

EPLA

European Patent Lawyers Association

YEARBOOK

2002-2003

Association européenne d'avocats spécialisés dans le contentieux des brevets d'invention
Europäische Vereinigung der Patentrechtsanwälte

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Association sans but lucratif (Loi du 27 juin 1921)

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EUROPEAN PATENT LAWYERS ASSOCIATION

BOARD 2002 - 2003

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Congress 8 November 2002 in Brussels

Working paper

(prepared by Prof. Dr. W. Tilmann)

Working Paper of the European Patent Lawyers Association (EPLA)

I. Regional Courts – Central Courts

1. What are the reasons for centralization?

The Commission has not yet explained, why more than a central court in the second instance (appeal court) is needed and why it proposes a central court already in the first instance, taking into account

- a) the comparable situation in the US (first instance courts in the states; central court only in the second instance: CFC in Washington),
- b) that in no member state civil law cases (including civil law patent cases) are legally centralized in the first instance,
- c) the fact, that the Community has opted to use the national court system for
 - (1) the Community Trade Mark
 - (2) the Community Design Right
 - (3) the Community Plant Variety Right
- d) the Resolution of the European Parliament of April 10, 2002 which proposed, that the Community Patent should use the national court system for the first instance
- e) the fact, that the Commission is about to decentralize the application of Art. 81 (3) EC to national courts and national antitrust-offices
- f) that any decision of the first instance which the losing party does not accept may be appealed to the central appeal court giving industry the legal security wanted
- g) that a central appeal court can influence and govern the interpretation and application of the Community Patent regulation by landmark decisions

2. Regional and/or Central Panels?

- a) The Commission proposes to create regional panels, but only after 150 cases in a given year have been started with the central panel.
- b) If the reason for doing this would only be a workload too heavy for the central panel (this is the reason put forward by the Commission), the better and logical solution would be a second central panel.
- c) However, according to the Stockholm Common Approach, the reasons for creating regional panels are, that the proceedings are conducted
 - (1) close to the parties,
 - (2) close to the infringing acts and to the means of proof (witnesses, inspection of infringing objects) and

- (3) in the language of the court and of the local parties, which constitute the majority of litigation parties, especially from the group of small and medium industry.
- d) If the reasons c) are decisive for the creation of regional panels, these regional panels should be instituted as soon as possible, i.e. already from the beginning of the CPC. There would be no logical reason for the users of the system to wait for the advantages of regionalization for a long time (150 cases per year in the central panel).
- e) This would, also, give the patent owner, who, after having got his patent after a, in many cases, long and costly procedure before the EPO, the possibility to choose the panel with infringement-jurisdiction best qualified for deciding the case. It would, at the same time, preserve a sort of competition for quality which has benefited the EP-Bundle-Patent court system.
- f) The complete centralization (for a long period) would not exclude the danger of a bottle neck in the central panel, which could arise especially due to the language regime for the central panel. 140 cases per year coming into the central panel for several years could result in a work load leading to very lengthy procedures. Therefore, the 150-cases-rule of Art. 5 of the Commission's proposal must – in any case – be amended by a clause according to which a regional panel will be instituted, if the central panel was not able to decide on ten pending cases within less than two years.
- g) Since quality and speed are decisive for creating regional panels, those locations should be selected to be the seat of a regional panel which have shown quality and speed under the EPC-Bundle-Patent. The number of EP-decisions per year is one indicator, not excluding other indications (large economies, high quality of judges, expertise in cross-border-litigation).
3. **Scope of review by Appeal-Court**
- a) EPLA approves of the proposal in the Commission's paper of August 30, 2002 according to which the CFE, acting as appeal court, should hear, in certain cases, also new facts, but that this scope of review should be limited.
- b) The cases to be envisaged for hearing new facts should be enumerated in a non-exclusive manner taking over the reasons mentioned in the Community in its commentary to Art. 4 in section 3 (changes to the statute of the Court of Justice relating to the Court of First Instance).
4. **Isolated Invalidity-Actions, Negative Orders for Infringement**
- a) Isolated invalidity-actions should be brought before the central panel in order to exclude forum shopping regarding invalidity, which industry wants to avoid.

- b) Negative actions for non-infringement should be brought before the panel which is competent for a (positive) infringement action (domicile; place of infringement).
- c) If the patent owner starts a (positive) infringement action before another panel, the panel dealing with the actions a) and b) should refer their case to that court.

5. Civil Law Questions

- a) The CPC (central or regional panel; CFI acting as an appeal court) may decide on all questions of European Law, especially the provisions of the Community Patent Regulation.
- b) Patent infringement actions, however, are civil-law actions in which civil-law questions may be raised for which there is no European civil-law solution.
- c) EPLA advises against staying the procedure in order to let the parties seek a decision by the competent civil-law court of a member state. This would lead to an undesirable length of the patent infringement action and could be creating the danger of abuse (raising civil-law defences in order to stop the infringement action for some time).
- d) The CPC should, by an express rule in the Community Patent Regulation, be given the right to apply the civil-law of a member state, which, by the applicable rules of international private law should govern the case. The CPC should be expressly empowered to decide, the civil-law of which member should be applied, even in those cases, in which the international private law of more than one member state would be applicable.

08 November 2002

Congress 8 November 2002 in Brussels

Resolution

on a European Court System for Patents

08 November 2002

EPLA

Resolution on a European Court System for Patents

The European Patent Lawyers Association (EPLA) is the representation of lawyers with long-time experience in Patent Litigation. EPLA wants to share the experience of its members with the EC-institutions (Commission, Council, Parliament, ECJ) active in preparing a Community Patent with a Community Patent Court system. It also wants to give any information or advice useful for the Working Group of the European Patent Convention (EPC) on a European Patent Litigation Protocol (EPLP).

During EPLA's 2. congress in Brussels on November 8, 2002, EPLA discussed questions relevant for both possible systems.

Lawyers are representing claimants and defendants. Their only "interest" lies in a high quality and a reasonably quick procedure, which, concerning the Community Patent, convinces the inventors that they are well advised to use the Community Patent and not to continue to use national patents or the EPC-bundle patent.

Regarding the Community Patent, the deliberations during the second congress form the basis for the following Resolution:

1. EPLA had welcomed the Common Approach reached under the Swedish Presidency in Stockholm stressing the importance, regarding the first instance, of
 - courts close to the conflict and to the parties,
 - courts using the language of the parties in its area of jurisdiction,
 - quick and low-cost proceedings.

The Community Patent will not be accepted, and the EPC-bundle-patent will continue to be used, if the solution for a central and regional Community Patent Court does not follow these principles, on which the Council agreed.

2. EPLA welcomes the proposal accepted by the European Parliament on April 10, 2002 regarding a court structure,
 - where the first instance decisions are rendered by national courts with long experience in patent litigation and
 - where an appeal from these courts is available to a centralized second instance.

This solution, which is implementing the principles of the Stockholm Approach would leave more than 70 % of all patent litigation cases close to the parties. The more difficult or the more disputed cases would, on appeal, be decided by the central appeal board, which would give, by its decisions, guidance for the courts of the first instance. This solution is compatible with the relevant Articles of the Nice Version of the EC.

3. EPLA would, if the proposal No. 2 is not accepted, be in favour of a system,
 - where the central panel and a sufficient number of regional panel of the Community Patent Court would decide in the first instance, and the court of first instance of the European Court of Justice would act on an appeal from these panels,
 - if the regional panels would be established where national courts with the highest numbers of decisions on European Patents exist showing the confidence of the owners of European Patents in their jurisdiction,
 - if the regional panels would start to work at the same time as the central chamber
 - if the regional panels would, if they not otherwise agree, use the language of their country, which would highly facilitate the procedure regarding difficult technical cases.
 - if the jurisdiction of the central chamber and the regional panels would follow the rules of Regulation 44/2001 (ex Brussels Convention).
4. EPLA strongly advises against the latest proposal of the EC-Commission, which would centralize all cases in the central panel, until this panel would decide 150 cases per year, starting only then with the establishment of regional panels. This would remove patent litigation for a long time from the neighbourhood of the parties and prove to be a strong deterrent against the use of the Community Patent. A patent owner would feel much more comfortable under the present European Patent-system.
5. EPLA does not see a lack of competence of EC-member-states to conclude a European Patent Litigation Protocol (EPLP). The Community Patent Court and the EPLP-Court would not decide on the same patents (Community Patents; EPC-bundle-Patents).

However, EPLA favours the Community Patent Court-system, leaving the EPC-bundle-Patent-cases to the national courts, which would, deciding EPC-bundle-patents, certainly follow the guidance of the Community Patent Court on Community Patents.

**Press release of the Council of Ministers of the
E.U.**

2490th Council meeting

Brussels, 3 March 2003

(pp. 1-4 and 15-18)

6874/1/03 (Presse 59)
REV 1 (en, de, it, sv)

2490th Council meeting

- COMPETITIVENESS -

(Internal Market, Industry and Research)

Brussels, 3 March 2003

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6874/1/03 REV 1 (en, de, it, sv) (Presse 59)

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¹ • Where declarations, conclusions or resolutions have been formally adopted by the Council, this is indicated in the heading for the item concerned and the text is placed between quotation marks.
 • The documents whose references are given in the text are available on the Council's Internet site <http://ue.eu.int>.
 • Acts adopted with statements for the Council minutes which may be released to the public are indicated by an asterisk; these statements are available on the above mentioned Council Internet site or may be obtained from the Press Office.

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Member
Member
Member

COMMUNITY PATENT

The Council reached agreement on a common political approach regarding the Community Patent. Discussions were based on a Presidency compromise proposal taking into account elements from previous debates. The text agreed, which covers the main principles and features of the jurisdictional system for the Community Patent, the language regime, costs, the role of national patent offices and the distribution of fees, is set out below:

"1. THE JURISDICTIONAL SYSTEM

- 1.1 The jurisdictional system of the Community Patent will be based on the principles of a unitary Court for the Community Patent, securing uniformity of the jurisprudence, high quality of working, proximity to the users and potential users and low operating cost.
- 1.2 The Court of Justice shall have exclusive jurisdiction in actions and claims of invalidity or infringement proceedings, of actions of a declaration of non-infringement, of proceedings relating to the use of the patent or to the right based on prior use of the patent, or requests for limitation, counterclaims for invalidity or applications for declaration of lapse, including requests for provisional measures. The Community patent may also be the subject of proceedings or claims for damages.
- 1.3 The litigation of Community Patents shall at first instance take place before a judicial panel established by a Council decision according to Article 225a of the EC Treaty. The appeal shall lie with the Court of First Instance of the European Communities (CFI). This judicial panel, called Community Patent Court (CPC), shall be attached to the CFI. Its seat shall be at the CFI. The judges shall be appointed on the basis of their expertise and taking into account their linguistic skills. The Community Patent Court may hold hearings in Member States other than that in which its seat is located.
- 1.4 The chambers of the CPC shall sit in sections of three judges.
- 1.5 The judges shall be appointed by a unanimous decision of the Council for a fixed term. The candidates for appointment must have an established high level of legal expertise in patent law.
- 1.6 Technical experts will assist the judges throughout the handling of the case.

- 1.7 The CPC will conduct the proceedings in the official language of the Member State where the defendant is domiciled, or in one of them to be chosen by the defendant, where in a Member State there are two or more official languages. At the request of the parties and with the consent of the CPC, any official EU language can be chosen as language of proceedings. The CPC may, in accordance with the rules of procedure, hear parties in person and witnesses in an EU official language other than the language of proceedings. In that case translations and interpretation into the language of the proceedings from another official EU language should be provided.
- 1.8 An appeal against a final decision of the CPC may be brought before the Court of First Instance.
- 1.9 The Community Patent Court shall be established at the latest by 2010. Each Member State shall designate a limited number of national courts to have jurisdiction in the actions and claims mentioned in paragraph 1.2 above until that time.

2. LANGUAGES AND COSTS

- 2.1 The language regime must meet the objectives of affordability, cost-efficiency, legal certainty and non-discrimination.
- 2.2 The language regime for the Community Patent will, up to grant, be the same as the one provided for in the European Patent Convention. This means that the applicant has to present a complete application document in one of the three official languages of the EPO as well as, at the time of grant of the patent, a translation of the claims into the two other EPO languages. However, where the applicant files the application in a non-EPO language and provides a translation into one of the EPO languages, the cost of that translation will be borne by the system ("mutualisation of costs").
- 2.3 For reasons of legal certainty - in particular in connection with actions or claims for damages - non-discrimination and dissemination of patented technology, the applicant must, upon the grant of the patent, file a translation of all claims into all official Community languages except if a Member State renounces the translation into its official language. The translations will be filed with the EPO and the costs borne by the applicant, who decides on the number and the length of claims to be included in the patent application, thereby having an influence on the cost of translation.
- 2.4 The renewal fee for a Community Patent must not exceed the level of the corresponding renewal fees for an average European Patent and will be progressive throughout the life of the Community Patent. The level of procedural fees for processing an application for a Community Patent will be the same regardless of where the application is filed and where the novelty search is carried out (EPO or national patent office). The level of fees will be related to costs for handling the Community Patent and must not lead to any indirect subsidy of national patent offices.
- 2.5 The Commission is invited to carry out a study into the possibility of further savings in costs, for example in respect of services rendered by patent agents.

3. ROLE OF NATIONAL PATENT OFFICES (NPO)

- 3.1 The European Patent Office (EPO) will play a central role in the administration of Community Patents and will alone be responsible for examination of applications and the grant of Community Patents.
- 3.2 All national patent offices will have an important role to play, as set out in the Common approach of 31 May 2001, *inter alia* advising potential applicants for Community Patents, receiving applications and forwarding them to the EPO, disseminating patent information and advising SMEs.
- 3.3 Applications for Community Patents can be filed with the National Patent Office of a Member State in its working language(s). Applicants will remain free to present their patent applications directly to the EPO. They may also request that their applications be fully processed by the EPO.
- 3.4 On behalf of the EPO and at the request of the applicant, National Patent Offices of Member States having an official language other than the three official languages of the EPO may carry out any task up to and including novelty searches in their respective language(s).
- 3.5 National Patent Offices of Member States having as their official language one of the three EPO languages, which have experience of cooperation with the EPO and which need to maintain a critical mass may, if they so wish, carry out search work on behalf of the EPO.
- 3.6 The relationship between NPOs carrying out tasks referred to in paragraphs 3.4 and 3.5 above and the EPO will be based on partnership agreements, containing *inter alia* common criteria for quality assurance. These criteria (covering documentation, staff training and qualifications and working tools) would aim to guarantee a comparable quality and uniformity of the Community Patent. The implementation of these partnership agreements, i.e. the compliance with these objective quality standards, will be subject to independent periodic review.
- 3.7 The Community Patent system will include a safeguard clause according to which the Council, acting on a proposal from the Commission after consultation with the EPO, can agree to extend the involvement of any NPOs in search activities to meet any severe problems of capacity in delivering Community Patents. Such arrangements must not lead to any reduction of quality of the Community Patent.

4. DISTRIBUTION OF FEES

- 4.1 NPOs will be compensated for the activities in respect of Community Patents referred to in paragraphs 3.2, 3.4 and 3.5.

- 4.2 Renewal fees for Community Patents will be payable to the EPO, which will keep 50 percent to cover its costs, including the costs of searches carried out by NPOs. The remaining 50 percent will be distributed among the NPOs of the Community Member States in accordance with a distribution key, which will be decided by the Council.
- 4.3 The distribution key will be based on a basket of fair, equitable and relevant criteria. Such criteria should reflect patent activities and the size of the market. In addition, considering the role to be played by NPOs as described in paragraph 3 above, a balancing factor should also be applied where Member States have a disproportionately low level of patent activities. On the basis of these criteria the Member States' share shall be adjusted periodically to current figures.

5. REVIEW CLAUSE

Five years after the grant of the first Community Patent, the Commission will present a report to the Council on the functioning of all aspects of the Community Patent and, where necessary, make appropriate proposals. The assessment will cover the issues of quality, coherence and time required for decisions and cost to the inventors. The Commission may propose recommendations for further changes of the jurisdictional system. Further reviews should be made periodically.

* * *

STATEMENT BY THE COUNCIL

The Council states that the words "upon the grant of the patent" in paragraph 2.3 mean within a reasonable time from the date of grant of the patent. During this time, the granted patent shall be valid irrespective of availability of translations of all claims into all official Community languages.

The Council notes that the German delegation considers that a reasonable time would be within two years from the date of the grant of the patent."

It is recalled that the purpose of the Community Patent is to provide for the creation of a single industrial property right for the whole Community, to be granted by the European Patent Office (EPO) in Munich. It aims at eliminating the distortions of competition created by the territorial nature of national protection rights and ensuring the free movement of goods protected by patents.

The European Council has emphasised on several occasions that the Community Patent must be an efficient and flexible instrument – obtainable by businesses at an affordable cost – which complies with the principles of legal certainty and non-discrimination between the Member States.

In the EU, patent protection for innovation is currently provided by two systems – the national patent systems and the European patent system – neither of which is based on a Community legal instrument. The 1973 Munich Convention established a European Patent Organisation, of which the EPO is part, laying down a single procedure for the granting of patents, which once granted become national patents subject to the national rules of the contracting states. All of the EU's Member States are members of the Convention, which is governed by international law.

Companies would remain free to choose the type of protection best suited to their needs. Given that the EPO would be responsible for examining patent applications and granting Community patents, the new system would require the Community's accession to the Munich Convention as well as a revision of that Convention.

EPLA Position Paper of 14 March 2003

(adopted by the Board)

March 14, 2003

Community Patent « Common political approach »

EPLA Position paper

The European Patent Lawyers Association (EPLA) comprising lawyers with many years experience in European Patent Law litigation welcomes the breakthrough achieved in the EU Council in creating a Community Patent. European patent litigation lawyers and their international clients have awaited the establishment of such a Community-wide patent right for more than 30 years. By adherence to the European Patent Convention the Community offers inventors the option to choose between the traditional "European Patent" offering, by a central grant through the European Patent Office, a bundle of national patent rights on the one hand and the new unitary Community Patent covering the entire Common Market on the other hand.

The choice which inventors will make will largely depend on the quality which the Community Patent system can offer, and this quality will be determined by the cost of obtaining and maintaining a Community Patent and by the cost and the speed of the Community Patent Court which will decide infringement and nullity proceedings.

Regarding the structure of the Community Patent Court, the Council, until now, has not followed the European Parliament Resolution that the first instance should consist of regional courts with a central appeal court giving guidance to their decisions which was also the unanimous advice of European patent litigators represented by EPLA. Instead, the Council has opted for a central court of first instance for all Community Patents. The Council, thus, went further than the court system in the United States, where patent cases are heard, in the first instance, by different Federal Courts and, on appeal only, by a central appeal court and is not coherent with the court system for Community Trademarks, Designs and Plant-Breeders-Rights (entrusted to the national courts of member-states). The solution favoured by the Council will, as EPLA and its members expect, deter many inventors, especially small and medium size firms, from using the Community Patent system.

- Patent owners will generally prefer to use a court nearby – which for many would seem to be less costly – and therefore have a tendency to choose the EPC bundle patent instead of a Community Patent. They might also want to cooperate with their known and trusted patent litigation lawyers representing them in a first instance litigation. If they have to carry the costs of sending them to a central court of first instance they may well rather choose the less costly alternative of continuing to use the EPC-bundle-patent giving them the opportunity to use a court nearby.
- A single central patent litigation court for the Community patent will offer no solution in the event of over-long procedures, or bottle-necks, in such a central court. Under the present system of the EPC-bundle-patent the patent-owner may choose the court giving the most speedy procedures. A kind of healthy "competition" of the first instance national courts has reduced the duration of first instance procedures in some of the EPC-member-states to 6 - 9 months. If the proposed system has only one central first instance court the patent owner has to make use of such a court, even if the duration of patent litigation procedures exceeds 1 or 2 or even 3 years as is quite often the case in the appeal procedures in the EPO and in the Alicante Office (for Community Trade marks) or – closer to the problem – in the procedures before the CFI and the ECJ. A bottle-neck situation almost certainly will arise because of the language and translation problems in invalidity and infringement cases.
- Without a choice between different courts and without competition between them as a guarantee of speed and quality, and in particular without the possibility to litigate close to the place of infringement, the future Community Patent will lack important features which users want. Here again the US system can be cited as an example: Although the US do not have specialized courts, a number of courts/judges have specialized in patent law and developed an especially fast procedure which has led to a concentration of patent litigation in these courts. The central Court of Appeal is there to ensure harmonization. One must not overlook the possibility that, if in Europe there is no choice within the system, users will choose between the available systems which may lead to a failure of the Community Patent.
- The belief that harmonization and predictability of decisions can only be achieved with a first instance central court is contradicted by the practice in different areas. How different chambers within the same institution may decide can best be demonstrated by the Boards of Appeal in Alicante and also in the EPO. On the other hand, with a competent and experienced appeal court a predictable case law can develop as can be demonstrated by the practice of the German Supreme Court in patent cases.

- EPLA, for this reason, proposes, as a first step, that the interim-period (planned to end "at the latest by 2010") be extended for a period sufficient to allow existing resources in the Community to demonstrate how they can contribute to the success of the Community patent. As the Community Patent will have, for cost reasons, a slow start, the period until 2010 is not long enough for such a practical demonstration.
- Such an approach will certainly be more in line with the Principle of Subsidiarity. It is, above all a safer and more practical proposal.

EPLA offers its and its experienced members advice in finding good practical solutions concerning the questions discussed. EPLA further offers its advice for the great number of detailed questions still to be solved in creating the first civil law court system and civil procedure law system in the EU.

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**Amended Proposal for a Council Regulation
on the Community Patent
(Doc. Council n° 12219/03 of
4 September 2003)**

Proposal for a
COUNCIL REGULATION
on the Community patent
(Text with EEA relevance)

COUNCIL OF
THE EUROPEAN UNION

Brussels, 4 September 2003

12219/03

Interinstitutional File:
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LIMITE

PI 77

DOCUMENT PARAPHE
ACCESSTOEUROPE

NOTE

from : Working Party on Intellectual Property (Patents)

No. prev. doc. : 12049/03 PI 72

No. Clon. prop. : 10786/00 PI 49

Subject : Proposal for a Council Regulation on the Community patent

- Consolidated/annotated text

Delegations will find enclosed a consolidated/annotated text of the above mentioned proposal, which takes account of discussions at the Working Party on Intellectual Property (Patents) on 1, 10, 22 and 23 July 2003, held on the basis of the consolidated text contained in doc. 10728/03.

- Having regard to the Treaty establishing the European Community, and in particular Article 308 thereof,
(Text with EEA relevance)
- Having regard to the proposal from the Commission¹,
- Having regard to the opinion of the European Parliament²,
- Having regard to the opinion of the European Economic and Social Committee³,
- Whereas:
- NOTE
- (1) The activities of the Community include the establishment of an internal market characterised by the abolition of obstacles to the free movement of goods and the creation of a system ensuring that competition in the internal market is not distorted. The creation of the legal conditions enabling undertakings to adapt their activities in manufacturing and distributing products to a Community dimension helps to attain these objectives. A patent to which uniform protection is given and which produces uniform effects throughout the Community should feature amongst the legal instruments which undertakings have at their disposal.
- (2) The Munich Convention on the Grant of European Patents of 5 October 1973 (hereinafter referred to as the "Munich Convention") established the European Patent Office (EPO) and entrusted it with the task of granting European patents. The expertise offered by the European Patent Office should therefore be used in the granting of the Community patent.

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¹ OJ C 337/E, 28.11.2000, p. 278.
² OJ C 127/E, 29.5.2003, p. 519.
³ OJ C 155, 29.5.2001, p. 80.

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- (2a) The European Patent Office will play a central role in the administration of Community Patents and will alone be responsible for examination of applications and the grant of Community Patents. All national patent offices will have an important role to play, *inter alia* advising potential applicants for Community Patents, receiving applications and forwarding them to the EPO, disseminating patent information and advising SMEs. National Patent Offices will be compensated for these activities.
- (2b) Applications for Community Patents can be filed with the National Patent Office of a Member State in its working language(s). Applicants will remain free to present their patent applications directly to the EPO. They may also request that their applications be fully processed by the EPO. On behalf of the EPO and at the request of the applicant, National Patent Offices of Member States having an official language other than the three official languages of the EPO may carry out any task up to and including novelty searches in their respective language(s). National Patent Offices of Member States having as their official language one of the three EPO languages, which have experience of cooperation with the EPO and which need to maintain a critical mass may, if they so wish, carry out search work on behalf of the EPO. The relationship between National Patent Offices carrying out these tasks and the EPO will be based on partnership agreements, containing *inter alia* common criteria for quality assurance. These criteria (covering documentation, staff training and qualifications and working tools) would aim to guarantee a comparable quality and uniformity of the Community Patent. The implementation of these partnership agreements, i.e. the compliance with these objective quality standards, will be subject to independent periodic review. National patent offices will be compensated for the searches that they carry.
- (2c) The Community Patent system will include a safeguard clause according to which the Council, acting on a proposal from the Commission after consultation with the EPO, can agree to extend the involvement of any National Patent Offices in search activities to meet any severe problems of capacity in delivering Community Patents. Such arrangements must not lead to any reduction of quality of the Community Patent.
- (3) The accession of the Community to the Munich Convention will enable the Community to be included in the Convention system as a territory for which a unitary patent can be granted. The Community can, therefore, limit this Regulation in particular to the creation of the law applicable to the Community patent once granted.⁴
- (3a) The Office should also be entrusted with the task of administering the Community patent, for example, as regards the collection of fees, the distribution of annual fees to N.P.O.s on the basis of a distribution key to be decided unanimously by the Council and management of the Community Patent Register. It is also appropriate to give the Office a number of other tasks relating to a Community patent, for example, limitation of the patent on application by the holder or recording the surrender or lapse of the patent.
- (4) Community patent law applicable to the Community patent should not replace the laws of the Member States on patents, nor European patent law as established by the Munich Convention. It would not in fact appear to be justified to require undertakings to apply for registration of their patents as Community patents, since national patents and European patents continue to be necessary for those undertakings which do not want protection of their inventions at Community level. This Regulation should therefore be without prejudice to the right of the Member States to grant national patents.
- (4a) The substantive law applicable to the Community patent, for example as regards patentability, the extent of patent protection, limitation of the effects of the patent and the exhaustion of rights, must follow the same principles as the existing Community legislation with respect to national patents.

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- (5) The objective of an affordable Community patent militates in favour of a patent that is valid throughout the Community in the language in which it was granted under the Munich Convention, subject, however, to the obligation on the applicant to submit a translation of all the claims into all the official Community languages. Thus, the language regime for the Community Patent will, up to grant, be the same as the one provided for in the European Patent Convention. This means that the applicant has to present a complete application document in one of the three official languages of the EPO as well as, at the time of grant of the patent, a translation of the claims into the two other EPO languages. However, where the applicant files the application in a non-EPO language and provides a translation into one of the EPO languages, the cost of that translation will be borne by the system ("mutualisation of costs"). For reasons of legal certainty - in particular in connection with actions or claims for damages - non-discrimination and dissemination of patented technology, the applicant must, at the time of grant of the patent, file a translation of all claims into all official Community languages except if a Member State renounces the translation into its official language. The translations will be filed with the EPO and the costs borne by the applicant, who decides on the number and the length of claims to be included in the patent application, thereby having an influence on the cost of translations.⁵
- (5a) The renewal fee for a Community Patent must not exceed the level of the corresponding renewal fees for an average European Patent and will be progressive throughout the life of the Community Patent. The level of procedural fees for processing an application for a Community Patent will be the same regardless of where the application is filed and where the novelty search is carried out (EPO or national patent office). The level of fees will be related to costs for handling the Community Patent and must not lead to any indirect subsidy of national patent offices.

- (5b) Renewal fees for Community Patents will be payable to the European Patent Office, which will keep 50 percent to cover its costs, including the costs of searches carried out by National Patent Offices. The remaining 50 percent will be distributed among the National Patent Offices of the Community Member States in accordance with a distribution key, which will be decided unanimously by the Council.
- (6) Any negative effects of a monopoly created by a Community patent should be prevented through a system of compulsory licences. The Community Patent Court, or in certain situations the Commission should be entrusted with the grant of compulsory licences. Commission decisions are subject to appeal under Article 230 of the Treaty before the Court of First Instance of the European Communities and before the Court of Justice of the European Communities.
- (7) As Community patents are Community titles the Community jurisdiction should have the power to decide matters affecting their validity. The jurisdictional system of the Community Patent will be based on the principles of a unitary Court for the Community Patent, securing uniformity of the jurisprudence, high quality of working, proximity to the users and potential users and low operating cost. For reasons of legal certainty, all legal actions relating to certain aspects of the Community patent should come under the jurisdiction of one court, and the decisions of that court should be enforceable throughout the Community. Exclusive jurisdiction for a certain category of actions and applications relating to a Community patent, and in particular for actions relating to infringement and validity, should therefore be given to the Court of Justice of the European Communities. Jurisdiction shall reside in the first instance in the Community Patent Court (CPC) created by the decision taken pursuant to Article 23a of the Treaty and, on appeal, in the Court of First Instance. The Court of Justice

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may make a decision in last resort, subject to the conditions provided for in Article 62 of the Statute of the Court of Justice. This judicial system must be in place and operational by January 2010 at the latest. Until that time, it is necessary to provide for a transitional period during which disputes for which the Community courts are competent shall be heard by the national courts. Once the final judicial system is operational, the Commission shall publish in the Official Journal of the European Union the date on which it shall be applicable. The final system shall apply to actions and applications initiated after that date, whereas individual actions initiated prior to that date before the national courts shall continue to be heard by the national courts.

(7a) The seat of the Community Patent Court shall be at the Court of First Instance. The judges shall be appointed on the basis of their expertise and taking into account their linguistic skills. The Community Patent Court may hold hearings in Member States other than that in which its seat is located.

(7b) The judges shall be appointed by a unanimous decision of the Council for a fixed term. The candidates for appointment must have an established high level of legal expertise in patent law. Technical experts will assist the judges throughout the handling of the case.

(7c) The Community Patent Court will conduct the proceedings in the official language of the Member State where the defendant is domiciled, or in one of them to be chosen by the defendant, where in a Member State there are two or more official languages. At the request of the parties and with the consent of the CPC, any official EU language can be chosen as language of proceedings. The CPC may, in accordance with the rules of procedure, hear parties in person and witnesses in an EU official language other than the language of proceedings. In that case translations and interpretation into the language of the proceedings from another official EU language should be provided.

(7d) The Community Patent Court shall be established at the latest by 1 January 2010. Until then each Member State shall designate a limited number of national courts to have jurisdiction in the actions and claims related to the Community Patents.

(8) The court ruling on infringement and validity should also be able to rule on penalties and compensation for damage on the basis of common rules. Those powers are without prejudice to the powers to apply any rules on criminal liability and unfair competition provided for under the Member States' national law.

(9) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of the proposed action, in particular the creation of a unitary right with effect throughout the Community, can be achieved only by the Community. This Regulation confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose.

(10) Since the measures necessary for implementing this Regulation are measures of general scope within the meaning of Article 2 of Council Decision 1999/463/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission⁶, they should be adopted in accordance with the regulatory procedure laid down in Article 5 of that Decision,

HAS ADOPTED THIS REGULATION:

⁶ OJ L 184, 17.7.1999 p. 23.

2. The Community patent shall have an autonomous character. It shall be subject [...] to the provisions of this Regulation and to the general principles of Community law. However, the provisions of this Regulation shall not exclude the application of the law of Member States with regard to criminal liability and unfair competition, and the provisions of the Munich Convention, which refer to the post-grant phase of European Patents and are not prescribed by this Regulation.⁷

CHAPTER I GENERAL PROVISIONS

Article 1

Community patent law

This Regulation establishes a Community law on patents. This law shall apply to all patents designating the Community granted by the European Patent Office (hereinafter referred to as "the Office") under the provisions of the European Patent Convention of 5 October 1973 (hereinafter referred to as the "Munich Convention") and to all applications for a European patent in which the Community is designated.

For the purpose of this Regulation, such patents shall be considered to be Community patents and the term "application for a Community patent" shall mean an application for a European patent designating the Community.

Article 2

Community patent

1. The Community patent shall have a unitary character. It shall have equal effect throughout the Community and may only be granted, transferred, declared invalid or lapse in respect of the whole of the Community.

- 2a. Deleted.⁸
3. Unless otherwise provided for, the terms used in this Regulation shall have the same meaning as the corresponding terms used in the Munich Convention.

- 3a. Deleted.
4. Deleted.

Article 3

Application to the sea and submarine areas and to space

1. This Regulation shall also apply to the sea and submarine areas adjacent to a Member State's territory in which that Member State exercises sovereign rights or jurisdiction in accordance with international law.
2. This Regulation shall apply to inventions created or used in outer space, including on celestial bodies or on spacecraft, which are under the jurisdiction and control of one or more Member States in accordance with international law.

CHAPTER II PATENT LAW

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SECTION 1
RIGHT TO THE PATENT

Article 4
Right to the Community patent

1. The right to the Community patent shall belong to the inventor or his successor in title.
2. If the inventor is an employee, the right to the Community patent shall be determined in accordance with the law of the State in which the employee is mainly employed; if the State in which the employee is mainly employed cannot be determined, the law to be applied shall be that of the State in which the employer has his place of business to which the employee is attached.
3. If two or more persons have made an invention independently of each other, the right to the Community patent shall belong to the person whose Community patent application has the earliest date of filing or, where applicable, the earliest date of priority. This provision shall apply only if the first Community patent application has been published under Article 93 of the Munich Convention.

3. Legal proceedings in respect of the rights referred to in paragraphs 1 and 2 may be instituted only within a period of three years after the date on which the Community Patent Bulletin, referred to in Article 57, publishes the grant of the Community patent. This provision shall not apply if the proprietor of the patent knew, at the time of the grant or of the acquisition of the patent, that he was not entitled to the patent.
4. The fact that legal proceedings have been instituted shall be entered in the Register of Community Patents referred to in Article 56. The final decision in the legal proceedings or any withdrawal thereof shall also be entered.

Article 6

Effect of change of proprietorship of the Community patent

1. Where there is a complete change of proprietorship of a Community patent as a result of legal proceedings referred to in Article 5, licences and other rights shall lapse upon the registration of the person entitled to the patent in the Register of Community Patents referred to in Article 56.
2. If, before the institution of legal proceedings has been registered,

Article 5

Claiming the right to the Community patent

- (a) the proprietor of the patent has used the invention within the territory of the Community or made effective and serious preparations to do so,
or
(b) a licensee of the patent has obtained his licence and has used the invention within the territory of the Community or made effective and serious preparations to do so,
he may continue such use provided that he requests a non-exclusive licence of the patent from the new proprietor whose name is entered in the Register of Community Patents. Such request must be made within the period prescribed in the implementing regulations. The licence shall be granted for a reasonable period and upon reasonable terms.
3. Paragraph 2 shall not apply if the proprietor of the patent or the licensee was acting in bad faith at the time when he began to use the invention or to make preparations to do so.

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Article 8
Prohibition of indirect use of the invention

SECTION 2
EFFECTS OF THE COMMUNITY PATENT AND THE COMMUNITY PATENT APPLICATION

Article 7

Prohibition of direct use of the invention

Without prejudice to Article 24⁹, the Community patent shall confer on its proprietor the right to prevent all third parties not having his consent

- (a) from making, offering, putting on the market or using the product which is the subject-matter of the patent, or importing or stocking the product for these purposes;
- (b) from using the process which is the subject-matter of the patent or, when the third party knows, or it is obvious in the circumstances, that the use of the process is prohibited without the consent of the proprietor of the patent, from offering the process for use within the Community;
- (c) from offering, putting on the market or using a product obtained directly by a process which is the subject-matter of the patent, or importing or stocking the product for these purposes.

1. In addition to the right conferred pursuant to Article 7, the Community patent shall confer on its proprietor the right to prevent all third parties not having his consent from supplying or offering to supply within the Community to a person, other than one entitled to exploit the patented invention, with means, relating to an essential element of that invention, for putting it into effect therein, when the third party knows, or it is obvious in the circumstances, that these means are suitable and intended for putting that invention into effect.
2. Paragraph 1 shall not apply when the means are staple commercial products, except when the third party induces the person supplied to commit acts prohibited by Article 7.

3. Persons performing the acts referred to in Article 9(a) (b) and (c) shall not be considered to be parties entitled to exploit the invention within the meaning of paragraph 1.

Article 8a

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Article 9

Limitation of the effects of the Community patent

The rights conferred by the Community patent shall not extend to:

- (a) acts done privately and for non-commercial purposes;
- (b) acts done for experimental purposes relating to the subject-matter of the patented invention;

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- (b.1) acts done for purposes which can reasonably be related to the development and presentation of information in accordance with relevant Community legislation and governing the production, use or sale of medicinal or phytopharmaceutical products protected by patents;¹⁰
- (c) the extemporaneous preparation for individual cases in a pharmacy of a medicine in accordance with a medical prescription nor acts concerning the medicine so prepared;
 - (d) the use on board vessels of countries other than Member States of the patented invention, in the body of the vessel, in the machinery, tackle, gear and other accessories, when such vessels temporarily or accidentally enter the waters of Member States, provided that the invention is used there exclusively for the needs of the vessel;
 - (e) the use of the patented invention in the construction or operation of aircraft or land vehicles or other means of transport of non-member States, or of accessories to such aircraft or land vehicles, when these temporarily or accidentally enter the territory of Member States;
 - (f) the acts specified in Article 27 of the Convention on International Civil Aviation of 7 December 1944, where these acts concern the aircraft of a country other than a Member State;
 - (g) the use by a farmer of the product of his crop for propagation or multiplication on his own holding, provided that the reproductive vegetable material was sold or otherwise commercialised by the holder of the patent or with his consent to the farmer, for agricultural purposes. The scope and the detailed methods of this use are laid down in Article 14 of Regulation (EC) No. 2100/94;
 - (h) the use by a farmer of protected livestock for farming purposes, on condition that the breeding animals or other animal reproductive material was sold or otherwise commercialised to the farmer by the holder of the patent or with his consent. Such use includes the provision of the animal or other animal reproductive material for the purposes of his agricultural activity, but not the sale as part of or for the purpose of commercial reproductive activity;
- (i) the acts allowed pursuant to Articles 5 and 6 of Directive 91/250/EEC on the legal protection of computer programs by copyright, in particular, by its provisions on decompilation and interoperability;
- (j) the acts allowed pursuant to Article 10 of Directive 98/44/EC on the legal protection of biotechnological inventions.
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Article 9a
Government use¹²

- Any provision in the law of a Member State allowing use of national patents by or for the government may be applied to Community patents, but only to the extent that the use is necessary for essential defence or national security. The patentee should be informed as soon as reasonably possible about the act and be compensated in respect of the act by the government concerned. Any dispute as to whether a patent was used or over the amount of compensation shall be decided by the national courts of the Member State concerned.
- (e)

Article 10

Community exhaustion of the rights conferred by the Community patent

The rights conferred by the Community patent shall not extend to acts concerning the product covered by that patent which are carried out within the territories of the Member States after that product has been put on the market in the Community by the proprietor of the patent or with his consent, unless there are legitimate grounds for the proprietor to oppose further commercialisation of the product.

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See doc. 12049/03, pp. 15-19.

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Article 11

Rights conferred by the Community patent application after publication

1. Compensation reasonable in the circumstances may be claimed from a third party who, in the period between the date of publication of a Community patent application and the date of publication of the mention of the grant of the Community patent, has made any use of the invention which, after that period, would be prohibited by virtue of the Community patent.
2. Reasonable compensation shall be due only if the applicant has either communicated to the person using the invention or filed with the Office a translation of the claims which the Office has made available to the public and which is in the official language of the Member State in which the person using the invention has his residence or principal place of business or, where that State has more than one official language, in the language which that person has accepted or designated.¹³ ¹⁴
3. When reasonable compensation is fixed, due account shall be taken of the good faith of the person who has used the invention.
4. The official language referred to in paragraph 2 shall be an official language of the Community.

Article 12

Right based on prior use of the invention

1. A Community patent may not be invoked against a person who, in good faith and for business purposes, had used the invention in the Community or had made effective and serious preparations for such use before the filing date or, where priority has been claimed, the priority date of the application on the basis of which the patent is granted (hereinafter referred to as "the prior user"); the prior user shall have the right, for business purposes, to continue the use in question or to use the invention as planned during the preparations.
2. The right of the prior user may not be transferred either during the user's lifetime or following his death other than with the user's undertaking or that part of the undertaking in which the use or the preparations for use took place.

Article 13

Process patents: burden of proof

1. If the subject-matter of a Community patent is a process for obtaining a new product, the same product when produced without the consent of the proprietor shall, in the absence of proof to the contrary, be deemed to have been obtained by the patented process.
2. The reversal of the burden of proof provided for in paragraph 1 shall apply equally where there is a strong likelihood that the same product was obtained by the process and [...] the holder of the Community patent has not been able, despite reasonable efforts, to determine what procedure has actually been used.
3. In adducing proof to the contrary, the legitimate interests of the defendant in protecting his manufacturing and trade secrets shall be taken into account.

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SECTION 3
THE COMMUNITY PATENT AS AN OBJECT OF PROPERTY

Article 14

Dealing with the Community patent as a national patent

1. Unless otherwise specified in Articles 15 to 24, the Community patent as an object of property shall be dealt with in its entirety, and for the whole of the Community, as a national patent of the Member State in which, according to the Register of Community Patents provided for by Article 56:
 - (a) the applicant for the patent had his residence or place of business on the date of filing of the Community patent application;
 - (b) where subparagraph (a) does not apply, the applicant had an establishment on that date;
 - (c) Deleted.

In all other cases, the Member State referred to shall be that in which the European Patent Organisation has its seat.

2. If two or more persons are mentioned in the Register of Community Patents as joint applicants, the first subparagraph of paragraph 1 shall apply to the joint applicant first mentioned. If this is not possible, the first subparagraph of paragraph 1 shall apply to the joint applicants next mentioned in order of entry. Where the first subparagraph of paragraph 1 does not apply to any of the joint applicants, the second subparagraph of paragraph 1 shall apply.

3. Deleted.

Article 15
Transfer

1. The transfer of the Community patent shall be made in writing and shall require the signature of the parties to the contract, except when it is a result of a judgement; otherwise it shall be void. The transfer shall be registered in the Register of Community Patents.
 2. Subject to Article 6(1), a transfer shall not affect rights acquired by third parties before the date of transfer.
 3. A transfer shall, to the extent to which it is verified by the documents set out in the implementing regulations referred to in Article 59, have effect vis-à-vis third parties only after entry in the Register of Community Patents referred to in Article 56. Nevertheless, a transfer, before it is so entered, shall have effect vis-à-vis third parties who have acquired rights after the date of the transfer but who knew of the transfer on the date on which the rights were acquired.

Article 16
Rights in rem

1. The Community patent may, independently of the undertaking, be given as security or be the subject of rights *in rem*.
 2. At the request of one of the parties, the rights referred to in paragraph 1 shall be entered in the Register of Community Patents referred to in Article 56 and published in the Community Patent Bulletin referred to in Article 57.

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- Article 17*
- Levy of execution**
1. The Community patent may be levied in execution.
 2. At the request of one of the parties, the levy of execution shall be entered in the Register of Community Patents referred to in Article 56 of this Regulation and published in the Community Patent Bulletin referred to in Article 57.

Article 18

Insolvency proceedings

1. The only insolvency proceedings in which a Community patent may be involved shall be those opened in the Member State within the territory of which the centre of a debtor's main interests is situated.
2. In the case of joint proprietorship of a Community patent, paragraph 1 shall apply to the share of the joint proprietor.
3. Where a Community patent is involved in insolvency proceedings, on request of the competent national authority an entry to this effect shall be made in the Register of Community Patents referred to in Article 56 and published in the Community Patent Bulletin referred to in Article 57.

Article 19

Contractual licensing

1. The Community patent may be licensed in whole or in part for the whole or part of the Community. A licence may be exclusive or non-exclusive.
2. The rights conferred by the Community patent may be invoked against a licensee who breaches any restriction in the licensing contract.

- Article 20*
- Licences of right**
3. Article 15(2) and (3) shall apply to the grant or transfer of a licence in respect of a Community patent.

Article 20

Licences of right

1. The proprietor of a Community patent may file a written statement with the Office that he is prepared to allow any person to use the invention as a licensee in return for appropriate compensation. In that case, the renewal fees for the Community patent which fall due after receipt of the statement shall be reduced; the amount of the reduction shall be fixed in the rules relating to fees referred to in Article 60. Where there is a complete change of proprietorship of the patent as a result of legal proceedings under Article 5, the statement shall be deemed withdrawn on the date of entry of the name of the person entitled to the patent in the Register of Community Patents.
2. The statement may be withdrawn at any time by a written communication to this effect to the Office, provided that no-one has yet informed the proprietor of the patent of his intention to use the invention. Such withdrawal shall take effect from the date of receipt of that communication by the Office. The amount by which the renewal fees were reduced shall be paid within one month after withdrawal; Article 25(2) shall apply, but the six-month period shall start upon expiry of the above period.
3. The statement may not be filed while an exclusive licence is recorded in the Register of Community Patents or a request for the recording of such a licence is before the Office.
4. On the basis of the statement, any person shall be entitled to use the invention as a licensee under the conditions laid down in the implementing regulations referred to in Article 59. A licence obtained under the terms of this Article shall, for the purposes of this Regulation, be treated as a contractual licence.

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5. On written request by one of the parties, the Community Patent Court shall determine the appropriate compensation referred to in paragraph 1 or review it if circumstances have arisen or become known which render the compensation determined obviously inappropriate.
6. No request for recording an exclusive licence in the Register of Community Patents shall be admissible after the statement has been filed, unless it is withdrawn or deemed withdrawn.
7. The Member States may not grant licences of right in respect of a Community patent.

Article 21

Grant of compulsory licences¹⁵¹⁶

1. The Community Patent Court may grant a compulsory licence for lack or insufficiency of exploitation of a Community patent to any person filing an application four years or later after the patent application was filed and three years or later after the patent was granted if the patent proprietor has not exploited the patent in the Community on reasonable terms or has not made effective and serious preparations to do so, unless he provides legitimate reasons to justify his inaction. In determining the lack or insufficiency of exploitation of the patent, no distinction shall be made between products originating within the Community and imported products.
2. On request, the Community Patent Court may grant a compulsory licence in respect of a first patent to the proprietor of a national or Community patent or to the proprietor of a plant variety right who cannot use his patent (second patent) or his national or Community plant variety right without infringing a Community patent (first patent), provided that the invention or new plant variety claimed in the second patent or plant variety right involves an important technical advance of considerable economic significance in relation to the invention claimed in the first patent. The Community Patent Court may take any measure it regards as useful to verify the existence of such a situation. In the case of a compulsory licence in respect of a dependent patent or plant variety right, the owner of the first patent shall be entitled to a cross-licence on reasonable terms to use the patented invention or protected plant variety.

3. When it is necessary to remedy a practice determined after judicial or administrative process to be anti-competitive, the Commission or the Community Patent Court may authorise the exploitation of a Community patent.

- 3a. In times of crisis or in other situations of extreme urgency, at the request of a Member State, the Commission or the Community Patent Court may authorize the exploitation of a Community patent.

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

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

6. The detailed rules of application and the procedures to be used for applying the principles set out in this Article shall be laid down in the implementing regulation, which shall include any transitional provisions required for the period before the Community Patent Court comes into operation.

Article 22

Conditions applicable to compulsory licences

1. When granting the compulsory licence under Article 21, the authority granting the licence shall specify the type of use covered and the conditions to be met. The following conditions shall apply:

¹⁵ See doc. 12049/03, pp. 20-25.

¹⁶ ~~DEFINITION~~.

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(a) the scope and duration of the exploitation shall be limited to the purpose for which it was authorised;

(b) the exploitation shall be non-exclusive;

(c) the exploitation shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use;

(d) the exploitation shall be authorised predominantly for the supply of the internal market of the Community unless it is necessary to correct a practice determined after judicial or administrative process to be anti-competitive;

(e) the authority granting the licence may, on reasoned request, decide to cancel the authorisation, subject to adequate protection of the legitimate interests of the persons so authorised, if and when the circumstances which led to it cease to exist and are unlikely to recur;

(f) the licence holder shall pay the right holder adequate remuneration, taking into account the economic value of the authorisation and any need to correct an anti-competitive practice;

(g) in the case of a compulsory licence in respect of a dependent patent or a plant variety right, the exploitation authorised in respect of the first patent shall be non-assignable except with the assignment of the second patent or plant variety right.

2. The Member States may not grant compulsory licences in respect of a Community patent other than as set out in this Regulation.¹⁷

Article 23
Effects vis-à-vis third parties

1. Legal acts referred to in Articles 16 to 22 concerning a Community patent shall have effects vis-à-vis third parties in all the Member States only after entry in the Register of Community Patents. Nevertheless, such an act, before it is so entered, shall have effect vis-à-vis third parties who have acquired rights concerning the patent after the date of that act but who knew of the act at the date on which the rights were acquired.

2. Paragraph 1 shall not apply in the case of a person who acquires the Community patent or a right concerning the Community patent by way of transfer of the whole of the undertaking or by any other universal succession.

Article 24

The application for a Community patent as an object of property

1. Articles 9a,¹⁸ 14 to 19 and Article 21(3) to (6), and Article 22 shall apply to the application for a Community patent, whereby it is understood that all references to the Community Patent Register include references to the European Patent Register provided for by the Munich Convention.

2. The rights acquired by third parties in respect of a Community patent application referred to in paragraph 1 shall continue to be effective with regard to the Community patent granted upon that application.

¹⁷ See doc. 12049/03, p. 24.

¹⁸ DELETED.

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CHAPTER IIa
COMPULSORY TRANSLATIONS OF THE COMMUNITY PATENT

Article 24a

Compulsory translations of the Community patent¹⁹

1. When the patent is granted, the applicant must submit a translation of all the claims into all the official languages of the Community, unless a Member State agrees to dispense with a translation into its language. The translations shall be deposited with the Office, which shall make them available to the public.
2. The decision of the Member State referred to in paragraph 1 to dispense with a translation must be communicated to the Commission in a statement, which it shall publish in the *Official Journal of the European Union*.
3. For the purposes of paragraph 1, if the translations into Community languages other than those required for the granting of the patent under the provision of the Munich Convention are produced and deposited at the Office within a maximum of two years of the granting of the patent, under conditions specified by the implementing rules, the holder of the patent may exploit the rights conferred by that patent as from the date of publication of the notice of granting of the patent.
4. (new) If the translations provided for in Article 24a are not deposited by the deadline laid down in Paragraph 3 of that Article, the Community patent shall be deemed to be void ab initio.

Conversion into a European patent designating one or more Member States²⁰

Article 24b

1. Deleted.

2. The holder of the patent may, within the time limit laid down in Article 24a(3), opt for the Community Patent to be converted into a European Patent designating one or more Member States.

Article 24 c

Authentic text of a Community patent application or of a Community patent²¹

1. The authentic text of a Community patent application or a Community patent shall be the text provided for in Article 70, paragraphs 1 and 2 of the Munich Convention.
2. However, for the purposes of the actions and proceedings referred to in Articles 11, 33 to 36 and 44, the translation of the claims, as provided for in Articles 11 and 24a and Article 14 of the Munich Convention, into an official language of the Member State in which the act of infringement was committed shall be regarded as authentic text of the application or of the patent in the event of the translation conferring narrower protection than the one conferred by the application or the patent in the language of the proceedings.
3. The applicant for or the proprietor or a patent may, at any time, file a corrected translation of the patent. Such corrected translation shall not have any legal effect until published by the Office.
4. Any person who, in that State, in good faith is using or has made effective and serious preparations for using an invention the use of which would not constitute infringement of the patent in the original translation may, after the corrected translation takes effect, continue such use in the course of his business or for the needs thereof without payment.
5. Where the proprietor of a patent has filed a translation according to Article 38, paragraphs 2 to 4 of this Article shall apply mutatis mutandis.]

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¹⁹ See doc. 12049/03, pp 4 to 8.
²⁰ See doc. 12049/03, pp 9 and 10.

²¹ See doc. 12049/03, pp 11 and 12.
²² See doc. 12049/03, pp 13 and 14.

3. Surrender shall be entered in the Register of Community Patents only with the agreement of any third party who has a right *in rem* recorded in the Register or in respect of whom there is an entry in the Register pursuant to Article 5(4), first sentence. If a licence is recorded in the Register, surrender shall be entered only if the proprietor of the patent proves that he has previously informed the licensee of his intention to surrender; this entry shall be made on expiry of the period laid down in the implementing regulations referred to in Article 59, and in accordance with the provisions of the Munich Convention.

Article 25

Renewal fees

Lapse

Article 27

1. Annual renewal fees in respect of Community patents shall be paid to the Office in accordance with the implementing regulations referred to in Article 60. These fees shall be due in respect of the years following the year in which the Community Patent Bulletin referred to in Article 57 mentions the grant of the Community patent.
2. When a renewal fee has not been paid on or before the due date, the fee may be validly paid within six months of that date, provided that an additional fee is paid at the same time.
3. Any renewal fee in respect of a Community patent falling due within two months after the publication of the mention of the grant of the Community patent shall be deemed to have been validly paid if it is paid within the period mentioned in paragraph 2. No additional fee shall be charged in this case.

Article 26

Surrender

1. The Community patent may be surrendered only in its entirety.
2. Surrender must be declared in writing to the Office by the proprietor of the patent. It shall not have effect until it is entered in the Register of Community Patents.

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Article 27a

Restitutio in integrum

1. The holder of a Community patent who, despite being able to demonstrate that he took all due care under the circumstances, was unable to meet an Office deadline, shall, on request, have his rights restored if the failure to meet the deadline directly resulted, by virtue of the provisions of this Regulation, in the loss of a right or of an avenue of appeal to the Office. The processes of restitutio in integrum laid down in the Munich Convention shall apply.
 - (c) the subject-matter of the patent extends beyond the content of the patent application as filed, or, if the patent was granted on a divisional application or on a new application filed in accordance with Article 61 of the Munich Convention, beyond the content of the earlier application as filed;
 - (d) the protection conferred by the patent has been extended;
 - (e) the proprietor of the patent is not entitled under Article 4(1) and (2) of this Regulation;
 - (f) the subject-matter of the patent is not new having regard to the content of a national patent application or of a national patent made public in a Member State on the date of filing or later or, where priority has been claimed, the date of priority of the Community patent, but with a filing date or priority date before that date;²³
2. Where the holder of a patent has his rights restored, he may not invoke his rights vis-à-vis a third party who, acting in good faith, began to exploit, or to make effective and serious preparations to exploit in the Community an invention covered by a Community patent during the period between the loss of the right referred to in paragraph 1 and the publication of notification of the restoration of that right.

SECTION 2

INVALIDITY AND LIMITATION OF THE COMMUNITY PATENT

Article 28

Grounds for invalidity

1. The Community patent may be declared invalid only on the grounds that:
 - (a) the subject-matter of the patent is not patentable according to Articles 52 to 57 of the Munich Convention;
 - (b) the patent does not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art;

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Article 29
Effects of invalidity

1. The Community patent shall be deemed not to have had, from the outset, the effects specified in this Regulation, to the extent that the patent has been declared invalid either in whole or in part.
2. The retroactive effect of the invalidity of the patent shall not affect:
 - (a) any decision on infringement which has acquired the authority of *res judicata* and been enforced prior to the invalidity decision;
 - (b) any contract concluded prior to the invalidity decision, in so far as it has been performed before that decision. However, repayment, to an extent justified by the circumstances, of sums paid under the relevant contract may be claimed on grounds of equity.

(b) any contract concluded prior to the invalidity decision, in so far as it has been performed before that decision. However, repayment, to an extent justified by the circumstances, of sums paid under the relevant contract may be claimed on grounds of equity.

Article 29a
Request for limitation

At the request of the holder of a patent, lodged with the Office, the Community patent may be subject to limitation in the form of an amendment to the claims. The provisions of the Munich Convention relating to the request for limitation shall apply.

CHAPTER IV
JURISDICTION AND PROCEDURE IN LEGAL ACTIONS RELATING TO THE COMMUNITY PATENT²⁴

SECTION 1
ACTIONS CONCERNING THE VALIDITY AND INFRINGEMENT OF THE PATENT AND THE USE OF THE INVENTION

Article 30
Actions and claims relating to the Community patent – Exclusive jurisdiction of the Court of Justice

1. The Community patent may be the subject of invalidity or of present or threatened²⁵ infringement proceedings, of action for a declaration of non-infringement, of proceedings relating to the use of the invention prior to the granting of the patent or to the right based on prior use of the patent, or of a counterclaim for a declaration of invalidity or of a petition for the grant or revocation of a compulsory licence.²⁶ It may also be the subject of proceedings or claims for damages or provisional or protective measures or requests for the determination of compensation.

2. In accordance with the decision giving the Court of Justice jurisdiction for matters relating to the Community patent, adopted pursuant to Article 229a of the Treaty, the actions and claims referred to in paragraph 1 shall come under the exclusive jurisdiction of the Court of Justice,²⁷ except in the case of Article 9a. In accordance with the decision taken pursuant to Article 225a of the Treaty, they shall be brought in the first instance before the Community Patent Court and, on appeal, before the Court of First Instance.

²⁴ DEFERRED.
²⁵ DEFERRED.
²⁶ DEFERRED.
²⁷ DEFERRED.

Article 31
Invalidity action

1. Invalidity proceedings against a Community patent may be based only on the grounds for invalidity set out in Article 28(1).
2. Any person or the Commission acting in the Community's interest may initiate invalidity proceedings; however, in the case referred to in Article 28(1)(e), the proceedings may be initiated only by a person entitled to be entered in the Register of Community Patents as the sole proprietor of the patent, or by all the persons entitled to be entered as joint proprietors of it in accordance with Article 5 acting jointly.²⁹

3. The proceedings may be brought even if opposition may still be filed or if opposition proceedings are pending before the Office. The Community Patent Court shall stay proceedings, either of its own motion, after hearing the parties, or at the request of one of the parties, and after hearing the other parties, until a decision of the Opposition Division of the Office is issued, or in the case of appeal, until a decision of the Board of Appeal of the Office is issued.
4. The proceedings may be brought even if the Community patent has lapsed.

Article 33
Infringement action

1. Actions for infringement may be based only on facts referred to in Articles 7, 8 and 19.
 1. Actions for infringement may be based only on facts referred to in Articles 7, 8 and 19.
2. Only the proprietor of the patent may bring an action for infringement. Unless otherwise stipulated in the contract, the beneficiary of a contractual licence may bring proceedings for infringement only if the patent proprietor consents thereto. However, the beneficiary of an exclusive licence and the beneficiary of a licence of right or a compulsory licence may bring such proceedings if the proprietor of the patent, after formal notice, does not himself bring infringement proceedings.²⁹

3. The proprietor of the patent shall be entitled to intervene in infringement proceedings brought by the licensee under paragraph 2.
4. A licensee shall, for the purpose of obtaining compensation for damage suffered by him, be entitled to intervene in infringement proceedings brought by the proprietor under paragraph 2.

Article 34
Action for declaration of non-infringement

1. Counterclaims for invalidity²⁸
 1. Counterclaims for invalidity against a Community patent may be based only on the grounds for invalidity set out in Article 28(1).
 2. If the counterclaim is brought in a legal action to which the proprietor of the patent is not already a party, he shall be informed thereof and may be joined as a party to the action.
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Article 35
Proceedings relating to use of the invention prior to the grant of the patent

1. Proceedings relating to the use of the invention during the period referred to in Article 11(1) may be brought by the applicant or proprietor of the patent. However, the beneficiary of an exclusive licence as well as the beneficiary of a licence of right or of a compulsory licence may bring such proceedings if the proprietor, after formal notice, does not himself bring proceedings.
2. The Court may not decide on the merits of a case until notification of the granting of the patent has been published.

Article 36
Proceedings relating to a right based on prior use of the invention

Proceedings relating to the right based on prior use of the patent referred to in Article 12(1) may be brought by the prior user or the person to whom he has assigned his right in accordance with paragraph 2 of that Article, with a view to establishing his right to use the invention in question.

Articles 37–38 – 39
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- In the proceedings referred to in Articles 33 to 36, the Community courts referred to in Article 30 shall have jurisdiction in respect of acts committed and activities undertaken in a part or in the entirety of the territory, zone or space to which this Regulation applies.
- Article 42*
Provisional or protective measures
- The Community courts referred to in Article 30 may adopt any provisional or protective measure, which may be necessary in accordance with their Statutes or Rules of Procedure. These measures may, for example, include measures to prevent acts of infringement of the right granted by the patent and, in particular, to prevent the introduction in the Community's trade channels of allegedly infringing goods, including goods imported immediately after customs clearance, and measures to safeguard evidence of the alleged infringement.
- Where the Community courts referred to in Article 30, in proceedings referred to in Article 33, find that the defendant has infringed a Community patent, they may issue the following orders:
- (a) an order prohibiting the acts which infringed the patent;
 - (b) an order prohibiting the defendant from continuing with the acts which infringed the patent;
 - (c) an order to confiscate the goods, materials and implements which constitute the means for putting the protected invention into effect and which have been supplied or offered for supply under the conditions set out in Article 8;

Article 40

Commission's capacity to act

1. Deleted.
2. The Commission's right to act shall be regulated in the rules of procedure of the Court of Justice.

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(d) any order imposing other measures adapted to the circumstances and suitable for guaranteeing compliance with the orders referred to in (a), (b) and (c).

Article 44

Actions or claims for compensation or damages³¹

1. The Community courts referred to in Article 30 shall have the power to order the payment of compensation for the use and/or for the damage underlying the actions referred to in Articles³² 31 to 36.
 2. In determining the appropriate compensation and damages, the courts shall take into account all relevant aspects, such as the economic consequences to the injured party of the infringement, as well as the undeserved profits made by the infringer and the behaviour and the good or bad faith of the parties.³³ ³⁴ ³⁵ The damages shall not be punitive.³⁶
3. For the purposes of paragraph 2, an alleged infringer who has his residence or principal place of business in a Member State whose official language, which is also an official language of the Community, is not the language in which the patent was granted or in which a translation of the patent claims has been made public in accordance with Article 24a or Article 58, is presumed³⁷ not to have known nor to have had reasonable grounds for knowing that he was infringing the patent. In such a situation, damages for infringement shall be due only for the period from the time when he is notified of a translation of the patent claims in the official language of the Member State of residence or principal place of business of the alleged infringer.³⁸

4. Where the Member State referred to in paragraph 3 has two or more official languages which are also official languages of the Community, the infringer shall be entitled to notification in one of those official languages that he knows.

Article 45

Period of limitation

1. The period of limitation for proceedings relating to use, to the right based on prior use, to infringement and to damages referred to in this section shall be barred after five years have elapsed from the date on which the requesting party became aware of facts justifying proceedings or should have become aware of them and in any case after ten years have elapsed from the infringement.³⁹

SECTION 2

JURISDICTION AND PROCEDURE IN OTHER ACTIONS RELATING TO THE COMMUNITY PATENT

Article 46

Jurisdiction of national courts

The national courts of the Member States shall have jurisdiction in actions relating to Community patents which do not come within the exclusive jurisdiction of the Court of Justice under this Regulation or under the decision adopted pursuant to Article 229a of the Treaty.

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2. A national court hearing an action or claim relating to a Community patent other than the actions referred to in Article 30 shall treat the patent as valid unless it has been declared invalid by the Community Patent Court in a decision which has the authority of res judicata.

3. A national court hearing an action or claim relating to a Community patent other than the actions referred to in Article 30 shall stay the proceedings if it considers a decision on an action or application referred to in Article 30 to be a prior condition for its judgment. Proceedings shall be stayed either by the court of its own motion, after hearing the parties, where an action or application referred to in Article 30 has been brought before the Community Patent Court, or at the request of one of the parties, and after hearing the other parties, where proceedings have not yet been brought before the Community court. In the latter case, the national court shall invite the parties to bring such proceedings within a period prescribed by it. If such proceedings are not brought within the prescribed period, the proceedings before the national court shall continue.

Article 52

Applicable law of procedure

Unless otherwise provided in this Regulation, a national court shall apply the rules of procedure governing the same type of action relating to a national patent in the Member State in which it is situated.

SECTION 3

ARBITRATION

Article 53

Arbitration

The provisions of this Chapter relating to jurisdiction and judicial procedure shall be without prejudice to the national arbitration rules of the Member States. However, a Community patent may not be declared invalid or be invalidated in arbitration proceedings.

SECTION 4

ACTIONS RELATING TO VALIDITY AND INFRINGEMENT OF THE PATENT AND TO THE USE OF THE INVENTION DURING THE TRANSITIONAL PERIOD

Article 53a

Legal jurisdiction during the transitional period

1. Notwithstanding the provisions of Section 1 of this Chapter, and until the system of Community jurisdiction referred to in Article 30 has been put into place, by 1 January 2010 at the latest, competence to hear the legal actions referred to in Section 1 of this Chapter shall be governed by the provisions of this Section.
2. The date on which the Community courts referred to in Article 30 shall commence their activities shall be published by the Commission in the Official Journal of the European Union. Legal actions referred to in Section 1 of this Chapter and begun prior to that date shall be brought before the national courts, in accordance with the provisions of this Section.

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Article 53b
Jurisdiction during the transitional period

1. Each Member State shall designate the smallest possible number of national courts of first instance and of second instance, which shall be entrusted with the task of performing the functions assigned to them by this Section.
2. Each Member State shall communicate to the Commission, by 31 December 2005 at the latest, a list of the national courts, indicating their names and their territorial jurisdiction.
3. Any change occurring after the communication referred to in paragraph 2 relating to the number, names or territorial jurisdiction of the said courts shall be communicated to the Commission by the Member State concerned without delay.
4. The information referred to in paragraphs 2 and 3 shall be communicated to the Member States by the Commission and shall be published in the Official Journal of the European Union.
5. Until such time as a Member State has communicated the information referred to in paragraph 2, any procedure resulting from an action or application referred to in Article 30 and for which the courts of that Member State have jurisdiction pursuant to Article 53c and 53d, shall be brought before the court of that Member State which would have had territorial jurisdiction and competence to decide on the action or application if the procedure had concerned a national patent of the Member State in question.

Article 53d

International jurisdiction during the transitional period

- Notwithstanding the provisions of the Regulation (EC) No 44/2001 or, where applicable, the provisions of the Convention on Jurisdiction and Execution applicable pursuant to Article 53c, international jurisdiction in proceedings resulting from the actions and applications referred to in Article 30 of this Regulation shall be determined exclusively in accordance with the following rules:
2. The action shall be brought before the courts of the Member State in whose territory the defendant is domiciled or, if he is not domiciled in a Member State, of the Member State in whose territory he has an establishment.
 - a) If the defendant neither is domiciled nor has an establishment in the territory of a Member State, these proceedings shall be brought before the courts of the Member State in whose territory the applicant is domiciled or, if he is not domiciled in any Member State, of the Member State in which he has an establishment.
 - b) If neither the defendant nor the applicant is domiciled or has an establishment, these proceedings shall be brought before the courts of the Member State in which the European Patent Organisation has its seat.
 - c) If neither the defendant nor the applicant is domiciled or has an establishment, these proceedings shall be brought before the courts of the Member State in which the European Patent Organisation has its seat.
 - d) Article 23 of Regulation (EC) 44/2001 or, where applicable, Article 17 of the Convention on Jurisdiction and Execution shall be applicable if the parties agree that a court in a different Member State is competent.

Article 53c
**Application of provisions on international jurisdiction and enforcement
during the transitional period**

Save where this Regulation provides otherwise, the provisions of the Regulation (EC) No 44/2001 or, where applicable, the Convention on Jurisdiction and Execution shall be applicable to actions concerning Community patents, and to decisions handed down on those actions.

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- 43 f) The proceedings resulting from the actions and applications referred to in Article 30 of this Regulation, except actions and applications for a declaration of invalidity, may also be brought before the courts of the Member State in whose territory the act of infringement was committed.
- 44
- Article 53e*
- Extent of jurisdiction during the transitional period**
1. A court whose jurisdiction is founded on Article 53d, points a) to e), shall be competent to decide on the facts of an infringement committed in the territory of any Member State.
 2. A court whose jurisdiction is founded on Article 53d, point f), shall be competent to decide only on the facts of an infringement committed in the territory of the Member State in which the court is located.⁴⁴

Article 53f

Presumption of validity - defence on the merits

In proceedings resulting from actions against infringement of a Community patent, the courts shall consider the Community patent to be valid. Validity may only be contested by a counterclaim for a declaration of invalidity. Nevertheless, a plea for the invalidity of the Community patent entered other than by a counterclaim shall be admissible to the extent that the defendant can demonstrate the Community patent could be declared invalid on grounds of a national right previously granted to the defendant within the meaning of Article 28(1)(f).

1. Decisions of the courts resulting from the actions and applications referred to in this Section shall be subject to appeal before the courts of second instance.
2. The conditions under which an appeal may be brought before a court of second instance shall be determined by the national law of the Member State in whose territory that court is located.
3. Decisions of the courts of second instance shall be governed by national provisions on further appeals.

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Article 53g

Effects of a decision on invalidity during the transitional period

Where a court decision to the effect that a Community patent is invalid has become enforceable, it shall produce the effects referred to in Article 29 of this Regulation in all the Member States [according to the provisions of the Regulation (EC) No 44/2001 or, where applicable, the Convention on Jurisdiction and Execution].

Article 53h

Applicable law during the transitional period

1. The courts shall apply the provisions of this Regulation.
2. The court shall apply its national laws, including its international private law, to all matters falling outside the scope of this Regulation.
3. Save where this Regulation provides otherwise, the court shall apply the rules of procedure applicable to the same type of procedure relating to national patents in the territory in which that court is located.

Article 53i

Jurisdiction in the second instance – further appeal - during the transitional period⁴⁵

1. Decisions of the courts resulting from the actions and applications referred to in this Section shall be subject to appeal before the courts of second instance.
2. The conditions under which an appeal may be brought before a court of second instance shall be determined by the national law of the Member State in whose territory that court is located.
3. Decisions of the courts of second instance shall be governed by national provisions on further appeals.

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 46 **DELETED**

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CHAPTER V
IMPACT ON NATIONAL LAW

Article 54
Prohibition of simultaneous protection

1. Where a national patent granted in a Member State relates to an invention for which a Community patent has been granted to the same inventor or to his successor in title with the same date of filing, or, if priority has been claimed, with the same date of priority, that national patent shall be ineffective to the extent that it covers the same invention for the same territory⁴⁶ as the Community patent, from the date on which:
 - (a) the period for filing an opposition to the decision of the Office to grant a Community patent has expired without any opposition being filed;
 - (b) the opposition proceedings are concluded with a decision to maintain the Community patent;or
 - (c) the national patent is granted, where this date is subsequent to the date referred to in point (a) or (b), as the case may be.
2. The subsequent lapse or invalidity of the Community patent shall not affect the provisions of paragraph 1.
3. Each Member State may prescribe the procedure whereby the effect of the national patent is determined to have been lost in whole or, where appropriate, in part. It may also prescribe that the loss of effect shall apply from the outset.
4. Simultaneous protection by a Community patent or Community patent application and a national patent or national patent application shall exist prior to the date applicable under paragraph 1.

Article 55
Deleted.

CHAPTER VI
FINAL PROVISIONS

- Article 56*
Register of Community Patents
- The Office shall keep a Register of Community Patents, which shall contain those particulars whose registration is provided for by this Regulation. The Register shall be open to public inspection.

- Article 57*
Community Patent Bulletin
- The Office shall periodically publish a Community Patent Bulletin. It shall contain entries made in the Register of Community Patents, as well as other particulars whose publication is prescribed by this Regulation or by the implementing regulation.

- Article 58*
Optional translations
- The proprietor of the patent shall have the option of producing and filing a translation of his patent in several or all of the official languages of the Member States which are official languages of the Community. Such translations may be filed with the Office, or with a National Patent Office of a Member State if that Member State's law so permits. National Patent Offices shall transmit a copy of such translations to the Office. The Register of Community Patents shall contain a mention of the filing of such translations. Those translations shall be made available to the public by the National Patent Offices and the Office.⁴⁷

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Article 59
Implementing regulation

1. The rules implementing this Regulation shall be adopted in an implementing regulation.
2. The implementing regulation shall be adopted and amended in accordance with the procedure laid down in Article 61(2).

Article 60

Rules relating to fees

1. The rules relating to fees shall determine the annual renewal fees, including additional fees, the amounts of the fees and the ways in which they are to be paid.

- 1a. Fifty per cent of the income from renewal fees shall be distributed among the central industrial property offices of the Member States in accordance with a distribution key mentioned in the rules relating to fees. The distribution key will be based on a basket of fair, equitable and relevant criteria. Such criteria should reflect patent activities and the size of the market. In addition, considering the role to be played by National Patent Offices, a balancing factor should also be applied where Member States have a disproportionately low level of patent activities. On the basis of these criteria the Member States' share shall be adjusted periodically to current figures.

2. The rules relating to fees shall be adopted and amended in accordance with the procedure referred to in Article 61(2). However, the distribution key referred to in paragraph 1a shall be adopted and amended by the Council of the European Union acting unanimously.

Article 61
Establishment of a committee and procedure for the adoption of the implementing regulations

1. The Commission shall be assisted by a committee, the Committee for issues relating to fees and to the rules for the implementation of the Regulation on the Community patent, composed of representatives of the Member States and chaired by the representative of the Commission.
2. Where reference is made to this paragraph, the regulatory procedure laid down in Article 5 of Decision 1999/468/EC shall apply, in compliance with Article 7 thereof.

Article 62

Report on the implementation of this Regulation

- Five years from the date on which the first patent designating the Community is granted, the Commission shall present to the Council a report on the operation of the Community patent system. The assessment shall cover quality and consistency, the deadlines required for decisions, and the costs incurred by inventors. Subsequent reports on the operation of the Community patent system shall be presented by the Commission every five years.

Article 63
Entry into force

1. This Regulation shall enter into force on the sixtieth day following that of its publication in the *Official Journal of the European Union*.
2. Applications for a Community patent may be filed with the Office from the date laid down in a Commission Decision in accordance with the procedure referred to in Article 61(2).⁴⁸

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Council
The President

⁴⁸ **DEFERRED**

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Progress Report on the Community Patent
(Council n° 12445/03 of 12 September 2003)



COUNCIL OF
THE EUROPEAN UNION

Brussels, 12 September 2003

12445/03

Interinstitutional File:
2000/0177 (CNS)

PI 81

REPORT

from: Presidency
to: Permanent Representatives Committee (Part 1) / Council
No. prev. doc. : 12219/03 PI 77
No. Cion prop. : 10876/00 PI 49
Subject : Community patent
- Progress report

A. INTRODUCTION

On 3 March 2003 the Council (Competitiveness) adopted a common political approach on the Community patent (7159/03 PI 24), covering the main principles and features of the Community patent system. Since then, work has continued at Working Party level and in the Permanent Representatives Committee on the text of the proposal for a Council Regulation on the Community patent as well as on proposals for amendments to the European Patent Convention.

B. PROPOSAL FOR A REGULATION ON THE COMMUNITY PATENT

The Working Party on Intellectual Property (Patents) has worked intensively on the text of the proposal for a Regulation on the Community patent with a view to reflecting in the legal text of this instrument the principles agreed in the common political approach of 3 March 2003.

The Working Party on the Court of Justice has also examined a number of provisions of the proposal for a Regulation.

Work at working party level on the proposal for a Regulation is now almost complete and a number of questions of a more political nature have been referred to the Permanent Representatives Committee (Part 1), which has already held a first discussion on some of these questions. The Permanent Representatives Committee will continue its examination of the outstanding questions over the coming weeks, with a view to enabling the Council to reach political agreement on the Regulation in November 2003. It should be noted that, before the Regulation can be formally adopted, the Council will have to reconsult the European Parliament, since the common political approach of 3 March 2003 implies a number of substantial changes in relation to the Commission proposal on which the Parliament gave its opinion in April 2002.

C. PROPOSALS FOR AMENDMENTS TO THE EUROPEAN PATENT CONVENTION

Alongside the Regulation on the Community Patent, amendments will have to be made to the European Patent Convention to enable the European Patent Office to play its part in the Community patent system.

On the basis of a text prepared by the Greek Presidency, the Working Party on Intellectual Property (Patents) has resumed examination of proposals for such amendments. This examination is continuing intensively, and the Presidency intends to report to the Permanent Representatives Committee in the next few weeks on the outcome of this work, with a view to enabling the Council to reach agreement in November 2003 on the proposals for amendments to be submitted to the Administrative Council of the European Patent Organisation in time for its meeting in early December 2003. The submission of these proposals should form the basis for the Administrative Council to decide on the convening of a revision conference to be held in 2004.

D. JURISDICTIONAL ARRANGEMENTS

The proposal for a Regulation on the Community patent, referred to above, contains a number of provisions relating to the jurisdictional arrangements to be adopted in respect of Community patents.

In addition, following the entry into force of the Nice Treaty, the Commission will make proposals for

- a decision conferring jurisdiction on the Court of Justice in disputes relating to Community patents (pursuant to Article 229a of the Treaty);
- a decision creating a judicial panel to hear and determine at first instance certain actions or proceedings in respect of Community patent (pursuant to Article 225a of the Treaty);
- changes to the Statute of the Court of Justice relating to the Court of First Instance.

These proposals from the Commission are expected at the end of September 2003. The Presidency intends to begin examination of these proposals at the earliest possible opportunity.

E. CONCLUSIONS

The Permanent Representatives Committee (Part 1) is invited to take note of this progress report and to forward it to the Council (Competitiveness) in preparation for its meeting on 22 September 2003, with a view to the Council taking note of this report and confirming the importance it attaches to concluding work on all aspects of the Community patent system at the earliest possible opportunity.

Council of the E.U.

Second Revised Presidency Compromise

(n° 14130/2/03 of 13 November 2003)



COUNCIL OF
THE EUROPEAN UNION

Brussels, 13 November 2003

14130/2/03
REV 2

Interinstitutional File:
2000/0177 (CNS)

PI 111

SECOND REVISED WORKING DOCUMENT

from: Presidency
to: Permanent Representatives Committee (Part 1)
No. prev. doc.: 14130/1/03 PI 111 REV 1
No. Cion prop.: 10876/00 PI 49
Subject: Proposal for a Council Regulation on the Community patent
- Second Revised Presidency compromise proposal concerning Recital 6 and
Articles 2, 9a, 20, 21, 22, 24a to 24d, 44 and 53a

In the light of discussions in the Permanent Representatives Committee on 7 November 2003,
delegations will find in Annex a second revised compromise proposal from the Presidency.

Changes in relation to 14130/1/03 PI 111 REV 1 are underlined.

ANNEX

Recital 6

- (6) Any negative effects of a monopoly created by a Community patent should be prevented through a system of compulsory licences. This is without prejudice to the application of Community competition law by the Commission or national authorities. However, the Community Patent Court should be entrusted with the grant of compulsory licences in situations not falling under Community competition law.

Article 2

Community patent

1. The Community patent shall have a unitary character. It shall have equal effect throughout the Community and may only be granted, transferred, declared invalid or lapse in respect of the whole of the Community.

2. The Community patent shall have an autonomous character. It shall be subject only to the provisions of this Regulation and to the general principles of Community law. However, the provisions of this Regulation shall not exclude the application of Community competition law, nor of the law of Member States with regard to criminal liability and unfair competition, nor of the provisions of the Munich Convention to the extent that they are not covered by this Regulation.

Paragraphs 2a to 4 deleted.

Article 9a

Government use

Any provision in the law of a Member State allowing non-commercial use of national patents by or for the government may be applied to Community patents, but only to the extent that the use is necessary for essential defence or national security. The patentee should be informed as soon as reasonably possible about the act and be compensated in respect of the act by the government concerned. Any dispute as to whether a Community patent has been used as provided for in this Article or over the amount of compensation shall be decided by the national courts of the Member State concerned.

Article 20

Licences of right

1. The proprietor of a Community patent may file a written statement with the Office that he is prepared to allow any person to use the invention as a licensee in return for appropriate compensation. In that case, the renewal fees for the Community patent which fall due after receipt of the statement shall be reduced; the amount of the reduction shall be fixed in the rules relating to fees referred to in Article 60. Where there is a complete change of proprietorship of the patent as a result of legal proceedings under Article 5, the statement shall be deemed withdrawn on the date of entry of the name of the person entitled to the patent in the Register of Community Patents.
2. The statement may be withdrawn at any time by a written communication to this effect to the Office, provided that no-one has yet informed the proprietor of the patent of his intention to use the invention. Such withdrawal shall take effect from the date of receipt of that communication by the Office. The amount by which the renewal fees were reduced shall be paid within one month after withdrawal; Article 25(2) shall apply, but the six-month period shall start upon expiry of the above period.
3. The statement may not be filed while an exclusive licence is recorded in the Register of Community Patents or a request for the recording of such a licence is before the Office.

4. On the basis of the statement, any person shall be entitled to use the invention as a licensee under the conditions laid down in the implementing regulations referred to in Article 59. A licence obtained under the terms of this Article shall, for the purposes of this Regulation, be treated as a contractual licence.
5. On written request by one of the parties, the Community Patent Court shall determine the appropriate compensation referred to in paragraph 1 or review it if circumstances have arisen or become known which render the compensation determined obviously inappropriate.
6. No request for recording an exclusive licence in the Register of Community Patents shall be admissible after the statement has been filed, unless it is withdrawn or deemed withdrawn.
7. The Member States may not grant licences of right in respect of a Community patent.

Article 21
Grant of compulsory licences

1. The Community Patent Court may grant a compulsory licence for lack or insufficiency of exploitation of a Community patent to any person filing an application four years or later after the patent application was filed and three years or later after the patent was granted if the patent proprietor has not exploited the patent in the Community on reasonable terms or has not made effective and serious preparations to do so, unless he provides legitimate reasons to justify his inaction. In determining the lack or insufficiency of exploitation of the patent, no distinction shall be made between products originating within the Community and imported products.
2. On request, the Community Patent Court may grant a compulsory licence in respect of a first patent to the proprietor of a national or Community patent or to the proprietor of a plant variety right who cannot use his patent (second patent) or his national or Community plant variety right without infringing a Community patent (first patent), provided that the invention or new plant variety claimed in the second patent or plant variety right involves an important

technical advance of considerable economic significance in relation to the invention claimed in the first patent. In the case of a compulsory licence in respect of a dependent patent or plant variety right, the owner of the first patent shall be entitled to a cross-licence on reasonable terms to use the patented invention or protected plant variety.

3. When it is necessary to remedy a practice determined after judicial or administrative process to be anti-competitive under national merger law, the Community Patent Court may authorise exploitation of a Community patent at the request of the competent national authority.
 - 3a. In times of crisis or in other situations of extreme urgency, including those relating to public health, the Community Patent Court may authorise at the request of a Member State the exploitation of a Community patent.
 4. In the case of semi-conductor technology, exploitation shall be possible without the authorisation of the right holder only in the situations set out in paragraph 3a.
 5. A licence or exploitation set out in paragraphs 1 and 2 may be granted only if the proposed user has made efforts to obtain authorisation from the patent holder on reasonable commercial terms and conditions, and if such efforts have not been successful within a reasonable period of time. However, the authority granting the licence may derogate from this condition in the situations set out in paragraph 3a. In these situations, the right holder shall be informed as soon as reasonably possible.
 6. The detailed rules of application and the procedures to be used for applying the principles set out in this Article shall be laid down in the relevant instruments.

Article 22
Conditions applicable to compulsory licences

1. When granting the compulsory licence under Article 21, the Community Patent Court shall specify the type of use covered and the conditions to be met. The following conditions shall apply:
 - (a) the scope and duration of the exploitation shall be limited to the purpose for which it was authorised;
 - (b) the exploitation shall be non-exclusive;
 - (c) the exploitation shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use;
 - (d) the exploitation shall be authorised predominantly for the supply of the internal market of the Community ;
 - (e) the Community Patent Court may, on reasoned request, decide to cancel the authorisation, subject to adequate protection of the legitimate interests of the persons so authorised, if and when the circumstances which led to it cease to exist and are unlikely to recur;
 - (f) the licence holder shall pay the right holder adequate remuneration, taking into account the economic value of the authorisation ;
 - (g) in the case of a compulsory licence in respect of a dependent patent or a plant variety right, the exploitation authorised in respect of the first patent shall be non-assignable except with the assignment of the second patent or plant variety right.
2. Deleted.

Article 24a

Compulsory translations of the Community patent

1. When the patent is granted, the applicant shall file a translation of all the claims into all the official languages of the Community, unless all Member States which have a given language as their official language or one of their official languages agree to dispense with a translation into that language. The translation shall be filed, at the choice of the applicant, either directly with the Office or via the national patent office of a Member State which has as its official language or one of its official languages the language of the translation.

Where the translation is filed directly with the Office, the Office shall immediately make it available to the national patent offices of the Member States and to the public by publishing it on its Internet database.

Where the translation is filed via a national patent office, that office shall immediately transmit the translation to the Office, which shall make it available to the national patent offices of the other Member States and to the public by publishing it on its Internet database.

2. The decision of one or more Member States referred to in paragraph 1 to dispense with a translation must be communicated to the Commission in a statement, which it shall publish in the *Official Journal of the European Union*.
3. For the purposes of paragraph 1, if the translations into Community languages other than those required for the granting of the patent under the provisions of the Munich Convention are produced and filed at the Office within a maximum of [three] [six] [nine] [twelve] [twenty four] months of the granting of the patent, under conditions specified by the implementing rules, the holder of the patent may exploit the rights conferred by that patent as from the date of publication of the notice of granting of the patent.
4. If the translations provided for in this Article are not filed within the deadline laid down in paragraph 3, the Community patent shall be deemed to be void ab initio.

Article 24b

Conversion into a European patent designating one or more Member States

1. Deleted.
2. The holder of the patent may, by a request filed with the Office within the time limit laid down in Article 24a(3) and under the conditions specified by the provisions of the Munich Convention, opt for the Community Patent to be converted into a European Patent designating one or more Member States.

Article 24 c

Authentic text of a Community patent application or of a Community patent

p.m. (A proposal by the Spanish delegation is awaited).

Article 24d

Status of the translations

The translations referred to in Articles 24a and 58, which have been carried out by a person authorized under the law of a Member State shall be deemed in the Community to be in conformity with the original, until proved to the contrary.

Article 44

Actions or claims for damages

1. The Community courts referred to in Article 30 shall have the power to order the payment of compensation for damage underlying the actions referred to in Articles 31 to 36.

2. In determining the appropriate damages, the courts shall take into account all relevant aspects, such as the economic consequences to the injured party of the infringement, as well as the undeserved profits made by the infringer and the behaviour and the good or bad faith of the parties. The damages shall not be punitive.
 3. For the purposes of paragraph 2, an alleged infringer who has his residence or principal place of business in a Member State whose official language, which is also an official language of the Community, is not the language in which the patent was granted or in which a translation of the patent claims has been made public in accordance with Article 24a or Article 58, is presumed not to have known nor to have had reasonable grounds for knowing that he was infringing the patent. In such a situation, damages for infringement shall be due only for the period from the time when he is notified of a translation of the patent claims in the official language of the Member State of residence or principal place of business of the alleged infringer.
- 3a The patent holder is not entitled to damages to the extent that, due to an inaccurate translation of the patent claims which has been made public in accordance with Article 24a or Article 58, an infringer did not know and did not have any reasonable grounds to know that he was infringing the patent.
4. Where the Member State referred to in paragraph 3 has two or more official languages which are also official languages of the Community, the infringer shall be entitled to notification in the official language of his choice.

Article 53a

Legal jurisdiction during the transitional period

1. Notwithstanding the provisions of Section 1 of this Chapter, and until the system of Community jurisdiction referred to in Article 30 has been put into place, by 1 January 2010 at the latest, competence to hear the legal actions referred to in Section 1 of this Chapter shall be governed by the provisions of this Section.

2. The date on which the Community courts referred to in Article 30 shall commence their activities shall be published by the Commission in the Official Journal of the European Union. Legal actions referred to in Section 1 of this Chapter and begun prior to that date shall be brought before the national courts, in accordance with the provisions of this Section.
3. By derogation from paragraph 2, during the period referred to in paragraph 1 the Commission shall have competence:
 - (a) to determine or review compensation in accordance with Article 20(5);
 - (b) to grant compulsory licences or authorise exploitation in accordance with Article 21.

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(October 2003)

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