

**LEGAL ADVICE 1994-05-03 ON IECEX Scheme**

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(should appear  
before "CONCLUSIONS")

Original : French  
GUARANTEE MARK

"IECEX"

Consultation of 3rd May 1994  
URB/aso

#### NOTES OF THE TRANSLATOR

1. All the quotations of Swiss law, etc. are unofficial translations.
2. Many of the quotations from the English draft text are not<sup>to</sup> be found at the place indicated (or at all) in the version of the draft supplied for reference (IECEE-MC (Sec) 150).
3. The Draft supplied as reference does not appear to be the same version as that commented on by URB - there are several discrepancies in numbering.  
    ↪ IECEE-MC (Sec) 129
4. I have translated "marque de garantie" by "guarantee mark" throughout as an aid to following the legal arguments discussed. In any definitive text, "Mark of Conformity", "Certification Mark", etc., could be substituted as preferred.

The original French version is available  
on request.

## A. The "IECEX" GUARANTEE MARK

## 1. Terminology

The term used in the draft rules, namely mark of conformity, is not a technical term in the legislation relating to marks. In countries where Anglo-American law applies, the "certification mark" is recognized. The Swiss legislator does not use the corresponding French term which would be "marque de certification" but has adopted the term "marque de garantie" (guarantee mark) (cf. art. 21 LPM). In this regard, I quote the Message du Conseil Fédéral : [unofficial translation] "By protecting the guarantee mark, this draft officializes a type of mark whose existence is not disputed by anyone but which the legislation in force does not protect. As opposed, in particular, to the "certification mark" of Anglo-American law, the guarantee mark is at present protected only by the legislation on unfair competition, except for collective marks ... which have a guarantee function (note 222.2).

In point of fact, the guarantee mark as recognized by the new Swiss legislation that came into force on 1st April 1993 and as it may be protected by this legislation does indeed correspond in the essential to the "certification mark" of Anglo-American law.

[3]

## 2. Legal definition

According to Swiss law, the guarantee mark is a sign used by several firms under the control of its owner with the objective of guaranteeing the quality or other common characteristics (art. 21, para. 1 LPM). As the Message du Conseil Fédéral indicates : "in practice, the function of the guarantee mark is often assumed by the signs of quality or checking marked on technical equipment and installations (note 222.2).

## 3. IN CONCRETO

What it is planned to do, according to the Draft submitted, corresponds well to the guarantee mark of the new Swiss legislation :

3.1 The IECEX sign must be "used by several firms", namely the equipment manufacturers or their authorised representatives (Draft - 8.3.3 and 8.3.4)

3.2 There is an "objective of guaranteeing" since it is specified that "the certificate will attest that the equipment design conforms to the relevant IEC standards and that the manufacturer operates a quality system meeting the requirements of ISO 9002" (Draft - 9.4 and 9.5).

3.3 The scheme will be placed under the authority of the IEC (IECEE Basic Rules, clause 2.1) and the users will be subject to monitoring (Draft - 8.3.5/6).

#### 4. Common characteristics

4.1 According to clauses 5.1, 9.4 and 9.5 of the Draft, the common characteristics of the products of the firms using the IECEX guarantee mark will be two in number, both being required :

- conformity with IEC standards and
- conformity with the quality requirements of the ISO 9002 system.

#### 4.2 CRITICAL COMMENTS

4.2.1 The model of the "IECEX Certificate of Conformity" refers only to IEC standards (Annex B, p.2 [[?]]). It should also indicate the checks carried out and conformity with the requirements of the ISO 9002 system.

4.2.2 Clause 3.14 of the Draft is also incomplete as currently worded: "...indicating that adequate confidence is provided that the relevant product is in conformity with a specified standard". It will be necessary to add a reference to the ISO 9002 system.

[6]

#### B. THE OWNER OF THE IECEX GUARANTEE MARK

##### 1. Principle

It is planned to register the mark in the name of the International Electrotechnical Commission which will be the owner (Draft 8.3.2). The IEC will not use the mark itself.

This solution is in accordance with the new Swiss legislation; clause 21, para. 2 LPM prohibits EXPRESSIS VERBIS the use of the guarantee mark by its owner or by a firm that has close economic links with the owner.

##### 2. Capacity to register [[to check]]

2.1 The International Electrotechnical Commission has a legal status (personality) in the sense of clause 60 of the Swiss "Code Civil", because in its statutes it expresses the wish to be organized on a corporate basis (Cf. clause 1 of the Statutes and Rules of Procedure 1993).

2.2 As a matter of principle, the previous Swiss legislation only authorized industrial production or trading firms to register marks. The new legislation has abandoned all restrictions of this kind. Consequently, any person, whether or not running a firm, may register a mark (Message, note 222.31). Thus, it is stipulated in clause 28 LPM : "Anyone can have a mark registered".

Therefore, the IEC has nothing more to worry about in this respect.

[8]

## C. USERS OF THE IECEX GUARANTEE MARK

## I. "Collective mark" system

## 1. Principle

The collective mark is the sign of a group of manufacturing firms...; it serves to distinguish "the products ... of the members of the group from those of other firms" (clause 22 LPM).

## 2. Member bodies

The members of the IEC, owner of the IECEX mark, are not industrial firms but the National Committees that themselves produce nothing. Therefore, they are not covered by the legal definition of the collective mark.

The IECEX mark will not serve to distinguish "their" products from those of third parties. On the contrary, it must distinguish the products of manufacturers that are NOT members of the group from the products of third parties.

Thus, the scheme of the Draft does not fit the legal definition of the collective mark.

[9]

## II "Licensing" system

## 1. Principle

According to clause 18 LPM, the owner of the mark may authorize third parties to use it.

A licensing scheme is therefore possible, in principle, both inside and outside Switzerland.

## 2. The lack of close economic links

Many countries only recognize licences when the parties, the licensor and the licensee have close economic links. This is the case in Switzerland.

The Message du Conseil Fédéral comments on the new clause 18 LPM in the following terms : "The federal tribunal admits licences for marks only if the contracting parties are closely associated economically and there is no risk that the use of the mark by the licensee will mislead the public or be detrimental to the public interest. The planned rules avoid making this a rigid principle. Rather, it will be the circumstances that determine whether or not there are grounds for recognizing a licensing contract as legitimate. In jurisprudence, the close economic relationship between the contracting parties must be considered as a potentially important factor but not as a SINE QUA NON condition for the validity of the licence" (cf. Message, note 222.16).

The only criterion for the validity of the licence that is "potentially" essential, namely the existence of a close economic link, is not satisfied in any of the relationships of the IECEX scheme.

### 3. IEC/ACB licence

It has been proposed that the IEC, owner of the IECEX mark, will license it "to be used as a certification mark by the Accepted Certification Bodies (ACBs)" (IEC letter of 23.12.93).

The ACBs are defined in clause 3.3 and their activity is described in clause 8.3.5 of the Draft. This shows that the ACBs do not have a production firm and do not put the IECEX mark on products made by their firm.

Thus, they do not fit the definition of licensee according to clause 18 LPM.

[11]

A licensing scheme in which the IEC would be the owner of the IECEX mark and the ACBs the licensees must therefore be ruled out on two counts.

### 4. ACB/manufacture licence

It would have been possible to envisage that instead of the IEC the ACBs could be the owners of the IECEX mark, each in its respective country where it keeps a check on the firms using it.

However, such a procedure would rule out an INTERNATIONAL scheme of conformity which itself can only guarantee the universal applicability of certificates issued on a national basis under an international authority and control such as the IEC can only provide if it too is the owner of the mark at the international level.

### 5. IEC/manufacturers licence

In each of the IEC member countries, there will be a large number of manufacturers of electrotechnical equipment that have to use the mark. Depending on the country, a licence issued to these manufacturers will be considered as valid or not depending on whether or not a close economic link is required between the owner of the mark and the licensee.

[12]

In many countries, there is another requirement for a licence to be valid, namely it must be registered at the [trade]mark office that checks the conformity of the contract with the national legislation.

There would therefore be an infinite number [sic] of individual contracts differing from each other and a whole organization would need to be set up to manage these contracts.

I think I can conclude without further ado that the IEC has neither the practical means nor the ambition to set up a world-wide multiple licensing scheme and then make it work.

### III "Guarantee mark" system

#### 1. Principle

It has also been suggested that the IECEX scheme should be structured in a similar way to the CENELEC/CECC 00600 certification system (IEC letter of 23.23.93 [sic]).

[13] As we have seen, by definition the guarantee mark is a sign "used by several firms under the control of its owner" (clause 21 para. 1 LPM).

#### 2. The CENELEC system

Although the document CECC 00600 defines the CECC mark as a "collective mark" (cf. article 2.1), in reality it is a guarantee mark (certification mark according to the cover page).

In that in reality it is a certification mark, it corresponds to the guarantee mark definition and legal position in Switzerland.

The Draft of the IEC scheme is modelled on the CECC 00600 system and therefore corresponds perfectly to the aims and to the requirements of the law on marks.

### IV The "right to use" the guarantee mark

#### 1. Principle

Clause 21 para. 3 LPM obliges the owner of a guarantee mark to authorize its use, in return for adequate remuneration, for the products that have the common characteristics guaranteed by the rules of the mark.

Regarding this subject, the Message du Conseil Fédéral explains "By its function, the guarantee mark is accessible to anyone satisfying the required conditions". Therefore, it is a sort of obligatory licence.

#### 2. CRITICAL COMMENTS

This possibility is not foreseen in the Rules.

In these circumstances, the Draft should therefore be supplemented by a clause stipulating that any manufacturer that satisfies the conditions set out in the Draft at 5.1, namely conformity with the IEC standard and the ISO 9002 requirements cannot be refused the certificate of conformity or the right to use the guarantee mark. It is necessary to make provision for dealing with the case of a dispute unconnected with the IECEX scheme occurring between the body delivering the certificate and the manufacturer.



### 3. Remuneration

The law stipulates adequate remuneration. When one is already in difficulty, an agreement often becomes impossible because a figure cannot be arrived at that could be considered as adequate. I therefore suggest that this should be discussed now and to arrange for a clause in the Rules indicating what is to be understood by "adequate remuneration in terms of percentage of the ex works price for example.

[15]

### 4. Financial contribution of manufacturers in general

The Rules are very brief as regards finance. They refer to "annual dues paid by the ACBs and other sources as agreed by the ExCC and approved by the management committee" (Draft 12.6.2).

But where do the ACBs obtain the money for the scheme? What will they ask for to cover their costs of examination, checking, etc.? What must a manufacturer pay to obtain the certificate of conformity? In my opinion, all these questions should be circumscribed, in particular if in the end the manufacturers are to be responsible for financing the scheme via the use of the mark, by paying a fixed amount per certificate supplied or by "royalties" paid on the basis of the number of items provided with the guarantee mark.

### 5. Manufacturers in a non-member country

In clause 9.13 [sic - should be 9.12], the Draft specifies that a manufacturer whose firm is in a country not participating in the scheme or his representative shall pay a contribution to the costs of the scheme "in the form of a surcharge for each application". This is the embryo of a solution to the problem raised by clause 21 para. 3 LPM.

[16]

## D. CONTROL OF THE USE OF THE MARK

### I Principle

For a guarantee mark to exist as such, its use must be "under the control of the owner" (clause 21 para. 1 LPM) and this control must be "effective" (clause 23 para. 2 LPM).

On this matter, the Draft stipulates the principle that the IECEX mark will be a guarantee mark "the use of which is controlled by these rules" (8.3.1).

### CRITICAL COMMENTS

Here there is a minor problem in wording; in my opinion, control should be carried out complying with rules and this could be rendered as "in conformity with these rules" or "under these rules" but not "by these rules" (?). [Author's query]

## II Indirect control system

### 1. Principle

The whole certification scheme is placed under the authority of the IEC (Basic rules IECEE 01, clause 2.1 and Draft 1), but the IEC does not directly control the use of the sign by manufacturers.

[17]

### 2. CRITICAL COMMENTS

At first sight, this arrangement appears to be contrary to clause 21 para. 1 LPM.

The Message du Conseil Fédéral says nothing about the question of whether the owner of a guarantee mark may arrange for delegation of control.

But the Message states that the legislator aimed to protect known certification systems within the framework of the LPM, from now on. Now, he should know, in particular, the CENELEC certification system by which the CECC is entrusted with supervising the observance of the conditions for the use of the certification mark (designated "collective mark") belonging to CENELEC (article 2 of CECC document 00600). Thus, the system of an indirect control already existed there. Moreover, in a way, it is essential, especially when the owner of the mark (collective mark or guarantee mark) does not have a manufacturing firm that would provide him with the experience and the technical means required for an effective control.

[18]

Therefore, I think that the legislator did not intend to render such known indirect control systems invalid and that what is provided for in the IECEX scheme may be retained. All the more so is this the case in that there are close relationships and progressive controls from one level to the next, as indicated below :

### 3. Organization of the control system

#### 3.1 IEC Council

The IEC Council is the supreme authority that governs the IEC (Statutes and rules of procedure 1993, article 8).

#### 3.2 Management Committee

Under the authority of the IEC Council, there is a Management Committee (MC) which has the overall responsibility for the operation of the IECEE scheme and which is an IEC committee (clause 6 of the Basic Rules, IECEE 01).

It is this Management Committee (MC) that will govern the IECEX scheme (Draft 4.1).

[19]

### 3.3 The members of the Management Committee

The Management Committee is made up of the persons delegated by each member body and by the Chairman of the IECEE scheme (Basic Rules IECEE 01, clause 7.1).

The Member Bodies are those of the IECEE scheme. They may be either an IEC National Committee or a body notified to the IEC by the IEC National Committee (Basic Rules IECEE 01, clause 5.1).

The Management Committee designates the Chairman and the Vice-Chairman of the Committee of the certification bodies (Basic Rules, IECEE 01, clause 7.4 h and Draft 4.2).

### 3.4 The Committee of the Certification Bodies

The Committee of the Certification Bodies (CCB), whose Chairman and Vice-Chairman will have been appointed by the Management Committee, will be responsible before the said Management Committee (Basic Rules IECEE 01, clause 9.1 and Draft 4.2).

This committee administers the operation of the IECEX scheme as "Ex Certification Committee (ExCC)" (Draft 3.2). In particular, it will check "to the extent and frequency deemed necessary" if the ACBs (still) satisfy the admission conditions (Draft 11.1.13).

The CCB (=ExCC) will also verify "by means of assessment and comparative testing to the extent and frequency deemed necessary" whether an "IECEX testing laboratory" (still) satisfies the conditions laid down in 11.2.1 (Draft 11.2.1).

### 3.5 The Committee of [Ex] Testing Laboratories

3.5.1 The Committee of [Ex] Testing Laboratories (CTL/CExTL) is placed under the supervision of the Certification Committee (Draft 4.3). Its Chairman and the Secretariat are designated by the Management Committee (Basic Rules IECEE 01, clause 10.2); the persons participating in the meetings of the CTL are designated by the Member Bodies and must be experts (Basic Rules IECEE 01, clause 10.4).

The CTL deals with the practical matters (Basic Rules IECEE 01, clause 10.1). It will handle all matters of a technical nature relating to the application of the IEC standards to the testing (Draft 4.3 and 13.2).

[21]

### 3.5.2 CRITICAL COMMENTS

The Committee "handles" the technical matters but it has no control function in the strict sense of the term despite its technical competence because of the fact that it is made up of experts. It would be desirable to define the function of the Committee more rigorously so that there is technical control and technical responsibility.

11

#### 4. Results

The organization of responsibilities is clearly structured and the different levels linked to each other so that it might reasonably be thought that it satisfies the requirements of the new Swiss legislation.

However, some misgivings remain at the level of technical control by the Committee of testing laboratories, which is nevertheless essential.

[22]

### III Inspection of the equipment

#### 1. Initial inspection

There is an initial inspection to determine who will be authorized to use the mark and for which equipment. This is defined and explained very precisely in relation with the conditions for the issue of the IECEX certificate of conformity (Draft 8.3.3, 9.2, 9.4 and 9.5) and calls for no special comment.

#### 2. Continuous control

##### 2.1 By the manufacturers themselves

The manufacturers themselves have the responsibility of ensuring the conformity of the equipment bearing the IECEX mark with the tested and certified equipment designs (Draft 9.10).

##### CRITICAL COMMENTS

This provision, if it is not complied with, enables the IEC to take action against the manufacturer but adds nothing in the context of the validity of the guarantee mark examined in the light of clause 21 LPM.

[23]

##### 2.2 By the ACBs

Periodic surveillance and inspection by the ACBs are provided for (Draft 9.7) in a way that may be considered adequate from the viewpoint of clause 21 LPM.

However, it should be borne in mind that we do not yet have the jurisprudence that would specify the requirements on this subject. It can only be considered that the Swiss legislator had in mind "usual practice around the world" ["ce qui se fait dans le monde"] in this respect (CECC, ISO, DIN,...).

##### 2.3 Inspection limits

2.3.1 For manufacturers without ISO 9002 registration, the ACBs undertake periodic surveillance of the manufacturer's quality system, notably by inspection and testing "of representative samples" (Draft 9.7).

2.3.2 For manufacturers with ISO 9002 registration, there are two distinct verifications to be carried out by the ACBs :

[24]

a) The first periodic verification relates to the continuity of the registration with ISO 9002 (Draft 9.8). However, in order to know whether the equipment is in fact in accordance with the quality requirements of the ISO 9002 system one is wholly dependent on the quality inspections provided for in the ISO 9002 system.

This referral to an inspection by a third party independent from the IEC and outside its authority may nevertheless suffice for the stipulations of clause 21 LPM in so far as the IECEX certification mark only certifies that the manufacturer has a quality system corresponding to the requirements of ISO 9002.

b) In addition, as concerns conformity with the IEC standards, the ACBs will carry out periodic inspection and testing of samples where required by the standards (Draft 9.8).

[[the quoted words are not in 9.8 of the draft version supplied]]

[25]

#### IV Transitional situations

##### 1. Principle

Those of the member countries of the International Electrotechnical Commission that wish to join the IECEX scheme but whose national standards are not identical to the IEC standards will nevertheless be able to participate. Transitional arrangements are provided for (Draft 5.5 and 5.7) during a period of agreed length that may possibly be extended (Draft 7.2 and 7.6).

##### 2. The guarantee mark during a transition period

Three distinct situations are considered :

2.1 The national standard differs from the international standard (Draft 5.1, variant (a))

If a product complying with the national standard does not comply with the IEC standard, the certificate of conformity must not be issued and the mark cannot be affixed to the product; otherwise, there would be cheating of the public.

The situation would be that referred to in clause 26 LPM : the use of the guarantee mark during such a transition period will lead to the nullification of its registration after a period of grace that will be fixed by the judge to correct the use of the guarantee mark contrary to the essential provisions of the Rules.

[26]

## CRITICAL COMMENTS

To avoid loss of the mark by application of clause 26 LPM, it will be necessary, in the context of this hypothesis, either to totally exclude the use of the guarantee mark during the transition period or to limit this period to a minimum amount of time and grant authorization for use only if the differences are minor.

2.2 The national and international standards are identical but the IECEX Certificate of Conformity is not recognized by the Member Body (Draft 5.5, variant (b)).

If the national standards are identical to the IEC standards but a problem remains for the establishment of the certificates of conformity, there is nothing against the use of the IECEX mark.

[27]

The situation is in fact just that considered in clause 21 para. 3 LPM: the manufacturer of a product that complies must be authorized to use the guarantee mark in return for adequate remuneration.

In fact, the solution to the problem is to be found in clause 5.7 of the Draft since the "IECEX Assessment and Test Reports produced by other ACBs" will have to be accepted.

2.3 In so far as there may be problems with respect to the ISO 9002 system, the solutions provided for in 9.5 (b) and 9.7 of the Draft are in line with what might be expected.

## 3. The end of the transition period

3.1 If the definitive admission conditions are satisfied, there is no longer any problem; the country joins the circle of Members of the scheme.

3.2 If, at the end of the transition period, possibly extended, the conditions of the scheme are not satisfied, "the country shall withdraw from the IECEX scheme" (Draft 7.6). The situation is then the same as when a country ceases to be a participating country for any other reason whatever, as provided for in 7.8 of the Draft (see E.I below).

[29]

## E. SANCTIONS

In accordance with clause 23, para. 2 LPM, the Rules of the guarantee mark must provide for "adequate sanctions". Analysis of the Draft leads to the following observations in this respect.

## I. Sanctions against a Member Body

## 1. The solution of the draft

The Member Bodies are either the IEC National Committee or a body notified by the National Committee (Draft 3.8 and Basic Rules IECEE 01, clause 5.1).

If therefore an IEC National Committee holds to the IECEX Rules and then does not comply with them, the Management Committee (MC) will give it a warning and, when the Member Body persists in its behaviour that has been criticized, the MC may exclude it from the scheme (Draft 7.7).

Exclusion will be a direct sanction. The consequences are specified in 7.8 of the Draft.

[30]

## 2. CRITICAL COMMENTS

I think it would be necessary to replace the auxiliary verb "may" by "will". If in point of fact a National Committee contravenes the Rules it must be excluded from the IECEX scheme - otherwise the scheme will lose its credibility and the mark will become invalid as expressly provided for in clause 26.

## II Sanctions against an Accepted Certification Body (ACB)

## 1. The solution of the Draft

When it is observed that an ACB violates the Rules, it is given an opportunity to state its own opinion on the matter and take corrective action over a period of 6 months (Draft 11.1.15)

If it fails to do so, the sanction specified is the suspension or withdrawal of the acceptance of the ACB by the ExCC. Consequently, the ACB will be no longer authorized to claim any relationship with the IECEX scheme (Draft 11.1.15 para. 1 and 3).

## 2. CRITICAL COMMENTS

2.1 The auxiliary verb "may" should be replaced by "will". In point of fact, in the event of violation, the ACB concerned must be sanctioned by the suspension of its functions to prevent the invalidation of the mark as provided for in clause 26 LPM.

[31]

2.2 The Certificates of Conformity established by an ACB contrary to the Rules would have to be withdrawn and the manufacturers would have to stop using the mark of conformity. But, in place of the ACB at fault, who will undertake the withdrawal of the Certificates and who will watch that the manufacturers stop using the mark ?

These questions are essential but I have not been able to find an answer in the current Draft. It will need to be supplemented by delegating the authority for withdrawal and checking to an ACB of another member country of the Scheme.

### III Sanctions against a Testing Laboratory (IECEXTL)

#### 1. The solution of the Draft

When a TL violates the Rules, it will have the right to a hearing and a period of six months to correct the faults noted by the ExCC (Draft 11.2.11/12).

If it has not corrected the state criticized, the ExCC may suspend or withdraw the acceptance of the Testing Laboratory (Draft 11.2.12). Consequently, the TL will no longer be authorized to claim any relationship with the IECEX scheme (Draft 11.2.12).

[32]

#### 2. CRITICAL COMMENTS

2.1 The auxiliary verb "may" should be replaced by "will". In point of fact, in the event of violation, the TL concerned must be sanctioned by the suspension of its functions to prevent the invalidation of the mark as provided for in clause 26 LPM.

2.2 The draft Rules do not indicate EXPRESSIS VERBIS that the Certificates of Conformity established on the basis of reports from a TL at fault must be withdrawn and that the manufacturer concerned must stop using the guarantee mark. As here it is a matter of technical checking and therefore essential for the guarantee scheme it would appear advisable to add an appropriate supplement to the draft Rules.

### IV Sanctions against a manufacturer

#### 1. The solution of the Draft

1.1 A number of situations, on the basis of which the Certificate of Conformity may be suspended or withdrawn by the ACB are listed in 9.14 of the Draft. [[[actually 9.13 of this version]]]. These are matters that lie in the sphere of the manufacturer.

We have seen that withdrawal of a Certificate of Conformity may also take place in situations that do not relate to the sphere of the manufacturer but to the behaviour of the control bodies (Member Body, ACB, TL) that must be mentally added to 9.14 of the Draft in order to have a complete list.

1.2 The sending of a warning to the manufacturer and allowing him time to correct the fault noted is not specified. However, The ACB concerned may take such action as may be necessary (Draft 8.3.5) and, consequently, send such a warning as a first "gentle" measure.

1.3 The ACB may take any other action considered necessary to prevent the "improper or unauthorized" use of the mark (Draft 8.3.5). Normally, there will be suspension or withdrawal of the Certificate of Conformity (Draft 8.3.5 and 9.14) with an indication of the reasons for this measure (Draft 9.14 [[[9.13 in this version]]]).



[34]

1.4 The consequence - suspension or withdrawal of the Certificate of Conformity - will be the essential sanction : "The manufacturer shall no longer supply the Ex equipment as a "IECEX Certified" nor shall he affix the IECEX mark of Conformity to the Ex equipment (Draft 9.14 [[9.13]]).

This prohibition of use will also apply to existing equipment (Draft 8.3.7) which must be destroyed or have the mark on it obliterated (Draft 8.3.7 [[Not this version !]]).

The ACB concerned will have the right to enter the works to check the said destruction or obliteration (Draft 8.3.7 [[No !]]).

## 2. CRITICAL COMMENTS

The sanctions against the manufacturer appear to be "adequate" in the sense of clause 23 para. 2 LPM.

It should only be noted that the sanction resulting from Rule 8.3.7 [?] goes further than is indicated in the note to 7.8 of the Draft. It will be necessary to eliminate any misunderstanding that could arise from this.

[35]

## V. Tolerance of usage contrary to the rules

### 1. Legal consequences

Clause 26 LPM is worded as follows :

[ad hoc translation]

"If the owner, contrary to the essential provisions of the rules [[these seem to be Swiss rules and not IEC Rules - whole text needs to be checked for possible misunderstanding in this regard]] tolerates repeated usage of his guarantee mark ... and does not correct this state of affairs within a time set by the judge, the registration of the mark ~~is~~ invalid at the end of this time."

This means that, <sup>is</sup> in accordance with the explanations given in the Message du Conseil Fédéral, the registration of a guarantee mark may be declared null and void when the owner tolerates usage contrary to the rules and the misuse is fairly serious and lasts for a certain time (Message note 222.2).

### 2. CRITICAL COMMENTS

It is certainly specified in the current [[[ ?! ]]] text of the Draft that different bodies are responsible for the satisfactory operation of the system. However, I think that it is essential to find more rigorous wording as regards inspection and sanctions and that it would be desirable to include a text explaining the responsibility taking clause 26 LPM into account.

[36]

Moreover, I suggest that it should be stipulated that the non-observance of the duties specified in the Draft also entails financial responsibility. I am thinking not only of the possibility, for the International Electrotechnical Commission, to claim damages for the loss of the guarantee mark but also of the real costs relating to the sanction measures of A POSTERIORI inspection and reorganization. X

## VI Legal proceedings

### 1. Formal notice

1.1 It is envisaged to warn the [legal] person concerned, if shortcomings are noted, by allowing a period of six months to correct them, either explicitly in the case of Member Bodies, ACBs and TLs or implicitly in the case of manufacturers.

#### 1.2 CRITICAL COMMENTS

The possibility currently stipulated in the Draft (9.14 [9.13]) of warning the manufacturer of the criticism that has been made of him only when giving notice of a decision to suspend or withdraw the Certificate of Conformity seems to me to be extremely harsh. I suggest specifying, in all cases, the obligation for the ACB concerned to warn the manufacturer, giving him [[advance]] notice of possibly less than six months, in particular when there is danger in delay or other reason for urgency, before the notice according to Draft 9.14 [9.13].

[[Note du traducteur - Maybe the word "notice" has been misunderstood at some point]]

### 2. Complaint to the Management Committee

1.1 In the event of problems with an ACB or a TL only, the ExCC and/or the party making the complaint will have the right to approach the Management Committee directly and request it to take appropriate action (Draft 12.7).

#### 1.2 CRITICAL COMMENTS

If the Management Committee takes effective measures then all is well. If it considers that nothing should be done or if it simply does not react in good time, the ExCC and/or the complainant must be able to take action elsewhere in the interests of the certification scheme itself.

[38]

Now, according to 12.8.6 of the Draft, the interested parties will have the right to be heard by a Board of Appeal and, if a recommendation made by this entity is not followed, the interested party may (re-)submit the case to the Management Committee "for appropriate action" (Draft 12.8.8).

Thus, they are going round and round in circles and the draft must be revised in this respect.

### 3. The Board of Appeal

3.1 All interested parties, whoever they may be, will have the right to be heard by the Board of Appeal (Draft 12.8.6).

14

## CRITICAL COMMENTS

Is this an obligatory recourse to legal proceedings as a preliminary to any possible legal action? It does not appear to be but is this really the intention of the drafter?

3.2 The Board of Appeal makes recommendations. If the recommendation is not followed by the one that should execute it, the affair may be submitted to the Management Committee "for appropriate action".

[39]

## CRITICAL COMMENTS

2-1.2?

There is the problem referred to above in 2.1.2 [?????].

Moreover, no provision is made for the case where the recommendation would be followed by the defendant but the plaintiff considers that the recommendation of the Board of Appeal is inadequate. What is to be done?

I remain at your disposal, if you so wish, for revising the Rules of procedure according to annex C [??] concerning recourse to the Board of Appeal.

now annex A

## 4. [Swiss?] State courts

The Draft says nothing about the competence of the State courts or regarding the applicable law.

## CRITICAL COMMENTS

La

If a problem should occur in Switzerland, it is probable that neither the Board of Appeal nor the Management Committee would be considered as legal entities capable of definitively dealing with a dispute, since the independence of the judge is lacking.

[40]

There is recent case law on this subject in connection with sports (ATF 119 II 271). If an appeal instance cannot be recognized as a court of arbitration recourse to the State courts remains possible.

## 5. WIPO (OMPI) arbitration centre

The State judge cannot be excluded except by a valid arbitration agreement.

By choosing the means of <sup>ha</sup>arbitrage as well as possible and only one applicable law, a system based on a guarantee mark can become very effective.

x

drawing

I therefore inform you that WIPO (OMPI) is in the process of setting up an arbitration centre here in Geneva and to draw up rules that will be applicable when the WIPO solution has been chosen. This system should have come into operation in June this year; it will be two or three months behind schedule. However, already an arbitration agreement may be drafted to accept this solution which I consider as ideal in the case of a guarantee mark. If this solution is of interest to you, I would be at your disposal for definite proposals in view of the fact that I have closely followed the evolution of this new service and the rules of procedure proposed by WIPO which have already been extensively discussed in the specialized circles of trademark law on the one hand and arbitration law on the other.

[42]

#### F. REGISTRATION OF THE GUARANTEE MARK

##### I Principle

The Draft states that IECEX is a registered certification trade mark (8.3.1) [registered guarantee mark in this legal discussion].

##### CRITICAL COMMENTS

It will thus be necessary to carry out the registration formalities not only in Switzerland but also in all the countries that it is hoped will participate in the scheme.

In practice, this means that in addition to the Swiss mark it will be necessary to undertake international registration and also national registration in the countries that have not joined the Madrid Convention.

In many countries, it is now possible for guarantee marks be registered but other countries do not recognize them as such. This question will be verified progressively in order to look for alternative solutions.

Depending on the registrations made, you could supplement 8.3.2 of the Draft as follows :

[43]

"The Mark is the property of the IEC, which [who ?] has filed applications for registration in all Member countries of the Madrid Convention and other countries throughout the world, as illustrated in Annex H."

##### II The formalities in Switzerland

##### 1. Principle

Registration of a guarantee mark in Switzerland requires the presentation of the rules relating to the use of the mark (clause 23 para. 1 LPM).

The rules must be approved by the federal intellectual property office in Bern, which will give its approval if the conditions specified in clause 23 LPM are satisfied (clause 24 LPM).

# Conditions for approval by WIPO

2. The conditions to be satisfied by the rules are as follows :

2.1 The rules must specify the common characteristics of the products... that the mark will guarantee (clause 23 para. 2 LPM).

44] The Draft satisfies this legal requirement (clause 5.1).

2.2 The rules must provide for effective control of the use of the mark (clause 23 para. 2 LPM).

The Draft specifies control but not completely effective at all levels. See the "critical comments" made in section D above.

2.3 The rules must provide for "adequate sanctions" (clause 23 para. 2 LPM).

Sanctions are provided for and these are certainly effective as far as the manufacturers are concerned. However, the system is not without its defects. See the "critical comments" made in section D above.

2.4 Generally, the rules must not contravene public order, morality or the law in force (clause 23 para. 4 LPM).

No problem is anticipated in this respect for the IECEEx Draft Rules.

## 3. Rules that do not comply

[45]

3.1 If the Rules do not satisfy all the requirements listed in clause 23 LPM, the OFPI will allow the filer a period of time to correct this and then will reject the request for registration if the necessary action has not been taken.

3.2 Once the mark has been registered, interested third parties will be able to appeal to the Swiss courts if they consider that the Rules are contrary to clause 23 LPM. Two situations are possible : it may subsequently turn out that the Rules were contrary to clause 23 LPM and that the OFPI should never have registered the mark; it is also possible that the Rules no longer satisfy the conditions specified in clause 23 LPM.

The judge may then specify a period of time for the owner of the mark to correct this. If the owner does not take the necessary action, the registration of the mark will become invalid at the end of the period set by the judge (clause 25 LPM).

## CONCLUSIONS

It is thus essential to rework the current Draft in order ~~for~~ to fully satisfy the conditions for validity set out in clause 23 LPM. ✓

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Ute Rüede-Bugnion

Annex : List of documents consulted

(21)

[47]

## DOCUMENTS CONSULTED

1. IECCE-MC (Secretariat) 129, 1993-05  
IEC SYSTEM FOR CONFORMITY TESTING TO STANDARDS FOR SAFETY OF ELECTRICAL EQUIPMENT (IECEE)
2. [Ditto ??]  
Draft - Rules and Procedures for the Scheme of the IECEE for Certification to Standards for Electrical Equipment for Explosive Atmospheres (IECEX Scheme) . IECEE-MC (Secretariat) 129 , 1993-05
3. CECC 00600 , 1982  
European Committee for Electrotechnical Standardization (CENELEC)  
Cenelec Electronic Components Committee  
Rules for the use and administration of the CECC certification mark
4. International Electrotechnical Commission <sup>tech</sup> [??]  
1973 Statutes and rules of procedure
5. IECEE publication 01  
IEC system for conformity testing to standards for safety of electrical equipment - [Basic rules and rules of procedure of the system]
6. IECEE publication 02  
~~IEC system for conformity testing to standards for safety of electrical equipment [???~~  
~~[Should be : Rules and procedures of the scheme of the IECEE for recognition of results of testing to standards for safety of electrical equipment (CB scheme)~~
7. ISO/IEC Guides 25, 40, 58
8. ISO 9001 International standard, International organization for standardization - Quality systems
9. ISO 9002 - ~~International standard [!]~~
10. International organization for standardization - Quality systems
11. IEC letter - 12 December 1993 - ref. IECEE-Ex

## 5 RESPONSIBILITY ARISING FROM DEFECTS IN A PRODUCT

1. The IECEX mark will guarantee certain characteristics of the products on which it is marked according to the definition of clause 5.1 of the Draft. What could be the financial responsibilities when products are placed on the market, bearing the guarantee mark, but do not correspond to what it implies.

### Responsibility within the scheme

a) Violation of these statutory obligations by a manufacturer will entail costs, at all levels responsible for inspection, for the procedure and for finding a replacement, etc. Theoretically, these costs may be quantified but in practice it will be relatively complicated.

Moreover, the reputation of the guarantee mark is prejudiced. This also implies damages but these can only be estimated.

### CRITICAL COMMENTS

I therefore take the liberty of suggesting, to obviate these problems, to provide for conventional penalties fixed in advance, payable by the "party at fault". Several solutions are then possible, namely that the amount of the conventional penalty will constitute a minimum, larger damages remaining reserved or not. It will be necessary to provide for sharing out this fixed amount between the IEC and the bodies of the scheme applied [appliqué - "impliqué" would be "involved"]. As this is a preliminary question of principle, I will not go into details for the moment.

b) A body of the scheme that failed in its obligations could cause costs for other bodies and for manufacturers, prejudice the reputation of the guarantee mark and cause losses to manufacturers that will have to cease using the mark logo because of the fault of a laboratory even if their products should be otherwise in accordance with the scheme.

For this situation too, it would be possible to provide for conventional penalties, while reserving the right to sue for greater damages.

2. Damages caused to consumers of products bearing the IECEX guarantee mark

a) More and more countries recognize the responsibility of the manufacturer arising from defects in his products. This is particularly the case in the USA; the European Union has also just drafted "Richtlinie Nr. 85/374 des Rates vom 25 Juli 1985" and, in Switzerland, a new law concerning this responsibility dating from 18th June 1993 came into force on 1st January 1994. The latter forms part of the "Eurolex" package, now christened "Swisslex" and is therefore in line with European law. Since the safety of a product and the basic concept of this legislation depends on the applicable law, responsibility of the owner of the guarantee mark cannot be excluded if the product bearing this mark is defective and does not correspond to the guarantees provided for in the rules, if the inspections have not been carried out or the sanctions necessary to prevent "misuse" have not been taken or are delayed. This is a whole set of questions to be examined separately from the subject of this study which is limited to [trade]mark law.

(23)

end