



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 8 January 2009

5072/09

**PI 1
COUR 1**

WORKING DOCUMENT

from: Presidency

to: Working Party on Intellectual Property (Patents)

No. prev. doc. : 16006/08 PI 88

Subject : Draft Agreement on the European and Community¹ Patents Court and Draft Statute

Delegations will find in Annex a Presidency working document containing a revised version of the Draft Agreement on the European and Community Patents Court, for discussion at the meeting of the Intellectual Property (Patents) Working Party on 19 January 2009. This revised version takes account of the discussions in the Working Party on 11 November 2008 as well as of written comments submitted by delegations.

Delegations will also find in the Annex a revised Draft Statute of the Court and the list of issues to be included in the Rules of Procedure.

¹ The terminology of the present draft has not yet been adapted to the terminology of the Lisbon Treaty

**EUROPEAN AND COMMUNITY PATENTS COURT
DRAFT AGREEMENT**

THE CONTRACTING PARTIES,

CONSIDERING that co-operation amongst the countries of Europe in the field of patents contributes significantly to the integration process in Europe, in particular to the establishment of an internal market within the European Economic Area characterized by the free movement of goods and services and the creation of a system ensuring that competition in the internal market is not distorted,

CONSIDERING that the fragmented market for patents and the significant variations between national court systems are detrimental for innovation, in particular for small and medium sized enterprises which have difficulties to enforce their patents and to defend themselves against unfounded claims,

WISHING to improve the enforcement of patents and to enhance legal certainty by setting up a European and Community Patents Court for litigation related to the infringement and validity of patents,

CONSIDERING that the integrated and exclusive European and Community Patents Court shall be set up for Community patents and European patents designating one or more Contracting States, under the necessary legal control of the Court of Justice of the European Communities, and that the present Agreement shall be open to accession by any Contracting State to the European Patent Convention,

CONSIDERING that the European and Community Patents Court shall be designed to ensure expeditious and high quality decisions, striking a fair balance between the interests of right holders and other parties and taking into account the need for proportionality and flexibility,

HAVE AGREED AS FOLLOWS:

PART I – GENERAL AND INSTITUTIONAL PROVISIONS

CHAPTER I – GENERAL PROVISIONS

Article 1

European and Community Patents Court

A jurisdictional system for the settlement of litigation related to Community patents and European patents is hereby established. To this end, the European and Community Patents Court is created.

Article 2

Definitions

- (1) "Court" means the European and Community Patents Court.
- (2) "Community Patent" means a patent within the meaning of Article 2, paragraph 1, of Regulation (EC) No... on the Community patent.
- (3) "European Patent" means a patent granted under the provisions of the European Patent Convention designating one or more Contracting States to this Agreement.
- (4) "Supplementary protection certificate" means a supplementary protection certificate granted under Regulation (EC) No 1768/92¹ or under Regulation (EC) No 1610/96².
- (5) "European Patent Convention" means the Convention on the Grant of European Patents of 5 October 1973, as amended.
- (6) "European Patent Office" means the organ carrying out the granting of patents as established by Article 4, paragraph 2(a) of the European Patent Convention.

¹ Council Regulation (EEC) No 1768/92 of 18 June 1992 concerning the creation of a supplementary certificate for medicinal products, OJ L 182, 2.7.1992, p. 1.

² Regulation (EC) No 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary certificate for plant protection products, OJ L 198, 8.8.1996, p. 30.

(7) "Patent" means either both a Community patent and a European patent, or one of them.

(8) "Statute" means the Statute of the European and Community Patents Court which is attached to this Agreement.

(9) "Rules of Procedure" means the Rules of Procedure of the European and Community Patents Court which are attached to this Agreement.

(10) "Contracting State" means any State party to this Agreement.

(11) "Contracting Parties" means the Contracting States and the European Community.

(12) "Member State" means a Member State of the European Union.

Article 3

Scope of application

This Agreement shall apply to any:

- (a) Community patent;
- (b) supplementary protection certificate issued for a patent;
- (c) compulsory licence in respect of a Community patent;
- (d) European patent which has not yet lapsed at the date referred to in Article 59 or was granted after that date, without prejudice to Article 58; and
- (e) application for a patent which is pending at the date referred to in Article 59 or filed after that date.

Article 3a

Legal status

- (1) The Court shall have legal personality.
- (2) In each Contracting State, the Court shall enjoy the most extensive legal capacity accorded to legal persons under the national law of that State.
- (3) The Court shall be represented by the President of the Court.

Article 3b

Privileges and immunities

The Protocol on the Privileges and Immunities of the European Communities shall apply to the Court.

Article 3c

Liability

- (1) The contractual liability of the Court shall be governed by the law applicable to the contract in question.
- (2) The non-contractual liability of the Court in respect of any damage caused by it or its staff in the performance of their duties shall be governed by the law of the State of seat of the organ of the Court concerned.

CHAPTER II – INSTITUTIONAL PROVISIONS

Article 4

The Court

- (1) The Court shall comprise a Court of First Instance, a Court of Appeal and a Registry.
- (2) The Court shall perform the functions assigned to it by this Agreement.

Article 5

The Court of First Instance

- (1) The Court of First Instance shall comprise a central division as well as local and regional divisions.
- (2) A local division shall be set up in a Contracting State upon its request.
- (3) An additional local division shall be set up in a Contracting State upon its request when more than one hundred patent cases per calendar year have been commenced in that Contracting State during three successive years prior to or subsequent to the date referred to in Article 59. The number of divisions in one Contracting State shall not exceed three.
- (4) A Contracting State hosting a local division shall designate its seat and provide the facilities necessary for that purpose.
- (5) A regional division shall be set up for two or more Contracting States, upon their request. Such Contracting States shall designate the seat(s) of the division concerned. The regional division may hear cases in multiple locations.
- (6) The central division shall have its seat in [...].

Article 6

Composition of the panels of the Court of First Instance

(1) Any panel of the Court of First Instance shall have a multinational composition. Without prejudice to paragraph 5 and to Article 15a, paragraph 2, it shall sit in a composition of three judges.

(2) Any panel of a local division shall sit in a composition of two permanent judges, who shall be nationals of the Contracting State hosting the division concerned, and one judge from the Pool of Judges.

(3) In a Contracting State where during a period of three successive years more than fifty patent cases per calendar year have been commenced at first instance, the third judge referred to in paragraph 2 shall serve on a permanent basis at the local division. In other Contracting States a judge shall be allocated from the Pool of Judges to the local division on a case by case basis.

(4) Any panel of a regional division shall sit in a composition of two permanent judges chosen from a regional list of judges, who shall be nationals of the Contracting States concerned, and one judge from the Pool of Judges who shall not be a national of the Contracting States concerned.

(5) Without prejudice to paragraphs 2 and 4, any local or regional division may request, where appropriate, and after having heard the parties, the President of the Court to allocate from the Pool of Judges a technically qualified judge with qualifications and experience in the field of technology concerned. In cases where such a technically qualified judge is allocated, no further technically qualified judge has to be allocated under Article 15a, paragraph 2(a).

(6) Any panel of the central division shall sit in a composition of two legally qualified judges and one technically qualified judge allocated from the Pool of Judges with qualifications and experience in the field of technology concerned.

(7) Any panel of the Court of First Instance shall be chaired by a legally qualified judge.

Article 7

The Court of Appeal

- (1) Any panel of the Court of Appeal shall sit in a multinational composition of five judges. It shall sit in a composition of three legally qualified judges and two technically qualified judges.
- (2) Any panel of the Court of Appeal shall be chaired by a legally qualified judge.
- (3) The panels of the Court of Appeal shall be set up in accordance with the Statute.
- (4) The Court of Appeal shall have its seat in [...].

Article 8

The Registry

- (1) A Registry shall be set up at the seat of the Court of Appeal. It shall be managed by the Registrar and perform the functions assigned to it in accordance with the Statute.
- (2) Sub-registries shall be set up at all divisions of the Court of First Instance.
- (3) The Registry shall keep records of all cases before the Court. Upon filing, the sub-registry concerned shall notify every case to the Registry.
- (4) The Court shall appoint the Registrar and lay down the rules governing his service.

Article 9

Committees

A Mixed Committee, a Budget Committee and an Advisory Committee shall be set up in order to ensure the effective implementation and operation of this Agreement. They shall in particular exercise the duties foreseen by this Agreement and the Statute.

[transferred to Article 57b]

CHAPTER III – JUDGES OF THE COURT

Article 10

Eligibility criteria

- (1) The Court shall comprise both legally qualified judges and technically qualified judges. Judges shall ensure the highest standards of competence and proven experience in the field of patent litigation.
- (2) Legally qualified judges shall be qualified for judicial functions at the national level.
- (3) Technically qualified judges shall have a university degree and proven expertise in a field of technology. They shall also have proven knowledge of civil law and procedure.

Article 11

Appointment procedure

- (1) The judges of the Court shall be appointed in accordance with the following procedure:
 - (a) the Advisory Committee shall establish a list of the most suitable candidates, in accordance with the Statute;
 - (b) on the basis of this list the Council of the European Union shall select nationals of Member States who it proposes to the Mixed Committee for appointment as judges of the Court;
 - (c) on the basis of this list the Contracting States which are not Member States shall select candidates who they propose to the Mixed Committee for appointment as judges of the Court;
 - (d) the Mixed Committee shall take a decision acting by common accord.
- (2) The implementing provisions shall be provided for in the Statute.

Article 12

Judicial independence and impartiality

- (1) The Court, its judges and the Registrar shall enjoy judicial independence. In their decisions, the judges shall not be bound by any instructions.
- (2) Legally qualified judges and technically qualified judges who are full-time judges of the Court may not engage in any occupation, whether gainful or not, unless otherwise provided for in this Article or where an exception is granted by the Mixed Committee.
- (3) The exercise of the office of a legally qualified judge shall not exclude the exercise of other judicial functions at the national level.
- (4) The exercise of the office of a technically qualified judge who are part-time judges of the Court pursuant to Article 13, paragraph 2, shall not exclude the exercise of other functions provided there is no conflict of interest.
- (5) In case of a conflict of interest, a judge shall not take part in proceedings. Rules governing conflicts of interest shall be provided for in the Statute.

Article 13

Pool of Judges

- (1) A Pool of Judges shall be set up in accordance with the Statute.
- (2) The Pool of Judges shall be composed of all legally qualified judges and technically qualified judges from the Court of First Instance who are full-time judges of the Court. Moreover, it shall comprise technically qualified judges who are part-time judges of the Court. It shall be ensured that the Pool of Judges includes at least one technically qualified judge with qualifications and experience per field of technology.
- (3) Where provided in this Agreement or the Statute, the judges from the Pool of Judges shall be allocated to the division concerned by the President of the Court. The allocation of judges shall be based on their legal or technical expertise, linguistic skills and proven experience.

Article 14

Training framework

- (1) A training framework for judges shall be set up in accordance with the Statute in order to improve and increase available patent litigation expertise and to ensure a broad geographic distribution of such specific knowledge and experience.
- (2) The training framework shall in particular focus on:
 - (a) internships in national patent courts or divisions of the Court of First Instance hearing a substantial number of patent litigation cases;
 - (b) improvement of language skills;
 - (c) technical aspects of patent law;
 - (d) the dissemination of knowledge and experience in civil procedure for technically qualified judges;
 - (e) the preparation of candidate-judges.

(3) The training framework will provide for continuous training. Regular meetings will be organized between all judges of the Court in order to discuss developments in patent law and to ensure consistency of jurisprudence.

CHAPTER IIIA – SUBSTANTIVE LAW

Article 14a

Applicable law

(1) When hearing a case brought before it under this Agreement, the Court shall respect Community law and base its decisions on:

- (a) this Agreement;
- (b) Council Regulation (EC) No ... on the Community patent;
- (c) any further provision of directly applicable Community law applicable to patents and national law of the Contracting States implementing Community law applicable to patents);
- (d) the European Patent Convention and national law which has been adopted by the Contracting States in accordance with the European Patent Convention; and
- (e) any provision of international agreements applicable to patents and binding on all the Contracting Parties.

(2) To the extent that the Court shall base its decisions on the national law of the Contracting States, the applicable law shall be determined:

(a) by directly applicable provisions of Community law, or

(b) in the absence of directly applicable provisions of Community law, by international instruments on private international law to which all Contracting Parties are parties; or

(c) in the absence of provisions referred to in (a) and (b), by national provisions on international private law as determined by the Court.

Article 14c

Infringement of European patents

For the purposes of litigation under this Agreement, a European patent shall confer on its proprietor the right to prevent any third party not having his consent:

- (a) from making, offering, putting on the market or using a product which is the subject-matter of the patent, or importing or stocking the product for these purposes;
- (b) from using a process which is the subject-matter of the patent or, when the third party knows, or it is obvious in the circumstances, that the use of the process is prohibited without the consent of the proprietor of the patent, from offering the process for use;
- (c) from offering, putting on the market, using, importing or stocking for these purposes a product obtained directly by a process which is the subject-matter of the patent.

Article 14d

Indirect infringements of European patents

(1) A European patent shall also confer on its proprietor the right to prevent any third party not having his consent from supplying or offering to supply within the territory of protection any person, other than a party entitled to exploit the patented invention, with means, relating to an essential element of that invention, for putting it into effect therein, when the third party knows, or it is obvious in the circumstances, that these means are suitable and intended for putting that invention into effect.

(2) Paragraph 1 shall not apply when the means are staple commercial products, except where the third party induces the person supplied to commit acts prohibited by Article 14c.

(3) Persons performing the acts referred to in Article 14e (a) to (c) shall not be considered to be parties entitled to exploit the invention within the meaning of paragraph 1.

Article 14e

Limitations of the effects of the European patent

The rights conferred by the European patent shall not extend to:

- (a) acts done privately and for non-commercial purposes;
 - (b) acts done for experimental purposes relating to the subject-matter of the patented invention;
 - (c) acts carried out solely for the purpose of conducting tests and trials in accordance with Article 13 of Directive 2001/82/EC¹ or Article 10 of Directive 2001/83/EC² in respect of any patent covering the reference product within the meaning of the said Directives;
 - (d) the extemporaneous preparation for individual cases in a pharmacy of a medicine in accordance with a medical prescription nor acts concerning the medicine so prepared;
 - (e) the use on board vessels of countries other than Contracting States of the patented invention, in the body of the vessel, in the machinery, tackle, gear and other accessories, when such vessels temporarily or accidentally enter the waters of Contracting States, provided that the invention is used there exclusively for the needs of the vessel;
 - (f) the use of the patented invention in the construction or operation of aircraft or land vehicles or other means of transport of non-Contracting States, or of accessories of such aircraft or land vehicles, when these temporarily or accidentally enter the territory of Contracting States;
 - (g) the acts specified in Article 27 of the Convention on International Civil Aviation of 7 December 1944³, where these acts concern the aircraft of a country other than a Contracting State
- ;

¹ Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products, OJ L 311, 28.11.2001, p. 1.

² Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ L 311, 28.11.2001, p. 67.

³ International Civil Aviation Organization (ICAO), "Chicago Convention", Document 7300/9 (9th edition, 2006)

(h) the use by a farmer of the product of his crop for propagation or multiplication on his own holding, provided that the reproductive vegetable material was sold or otherwise commercialized by the holder of the patent or with his consent to the farmer, for agricultural purposes. The scope and the detailed methods of this use are laid down in Article 14 of Regulation (EC) No. 2100/94¹;

(i) the use by a farmer of protected livestock for farming purposes, on condition that the breeding animals or other animal reproductive material was sold or otherwise commercialized to the farmer by the holder of the patent or with his consent. Such use includes the provision of the animal or other animal reproductive material for the purposes of his agricultural activity, but not the sale as part of or for the purpose of commercial reproductive activity;

(j) the acts allowed pursuant to Articles 5 and 6 of Directive 91/250/EEC on the legal protection of computer programs by copyright², in particular, by its provisions on decompilation and interoperability; and

(k) the acts allowed pursuant to Article 10 of Directive 98/44/EC on the legal protection of biotechnological inventions³

.Article 14f

Right based on prior use of the invention

Any person, who, if a national patent had been granted in respect of an invention, would have had, in a Contracting State, a right based on prior use of that invention or a right of personal possession of that invention, shall enjoy, in that Contracting State, the same rights in respect of a European patent for the same invention.

¹ Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, OJ L 227, 1.9.1994, p.1.

² Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122, 17.05.1991, p.42.

³ Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions OJ L 213, 30.7.1998, p. 13.

CHAPTER IV – JURISDICTION AND EFFECTS OF DECISIONS

Article 15

Jurisdiction

(1) The Court shall have exclusive competence in respect of:

- (a) actions for actual or threatened infringements of patents and supplementary protection certificates and related defences, including counterclaims concerning licences, or for a declaration of non-infringement;
- (b) actions for provisional and protective measures and injunctions;
- (c) actions or counterclaims for revocation;
- (d) actions for damages or compensation derived from the provisional protection conferred by a published patent application;
- (e) actions relating to the use of the invention prior to the granting of the patent or to the right based on prior use of the patent;
- (f) actions for the grant or revocation of compulsory licences in respect of Community patents;
- (g) actions on compensation for licences within the meaning of [Article 20, paragraph 1] of Council Regulation (EC) No. ... on the Community patent.

(2) The national courts of the Contracting States shall have jurisdiction in actions related to Community patents and European patents which do not come within the exclusive jurisdiction of the Court.

Article 15a

Jurisdiction of the divisions of the Court of First Instance

(1) The actions referred to in Article 15, paragraph 1(a), (b), (d) and (e) shall be brought before:

- (a) the local division hosted by the Contracting State where the actual or threatened infringement has occurred or may occur, or the regional division in which this Contracting State participates; or
- (b) the local division hosted by the Contracting State where the defendant is domiciled, or the regional division in which this Contracting State participates.

If the Contracting State concerned does not host a local division and does not participate in a regional division, actions shall be brought before the central division.

(2) A counterclaim for revocation can be brought in the case of an action for infringement. The local or regional division concerned shall, after having heard the parties, have the discretion to either:

- (a) proceed with both the infringement action and with the counterclaim for revocation and request the President of the Court to allocate from the Pool of Judges a technically qualified judge with qualifications and experience in the field of technology concerned;
- (b) refer the counterclaim for decision to the central division and suspend or proceed with the infringement proceedings; or
- (c) with agreement of the parties, refer the case for decision to the central division.

(3) Without prejudice to paragraph 2, the actions referred to in Article 15, paragraph 1(c), (f) and (g) shall be brought before the central division. Such actions may only be initiated if no action for infringement has been initiated between the same parties relating to the same patent before a local or a regional division.

(4) If an action for revocation is pending before the central division, an action for infringement between the same parties on the same patent may be initiated at any division, subject to paragraph 1. The local or regional division concerned shall have the discretion to proceed in accordance with paragraph 2.

(5) An action for declaration of non-infringement pending before the central division shall be terminated once an infringement action between the same parties related to the same patent is initiated within three months before a local or regional division.

(6) Parties may agree to bring an action before the division of their choice, including the central division.

(7) The actions referred to in paragraph 3 can be brought without the plaintiff having to initiate an opposition procedure before the European Patent Office. In the case of pending opposition proceedings before the European Patent Office, any party to an action before the Court shall inform the Court when it has requested accelerated proceedings before the European Patent Office. The Court may stay its proceedings when a rapid decision may be expected from the European Patent Office.

Article 16

Territorial effects of decisions

Decisions of the Court shall have effect, in the case of a Community patent, for the whole territory of the European Union and, in the case of a European patent, for the territory of those Contracting States for which the European patent has taken effect.

CHAPTER V – Patent Mediation and Arbitration

Article 17

Patent mediation and arbitration centre

(1) A patent mediation and arbitration centre is hereby established ("the Centre"). It shall have its seat in [...].

(2) The Centre shall provide facilities for mediation and arbitration of patent disputes falling within the scope of this Agreement. However, a patent may not be declared fully or partially invalid or be fully or partially invalidated in mediation or arbitration proceedings.

(3) In the interim procedure referred to in Article 32, paragraph 2, the judge acting as Rapporteur shall explore with the parties the possibilities for a settlement through mediation and arbitration, and for the use of the facilities of the Centre.

(4) The Centre shall establish Mediation and Arbitration Rules.

(5) The Centre shall draw up a list of mediators and arbitrators to assist the parties in the settlement of their dispute.

PART II – FINANCIAL PROVISIONS

Article 18

Budget of the Court

(1) The budget of the Court shall be financed by the Court's own financial revenues and by contributions from the European Community and from the Contracting States which are not Member States, in accordance with the Statute. The budget shall be balanced.

(2) The Court's own financial revenues shall comprise court fees and other revenues.

Article 19

Financing of the Court

(1) The operating costs of the Court shall be covered by the budget of the Court, in accordance with the Statute.

(2) On the date referred to in Article 59, paragraph 1, the European Community and the Contracting States which are not Member States shall provide initial financial contributions necessary for the setting up of the Court.

Article 20

Financing of the training framework for judges

The training framework for judges shall be financed by the budget of the Court.

Article 21

Financing of the Centre

The operating costs of the Centre shall be financed in accordance with the Statute.

PART III – ORGANISATION AND PROCEDURAL PROVISIONS

CHAPTER I – GENERAL

Article 21a

Statute

- (1) The Statute shall lay down the details of the organisation and functioning of the Court.
- (2) The Statute is attached to this Agreement. It may be amended by decision of the Mixed Committee, on the basis of a proposal from the Court. However, such amendments shall not contradict or alter the provisions of this Agreement.
- (3) The Statute shall guarantee that the functioning of the Court is organised in the most efficient and cost effective manner and shall ensure equitable access to justice.

Article 22

Rules of Procedure

- (1) The Rules of Procedure shall lay down the details of the proceedings before the Court. They shall comply with the provisions of this Agreement and of the Statute.
- (2) The Rules of Procedure are attached to this Agreement. They may be amended by decision of the Mixed Committee, on the basis of a proposal from the Court. However, such amendments shall not contradict or alter the provisions of this Agreement or the Statute.
- (3) The Rules of Procedure shall guarantee that the decisions of the Court are of the highest quality and that proceedings are organised in the most efficient and cost effective manner. They shall ensure a fair balance between the legitimate interests of all parties. They shall provide for the required level of discretion for the judges without impairing predictability of proceedings for the parties.

Article 23

Proportionality and fairness

(1) The Court shall deal with litigation in ways which are proportionate to its importance and complexity.

(2) The Court shall ensure that the rules, procedures and remedies provided for in this Agreement and in the Statute are used in a fair and equitable manner and shall not distort competition.

Article 24

Case management

The Court shall actively manage the cases before it in accordance with the Rules of Procedure without impairing the freedom of the parties to determine the subject-matter and the supporting evidence of their case.

Article 25

Electronic procedures

The Court shall make best use of electronic procedures, such as electronic filing of submissions of the parties and stating of evidence in electronic form, as well as video conferencing for overall communication, in accordance with the Rules of Procedure.

Article 26

Public proceedings

The proceedings shall be open to the public unless the Court decides to make them, to the extent necessary, confidential in the interest of one of the parties or other affected persons, or in the general interest of justice or public order.

Article 27

Parties

- (1) Any natural or legal person, or any body equivalent to a legal person entitled to initiate proceedings in accordance with the applicable law of the Contracting State concerned, shall have access to the Court in order to initiate actions, to defend itself against actions, or to seek application of the procedures and remedies provided for in this Agreement and in the Rules of Procedure.
- (2) The holder of an exclusive licence in respect of a patent shall be entitled to initiate proceedings before the Court in the same way as the proprietor of a patent, provided that the proprietor is given prior notice, unless the licensing agreement provides otherwise.
- (3) The holder of a non-exclusive licence shall not be entitled to initiate proceedings before the Court, unless the patent proprietor is given prior notice and in so far as expressly permitted by the licence agreement.
- (4) In proceedings initiated by any licence holder, the patent proprietor shall be entitled to join them as a party.
- (5) The validity of a patent cannot be contested in infringement proceedings initiated by the holder of a licence where the proprietor of the patent does not take part in the proceedings. The party in infringement proceedings wanting to contest the validity of a patent shall have to initiate proceedings against the proprietor.

(6) Any other natural or legal person, or any body equivalent to a legal person entitled to initiate proceedings in accordance with the applicable law of the Contracting State concerned, who is concerned by a patent, may initiate proceedings in accordance with the Rules of Procedure.

Article 28

Representation

(1) Parties shall be represented by lawyers authorized to practise before a court of a Contracting State.

(2) Parties may also be represented by European Patent Attorneys who are entitled to act as professional representatives before the European Patent Office pursuant to Article 134 of the European Patent Convention and who have appropriate qualifications such as a European Union Patent Litigation Certificate.

(3) The requirements for qualifications pursuant to paragraph 2 shall be established by the Mixed Committee on the basis of a proposal from the Commission of the European Communities. A list of European Patent Attorneys entitled to represent parties before the Court shall be kept by the Registrar.

(4) Representatives of the parties shall enjoy the rights and immunities necessary to the independent exercise of their duties, under the conditions laid down in the Rules of Procedure.

(5) Representatives of the parties shall be obliged not to misrepresent cases or facts before the Court either knowingly or with good reasons to know.

CHAPTER II – LANGUAGES OF PROCEEDINGS

Article 29

Language of proceedings at the Court of First Instance

(1) The language of proceedings before any local or regional division shall be the official European Union language(s) of the Member State or the official language(s) of other Contracting States hosting the relevant division, or the official language(s) designated by Contracting States sharing a regional division.

(2) Notwithstanding paragraph 1, Contracting States may designate one or more of the official languages of the European Patent Office as the language of proceedings of their local or regional division.

(3) Parties may agree on the use of the language in which the patent was granted as language of proceedings, subject to approval by the competent division. If the division concerned does not approve their choice, the parties may request that the case be referred to the central division.

(4) [At the request of one of the parties and after having heard the other parties] / [With the agreement of the parties] the competent local or regional division may, on grounds of convenience and fairness, decide on the use of the language in which the patent was granted as language of proceedings.

(5) The language of proceedings at the central division is the language in which the patent concerned was granted.

Article 30

Language of proceedings at the Court of Appeal

(1) The language of proceedings before the Court of Appeal shall be the language of proceedings before the Court of First Instance.

(2) Parties may agree on the use of the language in which the patent was granted as language of proceedings.

(3) In exceptional cases and to the extent deemed appropriate, the Court of Appeal may decide on another official language of a Contracting State as the language of proceedings for the whole or part of the proceedings, subject to agreement by the parties.

Article 31

Other language arrangements

(1) Any division of the Court of First Instance and the Court of Appeal may, to the extent deemed appropriate, dispense with translation requirements.

(2) At the request of one of the parties, and to the extent deemed appropriate, any division of the Court of First Instance and the Court of Appeal shall provide interpretation facilities to assist the parties concerned at oral proceedings.

CHAPTER III – PROCEEDINGS BEFORE THE COURT

Article 32

Oral, interim and written procedures

- (1) The proceedings before the Court shall consist of a written, interim and oral procedure, in accordance with the Rules of Procedure. All procedures shall be organized in a flexible and balanced manner.
- (2) In the interim procedure, after the written procedure and if appropriate, the judge acting as Rapporteur, subject to a mandate of the full panel and designated in accordance with the Rules of Procedure, shall be responsible for convening an interim hearing. He shall in particular explore the possibility for a settlement.
- (3) The oral procedure shall give parties the opportunity to explain properly their arguments. The Court may, with the agreement of the parties, dispense with the oral procedure.

Article 33

Means of evidence

- (1) In proceedings before the Court, the means of giving or obtaining evidence shall include in particular the following:
- (a) hearing the parties;
 - (b) requests for information;
 - (c) production of documents;
 - (d) hearing witnesses;
 - (e) opinions by experts;
 - (f) inspection;
 - (g) comparative tests or experiments;
 - (h) sworn statements in writing (affidavits).

(2) The Rules of Procedure shall govern the procedure for taking such evidence. Questioning of witnesses and experts shall be under the control of the Court and be limited to what is necessary.

Article 33a

Burden of proof

The burden of the proof of facts shall be on the party relying on those facts.

Article 34

Reversal of burden of proof

(1) If the subject-matter of a patent is a process for obtaining a new product, the identical product when produced without the consent of the proprietor shall, in the absence of proof to the contrary, be deemed to have been obtained by the patented process.

(2) The same shall apply if there is a substantial likelihood that the identical product was made by the process and the proprietor of the patent has been unable, despite reasonable efforts, to determine the process actually used.

(3) In the adduction of proof to the contrary, the legitimate interests of the defendant in protecting his manufacturing and trade secrets shall be taken into account.

CHAPTER IV – POWERS OF THE COURT

Article 34a

General

(1) The Court may impose such measures, procedures and remedies as are laid down in this Agreement and may make its orders subject to other conditions, in accordance with the Statute and the Rules of Procedure.

(2) The Court shall take due account of the interest of the parties and shall, before making an order, give any party an opportunity to present its interests unless this is incompatible with an effective enforcement of such order.

Article 35

Order to produce evidence

(1) Where a party has presented reasonably available evidence sufficient to support its claims and has, in substantiating those claims, specified evidence which lies in the control of the opposing party or a third party, the Court may order that party to produce such evidence. Such order shall not result in an obligation of self-incrimination.

(2) On application by a party the Court may order, under the same conditions as specified in paragraph 1, the communication of banking, financial or commercial documents under the control of the opposing party.

Article 35a

Order to preserve evidence and to inspect property

(1) The Court may, even before the commencement of proceedings on the merits of the case, on application by a party who has presented reasonably available evidence to support the claim that the patent right has been infringed or is about to be infringed, order prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement.

(2) Such measures may include the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto.

(2a) The inspection of the premises shall be conducted by a person appointed by the Court in accordance with the Rules of Procedure.

(3) At the inspection of the premises the requesting party shall not be present itself but may be represented by an independent professional practitioner whose name has to be specified in the Court's order.

(4) The measures shall be taken, if necessary without the other party having been heard, in particular where any delay is likely to cause irreparable harm to the proprietor of the patent, or where there is a demonstrable risk of evidence being destroyed.

(5) Where measures to preserve evidence are adopted without the other party having been heard, the parties affected shall be given notice, without delay and at the latest immediately after the execution of the measures. A review, including a right to be heard, shall take place upon request of the parties affected with a view to deciding, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.

(6) The Court shall ensure that the measures to preserve evidence are revoked or otherwise cease to have effect, upon request of the defendant, without prejudice to the damages which may be claimed, if the applicant does not initiate, within a period not exceeding 31 calendar days, proceedings leading to a decision on the merits of the case before the Court.

(7) Where the measures to preserve evidence are revoked, or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of the patent right, the Court may order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by those measures.

Article 35b

Freezing orders

The Court may order a party to refrain from removing from its jurisdiction any assets located there, or from dealing in any assets, whether located within its jurisdiction or not.

Article 36

Court experts

(1) Without prejudice to the possibility for the parties to produce expert evidence, the Court may at any time appoint court experts in order to provide expertise for specific aspects of the case.

(2) To this end, an indicative list of experts shall be drawn up by the Court in accordance with the Rules of Procedure and kept by the Registrar.

(3) The court experts shall guarantee independence and impartiality.

(4) Expert advice given to the Court shall be made available to the parties who shall have the possibility to comment on the advice given.

Article 37

Provisional and protective measures

(1) The Court may grant injunctions against an alleged infringer or against a third party whose intermediary services are used by the alleged infringer, on a provisional basis, intended to prevent any impending infringement, to forbid the continuation of the alleged infringement or to make such continuation subject to the lodging of guarantees.

(2) The Court shall have the discretion to weigh up the interests of the parties and in particular to take into account the potential harm for either of the parties resulting from the granting or the refusal of the injunction.

(3) The Court may also order the seizure or delivery up of the goods suspected of infringing a patent right so as to prevent their entry into or movement within the channels of commerce. If the injured party demonstrates circumstances likely to endanger the recovery of damages, the Court may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his/her bank accounts and other assets.

(4) The Court may, in respect of the measures referred to in paragraphs 1 and 3, require the applicant to provide any reasonable evidence in order to satisfy itself with a sufficient degree of certainty that the applicant is the right-holder and that the applicant's right is being infringed, or that such infringement is imminent.

(5) Article 35a, paragraphs 4 to 7 shall apply by analogy to the measures referred to in this Article.

Article 37a

Permanent injunctions

(1) Where a decision is taken finding an infringement of a patent, the Court may grant an injunction aimed at prohibiting the continuation of the infringement. The Court may also grant such injunctions against an intermediary whose services are being used by a third party to infringe a patent right.

(2) Where appropriate, such injunction shall be subject to a periodic penalty payment payable to the Court with a view to ensuring compliance.

Article 38

Corrective measures in infringement proceedings

(1) Without prejudice to any damages due to the injured party by reason of the infringement, and without compensation of any sort, the Court may order, at the request of the applicant, that appropriate measures be taken with regard to goods found to be infringing patent rights and, in appropriate cases, with regard to materials and implements principally used in the creation or manufacture of those goods.

(2) Such measures shall include:

- (a) declaration of the fact of infringement;
- (b) recall from the channels of commerce;
- (c) depriving the product from its infringing property;
- (d) definitive removal from the channels of commerce; or
- (e) destruction.

(3) The Court shall order that those measures be carried out at the expense of the infringer, unless particular reasons are invoked for not doing so.

(4) In considering a request for corrective measures, the need for proportionality between the seriousness of the infringement and the remedies ordered, the willingness of the party concerned to convert the materials into a non-infringing state, as well as the interests of third parties shall be taken into account.

Article 38a

Decision on invalidity of a patent

(1) The Court shall decide on the validity of a patent on the basis of a direct action for revocation or a counterclaim for invalidity.

(2) The Court shall revoke a patent, either entirely or partly, on the grounds referred to in Article 138, paragraph 1, of the European Patent Convention or Article 28, paragraph 1, of the Council Regulation (EC) No ... on the Community patent.

(3) The Court shall limit the patent by a corresponding amendment of the claims and revoke the patent in part if the grounds for revocation affect the patent only in part.

(4) To the extent that a patent has been revoked it shall be deemed not to have had, from the outset, in the case of a Community patent, the effects specified in Articles 7 and 8 of Council Regulation (EC) No. [...] on the Community patent, and in the case of a European patent, the effects specified in Articles 64 and 67 of the European Patent Convention.

(5) Where the Court, in a final decision, has revoked a patent, either entirely or partly, it shall send a copy of the decision to the European Patent Office and, with respect to a European patent, to the national patent office of any Contracting State concerned.

Article 39

Power to order the communication of information

(1) The Court may, in response to a justified and proportionate request of the plaintiff and in accordance with the Rules of Procedure, order an alleged infringer to inform the plaintiff of:

- (a) the origin and distribution channels of the infringing goods or processes;
- (b) the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods in question; and
- (c) the identity of any third person involved in the production or distribution of infringing goods or in the use of an infringing process.

(2) The Court may, in accordance with the Rules of Procedure, also order any other person who, on a commercial scale:

- (a) was found in the possession of infringing goods or in the use of an infringing process;
- (b) was found to be providing services used in infringing activities; or
- (c) was indicated by the person referred to in (a) or (b) as being involved in the production, manufacture or distribution of the goods or processes or in the provision of the services,

to provide the plaintiff with the information referred to in paragraph 1.

Article 40

Protection of confidential information

To protect a party's or a third party's trade secrets, personal data or other confidential information, or to prevent an abuse of evidence, the Court may order that the collection and use of evidence in proceedings before it be restricted or prohibited or that access to such evidence be restricted to certain persons.

Article 41

Award of damages

(1) The Court may, at the request of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in a patent infringing activity, to pay the injured party damages appropriate to the prejudice actually suffered as a result of the infringement.

(2) The injured party shall, to the extent possible, be restored in the position it would have been in if no infringement had taken place. The infringer shall not benefit from the infringement. However, damages shall not be punitive.

(3) When the Court sets the damages:

(a) it shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the injured party by the infringement; or

(b) as an alternative to (a), it may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of the royalties or fees which would have been due if the infringer had requested authorisation to use the patent in question.

(4) Where the infringer did not knowingly or with reasonable grounds to know engage in infringing activity, the Court may order the recovery of profits or the payment of compensation.

Article 42

Legal costs

- (1) Reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity requires otherwise.
- (2) Where a party succeeds only in part or in exceptional circumstances, the Court may order that costs be apportioned equitably or that the parties bear their own costs.
- (3) A party should bear any unnecessary costs it has caused the Court or another party.
- (4) At the request of the defendant the Court may order the plaintiff to provide adequate security for the legal costs and other expenses incurred by the defendant which the plaintiff may be liable to bear.

Article 43

Court fees

- (1) Parties to proceedings before the Court shall pay court fees. The court fees shall be set by the Mixed Committee.
- (2) The amount of the court fees shall ensure a right balance between the principle of fair access to justice and an adequate contribution of the parties for the services rendered by the Court. The level of the court fees shall be reviewed periodically.
- (3) Court fees shall be paid in advance. Any party which has not paid a prescribed court fee may be excluded from further participation in the proceedings.

Article 44

Legal aid

(1) A party who is a natural person and wholly or in part unable to meet the costs of the proceedings may at any time apply for legal aid. The conditions for granting of legal aid shall be laid down in the Rules of Procedure.

(2) The Court shall decide whether legal aid should be granted in full or in part, or whether it should be refused, in accordance with the Rules of Procedure.

(3) On a proposal from the Court, the Mixed Committee shall set the level of and rules on bearing the costs of legal aid.

Article 44a

Period of limitation

Proceedings relating to use, to the right based on prior use, to infringement and to damages referred to in this Chapter may be initiated until five years from the date on which the requesting party became, or had reasonable grounds to become, aware of the facts justifying the proceedings.

CHAPTER V – APPEALS

Article 45

Appeal

(1) An appeal against a decision of the Court of First Instance may be brought before the Court of Appeal by any party which has been unsuccessful, in whole or in part, in its submissions. An appeal may be brought against a final decision of the Court of First Instance or against an order referred to in Articles 35, 35a, 35b, 37 or 39.

(2) An appeal shall be brought within two months of the notification of a final decision of the Court of First Instance or within fifteen calendar days of the notification of an order referred to in paragraph 1.

(3) The appeal against a decision of the Court of First Instance may be based on points of law and matters of fact.

(4) New facts and new evidence may only be introduced if their submission by the party concerned could not reasonably have been expected during proceedings before the Court of First Instance, in accordance with the Rules of Procedure.

Article 46

Effects of an appeal

(1) Without prejudice to paragraph 2, an appeal shall not have suspensive effect unless the Court of Appeal decides otherwise at the motivated request of one of the parties. The Rules of Procedure shall guarantee that such a decision is taken without delay.

(2) An appeal against a decision on actions or counterclaims for revocation shall always have suspensive effect.

(3) The appeal against an order referred to in Articles 35, 35a, 35b, 37 or 39 shall not prevent the continuation of the principal proceedings. However, the Court may not give a final decision in the principal proceedings before the decision concerning an appealed order has been given.

Article 47

Decision on appeal and referral back

(1) If the appeal is well-founded, the Court of Appeal shall revoke the decision of the Court of First Instance and give a final decision. The Court of Appeal may in exceptional cases and in accordance with the Rules of Procedure refer the case back to the Court of First Instance for decision.

(2) Where a case is referred back to the Court of First Instance it shall be bound by the decision of the Court of Appeal on points of law.

Article 48

Interpretation of Community law

When a question of interpretation of Community law arises in a case pending before the Court of Appeal, the Court of Appeal shall ask, if it considers this necessary to enable it to give a judgement, the Court of Justice of the European Communities to decide on the question.

CHAPTER VI - DECISIONS

Article 49

Basis for decisions and right to be heard

- (1) The Court shall decide in accordance with the requests submitted by the parties. The Court shall not award more than is requested.
- (2) The decisions on the merits may only be based on grounds or evidence on which the parties have had an opportunity to present their comments.
- (3) Decisions on the merits may only be based on the grounds, facts and evidence submitted by the parties or introduced into the procedure by an order of the Court.
- (4) The Court shall evaluate evidence freely and independently.

Article 50

Formal requirements

- (1) The decision of the Court shall be reasoned and shall be given in writing in accordance with the Rules of Procedure.
- (2) The decision of the Court shall be delivered in the language of proceedings.

Article 51

Dissenting opinions

- (1) Decisions of the Court shall be taken by a majority of the panel, in accordance with the Statute. In case of equal votes the vote of the presiding judge shall prevail.
- (2) In exceptional circumstances any judge of the panel may express his dissenting opinion separately from the decision of the Court.

Article 52

Settlement

The parties may, at any time in the course of proceedings, conclude their case by way of settlement confirmed by a decision of the Court. A patent may not be declared fully or partially invalid or be fully or partially invalidated by way of settlement.

Article 54

Publication of decisions

The Court may order, at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part in public media.

Article 55

Rehearing

(1) A petition for rehearing after a final decision may exceptionally be made to the Court of Appeal on discovery of a fact by the party requesting the rehearing, which is of such a nature as to be a decisive factor and which, when the decision was given, was unknown to the party requesting the rehearing. Such petition may only be based on grounds of a fundamental procedural defect or of an act which was held, by a final court decision, to constitute a criminal offence.

(2) A request for a rehearing shall be filed within 10 years from the date of the decision but not later than two months from the date of the discovery of a fact within the meaning of paragraph 1. Such request shall not have suspensive effect unless the Court of Appeal decides otherwise.

(3) If the request for a rehearing is founded, the Court of Appeal shall set aside, in whole or in part, the decision under review and re-open the proceedings for a new trial and decision, in accordance with the Rules of Procedure.

(4) Persons using patents which are the subject-matter of a decision and who are acting in good faith should be allowed to continue the use.

Article 56

Enforcement of decisions

(1) Decisions of the Court shall be enforceable in any Contracting State without the need for a declaration of enforceability. An order for the enforcement of a decision shall be appended to the decision by the Court.

(2) Where appropriate, the enforcement of a decision may be subject to the provision of security or an equivalent assurance to ensure compensation for any prejudice suffered, in particular in the case of injunctions.

(3) Without prejudice to the provisions of this Agreement and the Statute, the enforcement procedures shall be governed by the law of the Contracting State where the enforcement takes place. Any decision of the Court shall be enforced under the same conditions as a decision given in the Contracting State where the enforcement takes place.

(4) If a party does not comply with the terms of an order of the Court, it may be sanctioned with a periodic penalty payment payable to the Court. The individual penalty shall be proportionate to the importance of the order to be enforced. The periodic penalty payment shall be ordered without prejudice to the party's right to claim damages or security.

PART IIIA – IMPLEMENTATION AND OPERATION OF THE AGREEMENT

Article 57

The Mixed Committee

(1) The Mixed Committee shall be composed of one representative of each Contracting Party. The European Community shall be represented by the Commission of the European Communities.

(2) Any State party to this Agreement shall have one vote.

(3) The Mixed Committee shall adopt its decisions by a majority of three quarters of the Contracting States represented and voting, except where this Agreement or the Statute provides otherwise.

(4) The Mixed Committee shall adopt its rules of procedure.

(5) The Mixed Committee shall elect a chairperson from among its members. The duration of the term of office shall be three years. The term of office shall be renewable.

Article 57a

The Budget Committee

(1) The Budget Committee shall be composed of one representative of each Contracting Party. The European Community shall be represented by the Commission of the European Communities.

(2) Any State party to this Agreement shall have one vote.

(3) The Budget Committee shall take its decisions by a simple majority of the representatives of the Contracting States. However, a majority of three-quarters of the representatives of the Contracting States shall be required for the adoption of the budget.

(3) The Budget Committee shall elect a chairperson from among its members. The duration of the term of office shall be three years. The term of office shall be renewable.

Article 57b

The Advisory Committee

(1) The Advisory Committee shall assist the Council of the European Union and the Mixed Committee in the preparation of the appointment of the judges of the Court.

(2) The Advisory Committee shall comprise patent judges and practitioners in patent law and patent litigation with the highest recognised competence. They shall be appointed, in accordance with the procedure laid down in the Statute, for a term of six years. They may be re-appointed.

(3) The composition of the Advisory Committee shall ensure a broad range of relevant expertise and the broadest possible geographic distribution within the territory of the Contracting States.

(4) The Advisory Committee shall elect a chairperson from among its members. It shall adopt its rules of procedure.

PART IV – TRANSITIONAL PROVISIONS

Article 58

Transitional period

(1) During a transitional period of seven years after the date referred to in Article 59, proceedings for infringement or for revocation of a European patent may still be initiated before the national courts or other competent authority of a Contracting State having jurisdiction under national law.

(2) Any proceedings pending before a national court at the end of the transitional period shall continue to be subject to the transitional regime.

(3) In order to ensure the most efficient use and pooling of resources during a transitional period of seven years, and without prejudice to Article 5 and Article 6, paragraph 3, those Contracting States where prior to the date referred to in Article 59, during a period of three successive years, less than fifty patent cases per calendar year have been commenced shall either:

- a) have panels of local divisions which shall initially sit in a composition of one judge who is a national of the Contracting State concerned and two judges from the Pool of Judges who are not nationals of the Contracting State concerned; or
- b) join a regional division with a critical mass of at least fifty cases per year.

(4) Unless proceedings have already been initiated before the Court, holders of European patents granted or applied for prior to the date referred to in Article 59 shall have the possibility to opt out from the application of Article 3. To this end they shall notify their opt-out to the Registry by the latest one month before expiry of the transitional period.

PART V – FINAL PROVISIONS

Article 58a

Ratification and depositing

This Agreement shall be ratified by the Contracting Parties in accordance with their respective constitutional requirements. Instruments of ratification shall be deposited with [the General Secretariat of the Council of the European Union (hereinafter referred to as "the depository")].

Article 58b

Accession

(1) This Agreement shall be open to accession by any Contracting State to the European Patent Convention.

(2) Instruments of accession shall be deposited with [the depository].

Article 58c

Duration of the Agreement

This Agreement shall be of unlimited duration.

Article 58d

Revision

- (1) This Agreement may be revised by the Contracting Parties.
- (2) Not later than five years from the date referred to in Article 59, the Commission of the European Communities shall draw up a report on the operation of the Court.

Article 58e

Denunciation

- (1) Any Contracting State which is not a Member State may at any time denounce this Agreement. Denunciation shall be notified to the Mixed Committee. Upon the receipt of such notification, a Protocol among the Contracting Parties shall be drawn up to this effect.
- (2) The denunciation of this Agreement shall be without prejudice to any proceedings pending before the Court.

Article 58f

Languages of the Agreement

This Agreement is drawn up in a single original, in the [...] languages, all of them being equally authentic.

Article 59

Entry into force

(1) This Agreement shall enter into force on the first day of the month following the date on which [the depository] notifies the Contracting Parties that the procedures referred to in Article 58a have been completed.

(2) In respect of any State which is eligible to accede to this Agreement in accordance with the provisions of Article 58b and which subsequently expresses its consent to be bound by it, this Agreement shall enter into force on the first day of the month following the deposit of the instruments of ratification.

Article 60

Entry into operation

[To be developed]

In witness whereof the undersigned, being duly authorised thereto, have signed this Agreement,

Done at the

Draft Statute of the European and Community Patents Court

Article 1

Scope of the Statute

This Statute contains institutional and financial arrangements for the European and Community Patents Court as established under Article 1 of the Agreement.

CHAPTER I - JUDGES

Article 2

Eligibility of judges

(1) Any person who is a national of a Contracting State and fulfils the conditions required by Article 10 of the Agreement and this Statute may be appointed as a judge.

(2) The judges shall have a good command of at least one official language of the European Patent Office.

Article 3

Appointment of judges

(1) Pursuant to the procedure set out in Article 11 of the Agreement, judges shall be appointed by the Mixed Committee acting by common accord on the basis of proposals from the Advisory Committee and, as far as nationals of the Member States are concerned, from the Council of the European Union.

(2) Vacancies shall be publicly advertised. The Advisory Committee shall give an opinion on candidates' suitability to perform the duties of a judge of the Court. The opinion shall comprise a list of most suitable candidates. The list shall contain at least twice as many candidates as there are vacancies to be filled in.

(3) When selecting and appointing judges, the Council of the European Union and the Mixed Committee shall ensure a balanced composition of the Court on as broad a geographical basis as possible among nationals of the Contracting States.

(4) The judges shall be appointed for a period of six years. They may be reappointed.

(5) The Mixed Committee shall appoint as many judges as are needed for the well functioning of the Court. Initially the Mixed Committee shall appoint the necessary number of judges for setting up at least one panel pursuant to Article 14 in each of the divisions of the Court of First Instance and at least two panels pursuant to Article 16 in the Court of Appeal.

(6) The decision of the Mixed Committee appointing judges shall state the instance of the Court and/or the division of the Court of First Instance for which each judge is appointed and the fields of technology for which a technically qualified judge is appointed.

Article 3a

Appointment of the members of the Advisory Committee

[To be developed]

Article 4

Oath

Before taking up his duties each judge shall, in open court, take an oath to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court.

Article 5

Impartiality

(1) When taking up their duties, the judges shall give a solemn undertaking that, both during and after their term of office, they shall respect the obligations arising therefrom, in particular the duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits.

(2) A judge may not take part in the hearing of any case in which he:

(a) has taken part as adviser;

(b) has been a party or acted for one of the parties;

(c) has been called upon to pronounce as a member of a court, tribunal, board of appeal, arbitration or mediation panel, a commission of inquiry or in any other capacity; or

(d) is related to one of the parties by family ties.

(3) If, for some special reason, any judge considers that he should not take part in the judgement or examination of a particular case, he shall so inform the President of the Court. If, for some special reason, the President of the Court considers that any judge should not sit or make submissions in a particular case, he shall notify him accordingly.

(4) Any party to the proceedings may object to a judge for any of the reasons mentioned in paragraph 2 or if the judge is suspected with good reason of partiality.

(5) Any difficulty arising as to the application of this Article shall be settled by decision of the Court of Appeal, sitting as a full Court, in accordance with the Rules of Procedure. The judge concerned shall be heard but shall not take part in the deliberations.

Article 6

Immunity of judges

(1) The judges shall be immune from legal proceedings for acts performed by them or in relation to their official capacity. They shall continue to enjoy this immunity after they have ceased to hold office.

(2) The Court of Appeal, sitting as a full Court, may waive the immunity.

(3) Where immunity has been waived and criminal proceedings are instituted against a judge, he shall be tried, in any of the Contracting States, only by the court competent to judge the members of the highest national judiciary.

(4) The Protocol on the privileges and immunities of the European Communities shall apply to the judges of the Court, without prejudice to the provisions relating to immunity from legal proceedings of judges which are set out in this Statute.

Article 7

End of duties

(1) Apart from normal replacement after expiry of his term pursuant to Article 3, paragraph 4, or death, the duties of a judge shall end when he resigns.

(2) Where a judge resigns, his letter of resignation shall be addressed to the President of the Court for transmission to the Chairman of the Mixed Committee.

(3) Save where Article 8 applies, a judge shall continue to hold office until his successor takes up his duties.

(4) Any vacancy shall be filled by the appointment of a new judge for the remainder of his predecessor's term.

Article 8

Removal from office

(1) A judge may be deprived of his office or of other benefits in its stead only if the Court of Appeal sitting as a full Court decides that he no longer fulfils the requisite conditions or meets the obligations arising from his office. The judge concerned shall be heard but shall not take part in the deliberations.

(2) The Registrar of the Court shall communicate this decision to the Chairman of the Mixed Committee.

(3) In the case of a decision depriving a judge of his office, a vacancy shall arise upon this latter notification.

Article 9

Training

The Court shall provide for appropriate and regular training of judges.

CHAPTER II – ORGANISATIONAL PROVISIONS

SECTION 1 – COMMON PROVISIONS

Article 10

President of the Court

(1) The President of the Court shall be elected by all judges of the Court of Appeal and of the Court of First Instance who are full-time judges, for a term of three years, from among their number. He may be re-elected twice.

(2) The President shall direct the judicial activities and the administration of the Court of Appeal. The Court of Appeal sitting as a full Court shall be chaired by the President.

Article 11

Presidium

(1) The Presidium shall be composed of the President of the Court, who shall act as chairperson, two judges of the Court of Appeal elected from among their number, three judges of the Court of First Instance who are full-time judges of the Court elected from among their number, and the Registrar.

(2) The Presidium shall be responsible for the management of the Court. It may, without prejudice to its own responsibility, delegate certain tasks to one of its members.

(3) The Presidium shall in particular:

(a) draw up proposals regarding the Rules of Procedure and the Financial Regulations of the Court;

(b) prepare the annual budget, the annual accounts and the annual report of the Court and submit them to the Budget Committee;

(c) establish the guidelines for the training programme for judges and supervise the implementation thereof;

(d) lay down the rules governing the Registry including the sub-registries.

(4) The Presidium can take valid decisions only when all members, or their substitutes, are present. Decisions shall be taken by a majority of votes.

Article 12

Staff

(1) The officials and other servants shall have a task to assist the President of the Court, the judges and the Registrar. They shall be responsible to the Registrar, under the authority of the President of the Court.

(2) The Mixed Committee shall establish the Staff Regulations of officials and other servants of the Court.

SECTION 2 - THE COURT OF FIRST INSTANCE

Article 13

Setting up and discontinuance of a local or regional division

(1) A request from one or more Contracting States for the setting up of a local or regional division shall be addressed to the Chairman of the Mixed Committee. It shall indicate the seat(s) of the local or regional division.

(2) The decision of the Mixed Committee setting up a local or regional division shall indicate the number of judges for the division concerned. The decision shall be published in [the Official Journal of the European Union.]

(3) The Mixed Committee shall decide to discontinue a local or regional division on the request of the Contracting State hosting the local division or the Contracting States participating in the regional division. The decision to discontinue a local or regional division shall state the date after which no new cases may be brought before the division and the date on which the division will cease to exist.

(4) As from the date on which a local or regional division ceases to exist, the judges assigned to this local or regional division shall be assigned to the central division, and cases still pending before the local or regional division together with the sub-registry and all of its documentation shall be transferred to the central division.

Article 14

Panels

(1). The composition of the panels and the assignment of cases within a division to its panels shall be governed by the Rules of Procedure. One judge of the panel shall be appointed as the presiding judge, in accordance with the Rules of Procedure.

(2) The panel may delegate, in accordance with the Rules of Procedure, certain functions to one or more of its judges.

(3) One judge of the panel shall act as Rapporteur, in accordance with the Rules of Procedure.

Article 15

Pool of Judges

(1) The Pool of Judges shall be composed of all legally qualified judges and technically qualified judges of the Court of First Instance who are full-time judges of the Court. In addition, technically qualified judges who are appointed as part-time judges of the Court shall also be included in the Pool of Judges.

(2) Part-time technically qualified judges shall be appointed as judges of the Court on the basis of their specific qualifications and experience. The appointment of these judges to the Court shall ensure that all fields of technology are covered.

(3) A list with the names of the judges included in the Pool of Judges shall be drawn up by the Registrar. In relation to each judge, the list shall at least indicate the languages used, the technical field of competence and experience as well as the cases previously handled by this judge.

SECTION 3 – THE COURT OF APPEAL

Article 16

Panels

(1) . The composition of panels and the assignment of cases to panels shall be governed by the Rules of Procedure. One judge of the panel shall be appointed as the presiding judge, in accordance with the Rules of Procedure.

(2) The Court of Appeal shall sit as a full Court where foreseen under this Statute. When a case is of exceptional importance, and in particular when the decision may affect the unity and consistency of the jurisprudence of the Court, the Court of Appeal may decide, on the basis of a proposal from the presiding judge, to refer the case to the full Court.

(3) The panel may delegate, in accordance with the Rules of Procedure, certain functions to one or more of its judges.

(4) One judge of the panel shall act as Rapporteur, in accordance with the Rules of Procedure.

SECTION 4 – THE REGISTRY

Article 17

Appointment and removal from office of the Registrar

(1) The Court of Appeal sitting as a full Court shall appoint the Registrar of the Court for a term of six years. He may be re-appointed.

(2) Before he takes up his duties the Registrar shall take oath before the Court of Appeal to perform his duties impartially and conscientiously.

(3) The Registrar may be removed from office only if he no longer meets the obligations arising from his office. The Court of Appeal sitting as a full Court shall take its decision after having heard the Registrar.

Article 18

Duties of the Registrar

(1) The Registrar shall assist the Court, the President of the Court and the judges in the performance of their functions. He shall be responsible for the organisation and activities of the Registry under the authority of the President of the Court.

(2) The Registrar shall in particular be responsible for:

- (a) keeping the registry which includes records of all cases before the Court;
- (b) keeping and administering lists drawn up in accordance with Articles 13, 28 and 36 of the Agreement;
- (c) keeping and publishing a list of notifications of opt-outs in accordance with Article 58 of the Agreement;
- (d) publishing the decisions of the Court, subject to the protection of confidential information;
- (e) publishing annual reports with statistical data; and
- (f) ensuring that the information on opt-outs in accordance with Article 58 of the Agreement is closely linked with the European Patent Office patent register.

Article 19

Keeping of the register

(1) Detailed rules for keeping the register of the Court shall be prescribed in the Instructions to the Registry, adopted by the Presidium.

(2) The rules on access to documents of the Registry shall be provided for in the Rules of Procedure.

Article 20

Sub-registries and Deputy-Registrar

(1) A Deputy-Registrar shall be appointed for a term of six years by the Court of Appeal, sitting as a full Court. He may be re-appointed.

(2) Article 17, paragraphs 2 and 3, shall apply by analogy.

(3) The Deputy-Registrar shall be responsible for the organisation and activities of sub-registries under the authority of the Registrar and the President of the Court. The duties of the Deputy-Registrar shall in particular include:

- (a) keeping records of all cases before the relevant division of the Court of First Instance;
- (b) notifying every case before the relevant division of the Court of First Instance to the Registry.

(4) The Deputy-Registrar shall also provide administrative and secretarial assistance to the relevant division of the Court of First Instance.

CHAPTER III – FINANCIAL PROVISIONS

[Transferred to Article 57a]

Article 22

Budget

- (1) The budget shall be adopted by the Budget Committee on the proposal of the Presidium. It shall be drawn up in accordance with the generally accepted accounting principles laid down in the Financial Regulations.
- (2) Within the budget, the Presidium may, in accordance with the Financial Regulations, transfer funds between the various headings or subheadings.
- (3) The Registrar shall be responsible for the implementation of the budget in accordance with the Financial Regulations.
- (4) The Registrar shall annually make a statement on the accounts of the preceding financial year relating to the implementation of the budget which shall be approved by the Court of Appeal sitting as a full Court.

Article 23

Authorisation for expenditure

- (1) The expenditure entered in the budget shall be authorised for the duration of one accounting period unless the Financial Regulations provide otherwise.
- (2) In accordance with the Financial Regulations, any appropriations, other than those relating to staff costs, which are unexpended at the end of the accounting period may be carried forward, but not beyond the end of the following accounting period.
- (3) Appropriations shall be set out under different headings according to type and purpose of the expenditure, and subdivided, as far as necessary, in accordance with the Financial Regulations.

Article 24

Appropriations for unforeseeable expenditure

- (1) The budget of the Court may contain appropriations for unforeseeable expenditure.
- (2) The employment of these appropriations by the Court shall be subject to the prior approval of the Budget Committee.

Article 25

Accounting period

The accounting period shall commence on 1 January and end on 31 December.

Article 26

Preparation of the budget

The Presidium shall submit the draft budget of the Court to the Budget Committee no later than the date prescribed in the Financial Regulations.

Article 27

Provisional budget

(1) If, at the beginning of the accounting period, the budget has not been adopted by the Budget Committee, expenditures may be effected on a monthly basis per heading or other division of the budget, in accordance with the Financial Regulations, up to one-twelfth of the budget appropriations for the preceding accounting period, provided that the appropriations thus made available to the Presidium do not exceed one-twelfth of those provided for in the draft budget.

(2) The Budget Committee may, subject to the observance of the other provisions laid down in paragraph 1, authorise expenditure in excess of one-twelfth of the appropriations.

Article 28

Auditing of accounts

(1) The annual financial statements of the Court shall be examined by independent auditors. The auditors shall be appointed and if necessary dismissed by the Budget Committee.

(2) The audit, which shall be based on professional auditing standards and shall take place, if necessary, in situ, shall ascertain that the budget has been implemented in a lawful and proper manner and that the financial administration of the Court has been conducted in accordance with the principles of economy and sound financial management. The auditors shall draw up a report after the end of each accounting period containing a signed audit opinion.

(3) The Presidium shall submit to the Budget Committee the annual financial statements of the Court and the annual budget implementation statement for the preceding accounting period, together with the auditors' report.

(4) The Budget Committee shall approve the annual accounts together with the auditors' report and shall discharge the Presidium in respect of the implementation of the budget.

Article 30

Financial Regulations

(1) The Financial Regulations shall lay down in particular:

- (a) arrangements relating to the establishment and implementation of the budget and for the rendering and auditing of accounts;
- (b) the method and procedure whereby the payments and contributions provided for in Article [...] and the initial financial contributions provided for in Article [...] are to be made available to the Court;
- (c) the rules concerning the responsibilities of authorising and accounting officers and the arrangements for their supervision; and
- (d) the generally accepted accounting principles on which the budget and the annual financial statements are to be based.

(2) The Financial Regulations shall be adopted by the Mixed Committee on the proposal from the Court.

SECTION 3 – INCOME AND OPERATING COSTS

Article 31

Income

[To be developed – own financial revenues as well as contributions from the European Community and from Contracting States which are not Member States]

Article 32

Operating costs

[To be developed - definition, financing or co-financing, etc]

CHAPTER IV – PROCEDURAL PROVISIONS

Article 33

Secrecy of deliberations

The deliberations of the Court shall be and shall remain secret.

Article 34

Decisions

(1) When a panel sits in composition of an even number of judges, decisions of the Court shall be taken by a majority of the panel. In case of equal vote the vote of the presiding judge shall prevail.

(2) In the event of one of the judges of a panel being prevented from attending, a judge from another panel may be called upon to sit in accordance with the Rules of Procedure.

(3) In cases where this Statute provides that a division of the Court of First Instance or the Court of Appeal shall take a decision sitting as a full court, such decision shall be valid only if it is taken by at least $[3/4]$ of the judges comprising the full court.

(4) Decisions of the Court shall contain the names of the judges deciding the case.

(5) Decisions shall be signed by the judges deciding the case, by the Registrar for decisions of the Court of Appeal, and by the Deputy-Registrar for decisions of the Court of First Instance. They shall be read in open court.

Article 35

Dissenting opinions

A dissenting opinion expressed separately by a judge of the panel in accordance with Article 51 of the Agreement shall be reasoned, given in writing and shall be signed by the judge expressing this opinion.

Article 36

Decision by default

(1) Where the defendant, after having been duly summoned, fails to file written submissions in defence or fails to appear at the oral hearing, decision shall be given against that party by default. An objection may be lodged against the decision within one month of it being notified.

(2) The objection shall not have the effect of staying enforcement of the decision by default unless the Court decides otherwise.

Article 37

Referrals to the Court of Justice of the European Communities

(1) The procedures established by the Court of Justice of the European Communities, hereinafter referred to as "the Court of Justice", for referrals for preliminary rulings within the European Community shall apply, as far as appropriate.

(2) Whenever the Court of Appeal has decided to refer a question of interpretation to the Court of Justice, it shall stay its proceedings.

(3) Further to the preliminary ruling, the Court of Appeal shall apply the interpretation ruled by the Court of Justice.

CHAPTER V - FINAL PROVISIONS

[To be developed]

Preliminary list of topics to be included in the Rules of Procedure

I. Organisation of the Court

1. Working of the Court

- Sessions, judicial vacations
- Dates, times and places of sitting of the Court (including the possibility for central and regional divisions to hold hearings in multiple locations)
- Inability to attend or absence of a judge
- Procedure of assignment of cases to panels
- Appointment and duties of judge-Rapporteur

2. Registry

- Appointment and oath of the Registrar
- Assistants of the Registrar
- Replacement of the Registrar
- Keeping of the Registry (including information on notifications about opt-outs)
- Procedure of publication of decisions

3. Languages

- Detailed language arrangements

4. Parties

- Initiation of proceedings by third parties (conditions, procedure)
- Special cases for a party to initiate proceedings (including proceedings initiated by an applicant for a patent or a prior user)
- Intervention in proceedings (application, conditions, invitation by the Court)

5. Representatives of parties

- Requirements for representatives
- Requirements for European Patent Attorneys (including rules on EU patent litigation certificates or proof of patent litigation experience)
- Privileges, immunities and facilities of representatives
- Status of parties' representatives
- Misrepresentation
- Exclusion from proceedings

II. Procedure

1. Written procedure

- Lodging of pleadings
- Application (including its putting in order, serving and publication)
- Lodging of defence
- Second exchange of pleadings
- Offers to introduce further evidence
- New pleas in law
- Documents for consideration
- Confidentiality

2. Interim procedure

- Conditions for convening an interim hearing
- Role of Judge-Rapporteur
- Mandate of a panel to Judge-Rapporteur
- Possibility for a settlement

3. Oral procedure

- Public proceedings
- Decision of the Court to make proceedings confidential
- Holding of hearings
- Date of the hearing
- Absence of the parties from the hearing
- Conduct of the hearing
- Close of the oral procedure
- Minutes of the hearing
- Interpretation to assist the parties

4. Electronic procedures

- Use of electronic procedures
- Electronic filing of submissions and evidence
- Electronic communication

5. Obtaining evidence

- Means of obtaining evidence
- Procedure depending on means of obtaining evidence
- Witnesses (summoning, examination, duties, oath)
- Experts (appointment, duties, oath, report, objection)
- Court experts (drawing up a list of experts in specific technical fields, appointment)
- Order to produce evidence
- Order to preserve evidence and to inspect property
- Freezing orders
- Conditions and procedure for ordering the communication of information

6. Provisional and permanent injunctions

- Granting provisional and protective measures (application, procedure)
- Granting permanent injunctions (application, procedure)
- Ordering corrective measures (request, procedure)

7. Settlement

- Examination for possibilities to settle, proposing solutions by the Court
- Agreement of the parties
- Confirmation by the Court

8. Stay of proceedings

- General conditions and procedure
- Staying of proceedings when validity and infringement questions are split
- Staying of proceedings due to action at the European Patent Office
- Staying or proceedings in connected cases
- Duration and effects

9. Expedited proceedings

- Conditions for expedited proceedings

10. Discontinuance of proceedings

- Discontinuance of proceedings at the request of applicant; no need to adjudicate; action bound to fail; absolute bar to proceedings

11. Decisions

- Deliberations (secrecy)
- Quorum
- Majority of the panel to take a decision
- Role of the presiding judge in case of equal votes
- Content and form of a decision
- Delivery of a decision
- Binding and territorial effect of a decision
- Rectification
- Enforcement (including rules of lodging of security)
- Publication
- Protection of confidential data in published decisions
- Publication of decision as a measure for dissemination of information

12. Legal costs

- Decision as to costs
- Allocation
- Unreasonable costs
- Costs of enforcing a decision
- Recoverable costs
- Dispute as to costs
- Payment

13. Legal aid

- Substantive conditions
- Formal conditions
- Procedure for granting aid

14. Serving of documents

- Procedure of serving documents
- Serving of documents by electronic means

15. Time limits

- Calculation of periods of time prescribed in the Agreement
- Extension of time limits
- Unforeseeable circumstances/force majeure in relation to time limits

III. Special forms of procedure

1. Appeals

- Conditions for appeals against decisions of the Court
- Proceedings in the Court of Appeal
- Decision in appeal
- Conditions and procedure for introduction of new facts and new evidence in the Court of Appeal

2. Referral back to the Court of First Instance

- Conditions for referral back
- Procedure for examining cases referred back

3. Petition for further appeal

- Conditions and procedure for petition for further appeal (cassation)

4. Exceptional review procedures

- Conditions and procedure for rehearing
- Third-party proceedings (when a decision affecting a third party has been taken without its participation)
- Interpretation of decisions of the Court

5. Decisions by default

- Procedure of taking decision by default (when defendant fails to lodge defence)
- Application to set aside a decision by default

IV. Final provisions

- Entry into force
 - Publication of the Rules of Procedure
-