure in one and the same application. However, the reinstatement fee is increased in such a case and becomes twice the fee for reinstatement the first time. It is however rather unusual that an application is reinstated more than once.

BR/GT I/148 e/72 prk
This system, where an application is considered withdrawn combined with the reinstatement possibility has been practised in Sweden since 1931 and in Norway since 1948. Because of the good experiences in these two countries the system was then introduced in all Nordic countries when the new patent laws entered into force in 1968.

The good experiences depend probably to a very large extent on the fact that the applicant has the possibility to reinstate the application. Without this possibility the applicants would in most cases in order to gain sufficient time for reflection and to safeguard their interests, submit a formal reply to the official action within the given period but without thereby making good the deficiencies in the applications. This would oblige the Patent Office to take up the application for a substantive decision, involving considerable effort, in spite of the fact that the applicant by that time has lost interest in the application. The period is construed in the following way. It covers the period for appeal (2 months) and furthermore some additional time to compensate somewhat for the delay before an answer to an action is usually taken up for consideration by the Office.

If the time limit for reinstatement is construed in such a manner the applicant has the same time to reflect regardless whether he files a formal answer or not.

The possibility of reinstatement applies to all kind of periods set by the Office in various actions during the examination procedure. For instance this applies to the
The Nordic system with reinstatement of patent applications

During the Conference in January 1972 the Swedish delegation was asked to submit information about the system used in the Nordic countries giving the applicant the possibility to reinstate his application when he has not observed a time limit given by the Patent Office. This note intends to meet the wishes of the Conference.

Section 15 of the patent laws in the Nordic countries contains the following provision:

"If the applicant has not complied with the requirements for the application, or if the Patent Office finds other objections to the acceptance of the application, the applicant shall be notified thereof by an official action, and be given a fixed period to answer the objections or to make the necessary connections.

If the applicant fails within the given period, to answer the action or to take steps to meet the objections raised, the application shall be dismissed as abandoned. The action shall include a notice to that effect.

Nevertheless, the application shall be reinstated if, within four months from the expiration of the fixed period, the applicant answers the action or takes steps to meet the objections raised and at the same time pays the prescribed reinstatement fee."

BR/GT I/148 e/72 prk
NOTE

Subject: The Nordic system with reinstatement of patent applications

Drawn up by: The Swedish delegation
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that Article 156, paragraph 3, was to be interpreted as an
authorisation for the Administrative Council to provide for the
levy of a search fee for each and every international patent
application, irrespective of whether additional searches within
the meaning of this provision should be carried out in the
individual cases.

11. Information to the public of official authorities, legal and administrative co-operation (Articles 127-132, Rules 93-100)

Only a few amendments were made to these provisions. The inspection of files under Article 128 was supplemented so as to
provide more precise information for the general public; thus,
before the publication of the European patent application, not
only the date of filling may be made known to third parties, but
also the date, State and file number of any application of which
the priority is claimed. The provisions of Articles 130/132 were
drafted more generally so that the European Patent Office
could make agreements concerning exchanges of information
and exchanges of publications not only with States which were
not a party to the Convention and with international patent
granting authorities, such as WIPO, but also with any other
organisations, especially documentation centres such as
INPADOC. It was also specified at the same time that the
substantive content of applications which had not yet been
published could not be the subject of such exchanges of
information. In addition, the Administrative Council was
authorised in Article 130, paragraph 3, to make provisions in
respect of exchanges of information with the last-named
organisations which derogated from the restrictions on the
inspection of files, in so far as the confidential treatment of the
information was guaranteed.

While dealing with the provisions of Article 131, the Main
Committee discussed a proposal which, in the light of the
procedure laid down in the Protocol on Recognition, aimed to
supplement the prescribed legal co-operation between the
European Patent Office and the Contracting States by an
obligation for the Contracting States to provide legal
assistance amongst themselves. This interesting idea was
rejected generally because the proposed extension was
considered to be an intrusion into international legal aid
between Contracting States and also an obligation which far
exceeded the purpose of the Convention. A further idea to
allow the European Patent Office to intervene as an
international notification authority in certain proceedings
concerning European patents, also found little approval.

12. Representation (Articles 133-134, 162/Rules 101-103, 107)

The provisions of the Convention and the Implementing
Regulations concerning representation before the European
Patent Office were already discussed with the organisations
concerned during the earlier stages of the negotiations and
were, as far as possible adapted to their proposals and wishes.
Fortunately this situation meant that the principles established
by the Inter-Governmental Conference were no longer
questioned as to their substance. In particular, the principle that
during a transitional period the representatives' status would
basically be controlled by the national law of Contracting
States and afterwards by European law, remained uncontested.
The general principles concerning representation in Article 133
were also unchanged. The Main Committee generally
considered that these principles should also be valid for the
transitional period. The Committee also specified that legal
persons could be represented not only by their employees — as
laid down in paragraph 3 of Article 133 — but also by their
departments. Such representation by their departments is
regarded as a matter of course, is understood from paragraph 1
of Article 133 and does not need to be expressly laid down.

However, material for discussion was provided by the
following points: the uninterrupted change from the transition-
al period to the permanent arrangements, in particular with
reference to the continued effects of national requirements, the
reasons for the deletion of professional representatives from
the list, questions concerning place of business and other
individual problems. The following is a report on the main
questions:

(a) Conditions of admission

The Main Committee again discussed the question raised in
the earlier negotiations concerning possession of the
nationality of a Contracting State as a condition of entry on the
list of professional representatives. The majority concluded
that this condition should be laid down in Article 162 not only in
respect of the permanent solution, but also in respect of the
transitional period, in order to avoid the improper acquisition
of representation rights after the publication of the
Convention. The status quo was taken into account in so far
that failure to have the nationality of a Contracting State would
not prevent entry on the list, if the representative had a place of
business or employment and the right of representation in a
Contracting State on 5 October 1973, i.e. at the time of the
signing of the Convention.

(b) Restrictions on authorisation to represent

The question arose as to whether restrictions on
representation arising from national law should also be valid in
respect of proceedings before the European Patent Office
during the transitional period. The Committee unanimously
considered that such restrictions based on specific rules of
national law, in particular on the legislation of the Federal
Republic of Germany, are not justified in respect of European
proceedings. The corresponding provisions of Article 162,
paragraphs 2 and 6, were therefore deleted.

(c) Questions concerning place of business

Article 134 provided that the representatives entered on the
list were entitled to establish a place of business in the Federal
Republic of Germany and the Netherlands for the purpose of
practising their profession before the European Patent Office.
In view of proceedings before national authorities carrying out
duties on behalf of the European Patent Office, as provided for
in the Protocol on Centralisation, the Main Committee
supplemented Article 134 accordingly. Professional represen-
tatives should consequently also be able to establish a place of
business in the Contracting States concerned. There was also
discussion of a provision which would have expressly granted
the right to practise a profession to a professional
representative, his associates, employees and colleagues and
the right of establishment to these persons including their
families. It was said in reply to the advocates of such a
provision, who considered it to be a necessary adjunct to the
right of residence, that this would be to bring a "foreign body"
into the Convention and might possibly conflict with existing
agreements in the field of public law. The Committee
thereupon rejected the proposed supplement, but noted on the
other hand that the stipulated right to a place of business in
accordance with Article 134, paragraphs 3 and 4, would be
meaningful only if its recognition were dealt with sensibly. A
designated Contracting States. The valid interests of an assumed infringer in the retroactive revocation of the patent may thus be upheld. In this connection it may be noted that this amendment has raised the opposition proceedings another step towards the level of actual revocation proceedings.

A further procedural amendment was made to Article 104 whereby any person who has been given notice by the proprietor as a result of a claimed patent infringement may also intervene in the opposition proceedings, if he proves that he has instituted proceedings to establish that the act in question did not infringe the patent. This text takes into account the fact that national laws of Contracting States allow such actions for negative declaratory judgments.

9. Appeals procedure (Articles 105-111/Rules 65-68)

Corresponding to the amendment to Article 98 with reference to the possibility of continuing the opposition proceedings despite the lapse of the patent, the Committee decided also to allow an appeal against a decision of the Opposition Division in such cases and to amend Article 105 accordingly. It was consequently made clear in Article 106 that all parties to proceedings of the first instance are also parties to appeal proceedings, even if they do not actively participate in the proceedings, so that for example a decision concerning costs by the Boards of Appeal which differs from the decision of the lower department will be binding for all parties.

The discussions during the earlier stages of the negotiations concerning the length of the time limit for filing an appeal were — as was to be expected — resumed in the Main Committee. An exchange of opinions showed that the division of the time limit for filing an appeal, as provided for in Article 107, into a time limit for filing the appeal and a time limit for filing the grounds for appeal, was generally welcomed. In the interests of the applicants and especially of their representatives who have such a multiplicity of time limits to observe, the Main Committee divided the time limits into one of two months for the notice of appeal, which also applies to the payment of the fee for appeal, and one of four months for filing the grounds for appeal; both time limits are to commence from the time when notification is given of the contested decision. This amendment made it necessary to adjust the one-month time limit for interlocutory revision, which now begins from the receipt of the grounds for appeal (Article 108). If the potential appellant waits until the end of such time limit — which experience leads us to expect — an appeal which is not immediately allowed will not reach the Board of Appeal earlier than five months after the contested decision has been taken! Whether this is compatible with the previously defended principle of streamlining the proceedings, remains to be seen.

In Article 109, paragraph 3, it was specified in respect of the appeals procedure that the deemed withdrawal of a European patent application in the event of failure to reply to an invitation from the Board of Appeal is not valid in proceedings against decisions of the Legal Division. In Article 111 the Committee expressly maintained in the interests of clear legal relationships that the parties to appeal proceedings should also be parties to any proceedings before the Enlarged Board of Appeal. Such a principle could easily be derived from Articles 112/115.

10. General principles governing procedure (Articles 112-126/Rules 69-92)

Some points of the general rules governing procedure were discussed in the Main Committee. In order to avoid improper delays in proceedings an assurance was given in Article 115 that repeated requests for oral proceedings could be refused by the European Patent Office under certain conditions. In Article 116 and in Rule 73 the peculiarities of the national laws of Contracting States were taken into account in respect of the taking of evidence, on the basis of letters rogatory, by authorities in the Contracting States and, in addition to the giving of evidence under oath by a party, witness or expert, provisions were made for other binding forms of evidence which enable the truth to be established. With reference to the communication of the possibility of appeal in accordance with Rule 69, paragraph 2, the principle that parties may invoke errors in the communication was abandoned; errors are however almost entirely excluded because reference must always be made in the communication to the relevant provisions of Articles 105-107, the text of which must be attached.

The rules governing time limits and the arrangements for dealing with unobserved time limits were adopted by the Committee with the following amendments. In Article 120 the time limit concerning the request for further processing of the European patent application was adapted to the new time limit for filing appeals and was therefore quite rightly reduced from three to two months. There was a detailed discussion on the concept of “force majeure” required in accordance with Article 121 for the re-establishment of rights. This condition was generally felt to be too strict because it would justify re-establishment only in the rarest of cases. The Committee also considered conditions such as those of the “unavoidable event” or of the “legitimate excuse” which are based on national laws of Contracting States. After comparing the laws of various States, the Committee finally agreed, in accordance with the conclusions of the Working Party which it had set up, that the justification for the re-establishment of rights was an impediment which, in spite of all due care required by the circumstances having been taken, had led to the non-observance of the time limit. The Committee also endorsed the general opinion that in reality justice is done to this obligation to take all due care only if the applicant or proprietor and his assistants, especially his representatives, have complied with it. In addition, the Committee considered that Article 121 was to be interpreted in a restrictive manner.

The Main Committee extended the maximum duration of time limits to be set by the European Patent Office under Rule 85 from four to six months for certain special circumstances. However, a proposal was not accepted which aimed to make provision for a one-month extension, on request, of any time limit for representatives who in the proceedings had to draw up documents to the European Patent Office in a language other than the official language of their State or residence. The Committee recognised unanimously that during a transitional period such translation difficulties should be deemed to be “certain special circumstances” within the meaning of paragraph 1 of Rule 85, in so far as the parties complied with their obligation to take due care in obtaining translations.

The provision in Article 124 concerning the procedure for drawing up supplementary search reports provided a large amount of material for discussion. This Article was deleted. The Committee considered it unnecessary to impose search costs on the applicant in the event of his making necessary an additional search due to an amendment to the claims. This financial problem could be settled by slightly increasing the standard amount of the main search fee. After lengthy discussions the Committee reached the majority decision that additional fees for additional searches which were drawn up outside the procedure for international search reports under Article 156, could be dispensed with, especially since such an additional cost would have an unfavourable visual effect in the Convention. At the same time the Committee stated expressly
Minutes of the proceedings of the Committee of the Whole

1. The Committee of the Whole, which was established by the Plenary of the Conference and comprised all the Government delegations (see Rule 14 of the Rules of Procedure)*, was, pursuant to paragraph 4 of Rule 14, chaired by Dr. Kurt Haerdtl (Federal Republic of Germany), President of the German Patent Office and Chairman of Main Committee I. Mr. François Savignon (France), Director of the French Industrial Property Office and Chairman of Main Committee II, was First Vice-Chairman; Mr. Edward Armitage (United Kingdom), Comptroller-General of the United Kingdom Patent Office and Chairman of Main Committee III was Second Vice-Chairman.

2. In accordance with Rule 14 of the Rules of Procedure, the terms of reference of the Committee of the Whole were to take decisions on proposals from the Gernal Drafting Committee on drafts established by Main Committees I, II and III and on proposals submitted to it directly and to forward the drafts approved by it to the Plenary of the Conference for adoption.

3. The Committee of the Whole met under the direction of the Chairman from 1 to 4 October 1973.

4. At the meeting on 1 October 1973, the Committee of the Whole received the reports of Main Committees I and II. Main Committee I's report was approved without debate (see Section I below).

5. At its meeting on 2 October 1973, the Committee of the Whole discussed Main Committee III's report. The discussion and subsequent approval of the report are dealt with below in Section II.

6. At the same meeting, it heard and approved Main Committee III's report (see Section III below); it also discussed the results of the proceedings of the General Drafting Committee (M/146 R/1 to R/15 and M/151 R/16). These discussions are covered in Section IV below.

7. On 3 October 1973, the Committee of the Whole received and approved the report of the Credentials Committee (see Section V below). The problems of a European School and the European Patent Office building in Munich were then dealt with (see Sections VI and VII).

8. At its last meeting on the morning of 4 October 1973, the Committee of the Whole discussed the organisation and work programme of the Interim Committee. These discussions are presented in Section VIII below. It finally considered a proposal from the Yugoslav delegation for a Resolution on technical assistance (Section IX) and a Recommendation regarding the status and remuneration of certain employees (Section X).

I. Report of the discussions and decisions of Main Committee I

9. The rapporteur of this Main Committee, Mr. Paul Braendli, Vice-Director of the Federal Intellectual Property Office (Switzerland), presented the report on the work of Main Committee I to the Committee of the Whole. The text of this report is given in Annex I.

The report was unanimously adopted by the Committee of the Whole.

II. Report on the work of Main Committee II

10. As regards the section of the report concerning the Protocol on Centralisation, the Netherlands delegation, commenting on the first sentence in point 16, stated that the obligations of the European Patent Office towards the Member States of the International Patent Institute had simply been clarified rather than extended. However, the French and United Kingdom delegations maintained that the obligations had in fact been extended since the original text had only referred to tasks at present incumbent upon the Institute whereas now tasks entrusted to the IIB after the signing of the Protocol were expressly covered. While disagreeing with this view, the Netherlands delegation did not insist on an amendment.

11. The Netherlands delegation proposed, also with regard to point 16, that the last sentence should state that the EPO would also undertake searches for Member States of the IIB which had not submitted any applications for search before the entry into force of the Convention. This would make provision for those States which, up to the time in question, had submitted no applications for search to the IIB although they were entitled to do so.

The Committee of the Whole agreed to amend the part of the report concerned as follows: "... the Office will also assume this responsibility in respect of a Member State of the Institute which prior to the entry into force of the Convention, has agreed to submit national applications to the Institute for search."

12. The Committee of the Whole adopted a proposal from the Swedish delegation that the idea proposed by the Scandinavian countries at the beginning of point 22 be worded as follows: "Consideration was given to the idea, proposed by the Scandinavian countries, that such work might be entrusted to national offices, possessing the minimum documentation, whether or not they possessed the other qualifications, required of an International Searching Authority under the Patent Cooperation Treaty. It also approved an addition at the end of the third sentence in this point to the effect that national offices would have to "fully" qualify as Searching Authorities.

13. The Austrian delegation suggested that in the English version of point 22, in the middle of page 14, the words "some search work" be used so as not to prejudice the question of the amount of such search work, which had deliberately been left open. The text would therefore read: "difficulties resulting from a renunciation under Section I, 2, to entrust some search work to national offices whose language is ..."

The Committee of the Whole accepted this suggestion. The German and French texts remained unaltered.

14. With regard to the part of the report dealing with Article 166 (Article 167 of the signed version) of the Convention, the Greek delegation proposed that point 11 be amended at the top of page 7 so as to state, not that Main Committee II had accepted the view as to the effects of a reservation, but that it had considered such a possibility. The rapporteur and the Netherlands delegation stated that this view had been generally accepted in Main Committee II.

The Committee of the Whole accordingly decided not to amend the draft which had been submitted.

III. Report on the results of Main Committee III's proceedings

15. Main Committee III's rapporteur, Mr. Fressonnet, Deputy Director of the National Industrial Property Office
should correspond to this practice and that the concept of "force majeure" was not suited for this purpose, since it would cover only the limited number of cases of objective "force majeure". The Working Party had also rejected the idea of using other concepts already applied in one State or another — the concept of an "act of God" or "legitimate excuse", for example — since they would offer the other States no real guide as to an accurate interpretation.

Finally, the Working Party unanimously agreed that the best solution would be to describe the grounds on which the desired "restitutio in integrum" could take place in the following manner:

"The applicant for or proprietor of a European patent who, in spite of all due care required by the circumstances having been taken, was unable to observe a time limit vis-à-vis the European Patent Office, shall..."

It considered that this form of wording would permit "restitutio in integrum" before the European Patent Office to be dealt with in much the same way as it was at present in the States concerned. It should be particularly stressed that, in the view of the Working Party, the applicant for or the proprietor of the patent were not guilty of negligence, this was not, in most cases, sufficient grounds for "restitutio in integrum": it was also necessary for the applicant to have exercised particular care.

571. The United Kingdom delegation said it welcomed the new formulation, particularly as it had never properly understood what "force majeure" meant.

Nonetheless, it should not be made too easy for applicants and, more particularly, their representatives before the Patent Office to engage unqualified staff. It was therefore in favour of a declaration being added to Article 121, paragraph 1, more or less as follows. Firstly, the provision should be interpreted narrowly. Secondly, no-one should be allowed to rely on a mistake in an official document if he knew perfectly well that he should have complied with other criteria. Thirdly, a high standard of proof should be demanded, either in the form of documents or in the form of testimony which was sworn or in other binding form.

The United Kingdom delegation considered that these precautions were necessary in order to avoid any abuse.

572. The delegation of the Federal Republic of Germany supported the United Kingdom delegation's view. It too desired a narrow interpretation of the newly drafted provision, i.e. that "restitutio in integrum" should be permitted only in exceptional cases in order to avoid undue severity.

573. The FICPI delegation welcomed the redraft of paragraph 1, and pointed out that neither applicants nor representatives were ever totally beyond making mistakes either. The provisions of paragraph 1 should also apply to representatives. Since this did not emerge clearly from the proposal, it called on the Main Committee to confirm that it considered that representatives were also covered by this provision.

574. The Chairman considered that representatives were definitely covered by this provision. The applicant would have to accept liability for any negligence on the part of his representative. If the representative had acted with due care, the applicant could demand "restitutio in integrum"; had he not done so, Article 121 was not applicable.

The Chairman noted that the delegation of the Federal Republic of Germany supported his view.

575. The French delegation questioned whether it was quite clear from the proposed provision that the applicant for or the proprietor of the patent had to accept liability for the acts of his representative or whether this point still had to be clarified. In any event, "restitutio in integrum" should not be granted where, despite the fact that the applicant had taken all due care in issuing instructions to his representative, the representative had not taken such care himself.

576. The Chairman pointed out that no mention had been made of the representative in the previous version of paragraph 1 either, and that to this extent the Working Party had made no change.

577. The Swiss delegation considered that, for the purposes of this provision, the applicant for or proprietor of the patent and his representative should be considered as one and the same person. It followed from this that "restitutio in integrum" should be ruled out if either the applicant or his representative had not taken all due care. It added that, under Swiss law, the applicant for or proprietor of the patent was liable for the negligence of an assistant and, if the representative was not guilty of negligence, the issue was then whether the applicant himself — e.g. in issuing instructions to the representative — had acted negligently.

578. The IAPPI delegation was in complete agreement with the views of the Swiss delegation. Since the representative represented the applicant, Article 121 had to apply just as much to him as to the applicant if, despite all due care, he failed to observe a time limit. This had, moreover, been the view expressed by all members of the Working Party.

579. The French delegation said that after the other delegation's statements, it did not consider it necessary for the text to be amended.

580. The Netherlands delegation greeted the Working Party's proposal as a suitable solution, which it was prepared to accept. However, it had misgivings regarding the declaration suggested by the United Kingdom delegation. At all events, it too was in favour of a narrow interpretation of the proposed provision, particularly as Article 120 (121) already provided for further processing of an application in certain circumstances. In no case should any such declaration refer to the provision of proof; this question should be left entirely to the jurisprudence of the European Patent Office.

581. The Chairman noted that the Main Committee approved the proposed version of paragraph 1.

As regards the declaration requested by the United Kingdom delegation, the Chairman suggested that both its statement and that made by the Netherlands delegation should be entered in the minutes.

582. The United Kingdom delegation said it could understand that the Netherlands delegation's misgivings over the question of proof, but would welcome an entry in the minutes, as the unanimous opinion of the Main Committee, that Article 121, paragraph 1, should be given a narrow interpretation, for no dissenting opinion had been expressed.

583. After consulting the delegations, the Chairman noted that it was the Main Committee's unanimous view that Article 121, paragraph 1, should be given a narrow interpretation.

Article 122(123) — Amendments

584. The Swiss delegation, supported by the Netherlands delegation, proposed that paragraph 1 should clearly stipulate that the conditions for the amendment of a European patent application or a European patent mentioned in the Implementing Regulations should be valid only for proceedings before the European Patent Office, and not for any proceedings which might be permissible before the national offices (M/54/I/II/III, page 20). For example, it was essential that States which recognised partial revocation of a patent should continue to be able to amend the patent claims of a granted European patent in revocation proceedings.

585. The Main Committee adopted this proposal.

586. The Belgian delegation proposed that paragraph 1
time. Limits in paragraph 2 should be uniformly set at two months (M/64/1, page 1), because time limits of differing lengths could only lead to confusion.

545. The Chairman recalled that the reason why the three-month time limit had originally been chosen was to keep it exactly the same length as for the filing of appeals. But since the Main Committee had reduced the time limit for the filing of appeals to two months (see above, point 462), it was only logical to reduce the time limit in Article 120, paragraph 2, to two months as well.

546. The CNIPA delegation suggested that both the time limits mentioned in paragraph 2 should be set at three months.

547. This suggestion was not taken up by any of the Government Delegations.

548. In conclusion, the Main Committee adopted the United Kingdom proposal.

549. The IAPIP delegation, supported by the French delegation, proposed that the concept of "force majeure" in paragraph 1 should be replaced by a less restrictive one. On the basis of Roman law, "force majeure" was to be interpreted as an external occurrence which the party concerned could neither foresee nor prevent. It might perhaps be better to substitute the concept of "legitimate excuse", which denoted a fortuitous, unintended and undeserved occurrence.

550. The delegation of the Federal Republic of Germany recalled its earlier vain attempts to introduce the concept of an act of God. It would, in certain circumstances, be prepared to reiterate its proposal, but did not know whether it fully reflected the views of the IAPIP delegation.

551. The IAPIP delegation replied that it did not believe that there was always a "legitimate excuse" in the case of an act of God.

552. The COPRICE delegation supported the suggestion made by the IAPIP delegation. It thought that the best rendering in German of the French term "excuse légitime" might perhaps be "unabweisbares Ereignis".

553. In view of the fact that Article 121 would have considerable practical significance, the FICPI delegation called on the Government Delegations to agree to the IAPIP proposal, since the concept "force majeure" was, in any case, too vague.

554. The United Kingdom delegation said it was not completely familiar with the foreign terms based on Roman law which had been used, but it definitely thought that the possibility for "restitutio in integrum" should be closely delimited. The present version had, incidentally, gone unchallenged for several years. It would be prepared to agree to an amendment only if the meaning thereof were clearly apparent.

555. The Austrian delegation, considering that the concept "force majeure" was too restrictive and should be extended, was prepared to support the suggestion made by the delegation of the Federal Republic of Germany.

556. The IFIA delegation pointed out that, on several occasions, it had already spoken up in the interests of inventors along the lines of the IAPIP proposal. It did not mind what term was finally selected, provided it were more flexible than the concept of "force majeure".

557. The UNION delegation supported the proposal put forward by the IAPIP delegation.

558. The Swiss delegation asked the IAPIP delegation whether the concept of "legitimate excuse" more or less corresponded to the concept of "non-liability", which it had itself earlier attempted to introduce.

559. The IAPIP delegation demonstrated its idea in the following way. A competent clerk in a patent agent's office, who was familiar with his work and suitably supervised, negligently allowed a time limit to expire as a result of which the patent application became void. This was not a case of "force majeure", since the employee's omission was neither unavoidable nor an act of God, although it was indeed fortuitous. The concept "excuse légitime" was apposite for the patent agent, since, if he had selected and supervised the competent clerk with due care, he was in no way liable for the latter's negligence.

560. At this juncture, the Main Committee decided, at the request of several delegations, to postpone discussion of paragraph 1 until the IAPIP delegation and the delegation of the Federal Republic of Germany had formulated their proposals for amendments and illustrated them with examples.

561. It also decided to set up a Working Party to discuss these proposals and to submit the results of its discussions to the Main Committee. This Working Party was to consist of the delegations of Austria, the Federal Republic of Germany, Finland, France, Switzerland, the United Kingdom and the IAPIP.

562. The Swiss delegation proposed the deletion from paragraph 5 of the reference to Article 85 (87), paragraph 1, in order to permit of "restitutio in integrum" in a priority period (M/54/II1/III, page 19), on the argument that in the version of Rule 85 (85) finally adopted by the Inter-Governmental Conference, "restitutio in integrum" in the priority period was, in certain cases, permissible. Furthermore, in the case of Article 121, "restitutio in integrum" would not take place automatically, but would depend on proof of "force majeure" or the like.

563. With the agreement of the Swiss delegation, this proposal supported by some delegations and rejected by others, was put to the vote without discussion. 4 delegations voted in favour, 9 against and there were 2 abstentions.

564. The Main Committee referred to the Drafting Committee a drafting proposal from the United Kingdom delegation concerning paragraph 5 (M/40, point 20).

565. The Main Committee referred to the Drafting Committee a drafting proposal made by the Luxembourg delegation concerning paragraph 7 (M/9, point 25).

566. The Belgian delegation proposed that paragraph 7 should clearly lay down that, in proceedings before courts in the Contracting States, where they relate to a European patent application or patent, national provisions on "restitutio in integrum" should continue to apply (see M/33, point 4).

567. An attempt was made during the discussion to agree that paragraph 7 should apply only to time limits which, under the Convention, were imposed, but not binding, on the national authorities of the Contracting States.

568. The Main Committee referred the Belgian delegation's proposal to the Drafting Committee with a request to examine whether it would represent any improvement on the existing version.

569. At a subsequent meeting, the Main Committee discussed the proposal concerning paragraph 1 submitted by the delegations of the Federal Republic of Germany and Switzerland, this proposal already having gone through the Working Party on "force majeure" (M/117/I).

570. In explanation of this proposal, the delegation of the Federal Republic of Germany said that, on the basis of the relevant discussions in the Main Committee (see points 549 et seq.), the Working Party had examined whether an alternative concept to that of "force majeure" should be used. It had examined the legal precedents of the States represented on the Working Party regarding the question of conditions for "restitutio in integrum" and had ascertained that practice in these States was very similar. There had therefore been unanimous agreement that the possibility of "restitutio in integrum" in proceedings before the European Patent Office

* For further discussions on paragraph 1 see points 569 et seq.
520. The IAPIP delegation wondered whether paragraph 1 might be so interpreted that, in taking a decision, the European Patent Office could consider facts or evidence which were unknown to the parties concerned.

In reply, the Chairman referred to Article 112(113), whereby the European Patent Office could base its decisions only on grounds or evidence on which the parties concerned had had an opportunity to present their comments.

521. The Main Committee referred to the Drafting Committee a drafting proposal from the French delegation concerning paragraph 2 (M/S8/1/I/II).

**Article 115 (116) — Oral proceedings**

522. The Main Committee referred to the Drafting Committee a drafting proposal from the Luxembourg delegation concerning this Article (M/9, point 21).

523. The Netherlands delegation, supported by the Italian delegation, proposed that Article 115 should be modified in such a way that the European Patent Office was not required to grant an application for more than one set of oral proceedings on the same question and could refuse to hold further proceedings (M/S2/1/I/II/III, page 28). The present version provided no assurance against abuse of the right of request.

524. The Austrian delegation considered that any amendment of the provision should make clear that the higher body would not be entitled to refuse oral proceedings because, say, they had already been held before the lower body.

525. In the view of the FICPI delegation, it would be better to speak of "proceedings on the same subject-matter" rather than of "proceedings on the same issue", for it ought to remain possible to examine one and the same issue, for example, on an inventive step, on the basis of different facts in several sets of proceedings.

526. The Main Committee adopted the Netherlands proposal and referred it to the Drafting Committee with a request to take account of the comments on drafting.

527. At a subsequent meeting, the Main Committee discussed the draft submitted by the Drafting Committee whereby the European Patent Office would be entitled to refuse a request for further oral proceedings in the same body, if the basic facts on which the proceedings were based remained unchanged.

528. At the request of the United Kingdom delegation, supported by the Netherlands delegation, the Main Committee made it clear that the right to refuse applied only if the parties concerned also remained unchanged.

**Article 116 (117) — Taking of evidence**

529. The Main Committee referred to the Drafting Committee a drafting proposal from the delegation of the Federal Republic of Germany concerning paragraph 1, sub-paragraph (g) (M/11, point 30).

530. The Main Committee also referred to the Drafting Committee a drafting proposal from the Luxembourg delegation concerning paragraphs 4 to 6 (M/9, point 22).

531. The Swiss delegation proposed that paragraphs 5 and 6 should be so supplemented that the court in the country of residence of the person giving evidence could also be requested to take evidence following a warning by the judge that false statements were punishable (see M/S4/1/I/II/III, page 18). Under Swiss procedural law, there was no oath in certain federal cantons, but instead the judge gave a warning of this nature and it was therefore essential for Switzerland that the Convention should be supplemented to this effect.

532. The Netherlands delegation supported this proposal since, under Netherlands law also, it was not always possible to demand an oath, and in certain cases an assurance had to suffice instead.

533. The United Kingdom delegation thought that it would be difficult to draft a text which took full account of the varying legal situation in all the Contracting States. It would be satisfied by a statement in the Conference minutes to the effect that persons giving evidence could make their statements in the form prescribed by the Contracting State concerned.

534. The FICPI delegation proposed that this provision should be worded to the effect that evidence could be confirmed either under oath or by means of a written statement comparable to an oath.

535. Finally, the Main Committee referred the Swiss proposal to the Drafting Committee with a request to examine and improve paragraphs 5 and 6 in the light of the discussions.

536. At a subsequent meeting, the Swiss delegation suggested that paragraphs 5 and 6, as formulated in the meantime by the Drafting Committee, should be amended, in German in any case, in order to convey that the form of statement permissible instead of an oath was binding on the person giving evidence.

537. This suggestion was referred to the Drafting Committee.

**Article 118 (119) — Notification**

538. The Main Committee referred to the Drafting Committee a drafting proposal from the Luxembourg delegation (M/9, point 23).

**Article 120 (121) — Further processing of the European patent application**

539. The Main Committee referred to the Drafting Committee a drafting proposal from the United Kingdom delegation concerning paragraph 1 (M/64/I, page 1).

540. The FICPI delegation said it had taken the German version of paragraph 1 to mean that a patent application could be further processed if it was to be or had been refused following failure to observe a time limit set by the European Patent Office or if — following failure to observe a time limit set by the European Patent Office or a contractual time limit — it was deemed to be withdrawn. It requested confirmation of its interpretation, particularly as the English version seemed to be more restrictive.

541. The Chairman replied that, in his view, it emerged clearly from the German version that further processing was permissible only when there had been failure to observe a time limit set by the European Patent Office. The same was obviously true in the case of an application which was deemed to be withdrawn. He considered that all three versions concurred on this point.

542. The FICPI delegation then suggested that the number of instances in which further processing was permissible where there was failure to observe a time limit should be extended in keeping with the FICPI delegation's understanding thereof.

This would cover only limited cases of time limits, but as regards practice they would be particularly important: e.g. the time limit for filing documents. Not to do so would in practice signify a degree of severity that was surely not intended by the authors of this provision.

543. The Chairman pointed out that it had been the Inter-Geographical Conference's deliberate intention — on the model of Scandinavian law, moreover — to limit this provision to the time limits laid down by the European Patent Office.

He noted that no Government Delegation was prepared to adopt the FICPI suggestion.

544. The United Kingdom delegation proposed that both the
Minutes of the Proceedings of Main Committee I

1. Main Committee I (see Rule 12 of the Rules of Procedure*) set up by the Plenary of the Conference to deal with matters concerning patent law was chaired by Dr. Kurt Haertel, President of the German Patent Office (Federal Republic of Germany). Mr. Göran Borggärd, Director-General of the Royal Swedish Patent Office (Sweden), was the first Vice-Chairman; Mr. Erkki Tuuli, Director-General of the Patent and Record Office (Finland), and Dr. Thomas Lorenz, Chairman of the Patent Office (Austria), were the other Vice-Chairmen. The Rapporteur was Lic. jur. Paul Braendli, Vice-Director of the Federal Intellectual Property Office (Switzerland) (see M/PR/K/1, points 19, 20 and 25; M/46/K, page 1 and M/55/K, page 2).

2. The duties of Main Committee I were based on Rule 12 of the Rules of Procedure (M/34) and on a recommendation adopted by the Steering Committee of the Conference (M/56/I/II/III).

On this basis the Main Committee was responsible for Articles 14, 50 — 142, 144, 148 — 157, 161, 162 and 174 of the Draft Convention (M/1), Rules 7 and 13 — 107 of the Draft Implementing Regulations (M/2), the Draft Protocol on Recognition (M/3), the Recommendation on preparations for the opening of the European Patent Office (M/8) and the Recommendation on training staff for the European Patent Office (M/37).

3. Main Committee I met from 11 to 14 September, 17 to 21 September, 24 to 26 September and on 28 and 29 September 1973.

4. At its first meeting the Main Committee, on a proposal from its Chairman, set up a Drafting Committee. Modelled on the Drafting Committee of the Luxembourg Inter-Governmental Conference, this consisted of the delegations of the Federal Republic of Germany, France and the United Kingdom. The Chairman was Mr. J. B. van Benthem, President of the Octrooiraad and Head of the Netherlands delegation.

5. The Main Committee did not deal with the tasks assigned to it in exactly the same order as the Articles, Rules and other provisions but in the order which seemed most appropriate in the given circumstances. Thus is happened that one and the same provision was discussed on different occasions, for example if the problem in question was first passed to a Working Party and subsequently referred back to the Main Committee.

However, in this report each provision is dealt with only once. The reader should thus be able to obtain, in one place, all the information he wants on the discussion of a particular problem. Within the following Sections the provisions are dealt with in numerical order:

A. General 8 — 10
B. Convention 11 et seq.
C. Implementing Regulations 2001 et seq.
D. Protocol on Recognition 3001 et seq.
E. Recommendation on preparations for the opening of the European Patent Office 4001 et seq.
F. Recommendation on training staff for the European Patent Office 5001 et seq.

6. If a provision was dealt with again in the Main Committee after being discussed in a Working Party or in the Drafting Committee, special mention is made of this below. On the other hand, if no mention is made, it is to be assumed that the Main Committee adopted the proposal of the Working Party or of the Drafting Committee. Purely drafting amendments which are not based on written proposals are not mentioned as a general rule.

7. In this report the numbering of the Articles, Rules, paragraphs, etc. follows the text of the draft proposals (M/1 to M/8). Where it seems appropriate, the numbering in the signed text is given in brackets after the number of the provision concerned.

A. General

8. At the beginning of the first meeting the Chairman noted that the Steering Committee had approved two requests at its meeting on 10 September 1973, namely that Mr. Sheehan of the US Patent Office and Mr. van Empel, a former member of the Secretariat, might be admitted as listeners to the meetings of the Main Committees. However, under Rule 48 of the Rules of Procedure Main Committee I's consent was also necessary, before participation in its proceedings was allowed.

Main Committee I agreed that both the gentlemen mentioned could take part in its proceedings as listeners pursuant to Rule 48, paragraph 1.

9. The Chairman pointed out that under Rule 32 of the Rules of Procedure only requests made in writing by the Government delegations could be discussed and voted upon. In principle, written requests had to be submitted by 5 p.m. on the day prior to the discussion.

10. The Chairman also stated that, pursuant to the Rules of Procedure, only Government delegations could make proposals, whereas representatives of any observer delegations could make oral statements under Rule 50 of the Rules of Procedure. If observer delegations made proposals, the latter had to be taken over by a Government delegation and seconded by a second Government delegation. If this was not the case, the proposal was deemed to be rejected.

The Main Committee agreed with this interpretation.

B. Draft Convention establishing a European system for the Grant of Patents (M/1)

Article 14 — Languages of the European Patent Office

11. The Main Committee forwarded to the Drafting Committee a drafting proposal from the Netherlands delegation concerning paragraph 2 (M/32, point 2).

12. While discussing Article 122, paragraph 2 (see point 594), the Main Committee decided on a further amendment to paragraph 2.

13. The Main Committee forwarded to the Drafting Committee a drafting proposal from the Luxembourg delegation concerning paragraph 4 (M/9, point 8).

14. The Main Committee decided that a proposal from the Netherlands delegation concerning paragraph 17 (M/52/I/II/III, point 2), to the effect that an applicant must submit a translation of the claims in the other two official languages of the European Patent Office, would be discussed in connection with Article 96 (see under point 350). The Committee also adopted paragraph 7.

15. The Turkish delegation proposed amending paragraph 7 so that claims would have to be translated into all the official languages of the designated Contracting States.

It was pointed out to the delegation that the question of the translation of the European patent specification is dealt with in Article 63 (65), so that, for example, Turkey could request that the specification be translated into Turkish, if the European patent was to be effective in Turkey.

The Turkish delegation said it was satisfied with this explanation and withdrew its proposal.

* The Rules of Procedure (M/34) had been previously adopted unanimously by the Plenary (see M/PR/K/1, point 10).
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
Further processing of the European patent application

(1) If the European patent application is to be refused or is refused or deemed to be withdrawn following failure to reply within a time limit set by the European Patent Office, the legal consequence provided for shall not ensue or, if it has already ensued, shall be retracted if the applicant requests further processing of the application.

(2) The request shall be filed in writing within two months of the date on which either the decision to refuse the application or the communication that the application is deemed to be withdrawn was notified. The omitted act must be completed within this time limit. The request shall not be deemed to have been filed until the fee for further processing has been paid.

(3) The department competent to decide on the omitted act shall decide on the request.
MUNICH DIPLOMATIC CONFERENCE
FOR THE SETTING UP OF A EUROPEAN SYSTEM FOR THE GRANT OF PATENTS

- 1973 -

Munich, 30 September 1973
M/ 146/R 5
Original: English/French/German

CONFERENCE DOCUMENT

Drawn up by: General Drafting Committee
Subject: Convention: Articles 112 to 139
Article 120

Further processing of the European patent application

(1) If the European patent application is to be refused or is refused or deemed to be withdrawn following failure to reply within a time limit set by the European Patent Office, the legal consequence provided for shall not ensue or, if it has already ensued, shall be retracted if the applicant requests further processing of the application.

(2) The request shall be filed in writing within two months of the date on which either the decision to refuse the application or the communication that the application is deemed to be withdrawn was notified. The omitted act must be completed within this time limit. The request shall not be deemed to have been filed until the fee for further processing has been paid.

(3) Unchanged from 1972 published text.
MUNICH DIPLOMATIC CONFERENCE
FOR THE SETTING UP OF A EUROPEAN SYSTEM FOR THE GRANT OF PATENTS

- 1973 -

Munich, 17 September 1973
M/88/I/R 3
Original: English/French/German

TEXTS DRAWN UP BY
THE DRAFTING COMMITTEE OF MAIN COMMITTEE I
AT THE MEETING ON 15 SEPTEMBER 1973

Articles of the Convention:

| Articles | 52 | 53 | 63 | 86 | 87 | 95 | 104 | 105 | 107 | 108 | 111 | 113 | 115 | 116 | 120 | 121 | 122 | 123 | 124 | 125 | 128 | 130 | 131 | 132 | 135 |

Rules of the Implementing Regulations:

| Rules | 56 | 65 | 73 | 96 |
FURTHER PROPOSALS BY THE UNITED KINGDOM DELEGATION

Article 107  Time limit and form of appeal

Notice of appeal must be filed in writing at the European Patent Office within two months after the date of notification of the decision appealed from. The notice shall not be deemed to be filed until after the fee for appeal has been filed. Within three months after the date of that notification, a written statement setting out the grounds of appeal must be filed.

Article 108

(1) Unchanged

(2) ... within one month after receipt of the statement of grounds, it shall be remitted ...

(3) ... shall be remitted to the Board of Appeal as soon as the statement of grounds has been filed.

Article 120  Further processing of the European patent application

(1) If ... failure to reply within a time limit ... application.

(2) The request shall be filed in writing within two months of the date ... was notified or the communication ... notified. The omitted ... paid.

(3) Unchanged
MUNICH DIPLOMATIC CONFERENCE
FOR THE SETTING UP OF A EUROPEAN SYSTEM FOR THE GRANT OF PATENTS

- 1973 -

Munich, 11 September 1973
M/64/I
Original: English

CONFERENCE DOCUMENT

Drawn up by: United Kingdom delegation
Subject: Further proposals for Articles 107, 108, 120, 130, 133, 144 of the Convention and for Rules 43, 55 and 107 of the Implementing Regulations
28 Artikel 107 und 108

Das Beschwerdeverfahren sollte in zwei Phasen abgewickelt werden können; in einer ersten Phase, in der die förmliche Beschwerde innerhalb von zwei Monaten eingelegt werden muß, und einer zweiten Phase, in der die Beschwerde innerhalb von höchstens sechs Monaten zu begründen ist.

29 Artikel 120 Absatz 2 (Der FEMIPI führt diesen Artikel lediglich als Beispiel an)

Der FEMIPI empfiehlt eindringlich, daß die im Verfahren vorgeschriebenen Fristen – wie beispielsweise die Frist nach Artikel 120 Absatz 2 – mindestens zwei Monate betragen.

30 Artikel 128 Absatz 5

Zu den Auskünften, die Dritten vor der Veröffentlichung erteilt werden können, sollten gegebenenfalls auch die Angabe der Priorität und des PCT-Ursprungs der Anmeldung gehören.

31 Artikel 130 und 131

Nach Ansicht des FEMIPI sollte sich die Erteilung von Auskünften an nationale Patentämter von Nichtvertragsstaaten keinesfalls auf Sachangaben erstrecken.

Ferner sollten die betreffenden Stellen ohne Rückicht auf die Gründe bei diesen Auskunftserteilungen und sonstigen Mitteilungen den Grundsatz der Geheimhaltung im Interesse des Anmelders beachten.

32 Artikel 133, 134 und 162

Die Stellungnahmen, Bemerkungen und Vorschläge des FEMIPI zu diesen Artikeln, die die Vertretung vor dem Europäischen Patentamt betreffen, sind in den Nummern 1 bis 12 enthalten.

In diesem Zusammenhang legt der FEMIPI angesichts der Unterschiedlichkeit der zur Zeit geltenden einzelstaatlichen Regelungen und im Interesse einer Vereinheitlichung, Wert auf die Feststellung, daß die Vertreter der Industrie bis an die Grenze der für sie annehmbaren Zugeständnisse gegangen sind, die zum Teil übrigens dazu führen, daß Vorrechte, die sie zur Zeit in Anspruch nehmen können, hinfällig werden.

33 Artikel 135

Es dürfte sowohl im Interesse der Patentinhaber als auch der Dritten nicht zweckmäßig sein, die „Umwandlung“ einer europäischen Patentanmeldung unter den in Artikel 135 Absatz 1 Buchstabe b vorgesehenen Bedingungen zuzulassen.

28 Articles 107 and 108

The appeals procedure should be divided into two stages: the first, the formal lodging of the appeal, being required to be made within a period of two months, and the second, the statement of the grounds on which the appeal is based, being required to be made within a maximum period of six months.

29 Article 120, paragraph 2 (This Article has been taken by FEMIPI as an example)

FEMIPI strongly recommends that the time limits provided for the procedure, such as that laid down in Article 120, paragraph 2, should be at least two months.

30 Article 128, paragraph 5

The information available to third parties before publication should also, where appropriate, comprise the reference to the priority and the reference to the PCT origin of the application.

31 Articles 130 and 131

In the opinion of FEMIPI, information communicated to the national offices of non-Contracting States should in no event include information of substance.

In addition, whatever the reasons for such exchanges of information and for any other communications, the principle of the secrecy of the proceedings of the bodies concerned should be observed in the interests of the applicant.

32 Articles 133, 134 and 162

The observations, comments and suggestions of FEMIPI on these Articles, which deal with representation before the European Patent Office, are contained in references 1 to 12.

In this connection FEMIPI would stress that in view of the diversity of the present national systems and in the interests of standardisation, agents of industry have made all the possible concessions acceptable to them even to the extent of making certain concessions which will lead to a loss of some rights at present enjoyed.

33 Article 135

Both in the interests of patentees and in the interests of third parties it would appear to be undesirable to permit the "conversion" of a European patent application in the circumstances laid down in Article 135, paragraph 1(b).
STELLUNGNAHME DES
FEMIPI
Europäischer Verband der Industrie-Patentingenieure

COMMENTS BY
FEMIPI
European Federation of Agents of Industry in Industrial Property

PRISE DE POSITION DE LA
FEMIPI
Fédération européenne des mandataires de l'industrie en propriété industrielle
Artikel 96 Absatz 2 Buchstabe b
32 Die Erteilungsgebühr und die Druckkostengebühr sollten zusammengefaßt werden.

Artikel 97 – Veröffentlichung des europäischen Patents
33 CIFE möchte, daß in der Patentschrift die vom Patentamt bei der Prüfung berücksichtigten Unterlagen angegeben werden.

Artikel 107 und 108 – Frist und Form der Beschwerde und Abhilfe
34 Nach Artikel 107 ist die Beschwerde innerhalb von drei Monaten nach der Zustellung der Entscheidung einzulegen und zu begründen.

Eine solche Regelung dürfte nicht flexibel genug sein. CIFE hätte den Wunsch, daß für die Einlegung der Beschwerde eine relativ kurze Frist von beispielsweise zwei Monaten nach der Zustellung der Entscheidung eingeführt, für die Einreichung der Begründung jedoch eine längere Frist von beispielsweise sechs Monaten nach der Zustellung der Entscheidung eingeräumt wird.

Hält die Stelle, deren Entscheidung angefochten wird, die Beschwerde für zulässig, so müßte sie ihr innerhalb einer Frist von einem Monat nach Erhalt der Begründung stattgeben.

Artikel 120 Absatz 2 – Weiterbehandlung der europäischen Patentanmeldung
35 CIFE vertritt die Auffassung, daß alle in Artikel 120 Absatz 2 genannten Fristen einheitlich zwei Monate betragen sollten.

Artikel 124 Absatz 3 – Ergänzender europäischer Recherchenbericht
36 CIFE vertritt die Auffassung, daß die Frist von einem Monat für die Entrichtung der Zusatzrecherchegebühr auf zwei Monate verlängert werden sollte.

Artikel 128 Absatz 5 – Akteneinsicht
37 CIFE würde es für richtig halten, daß außer den in Artikel 128 Absatz 5 aufgeführten Angaben, die das Europäische Patentamt Dritten mitteilen und sogar vor der Veröffentlichung der europäischen Patentanmeldung veröffentlichen kann, noch folgende Angaben derselben Regelung unterliegen:

– Hinweis auf die Priorität, sofern eine solche beansprucht wird, und
– Hinweis darauf, daß es sich um eine Anmeldung

32 It is suggested that the fees for grant and printing be combined.

Article 96, paragraph 2(b)

Article 97 – Publication of a European patent
33 CEIF formulates the wish that the patent specification should mention the documents considered in examination by the Office.

34 Article 107 stipulates that the appeal must be filed within three months after the date of notification of the decision and that it must set out the grounds on which it is based.

Such a system seems unduly rigid. CEIF would wish that the appeal has to be filed at relatively short notice, for example two months after the date of notification of the decision appealed from, but leaving more time, for example six months also from the date of notification, for giving the grounds on which it is based.

If the department whose decision is contested considers the appeal to be admissible, it should then rectify its decision within a month from receipt of the statement of grounds for the appeal.

Article 107 and Article 108 – Time limit and form of appeal
35 CEIF considers that the periods in Article 120, paragraph 2, should be uniformly set at two months.

Article 120, paragraph 2 – Further processing of the European application
36 CEIF considers that the time limit of one month for payment of the additional search fee should be increased to two months.

Article 124, paragraph 3 – Supplementary European search report

Article 128, paragraph 5 – Inspection of files
37 CEIF would wish that the data which the European Patent Office may communicate to third parties or publish even before publication of the patent application should include, in addition to those listed in Article 128, paragraph 5:

– a mention of priority, if claimed
– a mention of the PCT origin of the application where this is the case.
STELLUNGNAHME DES

CIFE
Rat der Europäischen Industrieverbände

COMMENTS BY

CEIF
Council of European Industrial Federations

PRISE DE POSITION DU

CIFE
Conseil des fédérations industrielles d'Europe

(1) English translation submitted by CEIF
Artikel 107
9 Vorschlag:
In Zeile 1 ist „drei“ durch „zwei“ zu ersetzen und in Zeile 3 ist nach dem Wort „und“ einzufügen „innerhalb von 4 Monaten nach der Zustellung“.
Begründung:
Die Frist zur Einlegung der Beschwerde soll kurz sein, damit möglichst bald Klarheit darüber geschaffen wird, ob das Verfahren beendet ist oder forgestellt wird. Eine ausreichende Frist zur Begründung liegt im Interesse des Amtes an einer sorgfältigen Bearbeitung.

Artikel 108, Absatz (2)
10 Vorschlag:
In Zeile 2 sind die Worte „ihrem Eingang“ zu ersetzen durch „Eingang der Begründung“.
Begründung:
Die Abteilung des Patentamtes wird über eine Abhilfe der Beschwerde erst entscheiden können, wenn die Begründung vorliegt.

Artikel 120, Absatz (2)
11 Vorschlag:
In der ersten Zeile ist der Ausdruck „drei Monaten“ zu ersetzen durch „zwei Monaten“.
Begründung:
Im Interesse einer zuverlässigen Überwachung der Fristen ist es erwünscht, daß die beiden in diesem Absatz erwähnten Fristen die gleiche Länge haben.

Artikel 121, Absatz (5)
12 Vorschlag:
Der Absatz sollte ersatzlos gestrichen werden.
Begründung:
Während es in dem Fall eines „unabwendbaren Zufalls“ berechtigt sein mag, gewisse Fristen von der Wiedereinsetzung auszunehmen, gilt das jedenfalls nicht für den Fall „höherer Gewalt“. Beispielsweise sollte Art. 121, Abs. 1 auch anwendbar sein, wenn die rechtzeitige Zahlung der in Art. 59, Abs. 3 vorgesehenen Gebühr, die rechtzeitige Einreichung der in Art. 85, Abs. 1 und Art. 93, Abs. 2 vorgesehe-
STELLUNGNAHME DER
UNEPA
Union Europäischer Patentanwälte

COMMENTS BY
UNEPA
Union of European Patent Agents

PRISE DE POSITION DE
L'UNEPA
Union des Conseils en brevets européens

(1) English translation submitted by UNEPA
(2) La traduction française a été fournie par l'UNEPA

Artikel 120 Absatz 2

24 Es ist nicht klar, warum unterschiedliche Fristen gewählt worden sind. Diese Unterschiede könnten leicht zu Irrtümern Anlaß geben, und es wird daher vorgeschlagen, eine einheitliche Frist von 3 Monaten vorzusehen.

Artikel 121 Absatz 5

25 Es dürfte vernünftig sein, höhere Gewalt als einen Grund für die verspätete Zahlung von Gebühren zu akzeptieren, was zur Zeit aus diesem Absatz ausklammert ist. Es hat nicht den Anschein, als ob der Artikel 120 oder die Regel 70 angewendet werden könnten.

Artikel 130 Absatz 3

26 In der Zeit nach der Einreichung einer europäischen Patentanmeldung ohne Priorität hat der Anmelder das Recht, die Anmeldung ohne Offenbarung zurückzuziehen und vielleicht von Artikel 4 Buchstabe C Absatz 4 der Pariser Verbandsübereinkunft zu profitieren. Während dieser Zeit sollte der Inhalt unverletzlich sein (abgesehen von Ausnahmen für nationale Gerichte im Rahmen des Artikels 131), und es wird eindringlich darum gebeten, daß die Auskunftserteilung nach Artikel 130 den Beschränkungen nach Artikel 128 unterliegt.

Artikel 133 Absätze 2 und 3

27 In bezug auf die juristischen Personen, die sich vertreten lassen müssen oder die sich durch einen Angestellten vertreten lassen können, wird vorgeschlagen, die Definition dem Staatsangehörigkeitsverfahren nach der Regel 18.2 (b) des PCT anzugleichen. Der neue Text könnte dann wie folgt lauten:

(2) Die natürlichen Personen, die keinen Wohnsitz in einem Vertragsstaat haben, und die juristischen Personen, die nicht nach dem Recht eines Vertragsstaats gegründet worden sind, müssen . . .
(3) Die natürlichen Personen mit Wohnsitz in einem Vertragsstaat und die juristischen Personen, applicant. In case the European Patent Office shares the opinion of the applicant, the latter will not be made aware of this and may act on the assumption that an unfavourable decision may eventually be given. To speed up the proceedings, it is suggested that the last sentence be amended so that at least the sense of the decision reached be communicated to the applicant. In the case of a favourable decision, the reasons are of less importance to the applicant than the result.

Article 120 (2)

24 The reasons for different time limits are not clear. Such differences may easily give rise to error and it is suggested that a common limit of 3 months be used.

Article 121 (5)

25 It seems reasonable that force majeure be accepted as an excuse for late payment of fees excluded by this paragraph. It does not appear that Article 120 or Rule 70 could be applicable.

Article 130 (3)

26 During the period following the filing of a European application without priority, the applicant has the privilege of withdrawing the application without disclosure and perhaps to benefit from Article 4.C. (4) of the Paris Convention. During this period, the contents should be sacrosanct (except under Article 131 to national courts) and it is strongly urged that communication under Article 130 be subject to the restrictions laid down in Article 128.

Article 133 (2) and (3)

27 As regards legal persons, required to be represented or free to act through employees, it is suggested that the definition be aligned with the nationality requirement in Rule 18.2 (b) of PCT. Thus the new wording could read:

“(2) Natural persons not having a residence within, and legal persons not constituted according to the law of, one of the Contracting States must be represented . . .
(3) Natural persons having their residence within, and legal persons constituted according to the law of, one of the Contracting States may be represented . . .”
STELLUNGNAHME DES
CNIPA
Committee of National Institutes of Patent Agents

COMMENTS BY
CNIPA
Committee of National Institutes of Patent Agents

PRISE DE POSITION DU
CNIPA
Committee of National Institutes of Patent Agents
einem Dritten gewährt, auch demjenigen zuzuerken-
nen, der vom Patentinhaber eine Warnung erhalten
hat, und der deswegen eine Klage gegen letzteren
erhebt mit dem Antrag, daß das Gericht feststelle,
der Kläger habe keine Patentverletzung begangen
(negative Feststellungsklage).

Artikel 107

15 Aus praktischen Gründen ist es wünschenswert, daß
die Beschwerde innerhalb von zwei Monaten einzule-
gen ist (formelle Beschwerde) und daß außerdem
eine weitere Frist von vier Monaten besteht, inner-
halb der die Beschwerde zu begründen ist.

Artikel 120 (2)

16 Es erscheint wünschenswert, für beide in Absatz (2)
vorgesehenen Fristen zwei Monate festzulegen.

Artikel 124 (3)

17 Die Frist von einem Monat für die Entrichtung der
Zusatzrecherchengebühr erscheint zu kurz; sie sollte
drei Monate betragen.

Artikel 128 (5)

18 Zu den Angaben, die das Europäische Patentamt
Dritten gegenüber machen kann, sollten hinzugefügt
werden:

– Prioritäten, falls der Anmelder sie geltend
macht,
– PCT-Ursprung, falls es sich um eine PCT-Anmel-
dung handelt.

Artikel 130 (3)

19 Für den Fall, daß das Europäische Patentamt den
Zentralbehörden für den gewerblichen Schutz
von Staaten, die nicht Vertragsstaaten sind, Aus-
künfte erteilt, sollten diese den Beschränkungen des
Artikels 128 unterliegen. Folglich sollte die Bezug-
nahme in Artikel 130 Absatz (3) nur den Arti-
kel 128 Absatz (1) erfassen.

Artikel 131 (1)

20 Es scheint, daß dieser Artikel sich teilweise mit dem
Artikel 130 überschneidet.

Artikel 135

21 In der englischen und französischen Fassung dieses
Artikels kommt an keiner Stelle der Begriff „Umw-
andlung“ vor. Aus Gründen der Klarheit erscheint
dies jedoch wünschenswert.

Article 104 to third parties should also be granted
to any person who has received notice from the
patent proprietor and as a result brings an action
against the latter requiring the court to declare that
he has not committed an infringement.

Article 107

15 For practical reasons it would be desirable for the
appeal to be filed within two months (formal
appeal) and for an additional time limit of four
months to be provided within which the grounds on
which the appeal is based must be stated.

Article 120, paragraph 2

16 The two time limits laid down in paragraph 2 should
each be of two months.

Article 124, paragraph 3

17 The period of one month for payment of the
additional search fee seems to be too short; it
should be extended to two months.

Article 128, paragraph 5

18 The following should be added to the data which
the European Patent Office may communicate to
third parties:

– any priorities claimed by the applicant,
– the PCT origin in the case of a PCT application.

Article 130, paragraph 3

19 Where the European Patent Office supplies informa-
tion to the central industrial property office of any
State which is not a party to this Convention, such
information should be subject to the restrictions
laid down in Article 128. The reference in Arti-
cle 130, paragraph 3, should therefore only be to
Article 128, paragraph 1.

Article 131, paragraph 1

20 This Article seems to duplicate partially what has
already been stated in Article 130.

Article 135

21 The concept of „conversion“ is nowhere contained
in the English and French versions of this Article. In
the interests of clarity this term should be included.
STELLUNGNAHME DER
UNICE
Union der Industrien der Europäischen Gemeinschaft

COMMENTS BY
UNICE
Union des Industries de la Communauté européenne

PRISE DE POSITION DE
L'UNICE
Union des Industries de la Communauté européenne

(1) Deutsche Übersetzung der Stellungnahme und der Anlage 2 vorgelegt von UNICE
(2) Annex 3 to these Comments submitted by UNICE in English
Artikel 119
Fristen
In der Ausführungsordnung wird bestimmt:

a) die Art der Berechnung der Fristen sowie die Voraussetzungen, unter denen Fristen verlängert werden können, wenn das Europäische Patentamt oder die in Artikel 73 Absatz 1 Buchstabe b genannten Behörden zur Entgegennahme von Schriftstücken nicht geöffnet sind oder Postsendungen am Sitz des Europäischen Patentamts oder der genannten Behörden nicht zuge stellt werden oder die Postzustellung allgemein unterbrochen oder im Anschluß an eine solche Unterbrechung gestört ist;

b) die Mindest- und die Höchstdauer der vom Europäischen Patentamt zu bestimmenden Fristen.

Vgl. Regeln 84 (Berechnung der Fristen), 85 (Dauer der Fristen) und 86 (Verlängerung von Fristen)

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Artikel 120
Weiterbehandlung der europäischen Patentanmeldung
(1) Ist nach Versäumnung einer vom Europäischen Patentamt bestimmten Frist die europäische Patentanmeldung zurückzuweisen oder zurückgewiesen worden oder gibt sie als zurückgenommen, so tritt die vorgese hene Rechtsfolge nicht ein oder wird, falls sie bereits eingetreten ist, rückgängig gemacht, wenn der Anmelder die Weiterbehandlung der Anmeldung beantragt.

(2) Der Antrag ist innerhalb von drei Monaten nach dem Tag, an dem die Entscheidung über die Zurückweisung der Anmeldung zugestellt worden ist, oder innerhalb von zwei Monaten nach dem Tag, an dem die Mitteilung, daß die Anmeldung als zurückgenommen gilt, zugestellt worden ist, schriftlich einzureichen. Die versäumte Handlung ist innerhalb dieser Frist nachzuholen. Der Antrag gilt erst als gestellt, wenn die Weiterbehandlungsgebühr entrichtet worden ist.

(3) Über den Antrag entscheidet die Stelle, die über die versäumte Handlung zu entscheiden hat.

Vgl. Regel 70 (Feststellung eines Rechtsverlusts)

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Artikel 121
Wiedereinsetzung in den vorigen Stand
(1) Der Anmelder oder Patentinhaber, der durch höhere Gewalt verhindert worden ist, gegenüber dem Europäischen Patentamt eine Frist einzuhalten, wird auf Antrag wieder in den vorigen Stand eingesetzt, wenn die Verhinderung nach dem Übereinkommen zur unmittelbaren Folge hat, daß die europäische Patentanmeldung oder ein Antrag zurückgewiesen wird, die Anmeldung als zurückgenommen gilt, das europäische Patent widerrufen wird oder der Verlust eines sonstigen Rechts oder eines Rechtsmittels eintritt.

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Title: The Implementing Regulations shall specify:

(a) the manner of computation of time limits and the conditions under which such time limits may be extended, either because the European Patent Office or the authorities referred to in Article 73, paragraph 1(b), are not open to receive documents or because mail is not delivered in the localities in which the European Patent Office or such authorities are situated or because postal services are generally interrupted or subsequently dis located;

(b) the minima and maxima for time limits to be determined by the European Patent Office.

Cf. Rules 84 (Calculation of time limits), 85 (Duration of time limits) and 86 (Extension of time limits)

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Article 120
Further processing of the European patent application
(1) If the European patent application is to be refused or is refused or deemed to be withdrawn following failure to observe a time limit set by the European Patent Office, the legal consequence provided for shall not ensue or, if it has already ensued, shall be retracted if the applicant requests further processing of the application.

(2) The request shall be filed in writing either within three months of the date on which the decision to refuse the application was notified, or within two months of the date on which the communication that the application is deemed to be withdrawn was notified. The omitted act must be completed within this time limit. The request shall not be deemed to have been filed until the fee for further processing has been paid.

(3) The department competent to decide on the omitted act shall decide on the request.

Cf. Rule 70 (Noting of loss of rights)

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Article 121
Restitutio in integrum
(1) The applicant for or proprietor of a European patent who is prevented by force majeure from observing a time limit vis-à-vis the European Patent Office shall, upon application, have his rights re-established if the non-observance in question has the direct consequence, by virtue of this Convention, of causing the refusal of the European patent application, or of a request, or the deeming of the European patent application to have been withdrawn, or the revocation of the European patent, or the loss of any other right or means of redress.
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
élabités 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
Article 104

45. The Danish delegation wondered whether there was not a contradiction between the last sentence of this Article and Rule 58, paragraph 4, which provides for different rules of procedure in the case of observations by an intervening party as compared with an opponent.

In order to take account of this observation the Conference recorded its agreement to an amendment of the sentence referred to in Article 104, reserving the application of the provisions of the Implementing Regulations. It was also pointed out that Rule 58, paragraph 4, in no way implied that the observations of the intervening party would not be taken into account, but merely exempted the Opposition Division from the obligation of notifying them to the other parties concerned.

Article 120

46. In reply to a question from the Belgian delegation, it was stated that the time limit of three months laid down in paragraph 2 for the case of refusal of the application was adopted by analogy with the period granted for appealing against a decision of the Office (Article 107). In addition, the period of two months laid down in the same paragraph for cases where the application is deemed to be withdrawn was laid down by analogy with the period fixed in Rule 70, paragraph 2, for applying for a decision by the Office.
MINUTES

of the

6th meeting of the Inter-Governmental Conference
for the setting up of a European System
for the Grant of Patents
(Luxembourg, 19 to 30 June 1972)
applications being published within the eighteen-month
time limit. However, in view of the Scandinavian
countries' experience in the matter and the fact that the
fee would have to be fixed at a suitable level, the number
of cases that actually occurred should be relatively small.

34. One delegation wondered if the sanction provided for
in Article 95, paragraph 3, for the case of an applicant
failing to comply with an invitation made by the European
Patent Office pursuant to paragraph 1 was not too severe
in spite of the new measures provided for in Article 120.
It suggested providing that in the event of failure to
comply with the invitation, the European Patent Office
would examine the application on the basis of the file as
it stood.

The Committee did not adopt this proposal, as the only
obligation incumbent upon the applicant was to inform the
European Patent Office whether or not he wished to proceed
further with his application.

Article 121

35. The Committee then examined the question of whether,
as a consequence of the insertion of Article 120, it should
not be provided that the application of Article 121 should
be limited to the time limits laid down in the Convention
and the Implementing Regulations. This solution was
rejected since it seemed necessary to give the applicant the
option to apply for restitutio in integrum, which could be
claimed up to a year from the date on which the time limit
expired, even if he had not requested further processing
under Article 120, which laid down a maximum time limit of
two or three months following the refusal of the application
or the withdrawal fiction. Moreover, the exemption of time
B. DISCUSSION OF THE MATTERS NOT SETTLED DURING THE 11TH
MEETING OF WORKING PARTY I
(Item 2 on the agenda)

(a) System of time limits

Article 120

33. The attention of the Committee was drawn to a
proposal from the Chairman to the effect that upon expiry of
a time limit interested parties should have the
opportunity to obtain restitutio in integrum on filing
a request and paying a fee (BR/CT I/163/72). This
proposal aimed to comply with the wishes expressed by the
interested circles during the second hearing (cf. BR/168/72,
point 15).

The Chairman's proposals, which were based on the
system provided under Scandinavian law (which only provides
for re-establishment of rights in respect of time limits
set by the Patent Office), contained two alternatives:

(i) the first solution only concerned the case of an
application being deemed to be withdrawn following
failure to observe a time limit (case referred to in
Articles 95 and 123);

(ii) the second solution concerned the case of an appli-
cation being refused under Article 90, paragraph 3,
as well as the case referred to under (i) above.

The Committee decided in favour of the second solution.
In so doing it took into account the fact that this
solution might in certain cases prejudice the chances of
MINUTES

of the

second meeting of the Co-ordinating Committee

held in Brussels from 15 to 19 May 1972

1. The second meeting of the Co-ordinating Committee was held in Brussels from 15 to 19 May 1972 with Dr HAERTEL, President of the German Patent Office, in the Chair.

Representatives of the Commission of the European Communities, of the IIB and of WIPO took part as observers. The representatives of the Council of Europe sent their apologies for being unable to attend. The list of those taking part in the meeting is given in Annex I to this report.

2. The Co-ordinating Committee - hereinafter referred to as the Committee - adopted the provisional agenda as contained in BR/174/72, supplemented as follows:
Article 120

Further processing of the European patent application

(1) If the European patent application is to be refused or is refused or deemed to be withdrawn following failure to observe a time limit set by the European Patent Office, the legal consequence provided for shall not ensue or, if it has already ensued, shall be retracted if the applicant requests further processing of the application.

(2) The request shall be filed in writing either within three months of the date on which the decision to refuse the application was notified, or within two months of the date on which the communication that the application is deemed to be withdrawn was notified. The omitted act must be taken within this time limit. The request shall not be deemed to have been filed until the fee for further processing has been paid.

(3) The department competent to decide on the action referred to in paragraph 2 shall decide on the request.
DRAFT CONVENTION
ESTABLISHING A EUROPEAN SYSTEM
FOR THE GRANT OF PATENTS

(Stage reached on 20 May 1972)
would no longer have a strict schedule to which it would have to adhere. Another solution was also indicated by FICPI: the European Patent Office should notify the applicant beforehand of the imminent expiry of a time limit.

CNIPA, IFIA and UNICE seconded the request made by the two above-mentioned organisations that the present rule, whereby delays in certain operations would lead to the application being deemed to have been withdrawn, be more flexibly worded. CNIPA and UNICE stressed that it should be possible to make good delays in operations, possibly against payment of a fine. IFIA was of the opinion that re-establishment of rights should be allowed for reasons other than force majeure.

Article 73 (Priority right)

74. CNIPA wondered whether, in view of the principle set out in Article 137a, paragraph 3, and Article 137b, paragraph 4, that the subject matter of the earlier application may not be extended, it would not be necessary to provide in Article 73, paragraph 1, that the priority of one or more earlier European applications may be claimed for a European patent application.

75. COPRICE raised the question of whether, in the event of the priority of a patent application filed in Great Britain being claimed, the priority date should be the date of filing of the provisional application or that of the complete specification.