



**COUNCIL OF
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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 and draft Statute

Delegations will find in Annex a Presidency working document containing a revised version of the Draft Agreement on the European Union Patent Court, for discussion at the meeting of the Intellectual Property (Patents) Working Party on 11 November 2008. This revised version takes account of the discussions in the Working Party on 24-25 July 2008 and on 11 September 2008 as well as of written comments submitted by delegations.

Delegations will also find in the Annex to the Draft Agreement a revised 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, under the necessary legal control of the Court of Justice of the European Communities, and that the present Agreement 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(a), 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 attached to an integral part of this Agreement.

(8) "Rules of Procedure" means the Rules of Procedure of the European Union Patent Court which are attached to this Agreement 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 any:

(a) any Community patent;

(b) any supplementary protection certificate issued for a Community patent;

(c) compulsory licences in respect of a Community 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~~ *[Transferred to new Article 7]*

Article 6-7

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 (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 judgemember of the Pool of Judges 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 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. 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 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.~~

~~(78) Any panel of the Court of First Instance shall be chaired by a legally qualified judge.~~

Article 7

The Court of Appeal

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

~~(12) 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.~~

~~(23) Any panel of the Court of Appeal shall be chaired by a legally qualified judge.~~

~~(34) 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

The Advisory Committee

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

(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 the Statute by the Council [and the Mixed Committee], for a term of six years. ~~They 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 qualified judges and technically qualified jJudges. Judges shall ensure the highest standards of competence and proven experience in the field of patent litigation.

(2) Legally qualified jJudges shall be qualified for judicial functions at the national level. They shall ensure the highest standards of competence in the field of patent litigation.

(3) Technically qualified jJudges 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 jJudges 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 shall select nationals of Member States of the European Union who it proposes to the Mixed Committee for appointment as judges of the Court;

(c) on the basis of this list the Contracting Parties who 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.

