



**COUNCIL OF  
THE EUROPEAN UNION**

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**NOTE**

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|-----------------|------------------------------------------------------------------------------------|
| from:           | Presidency                                                                         |
| to:             | Delegations                                                                        |
| No. prev. doc.: | 14750/12 PI 120 COUR 67                                                            |
| Subject:        | Draft agreement on a Unified Patent Court and draft Statute<br>- Consolidated text |

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Delegations will find in the Annex a revised version of the consolidated text of the above mentioned draft agreement, which takes into account delegations' comments.

Changes in relation to the previous version (14750/12) are underlined.

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**DRAFT AGREEMENT ON A UNIFIED PATENT COURT**

THE KINGDOM OF BELGIUM,

[enumeration of other Member States]...,

- (1) CONSIDERING that cooperation amongst the Member States of the European Union 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 Union characterised by the free movement of goods and services and the creation of a system ensuring that competition in the internal market is not distorted,
- (2) 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 and claims relating to patents which should be revoked,
- (3) CONSIDERING that the European Patent Convention ("EPC") which has been ratified by all Member States of the European Union provides for a single procedure for granting European patents by the European Patent Office,
- (4) CONSIDERING that by virtue of the Regulation of the European Parliament and of the Council of the European Union implementing enhanced cooperation in the area of the creation of unitary patent protection, patent proprietors can request unitary effect of their European patents so as to obtain unitary patent protection in the Member States of the European Union participating in the enhanced cooperation,

- (5) WISHING to improve the enforcement of patents and the defence against unfounded claims and patents which should be revoked and to enhance legal certainty by setting up a Unified Patent Court for litigation relating to the infringement and validity of patents,
- (6) CONSIDERING that the Unified Patent Court should be devised 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,
- (7) CONSIDERING that the Unified Patent Court should be a court common to the Contracting Member States and thus part of their judicial system, with exclusive competence in respect of European patents with unitary effect and European patents granted for one or more Contracting Member States,
- (8) CONSIDERING that the Court of Justice of the European Union is to ensure the uniformity of the Union legal order and the primacy of European Union law,
- (9) RECALLING the obligations of the Contracting Member States under the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), including the obligation of sincere cooperation as set out in Article 4(3) TEU and the obligation to ensure through the Unified Patent Court the full application of, and respect for, Union law in their respective territories and the judicial protection of an individual's rights under that law,
- (10) CONSIDERING that, as any national court, the Unified Patent Court must respect and apply Union law and, in collaboration with the Court of Justice of the European Union as guardian of Union law, ensure its correct application and uniform interpretation; the Unified Patent Court must in particular cooperate with the Court of Justice of the European Union in properly interpreting Union law by relying on the latter's case law and by requesting preliminary rulings in accordance with Article 267 TFEU,
- (11) CONSIDERING that the Contracting Member States should, in line with the case law of the Court of Justice of the European Union on non-contractual liability, be liable for damages caused by infringements of Union law by the Unified Patent Court, including the failure to request preliminary rulings from the Court of Justice of the European Union,

- (12) CONSIDERING that infringements of Union law by the Unified Patent Court, including the failure to request preliminary rulings from the Court of Justice of the European Union, are directly attributable to the Contracting Member States and infringement proceedings can therefore be brought under Article 258, 259 and 260 TFEU against any Contracting Member State to ensure the respect of the primacy and proper application of Union law,
- (13) RECALLING the primacy of Union law, which includes the TEU, the TFEU, the Charter of Fundamental Rights of the European Union, the general principles of Union law as developed by the Court of Justice of the European Union, and in particular the right to an effective remedy before a tribunal and a fair and public hearing within a reasonable time by an independent and impartial tribunal, the case law of the Court of Justice of the European Union and secondary Union law,
- (14) CONSIDERING that this Agreement shall be open to accession by any Member State of the European Union; Member States which have decided not to participate in the enhanced cooperation in the area of the creation of unitary patent protection may participate in this Agreement in respect of European patents granted for their respective territory,
- (15) CONSIDERING that this Agreement shall enter into force on 1 January 2014 or on the first day of the fourth month of the 13th deposit, provided that the Contracting Member States that will have deposited their instruments of ratification or accession include the three States in which the highest number of European patents was in force in the year preceding the year in which the signature of the Agreement takes place, or on the first day of the fourth month after the date of entry into force of the amendments to Regulation (EC) 44/2001<sup>1</sup> concerning its relationship with this Agreement, whichever is the latest.

HAVE AGREED AS FOLLOWS:

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<sup>1</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJEU L 12, 16.1.2001, p. 1), including any subsequent amendments.

## **PART I – GENERAL AND INSTITUTIONAL PROVISIONS**

### **CHAPTER I – GENERAL PROVISIONS**

#### **Article 1**

##### **Unified Patent Court**

A Unified Patent Court for the settlement of disputes relating to European patents and European patents with unitary effect is hereby established.

The Unified Patent Court shall be a court common to the Contracting Member States and thus subject to the same obligations under Union law as any national court of the Contracting Member States.

#### **Article 2**

##### **Definitions**

For the purposes of this Agreement:

- (1) "Court" means the Unified Patent Court created by this Agreement.
- (2) "Member State" means a Member State of the European Union.
- (3) "Contracting Member State" means a Member State party to this Agreement.
- (4) "EPC" means the Convention on the Grant of European Patents of 5 October 1973, including any subsequent amendments.
- (5) "European patent" means a patent granted under the provisions of the EPC, which does not benefit from unitary effect by virtue of the Regulation of the European Parliament and of the Council of the European Union implementing enhanced cooperation in the area of the creation of unitary patent protection.

- (6) "European patent with unitary effect" means a patent granted under the provisions of the EPC which benefits from unitary effect by virtue of the Regulation of the European Parliament and of the Council of the European Union implementing enhanced cooperation in the area of the creation of unitary patent protection.
- (7) "Patent" means a European patent and/or a European patent with unitary effect.
- (8) *Deleted.*
- (9) "Supplementary protection certificate" means a supplementary protection certificate granted under Regulation (EC) No 469/2009<sup>2</sup> or under Regulation (EC) No 1610/96<sup>3</sup>.
- (10) "Statute" means the Statute of the Court as set out in Annex I, which shall be an integral part of this Agreement.
- (11) "Rules of Procedure" means the Rules of Procedure of the Court, as established in accordance with Article 22.

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<sup>2</sup> Regulation (EC) No 469/2009 of 6 May 2009 concerning the supplementary protection certificate for medicinal products, (OJEU L 152, 16.6.2009, p.1) including any subsequent amendments.

<sup>3</sup> Regulation (EC) No 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary certificate for plant protection products, (OJEU L 198, 8.8.1996, p.30) including any subsequent amendments.

**Article 3**  
**Scope of application**

This Agreement shall apply to any:

- (a) European patent with unitary effect;
- (b) supplementary protection certificate issued for a product protected by a patent;
- (c) European patent which has not yet lapsed at the date of entry into force of this Agreement or was granted after that date, without prejudice to Article 58; and
- (d) European patent application which is pending at the date of entry into force of this Agreement or which is filed after that date, without prejudice to Article 58.

**Article 3a**  
**Legal status**

- (1) The Court shall have legal personality in each Contracting Member State and shall enjoy the most extensive legal capacity accorded to legal persons under the national law of that State.
- (2) *Deleted.*
- (3) The Court shall be represented by the President of the Court of Appeal who shall be elected in accordance with the Statute.

## **Article 3b**

### **Liability**

- (1) The contractual liability of the Court shall be governed by the law applicable to the contract in question in accordance with Regulation (EC) No. 593/2008<sup>4</sup> (Rome I), where applicable, or under the law of the Member State of the court seized.
- (2) The non-contractual liability of the Court in respect of any damage caused by it or its staff in the performance of their duties, to the extent that it is not a civil and commercial matter within the meaning of Regulation (EC) No. 864/2007<sup>5</sup> (Rome II), shall be governed by the law of the Contracting Member State in which the damage occurred. This provision is without prejudice to the application of Article 14c.
- (3) The court with jurisdiction to settle disputes under paragraph 2 shall be a court of the Contracting Member State in which the damage occurred.

## **CHAPTER II – INSTITUTIONAL PROVISIONS**

### **Article 4**

#### **The Court**

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

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<sup>4</sup> 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) (OJEU L 177, 4.7.2008, p. 6) including any subsequent amendments.

<sup>5</sup> 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) (OJEU) L 199, 31.7.2007, p. 40) including any subsequent amendments.

**Article 5**  
**The Court of First Instance**

- (1) The Court of First Instance shall comprise a central division as well as local and regional divisions.
- (1a) The central division shall have its seat in Paris, with sections in London and Munich. The cases before the central division shall be distributed in accordance with Annex II, which shall form an integral part of this Agreement.
- (2) A local division shall be set up in a Contracting Member State upon its request in accordance with the Statute. A Contracting Member State hosting a local division shall designate its seat.
- (3) An additional local division shall be set up in a Contracting Member State upon its request for every one hundred patent cases per calendar year that have been commenced in that Contracting Member State during three successive years prior to or subsequent to the date of entry into force of this Agreement. The number of local divisions in one Contracting Member State shall not exceed four.
- (4) *Moved partially to paragraph 2 above and to Art 19(1).*
- (5) A regional division shall be set up for two or more Contracting Member States, upon their request in accordance with the Statute. Such Contracting Member States shall designate the seat of the division concerned. The regional division may hear cases in multiple locations.

**Article 6**  
**Composition of the panels of the Court of First Instance**

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

(2) *Deleted.*

- (2a) Any panel of a local division in a Contracting Member State where, during a period of three successive years prior or subsequent to the entry into force of this Agreement, less than fifty patent cases per calendar year on average have been commenced shall sit in a composition of one legally qualified judge who is a national of the Contracting Member State hosting the local division concerned and two legally qualified judges who are not nationals of the Contracting Member State concerned and are allocated from the Pool of Judges in accordance with Article 13(3) on a case by case basis.
- (3) Notwithstanding paragraph 2a, any panel of a local division in a Contracting Member State where, during a period of three successive years prior or subsequent to the entry into force of this Agreement, fifty or more patent cases per calendar year on average have been commenced, shall sit in a composition of two legally qualified judges who are nationals of the Contracting Member State hosting the local division concerned and one legally qualified judge who is not a national of the Contracting Member State concerned allocated from the Pool of Judges in accordance with Article 13(3). Such third judge shall serve at the local division on a long term basis, where this is necessary for the efficient functioning of divisions with a high work load.
- (4) Any panel of a regional division shall sit in a composition of two legally qualified judges chosen from a regional list of judges, who shall be nationals of the Contracting Member States concerned, and one legally qualified judge who shall not be a national of the Contracting Member States concerned and who shall be allocated from the Pool of Judges in accordance with Article 13(3).

- (5) Upon request by one of the parties, any panel of a local or regional division shall request the President of the Court of First Instance to allocate from the Pool of Judges in accordance with Article 13(3) an additional technically qualified judge with qualifications and experience in the field of technology concerned. Moreover, any panel of a local or regional division may, after having heard the parties, submit such request on its own initiative, where it deems this appropriate.

In cases where such a technically qualified judge is allocated, no further technically qualified judge may be allocated under Article 15a(2)(a).

*(5a) Merged with paragraph 6 below*

- (6) Any panel of the central division shall sit in a composition of two legally qualified judges who are nationals of different Contracting Member States and one technically qualified judge allocated from the Pool of Judges in accordance with Article 13(3) with qualifications and experience in the field of technology concerned. However, any panel of the central division dealing with actions under Article 15(1)(g) shall sit in a composition of three legally qualified judges who are nationals of different Contracting Member States.
- (7) Notwithstanding paragraphs 1 - 6 and in accordance with the Rules of Procedure, parties may agree to have their case heard by a single legally qualified judge.
- (8) Any panel of the Court of First Instance shall be chaired by a legally qualified judge.

**Article 7**  
**The Court of Appeal**

(1) Any panel of the Court of Appeal shall sit in a multinational composition of five judges. It shall sit in a composition of three legally qualified judges who are nationals of different Contracting Member States and two technically qualified judges with qualifications and experience in the field of technology concerned. Those technically qualified judges shall be assigned to the panel by the President of the Court of Appeal from the pool of judges in accordance with Article 13.

(1a) Notwithstanding paragraph 1, a panel dealing with actions under Article 15(1)(g) shall sit in a composition of three legally qualified judges who are nationals of different Contracting Member States.

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

(3) The panels of the Court of Appeal shall be set up in accordance with the Statute.

(4) The Court of Appeal shall have its seat in Luxembourg.

## **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. Subject to conditions set out in this Agreement and the Rules of Procedure, the Registry shall be public.
- (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 in accordance with Article 17 of the Statute and lay down the rules governing the Registrar's service.

## **Article 9**

### **Committees**

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

## **Article 9a (ex-57)**

### **The Administrative Committee**

- (1) The Administrative Committee shall be composed of one representative of each Contracting Member State. The European Commission shall be represented at the meetings of the Administrative Committee as observer.
- (2) Each Contracting Member State shall have one vote.

- (3) The Administrative Committee shall adopt its decisions by a majority of three quarters of the Contracting Member States represented and voting, except where this Agreement or the Statute provides otherwise.
- (4) The Administrative Committee shall adopt its rules of procedure.
- (5) The Administrative Committee shall elect a chairperson from among its members for a term of three years. That term shall be renewable.

**Article 9b (ex-57a)**  
**The Budget Committee**

- (1) The Budget Committee shall be composed of one representative of each Contracting Member State.
- (2) Each Contracting Member State shall have one vote.
- (3) The Budget Committee shall take its decisions by a simple majority of the representatives of the Contracting Member States. However, a majority of three-quarters of the representatives of Contracting Member States shall be required for the adoption of the budget.
- (3a) The Budget Committee shall adopt its rules of procedure.
- (4) The Budget Committee shall elect a chairperson from among its members for a term of three years. That term shall be renewable.

**Article 9c (ex-57b)**  
**The Advisory Committee**

- (1) The Advisory Committee shall:
  - (a) assist the Administrative Committee in the preparation of the appointment of judges of the Court;
  - (b) make proposals to the Presidium referred to in Article 11 of the Statute on the guidelines for the training framework for judges referred to in Article 14; and
  - (c) deliver opinions to the Administrative Committee concerning the requirements for qualifications referred to in Article 28(2).
- (2) The Advisory Committee shall comprise patent judges and practitioners in patent law and patent litigation with the highest recognised competence. They shall be appointed, in accordance with the procedure laid down in the Statute, for a term of six years. That term shall be renewable.
- (3) The composition of the Advisory Committee shall ensure a broad range of relevant expertise and the representation of each of the Contracting Member States. The members of the Advisory Committee shall be completely independent in the performance of their duties and shall not be bound by any instructions.
- (3a) The Advisory Committee shall adopt its rules of procedure.
- (4) The Advisory Committee shall elect a chairperson from among its members for a term of three years. That term shall be renewable.

## **CHAPTER III – JUDGES OF THE COURT**

### **Article 10**

#### **Eligibility criteria for the appointment of judges**

- (1) The Court shall comprise both legally qualified judges and technically qualified judges. Judges shall ensure the highest standards of competence and shall have proven experience in the field of patent litigation.
- (2) Legally qualified judges shall possess the qualifications required for appointment to judicial offices in a Contracting Member State.
- (3) Technically qualified judges shall have a university degree and proven expertise in a field of technology. They shall also have proven knowledge of civil law and procedure relevant in patent litigation.

### **Article 11**

#### **Appointment procedure**

- (1) The Advisory Committee shall establish a list of the most suitable candidates to be appointed as judges of the Court, in accordance with the Statute.
- (2) On the basis of that list, the Administrative Committee shall appoint the judges of the Court acting by common accord.
- (3) The implementing provisions for the appointment of judges are set out in the Statute.

**Article 12**  
**Judicial independence and impartiality**

- (1) The Court, its judges and the Registrar shall enjoy judicial independence. In the performance of their duties, the judges shall not be bound by any instructions.
- (2) Legally qualified judges, as well as technically qualified judges who are full-time judges of the Court, may not engage in any other occupation, whether gainful or not, unless an exception is granted by the Administrative Committee.
- (3) Notwithstanding paragraph 2, the exercise of the office of judges shall not exclude the exercise of other judicial functions at national level.
- (4) The exercise of the office of technically qualified judges who are part-time judges of the Court shall not exclude the exercise of other functions provided there is no conflict of interest.
- (5) In case of a conflict of interest, the judge concerned shall not take part in proceedings. Rules governing conflicts of interest are set out in the Statute.

**Article 13**  
**Pool of Judges**

- (1) A Pool of Judges shall be established 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 or part-time judges of the Court. The Pool of Judges shall include at least one technically qualified judge per field of technology with the relevant qualifications and experience. The technically qualified judges from the Pool of Judges shall also be available to the Court of Appeal.

- (3) Where so provided by this Agreement or the Statute, the judges from the Pool of Judges shall be allocated to the division concerned by the President of the Court of First Instance.
- The allocation of judges shall be based on their legal or technical expertise, linguistic skills and relevant experience. The allocation of judges shall guarantee the same high quality of work and the same high level of legal and technical expertise in all panels of the Court of First Instance.

## **Article 14**

### **Training framework**

- (1) A training framework for judges, the details of which are set out in the Statute, 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. The facilities for that framework shall be situated in Budapest.
- (2) The training framework shall in particular focus on:
- (a) internships in national patent courts or divisions of the Court of First Instance hearing a substantial number of patent litigation cases;
  - (b) improvement of linguistic 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 shall provide for continuous training. Regular meetings shall be organised between all judges of the Court in order to discuss developments in patent law and to ensure the consistency of the Court's case law.

## **CHAPTER IIIA – THE PRIMACY OF UNION LAW, LIABILITY AND RESPONSIBILITY OF THE CONTRACTING MEMBER STATES**

### **Article 14a**

#### **Primacy of and respect for Union law**

The Court shall apply Union law in its entirety and shall respect its primacy.

### **Article 14b**

#### **Requests for preliminary rulings**

As a court common to the Contracting Member States and as part of their judicial system, the Court shall cooperate with the Court of Justice of the European Union to ensure the correct application and uniform interpretation of Union law, as any national court, in accordance with Article 267 TFEU in particular. Decisions of the Court of Justice of the European Union shall be binding on the Court.

### **Article 14c**

#### **Liability for damage caused by infringements of Union law**

- (1) The Contracting Member States are jointly and severally liable for damage resulting from an infringement of Union law by the Court of Appeal, in accordance with Union law concerning non-contractual liability of Member States for damage caused by their national courts breaching Union law.

- (2) An action for such damages shall be brought against the Contracting Member State where the claimant has its residence or principal place of business or, in the absence of residence or principal place of business, place of business, before the competent authority of that Contracting Member State. Where the claimant does not have its residence, or principal place of business or, in the absence of residence or principal place of business, place of business in a Contracting Member State, the claimant may bring such an action against the Contracting Member State where the Court of Appeal has its seat, before the competent authority of that Contracting Member State.

The competent authority shall apply the *lex fori*, with the exception of its private international law, to all questions not regulated by Union law or by this Agreement. The claimant shall be entitled to obtain the entire amount of damages awarded by the competent authority from the Contracting Member State against which the action was brought.

- (3) The Contracting Member State that has paid damages is entitled to obtain proportional contribution, established in accordance with the method laid down in Article 19(3) and (4), from the other Contracting Member States. The detailed rules governing the Contracting Member States' contribution under this paragraph shall be determined by the Administrative Committee.

#### **Article 14d**

#### **Responsibility of the Contracting Member States**

Actions of the Court are directly attributable to each Contracting Member State individually, including for the purposes of Articles 258, 259 and 260 TFEU, and to all Contracting Member States collectively.

## CHAPTER IIIB – SOURCES OF LAW AND SUBSTANTIVE LAW

### Article 14e Sources of law

- (1) In full compliance with Article 14a, when hearing a case brought before it under this Agreement, the Court shall base its decisions on:
  - (a) Union law, including Regulation of the Council and the European Parliament implementing enhanced cooperation in the area of the creation of unitary patent protection and Regulation of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements;
  - (b) this Agreement;
  - (c) the EPC;
  - (d) other international agreements applicable to patents and binding on all the Contracting Member States; and
  - (e) national law.
- (2) To the extent that the Court shall base its decisions on national law, including where relevant the law of non-contracting States, the applicable law shall be determined:
  - (a) by directly applicable provisions of Union law containing private international law rules, or
  - (b) in the absence of directly applicable provisions of Union law or where the latter do not apply, by international instruments containing private international law rules; or
  - (c) in the absence of provisions referred to in (a) and (b), by national provisions on private international law as determined by the Court.

- (3) The law of non-contracting States shall apply when designated by application of the rules referred to in paragraph 2 , in particular in relation to Articles 14f through 14i, 33a, 34, 38, 41 and 44a.

#### **Article 14f**

##### **Right to prevent the direct use of the invention**

A patent shall confer on its proprietor the right to prevent any third party not having the proprietor's consent from the following:

- (a) making, offering, placing on the market or using a product which is the subject matter of the patent, or importing or storing the product for those purposes;
- (b) using a process which is the subject matter of the patent or, where the third party knows, or should have known, that the use of the process is prohibited without the consent of the patent proprietor, offering the process for use within the territory of the Contracting Member States in which that patent has effect ;
- (c) offering, placing on the market, using, or importing or storing for those purposes a product obtained directly by a process which is the subject matter of the patent.

## **Article 14g**

### **Right to prevent the indirect use of the invention**

- (1) A [...] patent shall confer on its proprietor the right to prevent any third party not having the proprietor's consent from supplying or offering to supply, within the territory of the Contracting Member States in which that patent has effect, 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 should have known, that those 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 perform any of the acts prohibited by Article 14f.
- (3) Persons performing the acts referred to in Article 14h (a) to (d) shall not be considered to be parties entitled to exploit the invention within the meaning of paragraph 1.

## **Article 14h**

### **Limitations of the effects of the European patent**

The rights conferred by a [...] patent shall not extend to any of the following:

- (a) acts done privately and for non-commercial purposes;
- (b) acts done for experimental purposes relating to the subject matter of the patented invention;
- (ba) the use of biological material for the purpose of breeding, or discovering and developing other plant varieties;

- (c) the acts allowed pursuant to Article 13(6) of Directive 2001/82/EC<sup>6</sup> or Article 10(6) of Directive 2001/83/EC<sup>7</sup> in respect of any patent covering the product within the meaning of either of those Directives;
- (d) the extemporaneous preparation by a pharmacy, for individual cases, of a medicine in accordance with a medical prescription or acts concerning the medicine so prepared;
- (e) the use of the patented invention on board vessels of countries of the International Union for the Protection of Industrial Property (Paris Union) or members of the World Trade Organisation, other than those Contracting Member States in which that patent has effect, in the body of such vessel, in the machinery, tackle, gear and other accessories, when such vessels temporarily or accidentally enter the waters of a Contracting Member State in which that [...] patent has effect, provided that the invention is used there exclusively for the needs of the vessel;
- (f) the use of the patented invention in the construction or operation of aircraft or land vehicles or other means of transport of countries of the International Union for the Protection of Industrial Property (Paris Union) or members of the World Trade Organisation, other than those Contracting Member States in which that [...] patent has effect, or of accessories to such aircraft or land vehicles, when these temporarily or accidentally enter the territory of a Contracting Member State in which that [...] patent has effect;
- (g) the acts specified in Article 27 of the Convention on International Civil Aviation of 7 December 1944<sup>8</sup>, where these acts concern the aircraft of a country party to that Convention other than a Contracting Member State in which that patent has effect;

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<sup>6</sup> Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products (OJEU L 311, 28.11.2001, p.1), including any subsequent amendments.

<sup>7</sup> Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJEU L 311, 28.11.2001, p.67), including any subsequent amendments.

<sup>8</sup> International Civil Aviation Organization (ICAO), "Chicago Convention", Document 7300/9 (9th edition, 2006)

- (h) the use by a farmer of the product of his harvest for propagation or multiplication by him on his own holding, provided that the plant propagating material was sold or otherwise commercialised to the farmer by or with the consent of the patent proprietor for agricultural use. The extent and the conditions for this use correspond to those under Article 14 of Regulation (EC) No. 2100/94<sup>9</sup>;
- (i) the use by a farmer of protected livestock for an agricultural purpose, provided that the breeding stock or other animal reproductive material were sold or otherwise commercialised to the farmer by or with the consent of the patent proprietor. Such use includes making the animal or other animal reproductive material available for the purposes of pursuing the farmer's agricultural activity, but not the sale thereof within the framework of, or for the purpose of, a commercial reproductive activity;
- (j) the acts and the use of the obtained information as allowed under Articles 5 and 6 of Council Directive 2009/24/EC<sup>10</sup>, in particular, by its provisions on decompilation and interoperability; and
- (k) the acts allowed pursuant to Article 10 of Directive 98/44/EC<sup>11</sup>.

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<sup>9</sup> Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJEU L 227, 1.9.1994, p.1) including any subsequent amendments.

<sup>10</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJEU L 111, 05/05/2009, p.16) including any subsequent amendments.

<sup>11</sup> Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (OJEU L 213, 30.7.1998, p.13) including any subsequent amendments.

#### **Article 14i**

##### **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 Member State, a right based on prior use of that invention or a right of personal possession of that invention, shall enjoy, in that Contracting Member State, the same rights in respect of a [...] patent for the same invention.

#### **Article 14j**

##### **Effects of supplementary protection certificates**

A supplementary protection certificate shall confer the same rights as conferred by the patent and shall be subject to the same limitations and the same obligations.

#### **Article 14 k**

##### **Exhaustion of the rights conferred by a European patent**

The rights conferred by a European patent shall not extend to acts concerning a product covered by that patent after that product has been placed on the market in the Union by, or with the consent of, the patent proprietor, unless there are legitimate grounds for the patent proprietor to oppose further commercialisation of the product.

## CHAPTER IV – INTERNATIONAL JURISDICTION AND COMPETENCE

### Article -15(ex 15b)

#### International jurisdiction

The international jurisdiction of the Court shall be established in accordance with Regulation (EC) 44/2001<sup>12</sup> or, where applicable, on the basis of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention).

### Article 15

#### Competence of the Court

- (1) [...] The Court shall have exclusive competence in respect of:
- (a) actions for actual or threatened infringements of patents and supplementary protection certificates and related defences, including counterclaims concerning licences;
  - (a1) actions for declarations of non-infringement of patents and supplementary protection certificates;
  - (b) actions for provisional and protective measures and injunctions;
  - (c) actions for revocation of patents and for declaration of invalidity of [...] supplementary protection certificates;
  - (c1) counterclaims for revocation of patents and for declaration of invalidity of [...] supplementary protection certificates;

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<sup>12</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (OJEU L 12, 16.1.2001, p. 1) including any subsequent amendments.

- (d) actions for damages or compensation derived from the provisional protection conferred by a published European patent application;
  - (e) actions relating to the use of the invention prior to the granting of the patent or to the right based on prior use of the invention;
  - (f) actions for compensation for licences on the basis of Article 11 of the Regulation of the European Parliament and of the Council of the European Union implementing enhanced cooperation in the area of the creation of unitary patent protection; and
  - (g) actions concerning decisions of the European Patent Office in carrying out the tasks referred to in Article 12 of the Regulation of the European Parliament and of the Council of the European Union implementing enhanced cooperation in the area of the creation of unitary patent protection.
- (2) The national courts of the Contracting Member States shall remain competent for actions relating to patents which do not come within the exclusive competence of the Court.

### **Article 15a**

#### **Competence of the divisions of the Court of First Instance**

- (1) Without prejudice to paragraph 6 of this Article, actions referred to in Article 15(1)(a), (b), (d) and (e) shall be brought before:
- (a) the local division hosted by the Contracting Member State where the actual or threatened infringement has occurred or may occur, or the regional division in which that Contracting Member State participates; or

- (b) the local division hosted by the Contracting Member State where the defendant or, in the case of multiple defendants, one of the defendants has its residence, or principal place of business, or in the absence of residence or principal place of business, its place of business, or the regional division in which that Contracting Member State participates. An action may be brought against multiple defendants only where the defendants have a commercial relationship and where the action relates to the same alleged infringement.

Actions referred to in Article 15(1)(f) shall be brought before the local or regional division in accordance with point (b) of the first subparagraph.

Actions against defendants having their residence, or principal place of business or, in the absence of residence or principal place of business, their place of business, outside the territory of the Contracting Member States shall be brought before the local or regional division in accordance with point (a) of the first subparagraph of this paragraph or before the central division.

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

- (1b) If an action referred to in Article 15(1)(a), (b), (d), (e) or (f) is pending before a division of the Court of First Instance, any action referred to in Article 15(1)(a), (b), (d), (e) or (f) between the same parties on the same patent may not be brought before any other division.

[If an action referred to in Article 15(1)(a) is pending before a regional division and the infringement has occurred in the territories of three or more regional divisions, the regional division concerned shall, at the request of the defendant, refer the case to the central division.]

In case an action between the same parties on the same patent is brought before several different divisions, the division first seized shall be competent for the whole case and any division seized later shall declare the action inadmissible in accordance with the Rules of Procedure.

- (2) A counterclaim for revocation as referred to in Article 15(1)(c1) may be brought in the case of an action for infringement as referred to in Article 15(1)(a). The local or regional division concerned shall, after having heard the parties, have the discretion either to:
- (a) proceed with both the action for infringement and with the counterclaim for revocation and request the President of the Court of First Instance to allocate from the Pool of Judges in accordance with Article 13(3) a technically qualified judge with qualifications and experience in the field of technology concerned.
  - (b) refer the counterclaim for revocation for decision to the central division and suspend or proceed with the action for infringement; or
  - (c) with the agreement of the parties, refer the case for decision to the central division.
- (3) Actions referred to in Article 15(1)(a1) and (c) shall be brought before the central division. If, however, an action for infringement as referred to in Article 15(1)(a) between the same parties relating to the same patent has been brought before a local or a regional division, these actions may only be brought before the same local or regional division.
- (3a) Moved to paragraph 7a.*

- (4) If an action for revocation as referred to in Article 15(1)(c) is pending before the central division, an action for infringement as referred to in Article 15(1)(a) between the same parties relating to the same patent may be brought before any division in accordance with paragraph 1 of this Article or before the central division. The local or regional division concerned shall have the discretion to proceed in accordance with paragraph 2 of this Article.
- (5) An action for declaration of non-infringement as referred to in Article 15(1)(a1) pending before the central division shall be stayed once an infringement action as referred to in Article 15(1)(a) between the same parties or between the holder of an exclusive licence and the party requesting a declaration of non-infringement relating to the same patent is brought before a local or regional division within three months of the date on which the action was initiated before the central division.
- (6) Parties may agree to bring actions referred to in Article 15(1)(a)- (f) before the division of their choice, including the central division.
- (7) Actions referred to in Article 15(1)(c) and (c1) can be brought without the applicant having to file notice of opposition with the European Patent Office.
- (7a) Actions referred to in Article 15(1) (g) shall be brought before the central division.
- (8) A party shall inform the Court of any pending revocation, limitation or opposition proceedings before the European Patent Office, and of any request for accelerated processing before the European Patent Office. The Court may stay its proceedings when a rapid decision may be expected from the European Patent Office.

**Article 15b**  
**International jurisdiction**

*Moved up as Art. -15*

**Article 16**  
**Territorial scope of decisions**

Decisions of the Court shall cover, [...] in the case of a European patent, the territory of those Contracting Member States for which the European patent has effect.

**CHAPTER V – PATENT MEDIATION AND ARBITRATION**

**Article 17**  
**Patent mediation and arbitration centre**

- (1) A patent mediation and arbitration centre ("the Centre") is hereby established. It shall have its seats in Ljubljana and Lisbon.
- (2) The Centre shall provide facilities for mediation and arbitration of patent disputes falling within the scope of this Agreement. Article 56 shall apply mutatis mutandis to any settlement reached through the use of the facilities of the Centre, including through mediation. However, a patent may not be revoked or limited in mediation or arbitration proceedings.
- (3) Moved to Art 32(2))

- (4) The Centre shall establish Mediation and Arbitration Rules.
- (5) The Centre shall draw up a list of mediators and arbitrators to assist the parties in the settlement of their dispute.

## **PART II – FINANCIAL PROVISIONS**

### **Article 18**

#### **Budget of the Court**

- (1) The budget of the Court shall be financed by the Court's own financial revenues and at least in the transitional period referred to in Article 58 as necessary, by contributions from the Contracting Member States. The budget shall be balanced.
- (2) The Court's own financial revenues shall comprise court fees and other revenues.
- (3) Court fees shall be fixed by the Administrative Committee. They shall consist of a fixed fee, combined with a value-based fee above a pre-defined ceiling. The Court fees shall be fixed at such a level as to ensure a right balance between the principle of fair access to justice, in particular for small and medium-sized enterprises, micro-entities, natural persons, non-profit organisations, universities and public research organisations and an adequate contribution of the parties for the costs incurred by the Court, recognising the economic benefits to the parties involved, and the objective of a self-financing Court with balanced finances. The level of the Court fees shall be reviewed periodically by the Administrative Committee. Targeted support measures for small and medium-sized enterprises and micro entities might be considered.

- (4) If the Court is unable to balance its budget out of its own resources, the Contracting Member States shall remit to it special financial contributions.

## **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.

Contracting Member States setting up a local division shall provide the facilities necessary for that purpose. Contracting Member States sharing a regional division shall provide jointly the facilities necessary for that purpose. Contracting Member States hosting the central division , its sections or the Court of Appeal shall provide the facilities necessary for that purpose. During an initial transitional period of seven years starting from the date of the entry into force of this Agreement, the Contracting Member States concerned shall also provide administrative support staff, without prejudice to the Statute of that staff.

- (2) On the date of entry into force of this Agreement, the Contracting Member States shall provide the initial financial contributions necessary for the setting up of the Court.
- (3) During the initial transitional period of seven years, starting from the date of the entry into force of this Agreement, the contribution by each Contracting Member State having ratified or acceded to the Agreement before the entry into force thereof shall be calculated on the basis of the number of European patents having effect in the territory of that State on the date of entry into force of this Agreement and the number of European patents with respect to which actions for infringement or for revocation have been brought before the national courts of that State in the three years preceding entry into force of this Agreement.

During the same initial transitional period of seven years, for Member States which ratify, or accede to, this Agreement after the entry into force thereof, the contributions shall be calculated on the basis of the number of European patents having effect in the territory of the ratifying or acceding Member State on the date of the ratification or accession and the number of European patents with respect to which actions for infringement or for revocation have been brought before the national courts of the ratifying or acceding Member State in the three years preceding the ratification or accession.

- (4) After the end of the initial transitional period of seven years, by which the Court is expected to have become self-financing, should contributions by the Contracting Member States become necessary, they shall be determined in accordance with the scale for the distribution of annual renewal fees for European patents with unitary effect applicable at the time the contribution becomes necessary.

## **Article 20**

### **Financing of the training framework for judges**

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

## **Article 21**

### **Financing of the Centre**

The operating costs of the Centre shall be financed by the budget of the Court.

## **PART III – ORGANISATION AND PROCEDURAL PROVISIONS**

### **CHAPTER I – GENERAL PROVISIONS**

#### **Article 21a**

##### **Statute**

- (1) The Statute shall lay down the details of the organisation and functioning of the Court.
- (2) The Statute is annexed to this Agreement. The Statute may be amended by decision of the Administrative Committee, on the basis of a proposal of the Court or a proposal of a Contracting Member State after consultation with the Court. However, such amendments shall not contradict or alter 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 this Agreement and the Statute.
- (2) The Rules of Procedure shall be adopted by the Administrative Committee on the basis of broad consultations with stakeholders. The prior opinion of the European Commission on the compatibility of the Rules of Procedure with Union law shall be requested.

The Rules of Procedure may be amended by a decision of the Administrative Committee, on the basis of a proposal from the Court and after consultation with the European Commission. However, such amendments shall not contradict or alter 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 of judges without impairing the predictability of proceedings for the parties.

### **Article 23**

#### **Proportionality and fairness**

- (1) The Court shall deal with litigation in ways which are proportionate to the importance and complexity thereof.
- (2) The Court shall ensure that the rules, procedures and remedies provided for in this Agreement and in the Statute are used in a fair and equitable manner and 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 of, and the supporting evidence for, their case.

### **Article 25**

#### **Electronic procedures**

The Court shall make best use of electronic procedures, such as the electronic filing of submissions of the parties and stating of evidence in electronic form, as well as video conferencing, 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 confidential, to the extent necessary, in the interest of one of the parties or other affected persons, or in the general interest of justice or public order.

**Article 26a**  
**Legal capacity**

Any natural or legal person, or any body equivalent to a legal person entitled to initiate proceedings in accordance with its national law, shall have the capacity to be a party to the proceedings before the Court.

**Article 27**  
**Parties**

- (1) The patent proprietor shall be entitled to bring actions before the Court.
- (2) Unless the licensing agreement provides otherwise, the holder of an exclusive licence in respect of a patent shall be entitled to bring actions before the Court under the same circumstances as the patent proprietor, provided that the patent proprietor is given prior notice.
- (3) The holder of a non-exclusive licence shall not be entitled to bring actions before the Court, unless the patent proprietor is given prior notice and in so far as expressly permitted by the licence agreement.
- (4) In actions brought by a licence holder, the patent proprietor shall be entitled to join the action before the Court.

- (5) The validity of a patent cannot be contested in an action for infringement brought by the holder of a licence where the patent proprietor does not take part in the proceedings. The party in an action for infringement wanting to contest the validity of a patent shall have to bring actions against the patent proprietor.
- (6) Any other natural or legal person, or any body entitled to bring actions in accordance with its national law, who is concerned by a patent, may bring actions in accordance with the Rules of Procedure.
- (7) Any natural or legal person, or any body entitled to bring actions in accordance with its national law and who is affected by a decision of the European Patent Office in carrying out the tasks referred to in Article 12 of the Regulation of the European Parliament and the Council of the European Union implementing enhanced cooperation in the area of the creation of unitary patent protection is entitled to bring actions under Article 15(1)(g).

## **Article 28**

### **Representation**

- (1) Parties shall be represented by lawyers authorised to practise before a court of a Contracting Member State.
- (2) Parties may alternatively be represented by European Patent Attorneys who are entitled to act as professional representatives before the European Patent Office pursuant to Article 134 of the EPC and who have appropriate qualifications such as a European Patent Litigation Certificate.
- (2a) Moved down as (3a)
- (3) The requirements for qualifications pursuant to paragraph 2 shall be established by the Administrative Committee. A list of European Patent Attorneys entitled to represent parties before the Court shall be kept by the Registrar.

- (3a) Representatives of the parties may be assisted by patent attorneys, who shall be allowed to speak at hearings of the Court in accordance with the Rules of Procedure.
- (4) Representatives of the parties shall enjoy the rights and immunities necessary for the independent exercise of their duties, including the privilege from disclosure in proceedings before the Court in respect of communications between a representative and the party or any other person, under the conditions laid down in the Rules of Procedure, unless such privilege is expressly waived by the party concerned.
- (5) Representatives of the parties shall be obliged not to misrepresent cases or facts before the Court either knowingly or with good reasons to know.
- (6) Representation in accordance with paragraphs 1 and 2 shall not be required in proceedings under Article 15(1)(g).

## **CHAPTER II – LANGUAGE OF PROCEEDINGS**

### **Article 29**

#### **Language of proceedings at the Court of First Instance**

- (1) The language of proceedings before any local or regional division shall be an official European Union language which is the official language or one of the official languages of the Contracting Member State hosting the relevant division, or the official language(s) designated by Contracting Member States sharing a regional division.
- (2) Notwithstanding paragraph 1, Contracting Member States may designate one or more of the official languages of the European Patent Office as the language of proceedings of their local or regional division.

- (3) The parties may agree on the use of the language in which the patent was granted as the language of proceedings, subject to approval by the competent panel. If the panel does not approve their choice, the parties may request that the case be referred to the central division.
- (4) With the agreement of the parties the competent panel may, on grounds of convenience and fairness, decide on the use of the language in which the patent was granted as the language of proceedings.
- (4a) At the request of one of the parties and after having heard the other parties and the competent panel, the President of the Court of First Instance may, on grounds of fairness and taking into account all relevant circumstances, including the position of parties, in particular the position of the defendant, decide on the use of the language in which the patent was granted as language of proceedings. In this case the President of the Court of First Instance shall assess the need for specific translation and interpretation arrangements.
- (5) The language of proceedings at the central division shall be the language in which the patent concerned was granted.

### **Article 30**

#### **Language of proceedings at the Court of Appeal**

- (1) The language of proceedings before the Court of Appeal shall be the language of proceedings before the Court of First Instance.
- (2) Notwithstanding paragraph 1 the parties may agree on the use of the language in which the patent was granted as the language of proceedings.
- (3) In exceptional cases and to the extent deemed appropriate, the Court of Appeal may decide on another official language of a Contracting Member State as the language of proceedings for the whole or part of the proceedings, subject to agreement by the parties.

## Article 31

### Other language arrangements

- (1) Any panel of the Court of First Instance and the Court of Appeal may, to the extent deemed appropriate, dispense with translation requirements.
- (2) At the request of one of the parties, and to the extent deemed appropriate, any division of the Court of First Instance and the Court of Appeal shall provide interpretation facilities to assist the parties concerned at oral proceedings.
- (3) Notwithstanding Article 29(5), in cases where an action for infringement is brought before the central division, a defendant having its residence, principal place of business or place of business in a Member State shall have the right to obtain, upon request, translations of relevant documents in the language of the Member State of residence, principal place of business or, in the absence of residence or principal place of business, place of business, in the following circumstances:
  - (a) jurisdiction is entrusted to the central division in accordance with Article 15a (1) third or fourth subparagraph, and
  - (b) the language of proceedings at the central division is a language which is not an official language of the Member State where the defendant has its residence, principal place of business or, in the absence of residence or principal place of business, place of business, and
  - (c) the defendant does not have proper knowledge of the language of the proceedings.

## **CHAPTER III – PROCEEDINGS BEFORE THE COURT**

### **Article 32**

#### **Written, interim and oral procedures**

- (1) The proceedings before the Court shall consist of a written, an interim and an 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, shall be responsible for convening an interim hearing. That judge shall in particular explore with the parties the possibility for a settlement, including through mediation, and/or arbitration, by using the facilities of the Centre referred to in Article 17.
- (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 hearing.

### **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**

Without prejudice to Article 14e(2) and (3), the burden of the proof of facts shall be on the party relying on those facts.

### **Article 34**

#### **Reversal of burden of proof**

- (1) Without prejudice to Article 14e(2) and (3), 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 patent proprietor shall, in the absence of proof to the contrary, be deemed to have been obtained by the patented process.
- (2) The principle set out in paragraph 1 shall also apply where there is a substantial likelihood that the identical product was made by the patented process and the patent proprietor has been unable, despite reasonable efforts, to determine the process actually used for such identical product.
- (3) In the adduction of proof to the contrary, the legitimate interests of the defendant in protecting its manufacturing and trade secrets shall be taken into account.

## **CHAPTER IV – POWERS OF THE COURT**

### **Article 34a**

#### **The general powers of the Court**

- (1) The Court may impose such measures, procedures and remedies as are laid down in this Agreement and may make its orders subject to conditions, in accordance with 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 the opportunity to be heard, unless this is incompatible with the effective enforcement of such order.

### **Article 34b (ex Art 36)**

#### **Court experts**

- (1) Without prejudice to the possibility for the parties to produce expert evidence, the Court may at any time appoint court experts in order to provide expertise for specific aspects of the case. The Court shall provide such expert with all information necessary for the provision of the expert advice.
- (2) To this end, an indicative list of experts shall be drawn up by the Court in accordance with the Rules of Procedure. That list shall be kept by the Registrar.
- (3) The court experts shall guarantee independence and impartiality. Rules governing conflicts of interest applicable to judges set out in Article 5 of the Statute shall by analogy apply to court experts.
- (4) Expert advice given to the Court by court experts shall be made available to the parties which shall have the possibility to comment on it.

### **Article 34c (ex-40)**

#### **Protection of confidential information**

To protect the trade secrets, personal data or other confidential information of a party to the proceedings or of a third party, 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 specific persons.

### **Article 35**

#### **Order to produce evidence**

- (1) At the request of a party which 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 the opposing party or a third party to present such evidence, subject to the protection of confidential information. Such order shall not result in an obligation of self-incrimination,.
- (2) At the request of 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, subject to the protection of confidential information.

### **Article 35a**

#### **Order to preserve evidence and to inspect premises**

- (1) At the request of the applicant which has presented reasonably available evidence to support the claim that the patent has been infringed or is about to be infringed the Court may, even before the commencement of proceedings on the merits of the case, order prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement, subject to the protection of confidential information.

- (2) Such measures may include the detailed description, with or without the taking of samples, or the physical seizure of the infringing products, and, in appropriate cases, the materials and implements used in the production and/or distribution of those products and the documents relating thereto.
- (2a) The Court may, even before the commencement of proceedings on the merits of the case, at the request of the applicant who has presented evidence to support the claim that the patent has been infringed or is about to be infringed, order the inspection of premises. Such inspection of 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 applicant 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) Measures shall be ordered, 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 or inspect premises are ordered without the other party in the case having been heard, the parties affected shall be given notice, without delay and at the latest immediately after the execution of the measures. A review, including a right to be heard, shall take place upon request of the parties affected with a view to deciding, within a reasonable period after the notification of the measures, whether the measures are to be modified, revoked or confirmed.
- (5a) The measures to preserve evidence may be subject to the lodging by the applicant of adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant as provided for in paragraph 7.

- (6) The Court shall ensure that the measures to preserve evidence are revoked or otherwise cease to have effect, at the defendant's request, without prejudice to the damages which may be claimed, if the applicant does not bring, within a period not exceeding 31 calendar days or 20 working days, whichever is the longer, action 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, the Court may order the applicant, at the defendant's request, to provide the defendant with appropriate compensation for any damage suffered as a result of those measures.

### **Article 35b**

#### **Freezing orders**

- (1) At the request of the applicant which has presented reasonably available evidence to support the claim that the patent has been infringed or is about to be infringed the Court may, even before the commencement of proceedings on the merits of the case, order a party not to remove from its jurisdiction any assets located therein, or not to deal in any assets, whether located within its jurisdiction or not.
- (2) Article 35a (4)-(7) shall apply by analogy to the measures referred to in this Article.

### **Article 36**

*Moved up as Art. 34b*

## **Article 37**

### **Provisional and protective measures**

- (1) The Court may, by way of order, grant injunctions against an alleged infringer or against an intermediary whose services are used by the alleged infringer, intended to prevent any imminent infringement, to prohibit, on a provisional basis and subject, where appropriate, to a recurring penalty payment, the continuation of the alleged infringement or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the rightholder.
- (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 products suspected of infringing a patent so as to prevent their entry into, or movement, within the channels of commerce. If the applicant 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 the bank accounts and of other assets of the alleged infringer.
- (4) The Court may, in respect of the measures referred to in paragraphs 1 and 3, require the applicant to provide any reasonable evidence in order to satisfy itself with a sufficient degree of certainty that the applicant is the right-holder and that the applicant's right is being infringed, or that such infringement is imminent.
- (5) Article 35a(4)-(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 against the infringer aimed at prohibiting the continuation of the infringement. The Court may also grant such injunction against an intermediary whose services are being used by a third party to infringe a patent.
- (2) Where appropriate, non-compliance with the injunction referred to in paragraph 1 shall be subject to a recurring penalty payment payable to the Court.

## **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 products found to be infringing a patent and, in appropriate cases, with regard to materials and implements principally used in the creation or manufacture of those products.
- (2) Such measures shall include:
  - (a) a declaration of infringement;
  - (b) recalling the products from the channels of commerce;
  - (c) depriving the product of its infringing property;
  - (d) definitively removing the products from the channels of commerce; or
  - (e) the destruction of the products and/or of the materials and implements concerned.

- (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 pursuant to this Article, the Court shall take into account the need for proportionality between the seriousness of the infringement and the remedies to be ordered, the willingness of the infringer to convert the materials into a non-infringing state, as well as the interests of third parties.

### **Article 38a**

#### **Decision on the validity of a patent**

- (1) The Court shall decide on the validity of a patent on the basis of an action for revocation or a counterclaim for revocation.
- (2) The Court may revoke a patent, either entirely or partly, only on the grounds referred to in Articles 138(1) and 139(2) of the EPC.
- (3) Without prejudice to Article 138(3) of the EPC, if the grounds for revocation affect the patent only in part, the patent shall be limited by a corresponding amendment of the claims and revoked in part.
- (4) To the extent that a patent has been revoked it shall be deemed not to have had, from the outset, the effects specified in Articles 64 and 67 of the EPC.
- (5) Where the Court, in a final decision, revokes a patent, either entirely or partly, it shall send a copy of the decision to the European Patent Office and, with respect to a European patent, to the national patent office of any Contracting Member State concerned.

## **Article 38b**

### **Powers of the Court concerning decisions of the European Patent Office**

- (1) In actions brought under Article 15(1)(g), the Court may exercise any power entrusted on the European Patent Office in accordance with Article 12 of the Regulation of the European Parliament and the Council of the European Union implementing enhanced cooperation in the area of the creation of unitary patent protection, including the rectification of the Register for unitary patent protection.
- (2) In actions brought under Article 15(1)(g) the parties shall, by way of derogation from Article 42, bear their own costs.

## **Article 39**

### **Power to order the communication of information**

- (1) The Court may, in response to a justified and proportionate request of the applicant and in accordance with the Rules of Procedure, order an [...] infringer to inform the applicant of:
  - (a) the origin and distribution channels of the [...] infringing products or processes;
  - (b) the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the [...] infringing products; and
  - (c) the identity of any third person involved in the production or distribution of the [...] infringing products or in the use of the [...] infringing process.

- (2) The Court may, in accordance with the Rules of Procedure, also order any third party who, on a commercial scale:
- (a) was found in the possession of the [...] infringing products or in the use of an [...] infringing process;
  - (b) was found to be providing services used in [...] infringing activities; or
  - (c) was indicated by the person referred to in (a) or (b) as being involved in the production, manufacture or distribution of the [...] infringing products or processes or in the provision of the services,
- to provide the applicant with the information referred to in paragraph 1.

#### **Article 40**

#### **Protection of confidential information**

*Moved up as Art. 34c.*

#### **Article 41**

#### **Award of damages**

- (1) The Court shall, 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 harm actually suffered by that party as a result of the infringement.
- (2) The injured party shall, to the extent possible, be placed in the position it would have been in if no infringement had taken place. The infringer shall not benefit from the infringement. However, damages shall not be punitive.

- (3) When the Court sets the damages:
- (a) it shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the injured party by the infringement; or
  - (b) as an alternative to (a), it may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of the royalties or fees which would have been due if the infringer had requested authorisation to use the patent in question.
- (4) Where the infringer did not knowingly, or with reasonable grounds to know, engage in the infringing activity, the Court may order the recovery of profits or the payment of compensation.

## **Article 42**

### **Legal costs**

- (1) Reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity requires otherwise, up to a ceiling set in accordance with the Rules of Procedure.
- (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 applicant to provide adequate security for the legal costs and other expenses incurred by the defendant which the applicant may be liable to bear, in particular in the cases referred to in Articles 35, 35a, 35b and 37.

### **Article 43**

#### **Court fees**

- (1) Parties to proceedings before the Court shall pay court fees.
- (2) Court fees shall be paid in advance, unless the Rules of Procedure provide otherwise. 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 who is unable to meet the costs of the proceedings, either wholly or in part, may at any time apply for legal aid. The conditions for granting of legal aid shall be laid down in the Rules of Procedure.
- (2) The Court shall decide whether legal aid should be granted in full or in part, or whether it should be refused, in accordance with the Rules of Procedure.
- (3) On a proposal from the Court, the Administrative Committee shall set the level of legal aid and the rules on bearing the costs thereof.

**Article 44a**  
**Period of limitation**

- (1) Without prejudice to Article 14e(2) and (3), actions relating to all forms of financial compensation may not be brought more than five years after the date on which the applicant became aware, or had reasonable grounds to become aware, of the last fact justifying the action.
- (2) *Deleted.*

**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, within two months of the date of the notification of the decision.
- (1a) An appeal against an order 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:
- (a) for the orders referred to in Articles 29(4a), 35, 35a, 35b, 37 and 39 within 15 calendar days of the notification of the order to the applicant ;
  - (b) for other orders than the orders referred to in point (a):
    - (i) together with the decision, or
    - (ii) where the Court grants leave to appeal, within 15 days of the notification of the Court's decision to that effect.

- (2) *Merged with (1) and (1a)*
- (3) The appeal against a decision or an order 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 in accordance with the Rules of Procedure and where the submission thereof by the party concerned could not reasonably have been expected during proceedings before the Court of First Instance.

## **Article 46**

### **Effects of an appeal**

- (1) An appeal shall not have suspensive effect unless the Court of Appeal decides otherwise at the motivated request of one of the parties. The Rules of Procedure shall guarantee that such a decision is taken without delay.
- (2) Notwithstanding paragraph 1, an appeal against a decision on actions or counterclaims for revocation and on actions based on Article 15(1)(g) shall always have suspensive effect.
- (3) An appeal against an order referred to in Articles 29(4a), 35, 35a, 35b, 37 or 39 shall not prevent the continuation of the main proceedings . However, the Court of First Instance shall not give a decision in the main proceedings before the decision of the Court of Appeal concerning an appealed order has been given.

## **Article 47**

### **Decision on appeal and referral back**

- (1) If an appeal pursuant to Article 45 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 pursuant to paragraph 1, the Court of First Instance shall be bound by the decision of the Court of Appeal on points of law.

## **CHAPTER VI - DECISIONS**

### **Article 49**

#### **Basis for decisions and right to be heard**

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

## **Article 50**

### **Formal requirements**

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

## **Article 51**

### **Decisions of the Court and dissenting opinions**

- (1) Decisions and orders of the Court shall be taken by a majority of the panel, in accordance with the Statute. In case of equal votes, the vote of the presiding judge shall prevail.
- (2) In exceptional circumstances, any judge of the panel may express a 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, which shall be confirmed by a decision of the Court. A patent may not be revoked or limited by way of settlement.

**Article 54**  
**Publication of decisions**

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

**Article 55**  
**Rehearing**

- (1) A request for rehearing after a final decision of the Court may exceptionally be granted by the Court of Appeal in the following circumstances:
  - (a) on discovery of a fact by the party requesting the rehearing, which is of such a nature as to be a decisive factor and which, when the decision was given, was unknown to the party requesting the rehearing; such request may only be granted on the basis of an act which was held, by a final decision of a national court, to constitute a criminal offence; or
  - (b) in the event of a fundamental procedural defect, in particular when a defendant who did not appear before the Court was not served with the document initiating the proceedings or an equivalent document in sufficient time and in such a way as to enable him to arrange for the defence.
- (2) A request for a rehearing shall be filed within 10 years of the date of the decision but not later than two months from the date of the discovery of the new fact or of the procedural defect. Such request shall not have suspensive effect unless the Court of Appeal decides otherwise.

- (3) If the request for a rehearing is well-founded, the Court of Appeal shall set aside, in whole or in part, the decision under review and re-open the proceedings for a new trial and decision, in accordance with the Rules of Procedure.
- (4) Persons using patents which are the subject-matter of a decision under review and who act in good faith should be allowed to continue using such patents.

## **Article 56**

### **Enforcement of decisions and orders**

- (1) Decisions and orders of the Court shall be enforceable in any Contracting Member State. An order for the enforcement of a decision shall be appended to the decision by the Court.
- (2) Where appropriate, the enforcement of a decision may be subject to the provision of security or an equivalent assurance to ensure compensation for any damage suffered, in particular in the case of injunctions.
- (3) Without prejudice to this Agreement and the Statute, enforcement procedures shall be governed by the law of the Contracting Member State where the enforcement takes place. Any decision of the Court shall be enforced under the same conditions as a decision given in the Contracting Member State where the enforcement takes place.
- (4) If a party does not comply with the terms of an order of the Court, that party may be sanctioned with a recurring penalty payment payable to the Court. The individual penalty shall be proportionate to the importance of the order to be enforced and shall be without prejudice to the party's right to claim damages or security.

## PART IIIA – IMPLEMENTATION AND OPERATION OF THE AGREEMENT

*Moved up after art 9*

## PART IV – TRANSITIONAL PROVISIONS

### Article 58

#### Transitional regime

- (1) During a transitional period of seven years after the date of entry into force of this Agreement, an action for infringement or for revocation of a European patent or an action for infringement or for declaration of invalidity of a supplementary protection certificate issued for a product protected by a European patent may still be brought before national courts or other competent national authorities.
- (2) An action pending before a national court at the end of the transitional period shall not be affected by the expiry of this period.
- (3) Unless an action has already been brought before the Court, a proprietor of or an applicant for a European patent granted or applied for prior to the end of the transitional period under paragraph 1 and, where applicable, paragraph 5, as well as a holder of a supplementary protection certificate issued for a product protected by a European patent, shall have the possibility to opt out from the exclusive competence of the Court. To this end they shall notify their opt-out to the Registry by the latest one month before expiry of the transitional period. The opt-out shall take effect upon its entry into the Registry.

- (4) Unless an action has already been brought before a national court, proprietors of or applicants for European patents or holders of supplementary protection certificates issued for a product protected by a European patent who made use of the opt-out in accordance with paragraph 3 shall be entitled to withdraw their opt-out at any moment. In this event they shall notify the Registry accordingly. The withdrawal of the opt-out shall take effect upon its entry into the Registry.
- (5) Five years after the entry into force of this Agreement, the Administrative Committee shall carry out a broad consultation with the users of the patent system and a survey on the number of European patents and supplementary protection certificates issued for products protected by European patents with respect to which actions for infringement or for revocation or declaration of invalidity are still brought before the national courts pursuant to paragraph 1, the reasons for this and the implications thereof. On the basis of this consultation and an opinion of the Court, the Administrative Committee may decide to prolong the transitional period by up to seven years.

## **PART V – FINAL PROVISIONS**

### **Article 58a**

#### **Signature, ratification and accession**

- (1) This Agreement shall be open for signature by any Member State on 18 February 2013.
- (1a) This Agreement shall be subject to ratification in accordance with the respective constitutional requirements of the Member States. Instruments of ratification shall be deposited with the General Secretariat of the Council of the European Union (hereinafter referred to as "the depositary").

- (2) Each Member State having signed this Agreement shall notify the European Commission of its ratification of the Agreement at the time of the deposit of its ratification instrument pursuant to Article 22(2a) of the Regulation of the European Parliament and of the Council of the European Union implementing the enhanced cooperation in the area of the creation of unitary patent protection.
- (3) This Agreement shall be open to accession by any Member State. Instruments of accession shall be deposited with the depository.

#### **Article 58aa**

##### **Functions of the depository**

- (1) The depository shall draw up certified true copies of this Agreement and shall transmit them to the governments of all signatory or acceding Member States.
- (2) The depository shall notify the governments of the signatory or acceding Member States of:
  - (a) any signature ;
  - (b) the deposit of any instrument of ratification or accession ;
  - (c) the date of entry into force of this Agreement.
- (3) The depository shall register this Agreement with the Secretariat of the United Nations.

**Article 58b**  
**Membership**  
**Merged with 58a**

**Article 58c**  
**Duration of the Agreement**

This Agreement shall be of unlimited duration.

**Article 58d**  
**Revision**

- (1) Either seven years after the entry into force of this Agreement or once 2000 infringement cases have been decided by the Court, whichever is the later point in time, and if necessary at regular intervals thereafter, a broad consultation with the users of the patent system shall be carried out by the Administrative Committee on the functioning, efficiency and cost-effectiveness of the Court and on the trust and confidence of users of the patent system in the quality of the Court's decisions. On the basis of this consultation and an opinion of the Court, the Administrative Committee may decide to revise this Agreement with a view to improving the functioning of the Court.
- (2) The Administrative Committee may amend this Agreement to bring it into line with an international treaty relating to patents or Union law.
- (3) A decision of the Administrative Committee taken on the basis of paragraphs 1 and 2 shall not take effect if a Contracting Member State declares within twelve months of the date of the decision, on the basis of its relevant internal decision-making procedures, that it does not wish to be bound by the decision. In this case, a Review Conference of the Contracting Member States shall be convened.

## **Article 58f**

### **Languages of the Agreement**

- (1) This Agreement is drawn up in a single original in the English, French and German languages, each text being equally authentic.
- (2) The texts of this Agreement drawn up in official languages of Contracting Member States other than those specified in paragraph 1 shall, if they have been approved by the Administrative Committee, be considered as official texts. In the event of divergences between the various texts, the texts referred to in paragraph 1 shall prevail.

## **Article 59**

### **Entry into force**

- (1) This Agreement shall enter into force on 1 January 2014 or on the first day of the fourth month after the deposit of the thirteenth instrument of ratification or accession in accordance with Article 58a, including the three Member States in which the highest number of European patents had effect in the year preceding the year in which the signature of the Agreement takes place or on the first day of the fourth month after the date of entry into force of the amendments to Regulation (EC) 44/2001<sup>13</sup> concerning its relationship with this Agreement, whichever is the latest.
- (1a) *Deleted.*
- (2) Any ratification or accession after the entry into force of this Agreement shall take effect on the first day of the fourth month after the deposit of the instrument of ratification or accession.

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<sup>13</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJEU L 12, 16.1.2001, p. 1), including any subsequent amendments.

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

Done at Brussels on 18 February 2013 in English, French and German, all three texts being equally authentic, in a single copy which shall be deposited in the archives of the General Secretariat of the Council of the European Union.

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**DRAFT STATUTE OF THE UNIFIED PATENT COURT**

**Article 1**

**Scope of the Statute**

This Statute contains institutional and financial arrangements for the Unified Patent Court as established under Article 1 of the Agreement.

**CHAPTER I - JUDGES**

**Article 2**

**Eligibility of judges**

- (1) Any person who is a national of a Contracting Member State and fulfils the conditions set out in Article 10 of the Agreement and in this Statute may be appointed as a judge.
- (2) Judges shall have a good command of at least one official language of the European Patent Office.
- (3) Experience with patent litigation which has to be proven for the appointment pursuant to Article 10(1) of the Agreement may be acquired by training under Article 9(4)(a) of this Statute.

### Article 3

#### Appointment of judges

- (1) Judges shall be appointed pursuant to the procedure set out in Article 11 of the Agreement.
- (2) Vacancies shall be publicly advertised and shall indicate the relevant eligibility criteria as set out in Article 2. The Advisory Committee shall give an opinion on candidates' suitability to perform the duties of a judge of the Court. The opinion shall comprise a list of most suitable candidates. The list shall contain at least twice as many candidates as there are vacancies. Where necessary, the Advisory Committee may recommend that, prior to the decision on the appointment, a candidate judge receive training in patent litigation pursuant to Article 9(4)(a).
- (3) When appointing judges, the Administrative Committee shall ensure the best legal and technical expertise and a balanced composition of the Court on as broad a geographical basis as possible among nationals of the Contracting Member States.
- (4) *Moved to Art 3a*
- (5) The Administrative Committee shall appoint as many judges as are needed for the proper functioning of the Court. The Administrative Committee shall initially appoint the necessary number of judges for setting up at least one panel in each of the divisions of the Court of First Instance and at least two panels in the Court of Appeal.
- (6) The decision of the Administrative Committee appointing full-time or part-time legally qualified judges and full-time technically qualified judges shall state the instance of the Court and/or the division of the Court of First Instance for which each judge is appointed and the field(s) of technology for which a technically qualified judge is appointed.

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

**Article 3a**  
**Judges' term of office**

1. Judges shall be appointed for a term of six years, beginning on the date laid down in the instrument of appointment. They may be re-appointed.
2. In the absence of any provision regarding the date, the term shall begin on the date of the instrument of appointment.

**Article 3b**  
**Appointment of the members of the Advisory Committee**

- (1) Each Contracting Member State shall propose a member of the Advisory Committee who fulfils the requirements set out in Article 9c, paragraph 2, of the Agreement.
- (2) The members of the Advisory Committee shall be appointed by the Administrative Committee acting by common accord.

**Article 4**  
**Oath**

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

## **Article 5**

### **Impartiality**

- (1) Immediately after taking their oath, judges shall sign a declaration by which they solemnly undertake 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) Judges may not take part in the proceedings of a case in which they:
  - (a) have taken part as adviser;
  - (b) have been a party or have acted for one of the parties;
  - (c) have 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;
  - (d) have a personal or financial interest in the case or in relation to one of the parties; or
  - (e) are related to one of the parties or the representatives of the parties by family ties.
- (3) If, for some special reason, a judge considers that he or she should not take part in the judgement or examination of a particular case, that judge shall so inform the President of the Court of Appeal accordingly or, in the case of judges of the Court of First Instance, the President of the Court of First Instance. If, for some special reason, the President of the Court of Appeal or, in the case of judges of the Court of First Instance, the President of the Court of First Instance considers that a judge should not sit or make submissions in a particular case, the President of the Court of Appeal or the President of the Court of First Instance shall justify this in writing and notify the judge concerned accordingly.

- (4) Any party to an action may object to a judge taking part in the proceedings on any of the grounds listed in paragraph 2 or where 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 Presidium, 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 relation to their official capacity.
- (2) The Presidium may waive the immunity.
- (3) Where immunity has been waived and criminal proceedings are instituted against a judge, that judge shall be tried, in any of the Contracting Member States, only by the court competent to judge the members of the highest national judiciary.
- (4) The Protocol on the privileges and immunities of the European Union 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 replacement after expiry of a judge's term pursuant to Article 3a, or death, the duties of a judge shall end when that judge resigns.

- (2) Where a judge resigns, the letter of resignation shall be addressed to the President of the Court of Appeal or, in the case of judges of the Court of First Instance, the President of the Court of First Instance for transmission to the Chairman of the Administrative Committee.
- (3) Save where Article 8 applies, a judge shall continue to hold office until that judge's successor takes up his or her duties.
- (4) Any vacancy shall be filled by the appointment of a new judge for the remainder of his or her predecessor's term.

### **Article 8**

#### **Removal from office**

- (1) A judge may be deprived of his or her office or of other benefits in its stead only if the Presidium decides that that judge no longer fulfils the requisite conditions or meets the obligations arising from his or her office. The judge concerned shall be heard but shall not take part in the deliberations.
- (2) The Registrar of the Court shall communicate this decision to the Chairman of the Administrative Committee.
- (3) In the case of a decision depriving a judge of his or her office, a vacancy shall arise upon this latter notification.

## **Article 9**

### **Training**

- (1) Appropriate and regular training of judges shall be provided for within the training framework set up under Article 14 of the Agreement. The Presidium shall adopt Training Regulations ensuring the implementation and overall coherence of the training framework.
- (2) The training framework shall provide a platform for the exchange of expertise and a forum for discussion, in particular by:
  - (a) organising courses, conferences, seminars, workshops and symposia;
  - (b) cooperating with international organisations and education institutes in the field of intellectual property; and
  - (c) promoting and supporting further vocational training.
- (3) An annual work programme and training guidelines shall be drawn up, which shall include for each judge an annual training plan identifying that judge's main training needs in accordance with the Training Regulations.
- (4) The training framework shall in addition:
  - (a) ensure appropriate training for candidate-judges and newly appointed judges of the Court;
  - (b) support projects aimed at facilitating cooperation between representatives, patent attorneys and the Court.

**Article 9a**  
**Remuneration**

The Administrative Committee shall set the remuneration of the President of the Court of Appeal, the President of the Court of First Instance, the judges, the Registrar, the Deputy-Registrar and the staff.

**CHAPTER II – ORGANISATIONAL PROVISIONS**

**SECTION 1 – COMMON PROVISIONS**

**Article 10**  
**President of the Court of Appeal**

- (1) The President of the Court of Appeal shall be elected by all judges of the Court of Appeal for a term of three years, from among their number. The President of the Court of Appeal may be re-elected twice.
- (2) The elections of the President of the Court of Appeal shall be by secret ballot. A judge obtaining an absolute majority shall be elected. If no judge obtains an absolute majority, a second ballot shall be held and the judge obtaining the most votes shall be elected.
- (3) The President of the Court of Appeal shall direct the judicial activities and the administration of the Court of Appeal and chair the Court of Appeal sitting as a full Court.
- (4) If the office of the President of the Court of Appeal falls vacant before the date of expiry of his or her term, a successor shall be elected for the remainder thereof.

## **Article 10a**

### **President of the Court of First Instance**

- (1) The President of the Court of First Instance shall be elected by all judges of the Court of First Instance who are full-time judges, for a term of three years, from among their number. The President of the Court of First Instance may be re-elected twice.
- (1b) The first President of the Court of First Instance shall be a national of the Contracting Member State hosting the seat of the central division.
- (2) The President of the Court of First Instance shall direct the judicial activities and the administration of the Court of First Instance.
- (3) Article 10(2) and (4), shall by analogy apply to the President of the Court of First Instance.

## **Article 11**

### **Presidium**

- (1) The Presidium shall be composed of the President of the Court of Appeal, who shall act as chairperson, the President of the Court of First Instance, two judges of the Court of Appeal elected from among their number, three judges of the Court of First Instance who are full-time judges of the Court elected from among their number, and the Registrar as a non-voting member.
- (2) The Presidium shall exercise its duties in accordance with this Statute. It may, without prejudice to its own responsibility, delegate certain tasks to one of its members.

(3) The Presidium shall be responsible for the management of the Court and shall in particular :

(a) *Deleted.*

(b) draw up proposals for the amendment of the Rules of Procedure in accordance with Article 22 of the Agreement and proposals regarding the Financial Regulations of the Court;

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

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

(e) take decisions on the appointment and removal of the Registrar and the Deputy-Registrar;

(f) lay down the rules governing the Registry including the sub-registries;

(g) give an opinion in accordance with Article 58(5) of the Agreement;

(h) *Deleted.*

(4) Decisions of the Presidium referred to in Articles 5, 6, 8 and 17 shall be taken without the participation of the Registrar.

(5) The Presidium can take valid decisions only when all members are present or duly represented. Decisions shall be taken by a majority of the votes.

## **Article 12**

### **Staff**

- (1) The officials and other servants of the Court shall have the task of assisting the President of the Court of Appeal, the President of the Court of First Instance, the judges and the Registrar. They shall be responsible to the Registrar, under the authority of the President of the Court of Appeal and the President of the Court of First Instance.
- (2) The Administrative Committee shall establish the Staff Regulations of officials and other servants of the Court.

## **Article 12a**

### **Judicial vacations**

- (1). After consulting the Presidium, the President of the Court of Appeal shall establish the duration of judicial vacations and the rules on observing official holidays.
- (2). During the period of judicial vacations, the functions of the President of the Court of Appeal and of the President of the Court of First Instance may be exercised by any judge invited by the respective President to that effect. In cases of urgency, the President of the Court of Appeal may convene the judges.
- (3). The President of the Court of Appeal or the President of the Court of First Instance may, in proper circumstances, grant leave of absence to respectively judges of the Court of Appeal or judges of the Court of First Instance.

## SECTION 2 - THE COURT OF FIRST INSTANCE

### Article 13

#### Setting up and discontinuance of a local or regional division

- (1) A request from one or more Contracting Member States for the setting up of a local or regional division shall be addressed to the Chairman of the Administrative Committee. It shall indicate the seat of the local or regional division.
- (2) The decision of the Administrative Committee setting up a local or regional division shall indicate the number of judges for the division concerned and shall be public.
- (3) The Administrative Committee shall decide to discontinue a local or regional division at the request of the Contracting Member State hosting the local division or the Contracting Member States participating in the regional division. The decision to discontinue a local or regional division shall state the date after which no new cases may be brought before the division and the date on which the division will cease to exist.
- (4) As from the date on which a local or regional division ceases to exist, the judges assigned to that local or regional division shall be assigned to the central division, and cases still pending before that local or regional division together with the sub-registry and all of its documentation shall be transferred to the central division.

## **Article 14**

### **Panels**

- (1) The allocation of judges and the assignment of cases within a division to its panels shall be governed by the Rules of Procedure. One judge of the panel shall be designated as the presiding judge, in accordance with the Rules of Procedure.
- (2) The panel may delegate, in accordance with the Rules of Procedure, certain functions to one or more of its judges.
- (2a) A standing judge for each division to hear urgent cases may be designated in accordance with the Rules of Procedure.
- (3) In cases where a single judge in accordance with Article 6, paragraph 7, of the Agreement, or a standing judge, in accordance with paragraph 2a of this Article, hears a case that judge shall carry out all functions of a panel.
- (4) One judge of the panel shall act as Rapporteur, in accordance with the Rules of Procedure.

## **Article 15**

### **Pool of Judges**

- (1) A list with the names of the judges included in the Pool of Judges shall be drawn up by the Registrar. In relation to each judge, the list shall at least indicate the linguistic skills, the field of technology and experience of, as well as the cases previously handled by, that judge.
- (2) A request addressed to the President of the Court of First Instance to assign a judge from the Pool of Judges shall indicate, in particular, the subject matter of the case, the official language of the European Patent Office used by the judges of the panel, the language of the proceedings and the field of technology required.

## **SECTION 3 – THE COURT OF APPEAL**

### **Article 16**

#### **Panels**

- (1) The allocation of judges and the assignment of cases to panels shall be governed by the Rules of Procedure. One judge of the panel shall be appointed as the presiding judge, in accordance with the Rules of Procedure.
- (2) When a case is of exceptional importance, and in particular when the decision may affect the unity and consistency of the case law of the Court, the Court of Appeal may decide, on the basis of a proposal from the presiding judge, to refer the case to the full Court.
- (3) The panel may delegate, in accordance with the Rules of Procedure, certain functions to one or more of its judges.
- (4) One judge of the panel shall act as Rapporteur, in accordance with the Rules of Procedure.

## **SECTION 4 – THE REGISTRY**

### **Article 17**

#### **Appointment and removal from office of the Registrar**

- (1) The Presidium shall appoint the Registrar of the Court for a term of six years. The Registrar may be re-appointed.
- (2) Two weeks before the date fixed for appointing the Registrar, the President of the Court of Appeal shall inform the Presidium of the applications which have been submitted for the post.
- (3) Before taking up his or her duties, the Registrar shall take oath before the Presidium to perform the duties of the Registrar impartially and conscientiously.

- (4) The Registrar may be removed from office only if the Registrar no longer meets the obligations arising from his or her office. The Presidium shall take its decision after having heard the Registrar.
- (5) If the office of the Registrar falls vacant before the date of expiry of the term thereof, the Presidium shall appoint a new Registrar for a term of six years.
- (6) If the Registrar is absent or prevented from attending or where such post is vacant, the President of the Court of Appeal after having consulted the Presidium shall designate a member of the staff of the Court to carry out the duties of the Registrar.

## **Article 18**

### **Duties of the Registrar**

- (1) The Registrar shall assist the Court, the President of the Court of Appeal, the President of the Court of First Instance and the judges in the performance of their functions. The Registrar shall be responsible for the organisation and activities of the Registry under the authority of the President of the Court of Appeal.
- (2) The Registrar shall in particular be responsible for:
  - (a) keeping the registry which shall include records of all cases before the Court;
  - (b) keeping and administering lists drawn up in accordance with Articles 13, 28(3) and 34b(2) of the Agreement;

- (c) keeping and publishing a list of notifications 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 of the Agreement is notified to the European Patent Office.

## **Article 19**

### **Keeping of the registry**

- (1) Detailed rules for keeping the registry of the Court shall be prescribed in the Rules governing the Registry, adopted by the Presidium.
- (2) The rules on access to documents of the Registry shall be provided for in the Rules of Procedure.

## **Article 20**

### **Sub-registries and Deputy-Registrar**

- (1) A Deputy-Registrar shall be appointed for a term of six years by the Presidium. The Deputy-Registrar may be re-appointed.

- (2) Article 17, paragraphs 2 to 6, shall apply by analogy.
- (3) The Deputy-Registrar shall be responsible for the organisation and activities of sub-registries under the authority of the Registrar and the President of the Court of First Instance. The duties of the Deputy-Registrar shall in particular include:
  - (a) keeping records of all cases before the Court of First Instance;
  - (b) notifying every case before the Court of First Instance to the Registry.
- (3) The Deputy-Registrar shall also provide administrative and secretarial assistance to the divisions of the Court of First Instance.

### **CHAPTER III – FINANCIAL PROVISIONS**

#### **Article 22**

##### **Budget**

- (1) The budget shall be adopted by the Budget Committee on a proposal from the Presidium. It shall be drawn up in accordance with the generally accepted accounting principles laid down in the Financial Regulations, established in accordance with Article 30 of this Statute.
- (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 Presidium.

### **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, to the extent necessary, in accordance with the Financial Regulations.

### **Article 24**

#### **Appropriations for unforeseeable expenditure**

- (1) The budget of the Court may include 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, expenditure 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 budget appropriations for the preceding accounting period.

**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 be adopted by the Administrative Committee. They shall be amended by the Administrative Committee on a proposal from the Court.
- (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, including the initial financial contributions provided for in Article 19 of the Agreement are to be made available to the Court;
- (c) the rules concerning the responsibilities of authorising and accounting officers and the arrangements for their supervision; and
- (d) the generally accepted accounting principles on which the budget and the annual financial statements are to be based.

(2) *Moved up as paragraph -1*

#### *Articles 31 and 32*

Deleted.

### **CHAPTER IV – PROCEDURAL PROVISIONS**

#### **Article 33**

##### **Secrecy of deliberations**

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

#### **Article 34**

##### **Decisions**

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

- (2) In the event of one of the judges of a panel being prevented from attending, a judge from another panel may be called upon to sit in accordance with the Rules of Procedure.
- (3) In cases where this Statute provides that the Court of Appeal shall take a decision sitting as a full court, such decision shall be valid only if it is taken by at least 3/4 of the judges comprising the full court.
- (4) Decisions of the Court shall contain the names of the judges deciding the case.
- (5) Decisions shall be signed by the judges deciding the case, by the Registrar for decisions of the Court of Appeal, and by the Deputy-Registrar for decisions of the Court of First Instance. They shall be read in open court.

### **Article 35**

#### **Dissenting opinions**

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

### **Article 36**

#### **Decision by default**

- (1) At the request of a party to an action, a decision by default may be given in accordance with the Rules of Procedure, where the other party, after having been served with a document instituting proceedings or with an equivalent document, fails to file written submissions in defence or fails to appear at the oral hearing. An objection may be lodged against that decision within one month of it being notified to the party against which the default decision has been given.

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

### **Article 37**

#### **Questions referred to the Court of Justice of the European Union**

- (1) The procedures established by the Court of Justice of the European Union for referrals for preliminary rulings within the European Union shall apply.
- (2) Whenever the Court of First Instance or the Court of Appeal has decided to refer to the Court of Justice of the European Union a question of interpretation of the Treaty on the Functioning of the European Union or of the Treaty on European Union or a question on the validity or interpretation of acts of the institutions of the European Union, it shall stay its proceedings.

**Distribution of cases within the central division <sup>14)</sup>**

| <b>LONDON Section</b>     | <b>PARIS Seat</b>                          | <b>MUNICH Section</b>                                                  |
|---------------------------|--------------------------------------------|------------------------------------------------------------------------|
|                           | President's Office                         |                                                                        |
| (A) Human necessities     | (B) Performing operations,<br>transporting | (F) Mechanical engineering,<br>lighting, heating, weapons,<br>blasting |
| (C) Chemistry, metallurgy | (D) Textiles, paper                        |                                                                        |
|                           | (E) Fixed constructions                    |                                                                        |
|                           | (G) Physics                                |                                                                        |
|                           | (H) Electricity                            |                                                                        |

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<sup>14</sup> The classification into 8 sections (A to H) is based on the International Patent Classification of the World Intellectual Property Organisation (<http://www.wipo.int/classifications/ipc/en>).