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THE EUROPEAN UNION**

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NOTE

from: Presidency

to: Permanent Representatives Committee (Part 1)

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Subject: Draft Agreement on the creation of a Unified Patent Court
- Guidance for future work

I. INTRODUCTION

1. On 29 September 2011, the Competitiveness Council held an exchange of views on the creation of a unified patent litigation system, in particular on the compatibility of the draft Agreement with the EU legal order. The Presidency concluded that delegations seemed sufficiently reassured in this respect and announced that it would continue working with a view to reaching political agreement on the patent "package" by the end of the year.
2. In the course of October and November 2011, the Presidency organised numerous technical meetings to further elaborate the text of the draft Agreement. A 3-day long drafting session in Warsaw on 12-14 October was followed by meetings of the "Friends of the Presidency" group on 18 and 27 October and 14 November.

In parallel, on 11 October, 9 November and 16 November, three informal trilogues were held on the regulations implementing enhanced cooperation in the area of unitary patent protection, addressing also the European Parliament's draft own-initiative report on a jurisdictional system for patent disputes.

3. The Commission made a commitment to present the necessary amendments to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) early 2012 in order to ensure the compatibility of the draft Agreement with Union law.
4. Whilst the text of the draft Agreement has been thoroughly discussed and elaborated at technical level, there remain three issues that require political consideration and decision:
 - a) The financing of the Unified Patent Court, the financial contributions of the Member States and the level and type of court fees;
 - b) The link between the entry into force of the Agreement on the Unified Patent Court and its coming into operation and the application of unitary patent protection;
 - c) The transitional arrangements and the review clause.

II. KEY ISSUES

5. The financing of the Unified Patent Court, the financial contributions of the Member States and the level and type of court fees.

The Unified Patent Court will be a court common to Member States. Consequently it has to be financed by the financial contribution of the Member States and court fees to be paid by the parties. The basic principles, which need to be laid down in the Agreement, could be the following:

A) Facilities. It is indispensable for the proper functioning of the new litigation system that the Unified Patent Court has the appropriate facilities at its disposal from the very beginning. It seems that this could be best ensured if the Member States hosting divisions of the Court of First Instance or the Court of Appeal provide for the basic facilities. This would allow the use, at least during the initial stage and temporarily, of the facilities of existing national courts as concerns premises, office and IT equipment and administrative support staff. This would not only help to limit significantly the costs of the setting up the Unified Patent Court but it would also ensure that the facilities can be organised locally, without a need for their central management, and that they can be built up progressively in line with the real needs of the Court which can be expected to grow gradually.

Consequently,

- Member States hosting a local division would need to provide the appropriate facilities in terms of premises, furniture, office and IT equipment [and administrative support staff];
- Member States sharing a regional division would need to provide jointly the appropriate facilities in terms of premises, furniture, office and IT equipment [and administrative support staff];
- the Member State hosting the central division or the Court of Appeal would need to provide the appropriate facilities in terms of premises, furniture, office and IT equipment [and administrative support staff].

B) Court fees. The fee system of the Unified Patent Court should be straightforward and predictable for the users. It should also serve the long-term objective of a self-financed Court. Accordingly, the Unified Patent Court should apply a system of fixed fees.

The Court should be accessible for parties with limited resources. Thus the court fees should not be set at a high but at a low to intermediate level.¹

Whilst all users of the Unified Patent Court should contribute to its financing, users having more significant economic interests should provide a reasonable and proportionate contribution to the functioning of the Court, on the basis of a complementary value-based fee system applicable above a pre-defined ceiling.²

C) Contributions by the Contracting Member States. In the first years, the revenue of the Unified Patent Court from the court fees will not be sufficient to balance its budget. Therefore, at least during the transitional period referred to in Article 58 as necessary, the Contracting Member States should contribute to the budget of the Court. Moreover, if the Court is unable to balance its budget out of its own resources, the Contracting Member States shall provide special financial contributions (Article 18).³

The proportion of the financial contribution of the Contracting Member States should be determined on the basis of one of the following two methods:

- contributions could be calculated on the basis of the number of European patents in force in the Contracting Member States, the number of European patents litigated before national courts in the Contracting Member States, complemented by equal parts borne by each Contracting Member State; or
- contributions could be determined in accordance with the scale agreed upon for the distribution of annual renewal fees for European patents with unitary effect.

¹ Examples from the study on the caseload and financing of the Unified Patent Court: Fee for infringement action: €6000, fee for counterclaim for revocation: €4000, fee for revocation action: €6000, fee for appeal against final decision € 9000, fee for appeal against interlocutory order: €4500 (p. 90)

² The ceiling could be set at € 1 million.

³ On the basis of the study on the caseload and financing of the Unified Patent Court, initial/special contributions by the Contracting Member States (taking into account the intermediate fee level) can be expected to reach € 4,8m in 2015, €7,3m in 2016, €8,7m in 2017, €12m in 2018 and €15m in 2019 (p.94).

Contracting Member States should agree on and lay down the principles of the financing of the Unified Patent Court in the draft Agreement.

6. The link between the entry into force of the Agreement on the Unified Patent Court and its coming into operation and the application of unitary patent protection.

In order to ensure legal certainty for patent holders and third parties, in particular alleged infringers and the workability of the system creating the European patent with unitary effect, the establishment of a unified patent litigation system is essential. It is therefore necessary that the ratification of the draft Agreement takes place and Court becomes fully operational as soon as possible.

The draft Agreement should enter into force when [9] Contracting Member States ratify it, including the three States in which the highest number of European patents were in force in the year before the signature of the Agreement. The regulations on unitary patent protection should apply from [...] or the date of entry into force of the Agreement and the date of the coming into operation of the Unified Patent Court, whichever is the later. During a transitional period, until the ratification of the Agreement by all participating Member States, a European patent however should only have unitary effect in those participating Member States where the Unified Patent Court has exclusive competence.

7. The transitional arrangements and the review clause.

A) The transitional arrangements. With respect to "classical" European patents Article 58(1) provides that parties during a transitional period of 5 years have the choice to bring actions either before the Unified Patent Court or before national courts. This is because with respect to those patents, which may be valid only in a small number of Member States, parties may need a judgement only in one or two Member States. Many users of the patent have consistently argued that this period is too short and that in addition a possibility of prolongation beyond the initial period should be foreseen.

Consequently it could be envisaged to fix the initial transitional period at 7 instead at 5 years and to give the Administrative Committee the possibility to prolong the transitional period for another 7 years if a broad consultation with stakeholders reveals that this would be appropriate. Alternatively, as some users argue, a prolongation of the transitional period could be limited in a way that would allow a plaintiff to bring one action in one Member State only and to obtain a judgement there, but would exclude multiple actions before courts in several Member States.

B) The review clause in Article 58d(1) foresees the possibility of a review of the Agreement by the Administrative Committee with respect to the functioning, the efficiency and the implications of the provisions regarding the composition of the panels of the Court of First Instance and the jurisdiction in respect of actions and counterclaims for revocation (Articles 6 and 15a). Some Member States argue that even such a limited review by the Administrative Committee should be possible only by unanimity and should not take effect if a Contracting Member State declares within 12 months following the date of the decision, on the basis of a resolution of its national Parliament, that it does not wish to be bound by the decision. On the other hand, some users argue that a review should be possible also with respect to other provisions on the basis of a broad consultation with stakeholders concerning their functioning and efficiency.

Consequently, it could be envisaged to extend the possibilities for review by the Administrative Committee but make its decisions subject to a scrutiny procedure by the national Parliament as outlined above. In case a national Parliament rejects a decision for review of the Administrative Committee a Review Conference should be convened.

8. Language of proceedings in the Court of First Instance.

So far Member States were not able to agree on the conditions under which a panel of a local or regional division of the Court of First Instance could change the language of the proceeding to the language of the patent under Article 29(4). According to the provision the Court should be able to change the language of the procedure on the grounds of convenience and fairness. A number of delegations have argued that the Court should be able to change the language of the proceeding only if both parties agree. However, a number of other delegations were of the view that such a change should be made possible even in cases if it is requested by one of the parties. The delegations have agreed, together with the users of the system, that it is importance to ensure proper flexibility for the Court to change the language of the proceeding in order to allow the Court to curtail any unnecessary cost and delay in cases where both parties are capable of participating in the procedure on the language of the patent. On the basis of the discussions the Presidency considers that a possible compromise could be struck through a provision that would on the one hand require the agreement of both parties for the Court to change the language of the proceeding, while on the other hand would allow one of the parties to request the change of the language of the proceeding from the President of the Court of First Instance, who on the grounds of convenience and fairness could decide to change the language of the proceeding.

9. Declaration by Contracting Member States

Finally, in order to ensure that the Unified Patent Court become operational as soon as possible, the Contracting Member States should make a declaration (See Annex I) affirming their willingness to start the preparation for the entry into force of the Agreement without any delay.

10. The Presidency considers that the solutions presented above are efficient, they ensure the good functioning of the Unified Patent Court and provide the necessary legal certainty for the users. Thus, they provide a good basis for a consensus.
11. **The Presidency announced its intention to organise the initialling ceremony whereby the text of the Agreement could be finalised in Warsaw on 22 December 2011. The Presidency considers that the Member States should be able to arrive at a political agreement on the text of the Agreement at the meeting of the Competitiveness Council on 5 December 2011 on the basis of this set of compromise proposals, despite the fact that some issues of political importance could be left to be agreed at a later stage, but before the signature of the Agreement.**

III. CONCLUSION

12. The Permanent Representatives' Committee is therefore invited to give its view on the suggested solutions, as well as on the texts contained in the Annexes to this Note.
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DRAFT DECLARATION OF THE CONTRACTING MEMBER STATES

CONCERNING THE PREPARATION FOR THE COMING INTO OPERATION

OF THE UNIFIED PATENT COURT

The Contracting Member States having signed the Agreement on a Unified Patent Court consider that the Agreement should be ratified as quickly as possible **without prejudicing their national ratification procedures, including as appropriate their constitutional and parliamentary requirements**, and that the Unified Patent Court should become fully operational upon the entry into force of the Agreement without undue delay. To this end, they undertake to use their best efforts and affirm their willingness to start **promptly** with the preparation for the expeditious establishment of the Unified Patent Court.

The Contracting Member States are determined to ensure that the Unified Patent Court achieves a high degree of efficiency and delivers expeditious and high quality decisions from the outset. With this in mind they think it necessary that all practical arrangements for the proper functioning of the Unified Patent Court are already in place or are duly prepared before the entry into force of the Agreement.

The Contracting Member States intend to set up without any delay a Preparatory Committee which will be composed by their representatives. The Preparatory Committee shall prepare the practical arrangements and set out a roadmap for the early establishment and coming into operation of the Unified Patent Court. It may establish subgroups as appropriate and make use of teams of experts.

The Contracting Member States consider that the Preparatory Committee should in particular organise without delay training of future judges, prepare Rules of Procedure for the Unified Patent Court, prepare the budget of the Unified Patent Court for the first financial year, make proposals for appropriate facilities for the divisions of the First Instance and the Court of Appeal, prepare the election of the members of the Administrative Committee and the adoption of its Rules of Procedure, prepare the election of the members of the Budget Committee and the Advisory Committee, prepare the election of judges and the recruitment of administrative staff.

The Contracting Member States stress that the most urgent task is to organise training for future judges from Member States where there is currently little experience with patent litigation. To this end, the Contracting Member States who have specialised courts dealing with a significant number of patent cases affirm their willingness to offer appropriate training possibilities, in particular internships, for candidate judges from other Member States without any delay. The Preparatory Committee shall draw up an appropriate training plan, **including training related to competition law providing an appropriate understanding on how patents can be misused in an anticompetitive way,** and provide support for the organisational arrangements.

The Contracting Member States recall the importance of appropriate Rules of Procedure for the Unified Patent Court and of their uniform application, which are vital to 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 affirm their willingness to draw up a complete and detailed set of Rules of Procedure before the entry into force of the Agreement. The Preparatory Committee shall complete a first draft of Rules of Procedure on the basis of input of expert judges, lawyers and industry representatives within **three** months. This draft should be the basis of a broad consultation with stakeholders before it is finalised with a view **to reach agreement on it well before the end of the ratification procedures.** The adoption of the Rules of Procedure should be preceded by a consultation with the European Commission on their compatibility with Union Law.

The Contracting Member States emphasize that, for the proper functioning of the Unified Patent Court, it is important that from the outset it has appropriate facilities at its disposal. The Contracting Member States hosting a local, regional or the central division of the Court of First Instance or the Court of Appeal affirm their intention to have the appropriate facilities in terms of premises, furniture, office and IT equipment and administrative support staff in place before the entry into force of the Agreement. The Preparatory Committee shall serve as an interlocutor for the host Contracting Member States and provide the necessary support for the organisational arrangements.

The Contracting Member States consider that the fee system of the Unified Patent Court should be straightforward and predictable for the users. Accordingly, the Unified Patent Court should apply a system of fixed fees. The Court should be accessible for parties with limited resources. Thus the court fees should not be set at a high but at a low to intermediate level. Whilst all users of the Unified Patent Court should contribute to its financing, users having more significant economic interests should provide a reasonable and proportionate contribution to the functioning of the Court, on the basis of a complementary value-based fee system, **proportionate to the economic value of the case at stake in the specific procedure**, applicable above a pre-defined ceiling. **The fee system should provide adequate and specific tools to ensure proper access for small and medium sized enterprises to the Unified Patent, especially in relation to cases of high economic value.**

The Contracting Member States consider that the availability of supplementary protection certificates for pharmaceutical and plant protection products should be ensured in accordance with Regulation 469/2009 and Regulation 1610/96, for which the Commission should present proposals in due to time and as necessary.

The Contracting Member States recognize that the proper preparation for the coming into operation of the Unified Patent Court relies on their collective effort and on their efficient cooperation. They will act in good faith and use their best endeavours during the preparatory phase to ensure that the Unified Patent Court will work in the most efficient and cost effective way, will deliver judgments of the highest quality and will from the outset gain the trust and confidence of the users of the patent system.

Article 13
Pool of Judges

- (1) A Pool of Judges shall be set up in accordance with the Statute.
- (2) The Pool of Judges shall be composed of all legally qualified judges and technically qualified judges from the Court of First Instance who are full-time **or part-time** judges of the Court. **[...]** It shall be ensured that the Pool of Judges includes at least one technically qualified judge with qualifications and experience per field of technology.
- (3) Where provided in this Agreement or the Statute, the judges from the Pool of Judges shall be allocated to the division concerned by the President of the Court 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 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) this Agreement;
 - (b) 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;

- (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, 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 be applicable where relevant, **and in particular in relation to Articles 14f through 14i, 33a, 34, 38, 41 and 44a,** and as provided by provisions of Union law, in particular on the basis of Regulations 593/2008 (Rome I) and 864/2007 (Rome II), or by international instruments.

Article 15a

Competence of the divisions of the Court of First Instance

- (1) Without prejudice to paragraph 6 actions referred to in Article 15(1)(a), (b), (d), (e) and (f) 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 this 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 his residence, or principal place of business, or in the absence of residence or principal place of business, place of business, or the regional division in which this Contracting Member State participates.
- In the case of actions against multiple defendants, the defendants should have a commercial relationship and should relate to the same alleged product or process.**

Actions against defendants having their residence, or principal place of business or, in the absence of residence or principal place of business, 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) **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 listed in Article 15(1)(a), (b), (d), (e) or (f) between the same parties on the same patent may not be initiated before any other division.

In case an action between the same parties on the same patent is initiated 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 (Article 15(1)(c1)) can be brought in the case of an action for infringement (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 infringement action and with the counterclaim for revocation and request the President of the Court of First Instance to allocate from the Pool of Judges a technically qualified judge with qualifications and experience in the field of technology concerned;

- (b) refer the counterclaim for decision to the central division and suspend or proceed with the infringement proceedings; or
 - (c) with agreement of the parties, refer the case for decision to the central division.
- (3) Actions referred to in Article 15(1)(a1) and (c) shall be brought before the central division. If, however, an action for infringement (Article 15(1)(a)) has been initiated between the same parties relating to the same patent before a local or a regional division, these actions may only be brought before the same local or regional division.
- (3a) Actions referred to in Article 15(1) (g) shall be brought before the central division.
- (4) If an action for revocation (Article 15(1)(c)) is pending before the central division, an action for infringement (Article 15(1)(a)) between the same parties on the same patent may be initiated at any division in accordance with paragraph 1. The local or regional division concerned shall have the discretion to proceed in accordance with paragraph 2.
- (5) An action for declaration of non-infringement (Article 15(1)(a1)) pending before the central division shall be stayed once an infringement action (Article 15(1)(a)) related to the same patent between the same parties or between the holder of an exclusive licence and the party requesting a declaration of non-infringement is initiated within three months as of the date on which the action was initiated before the central division before a local or regional 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) The actions referred to in Article 15(1)(c) and (c1) can be brought without the plaintiff having to initiate an opposition procedure before the European Patent Office.
- (8) Any 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

The international jurisdiction of the Court shall be established in accordance with /Article 71bis/ [...] of Regulation (EC) 44/2001¹ 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 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.

¹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1–23.

- (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 and micro entities 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 or the Court of Appeal shall provide the facilities necessary for that purpose. During the first three years starting from the date of the entry into force of this Agreement, the Contracting Member States concerned shall also provide the administrative support staff.

- (2) On the date of entry into force according to Article 59(1), the Contracting Member States shall provide initial financial contributions necessary for the setting up of the Court.

(3) Option A

The contributions by the Contracting Member States shall be calculated on the basis of the number of European patents in force [...].and the number of European patents [...].with respect to which proceedings for infringement or for revocation have been initiated before the national courts in the Contracting Member States, on the date of entry into force of this Agreement, complemented by equal parts borne by each Contracting Member State.

Option B

The contributions by the Contracting Member States shall be determined in accordance with the scale [...].for the distribution of annual renewal fees for European patents with unitary effect applicable at the date of entry into force of this Agreement.

Article 28

Representation

- (1) Parties shall be represented by lawyers authorized 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) 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 or Procedure.

- (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.
- (4) Representatives of the parties shall enjoy the rights and immunities necessary to the independent exercise of their duties, including, **if the party requires**, 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.
- (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).**

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) Parties may agree on the use of the language in which the patent was granted as language of proceedings, subject to approval by the competent 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 of a local or regional division may, on grounds of convenience and fairness, decide on the use of the language in which the patent was granted as language of proceedings.
- (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 convenience and fairness and taking into account all relevant circumstances, including the position of parties, decide on the use of the language in which the patent was granted as language of proceedings.**
- (5) The language of proceedings at the central division is the language in which the patent concerned was granted.

Article 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, the defendant shall have the right to obtain, upon request, translations of relevant documents in the language of the [...] Member State where he has his residence, or 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 on the central division in accordance with Article 15a (1), 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 his residence, or 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.

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, **and up to a ceiling 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 plaintiff to provide adequate security for the legal costs and other expenses incurred by the defendant which the plaintiff may be liable to bear, in particular in cases referred to in Articles 35, 35a, 35b and 37.

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.
- (1a) An appeal may be brought against a final decision of the Court of First Instance or against an order referred to in Articles 29(4a), 35, 35a, 35b, 37 or 39. Any other order may only be appealed together with the final decision, unless the Court of Appeal grants leave to appeal.
- (2) An appeal shall be brought within two months of the date of the notification of a final decision of the Court of First Instance or within fifteen calendar days of the date of the notification of an order referred to in paragraph 1a.
- (3) The appeal against a decision of the Court of First Instance may be based on points of law and matters of fact.
- (4) New facts and new evidence may only be introduced if the submission thereof by the party concerned could not reasonably have been expected during proceedings before the Court of First Instance, in accordance with the Rules of Procedure.

Article 46

Effects of an appeal

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

- (2) An appeal against a decision on actions or counterclaims for revocation and on actions based on Article 15(1)(g) shall always have suspensive effect.
- (3) The appeal against an order referred to in Articles 29(4a), 35, 35a, 35b, 37 or 39 shall not prevent the continuation of the principal proceedings. However, the Court may not give a final decision in the principal proceedings before the decision concerning an appealed order has been given.

Article 55

Rehearing

- (1) A request for rehearing after a final decision may exceptionally be made to 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 a request may only be made** on the basis of an act which was held, by a final court decision, 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 from 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 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 are acting in good faith should be allowed to continue the use.

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 prejudice suffered, in particular in the case of injunctions.**
- (3) Without prejudice to the provisions of this Agreement and the Statute, the enforcement procedures shall be governed by the law of the Contracting 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 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 periodic penalty payment payable to the Court. The individual penalty shall be proportionate to the importance of the order to be enforced. The periodic penalty payment shall be ordered without prejudice to the party's right to claim damages or security.

Article 58

Transitional period

- (1) During a transitional period of seven years after the date of entry into force according to Article 59, proceedings for infringement or for revocation of a European patent may still be initiated before the national courts or other competent authorities of a Contracting Member State having jurisdiction under national law as determined by Union law.
- (2) Any proceedings pending before a national court at the end of the transitional period shall continue to be subject to the transitional regime.
- (3) Unless proceedings have already been initiated before the Court, holders of European patents or patent applications granted or applied for prior to the date of entry into force according to Article 59 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 proceedings have already been initiated before a national court, holders of European patents 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 with respect to which proceedings for infringement or for revocation are still initiated before the national courts pursuant to paragraph 1, the reasons for this and the implications. 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.

Article 58a

Ratification, depositing and notification

- (1) This Agreement shall be ratified by the Contracting Member States in accordance with their respective constitutional requirements. Instruments of ratification shall be deposited with [the General Secretariat of the Council of the European Union (hereinafter referred to as "the depository")].
- (2) Each Contracting Member State shall notify the European Commission of its ratification of the Agreement at the time of deposit of its ratification instrument pursuant to Art. 22(3) of Regulation .../... on the enhanced cooperation in the area of the creation of unitary patent protection.

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, the efficiency and the cost-effectiveness of the Court and the patent system's users' trust and confidence in the quality of its judgments[...]. 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 improve its functioning.
- (2) The Administrative Committee may amend this Agreement to bring it into line with an international treaty relating to patents or Union legislation [...].

- (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 following the date of the decision, on the basis of its national constitutional and parliamentary 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 59

Entry into force

- (1) This Agreement shall enter into force on *[date]* or on the first day of the *[...]* month after the deposit of the last instrument of ratification by *[9]* Contracting Member States in accordance with Article 58a, including the three States in which the highest number of European patents was in force in the year preceding the year in which the Diplomatic Conference for the signature of the Agreement takes place, whichever is the later.
- (2) In respect of any State which is eligible to accede to this Agreement in accordance with the provisions of Article 58b and which subsequently expresses its consent to be bound by it, this Agreement shall enter into force on the first day of the month following the deposit of the instruments of ratification by that Member State.

DRAFT STATUTE OF THE UNIFIED PATENT COURT

Article 3

Appointment of judges

- (1) Pursuant to the procedure set out in Article 11 of the Agreement, judges shall be appointed by the Administrative Committee acting by common accord on the basis of proposals from the Advisory Committee.
- (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 to be filled in.**[...]** Where necessary, the Advisory Committee may recommend that, prior to the decision on the appointment, a candidate judge should 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 geographical basis as possible among nationals of the Contracting Member States.
- (4) The judges shall be appointed for a period of six years. They may be reappointed.
- (5) The Administrative Committee shall appoint as many judges as are needed for the well functioning of the Court. Initially the Administrative Committee shall appoint the necessary number of judges for setting up at least one panel pursuant to Article 14 in each of the divisions of the Court of First Instance and at least two panels pursuant to Article 16 in the Court of Appeal.

- (6) The decision of the Administrative Committee appointing full-time legally and 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 fields 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 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 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 the 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:
 - (a) **[...]**
 - (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.**

- (4) Decisions of the Presidium referred to in Articles 5, 6 and 8 shall be taken in the absence of the Registrar.
- (5) The Presidium can take valid decisions only when all members, or their substitutes, are present. Decisions shall be taken by a majority of votes.

Article 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. He 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 includes records of all cases before the Court;
 - (b) keeping and administering lists drawn up in accordance with Articles 13, 28 and 36 of the Agreement;
 - (c) keeping and publishing a list of notifications **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 closely linked with the European Patent Office patent register.
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