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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.

(2) The implementing provisions shall be provided for in the Statute.

~~by decision of 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) Legally qualified judges and technically and legally qualified Judges who are full-time permanent Judges of the Court may not engage in any occupation, whether gainful or not, unless otherwise provided for in this Article or where an exception exemption is exceptionally granted by the Council ~~for the Mixed Committee~~.

(3) The exercise of the office of a legally qualified Judge shall not exclude the exercise of other judicial functions at the national level.

(4) The exercise of the office of a technically qualified Judge who are part-time not permanent Judges of the Court pursuant to Article 13, paragraph 2, shall not exclude the exercise of other functions provided there is no conflict of interest.

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

(2) The Pool of Judges shall be composed of all legally qualified judges and technically qualified judges from the Court of First Instance who are full-time judges of the Court. ~~as well as Moreover, it shall comprise technically qualified judges who are part-time not permanent judges of the Court.~~ It shall be ensured ~~The appointment of technically qualified members of the Pool shall ensure that~~ the Pool of Judges includes at least one technically qualified judge-member with qualifications and experience per field of technology.

(3) ~~Where provided in this Agreement or the Statute, At the request of a local or regional division the judges from the Pool of Judges shall be allocated to the division concerned by 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 legal or technical ~~and legal~~ expertise, linguistic skills and proven experience.

Article 14

Training Framework

(1) A training framework for judges shall be set up in accordance with the Statute in order to improve and increase available patent litigation expertise and to ensure a broad geographic distribution of such specific knowledge and experience.

(2) The training framework shall in particular focus on:

(a) internships in national patent courts or divisions of the Court of First Instance ~~hearing~~ 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 ~~in~~ civil procedure for technically qualified judges;
- (e) the preparation of candidate-judges.

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

CHAPTER IIIA – SUBSTANTIVE LAW

Article 14a

Applicable law relating to patents ~~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~~

(e) any further provision of Community law and national law implementing Community law, as well as international agreements, applicable to patents, including Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions.

Article 14b

Applicable 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) Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I);

~~EC Convention on the 2007 on the law applicable to contractual obligations (Rome I);~~

(c) other applicable instruments or national rules 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

[Deleted and transferred to the Draft Regulation on the Community patent]

Article 14h

Conditions applicable to compulsory licences in respect of Community patents

[Deleted and transferred to the Draft Regulation on the Community patent]

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 and related defences, 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 Community patents~~
- ~~(f) actions on compensation for licences within the meaning of [Article 20, paragraph 1] of Council Regulation (EC) No. ... on the Community patent;~~
- ~~(g) actions relating to ~~for~~ the grant or refusal/revocation of supplementary protection certificates issued for a Community patents.~~

(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

(15) 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 and on compensation for licences, actions relating to ~~or the grant or refusal of supplementary protection certificates and on compensation for licencees~~, and actions for ~~provisional and protective measures or injunctions~~ shall be brought before:

- (a) the local division hosted by the Contracting Party where the actual or threatened infringement has occurred 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.

(27) 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 suspend or proceed with the infringement proceedings; or
- (c) with agreement of the parties, refer the case for decision to the central division.

(31) 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 relating to ~~on~~ the same patent before a local or a regional division.

(42) 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 15. ~~The local or regional division concerned shall have the discretion to proceed in accordance with paragraph 2.~~

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

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

(74) The action referred to in paragraph 43 can be brought without the plaintiff having to initiate an opposition procedure before the European Patent Office. In the case of pending opposition proceedings before the European Patent Office any party to an action before the Court shall inform the Court when it has requested accelerated proceedings before the European Patent Office. The Court may stay its proceedings when a rapid decision may be expected from the European Patent Office.

Article 16

Territorial effects of decisions

Decisions of the Court ~~shall~~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 taken effect~~been validated~~.

CHAPTER V – Patent Mediation and Arbitration and Mediation

Article 17

Patent mediation and arbitration and mediation-centre

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

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

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

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

Article 19

Financing of the Court

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

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

Article 20

Financing of the Training Framework for Judges

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

Article 21

Financing of the Centre

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

PART III – ORGANISATION AND PROCEDURAL PROVISIONS

CHAPTER I – GENERAL

Article 21a

Statute

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

Article 22

Rules of Procedure

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

(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

Proportionality and fairness ~~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 provided for in this Agreement and in the Statute are used in a fair and equitable mannerway and shall not 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 without impairing the freedom of the parties to determine the subject-matter and the supporting evidence of their case.

Article 25

Electronic procedures

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

Article 26

Public proceedings

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

Article 27

Parties

(1) Any natural or legal person, or any body equivalent to a legal person entitled to initiate proceedings in accordance with the applicable law of the Contracting Party concerned, shall have access to the Court in order to ~~initiate~~~~bring~~ actions, to defend itself against actions, or to seek application of the procedures and remedies ~~provided for~~~~foreseen~~ in this Agreement ~~and in~~ the Rules of Procedure.

(2) The holder of an exclusive licence in respect of a patent shall be entitled to initiate proceedings before the Court in the same way as the proprietor of a patent, provided that the ~~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~~

~~(2) Parties may also be represented by European Patent Attorneys who are, who is a national of a Contracting Party entitled to act as professional representatives before the European Patent Office pursuant to Article 134 of the European Patent Convention, who have appropriate qualifications such as a European Union Patent Litigation Certificate and who are authorized to represent parties before a court of a Contracting party. (hereafter: European Patent Attorney), and/or by patent attorneys with proven patent litigation experience in accordance with the Rules of Procedure.~~

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

~~(4) 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.~~

~~(5) 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 was ~~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 petition for further appeal 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 ~~was~~ granted as language of proceedings.

(3) In exceptional cases and to the extent deemed appropriate, the Court of Appeal 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 petition for further appeal (cassation) ~~the review procedure~~ shall be the language of proceedings before the Court of Appeal.

Article 31

Other language arrangements

(1) Any division of the Court of First Instance ~~concerned~~ and the Court of Appeal ~~may~~ 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 of the Court of First Instance 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, ~~with the agreement of the parties, dispense with the oral procedure.~~

Article 33

Means of evidence

(1) In proceedings before the Court, the means of giving or obtaining evidence shall include in particular the following:

- (a) hearing the parties;
- (b) requests for information;
- (c) production of documents;
- (d) hearing witnesses;
- (e) opinions by experts;
- (f) inspection;
- (g) comparative tests or experiments;
- (h) sworn statements in writing (affidavits).

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

Article 33a

Burden of proof

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

Article 34

Reversal of burden of proof

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

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

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

CHAPTER IV – POWERS OF THE COURT

Article 34a

General

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

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

Article 35

Order to produce evidence

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

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

Article 35a

Order to preserve evidence and to inspect property

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

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

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

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

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

(5) Where measures to preserve evidence are adopted without the other party having been heard, the parties affected shall be given notice, without delay and at the latest immediately after the execution of the measures ~~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 ~~court 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 payable to the Court with a view to ensuring compliance.

Article 38

Corrective measures in infringement proceedings

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

(2) Such measures shall include:

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

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

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

Article 38a

Decision on invalidity of a patent

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

(2) The Court shall ~~revoke~~ 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.

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

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

(5) Whereas the Court, in a final decision, has ~~revoke~~ 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 plaintiff/claimant and in accordance with the Rules of Procedure, order an alleged infringer party (allegedly) infringing of the patent to inform the plaintiff/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 it~~he~~ would have been in if no infringement had taken place. The ~~infringer 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 compensation 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.

(4) At the request of the defendant the Court may order the plaintiff to provide adequate security for the legal costs and other expenses incurred by the defendant which the plaintiff may be liable to bear.

Article 43

Court fees

(1) Parties to proceedings before the Court shall pay court fees. The court fees shall be set by ~~the Mixed Committee,~~ 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~~ The level of the court fees shall be reviewed periodically.

(3) Court fees shall be paid in advance. Any party which has not paid a prescribed court fee may be excluded from further participation in the proceedings.

