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WORKING DOCUMENT

from: Presidency

to: Working Party on Intellectual Property (Patents)

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Subject : Draft Agreement on the European Union Patent Court

Delegations will find in Annex a revised joint Slovenian and French Presidency working document containing a Draft Agreement on the European Union Patent Court for discussion at the meeting of the Intellectual Property (Patents) Working Party on 24-25 July 2008. The revised version takes account of the discussions in the Working Party on 28 May 2008 and 11 June 2008 as well as of comments and observations received from stakeholders.

Delegations will also find annexed the draft Statute of the European Union Patent Court and the list of issues to be included in the Rules of Procedure.

**EUROPEAN UNION PATENT 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 Union Patent Court for litigation related to the infringement and validity of patents,

CONSIDERING that the integrated and exclusive European Union Patent Court shall be set up for Community patents and European patents designating the Contracting Parties, and it shall be open for all Contracting States of the European Patent Convention,

CONSIDERING that the European Union Patent 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 Union Patent Court

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

Article 2

Definitions

- (1) "Court" means the European Union Patent 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 Parties to this Agreement.
- (4) "European Patent Convention" means the Convention on the Grant of European Patents of 5 October 1973, as amended.
- (5) "European Patent Office" means the organ carrying out the granting of patents as established by Article 4, paragraph 2, point a) of the European Patent Convention.
- (6) "Patent" means a Community patent and/or a European patent.
- (7) "Statute" means the Statute of the European Union Patent Court which is an integral part of this Agreement.

(8) "Rules of Procedure" means the Rules of Procedure established by the Court in accordance with the provisions of this Agreement and the Statute.

(9) "Contracting Party" means any State party to this Agreement and/or the European Community.

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

(11) "Council" means the Council of the European Union.

(12) "Commission" means the Commission of the European Community.

Article 3

Scope of application

This Agreement shall apply to:

- (a) any Community patent;
- (b) any supplementary protection certificate issued for a patent;
- (c) compulsory licences in respect of patents;
- (d) any European patent which was granted and not yet lapsed at the date referred to in Article 59 or was granted after that date, without prejudice to Article 58; and
- (e) any 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 of the territories of the Contracting Parties, 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 shall be governed by the law of *[the State of seat of the organ of the Court concerned]*.

CHAPTER II - ORGANS OF THE COURT

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/or regional divisions.

(2) A local division shall be set up in the territory of a Contracting Party upon its request.

(3) An additional local division shall be set up in the territory of a Contracting Party upon its request when more than one hundred patent cases per calendar year have been commenced in that Contracting Party during three successive years prior to or subsequent to the date referred to in Article 59. The maximum number of divisions per Contracting Party shall be three.

(4) Contracting Parties 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 Parties, upon their request. Such Contracting Parties 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

The Court of Appeal

(1) The Court of Appeal shall have its seat in [...].

(2) The Court of Appeal shall sit in panels established in accordance with the Statute.

Article 7

Composition of panels

(1) Any panel of the Court of First Instance shall have a multinational composition. Without prejudice to paragraph 5 and Article 15a (7), 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 Party hosting the division concerned, and one Judge from the Pool of Judges.

(3) In Contracting Parties 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 Parties a member of the Pool of Judges shall be allocated 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 Parties concerned, and one Judge from the Pool of Judges who shall not be a national of the Contracting Parties 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.

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

(7) Any panel of the Court of Appeal shall sit in a composition of five Judges having a multinational composition. It shall sit in a composition of three legally qualified Judges and two technically qualified Judges.

(8) Any panel shall be chaired by a legally qualified Judge.

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.

Article 9

The Advisory Committee

(1) An Advisory Committee which shall assist the Council [and the Mixed Committee] in the preparation of the appointment of Judges of the Court shall be set up.

(2) The Advisory Committee shall comprise practitioners in patent law and patent litigation with the highest recognised competence. They shall be appointed by the Council [and the Mixed Committee] for a term of six years and 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 Parties.

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

CHAPTER III – JUDGES OF THE COURT

Article 10

Eligibility criteria

(1) The Court shall comprise both legally and technically qualified Judges. Legally qualified Judges shall be qualified for judicial functions at the national level. Technically qualified Judges shall have a university degree in a field of technology.

(2) Judges shall ensure the highest standards of competence in the field of patent litigation. They shall have knowledge of civil law and proven experience in patent litigation.

Article 11

Appointment procedure

(1) The Judges shall be appointed by the Council, in accordance with the procedure laid down in the Statute, on the basis of proposals from the Advisory Committee.

(2) Judges from Contracting Parties which are not Member States shall be appointed in accordance with Part IIIA.

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) Technically and legally qualified Judges who are permanent Judges may not engage in any occupation, whether gainful or not, unless otherwise provided in this Article or when an exemption is exceptionally granted by the Council [or 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 not permanent Judges pursuant to Article 13, paragraph 2, shall not exclude the exercise of other functions provided there is no conflict of interest.

(5) In cases of a conflict of interest, the Judges 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 drawn up in accordance with the Statute.

(2) The Pool shall be composed of legally and technically qualified Judges from the Court of First Instance as well as technically qualified Judges who are not permanent Judges of the Court. The appointment of technically qualified members of the Pool shall ensure that the Pool includes at least one member with qualifications and experience per field of technology.

(3) At the request of a local or regional division the President of the Court shall allocate Judges from the Pool of Judges to the division concerned. The allocation of Judges shall be based on their technical and legal expertise, linguistic skills and proven experience.

Article 14

Training Framework

(1) A training framework for Judges shall be set up 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 patent divisions having 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 on civil procedures 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

Substantive patent law

For the purpose of litigation under this Agreement the Court shall base its decisions on:

- (a) this Agreement;
- (b) Council Regulation (EC) No ... on the Community patent;
- (c) the European Patent Convention ;
- (d) national law which has been adopted by the Contracting Parties to implement Article 65, Article 67, paragraphs 2 and 3 and Article 70, paragraphs 3 and 4, of the European Patent Convention;
- (e) Regulation (EC) No 816/2006 of the European Parliament and the Council of 17 May 2006 on compulsory licensing of patents relating to the manufacture of pharmaceuticals for export to countries with public health problems;
- (f) Council Regulation (EC) No 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products, as amended;
- (g) Regulation (EC) 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a [supplementary protection certificate for plant protection products](#), as amended;
- (h) Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, as amended; and
- (i) Any further provision of Community law applicable to patents.

Article 14b

Application of civil law

To the extent that decisions will not be based on the legal acts referred to in Article [14a] but shall be based on national civil law, the applicable law will be determined in accordance with:

- (a) Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II);
- (b) EC Convention on the 2007 on the law applicable to contractual obligations (Rome I);
- (c) other instruments of private international law applicable between the Contracting Parties.

Article 14c

Infringement of European patents

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 to the effects of the European patent

The rights conferred by a 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) the extemporaneous preparation for individual cases in a pharmacy of a medicine in accordance with a medical prescription or acts concerning the medicine so prepared;
- (d) the use on board vessels of the countries of the Union of Paris for the Protection of Industrial Property, other than the Contracting Parties, 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 the Contracting Parties, provided that the invention is used there exclusively for the needs of the vessel;

(e) the use of the patented invention in the construction or operation of aircraft or land vehicles of the countries of the Union of Paris for the Protection of Industrial Property, other than the Contracting Parties, or of accessories of such aircraft or land vehicles, when these temporarily or accidentally enter the territory of the Contracting Parties; and

(f) the acts specified in Article 27 of the Convention on International Civil Aviation of 7 December 1944, where these acts concern the aircraft of a State, other than a Contracting State, benefiting from that Article.

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 Party, a right based on prior use of that invention or a right of personal possession of that invention, shall enjoy, in that Contracting Party, the same rights in respect of a European patent for the same invention.

Article 14g

Grant of compulsory licences in respect of Community patents

(1) The Court may grant a compulsory licence for lack or insufficiency of exploitation of a Community patent to any person filing an application four years or later after the patent application was filed and three years or later after the patent was granted if the patent proprietor has not exploited the patent in the Community on reasonable terms or has not made effective and serious preparations to do so, unless he provides legitimate reasons to justify his inaction. In determining the lack or insufficiency of exploitation of the patent, no distinction shall be made between products originating within the Community and imported products.

(2) On request, the Court may grant a compulsory licence in respect of a first patent to the proprietor of a national or Community patent or to the proprietor of a plant variety right who cannot use his patent (second patent) or his national or Community plant variety right without infringing a Community patent (first patent), provided that the invention or new plant variety claimed in the second patent or plant variety right involves an important technical advance of considerable economic significance in relation to the invention claimed in the first patent. In the case of a compulsory licence in respect of a dependent patent or plant variety right, the owner of the first patent shall be entitled to a cross-licence on reasonable terms to use the patented invention or protected plant variety.

(3) In times of crisis or in other situations of extreme urgency, including those relating to a public interest of extreme importance, the Court may authorise at the request of a Member State the exploitation of a Community patent.

(4) In the case of semi-conductor technology, exploitation shall be possible without the authorisation of the right holder only in the situations set out in paragraph 3.

(5) A licence or exploitation set out in paragraphs 1 and 2 may be granted only if the proposed user has made efforts to obtain authorisation from the patent holder on reasonable commercial terms and conditions, and if such efforts have not been successful within a reasonable period of time. However, the authority granting the licence may derogate from this condition in the situations set out in paragraph 3. In these situations, the right holder shall be informed as soon as reasonably possible.

Article 14h

Conditions applicable to compulsory licences in respect of Community patents

(1) When granting the compulsory licence under Article 14g, the Court shall specify the type of use covered and the conditions to be met. The following conditions shall apply:

- (a) the scope and duration of the exploitation shall be limited to the purpose for which it was authorised;
- (b) the exploitation shall be non-exclusive;
- (c) the exploitation shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use;
- (d) the exploitation shall be authorised predominantly for the supply of the internal market of the Community;
- (e) the Court may, on reasoned request, decide to cancel the authorisation, subject to adequate protection of the legitimate interests of the persons so authorised, if and when the circumstances which led to it cease to exist and are unlikely to recur;
- (f) the licence holder shall pay the right holder adequate remuneration, taking into account the economic value of the authorisation ;
- (g) in the case of a compulsory licence in respect of a dependent patent or a plant variety right, the exploitation authorised in respect of the first patent shall be non-assignable except with the assignment of the second patent or plant variety right.

CHAPTER IV – JURISDICTION, ALLOCATION OF CASES AND EFFECTS OF DECISIONS

Article 15

Competence

- (1) The Court shall have exclusive competence in respect of:
 - (a) actions for actual or threatened infringements, including counterclaims concerning licences, or for a declaration of non-infringement;
 - (b) actions or counterclaims for revocation;
 - (c) actions for damages or compensation derived from the provisional protection conferred by a published patent application;
 - (d) 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;

- (e) actions for the grant or revocation of compulsory licences in respect of patents
- (f) actions on compensation for licences within the meaning of [Article 20 (1)] of Council Regulation (EC) No. ... on the Community patent;
- (g) actions for the grant or revocation of supplementary protection certificates issued for a patent.

(2) The national courts of the Contracting Parties 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 in respect of infringement and validity

(1) Direct actions for revocation or actions for declaration of non-infringement shall be brought before the central division. Such action may only be initiated if no action for infringement has been initiated between the same parties on the same patent before a local or a regional division.

(2) 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 5. The local or regional division concerned may either stay the proceedings or, with agreement of the parties, refer the action for decision to the central division.

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

(4) The action referred to in paragraph 1 can be brought without the plaintiff having to initiate an opposition procedure before the European Patent Office.

(5) Actions for actual or threatened infringement, actions for damages and compensation, 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, actions for the grant or revocation of compulsory licences or supplementary protection certificates and on compensation for licences, and actions for interlocutory injunctions shall be brought before:

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

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

(6) In any case parties can agree to bring an action before the division of their choice, including the central division.

(7) Where a counterclaim for revocation is 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 proceed with the infringement proceedings; or
- (c) with agreement of the parties, refer the case for decision to the central division.

Article 16

Territorial effects of decisions

Decisions of the Court will 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 Parties for which the European patent has been validated.

CHAPTER V – Patent Arbitration and Mediation

Article 17

Patent arbitration and mediation centre

(1) A patent arbitration and mediation centre is hereby established ("the Centre").

(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 and 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 arbitration and mediation, and for the use of the facilities of the Centre.

Article 17a

Organisation

(1) The Centre shall have its seat in [...].

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

(3) 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

(1) The budget shall be based upon the Court's own financial revenues and, where necessary, contributions from the Community budget and from the Contracting Parties which are not Member States, in accordance with the Statute.

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

Article 19

Financing of the Court

Operating costs of the Court shall be financed from its budget, in accordance with the Statute.

Article 20

Financing of the Training Framework for Judges

The Training Framework for Judges shall be financed by the European Community and by the Contracting Parties which are not Member States.

Article 21

Financing of the Centre

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

PART III - PROCEDURAL PROVISIONS

CHAPTER I – GENERAL

Article 22

Rules of Procedure

- (1) The Court shall establish its Rules of Procedure.
- (2) Those Rules shall require the approval of the Council, acting by a qualified majority [and the Mixed Committee].

Article 23

General obligations

- (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 are used in a fair and equitable way and in particular do not distort competition.

Article 24

Case management

The Court shall actively manage the cases before it in accordance with the Rules of Procedure.

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 Party concerned, shall have access to the Court in order to bring actions, to defend itself against actions, or to seek application of the procedures and remedies foreseen in this Agreement or 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 patent 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 Party concerned, who is directly and individually concerned by a patent, may initiate proceedings in accordance with the Rules of Procedure.

Article 28

Representation

(1) The parties shall be represented by lawyers authorized to practise before a court of a Contracting Party. These representatives may be assisted by a European Patent Attorney, who is a national of a Contracting Party entitled to act as professional representative before the European Patent Office (hereafter: European Patent Attorney), and/or by patent attorneys with proven patent litigation experience in accordance with the Rules of Procedure.

(2) Notwithstanding paragraph 1, European Patent Attorneys and patent attorneys who either have proven patent litigation experience or who are in possession of a European Union Patent Litigation Certificate may represent the parties in actions for revocation or declarations of non-infringement of a patent before the central division.

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

(4) Representatives of the parties and their assistants 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 is (are) the official European Union language(s) of the Member State or the official language(s) of other Contracting Parties hosting the relevant division, or the official language(s) designated by Contracting Parties sharing a regional division.

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

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

(4) [At the request of one of the parties and after having heard the other partie(s)] / [With the agreement of the parties] the relevant local or regional division can, on grounds of convenience and fairness, decide on the use of the language in which the patent is 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 and for review

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

(2) Parties shall be entitled to agree on the use of the language in which the patent is granted as language of proceedings.

(3) In exceptional cases and to the extent deemed appropriate, the Court may decide on another European Union official language or the official language of a Contracting Party which is not a Member State as the language of proceedings for the whole or part of the proceedings, subject to agreement by the parties.

(4) The language of proceedings for the review procedure shall be the language of proceedings before the Court of Appeal.

Article 31

Other language arrangements

(1) Any division concerned and the Court of Appeal shall be entitled, to the extent deemed appropriate, to dispense with translation requirements.

(2) At the request of one of the parties, and to the extent deemed appropriate, any division and the Court of Appeal shall provide interpretation facilities to assist the partie(s) 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, on 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:

- hearing the parties,
- requests for information,
- production of documents,
- hearing witnesses,
- opinions by experts,
- inspection,
- comparative tests or experiments,
- 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.

(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 after the execution of the measures at the latest. 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 20 working days or 31 calendar days, whichever is the longer, 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 specified technical aspects of the case.
- (2) To this end, an indicative list of technical experts covering all technical fields shall be drawn up by the Court in accordance with the Rules of Procedure and kept by the Registry.
- (3) The technical 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, 2 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 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) a declaration of the fact of infringement;
- (b) recall from the channels of commerce;
- (c) deprive 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 declare a patent invalid, 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.

(2) 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.

(2) Whereas the Court, in a final decision, has declared a patent invalid, 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 Party concerned.

Article 39

Power to order the communication of information

(1) The Court may, in response to a justified and proportionate request of the claimant and in accordance with the Rules of Procedure, order a party (allegedly) infringing the patent to inform the claimant 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:

- (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) who 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 injured party with the information referred to in paragraph 1 (a), (b) and (c).

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 he would have been in if no infringement had taken place. The party infringing the patent 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 infringers 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 damages.

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.

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] on a proposal submitted by the Commission.

(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. They 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 which need to be satisfied for the full or partial grant 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) The Court shall set the level and bear 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 may 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 at 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.

(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

Petition for further appeal (cassation)

(1) Decisions given by the Court of Appeal under Article 47 may be subject to further appeal before the Court of Justice of the European Communities on points of law only, in accordance with the Statute.

(2) A petition for further appeal shall have no suspensive effect.

CHAPTER VI - DECISIONS

Article 49

Basis for decisions

(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 arguments 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 put forward by the parties or introduced into the procedure by the 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 will be given in writing in accordance with the Rules of Procedure.

(2) The decision of the Court will 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 member 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 53

Stay of proceedings

- (1) A party shall inform the Court when it has requested the European Patent Office accelerated processing in opposition procedures or before the boards of appeal. The Court may stay proceedings when a rapid decision may be expected from the European Patent Office.
- (2) The Rules of Procedure shall provide details on the stay of proceedings in connected cases.

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 which is of such a nature as to be a decisive factor and which, when the decision was given, was unknown to the party claiming the revision and only 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 may set aside, in whole or in part, the decision under review and re-open the proceedings for a new trial and decision.

(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, if necessary, subject to the provision of security or an equivalent assurance to ensure compensation for any prejudice suffered.

(2) The order for its enforcement shall be appended to the decision by the Court. A decision of the Court shall be enforceable in any Contracting Party without the need for a declaration of enforceability.

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

(4) If a party does not comply with the terms of an order of the Court, it could be sanctioned with a periodic penalty payment payable to the Court. The individual fine 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 – MIXED COMMITTEE

Article 57

[EU Member States and non-EU Member States – to be developed]

PART IV – TRANSITIONAL PROVISIONS

Article 58

Transitional period

(1) During a transitional period of seven years proceedings for infringement or validity of a European patent may still be initiated before the national courts or other competent authority of a Contracting Party having jurisdiction under national law which for that purpose shall continue to apply to European patents effective in the Contracting Parties.

(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 during a transitional period of seven years a most efficient use and pooling of resources, and without prejudice to Articles 5 and Article 7, paragraph 3, those Contracting Parties where prior to the period referred to in Article 59 during a period of three successive years less than fifty patent cases per calendar year have commenced shall either:

- a) have panels of local divisions which initially shall sit in a composition of one member who is a national of the Contracting Party concerned and two members from the Pool of Judges who are not nationals of the Contracting Party 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 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.

(5) Holders of European patents having made use of the opt-out foreseen by paragraph 4 shall be entitled to withdraw their opt-out at any moment. In this event they shall notify the Registry accordingly.

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 [...].

Article 58b

Accession

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

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

Article 58c

Duration of the Agreement

This Agreement shall be of unlimited duration.

Article 58d

Revision

(1) This Agreement may be revised by a Conference of the Contracting Parties.

(2) Not later than five years from the date referred to in Article 59, the Commission shall draw up a report on the operation of the Court.

Article 58e

Denunciation

(1) Any Contracting Party which is not a Member State may at any time denounce this Agreement. Denunciation shall be notified to the Secretary General of the Council. 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 Contracting Parties notify each other that the procedures referred to in Article 58a have been completed.

(2) In respect of any State which is eligible to adhere 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 Union Patent Court

N.B. Whereas Part IIIA of the draft Agreement on the envisaged participation of non-EU Contracting Parties has not yet been elaborated in the draft Agreement, these preliminary provisions of the Statute do at this stage in general only take into consideration the participation of EU Member States. The text may require amendments in view of the participation of non-EU Contracting Parties.

Article 1

Scope of the Statute

This Statute contains institutional and financial arrangements for the European Union Patent Court as established under Article 1 of the Agreement. The Statute shall be supplemented by the Rules of Procedure of the Court.

CHAPTER I - JUDGES

Article 2

Eligibility of Judges

- (1) Any person who is a national of a Contracting Party 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) All Judges shall be appointed by the Council acting by a qualified majority on the basis of proposals from the Advisory Committee.

(2) When appointing judges, the Council shall ensure a balanced composition of the Court on as broad a geographical basis as possible among nationals of the Contracting Parties.

(3) The Judges shall be appointed for a period of six years. Retiring judges may be reappointed.

(4) The Council shall appoint as many Judges as are needed for the well functioning of the Court. Initially the Council shall appoint the necessary number of Judges for setting up at least two panels in the meaning of Article 13 in the Court of Appeal and for setting up at least one panel in the meaning of Article 15 in each of the divisions of the Court of First Instance.

(5) The decision of the Council appointing Judges shall state the Court and 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

[Judges from non-EU Contracting Parties shall be appointed by the Mixed 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 has previously:

(a) taken part as adviser;

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

(c) 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. After they have ceased to hold office, they shall continue to enjoy immunity in respect of acts performed by them in their official capacity, including words spoken or written.

(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 Parties, 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 in the meaning of Article 3, paragraph 3, of this Statute, 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 President of the Council [and to the President 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 and, where applicable, all permanent Judges of his division of the Court of First Instance, decide 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 President of the Council [and the President 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 permanent Judges of the Court of Appeal and of the Court of First Instance, for a term of three years. He may be re-elected twice.

(2) The President shall represent the Court.

(3) 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 presided 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 permanent Judges of the Court of First Instance 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 Council, acting by qualified majority, shall establish the Staff Regulations of officials and other servants of the Court.

SECTION 2 - THE COURT OF APPEAL

Article 13

Panels

(1) The Court of Appeal shall sit in panels of five Judges. The composition of the panels and the assignment of cases shall be governed by the Rules of Procedure. The Judges shall elect the Presiding Judges of the panels from among their number for a period of three years. They may be re-elected.

(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 Panels may delegate, in accordance with the Rules of Procedure, certain functions to one or more of their members.

(4) At least one member of the panel shall act as Rapporteur, in accordance with the Rules of Procedure.

SECTION 3 – THE COURT OF FIRST INSTANCE

Article 14

Setting up and discontinuance of a local division or regional division

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

(2) The decision of the Council 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 Council, on the request of Contracting Partie(s) hosting the division, shall decide to discontinue a regional or local division. The decision to discontinue a regional or local 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 15

Panels

(1) The divisions of the Court of First Instance shall sit in panels of three Judges. The composition of the panels and the assignment of cases within a division to its panels shall be governed by the Rules of Procedure. The Judges shall elect the Presiding Judges of the panels from among their number for a period of three years.

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

(3) At least one member of the panel shall act as Rapporteur, in accordance with the Rules of Procedure.

Article 16

Pool of Judges

(1) The Pool of Judges shall be composed of legally and technically qualified Judges from any division of the Court of First Instance. In addition, technically qualified Judges not being permanent Judges may be included in the Pool of Judges.

(2) A list with the names of the Judges shall be drawn up by the Registrar.

(3) Technically qualified Judges shall be appointed on the basis of their specific qualifications and experience. The Pool of Judges shall always have at least one member covering one of the following main fields of technology. *[to be developed]*

(4) Judges from the Pool of Judges as foreseen under Article 7, paragraphs 2 and 4 and Article 15a, paragraph 7, of the Agreement shall be allocated to the respective panels by the President of the Court.

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 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 and 36 of the Agreement;

(c) keeping and publishing a list of notifications of opt-outs and withdrawals 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 (4) and (5) of the Agreement is closely linked with the European Patent Office patent register.

(3) The Registrar shall take an oath before the Court to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court.

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-Registrars

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

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

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

CHAPTER III – FINANCIAL PROVISIONS

SECTION 1 – BUDGET COMMITTEE

Article 21

Budget Committee

(1) The Budget Committee shall be set up comprising one representative of each Contracting Party.

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

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

SECTION 2 – BUDGET

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 advances provided for in Article [...] are to be made available to the Court by the Contracting Parties;

- (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 Council] on the proposal from the Court acting by qualified majority.

SECTION 3 – CONTRIBUTIONS AND OPERATIONAL COSTS

Article 31

Contributions (*Council WD: Article 18 (2)*)

[To be developed – contributions form Community budget, EU Member States and other Contracting Parties]

Article 32

Operating costs (*Council WD: Article 19*)

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

CHAPTER IV – PROCEDURAL PROVISIONS

SECTION 1 – PROCEEDINGS

Article 33

Secrecy of deliberations

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

Article 34

Decisions

- (1) When a panel consists of an even number of Judges, decisions of the Court shall be taken by a majority of the panel and 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 the Court of Appeal, the Court of First Instance or a division of the Court of First Instance 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 member of the panel in accordance with Article 53 of the Agreement shall be reasoned, given in writing and shall be signed by the Judge expressing this opinion.

Article 36

Decision in default

- (1) Where the defending party, 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.

SECTION 2 – FURHER APPEAL (CASSATION) (*Council WD: Article 48*)

[To be developed]

CHAPTER V - FINAL PROVISIONS

[To be developed]

**Preliminary list of topics to be included in the Rules of Procedure
of the European Union Patent Court**

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) (*Council WD: Article 5 (4) and (6)*)
- Inability to attend or absence of a Judge
- Procedure of assignment of cases to panels
- Appointment and duties of Judge-Rapporteur (*Council WD: Article 32 (2)*)

2. Registry (*Council WD: Article 8*)

- 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 (*Council WD: Chapter II, Articles 29-31*)

- Detailed language arrangements

4. Parties

- Initiation of proceedings by third parties (conditions, procedure) (*Council WD: Article 27(6)*)
- 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) (*Council WD: Article 27(4)*)

5. Representatives of parties *(Council WD: Article 28)*

- 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 *(Council WD: Article 32 (1))*

- 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 *(Council WD: Articles 26 and 40)*

2. Interim procedure *(Council WD: Article 32 (1) and (2))*

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

3. Oral procedure *(Council WD: Article 32 (1) and (3))*

- Public proceedings *(Council WD: Article 26)*
- Decision of the Court to make proceedings confidential *(Council WD: Article 26)*
- 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 (*Council WD: Article 31 (2)*)

4. Electronic procedures (*Council WD: Article 25*)

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

5. Obtaining evidence (*Council WD: Article 33*)

- 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) (*Council WD: Article 36*)
- Order to produce evidence (*Council WD: Article 35*)
- Order to preserve evidence and to inspect property (*Council WD: Article 35b*)
- Freezing orders (*Council WD: Article 35c*)
- Conditions and procedure for ordering the communication of information (*Council WD: Article 39*)

6. Provisional and permanent injunctions

- Granting provisional and protective measures (application, procedure) (*Council WD: Article 37*)
- Granting permanent injunctions (application, procedure) (*Council WD: Article 37b*)
- Ordering corrective measures (request, procedure) (*Council WD: Article 38*)

7. Settlement (*Council WD: Article 32 (2) and Article 52*)

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

8. Stay of proceedings (*Council WD: Articles 15b and 53*)

- General conditions and procedure
- Staying of proceedings when validity and infringement questions are split (*Council WD: Articles 15b*)
- Staying of proceedings due to action at the European Patent Office (*Council WD: Articles 53*)
- 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 (*Council WD: Chapter VI, Articles 49-51 and 54*)

- 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 (*Council WD: Article 16*)

- Rectification
- Enforcement (including rules of lodging of security) (*Council WD: Articles 46 and 56*)
- Publication
- Protection of confidential data in published decisions
- Publication of decision as a measure for dissemination of information (*Council WD: Article 54*)

12. Legal costs (*Council WD: Article 42*)

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

13. Legal aid (*Council WD: Article 44*)

- 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 (*Council WD: Article 45-46*)

- 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
(*Council WD: Article 45 (3)*)

2. Referral back to the Court of First Instance (*Council WD: Article 47*)

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

3. Petition for review (*Council WD: Article 48*)

- Conditions and procedure for petition for review (cassation)

4. Exceptional review procedures

- Conditions and procedure for rehearing (*Council WD: Article 55*)
- 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