

MINUTES

of the

118th meeting of the

ADMINISTRATIVE COUNCIL

Munich, 23 to 25 June 2009

The summary of decisions has been issued separately as CA/111/09.

2.4 Preparations for the election of the President of the Office (CA/103/09)

67. The chairman explained that President's term ended on 30 June 2010, and she had recently informed Council delegations and EPO staff that she did not wish to seek an extension. The Council thanked her for this clear and early statement of intent; it now needed to organise, as soon as possible, the procedure for selecting her successor. There was still a year's time – which in one way was long but in another very short. Previous transitions had encountered difficulties – both foreseeable and unexpected – and often delays. After a "ticket" of two brief (three-year) terms, the Office and Organisation more than ever needed clarity and stability, so the necessary procedures should be initiated without delay. He had

therefore presented an outline procedure for discussion by the B28; CA/103/09 was an updated version of that. It was of course still only a proposal; the delegations would no doubt wish to comment. A decision on the next President should be taken as soon as possible, preferably by the end of 2009. Under Article 11(1) in conjunction with Article 35(2) EPC, the President had to be elected by a three-quarters' majority, so rules to facilitate the decision were needed. Also, electing the President was one of the Council's most important tasks, so complete transparency was essential. Lastly, with a view to his own possible candidacy and to avoid any ambiguity, he would not chair the discussions on this matter; he would leave the room, and the deputy chairman, Jesper Kongstad, head of the Danish delegation, would take the chair.

68. The deputy chairman said he too planned to be a candidate. Therefore, for the reasons just given by the chairman, he felt he also could not chair or take part in the discussions on this issue.
69. The chairman responded said that under the Council's rules of procedure, if neither the chairperson nor deputy chairperson could conduct the meeting, the longest serving member took the chair. That was Roland Grossenbacher, head of the Swiss delegation.
70. Mr Grossenbacher said he too was intending to seek the EPO presidency; he had the support of the Swiss government. Like the chairman and deputy chairman, therefore, he was similarly unable to chair these discussions.
71. The chairman said that in that case the second longest serving Council member after Mr Grossenbacher was Claude Sahl on the Luxembourg delegation.
72. Mr Sahl said he was willing to act as the meeting's *ad hoc* chairman – for this item only and subject of course to the Council's agreement.
73. The UK delegation said it wanted Mr Sahl to take the chair for present item 2.4 only.
74. The German delegation said Article 4(4) of the Council's rules of procedure was quite specific: *"In the event of neither the chairperson nor the deputy chairperson being able to attend a meeting of the Council, the meeting shall be opened by the longest serving member, who shall immediately invite the Council to elect an ad*

hoc chairperson". So Mr Sahl's job was simply to organise the election of an *ad hoc* chairperson. It had no objections to Mr Sahl acting as chairman, but the Council should take a formal vote to decide that.

75. The Portuguese and Norwegian delegations agreed. They also asked whether Mr Sahl, if formally elected now, would be interim chairman for the present meeting only, or for subsequent ones as well.
76. In reply, Mr Sahl restated his intention – if formally elected – of taking the chair only for item 2.4 and only at the present meeting.
77. The Belgian delegation thought the Council had implicitly elected Mr Sahl by asking him to take the chair. However, it took the German delegation's formal point.
78. The Icelandic delegation thought an interim chairman should be elected right now.
79. The Austrian delegation said the question, if an interim chairman were elected now, was the extent of his remit. In other words, would he chair the Council only for items about electing the new President, or the entire meetings until the election procedure was over? In the former eventuality, the serving chairman would remain in office, and would then receive the candidatures, including his own. That did not seem acceptable. The interim chairman should therefore chair all Council meetings until the new President was elected.
80. The UK and Italian delegations thought the first thing to decide was whether the Council was making Mr Sahl its *ad hoc* chairman for this specific agenda item at the present meeting.
81. Taking a similar line, the Hungarian and Netherlands delegations added that the serving chairman and deputy chairman had both just said they planned to present their candidature. But they had not done so yet. An interim chairman would be needed only if, come the closing date, they had indeed both applied – in which case obviously they could not chair the Council. That left enough time to consider possible solutions.
82. The Austrian delegation disagreed. It thought the interim chairmanship had to be decided now, mainly because – as it had just mentioned – if the serving chairman

stayed in office he would receive his own candidature, because under the procedure described in CA/103/09 applications were to be sent to the Council chairman.

83. Endorsing the Austrian delegation's remarks, the Swiss delegation added that if the serving chairman – and deputy chairman, for that matter – stayed in office they would also remain *ex officio* members of the B28. There would then be an obvious risk of conflict of interest.
84. Like the Austrian and Swiss delegations, the Hellenic delegation thought the Council should now nominate someone to chair all Council meetings until the procedure for electing the new President was over.
85. The German delegation understood the Austrian, Swiss and Hellenic delegations' position, but did not think that at this stage an interim chairman should be appointed for all meetings to be held until the election procedure was over. It was not yet certain that the serving chairman and deputy chairman would actually apply. For now the Council should therefore just confirm Mr Sahl formally as its *ad hoc* chairman, for item 2.4 and the present meeting only. Once the closing date passed, it would then have time to consider whether it needed an interim chairman. There was however nothing to prevent it from deciding now who the interim chairman (if needed) might be, and then confirming that choice in due course if necessary.
86. The Belgian and Italian delegations endorsed the German delegation's comments. So did the Finnish delegation, which also proposed Alberto Casado Cerviño, head of the Spanish delegation, as a possible interim chairman.
87. The Norwegian, Spanish, Maltese and Austrian delegations said they were in favour of confirming Mr Sahl as *ad hoc* chairman for item 2.4 and the present meeting only. They thought the Finnish delegation's suggestion about Alberto Casado Cerviño was an excellent one, but wanted him elected, at the present meeting, as interim chairman for all Council meetings pending election of the new EPO President.
88. The Council then formally unanimously elected Mr Sahl to act as *ad hoc* chairman for item 2.4 at the present meeting (present: 35; for: 35).
89. The Council then discussed CA/103/09 in detail.

90. The UK delegation thought the proposed procedure was largely in line with that used for the last such election, in 2003. However, there was a potential problem if the serving Council chairman applied for the presidency, because under point 2 of Section II ("Decision") it was to him that applications had to be sent. It therefore again urged that an interim chairman be appointed, to conduct the procedure from start to finish. There was also an inconsistency between the conditions stipulated in point 2 of Section II and those laid down in point 3 of the vacancy notice (Section III): the latter specified language requirements, the former did not. Even so, the UK delegation could support the procedure proposed in CA/103/09.
91. The Netherlands delegation too thought the Council should appoint, at its present meeting, an interim chairman to conduct the procedure. As to the procedure itself, obviously the Council could not predict every possible eventuality, but it could at least, given experience at the last election, consider the possibility of two candidates emerging neck-and-neck from the various rounds of voting, and make provision for a procedure if this happened again. In the clearly more desirable event that a single candidate emerged from the voting, there should be an extra round to confirm that choice by the three-quarters' majority required under the EPC. And obviously, in that final vote, the fewer abstentions the better; the President had to have the support of as many delegations as possible. Lastly, if no three-quarters' majority was achievable in this final vote, perhaps a candidate eliminated in an earlier round might be a compromise solution. That meant, in the Netherlands delegation's view, that candidates eliminated after a voting round were out of contention for the following rounds but not knocked out of the procedure altogether.
92. The Polish delegation could agree to the procedure proposed in CA/103/09, subject to the corrections suggested by the UK delegation.
93. The Italian delegation too felt that this procedure was acceptable on the whole, but agreed with the UK delegation about the potential problem of having to send applications to the Council chairman. It therefore felt that the present meeting should appoint an interim chairman. It also endorsed the Netherlands delegation's view that the candidate who emerged after the different rounds of voting should be confirmed by a qualified-majority vote, and shared its concerns that a large number of abstentions from that confirmation vote might be detrimental to the new

President's legitimacy. One way of avoiding that was to oblige Council members to vote "yes" or "no" by not allowing abstentions. Lastly, it again agreed with the Netherlands delegation that candidates eliminated after a voting round were out of contention for all subsequent rounds but not knocked out of the procedure altogether. So if the confirmation vote did not achieve a qualified majority, the entire procedure would have to start again from scratch, with all the candidates. The Swiss delegation endorsed that.

94. The Swedish delegation fully supported the Netherlands delegation's two proposed improvements. It also thought the draft decision (Section II) should include a provision saying who – i.e. an interim Council chairman – would conduct the entire procedure.
95. The Hungarian delegation wondered who would verify compliance with the formal requirements specified in point 2 of Section II. Also, candidates for the presidency had hitherto been required to have a good command of one EPO official language and the ability to understand another. According to point 3 of the vacancy notice, they now had to have knowledge of all three official languages and a good command of at least two. What was the reason for these more stringent requirements?
96. The Hellenic delegation felt, like many earlier speakers, that the present meeting should appoint an interim chairman to conduct the entire procedure. As to the actual procedure, it would not be very democratic to require Council members to vote for the sole candidate remaining after the different voting rounds. It therefore suggested that once the candidates were down to two, the delegations should decide between them by qualified-majority vote. If no such majority could be achieved, the voting rounds would have to start again from the beginning, with all the candidates.
97. The Norwegian delegation shared the Netherlands and Italian delegations' fears of possible problems if, in the confirmation vote, the last remaining candidate obtained the necessary three-quarters' majority but with a large number of abstentions. However, the EPC was very clear: firstly, under its Article 35(2), the President had to be elected by a qualified majority; secondly, under Article 35(4), abstentions did not count. It agreed that the language requirements in point 3 of the vacancy notice were too strict. In its view, they discriminated against

candidates from countries whose national language was not an EPO official one. Command of just one official language should suffice.

98. Endorsing that last point, the Danish delegation also drew attention to point 8 of Section II: *"The Council may at any time decide by a three-quarters' majority to terminate the procedure and to adopt a new procedure, to be applicable immediately"*. That was not in line with the EPC; such decisions required only a simple majority.
99. The Austrian delegation too felt that the Council had to appoint an interim chairman immediately – to conduct not just the election procedure but all Council work in all its meetings pending election of the new President. As to the election procedure, it agreed with earlier speakers that, if no three-quarters' majority were achieved in the final "confirmation" vote on the last remaining candidate, the whole procedure would have to start all over again, with all the candidates. It also felt that the Italian delegation's suggestion of requiring Council members to say "yes" or "no" in that confirmation vote was a way to avoid possible problems due to too many abstentions. Lastly, it thought point 9 of Section II should give more information about the future President's contract. Such information was important when deciding whether or not to apply for a post.
100. Returning to the floor, the Netherlands delegation endorsed the Hellenic delegation's idea of holding the confirmation when two candidates were left. But it was not convinced that the "yes" or "no" vote suggested by the Italian delegation, with support from the Austrian delegation, was necessarily the right solution for the abstentions issue.
101. The Swiss delegation too thought the appointment of an interim chairman was indispensable; the only question was when he should start. It added that point 7 of Section II – *"The Council may at any time decide by a simple majority to suspend voting for the current meeting and resume it at the next"* – was at odds with Article 9(9)(b) of the Council's rules of procedure, requiring unanimous agreement to carry an agenda item over to a subsequent meeting. Lastly, it shared the Hungarian, Norwegian and Danish delegations' concerns that the language requirements might be discriminatory.
102. On the language requirements, the Finnish delegation said the point of the exercise was to recruit not a linguist but a competent manager with all the qualities needed to run the Office effectively. It regarded the proposals in CA/103/09 as a

good starting point. The procedure should be transparent and in accordance with the rules. Memories were still vivid of the difficulties with the last election (in 2003), and it was essential to avoid any repetition of the mistakes and blunders made then. Lastly, it would be better at this stage for the Council not to take a definitive, binding decision obliging it to follow a specific procedure, because the procedure might need to be adjusted in the light of the type of candidatures submitted.

103. The UK delegation said the aim at this point was to adopt a transparent and fair procedure, and also to put a structure in place enabling the Council to take a decision in due course. The proposals in CA/103/09 were a good starting point, but the second bullet under point 5 of Section II should be worded more precisely. On the abstentions issue, all Council members should be aware of their responsibility for ensuring a clear decision. Abstaining from such an important vote would hardly promote such clarity. Lastly, like numerous other delegations, it thought the language requirements should be revised downwards if not deleted altogether.
104. The Icelandic delegation completely agreed with the UK delegation about the need for a transparent and fair procedure. At the present meeting, the Council should therefore appoint an interim chairman to carry out all the tasks involved, including chairing B28 and Council meetings, until the new President was elected. It too thought the language requirements were too strict.
105. The German delegation likewise regarded CA/103/09 as a good starting point, but suggested two changes. Firstly, applications should be sent to the Council Secretariat, not to the chairman as per point 2 of Section II. That would avoid possible conflict of interest if the serving chairman applied, and the Secretariat could also check for compliance with the formal requirements. As regards appointing an interim chairman, the Council could do that only in very specific circumstances: basically, if both its chairman and deputy chairman were unable to attend. That would certainly be the case if they both applied for the EPO presidency, because candidate status would be incompatible with continuing to lead the Council. So far, however, they had not submitted candidatures; they had merely said they might. If they did, they would have to state officially that they could not continue in office, and were therefore standing down for the time being.

Only then could the Council appoint an interim chairman, if necessary under the written procedure. It could of course decide here and now that if its chairman and deputy chairman became candidates, then its interim chairman would be such-and-such a person, but the German delegation was not certain that would be lawful.

106. The Irish delegation agreed that until such time as the chairman and deputy chairman officially became candidates there was nothing to stop them carrying on, and no need to appoint an interim chairman.
107. The Italian delegation said the election procedure had to comply with the EPC, and its Article 35(2) stipulated that the President's appointment (Article 11(1) EPC) had to be made by a three-quarters' majority. One way to increase the likelihood of achieving that majority was to stop the elimination rounds with two candidates left, as suggested by the Hellenic delegation, and organise a new voting round to decide between them. One of them might then get a three-quarters' majority. If not, another round of voting would have to be held, for the leading candidate of the two, to confirm that this candidate was indeed the Council's choice. Three quarters of the positive votes would however be needed to declare that candidate elected. But it was also possible that this three-quarters' majority could not be achieved, in which case the entire procedure would have to start again, including all the candidates previously eliminated.
108. The French delegation agreed with the other delegations that the election procedure had to be transparent and effective. That proposed in CA/103/09 met those requirements, and was therefore a good starting point. At the same time, it also endorsed all the German delegation's comments.
109. The Swiss delegation thought the rules should not be too rigid; the procedure needed to be flexible. But it also had to comply with the EPC, especially Article 27(1) and Article 35(2), and offer a way out if the last candidate left after the elimination rounds was not confirmed by a three-quarters' majority vote. CA/103/09 failed to make provision for that.
110. The Austrian delegation was perplexed that CA/103/09 had been drawn up by a potential candidate for the presidency. The Council should put on record, at the present meeting, that if its chairman and deputy chairman became candidates they could not perform their duties, not only for the actual election but for all agenda items at all meetings until the election occurred. It should therefore decide right

now that in that eventuality it would have an interim chairman, namely Alberto Casado Cerviño.

111. On the language requirements, the Belgian delegation cited the need to preserve the Office's cultural diversity, adding that out of respect for its staff it was not unreasonable to expect its President – like most of those staff – to know the three official languages, although obviously he could not be required to be equally proficient in all of them. On the interim chairman issue, one should be appointed straight away, but only for election-related matters.
112. The Norwegian delegation entirely agreed with the Austrian delegation. It disagreed with the Belgian delegation: the interim chairman's brief could not be confined to election-related matters. After all, the chairman conducted B28 as well as Council meetings.
113. The Hellenic, Finnish and Hungarian delegations endorsed the Austrian and Norwegian delegations' comments.
114. The head of the Spanish delegation said that were the Council to do him the honour of proposing that he serve as interim chairman, he was willing to accept. It would then need to specify clearly what his remit would be, and when his interim chairmanship would start and end.
115. The staff representatives said the staff would like the presidency issue clarified as rapidly as possible. The next President should serve for five years; a three-year term was much too short. It seemed only logical to expect the President to fulfil the same language requirements as any other A-grade staff member.
116. Adjourning these discussions, the Council asked the Secretariat to produce a revised version of CA/103/09.
117. On their resumption, the Secretariat submitted CA/103/09 Rev. 1 and a draft supplementary decision about the Council chairmanship, both written by the Secretariat.
118. The Austrian delegation said the deputy chairman had just indicated that he was temporarily standing down with immediate effect, so the draft decision's second recital should not be there. On CA/103/09 Rev. 1, it was awkward that applications were to be sent to the Secretariat, which was answerable to the Council chairman, when the serving chairman was a potential candidate but, unlike the deputy chairman, had not said he was standing down. Applications should therefore be sent to a particular country – preferably Spain, since in all likelihood the head of

the Spanish delegation would be the interim chairman. The draft decision should make it clear that the interim chairmanship would start automatically when the serving chairman applied for the presidency.

119. Several delegations agreed with the Austrian delegation, a number adding however that it would be better to specify a date for the start of the interim chairmanship. That however required the serving chairman to state clearly his intentions concerning his term of office.
120. The Swedish delegation said it would be more consistent to use only the term "designation" (rather than "election") in CA/103/09 Rev. 1. The Swiss delegation agreed.
121. The Netherlands and Italian delegations could agree to the procedure proposed in CA/103/09, but regretted that it would not allow a compromise candidate to emerge.
122. The *ad hoc* chairman then read the following statement from the serving chairman:
- "As I indicated earlier, I am of course ready to suspend my chairmanship of the Council should I apply for the presidency of the Office.*
- Should the Council take the view that this decision must take effect as from 1 July 2009, naturally I am ready to oblige.*
- Let me add that of course I accept any date the Council may decide; to my mind there is no discussion about that".*
123. The Council then adjourned, asking the Secretariat to prepare a new version of CA/103/09 taking account of the latest developments and the delegations' comments.
124. When it resumed, it had before it CA/103/09 Rev. 2 from the Secretariat.
125. The Council unanimously approved the draft decision in its Section II concerning the procedure for electing the next President, and the text of the vacancy notice proposed in its Section III (present: 35; for: 35).
126. The Council also unanimously approved the draft supplementary decision about its chairmanship set out in Section IV of du CA/103/09 Rev. 2 (present: 35; for: 33 – BG, BE, CZ, DK, DE, EE, GR, ES, FR, HR, IE, IS, IT, CY, LV, LI, LT, LU, HU, MK, MT, MC, AT, PL, PT, RO, CH, SI, SK, FI, SE, TR, GB; abstentions: 2 – NL, NO).