Article 53 E

Travaux Préparatoires (EPC 1973)

Comment:

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### Art. 53
MPU
Ausnahmen von der Patentierbarkeit

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Comments

on the first Preliminary Draft Convention
relating to a European patent law
of 14 March 1961

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(Articles 11 to 29)
Re Article 12

Exceptions to patentability

1. Documents:
   (a) Haertel Study, p. 7 et seq
   (b) Gajac Study, French text p. 17 et seq; German text p. 18 et seq
   (c) Draft Nordic patent law, Section 1, paragraph 2

2. Comments:

   The Co-ordinating Committee concluded that the concept of patentability in the European patent law must be as wide as possible (cf. report of the Co-ordinating Committee of 10 November 1960, II. 4).

   Regarding Article 12, the following points in particular need further study:

   (a) If use of the invention is contrary to "ordre public" or morality in only one of the Contracting States, will grant of a European patent be excluded? It remains to be examined whether, in such cases, it would not be sufficient to replace exclusion of patentability by the possibility of withdrawal of protection by the Contracting State concerned.

   (b) The Co-ordinating Committee concluded that European patents should not be granted for inventions relating to new plant varieties. Obviously the national legislatures of the Contracting States remain at liberty to provide for the grant of national patents for new plant varieties.
Even if protection of new plant varieties and processes for producing new plants is excluded under European patent law, European patents will still have to be granted for processes which, while being applicable to plants, are of a technical nature, e.g. processes for producing new plants by irradiation of the plants themselves or the seed with isotopes. It remains to be examined whether that possibility of patent protection must be expressly incorporated in European law or whether it is obvious from general principles.

(c) The comments under (b) also apply mutatis mutandis to the patentability of new animal species.

(d) Paragraph 3 of Article 12 has been inserted merely for the record. Detailed consideration of that provision should be left until the subsequent discussion of the general problem of inventions to be kept secret for defence reasons.

For various reasons the possibility might be considered of making inventions that have to be kept secret for reasons of State ineligible for European patenting and to allow for them only the grant of national patents under the national procedure.

(e) In conformity with the decisions of the Co-ordinating Committee, the text of Article 12 presupposes that the grant of a European patent is not excluded merely because exploitation of the invention is contrary to the laws of one or more Contracting States.
Strasbourg, 13th December 1961

CONFIDENTIAL

EXF/Brev (61) 8
Cr. Fr.

COMMITTEE OF EXPERTS ON PATENTS

Memorandum by the Secretariat on the meeting held at Strasbourg from 7th to 10th November 1961.

I. INTRODUCTION

1. The Committee of Experts on Patents met at Strasbourg from 7th to 10th November 1961 under the Chairmanship of Mr. Grant (United Kingdom). The meeting was attended by experts of all member countries of the Council of Europe. Observers from Spain, the United States and Switzerland, the Deputy Director of the Geneva Combined International Bureaux for the Protection of Intellectual Property, and representatives of the European Economic Community, Euratom and the International Patent Institute of The Hague were also present. A list of participants is attached at Appendix III and a list of working papers at Appendix II.

A 67.245
TH 6991/NLA/AEG
The processes for "the production of plants or animals" referred to in the new text include those which may produce known varieties as well as those which may produce new ones, it being understood that only new varieties can eventually qualify for protection in themselves. Selection or hybridisation of existing varieties may be mentioned as examples of such processes (in the vegetable kingdom). The new text specifies that the processes which may be ineligible for patents are essentially (and no longer purely) biological. It was evident that the exclusion should be extended to cover processes which were fundamentally of this type even if, as a secondary feature, "technical" devices were involved (use of a particular type of instrument in a grafting process, or of a special greenhouse in growing a plant), it being understood that such technical devices may perfectly well be patented themselves, but not the biological process in which they are used.

7. Paragraph 4 of Article 3 (novelty) has also been radically altered, but the amendments to the preceding paragraphs do not affect their substance.

Paragraph 4 concerns protection for the inventor against certain forms of disclosure occurring within a specified period preceding the filing of the patent application.

Sub-paragraph (a) has, in general, retained its original content: disclosures resulting from an "evident abuse" or from the display of an invention in certain strictly defined exhibitions within six months preceding the filing of the
subject of a valid patent. The purely positive wording of the earlier text was indeed incomplete; for it specified that patents could be granted to inventions complying with certain conditions, but did not exclude patents for inventions which did not comply with them.

6. Considerable changes were made in the second paragraph of Article 2 (definition of industrial character), which leaves States free to exclude certain classes of biological invention from patentability.

While the allusion to "plant or animal varieties" remains much as it was, the reference to "processes" is quite differently worded in several respects and thus requires some explanation.

First of all, the new text no longer mentions "horticultural or agricultural (agronomic)" processes. Contracting States, however, still have the right to refuse patents for inventions of this kind. But a very important innovation, which represents a noteworthy concession on the part of some delegations (Netherlands, United Kingdom), is that this right of exclusion now appears only in Article 6, among the "reservations", and thus acquires a merely temporary character in the new text.
COUNCIL OF EUROPE
CONSEIL DE L’EUROPE

Strasbourg, 8th May 1961

Confidential
EXP/Brev (61) 2 revised
Cr. Fr.

COMMITTEE OF EXPERTS ON PATENTS

Draft Report
by the Committee of Experts to the Committee of Ministers
on the meeting held at Strasbourg
from 2nd to 5th May 1961

I. Introduction

1. The Committee of Experts on Patents met at Strasbourg
from 2nd to 5th May 1961 under the Chairmanship of
Mr. Grant (United Kingdom). The meeting was attended by
experts of all member countries of the Council of Europe
except those of Luxembourg, who had been unable to come,
and Austria, who were prevented from coming by an unfortunate
accident. Observers from Spain, the Principality of Monaco
and Switzerland, the Director and Deputy Director of the
Geneva International Bureau for the Protection of Industrial
Property, and representatives of the European Economic
Community, Euratom and the International Patent Institute

62.200
APPENDIX V

Preliminary draft Convention on the unification of certain points of substantive law on patents for inventions

Article 1

In each of the Contracting States, patents shall be granted for any new inventions susceptible of industrial application.

There shall be no obligation to grant patents for inventions, the exploitation of which would be contrary to "ordre public" or morality.

Article 2

Industrial character

The words "susceptible of industrial application" shall be understood in the widest sense.

Nevertheless, the Contracting States shall not be bound to provide for the grant of patents, in respect of new plant or animal species or of purely biological, horticultural or agricultural (agronomic) processes.
Proceedings of the 1st meeting of the Patents Working Party held at Brussels from 17 to 28 April 1961
Article 12
Exceptions to patentability

European patents shall not be granted in respect of:

1. 1st variant:
   - inventions the exploitation of which would be contrary to morality;

2nd variant:
   - inventions the exploitation of which would be contrary:

   (a) to morality,

   (b) to the fundamental principles of "ordre public";
   the mere fact that a legal provision prohibits the
   exploitation of an invention shall not be decisive for
   the application of this Article.

2. - new plant varieties or new animal species and purely biological
   processes for producing them.

3. The question of the exclusion of inventions kept secret for defence
   reasons will be reviewed later.
Proceedings of the 1st meeting of the Patents Working Party held at Brussels from 17 to 20 April 1961
Mr. De Muysèr said that it would be desirable for each Article in the Convention to be accompanied by an official commentary to assist courts in interpreting the Convention uniformly.

The Chairman doubted whether it would be possible to bind courts by such a commentary which could not be ratified as a law but he felt that an explanatory commentary would certainly be of value.

The Working Party then turned to the question of whether they should define the concept of invention in terms of what was excluded in accordance with the Reimer proposal (cf. EXP/Brev. (56) 8 of the Council of Europe, page 8, Section 1, paragraph 2).

The Chairman felt that in practice national case law applied the same principles in this respect and, in any case, Mr. Reimer's proposals did not provide a clear and precise definition.

The Working Party agreed not to lay down in the European Convention any exceptions to patentability as put forward in the Reimer proposal since a negative definition would be just as difficult as a positive definition. Furthermore in the past this point had not given rise to any practical problems under national law. The Working Party did, however, accept a proposal by Mr. De Muysèr that the experts draw up a commentary explaining its decisions.

The Working Party unanimously agreed that no definition of the concept of technical progress be included in the European Convention.

Discussion of Article 12 of the Preliminary Draft

As regards exceptions to patentability, the Co-ordinating Committee, with the approval of the State Secretaries, gave instructions that only inventions contrary to "ordre public" and morality should be excluded. The Chairman proposed that inventions relating to new plant or animal varieties be excluded as well.
After some preliminary discussion, the Working Party agreed to leave aside for the time being the problem of "ordre public" and to consider the following problems in the order given:

- Is it necessary to provide for such exceptions to patentability in the European Convention?

- What is the definition of morality? Is there a "European" definition of morality? Should national definitions be applied or is it necessary to consider what is common to them all?

- Finally, if it is agreed to use national definitions, will an invention be patentable if it is contrary to morality in only one of the Contracting States?

The Chairman adjourned the meeting at 18.00 hrs.
Meeting from 17 to 28 April 1961

Minutes of the meeting on 18 April 1961

The Chairman opened the meeting at 9.30 hrs. and re-opened discussions on Article 12 of the Preliminary Draft Convention.

The Working Party agreed to prescribe that an invention contrary to morality would not be patentable.

The Working Party recognised that there was no European definition of morality. The German delegation and the Chairman preferred to refer to national concepts. But the majority felt that if such a stance were taken, it would give too great a prominence to national concepts in the European Convention. The Working Party unanimously thought that interpretation of the concept of morality should be a matter for the European institutions. It was therefore enough to mention the concept of morality in Article 12, paragraph 1, without giving further details.

The Chairman made two reservations. First he pointed out that the European Office was liable to interpret the concept of morality in a manner at variance with a national concept, a point on which the States were particularly sensitive. Secondly, the Chairman felt that when examining the problem of revocation, the problem of revocation of a European patent in one State on the grounds that the patent was contrary to morality there would have to be considered in greater depth.

As regards "ordre public", the Working Party investigated in what States that concept existed and how it was interpreted. It found that in the Netherlands the concept was particularly wide and the exclusion applied to an invention which
merely contravened a single law. In all other States, apart from Germany, the "ordre public" requirement existed but had no practical importance.

Two solutions were put forward:

(1) making no mention of "ordre public" in the European Convention, or
(2) mentioning "ordre public" but qualifying it with a rider that the mere fact that an invention was contrary to a national law was not sufficient for "ordre public" to be invoked.

As regards the first solution, Mr. Pfanner and Mr. Fressonnet stated that the European Office cannot be empowered to determine national "ordre public". Such a power might infringe principles of national law. It would also be difficult to define the concept properly to avoid any abuse.

Mr. Roscioni thought that the fact that "ordre public" was mentioned in all national laws was a point in favour of the second solution. The concept of "ordre public" should be qualified by a rule similar to that in Article 6 quinquies B. 3. of the Paris Convention for the Protection of Industrial Property.

The Working Party instructed the Drafting Committee to draw up two provisions on the lines of the solutions set out above for Article 12, paragraph 1.

Article 12, paragraph 2, first sub-paragraph, was approved unanimously.

Regarding processes of a technical nature for producing new vegetable or animal species (Article 12, paragraph 2, second sub-paragraph), the Netherlands delegation filed a reservation pending the results of internal discussions. The other delegations were in agreement. Mr. Pfanner stated however that a distinction had to be drawn between production by biological means and production involving external technical factors.

The sub-paragraph was transmitted to the Drafting Committee together with the Netherlands reservation.
During the course of an in-depth discussion of Article 12, paragraph 3, the Working Party considered the following three alternatives:

1. **Alternative advocated by the Chairman**

   To obtain a European patent, the application had always to be filed with a national body to allow national defence interests to determine, within fixed time limits, whether it had to be kept secret.

   One advantage of such national screening was that it would not be necessary to set up within the European Office a committee of experts on national defence; furthermore European officials would not have to decide on secrecy and the final advantage would be that the applicant would no longer run the risk of being guilty of "treachery" under his national law.

   Mr. Roscioni pointed out that such screening would compromise the possibility of establishing common filing.

2. **Alternative advocated by Mr. van Benthem**

   The application for a European patent was filed with the national authorities which suspended proceedings if it had to be kept secret. The national authority would transmit the application to the European Office if the secrecy bar was lifted. This solution could be combined either with simultaneous filing with the national authorities and the European Office, or with filing with the European Office and transmission of a copy to the competent national authority.

   The advantages of this alternative were that:

   1. the European Office would not have to determine whether an invention was to be kept secret; and
   2. the European application would retain its priority if the secrecy requirement was lifted after perhaps a very short interval.
3. **Alternative advocated by Mr. Lannoy**

The application could be filed with the European Office but it was for national legislation to require that inventions possibly concerning national defence be submitted to national authorities. That solution was implicit in the wording of Article 12, paragraph 3, which would be superfluous if the European Office could never decide whether an invention was to be kept secret.

The Working Party decided to leave the question open. But the wording of Article 12, paragraph 3, was retained for the time being to draw attention to the problem.

The Working Party instructed its Chairman to examine the matter in depth and to submit a study on the matter at a later date.

The Chairman explained the approach he intended to adopt. The ideal solution to avoid the above-mentioned drawbacks would be not to allow secret patents to come before the European Office. To that end there should be national screening. It seemed unnecessary for the Convention to require Member States to provide for such a procedure. The problem could be resolved by national legislation.

The meeting was adjourned at 12.30 hrs and resumed at 15.15 hrs.

**Discussion of Article 13 of the Preliminary Draft**

The delegations approved the content of Article 13. However the Netherlands delegation filed a reservation concerning technical processes in agriculture.

The Chairman pointed out that it would be difficult to exclude inventions concerning agriculture from patentability under the European Convention because of the opposition of a single State. If the Netherlands reservation was not
The text put forward contained two variants. The first variant made no reference to "ordre public". The second did, mentioning specifically "fundamental principles of ordre public". That abstract expression had been chosen deliberately to emphasise that an invention contrary to a national law would not necessarily be contrary to "ordre public" within the meaning of the Convention.

The Working Party approved the text on morality and went on to discuss the exception for "ordre public".

The phrase "the fundamental principles of ordre public" was considered tautologous since the concept of "ordre public" was essentially based on fundamental principles.

After discussing that problem, the Working Party endorsed Mr. Fressonnet's proposal incorporating the following new wording for sub-paragraph (b) of the second variant:

"(to the fundamental principles) of ordre public; the fact that a legal provision prohibits the exploitation of an invention shall not be decisive for the application of this Article".

Regarding point 2 of the second variant, Mr. De Reuse criticised the term "les nouveautés végétales"; he preferred "les nouvelles obtentions végétales". He thought that the term "nouvelles espèces animales" would not cover any new animal breeds that were produced.

The Working Party decided to wait and see what terminology would shortly be adopted in Paris at the International Conference on the Protection of New Varieties of Plants before changing those terms.
It further agreed to submit the whole of point 2 to specialists to check that the terms used were in accordance with the wishes of the drafters, particularly regarding the meaning of the words "purely biological processes".

After discussing the second paragraph of point 2 of the second variant, the Working Party decided to delete it and incorporate it in the first paragraph which would be worded as follows:

2. "New plant varieties or new animal species and purely biological processes for producing them."

The German text was to be adapted to the French text with the word "Erfindungen" (inventions) in particular being deleted.

The new version of Article 12 was adopted subject to the opinion of the experts on paragraph 2 of the second variant.

The meeting was adjourned at 12.30 hrs. and resumed at 15.00 hrs.

Article 13

Mr. De Muyster and Mr. De Reuse asked whether the reference to the manufacture or use of the subject-matter of an invention was enough to cover all possible applications.

The Chairman, supported by Mr. Fressonnet, explained that the subject-matter of an invention could also be a new application of a known substance obtained by a process already used. The implementation of a new application constituted a use of the subject-matter of the invention. He therefore felt that the wording of Article 13 covered all possible eventualities. A corresponding explanation would be given in the report sent with the proposed texts to the Co-ordinating Committee.

The new text of Article 13 was adopted.
Bonn, 14 March 1961

First Preliminary Draft
Convention relating to a European Patent Law
Articles 11 to 29
Article 12

Exceptions to patentability

European patents shall not be granted in respect of:

1. Inventions the exploitation of which would be contrary to morality or "ordre public";

2. Inventions relating to the production of or a process for producing a new plant variety or a new animal species.

This provision shall not apply to processes of a technical nature.

3. Inventions which must be kept secret for reasons relating to the defence of one of the Contracting States.
Proceedings of the 5th meeting of the Patents Working Party held at Brussels from 2 to 18 April 1962
Section 2

The Chairman pointed out that the wording of Articles 11 to 18 had strongly influenced decisions taken by the Council of Europe on a draft convention on the harmonisation of patent law. They should therefore not alter the wording of those articles too much as otherwise they would have to inform the Council of Europe, especially since the text agreed at Strasbourg had been submitted to the Governments.

The Working Party decided to endeavour not to make any changes deviating from the text agreed in the Council of Europe.

Article 11

Article 11 was passed to the Drafting Committee.

Article 12

The Chairman was in favour of the second variant. The Working Party agreed. The first variant was deleted.

Mr. Fressonnet pointed out that the French draft concerned publication of an invention contrary to morality.

The Chairman raised no objection to that addition. The text of Article 12 would therefore refer to exploitation or publication.

Regarding the term "fundamental principles of ordre public", Mr. Fressonnet, supported by Mr. van Benthem, explained that that expression was intended
To prevent the Office from granting patents for inventions that were clearly contrary to "ordre public" but without requiring the Office to know in detail all the provisions of national law on "ordre public".

The Working Party decided to delete the brackets around the term "to the fundamental principles of".

The second variant of Article 12 was referred to the Drafting Committee.

The meeting adjourned at 12.45 hrs. and resumed at 15.00 hrs.

Continuation of the second reading of Article 12

Turning to sub-paragraph 2, the Working Party decided to adopt the wording used in Article 2(2) of the draft Council of Europe Convention.

The Chairman then proposed that sub-paragraph 3 be deleted but that there be incorporated in Article 62 an exception from the national authorities' obligation to transmit to the European Patent Office European applications filed with them if the subject-matter of the application had to be kept secret for national defence reasons.

The Working Party adopted that proposal and instructed the Drafting Committee to determine whether Contracting States should be obliged to convert any European application for which the patent had to be kept secret into a national application with the same priority. The Drafting Committee would report to the Working Party at the subsequent meeting in Munich.

Article 13

The Netherlands delegation first withdrew its reservation about Article 13.

After specifically discussing pharmaceutical products, the Working Party concluded that each Contracting State could cause compulsory licences to be granted for a European patent protecting such a product if public interest so required. Such licences would be limited to the territory of the State concerned. In that way
VE MAY 1962
PRELIMINARY DRAFT CONVENTION
RELATING TO A
EUROPEAN PATENT LAW
Article 10 (12)
Exceptions to patentability

European patents shall not be granted in respect of:

(a) inventions the publication or exploitation of which would be contrary to morality or to the fundamental principles of "ordre public", provided that this Article shall not apply merely because the exploitation of the invention is prohibited;

(b) plant or animal varieties or essentially biological processes for the production of plants or animals.
Proceedings of the 6th meeting of the Patents Working Party held at Munich from 13 to 23 June 1962
Article 9(11)

Article 9 was adopted.

Article 10(12)

Mr. van Benthem pointed out that the insertion of the word "publication" in sub-paragraph (a) was in accordance with a French proposal that had been approved by the Working Party. The other amendments were purely linguistic. Sub-paragraph (b) corresponded exactly to the text of the Council of Europe Draft.

Mr. van Benthem reported that, in the Netherlands, the text of the Strasbourg Draft had been submitted to the interested circles who had asked to have inserted therein a provision such as that in the European Convention. It seemed preferable to leave the question of micro-organisms raised by sub-paragraph (b) to the courts without laying down any express rules.

The Chairman hoped that all the delegations of the Six EEC countries would support
the Netherlands proposal in Strasbourg for the incorporation of the European Convention provision in the Council of Europe Draft. He also thought that the question of micro-organisms should be left to the courts since there was a risk of any express rule distorting the sense of the provision by introducing an a contrario argument.

Replying to Mr. Briganti, Mr. van Benthem stated that inventions with national defence implications were now covered by Article 67 (62).

Article 10 was approved.

Article 11(14)

The discussion was deferred until the following week pending a proposal to be made by the German delegation.

Article 12(15)

Mr. van Benthem explained that the Drafting Committee had wondered whether complete protection should not be afforded against unauthorised disclosure. The Netherlands delegation could now accept the current text in view of the fact that priority based on exhibitions would require a check that the subject-matter of the subsequent application was identical with the matter exhibited which would entail considerable problems.

Mr. Sünner and Mr. van Benthem wondered about the significance of the note at the end of Article 12.

The Chairman informed them that it merely meant that the Working Party would have to discuss a new solution for the European Convention if the Council of Europe Draft came to nothing. But he thought that the prospects for the Strasbourg Draft could be viewed with some optimism.

With a view to co-ordinating the six delegations from the EEC countries for the
Article 10(12)

Mr. Fressonnet proposed that a note be inserted in this article that the special question of patents for pharmaceutical products, which also fell under the jurisdiction of Ministers of Health, would be considered later.

Mr. van Benthem said that such a note would oblige his delegation to ask for another concerning agricultural products.

The Chairman pointed out that any possible new exceptions to patentability would call the whole Preliminary Draft Convention in question again.

In the light of those factors, Mr. Fressonnet withdrew his request and agreed to accept an indication in the minutes that the French delegation wanted the question of whether patents for pharmaceutical products should be subject to specific rules to be examined later.

Article 11(14)

Regarding paragraph 3, Mr. Pfanner explained to the Working Party the German delegation’s new proposal concerning prior national rights (Doc. Bonn, 6 June 1962). He first reminded the Working Party that at its 5th meeting it had adopted the solution appearing in Articles 11(14) and 19(20a) of the Preliminary Draft. Contrary to what had been provided previously, prior national rights did not form part of the state of the art within the meaning of Article 11(14), paragraph 3. Furthermore European patents had no effect in Contracting States in which prior national rights existed.

The drawback of that solution was that it breached the territorial unity of the European patent. The basis for the new German proposal was that at the 5th meeting...
Proceedings of the 10th meeting of the Patents Working Party held at Brussels from 16 to 27 September 1963

MINUTES
the corresponding article of the Strasbourg draft, the wording of which seemed better.

Article 10

Mr. Froschmaier set out the views of the international associations which wanted sub-paragraph (b) to provide that the exception to patentability in that sub-paragraph should not apply to microbiological processes and the products thereof in accordance with the Strasbourg draft. He then read a note from UNICE requesting clarification at the Diplomatic Conference that the Convention allowed all conceivable objects to be patented, even those that were not eligible for national protection. He added that the United Kingdom shared the views of the international associations on microbiological processes and that Austria wanted a number of additional exceptions to patentability.

After a short discussion, the Working Party accepted the proposal on microbiological processes and referred the text in question to the Drafting Committee for harmonisation with the wording of the Strasbourg draft. UNICE's request was not approved as it was clear that the provisions in the Convention on patentability were not the same as national provisions.

Article 11

Mr. Froschmaier read the views of the international associations on paragraph 1. The International Association for the Protection of Industrial Property (AIPPI) and UNICE proposed the following wording: "An invention shall not be considered as new if it forms part of the state of the art".

The United Kingdom raised the problem of multiple priorities.

Mr. Pfanner then explained the provisions of the Scandinavian draft on novelty.

The Chairman thought that the UNICE proposal should not be adopted. The drawback was that it was expressed as a negative. It seemed to shift the burden of
Translation of a Draft Convention relating to a European Patent Law

LONDON
HER MAJESTY'S STATIONERY OFFICE
FIVE SHILLINGS NET
Translation of a Draft Convention relating to a European Patent Law

This document is an unofficial English translation of the official texts in French and German. The draft Convention was prepared by a committee of representatives of the Six Countries of the European Economic Community. The assistance of the secretariat of that committee in the preparation of this translation is gratefully acknowledged.

LONDON
HER MAJESTY'S STATIONERY OFFICE
1962
PART II—PATENT LAW

CHAPTER I—PATENTABILITY

Article 9. Patentable inventions
European patents shall be granted for any inventions which are susceptible of industrial application, which are new and which involve an inventive step.

Article 10. Exceptions to patentability
European patents shall not be granted in respect of:
(a) inventions the publication or exploitation of which would be contrary to 'ordre public' or morality (the mere prohibition of the exploitation of the invention not making it so contrary);
(b) plant or animal varieties or essentially biological processes for the production of plants or animals.

Article 11. Novelty
(1) An invention shall be considered to be new if it does not form part of the state of the art.

(2) The state of the art shall be held to comprise everything made available to the public by means of a written or oral description, by use, or in any other way, before the date of filing the application for a European patent.

(3) Additionally, the contents of European patent specifications published on or after the date referred to in paragraph 2, shall be considered as comprised in the state of the art, provided that such patents have an earlier priority date. If several applications for European patents have been filed on the same day, the order in which they were filed shall determine how this paragraph is to be applied.

Article 12. Non-prejudicial disclosures
A disclosure of the invention within the meaning of Article 11 shall not be taken into consideration if it occurred within six months preceding the application for a European patent and if it was in consequence of:
(a) an evident abuse in relation to the applicant or his predecessor in title;
(b) the fact that the applicant or his predecessor in title has displayed the invention at official, or officially recognised, exhibitions falling within the terms of the Convention relating to international exhibitions signed at Paris on 22nd November, 1928, and revised on 10th May, 1948.

Note:
This article reproduces exactly one of the provisions in the draft Convention for the unification of patent laws drawn up under the aegis of the Council of Europe.
Amendments to the Preliminary Draft Convention relating to a European Patent Law

(Articles 1 to 175)

This document replaces document 11.155/IV/64-E of 2 October 1964 (Articles 1 to 103)
Article 10

Exceptions to patentability

European patents shall not be granted in respect of:

(a) inventions the publication or exploitation of which would be contrary to "ordre public" or morality, provided that the exploitation shall not be deemed to be so contrary merely because it is prohibited by laws or regulations in some or all of the Contracting States;

(b) plant or animal varieties or essentially biological processes for the production of plants or animals; this provision does not apply to microbiological processes or the products thereof.
Proceedings of the 12th meeting
of the Patents Working Party
held at Brussels from 26 February to 6 March 1964

MINUTES
Article 76

Paragraph 2(a) provided that the examining section should examine whether the subject-matter of an application was, by its nature, obviously not an invention.

Mr. van Benthem observed that the interested circles in the Netherlands wanted an express reference in that provision to Article 10 ruling out from patentability inventions contrary to "ordre public" and plant varieties. UNION endorsed that view.

Mr. van Benthem rectified his statement. The interested circles in the Netherlands felt that the text of the paragraph was not sufficiently clear and that it might be thought to refer to the application of Article 10 whereas it in fact referred to Article 9.

The Chairman replied that reference to Article 9 was also undesirable. That Article did not define the concept of invention but gave a list of criteria for inventions.

After further discussion, the Chairman instructed the Drafting Committee to review the wording of sub-paragraph (a) to avoid any ambiguity and to make it clear that the aim of the provision was to rule out any applications obviously not involving inventions, e.g. applications relating to methods of calculation. Mr. van Benthem raised the question of whether a therapeutic method should be regarded as an invention.

After some discussion, the Chairman recorded that therapeutic methods were not patentable under the national laws of the six Member States and no delegation on the Working Party wanted European law to depart from that principle.
The Working Party then went on to discuss the proposal from the German and Netherlands delegations that the Convention include, in Article 9, a list, of examples of what would not be considered to be inventions.

Following that discussion the Chairman asked those two delegations to draft a provision incorporating their proposal. The text would be discussed first by the Drafting Committee and would then be considered by the Working Party at its next meeting.

Mr. Fressonnet further pointed out that another possibility would be to include such a list of examples in the general report at the Diplomatic Conference when comments would be drawn up on the fundamental principles of the Convention, including Article 9.

The Working Party then went on to analyse sub-paragraph 2(b) which provided that the examining section would examine whether the invention was not excluded from patentability under Article 10.

Mr. van Benthem wanted the word "obviously" to be included in that provision. In some cases it would be very difficult to decide whether a process was essentially biological.

Mr. Pfanner said that such cases would be fairly rare and could be left to the examining sections. He went on to point out that the aim of Article 76 was that during the first examination of the application the examiner should not consider the question of inventive level. That did not prevent him from examining inventions to see whether or not they involved biological processes.

The Chairman shared Mr. Pfanner's view and said that the advantage of the method chosen in sub-paragraph (b) was that it would avoid the appeals which would inevitably be filed if, as Mr. van Benthem suggested, the examiner did not examine in depth whether or not a biological process was involved.
MINUTES

of the meeting of Working Party I
(Luxembourg, 8 - 11 July 1969)

I

1. The first working meeting of Working Party I, set up by the Conference, was held at Luxembourg from Tuesday 8 to Friday 11 July 1969.

In accordance with the decision taken by the Working Party at its inaugural meeting held at Brussels on 21 May 1969, the Chair was taken by Dr. HAERTEL, President of the German Patent Office.

In addition to the Commission of the European Communities, the following inter-governmental organisations, which had been invited to take part in the work of the Working Party, were represented: BIRPI, the General Secretariat of the Council of Europe and the International Patent Institute (1).

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(1) See annexed list of participants in the meeting of the Working Party.
However, the Working Party considered that this provision should form part of the Convention, as it was a substantial provision fixing the conditions for the grant of patents.

For the drafting of paragraph 2, it based itself on rule No. 39 of the PCT plan.

The Working Party points out that the text of paragraph 2 does not prejudice the question of whether computer programmes may be the subject of a European patent.

**Article 10 - Exceptions to patentability**

23. The Working Party points out that this Article corresponds to Article 2 of the 1963 Strasbourg Convention.

**Article 11 - Novelty**

24. Paragraphs 1 and 2 correspond to paragraphs 1 and 2 of Article 4 of the 1963 Strasbourg Convention.

25. As regards paragraph 3, the Working Party was faced with two possible solutions to the problem of knowing what effects the existence of an application for a European patent has on a later application designating the same Contracting States.
SECOND PRELIMINARY DRAFT OF A CONVENTION
ESTABLISHING A EUROPEAN SYSTEM FOR THE GRANT OF PATENTS

with
FIRST PRELIMINARY DRAFT OF THE IMPLEMENTING REGULATIONS TO THE
CONVENTION ESTABLISHING A EUROPEAN SYSTEM FOR THE GRANT
OF PATENTS

and
FIRST PRELIMINARY DRAFT OF THE RULES RELATING TO FEES

SECOND AVANT-PROJET DE CONVENTION INSTITUANT UN
SYSTÈME EUROPÉEN DE DÉLIVRANCE DE BREVETS

ainsi que
PREMIER AVANT-PROJET DE RÈGLEMENT D'EXÉCUTION DE LA CONVENTION
INSTITUANT UN SYSTÈME EUROPÉEN DE DÉLIVRANCE DE BREVETS

et
PREMIER AVANT-PROJET DE RÈGLEMENT RELATIF AUX TAXES

— 1971 —
ZWEITER TEIL
MATERIELLES PATENTRECHT

KAPITEL 1
Patentierbarkeit

Artikel 9

Patentfähige Erfindungen

(1) Europäische Patente werden für Erfindungen erteilt, die neu sind, auf einer erfinderischen Tätigkeit beruhen und gewerblich anwendbar sind.

(2) Als Erfindung im Sinne des Absatzes 1 gelten insbesondere nicht

a) wissenschaftliche und mathematische Theorien;

b) die bloße Entdeckung in der Natur vorkommender Stoffe;

c) rein ästhetische Formschöpfungen;

d) Pläne, Regeln und Verfahren für eine geschäftliche Tätigkeit, für rein gedankliche Tätigkeiten oder für Spiele;

e) Verfahren zur chirurgischen oder therapeutischen Behandlung des menschlichen [oder tierischen] Körpers sowie Diagnostizierverfahren;

[f] die bloße Wiedergabe von Informationen;

[g] Computer-Programme.

PART II
SUBSTANTIVE PATENT LAW

CHAPTER 1
Patentability

Article 9

Patentable inventions

(1) European patents shall be granted for any inventions which are susceptible of industrial application, which are new and which involve an inventive step.

(2) Inventions within the meaning of paragraph 1 shall in particular exclude:

a) scientific and mathematical theories;

b) the mere discovery of materials occurring in nature;

c) purely aesthetic creations;

d) schemes, rules or methods of doing business, performing purely mental acts or playing games;

e) methods for treatment of the human [or animal] body by surgery or therapy, as well as diagnostic methods;

[f] mere presentations of information;

[g] computer programmes.

Artikel 10

Ausnahmen von Patentierbarkeit

Europäische Patente werden nicht erteilt:

a) für Erfindungen, deren Veröffentlichung oder Verwertung gegen die öffentliche Ordnung oder die guten Sitten verstoßen würde; ein solcher Verstoß kann nicht allein aus der Tatsache hergeleitet werden, daß die Verwertung der Erfindung in allen oder einem Teil der Vertragsstaaten durch Gesetz oder Verwaltungsvorschrift verboten ist;

b) für Pflanzenorien oder Tiertaten sowie für im wesentlichen biologische Verfahren zur Züchtung von Pflanzen oder Tieren; diese Vorschrift ist auf mikrobiologische Verfahren und auf die mit Hilfe dieser Verfahren gewonnenen Erzeugnisse nicht anzuwenden.

Article 10

Exceptions to patentability

European patents shall not be granted in respect of:

(a) inventions the publication or exploitation of which would be contrary to "ordre public" or morality, provided that the exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States;

(b) plant or animal varieties or essentially biological processes for the production of plants or animals; this provision does not apply to microbiological processes or the products thereof.
Article 8
Accords particuliers
Tout groupe d’États contractants peut disposer par un accord particulier que les brevets européens, délivrés pour ces États, auront un caractère unitaire sur l’ensemble de leurs territoires, qu’ils seront soumis aux dispositions de cet accord particulier et que de tels brevets ne pourront être délivrés pour une partie seulement de ces États.

Article 8a
Modèles d’utilité et certificats d’utilité nationaux
Les articles 6, 61 paragraphe 2, 76, 124 à 127, 134 et 150 sont applicables aux modèles d’utilité ou aux certificats d’utilité, ainsi qu’aux demandes correspondantes, dans les États contractants dont la législation prévoit de tels titres de protection.
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)
Finally, the Conference instructed Working Party I to examine the possibility of reproducing the contents of sub-paragraph (g) in a more general wording of sub-paragraph (d).

The Netherlands delegation reserved the right to submit a proposal at the next Meeting of the Conference, aimed at providing the Administrative Council with a specific power enabling it to delete computer programmes from the list of non-patentable items.

Article 10 (Exceptions to patentability)

37. One delegation, while taking note of the opinion expressed by Working Party I (1), drew attention to difficulties which, in its view, could arise from the exclusion of plant varieties in sub-paragraph (b) of this Article. Article 10 could, in fact, be interpreted as listing instances of inventions excluded from patentability, whereas items not constituting inventions within the meaning of the Paris Union Convention would be provided for in Article 9. This would be contrary to the majority opinion expressed at the conclusion of the Paris Convention concerning new plant varieties, according to which plant varieties were not inventions.

(1) Cf. minutes of the 9th meeting of Working Party I, ER/135/71, point 98.
M I N U T E S

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)
provide for simultaneous protection, and to do so without prejudice to whatever solutions might be considered necessary for the Community patent.

II. IPIP stated, in connection with the implementation of Article 6, that if a national judge were to revoke a national patent for reasons other than those set out in Article 133, it should not be possible to revoke the parallel European patent for the same reasons.

Article 9 (Patentable inventions) and Article 10 (Exceptions to patentability)

11. Some organisations (CCPRICE, UNEPA and UNICE) requested that Article 9, paragraph 2, be deleted. In their opinion, jurisprudence should be allowed all the flexibility and freedom necessary for interpreting the definition given in paragraph 1 of patentable inventions. The fact that paragraph 2 is based on Rules 39 and 67 of the Regulations under the PCT did not justify retention of this provision, as the aim of the PCT provision was not to define what should be excluded from patentability but only to lay down the cases in which the searching or preliminary examination of an international application would not be compulsory.

12. CEIF commented upon the relationship between Article 9, paragraph 2, and Article 10. Article 9, paragraph 2, listed, in addition to intrinsically unpatentable subject-matter (under (a), (b), (c) and (f)), subject-matter which might be considered as inventions in certain circumstances, as demonstrated in the national laws of certain countries,
and which, if excluded from patentability, would be excluded for reasons of expediency rather than logic (under (d), (e) and (g)). If their content were retained as it stood, these sub-paragraphs would be better placed in Article 10.

13. **CNIPA** stated that it was concerned about the fact that the list set out in Article 9, paragraph 2, consisted merely of examples. Too wide an interpretation of this provision by European Patent Office examiners might make the Convention less liberal than certain national laws.

14. Several organisations (CEIF, CNIPA, CFCCI, FICPI, IFIA and, in the event of the proposal stated under point 11 above not being adopted, COPRICE and UNICE) asked that the content of Article 9, paragraph 2, be transferred to the Implementing Regulations. This would allow the matter to be treated with greater flexibility, and the Administrative Council would thus be able to amend by a three-quarters majority the list of non-patentable subject-matter if this became desirable in the light of future developments. It was pointed out in addition that under the PCT, Rules 39 and 67 were also to be found in the Regulations.

15. In connection with sub-paragraphs (a), (d), (f) and (g) of Article 9, paragraph 2, some organisations (CEIF, EIIRL, and UNICE) suggested that their contents should be placed in a generally worded provision. This solution would in particular make it possible to settle the problems raised by the reference to computer programs in (g) (cf. also point 19 below in this connection).
16. **CEIF** proposed that sub-paragraphs (a) and (b) of Article 9, paragraph 2, should be combined to provide for the exclusion of theories, discoveries and scientific methods.

In addition, certain organisations, (**CEIF, COPRICE, CPCCI** and **UNICE**) asked that there should be a provision in the Implementing Regulations interpreting sub-paragraph (b) (for CEIF, such a provision would interpret the new sub-paragraph (a) combining the present sub-paragraphs (a) and (b)) as meaning that forms and states as yet unknown of materials occurring in nature should not be excluded from patentability. Concern was expressed with regard to the patentability of new antibiotics, as the discovery of these could in certain cases be interpreted as a mere discovery of materials occurring in nature.

**UNEP** also pointed out that the wording of Article 10, sub-paragraph (b), ("this provision does not apply to microbiological processes or the products thereof") could facilitate such an interpretation of Article 9, paragraph 2(b).

17. With regard to **sub-paragraph (e)** of Article 9, paragraph 2, a number of organisations (**IAPIP, ICC, CEIF, COPRICE, CNIPA** and **UNICE**) were in favour of deleting the words "or animal" on the grounds of the difficulty of distinguishing between strictly veterinary methods of treatment and other methods, concerning stock-rearing or sterilisation of certain species of insects, for example, which would be clearly of a more industrial nature.

A number of organisations (**IAPIP, CEIF, CPCCI, UNICE** and **EIRMA**) also proposed that new therapeutical applications

BR/169 e/72 lor/KM/go
of known substances should not be excluded from patentability, and that a provision interpreting sub-paragraph (e) to this effect should perhaps be included in the Implementing Regulations. UNICE and CEIF listed examples illustrating the importance, for the development of medicine and for public health in general, of the rules adopted encouraging research into new therapeutical applications of known substances. Without such incentive, the pharmaceutical industry might well concentrate its research efforts on entirely new products or compounds, which it would be very costly to perfect.

Two organisations (CNIPA and UNEPA) expressed reservations on a straightforward exclusion of diagnostic methods from patentability. Developments in technology had been seen with regard to diagnostic methods which were not of a specifically medical nature (for example, use of equipment to determine the blood group of a patient).

Two other organisations (UNICE and CEIF) urged that it should be provided that methods for treatment of the human body by therapy should be excluded from patentability only in the case of physical treatment.

18. With regard to sub-paragraph (g) of Article 9, paragraph 2, all the organisations which spoke requested that it be deleted. It was pointed out that the area of computer programs was one that was developing rapidly. The relevant courts of certain countries seemed to be moving in the direction of considering computer programs patentable under certain conditions. It would therefore be premature to provide for their straightforward exclusion from patentability;
it would be more appropriate to leave it to the development of practice at the European Patent Office and in the national courts to determine the principles to be applied in this field.

CNIPA in particular urged that if computer programs were nevertheless to be excluded, it should at least be understood that items which were traditionally patentable should not be excluded merely because they contained computer programs.

Article 11 (Novelty)

19. A majority of the organisations (CEIF, COPRICE, CPCCI, EIRMA, FICPI, IFIA, UNIPA and UNICE) favoured the "prior claim approach" being introduced into the Convention. It was pointed out in particular that this approach would eliminate the problem of "self-collision"; it had been applied with satisfactory results for a number of years in several States and only recently had been adopted by French law; it could also operate within a system of liberal interpretation of the claims, as could be seen from experience in Germany. The possibility of a delay in determining the protection conferred was not a substantial drawback in a system under which there was practically no deferred examination. To reduce this possibility, EIRMA suggested that any prior claims should be assumed to be valid, without prejudice to any legal action challenging such an assumption after the grant of the patent.

These organisations also drew attention to the disadvantages of the "whole contents approach", the most serious of these being the possibility of self-collision,
INTER-GOVERNMENTAL CONFERENCE  
FOR THE SETTLING UP OF A EUROPEAN  
SYSTEM FOR THE GRANT OF PATENTS  

Brussels, 17 November 1971  
BR/135/71  

Secretariat  

MINUTES  

of the 9th meeting of Working Party I  

held from 12 to 22 October 1971, in Luxembourg  

1. Working Party I held its 9th meeting in Luxembourg from 12 to 22 October 1971, with Dr. Haertel, President of the German Patent Office, in the Chair.  

Representatives from the IIB and WIPO took part in the meeting as observers. The representatives of the Commission of the European Communities and the Council of Europe sent their apologies for being unable to attend. See Annex I to these minutes for the list of those present at the 9th meeting.  

2. Working Party I adopted the provisional agenda as contained in BR/GT I/120/71 and attached to this document as Annex II.  

3. The Drafting Committee of Working Party I met first under the chairmanship of Mr. van BENTHEM, President of the Octrooiraad; and after his departure, that of Mr. LABRY, Embassy Counsellor at the Ministry of Foreign Affairs (France).  

BR/135 e/71 prk  
(Unrevised translation)
Article 10 - (Exceptions to patentability)

98. The Working Party considered the question raised by the Conference, whether Article 10(b) was compatible with the Paris Convention for the Protection of New Varieties of Plants. The representative of WIPO informed the Working Party that according to the Plant Variety Union there was no incompatibility between the two Conventions.

99. The United Kingdom delegation proposed that sub-paragraph (b) should be amended to read simply "plant or animal varieties" on the grounds that the meaning of "essentially biological processes" was not clear and it could see no reason why any biological processes other than for the treatment of the human body should be specifically excluded by the Convention. This proposal found no support from any other delegation.

The relationship between Article 9(2) and Article 10

100. Two delegations proposed that sub-paragraph (b) of Article 10 should be inserted in Article 9(2). As a matter of fact, as far as the applicant is concerned, the two sets of exclusions enter into the same category.

On the other hand some delegations drew a distinction between 9(2) and 10(b) in that Article 9(2) dealt with non-inventions while 10(b) dealt with inventions which were specifically excluded. It was also considered desirous to follow the wording of the Strasbourg Convention.

Finally the proposal was not accepted.

BR/135 e/71 prk
MINUTES
of the
4th Meeting of the Inter-Governmental Conference
for the setting up of a European System
for the Grant of Patents
(Luxembourg, 20 to 28 April 1971)
PART II
SUBSTANTIVE PATENT LAW
CHAPTER I
Patentability

Article 9 (Patentable inventions)

Article 10 (Exceptions to patentability)

16. The Conference instructed Working Party I to re-examine paragraph 2 of Article 9 and in particular the words in brackets, bearing in mind the opinions expressed by the interested circles. Working Party I would also study the relation between this paragraph, which lists what is not to be regarded as an invention, and Article 10, which defines exceptions to patentability.

In particular it was asked whether Article 10, sub-paragraph (b), was compatible with the provision on the protection of plant varieties in the Strasbourg Convention. According to some delegations, the present drafting of Article 10 would attribute the character of an invention to plant or animal varieties, even though they were unpatentable; another delegation was of the opinion that such a conclusion could not be drawn from the text of Article 10.
INTER-GOVERNMENTAL CONFERENCE  
FOR THE SETTING UP OF A EUROPEAN  
SYSTEM FOR THE GRANT OF PATENTS  

- Secretariat -  

BRUSSELS, 15th February 1971  
BR/88/71  

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

- Stage reached on 29 January 1971 -  

Deutsches Patentamt  
Eing. 8. Mrz. 1971  
Vtr. 1  
Sachgebiet: 55/71  
Denkm. EPR.
Article 10

Exceptions to patentability

European patents shall not be granted in respect of:

(a) inventions the publication or exploitation of which would be contrary to "ordre public" or morality, provided that the exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States;

(b) plant or animal varieties or essentially biological processes for the production of plants or animals; this provision does not apply to microbiological processes or the products thereof.

Note to Article 10:

Article 10 corresponds to Article 2 of the Strasbourg Convention.

BR/88 e/71 gc
ENTWURF EINES ÜBEREINKOMMENS
ÜBER EIN EUROPÄISCHES PATENTERTeilungsVERFAHREN

DRAFT CONVENTION
ESTABLISHING A EUROPEAN SYSTEM FOR THE GRANT OF PATENTS

PROJET DE CONVENTION
INSTITUANT UN SYSTÈME EUROPÉEN DE DÉLIVRANCE DE BREVETS
ZWEITER TEIL
MATERIELLES PATENTRECHT

Kapitel I
Patentierbarkeit

Artikel 50
Patentfähige Erfindungen

(1) Europäische Patente werden für Erfindungen erteilt, die neu sind, auf einer erforderlichen Tätigkeit beruhen und gewerblich anwendbar sind.

(2) Als Erfindungen im Sinn des Absatzes 1 werden insbesondere nicht angesehen:

a) Entdeckungen als solche sowie wissenschaftliche Theorien und mathematische Methoden;

b) rein ästhetische Formschöpfungen;

c) Pläne, Regeln und Verfahren für rein gedankliche Tätigkeiten, für Spiele oder für geschäftliche Tätigkeiten sowie Programme für Datenverarbeitungsanlagen;

d) Verfahren zur chirurgischen oder therapeutischen Behandlung des menschlichen oder tierischen Körpers und Diagnostizierverfahren, die am menschlichen oder tierischen Körper vorgenommen werden;

e) die bloße Wiedergabe von Informationen.

(3) Absatz 2 Buchstabe d steht der Patentierbarkeit eines Stoffes oder Stoffgemisches zur Anwendung in einem in der genannten Vorschrift bezeichneten Verfahren nicht entgegen.

Artikel 51
Ausnahmen von der Patentierbarkeit

Europäische Patente werden nicht erteilt für:

a) Erfindungen, deren Veröffentlichung oder Verwertung gegen die öffentliche Ordnung oder die guten Sitten verstoßen würde; ein solcher Verstoß kann nicht allein aus der Tatsache hergeleitet werden, daß die Verwertung der Erfindung in allen oder einem Teil der Vertragsstaaten durch Gesetz oder Verwaltungsvorschrift verboten ist;

b) Pflanzensorten oder Tierarten sowie für im wesentlichen biologische Verfahren zur Züchtung von Pflanzen oder Tieren; diese Vorschrift ist auf mikrobiologische Verfahren und auf die mit Hilfe dieser Verfahren gewonnenen Erzeugnisse nicht anzuwenden.

PART II
SUBSTANTIVE PATENT LAW

Chapter I
Patentability

Article 50
Patentable inventions

(1) European patents shall be granted for any inventions which are susceptible of industrial application, which are new and which involve an inventive step.

(2) The following in particular shall not be regarded as inventions within the meaning of paragraph 1:

a) discoveries as such, scientific theories and mathematical methods;

b) purely aesthetic creations;

c) schemes, rules and methods for performing purely mental acts, playing games or doing business, and programs for computers;

d) methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practised on the human or animal body;

e) mere presentations of information.

(3) The provision of paragraph 2(d) does not exclude the patentability of a substance or composition for use in a method referred to in that provision.

Artikel 52
Neuheit

(1) Eine Erfindung gilt als neu, wenn sie nicht zum Stand der Technik gehört.

Article 52
Novelty

(1) An invention shall be considered to be new if it does not form part of the state of the art.
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
délarorés 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
MUNICH DIPLOMATIC CONFERENCE
FOR THE SETTING UP OF A EUROPEAN SYSTEM FOR THE GRANT OF PATENTS

- 1973 -

Munich, 10 September 1973

M/54/I/II/III
Origina l: German

CONFERENCE DOCUMENT

Drawn up by: The Swiss delegation

Subject: Proposals for amendments to the draft texts
Article 51 sub-paragraph (a) and Rule 34, paragraph 2

Proposals: 1. Deletion of the words "publication or" in Article 51 sub-paragraph (a).

2. Following possible amendment to paragraph 2 of Rule 34:
   1st sentence: "..., the European Patent Office shall omit it when publishing the application."
   2nd sentence: Deletion of the end as from "and shall furnish, upon request, ".

Reason: According to the present rules it does not seem possible to refuse or annul the grant of a European patent because the publication of the invention "would be contrary to "ordre public" or morality". Generally this is only noted after the application has already been published (Articles 88, 90, 92); the whole content of the application is therefore published as a rule (Article 52, paragraph 2) and this publication may no longer be withdrawn; consequently the ground for revocation that the publication would be contrary to "ordre public" or morality seems to be rather illusory. This is all the more true when simply on request a copy is furnished of passages which perhaps should not be published (Rule 34, paragraph 2). Therefore, if effective measures are to be taken to protect "ordre public" or morality, paragraph 2 of Rule 34 must be amended.
MUNICH DIPLOMATIC CONFERENCE
FOR THE SETTING UP OF A EUROPEAN SYSTEM FOR THE GRANT OF PATENTS

1973

Munich, 30 September 1973
M/ 146/R 2
Original: English/French/German

CONFERENCE DOCUMENT

Drawn up by: General Drafting Committee

Subject: Convention: Articles 27 to 54
Article 54

Exceptions to patentability

European patents shall not be granted in respect of:

(a) inventions the publication or exploitation of which would be contrary to "ordre public" or morality, provided that the exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States;

(b) plant or animal varieties or essentially biological processes for the production of plants or animals; this provision does not apply to microbiological processes or the products thereof.
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
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/11/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 1 — 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 Bentheim, 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 it 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:

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<td>2001 et seq.</td>
<td>C. Implementing Regulations 3001 et seq.</td>
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<td>4001 et seq.</td>
<td>D. Protocol on Recognition 5001 et seq.</td>
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|  | E. Recommendation on preparations for the opening of the European Patent Office 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 30 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/11/II, 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].
Article 50 (52) — Patentable inventions


17. The FICPI delegation feared that in paragraph 2(c) the term "programs for computers" might be broadly interpreted in the future. There was a danger that the structures or algorithms on which such programs were based would also not be considered an invention. This could give rise to problems for large sections of industry operating in the field of data processing in particular or of communications technology in general. And, in any case the Conference should be on its guard against excluding from being patentable certain technologies which had not even been thought of today.

18. As regards this comment the Chairman recalled that the Luxembourg Inter-Governmental Conference had already tried in vain to define the term "programs for computers". The European Patent Office would simply have to be relied upon subsequently to interpret this expression unequivocally.

19. The Italian delegation considered that the English expression "computer" denoted a much more complex system than the German term "Datenvorarbeitenanlage" and the French expression "ordinateur". It was therefore perhaps appropriate to choose the phrase "data handling systems" in the English version.

20. The United Kingdom delegation stated in this connection that in its view the expression "computer" should be retained in English, even though linguistically it could mean more than a simple piece of calculating equipment. The definition of such terms could safely be left to the practical work of the European Patent Office.

21. The Austrian delegation proposed examining the German text with a view to ascertaining whether the expression "Datenvorarbeitenanlage" was not too broad a term compared with the English expression "computer" and the French term "ordinateur". Otherwise there was perhaps a danger that this provision would be interpreted too broadly on the basis of the German text.

22. The Main Committee finally agreed to retain the English term "computer" as the appropriate expression. It also requested the Drafting Committee to examine whether a more restrictive term could perhaps be found instead of the German expression "Datenvorarbeitenanlagen".

23. With reference to paragraph 2, sub-paragraph (d) (now paragraph 4, first sentence), the Main Committee endorsed the United Kingdom delegation’s interpretation of the text (see M/10, point 6) whereby "treatment of the animal body by therapy" means the treatment of illness or disease and not, for example, treatment effected with a view to increasing the quality or quantity of the production of an animal product.

24. The delegation of the Federal Republic of Germany proposed (M/11, point 21) making the content of paragraph 2(d) into a new first sentence of paragraph 4, since in the case of methods for treatment by surgery or therapy actual inventions were involved for which only the industrial application was lacking, whereas the subject-matter or activities referred to in sub-paragraphs (a), (b) and (c) would not in practice be considered as inventions.

25. The IAPIP delegation, supported by the Belgian, French and Netherlands delegations, proposed simplifying the German delegation’s proposals still further by deleting paragraph 3 and including the substance thereof at the beginning of paragraph 2. It promised to put forward a written proposal about this.

26. The Main Committee decided to forward the German proposal, along with the IAPIP drafting proposal which would be submitted later (subsequent M/66/I), to the Drafting Committee.

27. The CNIPA delegation, supported by the United Kingdom and Irish delegations, was in favour of transferring sub-paragraphs (c), (d) and (e) to the Implementing Regulations in order to be able to take more account of scientific and technological developments (see M/20, point 10). The United Kingdom delegation pointed out that the questions about patentability which were dealt with here were also primarily politico-legal matters which were the responsibility of the Administrative Council in its capacity as the political body of the Patent Organisation.

28. The Netherlands delegation considered that, without wishing to take up a position on the problem itself, the same result could be achieved by supplementing Article 31 (33), whereby the Administrative Council was competent to amend certain provisions of the Convention.

29. The delegation of the Federal Republic of Germany thought it was inadmissible, as a matter of principle, for the question of the patentability of such subject-matter or activities to be left to the Administrative Council to settle.

30. The Yugoslav delegation, too, believed there was little likelihood of such an arrangement being accepted for the additional reason of legal certainty.

31. The Swedish and Portuguese delegations also shared the German delegation’s views.

32. Furthermore, the French delegation pointed out that Article 50 (52) was a fundamental Article of the Convention. The provisions governing patentability laid down in this Article should not be left to the Administrative Council; the latter ought not to be able, irrespective of the legal and technical means employed, to amend the individual provisions on its own responsibility.

33. The Swiss delegation was also against transferring the three provisions mentioned to the Implementing Regulations. It emphasised that if the CNIPA proposal were adopted, the Administrative Council would also be afforded the possibility, which nobody wanted, of adding new conditions relating to patentability to the Convention and of amending the grounds for revocation connected with Article 50.

34. Consequently, the United Kingdom delegation renounced the idea of transferring sub-paragraphs (c), (d) and (e) to the Implementing Regulations.

35. The delegation of the Federal Republic of Germany proposed (M/11, point 21) transferring paragraph 3, which at the moment related solely to substances and compositions for use in a method for treatment by surgery or therapy, to the proposed new paragraph 4 as the second sentence. The proposal was referred to the Drafting Committee.

36. The Netherlands delegation proposed (M/32, point 8) making it clear in paragraph 3 that a medical instrument for use in a method for treatment by surgery or therapy was patentable.

37. The delegation of the Federal Republic of Germany said that, although it considered the existing text sufficiently clear on this point, it did not wish to oppose the proposal.

38. The Main Committee adopted the proposal which was supported by the United Kingdom and the French delegations.

39. The Main Committee also discussed the proposal by the Netherlands delegation (M/52/I/II/I/I, point 6) that the words "any substance which can be used for a method" be substituted for "a substance for use in a method".

40. The United Kingdom delegation was not in favour of this wording. It said that the purpose of paragraph 3 was to make it clear that a claim for a product for use in a method for treatment by surgery or therapy should be patentable, even if the method itself in which such a product was used was not
patentable. The present text of paragraph 3 was sufficiently clear and did not need to be amended.

41. The Netherlands delegation withdrew its proposal at a subsequent meeting.

42. On a proposal from the delegation of the Federal Republic of Germany (M/11, point 21), the Main Committee agreed to specify in paragraph 3 that the patentability of the subject-matter and activities listed in paragraph 2 was excluded only to the extent to which an application or patent related to the subject-matter or activities as such.

43. Finally, the Main Committee referred to the Drafting Committee a drafting proposal from the French delegation concerning paragraph 3 (M/58/11).

Article 51 (53) — Exceptions to patentability

44. The Swiss delegation pointed out that under sub-paragraph (a) patents could not be granted for inventions, the publication or exploitation of which were contrary to "ordre public" or morality. In most instances this provision would not fulfil its purpose because at the examination on filing and the examination as to formal requirements, no check was made on whether the publication of the invention was contrary to "ordre public" or morality and, consequently, the application would normally be published in full. If, however, such an application had already been published, there would no longer be any point in refusing the patent or even revoking a patent which had already been granted. It therefore requested (M/54/11/III, page 7) either the deletion of the words "publication or" in Article 51 (53), sub-paragraph (a) or alternatively changing Rule 34, paragraph 2, into a mandatory provision.

45. The Chairman drew attention to the fact that if the main proposal were accepted, the European Patent Office would be obliged to grant patents the publication of which was contrary to morality and that once patents had been granted it would no longer be possible to revoke them on account of such an infringement.

46. The Swiss delegation withdrew its main proposal. However, it maintained its subsidiary request concerning Rule 34, paragraph 2 (see below points 2226 et seq.).

47. In connection with Article 51 (53) the Turkish delegation said that it proposed to raise the question of the patentability of methods used to obtain medicines, foodstuffs and fertilisers and the question of the patentability of chemical substances when Main Committee II discussed the final provisions.

Article 52 (54) — Novelty

48. The AIPPI delegation requested that paragraph 3 be drafted in such a way that a previous application which was published later did not form part of the state of the art, if filed by the same applicant as filed the later application.

49. The Chairman noted that none of the Government delegations wished at this point to raise the problem of "self-collision".

50. The Belgian delegation asked whether it was clear from paragraph 4 that paragraph 3 was only to be applied if the Contracting State designated in the later application was also designated in the earlier published application and that paragraph 3 did not apply to a Contracting State which had not been designated in the earlier application.

51. The Main Committee affirmed that this was clear, in agreement with the United Kingdom delegation, which drew attention to Rule 88 (d), according to which differing claims could be presented for different Contracting States.

52. In order to make this situation quite clear, the Main Committee decided at a subsequent meeting, at the request of the Netherlands delegation, to reword the first words of paragraph 4 as follows: "Paragraph 3 shall be applied only in so far as . . ."

53. At the request of the Netherlands delegation, the Main Committee stated that, further to paragraph 4, the words "a Contracting State designated in respect of the later application, was also designated in respect of the earlier application as published" were to be understood as follows: if the designation of a State which appeared in the earlier application as published is later withdrawn, that State may no longer be designated in respect of the later application.

54. The Netherlands delegation proposed that the wording of paragraph 5 (M/32, point 9) should be improved. It said that on no account did it wish, with its proposal, to break away from the principle that only the first application in respect of the use of a known substance or composition in a method for treatment of a human or animal body by surgery or therapy is patentable, and not the second and subsequent applications.

55. The Main Committee referred the proposal to the Drafting Committee.

56. The Yugoslav delegation also considered that the present text of paragraph 5 was insufficiently clear and asked the meaning of the words "even when the substance or composition in question is disclosed in the state of the art".

57. The Chairman replied to the Yugoslav delegation and said that, in his opinion, the aim in paragraph 5 was to make clear that a known substance (or a known composition) which, since it formed part of the state of the art, was no longer patentable, nevertheless could be patented for the first use in a method for treatment of the human or animal body by surgery or therapy; however, a further patent could not be granted if a second possible use were found for the same substance, irrespective of whether the human or animal body was to be treated with it.

58. The Chairman noted that his views were shared by the Government delegations.

59. The UNICE delegation said that although it also shared these views, it had understood until now that a known substance which was patentable for its first use in a method for treatment of the human body, had also to be patentable for a first use, which was found subsequently, in a method for treatment of the animal body, and vice versa.

60. The Chairman noted that the Main Committee did not wish to endorse this interpretation.

Article 53 (55) — Non-prejudicial disclosures

61. At the Netherlands delegation's request the Chairman noted that the Main Committee was agreed that in the introductory part of paragraph 1 the "date of filing" should be understood as the actual date on which the patent application was filed. The Drafting Committee subsequently amended paragraph 1 accordingly.

62. The United Kingdom delegation pointed out that the existing text of paragraph 1, which was taken from Article 4, paragraph 4, of the 1963 Strasbourg Convention on the Unification of Certain Points of Substantive Law on Patents for Invention, contained a loophole; it proposed substituting the words "not more than six months preceding the date of filing" for the phrase "within six months preceding the date of filing" (M/10, point 8).

63. In order to illustrate the problem raised by the United Kingdom delegation, the Chairman gave the following two examples: a European patent application is fraudulently filed on 1 January 1980 and published on 1 July 1981. On 1 October 1981 an application relating to the same subject-matter is filed
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
official languages instead of only the language of the proceedings.

2. Patentability (Articles 50-55)

The provisions of substantive law on patentability were not amended as to substance. The exceptions listed in Article 50, paragraph 2, were confirmed by the Main Committee as basic principles of the Convention. Certain drafting improvements however now make it completely clear that the various types of subject-matter, acts and activities listed are only excluded as such from patentability and that therapeutic and diagnostic methods are not patentable on the grounds that they lack industrial application.

The exception to patentability laid down in Article 51 in respect of inventions the publication of which would be contrary to "ordre public" or morality was reinforced by a duty to examine on the part of the European Patent Office (see Rule 34).

An improved wording of Article 52, paragraph 5, now ensures the patentability of known chemicals for such uses in therapeutic and diagnostic methods as do not form part of the state of the art. In this connection the Main Committee was also of the opinion that only a first use, irrespective of whether it is with regard to humans or animals, fulfils the requirements of this provision.

With respect to non-prejudicial disclosure the Main Committee amended Article 53 to provide that an abusive disclosure in relation to the person entitled shall not be prejudicial if it occurred no earlier than six months before the filing of the application. This amendment means that, taking into account the concept of novelty contained in Article 52, paragraphs 3 and 4, cases of abusive disclosure after the date of filing of the application by the person entitled are dealt with in the same way as a disclosure within six months preceding the date of filing of the European patent application. The Main Committee decided not to extend the definition of the international exhibitions referred to in Article 53 not only because such an amendment would diverge from the Strasbourg Convention but also because exhibition priorities as such are a dangerous instrument for the applicant.

In discussing Article 54 a proposal for supplementing this provision to the effect that any technological advance proven by the applicant should be taken into account in deciding whether there has been an inventive step was rejected, mainly because it was feared that too much weight might be given to this factor.

3. Position of the Inventor (Articles 58, 59, 60, 79, 90 and Rules 17, 19, 26, 42)

The Main Committee gave detailed consideration to a proposal to give the inventor a better and stronger legal position in the system set up by the Convention than that afforded by the drafts. The main proposal sought to compel the applicant to designate the inventor at the time of filing the application and at the same time to prove his entitlement to the invention by producing a certificate of transfer drawn up by the inventor or some other conclusive document.

It was not contested that the rights of the inventor should be adequately protected in the Convention. The Main Committee therefore decided unanimously that in respect of all European patent applications, irrespective of which States were designated in them, the filing of a statement identifying the inventor should be a compulsory requirement, with the result that if it were not complied with, the application would be deemed to be withdrawn. However, the Main Committee rejected the proposal to require the production of proof that the applicant was the inventor's successor in title for three main reasons: there would be difficulties in obtaining such a document in individual cases; it could not be produced where the transfer took place in the due course of law; and finally it would put the European Patent Office in the extremely difficult situation of having to apply the national law of the Contracting States in examining such documents. Similarly, an alternative proposal, to require proof of being the inventor's successor in title only where the national law of at least one of the designated Contracting States required such proof in respect of national patent applications, could not be adopted as this would have caused the same difficulties. In order that the rights of the inventor should nevertheless be protected, the Main Committee finally adopted a compromise solution whereby, if the applicant were not the inventor or not the sole inventor, he would be obliged to file a statement, which would be an integral part of the designation of the inventor indicating the legal basis of his acquisition of the invention. In addition, this designation of the inventor by the applicant would be notified to the inventor, thus allowing him where necessary to invoke his rights in due time. Corresponding amendments were made to Articles 79 and 90 and to Rules 17, 19, 26 and 42.

4. Effects of the European patent and the European patent application (Articles 61-68)

The main subject of discussion in this respect was Article 67 which defines the protection conferred by the European patent and the European patent application.

The Main Committee adopted by a majority a provision which also occurs in the Draft of the Second Convention for the Community patent, whereby the protection conferred on a process is extended to the products directly obtained by that process. This provision, which was inserted in Article 62 and which is already known in the laws of several Contracting States, takes account of the fact that in certain branches of industry, such as the plastics industry, it is not always possible to define a material without reference to its means of production. At the same time, a similar majority of the Main Committee rejected a proposal that this extended protection be reinforced in the case of an invention relating to the manufacture of a new product by assuming, to the benefit of the proprietor of the patent, that any product of the same nature would be considered to be obtained by the protected process. This proposal to reverse the burden of proof was countered by the argument that it would constitute too great an inroad into the national law of the Contracting States.

Main Committee I also considered, in respect of Article 67, paragraph 2, that the concept of extending the protection conferred by the European patent application included the case of a shift in the protection as a result of an amendment to the claims. With regard to the interpretative statement proposed by the Inter-Governmental Conference in respect of Article 67, it considered that this should be officially adopted unamended by the Diplomatic Conference and should be annexed to the Convention in the form of a declaration.

As regards the right to continue to use the invention, which a third party who has been operating in good faith may invoke under Article 68, paragraph 4(b), where the proprietor of the patent has corrected the translation of the specification, the Main Committee decided by a majority to depart from the draft by providing that this right could be exercised without payment, by analogy with the comparable situation dealt with in Article 121, paragraph 6.
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 Haerel (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 General 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 II's report. The discussion and subsequent approval of the report are dealt with 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

8. 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.

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

II. Report on the work of Main Committee II

9. Subject to a few minor amendments, the Committee of the Whole unanimously approved the report presented by the rapporteur of Main Committee II, Mr. R. Bowen (United Kingdom), Assistant Comptroller of the United Kingdom Patent Office. The text of the report as adopted by the Committee of the Whole is given in Annex II. The discussions concerning the proposals for amendments to the report are summarised in the following paragraphs.

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.

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 prejudge 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 12, 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...