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Subject: Proposal for a Council Decision establishing the Community Patent Court and concerning appeals before the Court of First Instance

Delegations will find attached a Commission proposal submitted under a covering letter from Ms Patricia BUGNOT, Director, to Mr Javier SOLANA, Secretary-General/High Representative.

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COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

COUNCIL DECISION

**establishing the Community Patent Court
and concerning appeals before the Court of First Instance**

(presented by the Commission)

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EXPLANATORY MEMORANDUM

1. BACKGROUND

In the Community, patent protection has long been provided for in two ways, neither of which is based on a Community instrument: National patents are granted by national patent offices on the basis of legislation of the respective Member State. The protection conferred is limited to the territory of that Member State and in case of dispute the patent right has to be enforced before the competent national courts. European patents are granted by the European Patent Office established by the Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973 providing for substantive patent law and a single procedure of grant. Once granted, the European patent confers protection on the territory of those Contracting States which are designated by the right holder. Whereas the harmonised patent law of the European Patent Convention is essentially limited to the phase up to the grant of the European patent, its effects are determined according to the respective national patent law of each designated Contracting State. In case of dispute, litigation must also take place before the competent national courts. This situation, where the patent right is only granted in or with effect for individual Member States of the European Union entails for the right holder the risk of being forced to enter into multiple litigation in a number of Member States on the same patent issue with possibly variable results has long been criticised as inappropriate and unsuitable for the needs of European industry operating within the common market. Member States have already in the past undertaken great efforts to redress this situation in a Community context. The Community Patent Convention intending to create a unitary Community patent title was signed on 15 December 1975 in Luxembourg followed by the 15 December 1989 agreement relating to the Community patent including a protocol on the settlement of litigation concerning the infringement and validity of Community patents. However these agreements never entered into force.

2. THE COMMUNITY PATENT

The European Council held in Lisbon in March 2000 launched a general programme to increase the competitiveness of the Union's economy and took up the issue again. As one concrete measure for improvement, the Council called for the creation of a Community patent system to address existing shortcomings in the legal protection for inventions thus giving an incentive for investments in research and development and contributing to the competitiveness of the economy as a whole. In the wake of the Lisbon European Council, the Commission put forward on 1 August 2000 a proposal for a Council regulation on the Community patent [COM(2000) 412 final] containing the relevant provisions applying to Community patents, in particular the provisions for the creation of a unitary Community patent title including the rights conferred by it, the possible actions for the enforcement of these rights, the grounds for invalidity as well as the mechanisms for the administration of granted Community patents such as their yearly renewal. It is foreseen that the grant of Community patents will be carried out by the European Patent Office. For this purpose the Community must accede to the European Patent Convention thereby charging the European Patent Office with the task of granting Community patents. Thus the European Patent

Office will grant European and Community patents according to the same standards of the European Patent Convention ensuring uniformity and legal security of patent law in Europe. At the same time the European Patent Office's high expertise as an examining patent office can be put to use for the Community patent.

3. THE COMMUNITY PATENT JURISDICTION

The establishment of a Community patent jurisdiction is a key element of the Community patent system. The Community patent title covering the territory of all Member States will not only be governed by the uniform provisions of Community law contained in the regulation of the Council on the Community patent. It will, at the latest by 2010, after a transitional period during which national courts will retain jurisdiction for the subject matter, also be enforceable before a Community jurisdiction whose decisions enjoy Community wide effect.

The legal basis to be used for the establishment of a Community patent jurisdiction was introduced into the EC Treaty by Article 2 (26 ff.) of the Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts which entered into force on 1 February 2003, inserting Article 229a and Article 225a into the EC Treaty. It is proposed that the Community patent jurisdiction will be established by two Council Decisions based on those Articles.

In order for the Court of Justice to assume jurisdictional responsibilities with regard to the Community patent, that jurisdiction must be conferred on it. Article 229a of the EC Treaty allows the Council to adopt provisions to confer jurisdiction to the extent that it shall determine on the Court of Justice in disputes relating to the application of acts adopted on the basis of the Treaty which create Community industrial property rights. To that effect, the Commission put before the Council a separate proposal for a Council Decision containing such a conferral of jurisdiction with regard to the Community patent. The Court of Justice should have jurisdiction in disputes relating to the infringement or the validity of a Community patent and a Community supplementary protection certificate, the use of the invention after the publication of the Community patent application, the right based on prior use of the invention, provisional and evidence-protection measures in the subject matter conferred, damages or compensation in the situations referred to above and orders of a penalty payment in case of non-compliance with a decision or order constituting an obligation to act or to abstain from an act.

The present Commission proposal for a Council Decision based on Articles 225a, 245 of the EC Treaty proposes the establishment of a judicial panel to be called "Community Patent Court" which would within the Court of Justice exercise at first instance the jurisdiction in disputes relating to the Community patent. The Decision also contains necessary provisions with a view to accommodating the new function of the Court of First Instance as appeal instance according to Article 225(2) of the EC Treaty against decisions of the Community Patent Court.

4. THE COMMUNITY PATENT COURT

Article 225a of the EC Treaty provides for the possibility to create judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas. It is proposed that the Community Patent Court is established as a judicial panel in the sense of Article 225a of the EC Treaty. It would be competent for first instance litigation relating to the Community patent for which jurisdiction is conferred on the Court of Justice by the Decision of the Council based on Article 229a of the EC Treaty.

The EC Treaty itself already contains a number of provisions relevant to judicial panels. Judicial panels are according to Article 220(2) of the EC Treaty attached to the Court of First Instance. Article 225a(4) of the EC Treaty sets out the required qualifications for the judges of judicial panels and the appointment procedure. Judges shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. Unlike the judges of the Court of Justice and the Court First Instance who are appointed by common accord of the governments of the Member States, the judges of a judicial panel are appointed by a unanimous decision of the Council. Article 225a(5) of the EC Treaty provides that the Rules of Procedure of a judicial panel are established by the panel itself in agreement with the Court of Justice and subject to the approval by the Council acting by a qualified majority. The EC Treaty provisions relating to the Court of Justice and the provisions of the Statute of the Court of Justice apply according to Article 225a(6) of the EC Treaty also to judicial panels unless the decision establishing a judicial panel provides otherwise. Appeals against decisions of the Community Patent Court will, according to Articles 225(2), 225a(3) of the EC Treaty be heard by the Court of First Instance. That appeal is limited to points of law unless otherwise provided for in the decision establishing the judicial panel.

With regard to the structure of the Community Patent Court, the proposal contains a centralised and specialised Community jurisdiction which will best ensure legal certainty regarding the unitary Community patent. The Community patent title covering the territory of all EU Member States should not only be granted according to the uniform standards of the European Patent Convention and after grant be governed by the uniform provisions of Community law contained in the Community patent regulation. It should also be effectively enforceable before a Community jurisdiction guaranteeing high quality decisions in a quick, inexpensive and uniform procedure. The Community Patent Court with its judges coming from different legal backgrounds within the Community would from its establishment develop a common Community patent case law ensuring legal certainty throughout the Community. These arguments in favour of a completely centralised Community jurisdiction have after a long and thorough discussion found the unanimous support of the Council as expressed in the common political approach of 3 March 2003. The judges of the Community Patent Court as a specialised Community jurisdiction should be sufficiently experienced in the field of patents. This has been expressly recognised by the Council who agreed in its common political approach that candidates for appointment must have an established high level of legal expertise in patent law and that judges shall be appointed on the basis of their expertise.

It is proposed that the Community Patent Court will consist of seven judges including the president. With the normal composition of the bench being three judges, six judges would allow to form two chambers within the Community Patent

Court. The seventh member would appear necessary for the reinforcement of a chamber where needed, e.g. due to illness of a judge or for the chamber presided over by the president of the Community Patent Court who also has to assume tasks related to the administration and the representation of the Community Patent Court. In special circumstances provided for in the Rules of Procedure, the Community Patent Court could sit in an enlarged composition, for example in cases where fundamental questions of patent law are concerned or in a reduced composition which could be the case for interim measures or simple cases in main proceedings.

The judges should be assisted in their work throughout the handling of the case by technical experts as agreed upon by the Council in its 3 March 2003 common political approach. For that purpose, use of “assistant rapporteurs” as foreseen in Article 13 of the Protocol on Statute of the Court of Justice shall be made. Such assistant rapporteurs, specialised in different technical fields, should actively participate in the preparation, the hearing and the deliberation of a case. However, they would not have a right to vote on the decision to take. Their input would be important in helping the judges to focus from the start of proceedings on the essential technical questions involved. Their role would not be to make the use of experts entirely superfluous but to enable the court as a whole to understand the technical aspects of the case quickly and accurately which is relevant for an efficient handling of a case and for a legally sound decision.

The Community Patent Court, though attached to the Court of First Instance should have its own registrar. With a view to an entirely different type of litigation and the case load of the Community Patent Court, a separate registrar would appear to be necessary to ensure swift and efficient proceedings before the Community Patent Court.

With a view to the first instance proceedings before the Community Patent Court, Article 4 of the Decision creates Annex II to the Protocol on the Statute of the Court of Justice including a number of provisions adapting the provisions of the Statute of the Court of Justice which are applied to judicial panels according to Article 225a(6) of the EC Treaty. With a view to the special nature of litigation before the Community Patent Court, i.e. private party patent litigation, some provisions of the Statute of the Court of Justice cannot apply e.g. those concerning the review of the legality of Community acts, others need amendments e.g. those concerning the procedure, the production of evidence or the revision of a judgment and finally some provisions need to be added e.g. those concerning the enforcement of decisions of the Community Patent Court or court fees.

Any official EU language can, depending on the circumstance, become the language of proceedings before the Community Patent Court. The principle that will decide on the language of proceedings in a particular case centres on the place of domicile of the defendant in the Community. The Community Patent Court conducts the proceedings in the official EU 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. However, at the request of the parties and with the consent of the Community Patent Court, any official EU language can be chosen as language of proceedings. Where the defendant is not domiciled in a Member State, the language of proceedings would be determined by the official EU language in which the Community Patent was granted.

The proposal provides that the proceedings before the Community Patent Court will not be free of charge. The Community Patent Court will hear litigation in which parties seek to enforce their private rights against competitors and who should therefore adequately contribute to the incurred court cost. In that respect, the principle contained in Article 72 of the Rules of Procedure of the Court of Justice and Article 90 of the Rules of Procedure of the Court of First Instance that proceedings are free of charge will not be upheld for Community patent litigation. However, provisions on legal aid will have to be provided for in the Rules of Procedure of the Community Patent Court where a party is unable to meet the cost of proceedings as is the case in the Rules of Procedure in Articles 76 for the Court of Justice and 94. ff for the Court of First Instance.

5. THE APPEAL TO THE COURT OF FIRST INSTANCE

With the establishment of a Community Patent Court as a judicial panel in the sense of Article 225a of the EC Treaty which is attached to the Court of First Instance according to Article 220(2) of the EC Treaty, the latter will under Article 225(2) of the EC Treaty have jurisdiction to hear and determine appeals against decisions of the Community Patent Court.

For that purpose it is suggested to set up a special patent appeal chamber within the Court of First Instance with three judges having a high level of legal expertise in patent law providing the legal experience required for the highly specialised field of patent litigation. This appears to be necessary not only in first instance on the level of the Community Patent Court but also on appeal ensuring swift and efficient proceedings resulting in high quality decisions that merit the trust of the users from the very beginning of the system. The judges hearing the appeal will also be assisted by technical experts throughout the handling of the case. These "assistant rapporteurs" will be required to participate in the preparation, the hearing and the deliberation of the case.

The Community Patent Court in first instance and the patent appeal chamber of the Court of First Instance in patent appeal proceedings must, as the two stages of a uniform procedure, work to the same set of procedural rules. Therefore, those special Statute provisions that are necessary with a view to the specific nature of patent litigation which deviate from the Statute provisions of the Court of Justice as they would apply the Community Patent Court according to Article 225a(6) of the EC Treaty are also made applicable for the appeal proceedings before the Court of First Instance.

In principle Community patent disputes are heard by the Court of First Instance in second and last resort. A further appeal of a case to the Court of Justice is not foreseen. However, in exceptional cases, the decision of the Court of First Instance can be reviewed by the Court of Justice at the request of the First Advocate General according to Article 225(2) of the EC Treaty, Article 62 of the Statute of the Court of Justice where there is a serious risk of the unity or consistency of Community law being affected. The Court of Justice is expected to come forward with a request to change its Statute introducing further details for such a review procedure as called for in Declaration No 13 adopted by the Nice conference.

With a view to the enabling provision of Article 225(3) of the EC Treaty allowing, by way of Statute provision, to entrust the Court of First Instance in specific areas with jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234 of the EC Treaty, the present proposal does not foresee any such competence for Community patent law provisions. While this question has been considered and held to yield important potential synergies with a view to the Court of First Instance deciding on parallel material issues either as an appeal instance in Community patent litigation or at the request of national courts for a preliminary ruling, it was felt that for the time being this competence should remain with the Court of Justice. The establishment of the Community Patent Court dealing with a new kind of litigation on a Community level constitutes itself a major innovation for the Community legal order such that it would appear appropriate to gather sufficient practical experience in the operation of the new jurisdictional arrangements before taking further steps.

6. TRANSITIONAL PERIOD

As agreed by the Council in its 3 March 2003 common political approach, the Community Patent Court shall be established at the latest by the year 2010. Until that time national courts of Member States will have jurisdiction. This would be relevant for those Community patents which come into effect before the establishment of the Community patent jurisdiction. The Community patent regulation will contain special provisions governing this transitional period. It is foreseen that each Member State will designate for this purpose a limited number of national courts to exercise the jurisdiction which will at the end of the transitional period be conferred on the Court of Justice. With regard to legal remedies against a decision of a national court in first instance, the legal remedies allowed in the respective Member State are applicable. Except where the jurisdiction of a national court is based on the place where an infringement was committed, in which case the jurisdiction is limited to the acts committed in that Member State, the national courts will have Community wide jurisdiction. Before the national courts, the Community patent will enjoy a comprehensive presumption of validity excluding the simple plea for invalidity as a defence against an infringement action. According to Article 2 of the Commission proposal for a Council Decision conferring jurisdiction on the Court of Justice relating to the Community patent, legal actions of which national courts have been seised at the time when the conferral of jurisdiction on the Court of Justice will take effect will be decided by the competent national courts.

7. NEED FOR A COMMUNITY INTERVENTION

The present Decision relating to jurisdictional aspects of the Community patent system intends to redress the existing shortcomings of the current situation of patent protection in the Union. The objective is to establish Community wide patent protection which can be enforced before one single court operating to uniform standards. This objective can only be achieved at a Community level.

8. PROPOSED PROVISIONS

With regard to its structure, the present Decision contains three chapters relating to the Community Patent Court (Chapter I), the appeal proceedings against decisions of the Community Patent Court before the Court First Instance (Chapter II) and final provisions (Chapter III).

Chapter I - The Community Patent Court

Chapter I on the Community Patent Court contains two major elements. Articles 1 to 3 of the Decision contain provisions which set up the Community Patent Court, determine the EC Treaty provisions to be applied to the Community Patent Court and provide a legal basis for an annex to the Protocol on the Statute of the Court of Justice containing the Statute provisions as applied by the Community Patent Court. Article 4 contains the special provisions relating to the Community Patent Court which are to be annexed to the Protocol on the Statute of the Court of Justice (hereinafter "Statute").

Article 1 - Establishment of the Community Patent Court

Article 1 establishes a judicial panel to be called "Community Patent Court" for first instance Community patent litigation. The establishment of the Community Patent Court is based on Article 225a of the EC Treaty which allows for the creation of judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas. Pursuant to Article 220(2) of the EC Treaty, the Community Patent Court is attached to the Court of First Instance. The structure of the Community Patent Court had been subject to intensive debate in the Council as to the proper degree of centralisation. The Council, in its common political approach adopted on 3 March 2003 unanimously agreed on a fully centralised first instance. The proposal for the establishment of a Community Patent Court is built on this approach. Consequently, the Community Patent Court should have its seat at the Court of First Instance without any of the possibilities that had been under discussion in the Council allowing for the establishment of permanent regional divisions of the Community Patent Court in Member States.

Article 2 – Application of EC Treaty provisions

In accordance with Article 225a(6) of the EC Treaty, the provisions of the EC Treaty relating to the Court of Justice and the provisions of the Statute of the Court of Justice will apply to the Community Patent Court unless the Decision establishing the Community Patent Court provides otherwise. Article 2 contains a list of Articles chosen from the EC Treaty provisions relating to the Court of Justice that are applicable to the Community Patent Court subject to the subsequent provisions of Chapter I of this Decision. The same approach had been employed by Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing the Court of First Instance.

The EC Treaty provisions relating to the Court of Justice do not seem in their entirety to be suitable for the special litigation to be handled by the Community Patent Court. Not applicable of course are the provisions relating to the Court of Justice and the Court of First Instance themselves, or to special proceedings before them. Moreover, among those provisions of a more general nature, a number of Articles referring to acts of the Communities and in particular their nullification, such as Articles 231, 233, 242 of the EC Treaty, are not applicable to the Community Patent Court handling private party litigation not involving the annulment of Community acts.

Articles 241, 243, 244 and 256 of the EC Treaty will apply to the Community Patent Court. Article 241 of the EC Treaty allows private parties to plead for the

non-application of a regulation on the grounds stated by Article 230(2) of the EC Treaty. The EC Treaty in allowing this plea for non-application ensures the protection against the application of illegal regulation provisions, a safeguard that should also apply in patent litigation. Parties should be allowed to attack indirectly the validity of relevant patent provisions. Article 243 of the EC Treaty states the principle that the Court can order any necessary interim measures. Such provision is also valid for private party litigation and should thus apply to the Community Patent Court. Articles 244 and 256 of the EC Treaty concern the enforcement of a judgment which is governed by the law of the Member State in which enforcement is sought. This provision should also apply to the judgments of the Community Patent Court.

With regard to interim measures (Article 14 of Annex II to the Statute) and the enforcement of decisions of the Community Patent Court (Article 22 of Annex II to the Statute) the Decision takes particular account of the special nature of Community patent litigation. The order of interim measures provided for in Article 243 of the EC Treaty should not be conditional upon main proceedings having already been instituted before the Community Patent Court; also, interim measures that have been found unjustified may give rise to a claim for adequate compensation for the injury thereby caused. Furthermore, the enforcement mechanism provided for in Article 256 of the EC Treaty does not seem to be entirely suitable for the enforcement of decisions of the Community Patent Court, and in particular for interim measures, in that it requires an order of enforcement to be appended to the decision by the national authority designated for this purpose by the Member State in which the enforcement takes place. Although the national authority would only verify the authenticity of the decision to be enforced, this would still result in unjustified delays. Consequently the order of enforcement should be appended directly to the decision by the Community Patent Court. Furthermore, decisions of the Community Patent Court should also be enforceable against Member States as they should be treated on an equal basis with other parties where they own or infringe a Community patent. Finally, the Community Patent Court should have the power to ensure the enforcement of certain decisions by an order of a penalty payment.

Article 3 – Statute provisions for judicial panels

This Article contains a provision inserting a new Title VI "Judicial Panels" into the Statute of the Court of Justice with a new Article 65 creating a legal basis to annex provisions to the Statute of the Court of Justice relating to judicial panels created under Article 225a of the EC Treaty. This provision of a general character and applies equally to any future judicial panel to be established. According to Article 225a(6) of the EC Treaty, unless otherwise provided for in the decisions establishing them, judicial panels apply the provisions of the Statute of the Court of Justice. While the majority of the provisions of the Statute of the Court of Justice will also be suitable to apply to judicial panels, some special provisions are necessary in order to take the individual circumstances of the judicial panel concerned into consideration, e.g. concerning the organisation and composition of the panel and special procedural elements. Therefore, for each judicial panel established in the future, a corresponding annex will be created to deal with the Statute provisions to be applied by the judicial panel concerned. Consequently the new Article 65 of the Statute of the Court of Justice consequently lays down that the provisions relating to the jurisdiction, the composition, and the organisation of judicial panels, and the procedure before them are to be set out in an annex to the Statute of the Court of Justice.

Article 4 – Annex to the Protocol on the Statute of the Court of Justice

On the basis of the new Article 65 of the Statute of the Court of Justice which will be inserted by virtue of Article 3 of the present Decision as explained above, Article 4 creates an Annex II to the Statute of the Court of Justice entitled "The Community Patent Court" with the following elements:

Article 1 of Annex II lays down the jurisdiction of the Community Patent Court. Articles 2 and 3 of Annex II concern the appointment of judges, Article 4 the election of the president of the Community Patent Court.

Article 5 of Annex II identifies the provisions from Title I and II of the Statute which apply to the Community Patent Court followed by special provisions relating to the organisation of the Community Patent Court (Articles 6 to 9 of Annex II). Article 10 of Annex II prescribes that the procedure before the Community Patent Court shall be governed by Title III of the Statute followed by a number of special provisions that are necessary in view of particular requirements of the special type of litigation before it (Articles 11 to 25 of Annex II). Articles 47 ff and 53 ff. of Title IV of the Statute of the Court of Justice contain a parallel structure with regard to the Court of First Instance.

Finally, Annex II contains special provisions on the appeal to the Court of First Instance (Articles 26 to 28) and a legal basis to lay down in the Rules of Procedure necessary provisions for applying and, where required, supplementing it.

Article 1 of Annex II to the Statute – Jurisdiction

Pursuant to Article 229a of the EC Treaty, exclusive jurisdiction relating to the Community patent is conferred on the Court of Justice by a separate Council Decision allowing the Court of Justice to assume jurisdictional responsibilities in this field.

The present Article attributes within the Court of Justice the exclusive jurisdiction for these disputes relating to the application of Council regulation (EC) No.../... of ... on the Community patent and Council regulation (EC) No.../... of ... on the Community supplementary protection certificate to be exercised at first instance by the Community Patent Court. The jurisdiction of the Community Patent Court is determined by way of reference to the Council Decision conferring jurisdiction on the Court of Justice relating to the Community patent for which the Commission has put forward a separate proposal for a Council Decision. The Community Patent Court would thus have jurisdiction for the subject matter laid down in Article 1 of the Commission proposal for such a Council Decision, namely for disputes relating to the infringement or the validity of a Community patent and a Community supplementary protection certificate, the use of the invention after the publication of the Community patent application, the right based on prior use of the invention, interim and evidence-protection measures in the subject matters conferred, damages and compensation incurred in the situations referred to above and orders of a penalty payment in case of non-compliance with a decision or order constituting an obligation to act or to abstain from an act.

In a transitional period before the conferral of jurisdiction on the Court Justice takes effect, disputes will be decided by national courts in accordance with the provisions

of the Community patent regulation. As provided for in Article 2 of the proposed Council Decision conferring jurisdiction on the Court of Justice relating to the Community patent, the Community Patent Court will not have jurisdiction for those disputes of which national courts have already been seised during that transitional period, since the conferral of jurisdiction does not extend to those disputes.

Article 2 of Annex II to the Statute – Number, appointment and term of office of judges of the Community Patent Court

Article 2 contains provisions relating to the judges of the Community Patent Court.

Paragraph 1 lays down the number of members of the Community Patent Court and their term of office. As to the size of the Community Patent Court, a total of seven judges including the president is proposed. The Community Patent Court will, according to Article 8 of Annex II to the Statute of the Court of Justice normally sit in chambers with three judges. Six judges would allow formation of two chambers. The seventh member would seem appropriate to give special support to the chamber presided over by the president of the Community Patent Court who will also have to perform other tasks relating for example to the administration and representation of the Community Patent Court. In addition, a complement of seven judges would enable all to sit and issue decisions together in accordance with Article 17(1) of the Statute of the Court of Justice which provides that only an uneven number of judges may sit. This number would also guarantee a smoothly operating jurisdiction in case of leave or sickness of judges and in general seems to be the number appropriate to the tasks to be carried out and the workload to be expected in the initial phase of the Community Patent Court. The judges will, according to Article 225a(5) of the EC Treaty, have to establish the Rules of Procedure of the Community Patent Court; a common practice under the adopted Rules of Procedure will have to be developed, and necessary adaptations in the light of experience be considered. The expected caseload in the initial phase is estimated for the first three consecutive years at around 50, 100 and 150 newly lodged cases which would mean a case load of 25, 50 and 75 new cases per year per chamber. This assumption is based on an expected number of 100 000 patents granted by the European Patent office per year of which around 50 000 would designate the Community and an annual litigation rate of 1 in 1 000 patents in force. When assessing the caseload that can reasonably be handled it must also be borne in mind that the Community Patent Court will have to develop a common jurisprudence necessitating in particular in the initial phase a number of fundamental decisions with corresponding need for intensive discussions.

As a term of office, a six year term with the possibility of renewal as is the case for the Court of Justice in Article 223(1) and (4) of the EC Treaty and for the Court of First Instance in Article 224(2) of the EC Treaty also seems appropriate for the Community Patent Court. The membership will be partially renewed every three years as foreseen for the Court of First Instance in Article 224(2) of the EC Treaty. Such a partial renewal of membership will ensure that the expertise built up by the court can be passed on from experienced judges to newly appointed judges and thus contribute to a stable jurisprudence and legal certainty. In order to establish this cycle where the Community Patent Court is only partially re-staffed at any one time, some members will need to have a shorter initial term of office. To that end, the present decision contains in its Article 7(2) a transitory provision whereby the president of the Council is to proceed to choose by lot the judges whose terms of office are to expire at the end of the first three years.

Paragraph 2 provides that judges are appointed from candidates presented by the Member States, and addresses the particular qualifications of members of the Community Patent Court. The EC Treaty itself prescribes in Article 225a(4) that eligible members of the judicial panels are "persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office". Paragraph 2 specifies this general provision which is meant to address all the different kinds of possible panels by laying down specific requirements relating to the necessary professional profile of possible candidates for judges of the Community Patent Court. As agreed by the Council in its common political approach of 3 March 2003, the members must be appointed on the basis of their expertise from candidates having an established high level of legal expertise in patent law. This is particularly important because the special nature of patent law requires much experience. The experience of the judges in this field will be crucial for the acceptance of the system by users by guaranteeing efficient proceedings and high quality decisions. The judges will be appointed after consultation of a committee to be set up in accordance with Article 3.

Article 3 of Annex II to the Statute – Advisory committee

Paragraph 1 provides that the judges will be appointed following consultation of an advisory committee to be set up for this purpose which is to give an opinion on the adequateness of the profile of candidates for membership of the Community Patent Court. The Council will be aided by the Committee's opinion in the appointment process in finding the best suited candidates for membership of the Community Patent Court. In the light of the specific requirements to be observed, the advisory committee may also provide a list of those candidates who possess the most appropriate high level of legal experience. In such a case the list must include twice the number of candidates as the number of judges to be appointed, in order to guard against any risk of a predetermination of the decision of the Council by the committee's opinion.

Paragraph 2 determines that the advisory committee shall be composed of seven members chosen from among former members of the Court of Justice, the Court of First Instance, the Community Patent Court or lawyers of recognised competence. The appointment of members of the committee and its operating rules shall be decided by the Council, acting by a qualified majority, on a proposal from the president of the Court of Justice.

Article 4 of Annex II to the Statute - President of the Community Patent Court

This Article concerns the president of the Community Patent Court who is to be elected by the judges from among their number for a term of three years with the possibility of re-election. The same principles are applied to the Court of First Instance in Article 224(3) of the EC Treaty. However, the transitory provision contained in Article 7(1) of the present Decision provides that the first president of the Community Patent Court exceptionally appointed in the same manner as its members, unless the Council decides that also the first president shall be elected by the judges. This approach had also been followed for the Court of First Instance in Article 11(1) of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing the Court of First Instance.

Article 5 of Annex II to the Statute – Applicability of provisions from Titles I and II of the Statute to the Community Patent Court and its judges

In the first sentence, this Article contains a reference to those Statute provisions from Titles I and II of the Statute that shall also apply to the Community Patent Court. A corresponding provision for the Court of First Instance is contained in Article 47(1) of the Statute.

For the Community Patent Court are declared applicable from Title I of the Statute: Article 2 (oath), Article 3 (immunity), Article 4 (other occupation), Article 5 (resignation), Article 6 (deprivation of office) and Article 7 (term of office in case of replacement). The present Article does not contain a reference to Article 8 of the Statute relating to the Advocate General since a participation of the Advocate General in proceedings before the Community Patent Court is not foreseen.

From Title II are declared applicable: Article 13 (assistant rapporteur), Article 14 (requirement of residence), Article 15 (judicial vacations), the first, second and fifth paragraphs of Article 17 (composition and quorum) and Article 18 (challenge for bias). The present Article does not contain a reference to Article 9 (number of judges to be replaced), Article 12 (staff attached to the Court of Justice), Article 16 (chambers of the Court of Justice), the third and fourth paragraphs of Article 17 (quorum for grand chamber and full Court). These provisions relate to specificities of the Court of Justice and should not apply to the Community Patent Court.

In the second sentence, the present Article specifies that also in relation to the Community Patent Court the oath of the judges is taken before the Court of Justice who is also attributed the competence to take decisions concerning the immunity and other occupations of judges and their deprivation of office.

Article 6 of Annex II to the Statute – Registrar

The first sentence provides for a registrar of the Community Patent Court. Although the Community Patent Court is attached to the Court of First Instance, a separate registrar seems appropriate since the Community Patent Court will deal with an entirely different type of litigation and also the expected caseload will justify such a measure. A legal basis for the appointment of the registrar and the rules governing his service would seem necessary in the Statute. Unlike for the Court of Justice (Article 223(5) of the EC Treaty) and the Court of First Instance (Article 224(4) of the EC Treaty) no such provision is included in the EC Treaty for the panels to be created under Article 225a.

The second sentence declares the provisions of the Statute relating to the registrar of the Court of Justice applicable to the registrar of the Community Patent Court as is the case for the registrar of the Court of First Instance in Article 47(2) of the Statute. The provisions concerned are Article 3(4) (immunities), Article 10 (oath and duties of the registrar), Article 11 (replacement of the registrar) and Article 14 (requirement of residence).

Article 7 of Annex II to the Statute – Assistant rapporteurs

This Article deals with the question in which way technical expertise is incorporated on the side of the Community Patent Court. An appropriate incorporation of

technical expertise appears to be of particular importance for the efficiency and quality of the proceedings before the Community Patent Court. The judges of the Community Patent Court are confronted with cases involving highly complicated technologies from a wide range of technical fields. In this context, technical expertise can be considered essential in helping the judges to focus from the start of proceedings on the essential technical questions involved. The objective would not be to make the use of experts entirely superfluous but rather to enable the court as a whole to understand the technical aspects of the case quickly and accurately which is relevant for an efficient handling of a case and for a legally sound decision. The question has been subject to thorough discussions in the Council which reached agreement in its common political approach of 3 March 2003 that technical experts should assist the judges throughout the handling of the case. The present Article builds on this approach.

Paragraph 1 provides for technical experts of the Community Patent Court and specifies the framework within which they assume their function. Technical experts will assist the judges throughout the handling of the case as assistant rapporteurs. Article 13 of the Statute is applied to the assistant rapporteurs of the Community Patent Court. They are consequently appointed by the Council, acting unanimously, on a proposal from the Court of Justice. They shall be chosen from persons whose independence is beyond doubt and who possess the necessary legal qualifications. In this context, a thorough experience in patent law would seem necessary since the assistant rapporteur must have a good understanding of what technical aspects are relevant for a legally sound decision of the Community Patent Court. Assistant rapporteurs shall take an oath before the Court of Justice to perform their duties impartially and conscientiously and to preserve the secrecy of deliberations.

Paragraph 2 adds on to these elements providing that assistant rapporteurs must have a high level of expertise in the relevant technical field. The proposal does not foresee a fixed number of assistant rapporteurs but prefers to leave this question to be solved in the light of experience to be gathered. In order to reach the objective as outlined above, which is to provide the bench with technical expertise of a general kind, a limited number of assistant rapporteurs covering the basic divisions of technology such as one for each of the following seven fields would seem appropriate: inorganic chemistry and materials science, organic and polymer chemistry, biochemistry and biotechnology, general physics, mechanical engineering, information and communication technology, electrical engineering. Assistant rapporteurs shall like the judges be appointed for a term of six years with the possibility of reappointment.

Paragraph 3 contains a provision specifying the functions of the assistant rapporteurs within the Community Patent Court. As they shall assist the judges throughout the handling of the case, their participation is foreseen in the preparation, the hearing and the deliberation of cases. The details concerning their participation shall be laid down in the Rules of Procedure. Assistant rapporteurs shall have the right to ask questions to the parties to clarify relevant technical questions. They shall take part in the deliberation of the judges but do not have a right to vote.

Article 8 of Annex II to the Statute – Composition of the chambers and assignment of cases

Paragraph 1 provides that the Community Patent Court as a rule shall sit in chambers composed of three judges. This number also retained in the Council's common

political approach of 3 March 2003 seems to be most appropriate with a view to litigation to be handled striking the right balance between thoroughness and efficiency of case handling for the average cases.

Paragraph 2 addresses situations where there might be a need to deviate from the standard composition of a chamber of three judges. An enlarged configuration might be appropriate, for instance, in cases that involve fundamental points of law or where chambers take a different view on a legal matter. A reduced configuration might be considered for provisional measures or simple cases. The requirements for such a special composition shall be laid out in the Rules of Procedure to allow for the necessary flexibility including provisions on the quorum since the standard provisions of Article 17(3) (grand chamber) and Article 17(4) (full court) of the Statute do not apply to the Community Patent Court.

Paragraph 3 provides that the president of the Community Patent Court shall always preside *ex officio* over one of the chambers of the Community Patent Court. He shall also preside where the Community Patent Court in accordance with its Rules of Procedure sits in an enlarged composition. The presidents of the remaining chambers shall be elected by the judges from among their number for a term of three years with the possibility of re-election.

Paragraph 4 specifies that the composition of the chambers and the assignment of cases to the chambers is governed by the Rules of Procedure. The composition of the chambers and the assignment of cases will thus be predetermined in the Rules of Procedure but at the same time an appropriate degree of flexibility is left to adapt such rules in the light of efficient case handling. It opens, for example, the possibility of largely attributing the cases to the chambers on the basis of the field of technology concerned enhancing the expertise of the individual chamber by building up experience in the technical fields concerned.

Article 9 of Annex II to the Statute – Agreement on services of support staff

According to Article 12 of the Statute, officials and other servants are attached to the Court of Justice. They are responsible to the registrar of the Court of Justice under the authority of the president of the Court of Justice. The conditions under which these officials and other servants render their services to the Court of First Instance are according to Article 52 of the Statute determined by common accord between the president of the Court of Justice and the president of the Court of First Instance.

The present Article lays down the framework under which officials and other servants attached to the Court of Justice will render services to the Community Patent Court to enable it to function. This will be determined between the President of the Court of Justice or, where appropriate, the President of the Court of First Instance by common accord with the President of the Community Patent Court. As a rule, such an agreement will be reached between the president of the Court of Justice and the president of the Community Patent Court. However, there might also be situations where the common accord between the president of the Court of Justice and the president of the Court of First Instance has already taken account of the needs of the Community Patent Court so that in such a case the president of the Court of First Instance and the president of the Community Patent Court are in a position to agree on appropriate terms for the Community Patent Court. Finally, certain officials and other servants who directly support the president, the judges or

the registrar such as legal secretaries or officials of the registry shall be responsible to the registrar of the Community Patent Court under the authority of the president of the Community Patent Court. There is a corresponding provision for the Court of First Instance in Article 52 of the Statute.

Article 10 of Annex II to the Statute – Applicability of provisions from Title III of the Statute to the procedure before the Community Patent Court

Paragraph 1 of this Article declares Title III of the Statute applicable for the procedure before the Community Patent Court as is the case for the Court of First Instance in Article 47 of the Statute. The majority of procedural provisions contained in Title III of the Statute concerning basic principles of procedure before the Court of Justice can also apply to the Community Patent Court. They can be considered a set of common principles of Community court procedure. However, where necessary with a view to the special type of litigation before the Community Patent Court changes have to be made. The Community Patent Court will hear private party Community patent litigation. It will not be concerned with the review of the legality of Community acts but decide disputes between private parties. As a result, not all of the provisions contained in Title III of the Statute can apply in their present form. Hence, certain provisions of Title III of the Statute which are not relevant to the procedure before the Community Patent Court are disapplied (Articles 21(2), 22, 23, 40(1) and (3), 42, 43 of the Statute). Where the special nature of litigation before the Community Patent Court makes adaptations to the existing provisions of Title III of the Statute necessary, this has been done in Articles 11 to 25 of Annex II to the Statute.

The provisions from Title III of the Statute apply to the Community Patent Court as follows:

Article 19 of the Statute on legal representation is applied to the Community Patent Court with the amendments relating to the role of European patent attorneys which are proposed in Article 11 of Annex II to the Statute and who should have a right to speak before the Community Patent Court.

Article 20 of the Statute laying down the principal structure of the procedure consisting of two parts, a written and an oral part, its provisions on communications to the parties and the contents of the oral procedure are applied to the Community Patent Court with the proposed amendments contained in an Article 12 of Annex II to the Statute providing e.g. for exceptional cases to dispense with the oral procedure and allowing for proceedings to be conducted in electronic form.

Article 21(1) of the Statute concerns the necessary elements of written applications. Article 21(2) of the Statute concerns the annulment of measures issued by a Community institution. The Community Patent Court, however, will not be concerned with the review of the legality of Community acts and it is therefore not necessary for this power to apply to the Community Patent Court.

Articles 22 and 23 of the Statute concern appeals against EAEC arbitration awards and preliminary rulings. Since neither of these situations can arise before the Community Patent Court, these provisions should not apply to the Community Patent Court.

Paragraph 1 of Article 24 of the Statute places an obligation of the parties to produce documents and supply information considered desirable by the Court. This obligation seems too wide for private party litigation and consequently should apply to the Community Patent Court in a narrower sense as proposed in Article 13 of Annex II to the Statute. Paragraph 2 of Article 24 of the Statute places a general obligation on Member States and the institutions to provide necessary information.

Articles 25 to 30 of the Statute relate to the taking of evidence by witnesses and expert opinions, and should apply to the Community Patent Court: Article 25 (court's choice of expert), Article 26 (hearing of witnesses), Article 27 (powers with respect to defaulting witnesses), Article 28 (oath of witnesses and experts), Article 29 (hearing of witness or expert by judicial authority of residence), Article 30 (violation of oath).

The elements of the procedure contained in Articles 31 to 38 of the Statute can also apply to the Community Patent Court: Article 31 (principle of public hearings), Article 32 (examination of experts, witnesses and parties), Article 33 (minutes of hearings), Article 34 (establishment of case list), Article 35 (secrecy of deliberations), Article 36 (contents of judgments), Article 37 (signing of judgments and reading of judgment in open court) and Article 38 (adjudication upon costs).

Article 39 of the Statute concerns the order of interim measures in a special summary procedure. This Article should apply to the Community Patent Court with the adjustments specified in Article 15 of Annex II to the Statute proposing that Article 39 would extend to evidence-protection measures and that the Rules of Procedure shall determine who is competent to make orders.

Article 40 of the Statute deals with the intervention of third parties in proceedings supporting the form and order sought by one of the parties. Such intervention should also be possible before the Community Patent Court. However, Article 40(1), (3) of the Statute confers a special right of intervention for the institutions of the Communities, the Member States and other States which are parties to the Agreement on the European Economic Area and the EFTA Surveillance Authority to intervene in proceedings without the general requirement of the establishment of an interest in the result of the case as laid in Article 40(2) of the Statute. This unconditional right of intervention is inappropriately broad to apply to litigation before the Community Patent Court which concerns day to day disputes relating to rights of private parties.

Article 41 of the Statute contains provisions on a judgment by default and should apply to the Community Patent Court together with further specifications laid down in Article 16 of Annex II to the Statute.

Article 42 of the Statute provides for the possibility of third parties to contest a judgment prejudicial to their rights where they had not been heard. Such a provision is incompatible with the principle of legal certainty in private party litigation and should thus not apply to the Community Patent Court. Once a judgment of the Community Patent Court becomes final and can no longer be subject to appeal, there should be no further possibility to reopen the case except in the very limited situation of a revision under Article 44 of the Statute and Article 17 of its Annex II in case of a fundamental procedural defect or a criminal offence. In all other cases parties must be able to rely on the terms of a final judgment. Moreover, a situation envisaged by

Article 42 hardly arises in private party litigation where judgments only produce their effects upon the parties of the case which are bound by the judgment. Situations where third parties might be indirectly affected only arise where there are rights concerned with a patent which has been declared invalid. For these cases, the Rules of Procedure will need to make appropriate provisions ensuring that, where necessary, interests of third parties are already taken into account during the proceedings leading up to the judgment. These could provide, for example, that in case of an exclusive licence, both the right holder and the licensee would need to be sued together whereas in the case of a simple contractual licence the consequences of a declaration of invalidity pronounced in proceedings against the right holder might be left to the legal relationship between right holder and licensee.

Article 43 of the Statute providing for special proceedings in which the scope of a judgment can be subject to interpretation does not seem to be appropriate for private patent litigation and should consequently not apply to the Community Patent Court. The claims granted by the Community Patent Court must be clear and of such nature that they are directly enforceable without the need of further interpretation by the Community Patent Court. Moreover, the provision could be misunderstood as reserving any kind of interpretation of the judgment to the Community Patent Court. However, in the enforcement stage which is according to Articles 244, 256 of the EC Treaty provided for by national law, the competent authority will need to apply the terms of the judgment and decide on the question if a particular embodiment of an invention falls within the scope of an injunction not to infringe a patent. Finally, if systematically used by the defendant in the course of enforcement measures, this provision applied to the Community Patent Court would carry the risk of paralysis of Community patent litigation.

Article 44 of the Statute allowing for a revision of a judgment on the grounds of discovery of new facts, which were unknown at the time judgment was given, seems incompatible with the principle of legal security in private party litigation. Consequently, adaptations to this provision are proposed in Article 17 of Annex II to the Statute limiting a revision to cases of a fundamental procedural defect or a criminal offence in the proceedings that led to the judgment.

Finally, Article 45 of the Statute on time limits and Article 46 of the Statute on a liability bar against the Communities shall apply before the Community Patent Court.

Paragraph 2 of the present Article provides in its first sentence that further and more detailed provisions on the procedure before the Community Patent Court shall be laid down in the Rules of Procedure which, according to Article 225a(5) of the EC Treaty, are established by the Community Patent Court in agreement with the Court of Justice and subject to approval by the Council. The second sentence allows the Rules of Procedure to derogate from Article 40 of the Statute on intervention in order to take account of the special features of private party Community patent litigation. A corresponding provision is contained for the Court of First Instance in Article 53(2) of the Statute.

Article 11 of Annex II to the Statute – European Patent Attorney

This Article contains adaptations to Article 19 of the Statute on legal representation before the Court for the purpose of proceedings before the Community Patent Court.

In patent litigation, questions of technology play an important part in order to reach a legally sound decision. Technical expertise is required not only on the side of the Community Patent Court contributed by assistant rapporteurs but also on the side of the parties.

The first and second paragraphs recognise this important role of technical expertise for the parties giving European Patent Attorneys the right of audience before the Community Patent Court. A reference to the list maintained by the European Patent Office for the purpose of legal representation before it will ensure appropriate and uniform standards for qualifying persons which must be met for efficient proceedings.

The third paragraph applies Article 19(5) and (6) of the Statute to European Patent Attorneys. Where a European Patent Attorney appears before the Community Patent Court, he will enjoy the necessary rights and immunities and the Community Patent Court will have the powers normally accorded to courts of law under the conditions laid down in the Rules of Procedure.

Article 12 of Annex II to the Statute - Oral and written procedure

This Article adapts Article 20 of the Statute concerning the written and oral part of the procedure to proceedings before the Community Patent Court.

It is proposed to rephrase Article 20(4) relating to the conduct of the oral hearing. The obligation of the "reading of a report" by the judge rapporteur seems too rigid for daily trial court proceedings and should be replaced by a more flexible wording referring to the "presentation of the main features of the case". Since the wording of Article 20(4) of the Statute does not allow the hearing of a European Patent Attorney as foreseen before the Community Patent Court by the proposed Article 11 of Annex II to the Statute, the concerned wording should be replaced by the more general wording "hearing of the parties". The question of who actually addresses the court does not have to be enumerated as is currently done in Article 20(4) of the Statute but would be a question of proper legal representation. Finally the hearing of witnesses and experts is replaced by the more general wording of "examination of evidence".

Article 20(5) of the Statute which deals with the Advocate General should not apply to the Community Patent Court as the Advocate General will not participate in proceedings. Instead a provision is proposed that would allow in appropriate cases to pass to a written procedure. Article 20(1) of the Statute lays down the important principle that cases are only decided upon after an oral hearing. For certain cases, an oral hearing might not be appropriate e.g. in simple cases with uncontested facts or where the defendant accepts the plaintiff's claims. For such cases there should be the possibility to deviate from the principle of an oral hearing and exceptionally decide a case in a written procedure. Therefore, the Community Patent Court should have the possibility to dispense with the oral procedure after having heard the parties and in accordance with the Rules of Procedure.

Finally an enabling clause should be introduced which allows for the employment of technical means in the written and oral procedure before the Community Patent Court. This could, for example, apply to the submission of documents in the written procedure or video conferencing at the oral stage. The specification of the parts of

the procedure which can be conducted by electronic means and the conditions for so doing should be left to the Rules of Procedure. Practice will show where, to what extent and under what conditions electronic means should be employed. Moreover technology is constantly developing and the Rules of Procedure would be best suited to keep track of the widening technological possibilities by introducing necessary changes into the procedure.

Article 13 of Annex II to the Statute – Production of evidence

Paragraph 1 of Article 24 of the Statute contains an obligation of the parties to produce documents and supply information considered desirable by the Court. This obligation seems too wide for private party litigation and consequently should apply to the Community Patent Court in a narrower sense. In principle it is the obligation of each party in private party litigation to bring forward the necessary evidence to prove its contested claim. However, under special circumstance it would seem justified to oblige the opposing party to produce evidence in favour of the other party. A reasonable balance between the interests of parties would seem to be struck as recognised by Article 43(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of 15 April 1994 where a party has presented reasonably available evidence to support its claims, and has, in substantiating those claims cited evidence under the control of the opposing party. In such a case the Community Patent Court may order that evidence be produced by the opposing party, subject to the protection of confidential information.

Article 14 of Annex II to the Statute – Interim and evidence-protection measures

This Article contains special provisions on interim and evidence protection measures.

Paragraph 1 concerns the order of interim measures. Article 243 of the EC Treaty provides that the Court may in cases before it prescribe any necessary interim measures. This provision which is also applied to the Community Patent Court by Article 2 of this Decision does not foresee the ordering of interim measures before main proceedings are pending. However, a need for such a possibility exists in patent litigation where for example a preliminary injunction to stop an infringement is necessary even before the main proceedings have commenced. Also Article 50(6) of the TRIPS Agreement presupposes the possibility to prescribe interim measures in cases where main proceedings have not yet been brought. Consequently the present Article makes use of the possibility foreseen in Article 225a(6) of the EC Treaty to derogate for judicial panels from the EC Treaty provisions relating to the Court of Justice. It is proposed that interim measures shall not be conditional upon main proceedings having already been instituted before the Community Patent Court.

Paragraph 2 provides for evidence-protection measures allowing an order to authorize a detailed description or the physical seizure of infringing goods and related documents in the event of actual or imminent infringement. The measure also known in patent law as *saisie-contrefaçon* supplements the obligation of the parties to produce evidence as laid down in Article 13 of Annex II to the Statute and has proven to be a valuable instrument for the enforcement of intellectual property rights and has therefore also been taken up in Article 8 of the Commission proposal for a directive on measures and procedures to ensure the enforcement of intellectual property rights of 30 January 2003 [COM (2003) 46 final].

Paragraph 3 provides for a claim for adequate compensation in case of interim measures or evidence-protection measures where measures are revoked. Interim measures and evidence protection measures can have a significant economic impact on the party against whom they are ordered. It must also be born in mind that such orders are made in a summary procedure under Article 39 of the Statute, Article 15 of its Annex II at a stage where the judge does not yet have all the necessary elements of fact and evidence to give final judgment. Therefore an appropriate balance between the parties' legitimate interests requires that the applicant obtaining an interim or evidence-protection measure would have the obligation to compensate the opposing party for any injury caused where a measure is not upheld. Such a claim is also provided for in Article 50(7) of the TRIPS Agreement in relation to interim measures and in Articles 8(3) and 10(5) of the Commission proposal for a directive on measures and procedures to ensure the enforcement of intellectual property rights of 30 January 2003 for both measures concerned.

Article 15 of Annex II to the Statute – Special orders

This Article contains adjustments to Article 39 of the Statute on interim measures and measures relating to the suspension of enforcement. Article 39 of the Statute provides a basis for a summary procedure for these cases to be laid down in the Rules of Procedure which may differ from the rules laid down in the Statute. This provision takes account of the special situation and urgency of the measures concerned justifying, where appropriate, deviating from the rules governing main proceedings. For the purpose of proceedings before the Community Patent Court, evidence-protection measures, provided for under Article 14 of Annex II to the Statute should, with a view to their nature and in particular their urgency, qualify for those special measures to be ordered in a summary procedure.

A second amendment for the purpose of proceedings before the Community Patent Court is made with a view to the person entitled to make the orders concerned. Article 39 of the Statute attributes this competence to the president of the Court. This approach does not seem to leave the appropriate degree of flexibility for patent litigation before the Community Patent Court. The question whether the enforcement of a judgment should be suspended is closely linked to the individual case and might consequently be handled more efficiently by the chamber that made the judgment or one of its judges. Interim and evidence-protection measures will also be quite a common procedure in patent litigation and might therefore be better handled by the chamber which is competent for main proceedings or one of its judges. To refer the question who is competent to make orders in a summary procedure to the Rules of Procedure leaves the necessary flexibility to provide for the most suitable solution.

Article 16 of Annex II to the Statute – Judgment by default

This Article makes amendments to Article 41 of the Statute on a judgment by default.

Article 41 of the Statute foresees the possibility for a judgment by default where a defending party, after having been duly summoned, fails to file written submissions in defence. For private party patent litigation this should not be the only situation in which the Community Patent Court should be able to decide the case by a judgment by default. A judgment by default should also be possible where the defendant filed submission in the written part of the procedure but later, after having duly been

summoned, fails to appear at the oral hearing to defend himself. In this situation the Community Patent Court should be able to make a judgment by default which would end the case unless the defendant according to the second sentence of Article 41 of the Statute lodges an objection against the judgment within one month of its notification. Finally, a judgment by default should also be possibly against the plaintiff who, after having been duly summoned, fails to appear at the oral hearing.

Article 17 of Annex II to the Statute – Revision of a judgment

Article 44(1) of the Statute contains a provisions on the revision of a judgment unsuitable for private party litigation before the Community Patent Court. Article 44 allows the revision of a final judgment on the grounds that a decisive factor was unknown at the time the judgment was given. With a view to legal certainty, such grounds are insufficient to reopen a case in private party litigation. Parties must be able to rely on a judgment of the Community Patent Court where that judgment is no longer subject to an appeal even in a case where a decisive fact was unknown at the time of judgment. The reopening of cases must remain very exceptional and should be limited to the discovery of a decisive factor which was unknown to the party claiming the revision and only on the grounds of a fundamental procedural defect or an act which was held by a final court decision to constitute a criminal offence. Only in these very exceptional cases is it justified that a final judgment may legitimately be challenged.

Article 18 of Annex II to the Statute – Settlement

A dispute between the parties may not only be resolved by a final decision of the Community Patent Court in a judgment but also by a settlement between the parties before the Community Patent Court. The present Article lays out the legal basis for an in court settlement which can be concluded by the parties at any time in the course of proceedings. Such a settlement which is confirmed by the Community Patent Court has two important effects: it will terminate the proceedings before the Community Patent Court and it serves as an enforceable title under Articles 244, 256 of the EC Treaty in case a party does not comply with the terms of the settlement. The second sentence clarifies that a settlement cannot affect the validity of a Community patent which is exclusively governed by law and not subject to party autonomy. Of course, parties remain free to conclude a settlement including an agreement to surrender or voluntarily limit the patent.

Article 19 of Annex II to the Statute – Wrongly addressed Community court

Article 54(1) of the Statute concerns the obligation of the registrars of the Court of Justice and the Court of First Instance to forward documents addressed to one of them but accidentally lodged with the other. Article 54(2) of the Statute governs the situation that either the Court of Justice or the Court of First Instance is seised whereas the other court is the competent court. In this case the seised court can refer the action with binding effect. Both provisions shall apply *mutatis mutandis* also in relation to the Community Patent Court.

Article 54(3) of the Statute providing for the possibility to stay proceedings and wait for the ruling of the Court of Justice necessitates some changes and is separately treated in the following Article 20 of Annex II to the Statute.

Article 20 of Annex II to the Statute – Stay of proceedings

This Article contains rules on the stay of proceedings.

Paragraph 1 covers like Article 54(3) of the Statute for the Court of First Instance, the situations in which the Community Patent Court may, after hearing the parties, stay proceedings in order to wait for a decision of another Community court. The Community Patent Court should have the possibility to stay proceedings where there is a sufficient link between the questions at issue before it and those raised in a case before the Court of Justice or the Court of First Instance. A stay of proceedings can be considered where the Court of Justice is seised of a case raising the same issue of interpretation either by way of a preliminary ruling or in the context of a review in accordance with Article 225(2) of the EC Treaty. A stay of proceedings could further be considered where the Court of First Instance has to decide on the validity of the same Community patent that is also subject to proceedings before the Community Patent Court. Under these circumstances a stay of proceedings should be considered with a view to a uniformity of jurisprudence and efficient case handling.

Paragraph 2 provides for the possibility of the Community Patent Court to stay proceedings where it is seised of an invalidity action and where opposition proceedings are ongoing before the European Patent Office. No automatic stay of proceedings is foreseen. It is left to the Community Patent Court to decide this question in view of the circumstances of the individual case. The Community Patent Court may, after hearing the parties, stay proceedings until such time as a final decision is issued on the opposition. Such a final decision, i.e. a decision that is no longer subject to further legal remedy before the European Patent Office, can be issued by the Opposition Division or where an appeal is filed by the Board of Appeal of the European Patent Office.

Article 21 of Annex II to the Statute – Communication of decisions

This Article applies Article 55 of the Statute determining the decisions to be notified and their recipients with slight amendments to the Community Patent Court. The registrar shall notify final decision, decisions disposing of substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility to all parties. Member States and the institutions of the Communities which have neither intervened nor been a party to the case shall only be informally sent the final decision of the Community Patent Court for information purposes. A formal notification of the full range of decisions seems inadequate.

Article 22 of Annex II to the Statute – Enforcement of decisions of the Community Patent Court

This Article concerns the enforcement of decisions of the Community Patent Court.

Paragraph 1 lays down two principles governing the enforceability of decisions of the Community Patent Court. Decisions of the Community Patent Court should always be enforceable if they are no longer subject to appeal. Enforcement commences where the decision of the Community Patent Court is *res judicata*. Consequently the appeal against a decision of the Community Patent Court preventing the *res judicata* effect should have a suspensory effect for the enforceability of the decision. However, a party that has won a case at first instance

can have a legitimate interest to start enforcing the terms of a decision even where the opposing party appeals the decision. To postpone any type of enforcement until after a decision on the appeal might dramatically reduce the value of proceedings before the Community Patent Court since the effective remedy might only be realised at a point in time where the party can no longer gather the economic benefit that the proceedings were meant to ensure. Moreover, it has to be born in mind that the Community Patent Court will have decided the case after a thorough examination. On the other hand if the enforcement is allowed prior to the decision reaching *res judicata*, safeguards are necessary to adequately protect a party against whom the enforcement is directed from damages if the decision is not finally upheld on appeal. The present Article strikes a balance between these interests of parties involved in allowing the Community Patent Court to declare its decisions enforceable while, if necessary, subjecting enforcement to the provision of security. Where the Community Patent Court subjects the enforcement to the provision of security, the defendant who successfully appeals a first instance decision which was enforced against him can always recover e.g. a paid sum if necessary from the security even where the opposing party in the meantime has fallen into insolvency. The kinds of situations in which a security would not need to be provided must be developed by the Community Patent Court. This could e.g. be the case for a judgment by default where the party against whom the decision is directed, though duly summoned, has not entered an appearance or where a party has accepted a claim.

Paragraph 2 simplifies the mechanism for the enforcement of decisions of the Community Patent Court. According to Article 225a(6) of the EC Treaty, the enforcement of the decisions of the Community Patent Court is governed by Articles 244, 256 of the EC Treaty unless the decision establishing the Community Patent Court provides otherwise. Under Article 256 of the EC Treaty, enforcement is governed by the rules of civil procedure in force in the State in the territory of which it is carried out. In order to be able to start such enforcement procedures, the national authority designated for this purpose by the Member State needs to append to the decision an order for its enforcement. For doing so, the national authority is entitled only to verify the authenticity of the decision. Even though the role of the national authority in this context is already limited to a formality check of the authenticity of the decision to be enforced, this would seem to be neither necessary nor suitable for the enforcement of decisions of the Community Patent Court. The Community Patent Court would itself be best placed to certify the authenticity of the enforceable decision. A special procedure to obtain an order of enforcement from a national authority would unduly prolong enforcement and would in particular present problems for the enforcement of interim measures which by nature require rapid actions, sometimes within hours. It is therefore proposed that the Community Patent Court itself would append the order of enforcement to its decision which a party could then directly enforce according to the national civil procedure law concerned. Paragraph 2 also allows the enforcement of decisions against Member States. Member States may, like any other person or legal entity, be a party to proceedings before the Community Patent Court. They may obtain a Community patent and they may be subject to infringement proceedings brought by other right holders. Consequently decisions of the Community Patent Court must be enforceable against them.

Paragraph 3 contains a further specificity concerning the enforcement of decisions of the Community Patent Court. Decisions ordering the defendant to act in a certain way or to abstain from certain acts are enforceable through an order of a penalty payment in case of non-compliance with the terms of a decision. The Community Patent Court itself should be able to order such a penalty payment for non-compliance with its decisions or orders. If for example the Community Patent Court orders a defendant to stop infringement, it should at the same time be able to make an order whereby the non-compliance would be sanctioned by an obligation to pay a certain sum of money. If such an order necessitated a separate application to the courts of Member States, valuable time could be lost in ensuring that the decision of the Community Patent Court is respected. The Community Patent Court may order a single amount to be paid in case of non-compliance with the court decision. It may also order the payment of a recurrent fine where the fines are dependant on circumstances to be specified by the court such as e.g. each case of non-compliance with the court decision or the non compliance within a certain time span. The individual fine must be proportionate with a view to the importance of the order to be enforced and may in any case not exceed an amount of EUR 50 000.

Article 23 of Annex II to the Statute – Court fees

This Article introduces Court fees for proceedings before the Community Patent Court.

Paragraph 1 contains the principle that appropriate court fees will be charged for proceedings before the Community Patent Court. While proceedings before the Court of Justice and the Court of First Instance are free of charge, it seems appropriate for Community patent litigation that parties adequately contribute to the costs incurred by the Community Patent Court. Before the Community Patent Court, the parties will litigate disputes about their subjective private rights. The costs of such a dispute between private parties should not entirely be left to be paid for by the public.

Paragraph 2 concerns the adoption of a schedule of fees which would provide for the individual fees as well as the amount to be charged. The schedule of fees should be adopted by the Council by qualified majority on a proposal from the Commission and after consulting the European Parliament and the Court of Justice or at the request of the Court of Justice and after consulting the European Parliament and the Commission. The amount to be charged would need to strike the right balance between the principle of fair access to justice and an adequate contribution of the parties for the services rendered by the Community Patent Court. This means on the one hand that fees must not be of a kind that they create a prohibiting effect rendering the enforcement of Community patents unduly costly. Also for defendants, in particular SMEs, the risk of being sued before the Community Patent Court must not present a financial threat inducing them to rather give up a position than having a dispute decided. On the other hand, parties should shoulder a fair share of the costs that their litigation creates. In addition to a balanced schedule of fees, the Rules of Procedure would need to provide for legal aid for parties unable to meet the costs as is the case in Article 76 of the Rules of Procedure of the Court of Justice and Articles 94 ff. of the Rules of Procedure of the Court of First Instance.

Paragraph 3 specifies that fees shall be paid in advance and that a party which has not paid a prescribed court fee may be excluded from further participation in the proceedings. Parties would pay the due amount according to the schedule of fees

before the Community Patent Court takes action. This shall ensure that the Community Patent Court will receive its fees without spending unnecessary resources on the collection of fees including the world wide enforcement against parties that are not paying their fees. The Community Patent Court will adjudicate upon costs in accordance with Article 38 of the Statute and the relevant provisions of the Rules of Procedure which would lay down detailed provisions on which party ultimately has to bear the costs as is the case for the Court of Justice in Articles 69 ff. and the Court of First Instance in Articles 87 ff of their respective Rules of Procedure. A party winning a case which had advanced a fee would thus be able to reclaim the fees from the losing party. Finally, it should be noted that the Community Patent Court "may" exclude parties from further proceedings. This allows the Community Patent Court to develop a practice under which circumstances fees exceptionally need not be paid in advance as may be appropriate in the case of urgent interim measures leaving no time for prior payment of fees.

Article 24 of Annex II to the Statute –Hearings in Member States

This Article clarifies that the Community Patent Court may hold hearings in Member States other than that in which its seat is located as agreed upon by the Council in its common political approach of 3 March 2003. It is for the Community Patent Court to decide in the individual case on the appropriateness of such hearings.

Article 25 of Annex II to the Statute – Language of proceedings

This Article lays down the principles governing the language of proceedings before the Community Patent Court.

Paragraph 1 provides that the Community Patent Court will conduct proceedings in the official EU 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 EU languages. This principle which was recognised in the common political approach of the Council of 3 March 2003 shall ensure that an EU domiciled defendant who is confronted with claims of a plaintiff can defend himself in a language he knows or can be expected to know. Since the domicile of the defendant can regularly be determined with no great difficulty, the chosen rule is very clear contributing to legal certainty for the plaintiff. Where, however, the defendant is not domiciled in a Member State, the Community Patent Court shall conduct proceedings in the official EU language in which the patent was granted. This provision contains a clear rule for all other possible situations in which the defendant has his domicile in a third State.

Paragraph 2 provides as agreed upon by the Council in its 3 March 2003 common political approach that at the request of the parties and with the consent of the Community Patent Court, any official EU language can be chosen as language of proceedings to take account of their respective situations. Such an agreement of the parties would be likely e.g. where the defendant though domiciled in a different Member State originates from the same Member State as the plaintiff or where in particular companies communicate in the same international business language which the defendant would prefer to use in preference to the language of his domicile. Under normal circumstances, the Community Patent Court would consent to the joint request of the parties to change from one language of proceedings to another. However, for exceptional cases, the Community Patent Court should have

the power to reject the request e.g. where the request is made untimely causing difficulty to the Community Patent Court such as a corresponding request close to or at an oral hearing for which interpretation cannot be provided.

Paragraph 3 clarifies that the Community Patent Court may hear, in accordance with the Rules of Procedure, the parties in person, witnesses and experts in any language. The Community Patent Court must be allowed, where it considers necessary, to question any such person even where that person does not speak any of the official EU languages. In such a case, the registrar shall provide for interpretation into the language of proceedings and at the request of any party into the language used by that party at the oral hearing in accordance with the Rules of Procedure.

Paragraph 4 finally provides for the possibility of the Community Patent Court to allow the submissions of accompanying documents drawn up in a language other than the language of proceedings avoiding unnecessary and costly translations. However, the Community Patent Court may at any time order that such a translation be produced.

Article 26 of Annex II to the Statute – Appeal against decisions of the Community Patent Court

This Article contains provisions on the possibility to appeal decisions of the Community Patent Court.

Paragraph 1 lays down, that final decisions of the Community Patent Court may be appealed within two month of the notification of the decision. This provision corresponds to Article 56(1) of the Statute governing the appeal against decisions of the Court of First Instance. The additional wording of that Article relating to an appeal against decisions "disposing of substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility" has not been retained for the Community Patent Court. A decision disposing of substantive issues in part would be a judgment of the Community Patent Court and could thus be appealed against. The same can be said for a decision declining competence or declaring an action inadmissible.

Paragraph 2 contains a specific provision on the possibility to appeal against interim measures made pursuant to Article 243 of the EC Treaty, orders for the suspension of enforcement made under Article 256(4) of the EC Treaty and evidence protection measures provided for in Article 14 of Annex II to the Statute. An appeal against such orders may be brought within two month from their notification. A corresponding provision for the Court of First Instance is contained in Article 57(2) of the Statute. In the situations referred to by Article 50(2) of the TRIPS Agreement where such an order has been made without the prior hearing of the party adversely affected by the measures, the legal remedy shall not consist of a direct appeal. Instead that party may, within two months of the notification, lodge an objection with the Community Patent Court which then shall, with due consideration of the arguments brought forward by the party adversely affected, review and modify, revoke or confirm the measures. That decision of the Community Patent Court would then be subject to an appeal. This procedure ensures that an appeal is reserved as a legal remedy against a considered decision of the Community Patent Court handed down after an *inter partes* procedure.

Paragraph 3 provides for an appeal against a decision dismissing an application to intervene within two weeks from the notification of the decision dismissing the application (see also for the Court of First Instance Article 57(1) of the Statute).

Paragraph 4 concerns the possibility of an appeal against other decisions taken by the Community Patent Court in the course of proceedings. The possibility to appeal against every decision disposing of procedural issues seems too wide and would risk paralysing the proceedings. Such appeals should only be possible where explicitly allowed in the Rules of Procedure. Unless otherwise provided for in the Rules of Procedure, any mistake in the procedure would have to be dealt with in the framework of the appeal against the judgment itself ensuring swift first instance proceedings while leaving sufficient safeguards for the parties. An isolated appeal against decisions of a procedural nature could be considered where an immediate appeal is justified by the importance of the disputed decision, for example in the case of a decision of the Community Patent Court on a challenge for bias.

Paragraph 5 clarifies that an appeal provided for in paragraphs 1 to 4 of this Article may only be brought by the party which has been unsuccessful, in whole or part, in its submissions (see also for the Court of First Instance Article 56(2) of the Statute). The procedure referred to in paragraphs 2 and 3 shall be conducted under the summary procedure provided for in Article 39 of the Statute (see also for the Court of First Instance Article 57(3) of the Statute).

Article 27 of Annex II to the Statute – Grounds for appeal

This Article contains the grounds for appeal. Article 225a(3) of the EC Treaty restricts the appeal against decision of a panel set up under that Article to points of law unless otherwise provided for in the decision establishing the panel.

Paragraph 1 provides for the Community Patent Court that an appeal may be based on points of law and matters of fact.

Paragraph 2 specifies on what grounds an appeal on points of law may lie. It could lie on the grounds of lack of competence of the Community Patent Court, a breach of procedure which adversely affects the interests of the appellant or the infringement of Community law by the Community Patent Court. This same list is contained in Article 58(1) of the Statute for an appeal on points of law against decisions of the Court of First Instance to the Court of Justice.

Paragraph 3 specifies on what grounds an appeal on matters of fact shall lie. While an appeal in private party litigation should not be restricted to points of law but should also allow parties to raise matters of fact, a full retrial of a case in second instance should be excluded. A full retrial would reduce the value of the first instance proceedings before the Community Patent Court and risk carrying the trial into the appeal instance before the Court of First Instance which would then risk that it would not be able to properly fulfil its function as an appeal instance, namely to concentrate on specific issues singled out by the parties for more detailed review at a higher level. To this end, an appeal on matters of fact may lie on the grounds of a re-evaluation of facts and evidence submitted to the Community Patent Court. On appeal, the Court of First Instance would be free to make its proper evaluation of the facts brought forward by the parties at first instance before the Community Patent Court. Also where there are contested facts, the Court of First Instance could make

its own evaluation of the evidence produced at first instance. However, the possibility for the parties to submit new facts or evidence for the first time during the appeal proceedings would be restricted to those situations where their submission by the party concerned could not reasonably have been expected during the proceedings before the Community Patent Court. This could, for example, be the case if a fact was unknown to a party and could, while applying due diligence, not have been known by that party or if the Community Patent Court took a view of the case that suggested known facts to be irrelevant. It is left to the Court of First Instance to establish through jurisprudence under what circumstances the submission of facts and evidence could not have been reasonably expected at first instance leaving the necessary flexibility to take account of all the possible situations that may occur in practise.

Paragraph 4 provides that no appeal shall lie regarding only the amount of the costs or the party ordered to pay them as does Article 58(2) of the Statute for appeals against decisions of the Court of First Instance.

Article 28 of Annex II to the Statute – Decisions by the Court of First Instance and referral back to the Community Patent Court

This Article concerns the decision by the Court of First Instance and a possible referral of the case back to the Community Patent Court.

Paragraph 1 provides that where the appeal is well founded, the Court of First Instance shall quash the decision of the Community Patent Court and give final judgment. Only in exceptional circumstances may the Court of First Instance refer the case back to the Community Patent Court for judgment. It seems essential for efficient and swift patent proceedings to avoid unnecessary referrals of a case back and forth between instances. Unlike in Article 61 of the Statute, which addresses the appeal against decisions of the Court of First Instance to the Court of Justice on points of law stating that the Court of Justice may give final judgment where the state of proceedings so permits or otherwise refer the case back to the Court of First Instance, the present Article states the rule that the Court of First Instance in patent appeal proceedings shall decide the case. This follows from the nature of patent appeal proceedings which can also take factual elements into consideration. The Court of First Instance can establish those facts that are missing in its view and then give final judgment whereas the Court of Justice can only use the established facts of the first instance which makes it necessary to refer back a case if further facts need to be established.

However, there are cases where a referral back to the Community Court would be appropriate. A referral back would seem appropriate where the case was not heard in substance before the Community Patent Court and a direct decision of the Court of First Instance would take away the entire first instance for the parties. Examples for such a referral back to the Community Patent Court would be cases where an appeal was brought forward against a judgment declining competence or deciding e.g. only on the liability as such but not the amount of damages. Another situation where a referral back could be considered is where the Community Patent Court committed a fundamental procedural mistake that had an effect on the judgment which could be the case e.g. with a violation of the right to be heard. In such a case the first instance proceedings might not be considered to be an effective legal remedy.

Paragraph 2 provides that the Community Patent Court shall be bound by the decision of the Court of First Instance on points of law where a case is referred back to it (see for the Court of First Instance Article 61(2) of the Statute).

Article 29 of Annex II to the Statute – Rules of Procedure

This Article provides that the Rules of Procedure of the Community Patent Court shall contain any provision necessary for applying and, where required, supplementing Annex II to the Statute. A corresponding provision for the Court of Justice and the Court of First Instance is contained on Article 63 of the Statute.

Chapter II – Appeal proceedings before the Court of First Instance

Chapter II contains amendments to the Statute of the Court of Justice with respect to the function of the Court of First Instance as Community Patent Appeal Court providing in particular for a specialised patent appeal chamber within the Court of First Instance and special provisions governing the procedure before it.

Article 5 – Number of Judges of the Court of First Instance

This Article proposes to raise the number of judges of the Court of First Instance by three judges from 15 to 18. Community patent cases would be heard by a specialised appeal chamber which should be set up within the Court of First Instance in accordance with Article 61a of the Statute as amended by Article 6 of this Decision. The three judges forming the patent appeal chamber should be additional judges with a view to the required professional profile of candidates and the increased case load of the Court of First Instance caused by Community patent appeal proceedings.

Article 6 –Community patent appeal proceedings

This Article inserts into the Statute of the Court of Justice an Article 61a containing special provisions concerning Community patent appeal proceedings before the Court of First Instance.

Paragraph 1 of the proposed Article 61a of the Statute as amended provides for a special chamber to be set up within the Court of First Instance for the purpose of hearing appeals against decisions of the Community Patent Court composed of three judges. Such a specialised chamber seems appropriate with a view to the special type of litigation before it. Litigation concerning the Community Patent is private party litigation in a field that requires a particular experience. It would be difficult to build up and maintain the necessary experience if such appeal proceedings were heard by different chambers. Instead, proceedings should be handled by only one chamber, thus concentrating the expertise within the Court of First Instance.

Paragraph 2 of Article 61a of the Statute as amended proposes that the judges sitting in the patent appeal chamber of the Court of First Instance should be judges having a high level of legal expertise in patent law. This provision is in line with the general approach followed in the establishment of a Community patent jurisdiction i.e. to create a specialised court system for litigation on the Community patent. One of the central demands to come forward with a Community patent system has been to provide for an increased legal security in the Union by a centralised and specialised jurisdiction with experienced judges. As this seems vital for the success of the entire

system, judges sitting at first instance as well as those sitting on appeal should have expertise in patent law. The present provision does not alter in any way Article 224 of the EC Treaty relating to the appointment of judges of the Court of First Instance. That Article, of course, also applies to the appointment of the judges meant to form the patent appeal chamber. With the present provision, the Council would only agree to present candidates and appoint judges with a particular professional profile.

The reference to Article 17(5) and Article 50 of the Statute clarifies that the establishment of a patent appeal chamber within the Court of First Instance is not meant to separate this chamber from the rest of the court. It shall merely be ensured that Community patent appeal cases in the standard composition are heard by specialised judges with particular experience in the field of law concerned. However, any Member of the Court of First Instance may sit in the patent appeal chamber where an additional judge needs to sit. This would be the case where the patent appeal chamber sits in accordance with Article 50 of the Statute with more than three judges which could be appropriate e.g. for cases that would reach beyond patent law and concern the unity and consistency of Community law. Also in the event that one judge of the patent appeal chamber is prevented from attending, a judge of another chamber can be called upon to sit in accordance with Article 17(5) of the Statute. Finally nothing should prevent that, where the caseload so permits, the patent appeal chamber is attributed other cases than Community patent cases such as Community trade mark or design cases in accordance with Article 50(2) of the Statute.

Paragraph 3 of Article 61a of the Statute as amended concerns the appeal procedure before the patent chamber of the Court of First Instance. The object of this provision is to ensure that the Statute provisions governing the procedure for Community patent litigation are the same for the complete trial of first and second instance. Where special procedural provisions are necessary in view of the special character of Community patent litigation i.e. private party litigation these should apply in a uniform manner for the Community Patent Court and the Court of First Instance on appeal. Article 53 of the Statute provides for the Court of First Instance that the procedure before it shall be governed by Title III of the Statute. The same will be valid for the Community Patent Court according to Article 10 of Annex II to the Statute. The special provisions amending Title III of the Statute with regard to the procedure at first Instance before the Community Patent Court are also made applicable to the procedure before the patent appeal chamber of the Court of First Instance. The following provisions of Annex II to the Statute are concerned: Assistant rapporteur (Article 7), provisions from Title III of the Statute that do not apply to patent litigation (Article 10), the role of European Patent Attorneys in the representation of parties (Article 11), the oral and written procedure (Article 12), the production of evidence (Article 13), interim and evidence-protection measures (Article 14), special orders in a summary procedure (Article 15), judgment by default (Article 16), the revision of a judgment (Article 17), settlement (Article 18), the obligation of all Community Courts to forward wrongly addressed documents and refer actions to the competent court (Article 19), the stay of proceedings (Article 20), the transmission of decisions (Article 21), the enforcement of decisions (Article 22) and Court fees (Article 23). For details, see the provisions referred to by the present Article.

The second sentence of Paragraph 3 provides that Member States and the institutions of the European Community shall have the right to intervene in Community patent cases before the Court of First Instance in accordance with Article 40(1) of the

Statute. This possibility is excluded by Article 10 of Annex II to the Statute for proceedings at first instance before the Community Patent Court. While such intervention at the first instance seems too broad for the entirety of cases at first instance, such a possibility seems appropriate for the second instance allowing Member States and the institutions of the European Community to contribute to the development of legal questions of Community patent law.

Paragraph 4 of Article 61a of the Statute as amended provides for the language of appeal proceedings which shall be the language of proceedings in which the case was conducted before the Community Patent Court. This ensures a uniform treatment of the entire case, both at first and second instance. Applications, decisions, written contributions, testimonies of witnesses, expert opinions etc. can be directly considered in second instance without further translations. Also parties might have disposed for their representation at first instance with regard to the language of proceedings and might wish that their representative who is familiar with the case also represents them before the Court of First Instance on appeal. A reference to the provision contained in Article 25(1) of Annex II to the Statute providing for the language of the Member State where the defendant is domiciled as language of proceedings before the Community Patent Court could not be made as the plaintiff of first instance might become the defendant in appeal. However, the further principles laid down in Article 25(2) to (4) of Annex II to the Statute concerning an agreement of the parties on the language of proceedings, the hearing of parties in person, witnesses and experts in a language other than the language of proceeding and the possibility to submit accompanying documents in a language other than the language of proceedings shall also apply to the appeal proceedings.

Chapter III – Final provisions

Chapter III contains final provisions concerning transitional provisions and the entry into force of this Decision.

Article 7 – Transitional provisions

Paragraph 1 of this Article concerns the appointment of the president of the Community Patent Court providing that the first president of the Community Patent Court shall be appointed in the same manner as its members unless the Council decides that also the first president shall be elected by the judges according to Article 4 of Annex II to the Statute. A parallel approach had also been taken for the Court of First Instance in Article 11(1) of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing the Court of First Instance.

Paragraph 2 concerns the newly appointed first judges of the Community Patent Court. In order to establish a cycle where the Community Patent Court is only partially re-staffed at any one time, as foreseen by Article 2 of Annex II to the Statute, some members of the Community Patent Court will need to have a shorter initial term of office. The president of the Council shall proceed to choose by lot the judges whose terms of office are to expire at the end of the first three years which had also been foreseen for the Court of First Instance in Article 12 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing the Court of First Instance.

Article 8 – Entry into force

This Article contains provisions for the entry into force of this Decision. The entry into force should depend on the adoption of the Council Decision taken pursuant to Article 229a of the EC Treaty conferring jurisdiction on the Court of Justice relating to the Community patent and its acceptance by all Member States in accordance with their constitutional requirements. After the corresponding notification by Member States, the necessary preparations for the establishment of the Community Patent Court and the setting up of the patent appeal chamber of the Court of First Instance can commence.

However, Article 1 of Annex II to the Statute containing the provision attributing jurisdiction within the Court of Justice to the Community Patent Court should only enter into force on the date on which the Council Decision conferring jurisdiction on the Court of Justice enters into force which in turn is dependent on the publication of a notice by the president of the Court of Justice that the Community Patent Court and the appeal chamber within the Court of First Instance have been constituted in accordance with law. This ensures that the conferral of jurisdiction on the Court of Justice and the attribution of jurisdiction to the Community Patent Court take effect at the same point in time marking the end of the transitional period and the beginning of the Community jurisdiction.

Proposal for a

COUNCIL DECISION

**establishing the Community Patent Court
and concerning appeals before the Court of First Instance**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 225a, 245 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Parliament²,

Having regard to the opinion of the Court of Justice³,

Having regard to the opinion of the European Economic and Social Committee⁴,

Whereas:

- (1) The European Council held in Lisbon in March 2000 called for the necessary steps to increase the competitiveness of the Union in a modern, knowledge-based economy underlining the importance of effective Community-wide patent protection.
- (2) The system of patent protection has been characterised by patents granted either by a national patent office in a Member State or by the European Patent Office with effect in a Member State and by enforcement of those patents before the national courts of the Member State concerned.
- (3) Innovative European industry relies on effective Community-wide legal protection for its inventions. The creation of a Community patent system comprising a unitary Community patent title and the possibility of enforcing such a right before a Community jurisdiction to be established at the latest by 2010 after a transitional period in which national courts retain competence will provide the missing elements completing the system of patent protection in the Union.
- (4) Council Regulation (EC) No .../2003⁵ creates a Community patent title. Holders of such a title will enjoy Community wide protection of an invention according to the uniform standards of the regulation.

¹ OJ C
² OJ C
³ OJ C
⁴ OJ C
⁵ OJ L

- (5) By Decision 2003/.../EC⁶, the Council confers jurisdiction on the Court of Justice in certain disputes relating to the Community patent, recommending those provisions to the Member States for adoption in accordance with their respective constitutional requirements.
- (6) The second paragraph of Article 220 of the Treaty provides that judicial panels may be attached to the Court of First Instance under the conditions laid down in Article 225a thereof, in order to exercise, in certain specific areas, the judicial competence laid down in the Treaty.
- (7) The jurisdiction conferred on the Court of Justice under Article 229a of the Treaty in disputes relating to the Community patent should be exercised at first instance by a judicial panel established on the basis of Article 225a of the Treaty, to be called "Community Patent Court".
- (8) Article 225(2) of the Treaty provides that the Court of First Instance has jurisdiction to hear and determine actions and proceedings brought against decisions of the judicial panels set up under Article 225a of the EC Treaty. For this purpose a specialised patent appeal chamber should be created within the Court of First Instance to hear appeals against decisions of the Community Patent Court. Decisions made by the Court of First Instance on appeal against decisions of the Community Patent Court are according to Article 225(2) of the Treaty, exceptionally, subject to review by the Court of Justice where there is a serious risk to the unity or consistency of Community law.
- (9) In order to take account of the special nature of private-party Community patent litigation and to ensure a uniform procedure at both instances, amendments to the procedural rules contained in the Protocol on the Statute of the Court of Justice are necessary, both for the procedure at first instance before the Community Patent Court and on appeal before the Court of First Instance.
- (10) A centralised and specialised Community court system, holding exclusive jurisdiction for Community patent disputes and composed of a first-instance Community Patent Court and an appeal chamber within the Court of First Instance, should ensure expertise and decisions of the highest quality. It should guarantee efficient patent proceedings for the whole Community, the establishment of a common body of case-law and the uniform application of Community patent law,

⁶ OJ L

HAS DECIDED AS FOLLOWS:

Chapter I

Community Patent Court

Article 1

Establishment

A judicial panel, to be called "Community Patent Court ", shall be attached to the Court of First Instance of the European Communities.

Its seat shall be at the Court of First Instance.

Article 2

Application of Treaty provisions

Save as hereinafter provided for in this Chapter, Articles 241, 243, 244 and 256 of the Treaty shall apply to the Community Patent Court.

Article 3

Statute provisions for judicial panels

The following Title VI is added to the Protocol on the Statute of the Court of Justice:

"Title VI

JUDICIAL PANELS

Article 65

The provisions relating to the jurisdiction, the composition, and the organisation of judicial panels established under Article 225a of the Treaty, and the procedure before them, shall be as laid down in the annexes to this Statute."

Article 4

Annex to the Protocol on the Statute of the Court of Justice

The following Annex [II] is added to the Protocol on the Statute of the Court of Justice:

"Annex [II]

Community Patent Court

Article 1

The Community Patent Court shall have, at first instance, exclusive jurisdiction in disputes relating to the application of Council Regulation (EC) No.../... [of ... on the Community patent] and Council Regulation (EC) No .../... [of ... on the Community supplementary protection certificate] to the extent that jurisdiction is conferred on the Court of Justice pursuant to Article 229a of the EC Treaty.

Article 2

The Community Patent Court shall consist of seven Judges, who shall be appointed for a period of six years. The membership shall be partially renewed every three years, replacing four and three members alternately. Retiring members shall be eligible for reappointment.

The Judges shall be chosen from candidates presented by the Member States having an established high level of legal expertise in patent law. They shall be appointed by the Council on the basis of their expertise after consultation of a committee to be set up in accordance with Article 3.

Article 3

An advisory committee to be set up for this purpose shall, prior to the appointment decision of the Council, give an opinion on the adequacy of the profile of candidates with a view to the function of a Judge at the Community Patent Court. It may attach to its opinion a list of candidates possessing the most appropriate high level of legal experience. Such a list shall comprise a number of candidates twice the number of Judges to be appointed by the Council.

The advisory committee shall be composed of seven members chosen from among former members of the Court of Justice, the Court of First Instance, the Community Patent Court or lawyers of recognised competence. The appointment of members of the advisory committee and its operating rules shall be decided by the Council, acting by a qualified majority, on a proposal from the President of the Court of Justice.

Article 4

The Judges shall elect the President of the Community Patent Court from among their number for a term of three years. He may be re-elected.

Article 5

Articles 2 to 7, Articles 13, 14 and 15, the first, second and fifth paragraphs of Article 17, and Article 18 of the Statute shall apply to the Community Patent Court and its members.

The oath referred to in Article 2 of the Statute shall be taken before the Court of Justice and the decisions referred to in Articles 3, 4 and 6 of the Statute shall be adopted by that Court after hearing the Court of First Instance and the Community Patent Court.

Article 6

The Community Patent Court shall appoint its Registrar and lay down the rules governing his service. The fourth paragraph of Article 3 of the Statute and Articles 10, 11 and 14 thereof shall apply to the Registrar of the Community Patent Court *mutatis mutandis*.

Article 7

Technical experts shall assist the Judges throughout the handling of the case as Assistant Rapporteurs. The fourth paragraph of Article 3 and Article 13 of the Statute shall apply.

Assistant Rapporteurs must have a high level of expertise in the relevant technical field. They shall be appointed for a period of six years on a proposal from the Court of Justice. Retiring Assistant Rapporteurs shall be eligible for reappointment.

Assistant Rapporteurs are required, under the conditions laid down in the Rules of Procedure, to participate in the preparation, the hearing and the deliberation of cases. They shall have the right to put questions to the parties. They shall not have a right to vote.

Article 8

The Community Patent Court shall sit in chambers of three Judges.

In certain cases governed by the Rules of Procedure, the Community Patent Court may sit in an enlarged configuration, or be constituted by a single Judge. They shall contain provisions concerning the quorum.

The President of the Community Patent Court shall preside over one of the chambers of three Judges. In addition, he shall preside where the Community Patent Court sits in an enlarged configuration. The President of the remaining chambers shall be elected by the Judges from among their number for a term of three years. They may be re-elected.

The composition of the chambers and the assignment of cases to them shall be governed by the Rules of Procedure.

Article 9

The President of the Court of Justice or, where appropriate, the President of the Court of First Instance shall, acting by common accord with the President of the Community Patent Court, determine the conditions under which officials and other servants attached to the Court of Justice shall render their services to the Community Patent Court to enable it to function. Certain officials or other servants shall be responsible to the Registrar of the Community Patent Court under the authority of the President of the Community Patent Court.

Article 10

The procedure before the Community Patent Court shall be governed by Title III of the Statute with the exception of the second paragraph of Article 21, Articles 22 and 23, the first and third paragraphs of Article 40, Article 42 and Article 43 thereof. It shall be subject to Articles 11 to 25 of this Annex.

Such further and more detailed provisions as may be necessary shall be laid down in its Rules of Procedure. The Rules of Procedure may derogate from Article 40 of the Statute in order to take account of the specific features of litigation in the field of Community patents.

Article 11

The lawyer referred to in Article 19 of the Statute may be assisted by a European Patent Attorney whose name appears on the list maintained by the European Patent Office for the purpose of legal representation before it and who is a national of a Member State or of another State which is a party to the Agreement on the European Economic Area.

The European Patent Attorney shall be allowed to speak at hearings under the conditions laid down in the Rules of Procedure.

The fifth and sixth paragraphs of Article 19 of the Statute shall apply *mutatis mutandis*.

Article 12

By way of derogation from the fourth, fifth and sixth paragraphs of Article 20 of the Statute the following rules shall apply:

The oral procedure shall consist of the presentation of the main features of the case by the Judge acting as Rapporteur, the hearing by the Community Patent Court of the parties, and the examination of evidence.

The Community Patent Court may, in accordance with the Rules of Procedure and after having heard the parties, dispense with the oral procedure.

The Rules of Procedure may provide that all or part of the procedure may be conducted in electronic form, and the conditions for so doing.

Article 13

By way of derogation from the first sentence of the first paragraph of Article 24 of the Statute the following rule shall apply:

Where a party has presented reasonably accessible evidence sufficient to support its claims, and has, in substantiating those claims, cited evidence which is to be found under the control of the opposing party, the Community Patent Court may order that such evidence be produced by the opposing party, subject to the protection of confidential information.

Article 14

The competence of the Community Patent Court to prescribe any necessary interim measures shall not be conditional upon main proceedings having already been instituted before it.

Where there is a demonstrable risk that evidence may be destroyed even before the commencement of proceedings on the merits of the case, the Community Patent Court may, in the event of an actual or imminent infringement of a Community patent, authorise in any place either the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the documents relating thereto.

Where interim or evidence-protection measures have been revoked the Community Patent Court shall order the applicant, at the request of the defendant, to provide the defendant adequate compensation for any injury caused by these measures.

Article 15

Article 39 of the Statute relating to special orders in a summary procedure shall also apply to evidence-protection measures. The Rules of Procedure shall determine who is competent to make the orders.

Article 16

Without prejudice to Article 41 of the Statute, a judgment by default may be given against the party that, after having been duly summoned, fails to appear at the oral hearing.

Article 17

By way of derogation from the first paragraph of Article 44 of the Statute, the following rule shall apply:

An application for revision of a judgment may exceptionally be made to the Community Patent Court on discovery of a fact which is of such a nature as to be a decisive factor, and which, when the judgment was given, was unknown to the party claiming the revision, and only on the grounds of a fundamental procedural defect or of an act which was held, by a final court decision, to constitute a criminal offence.

Article 18

The parties may, at any time in the course of proceedings, conclude their case by way of settlement confirmed by a decision of the Community Patent Court. The settlement cannot affect the validity of a Community patent.

Article 19

The first and second paragraphs of Article 54 of the Statute shall apply *mutatis mutandis* to the Community Patent Court.

Article 20

Where the Court of Justice is seised of a case in which the same issue of interpretation is raised, or where the Court First Instance is seised of a case in which the validity of the same Community patent is called in question, the Community Patent Court may, after hearing the parties, stay proceedings before it until such time as the Court of Justice or the Court of First Instance shall have delivered judgment.

Where an opposition against the grant of a European patent designating the Community is filed with the European Patent Office, the Community Patent Court, seised of an invalidity action, may, after hearing the parties, stay proceedings until such time as a final decision is issued on the opposition.

Article 21

Article 55 of the Statute shall apply subject to the condition that Member States and institutions of the Communities which have neither intervened nor been a party to the case shall only receive the final decision of the Community Patent Court.

Article 22

Final decisions of the Community Patent Court shall be enforceable if they are no longer subject to appeal. Appeal shall have suspensory effect. However, the Community Patent Court may declare its decisions enforceable while, if necessary, subjecting enforcement to the provision of security.

The order for its enforcement is appended to the decision by the Community Patent Court. Decisions shall be enforceable against Member States.

The Community Patent Court may order that non-compliance with its decisions or orders constituting an obligation to act or to abstain from an act shall be sanctioned by a penalty payment. The penalty payment may consist in a single or a recurrent fine. The individual fine must be proportionate and may not exceed EUR 50 000.

Article 23

Appropriate court fees will be charged for proceedings before the Community Patent Court.

A schedule of fees shall be adopted by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament and the Court of Justice or at the request of the Court of Justice and after consulting the European Parliament and the Commission.

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

Article 24

The Community Patent Court may hold hearings in Member States other than that in which its seat is located.

Article 25

The Community Patent Court shall conduct proceedings in the official EU 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 EU languages. Where the defendant is not domiciled in a Member State, the Community Patent Court will conduct the proceedings in the official EU language in which the Community Patent was granted.

At the request of the parties, and with the consent of the Community Patent Court, any official EU language can be chosen as language of proceedings.

The Community Patent Court may, in accordance with the Rules of Procedure, hear parties in person, witnesses and experts in a language other than the language of proceedings. In that case the Registrar shall cause everything said during the oral procedure to be translated into the language of proceedings and, at the request of any party, into the language used by that party in accordance with the Rules of Procedure.

The Community Patent Court may, in accordance with the Rules of Procedure, allow the submission of accompanying documents drawn up in a language other than the language of proceedings. It may at any time order that party to produce a translation of such documents into the language of proceedings.

Article 26

An appeal against a final decision of the Community Patent Court may be brought before the Court of First Instance within two months of the notification of the decision appealed against.

An appeal against a decision of the Community Patent Court made pursuant to Article 243 of the Treaty or the fourth paragraph of Article 256 thereof or pursuant to the second paragraph of Article 14 of this Annex may be brought before the Court of First Instance within two months of its notification. However, if the order has been made without a prior hearing of the party adversely affected, that party may, within two months of the notification, lodge an objection with the Community Patent Court, whose decision shall be subject to an appeal to the Court of First Instance.

An appeal against a decision of the Community Patent Court dismissing an application to intervene may be brought before the Court of First Instance within two weeks of its notification.

The Rules of Procedure may determine the situations and conditions under which an appeal may be brought against decisions of a procedural nature taken by the Community Patent Court in the course of proceedings.

An appeal as provided for in paragraphs 1 to 4 may be brought by any party which has been unsuccessful, in whole or in part, in its submissions. The appeals referred to in paragraphs 2

and 3 shall be heard and determined under the procedure referred to in Article 39 of the Statute.

Article 27

The appeal may be based on points of law and matters of fact.

An appeal on points of law shall lie on the grounds of lack of competence of the Community Patent Court, a breach of procedure before it which adversely affects the interests of the appellant, or an infringement of Community law by the Community Patent Court.

An appeal on matters of fact shall lie on the grounds of a re-evaluation of the facts and evidence submitted to the Community Patent Court. New facts and new evidence may only be introduced if their submission by the party concerned could not reasonably have been expected during proceedings at first instance.

No appeal shall lie regarding only the amount of the costs or the party ordered to pay them.

Article 28

If the appeal is well founded, the Court of First Instance shall quash the decision of the Community Patent Court and give final judgment. The Court of First Instance may in exceptional circumstances and in accordance with the Rules of Procedure refer the case back to the Community Patent Court for judgment.

Where a case is referred back to the Community Patent Court, it shall be bound by the decision of the Court of First Instance on points of law.

Article 29

The Rules of Procedure of the Community Patent Court shall contain any provision necessary for applying and, where required, supplementing this Annex."

Chapter II

Appeal proceedings before the Court of First Instance

Article 5

Number of Judges of the Court of First Instance

Article 48 of the Protocol on the Statute of the Court of Justice is replaced by the following:

“Article 48

The Court of First Instance shall consist of 18 Judges.”

Article 6

Community Patent appeal proceedings

The following Article is inserted into the Protocol on the Statute of the Court of Justice:

"Article 61a

A specialised patent chamber of the Court of First Instance with three Judges shall hear appeals against decisions of the Community Patent Court.

Without prejudice to the fifth paragraph of Article 17 and Article 50, the Judges of the patent appeal chamber shall be chosen from candidates having an established high level of legal expertise in patent law and appointed on the basis of their expertise.

Article 7 and Articles 10 to 23 of Annex [II] to the Statute shall apply to the appeal procedure before the patent chamber of the Court of First Instance *mutatis mutandis*. Member States and institutions of the European Community shall have the right to intervene in accordance with the first paragraph of Article 40.

The appeal proceedings shall be conducted in the language of proceedings in which the case was conducted before the Community Patent Court. The second, third and fourth paragraphs of Article 25 of Annex [II] to the Statute apply."

Chapter III

Final provisions

Article 7

Transitional provisions

The first President of the Community Patent Court shall be appointed for a term of three years in the same manner as its members. However, the Council may decide that the procedure laid down in Article 4 of Annex [II] to the Protocol on the Statute of the Court of Justice shall apply.

Immediately after all members of the Community Patent Court have taken oath, the President of the Council shall proceed to choose by lot the Judges whose terms of office are to expire at the end of the first three years.

Article 8

Entry into force

Following its publication in the *Official Journal of the European Union*, this Decision shall enter into force on the day following notification by the last Member State of its acceptance of

the provisions of Council Decision 2003/.../EC taken pursuant to Article 229a of the EC Treaty conferring jurisdiction on the Court of Justice relating to the Community Patent.

Article 1 of Annex [II] to the Protocol on the Statute of the Court of Justice shall become applicable on the date on which Council Decision 2003/.../EC conferring jurisdiction on the Court of Justice relating to the Community patent enters into force.

Done at Brussels, [...]

For the Council
The President
[...]

LEGISLATIVE FINANCIAL STATEMENT

Policy area: Industrial Property

Activity: Creation of the Community patent jurisdiction

TITLE OF ACTION: PROPOSAL FOR A COUNCIL DECISION ESTABLISHING THE COMMUNITY PATENT COURT AND CONCERNING APPEALS BEFORE THE COURT OF FIRST INSTANCE

1. BUDGET LINE(S) + HEADING(S)

Section IV - Court of Justice

2. OVERALL FIGURES

The creation of the Community patent jurisdiction has a financial impact on part A of the budget (human resources and other administrative expenditure). Community patent litigation brings a new type of litigation under the jurisdiction of the Court of Justice but also a considerable quantity of new cases in a specialised field which consequently requires new staff to handle cases. With the increasing number of Community patents being granted, the number of new cases before the Community Patent Court will rise sharply. The European Patent Office can be expected to grant each year 50 000 new Community patents which would, in view of a litigation rate of around 1 per 1 000 patents in force, increase the number of new proceedings at first instance by about 50 per year. In about 25% of the cases decided by the Community Patent Court an appeal to the Court of First Instance is likely to be filed. The resources which are considered necessary for the initial phase of the Community patent jurisdiction till 2014 can be brought in gradually according to the type and size of the tasks to be handled. Where additional staff are brought in, the calculation of the financial impact of human resources follows the general practice in this matter, i.e. newly created posts in the year of their creation are only calculated on a six-month basis.

– Necessary resources in the first five years of operation (2010-2014)

At the level of the Community Patent Court seven judges (including the president) have been considered appropriate to fulfil its function in the initial phase. Even before the new jurisdiction can start up its function, the judges will, according to Article 225a(5) of the EC Treaty, need to establish the first codification of a Community civil procedure law which in itself is a major undertaking. In the initial phase, a number of key decisions on fundamental questions will need to be taken by an enlarged bench. Each judge will need to be assisted by one legal secretary and one clerical secretary.

The highly technical Community patent litigation will also have consequences for the Court of First Instance hearing cases on appeal. With a view to the highly specialised and technical subject matter, a patent appeal chamber will need to be set up with three additional specialised judges at the Court of First Instance. Each judge will need to be assisted by at least one legal and one clerical secretary.

In addition, the special nature of patent litigation which deals with a subject matter involving the latest technological developments requires not only lawyers on the bench but also the attendance of technical experts. The Council in its 3 March 2003 common political approach decided that technical experts shall assist the judges throughout the handling of a case. To cover the more than 70 fields of technology, seven such technical experts (assistant rapporteurs) are foreseen for the first instance Community Patent Court in the following sub-divisions (1) inorganic chemistry and materials science, (2) organic and polymer chemistry, (3) biochemistry and biotechnology, (4) general physics, (5) mechanical engineering, (6) information and communication technology and (7) electrical engineering. With a view to the preparation of the technical questions raised by a case during first instance proceedings, the assistance of a reduced number of three technical experts during the appeal proceedings before the Court of First Instance in the more general sub-divisions chemistry, physics and mechanics would seem sufficient.

The Community Patent Court would also need a registrar who would be supported by six officials in the registry. The registry would need to operate in a particularly complex environment. The registry of the Community Patent Court would be responsible not only for keeping the register but also for the correspondence with parties and their legal representatives from all over the world, as cases could even involve e.g. two parties from non EU countries. The registry would need to be able to process incoming private party litigation in all of the official languages of the Community. It would have to respond orally and in writing to requests made by the parties (e.g. request for information on state of the case, scheduling of hearings etc.) or the judges (e.g. request for additional information, missing documents etc.). In order to safeguard the proper functioning of the court, such day to day contact between the parties and the court will not be able to rely on the regular translation or interpretation services but will have to be provided by the registry directly. Moreover, the registry would also be responsible for cooperation with the national authorities enforcing the decisions of the Community Patent Court under Articles 244, 256 of the EC Treaty. The Community Patent Court will only deliver the judgment whereas the terms of the judgment must be enforced by the competent authorities in the Member States. The registry must ensure communication in the official language of the Member State where the decision of the Community Patent Court is enforced.

A lecteur d'arrêt appears to be necessary in order to verify that the judgment, drafted by judges in a language which is not necessarily their mother tongue, is linguistically correct. This is current practice at the Court to safeguard quality standards and must also be provided for with respect to decisions of the new Community Patent Court and the patent chamber of the Court of First Instance. A researcher seems necessary in order to research the legislation and jurisprudence in Member States to provide data for the Community patent jurisdiction that is necessary to establish Community jurisprudence in this field. As jurisdiction in private party patent litigation will be completely new to the Community legal order, the researchers would be indispensable to investigate the existing concepts in Member States in order to allow the court to take them sufficiently into account when considering new cases. An additional legal secretary for the Advocate General seems necessary in view of review procedures under Article 225(2) of the EC Treaty before the Court of Justice against decisions of the Court of First Instance. All the patent decisions of the Court of First Instance would need to be evaluated as to their unity and consistency with

Community law. Where there is a serious risk that Community law might be affected, this person would support the Advocate General in the necessary proceedings before the Court of Justice. Apart from the staff that will be necessary to operate the Community Patent Court as such, the proposals must also provide the necessary reinforcement of the translation service. Finally the establishment of an IP library will be essential for the new jurisdiction. The relevant publications (from all Member States) such as law books, periodicals and collections of court decisions and also publications on all fields of technology as well as access to legal and technical data bases will need to be provided for.

– Phasing in of human resources

The new jurisdiction will necessarily go through a period in which staff may be recruited gradually according to the type and size of the tasks to be handled.

In the year before the estimated start of the Community jurisdiction, which is foreseen for 2010, a reduced number of staff will suffice for the necessary preparations. Only the judges with secretarial support will need to be appointed. It is important that all the judges are present from this moment. They will have to prepare the Rules of Procedure for patent proceedings which according to Articles 224(5), 225a(5) of the EC Treaty are adopted by the judges themselves. At this stage a librarian would also need to begin with the preparations to establish the IP library. Consequently a reduced figure of 14 staff has been introduced for the year 2009 in tables 2.3c), 7.1.

A considerable (but not yet the full) number of staff is only necessary as from the point when the Community patent jurisdiction takes up its function in 2010 (see increased expenditures set out accordingly in tables 2.3(c) and 7.2. A total of 70 personnel seems appropriate at the start of the new jurisdiction in order to fulfil its functions properly. This includes first of all the seven judges of the Community Patent Court. In particular in the initial phase, a number of key decisions on fundamental questions need to be taken by the court in which they establish important case law. Such decisions should be taken by an enlarged bench instead of a chamber of three judges. This number of judges is also necessary in order to guarantee a smoothly operating jurisdiction in case of sickness or leave of a judge. As concerns the three judges of the patent appeal chamber of the Court of First Instance, it is important to note that appeals will be filed from the time when the system becomes operational, in particular concerning interim measures or evidence-protection measures. Furthermore all the technical experts, seven for the Community Patent Court and three for the Court of First Instance, need to be present from the start of the operation. Cases may come from any of the existing fields of technology and as a consequence this number cannot be reduced in this initial phase. The president of the Community Patent Court who will apart from his jurisdictional functions also have to deal with administrative matters and the representation of the first private party Community jurisdiction will need to be assisted in his work by a *chef de cabinet* from the beginning. A *lecteur d'arrêt* for the Community Patent Court and the Court of First Instance will be necessary from the first year of operation since decisions will be delivered right from the start by both courts.

However, five legal secretaries for the Community Patent Court and two for the Court of First Instance, ten clerical secretaries and one researcher will suffice for this initial period of operation of the Community patent jurisdiction. Finally, in view of

the case load of this initial phase, a first (modest) reinforcement of the translation and interpretation capacities of the Court of Justice by ten translators and ten interpreters seems sufficient.

Certain posts can be phased in at a later stage as the case load rises. (see increase of expenditure in tables 2.3(c), 7.3 and 7.4 below). This concerns secretarial support, where eleven further staff are foreseen for 2012. For 2014, three further legal secretaries are foreseen for the judges of the Community Patent Court and the Court of First Instance so that each judge finally will be assisted by one legal secretary. In the same year, one additional legal secretary for the Advocate General for review proceedings seems necessary as the judgments of the Court of First Instance on appeal against decisions of the Community Patent Court will have reached a number where their scrutiny in view of possible review proceedings justifies an additional post. Also a second researcher would only be necessary in 2014 as the case load increases. Finally, the translation and interpretation capacities of the Court of Justice can be expanded in relation to increasing case load on a step-by-step basis, i.e. by another ten staff in 2012 and another eighteen in 2014. The total staff for the Community patent jurisdiction will thus by 2014 amount to 114 posts.

2.1. Total allocation for action (Part B): EUR million for commitment

None

2.2. Period of application:

Start: 2009

Expiry: open ended

2.3. Overall multiannual estimate of expenditure:

(a) Schedule of commitment appropriations/payment appropriations (financial intervention) (*see point 6.1.1*)

Not applicable

(b) Technical and administrative assistance and support expenditure (*see point 6.1.2*)

Not applicable

(c) Overall financial impact of human resources and other administrative expenditure (*see point 7*)

Year (n)	2009	2010	2011	2012	2013	2014
Year of operation	---	I	II	III	IV	V
New cases at first instance	0	50	100	150	200	250
Posts:						
Jurisdiction	13	49	49	60	60	65
Library	1	1	1	1	1	1
Translation	---	20	20	30	30	48
Total	14	70	70	91	91	114

Commitment s/ payments in EUR	3 257 000	7 115 000	10 472 000	11 606 000	12 740 000	13 982 000
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2.4. Compatibility with financial programming and financial perspective

Not applicable

2.5. Financial impact on revenue:

[...] Proposal has no financial implications (involves technical aspects regarding implementation of a measure)

OR

[X] Proposal has financial impact – the effect on revenue is as follows:

The proposal provides that parties will be charged appropriate court fees for Community patent litigation at first and second instance (See Article 23 of Annex II the Statute). However, the amount of revenue cannot be estimated at present. The amount to be charged would need to strike the right balance between the principle of a fair access to justice and an adequate contribution of the parties for the services rendered by the Community patent jurisdiction to solve their private disputes. In any case, the revenues from court fees will only contribute in a modest way to cover the overall incurred costs and could by no means be expected to lead to a self financing system. A schedule of fees laying down the exact fees to be paid will be adopted by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament and the Court of Justice or at the request of the Court of Justice and after consulting the European Parliament and the Commission.

3. BUDGET CHARACTERISTICS

Type of expenditure		New	EFTA contribution	Contributions from applicant countries	Heading in financial perspective
Non-comp	Non-diff	YES	NO	NO	No 5

4. LEGAL BASIS

Articles 225a, 245 of the EC Treaty.

5. DESCRIPTION AND GROUNDS

5.1. Need for Community intervention

5.1.1. Objectives pursued

The proposed Council Decision is part of the overall project to establish the Community patent system. By way of revision of the European Patent Convention and accession of the Community to the same, the European Patent Office shall be empowered to grant Community patents which will confer rights on their holders according to the regulation of the Council on the Community patent. Disputes concerning in particular the infringement and validity of these rights shall, after a transitional period, be brought before a Community jurisdiction. These measures shall reform the system of patent protection in Europe, which has been characterised by national patent titles enforceable before national courts, and make the necessary adaptations for the needs of European industry which increasingly operates trans-nationally within the common market. The measures are designed to increase the competitiveness of the Union's innovative industries by creating a Community wide uniform patent protection which can be enforced before a single Community jurisdiction rendering decisions with Community wide effect.

Within this overall project, the objective of the present proposal is to establish a Community Patent Court for first instance Community patent litigation and to provide for the necessary provisions with a view to accommodating the new function of the Court of First Instance as appeal instance against decisions of the Community Patent Court.

5.1.2. Measures taken in connection with ex ante evaluation

The necessity to create a patent system covering the Community as a whole has been recognised for decades. The first initiative to create such a system resulted in the European Patent Convention of 5 October 1973 which harmonised the grant of the European patent by the European Patent Office but neither included provisions on the rights conferred by such a patent nor created a single jurisdiction to deal with disputes. This is still left to national legislation and jurisdiction of the Contracting States. In a second initiative, EC Member States tried to create a Community patent on the basis of an international agreement including an integrated jurisdiction. The Community Patent Convention was signed on 15 December 1975 in Luxembourg followed by the 15 December 1989 agreement relating to the Community patent

which included a protocol on the settlement of litigation concerning the infringement and validity of Community patents. The Convention however never entered into force. In the context of the Amsterdam European Council of June 1997 (action plan for the single market), the Commission published a green paper on the promotion of innovation by patents. The consultations on the green paper including the comments made in the hearing on 25 and 26 November 1997 showed clear support for the creation of a Community patent system. Finally, the Lisbon European Council in March 2000 took up the issue and called for the creation of a Community patent system. The Council in its 3 March 2003 common political approach reached agreement on a number of key issues of the Community patent system including the jurisdictional aspects calling for the establishment of the Community Patent Court on the basis of Article 225a of the EC Treaty.

5.2. Action envisaged and budget intervention arrangements

The proposal constitutes a major element of the envisaged Community patent system. It contains the necessary legal provisions to set up a Community Patent Court which will deal with the Community patent related disputes for which jurisdiction is conferred on the Court of Justice. It also contains necessary provisions with a view to accommodating the new function of the Court of First Instance as appeal instance against decisions of the Community Patent Court. An efficiently functioning Community patent jurisdiction requires adequate resources. Court staff need to be employed (judges, registrar, assistant rapporteurs, legal secretaries, lecturers, researchers, secretaries, translators, interpreters, librarian), court rooms and equipment (office equipment, ICT facilities, library) have to be provided.

5.3. Methods of implementation

The necessary staff identified in 5.2. will be regular staff employed by the Court of Justice.

6. FINANCIAL IMPACT

6.1. Total financial impact on Part B - (over the entire programming period)

Not applicable

6.2. Calculation of costs by measure envisaged in Part B (over the entire programming period)

Not applicable

7. IMPACT ON STAFF AND ADMINISTRATIVE EXPENDITURE

7.1 The year before the Community patent jurisdiction becomes operational (2009)

The following tables show the impact on staff and administrative expenditures in 2009, the year before the Community patent jurisdiction becomes operational.

7.1.1. *Impact on human resources*

Types of post		Staff to be assigned to management of the action using existing and/or additional resources		Total	Description of tasks deriving from the action
		Number of permanent posts	Number of temporary posts		
officials or temporary staff	judges	10		10	CPC: (1 president, 6 judges); CFI: 3 judges
	B	1		1	librarian
	C	3		3	secretaries
total		14		14	

7.1.2. *Overall financial impact of human resources*

Type of human resources	Amount (EUR)	Method of calculation *
judges	2 825 000	CPC: 275 000 EUR X 7 CFI: 300 000 EUR X 3
officials (B, C)	432 000	108 000 EUR X 4
Total	3 257 000	

The amounts are total expenditure for twelve months.

7.1.3. *Other administrative expenditure deriving from action in 2009*

Budget line (number and heading)	Amount EUR	Method of calculation
Overall allocation (Title A7)		
A0701 – Missions		
A07030 – Meetings		
A07031 – Compulsory committees ¹		
A07032 – Non-compulsory committees ¹		
A07040 – Conferences		
A0705 – Studies and consultations		
Other expenditure (specify)		
Information systems (A-5001/A-4300)		
Other expenditure - Part A: Library		
Total	0	

The amounts are total expenditure for twelve months.

¹ Specify the type of committee and the group to which it belongs.

I.	Annual total (7.1.2. + 7.1.3.)	EUR 3 257 000
II.	Duration of action	indefinitely

7.2. First two years of operational Community patent jurisdiction (2010-2011)

The following tables show the impact on staff and administrative expenditures in 2010 -2011, the first two years from the start of the Community patent jurisdiction.

7.2.1. Impact on human resources

Types of post		Staff to be assigned to management of the action using existing and/or additional resources		Total	Description of tasks deriving from the action
		Number of permanent posts	Number of temporary posts		
officials or temporary staff	judges	10		10	CPC: (1 president, 6 judges); CFI: 3 judges
	registrar	1		1	registrar of CPC
	A	10		10	assistant rapporteurs: 7 CPC, 3 CFI
	other A	11		11	CPC 7 (5 legal secretaries, 1 lecteur, 1 chef cab. president) CFI: 3 (2 legal secretaries, 1 lecteur)
	B	6		6	CPC and CFI: 1 researchers registry CPC
	C	10		10	CPC: 7 (secretaries); CFI: 3 (secretaries)
	D	1		1	chauffeur president CPC
subtotal		49		49	
Other human resources for general services of the Court of Justice		1		1	librarian
		10		10	translators
		10		10	interpreters
subtotal		21		21	
total		70		70	

7.2.2. Overall financial impact of human resources

7.2.2.1. Overall financial impact on human resources in 2010

Type of human resources	Amount (EUR)	Method of calculation*
judges CPC and CFI	2 825 000	CPC: 275 000 EUR X 7 CFI: 300 000 EUR X 3
registrar CPC	138 000	275 000 EUR / 2
officials for CPC and CFI (A, B, C, D posts)	324 000	108 000 EUR X 3
	1 890 000	108 000 EUR X 35 / 2
subtotal	5 177 000	
other human resources for general services of the Court of Justice		
librarian	108 000	108 000 X 1
translators / interpreters	1 080 000	108 000 EUR X 20 / 2
total	6 365 000	

The amounts are total expenditure for twelve months. Newly created posts in 2010 are calculated for six months.

7.2.2.2. Overall financial impact on human resources in 2011

Type of human resources	Amount (EUR)	Method of calculation*
judges and registrar	3 100 000	CPC: 275 000 EUR X 8 CFI: 300 000 EUR X 3
officials for CPC and CFI (A, B, C, D posts)	4 104 000	108 000 EUR X 38
subtotal	7 204 000	
other human resources for general services of the Court of Justice (translators, interpreters, librarian)	2 268 000	108 000 EUR X 21
total	9 472 000	

The amounts are total expenditure for twelve months.

7.2.3. *Other administrative expenditure deriving from the action*

7.2.3.1. Other administrative expenditure deriving from action in 2010

Budget line (number and heading)	Amount EUR	Method of calculation
Overall allocation (Title A7) A0701 – Missions A07030 – Meetings A07031 – Compulsory committees ¹ A07032 – Non-compulsory committees ¹ A07040 – Conferences A0705 – Studies and consultations Other expenditure (specify)	p.m.	
Information systems (A-5001/A-4300)		
Other expenditure - Part A: Library	750 000	
Total	750 000	

The amounts are total expenditure for twelve months.

¹ Specify the type of committee and the group to which it belongs.

7.2.3.2. Other administrative expenditure deriving from action in 2011

Budget line (number and heading)	Amount €	Method of calculation
Overall allocation (Title A7) A0701 – Missions A07030 – Meetings A07031 – Compulsory committees ¹ A07032 – Non-compulsory committees ¹ A07040 – Conferences A0705 – Studies and consultations Other expenditure (specify)	p.m.	
Information systems (A-5001/A-4300)		
Other expenditure - Part A: Library	1 000 000	
Total	1 000 000	

The amounts are total expenditure for twelve months.

¹ Specify the type of committee and the group to which it belongs.

I.	Annual total (7.2.2 + 7.2.3)	
	Annual total in 2010	EUR 7 115 000
	Annual total in 2011	EUR10 472 000
II.	Duration of action	indefinitely

7.3. Third and fourth year of operation of the Community patent jurisdiction (2012 – 2013)

The following tables show the impact on staff and administrative expenditures in 2012 and 2013, the third and fourth year of the operation of the Community patent jurisdiction.

7.3.1. Impact on human resources

Types of post		Staff to be assigned to management of the action using existing and/or additional resources		Total	Description of tasks deriving from the action
		Number of permanent posts	Number of temporary posts		
officials or temporary staff	judges	10		10	CPC: (1 president, 6 judges); CFI: 3 judges
	registrar	1		1	registrar of CPC
	A	10		10	assistant rapporteurs: 7 CPC, 3 CFI
	other A	11		11	CPC 7 (5 legal secretaries, 1 lecteur, 1 chef cab. president) CFI: 3 (2 legal secretaries, 1 lecteur)
	B	6		6	CPC and CFI: 1 researcher 6 (registry CPC),
	C	21		21	CPC: 15 (secretaries); CFI: 6 (secretaries)
	D	1		1	chauffeur president CPC
subtotal		60		60	
other human resources for general services of the Court of Justice		1		1	librarian
		15		15	translators
		15		15	interpreters
subtotal		31		31	
total		91		91	

7.3.2. Overall financial impact on human resources

7.3.2.1. Overall financial impact on human resources in 2012

Type of human resources	Amount (EUR)	Method of calculation *
judges and registrar	3 100 000	CPC: 275 000 EUR X 8 CFI: 300 000 EUR X 3
officials for CPC and CFI (A, B, C, D posts)	4 104 000	108 000 EUR X 38
	594 000	108 000 EUR X 11 / 2
subtotal	7 798 000	
other human resources for general services of the Court of Justice (translators, interpreters, librarian)	2 268 000	108 000 EUR X 21
	540 000	108 000 EUR X 10 / 2
Subtotal	2 808 000	
Total	10 606 000	

The amounts are total expenditure for twelve months. Newly created posts in 2012 are calculated for six months.

7.3.2.2. Overall financial impact on human resources in 2013

Type of human resources	Amount (€)	Method of calculation *
judges and registrar	3 100 000	CPC: 275 000 EUR X 8 CFI: 300 000 EUR X 3
officials for CPC and CFI (A, B, C, D posts)	5 292 000	108 000 EUR X 49
subtotal	8 392 000	
other human resources for general services of the Court of Justice (translators, interpreters, librarian)	3 348 000	108 000 EUR X 31
total	11 740 000	

The amounts are total expenditure for twelve months.

7.3.3. *Other administrative expenditure deriving from action in each of the years 2012 and in 2013*

Budget line (number and heading)	Amount EUR	Method of calculation
Overall allocation (Title A7)	p.m.	
A0701 – Missions		
A07030 – Meetings		
A07031 – Compulsory committees ¹		
A07032 – Non-compulsory committees ¹		
A07040 – Conferences		
A0705 – Studies and consultations		
Other expenditure (specify)		
Information systems (A-5001/A-4300)		
Other expenditure - Part A: Library	1 000 000	
Total	1 000 000	

The amounts are total expenditure for twelve months.

¹ Specify the type of committee and the group to which it belongs.

I.	Annual total (7.3.2 + 7.3.3)	
	Annual total in 2012	EUR 11 606 000
	Annual total in 2013	EUR 12 440 000
II.	Duration of action	indefinitely

7.4. End of the initial phase (2014)

The following tables show the impact on staff and administrative expenditure in 2014 marking the end of the initial phase when the staffing of the Community patent jurisdiction will be completed.

7.4.1. *Impact on human resources*

Types of post		Staff to be assigned to management of the action using existing and/or additional resources		Total	Description of tasks deriving from the action
		Number of permanent posts	Number of temporary posts		
officials or temporary staff	judges	10		10	CPC: (1 president, 6 judges); CFI: 3 judges
	registrar	1		1	registrar of CPC
	A	10		10	assistant rapporteurs: 7 CPC, 3 CFI
	other A	16		16	CPC 9 (7 legal secretaries, 1 lecteur, 1 chef cab. president) CFI: 4 (3 legal secretaries, 1 lecteur) CPC and CFI: 2 researchers ECJ: 1 legal secretary for review procedure
	B	6		6	6 (registry CPC),
	C	21		21	CPC: 15 (secretaries); CFI: 6 (secretaries)
	D	1		1	chauffeur president CPC
subtotal		65		65	
Other human resources for general services of the Court of Justice		1		1	librarian
		24		24	translators
		24		24	interpreters
subtotal		49		49	
total		114		114	

7.4.2. Overall financial impact of human resources

Type of human resources	Amount (EUR)	Method of calculation*
judges and registrar	3 100 000	CPC: 275 000 EUR X 8 CFI: 300 000 EUR X 3
officials for CPC and CFI (A, B, C, D posts)	5 292 000	108 000 EUR X 49
	270 000	108 000 EUR X 5 / 2
subtotal	8 662 000	
other human resources for general services of the Court of Justice (translators, interpreters, librarian)	3 348 000	108 000 EUR X 31
	972 000	108 000 EUR X 18 / 2
subtotal	4 320 000	
total	12 982 000	

The amounts are total expenditure for twelve months. Newly created posts in 2014 are calculated for six months.

7.4.3. Other administrative expenditure deriving from the action

Budget line (number and heading)	Amount EUR	Method of calculation
Overall allocation (Title A7)	p.m.	
A0701 – Missions		
A07030 – Meetings		
A07031 – Compulsory committees ¹		
A07032 – Non-compulsory committees ¹		
A07040 – Conferences		
A0705 – Studies and consultations		
Other expenditure (specify)		
Information systems (A-5001/A-4300)		
Other expenditure - Part A: Library	1 000 000	
Total	1 000 000	

The amounts are total expenditure for twelve months.

¹ Specify the type of committee and the group to which it belongs.

I.	Annual total (7.4.2 + 7.4.3)	Eur 13 982 000
II.	Duration of action	indefinitely

8. FOLLOW-UP AND EVALUATION

8.1. Follow-up arrangements

The Council in its 3 March 2003 common political approach (point 5) foresees a review mechanism of the Community patent system including the jurisdictional arrangements. Regarding the contents of the present Decision, the organisation of the Community Patent Court and the provisions of the Statute of the Court of Justice relating to the work of the Community Patent Court at first instance and the Court of First Instance on appeal would have to be reviewed in the light of experience gathered. The Commission will need to consult the Court of Justice and interested circles to collect data on the functioning of the Community patent jurisdiction and will have to evaluate the collected data and where appropriate suggest changes to the current Decision.

8.2. Arrangements and schedule for the planned evaluation

On the basis of the common political approach adopted by the Council on 3 March 2003, the Commission will present a report on the functioning of all aspects of the Community patent including the jurisdictional arrangements five years after the grant of the first Community patent. Further reviews will be made periodically.

9. ANTI-FRAUD MEASURES

This does not apply. The proposal deals with the establishment of a Community Patent Court and the appeal procedure before the Court of First Instance and does not cover a policy area with a risk of fraud.

IMPACT ASSESSMENT FORM

THE IMPACT OF THE PROPOSAL ON BUSINESS WITH SPECIAL REFERENCE TO SMALL AND MEDIUM-SIZED ENTERPRISES(SMEs)

TITLE OF PROPOSAL

Proposal for a Council Decision establishing the Community Patent Court and concerning appeals before the Court of First Instance.

DOCUMENT REFERENCE NUMBER

[...]

THE PROPOSAL

1. Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?

The object of the Community patent system is to provide a Community wide patent protection which can be enforced before one single court operating to uniform standards and whose decisions enjoy Community wide effect. This objective can only be achieved at a Community level.

THE IMPACT ON BUSINESS

2. Who will be affected by the proposal?

- which sectors of business

All sectors of business that deal with technical inventions which can be subject to patent protection are concerned by the Community patent system. They can in case of conflict be party to litigation before the Community jurisdiction.

- which sizes of business (what is the concentration of small and medium-sized firms)

Potentially every size of business can be a party to Community patent litigation before the Community patent jurisdiction. For example, the holder of a Community patent may as a plaintiff wish to enforce his rights flowing from the Community patent title before the Community Patent Court. A third person may as a plaintiff wish to attack the validity of such a Community patent granting exclusive rights to its holder that he considers to be invalid. As defendant the right holder may wish to defend the validity of his patent or as a third person defend himself against an alleged infringement of a Community patent.

The Community patent system intends to make patenting of inventions more attractive especially for SMEs which will particularly increase the significance for this group. So far patenting is done in or with effect for individual Member States

and the enforcement must take place before the national courts of the respective Member States their national patent law and their national legislation on the court procedure which is particularly cumbersome for SMEs. The Community patent jurisdiction will allow to enforce a unitary patent right valid in the entire Community in one single court procedure operating to common standards.

3. What will business have to do to comply with the proposal?

The effect for businesses will be felt only in cases of litigation over a Community patent. In that case they have to familiarise themselves with the proceedings before the Community patent jurisdiction.

4. What economic effects is the proposal likely to have?

The proposal will only have an economic effect in combination with the other legal instruments creating a Community patent system. The Community patent system as a whole will have a positive economic impact. In particular:

- on investment and the creation of new businesses

The Community patent system will have a positive impact on investments due to a better Community wide legal protection of inventions. The return on investments in innovative technologies will be more secure serving as an incentive for more investment. Moreover, since better legal protection will be rendered less costly, businesses will be able to make more efficient use of their existing budget for research and development which will lead to more inventions which in turn will stimulate investments to economically exploit these inventions. Since effective patent protection often serves as the legal basis for an economically successfully operating business, a more comprehensive, easier and less costly patent protection will promote the creation of new businesses.

- on the competitiveness of businesses

The Community patent system will make patent protection more effective, easier and less costly not only for those businesses that already make use of patent protection but also make patenting more easily accessible for other businesses and in particular for SMEs. The possibility to protect an invention and with it the associated investment into it with Community wide effect will increase the ability of all businesses that make use of this possibility to compete in the common market. Moreover, the competitiveness of European industry will be increased on a global scale compared to the major trading partners and competitors. Today patent protection, for example in the United States or Japan, is considerably less costly than in Europe under the national and the European patent system. Consequently US and Japan based companies can develop patented products at a considerably lower price which later are marketed world wide. The Community patent system intends to eliminate this obstacle for the competitiveness of the European industry.

- on employment

An increased investment in inventive technologies and a strengthened competitiveness of the European industry will lead to the creation of new jobs. The creation of new jobs can be expected across the full range of technical fields and

their related industries. In particular the modern, innovative technologies which are playing a steadily increasing role in a knowledge based global economy will benefit.

5. Does the proposal contain measures to take account of the specific situation of small and medium-sized firms (reduced or different requirements etc)?

This does not apply. No distinction according to the size of companies can be made with regard the establishment, the organisation and the procedure before the Statute the Community Patent Court and the Court of First Instance on appeal.

CONSULTATION

6. List the organisations which have been consulted about the proposal and outline their main views:

The necessity to create a patent system covering the Community as a whole has been recognised for decades. The first initiative to create such a system resulted in the European Patent Convention of 5 October 1973 which harmonised the grant of the European patent by the European Patent Office but neither included provisions on the rights conferred by such a patent nor created a single jurisdiction to deal with disputes. This was still left to national legislation and jurisdiction of the Contracting States. In a second initiative, EC Member States tried to create a Community patent on the basis of an international agreement including an integrated jurisdiction. The Community Patent Convention was signed on 15 December 1975 in Luxembourg followed by the 15 December 1989 agreement relating to the Community patent which included a protocol on the settlement of litigation concerning the infringement and validity of Community patents. The Convention however never entered into force. In the context of the Amsterdam European Council of June 1997 (action plan for the single market), the Commission published a green paper on the promotion of innovation by patents. The consultations on the green paper including the comments made in the hearing on 25 and 26 November 1997 showed clear support for the creation of a Community patent system. Finally, the Lisbon European Council in March 2000 took up the issue and called for the creation of a Community patent system. The Council in its 3 March 2003 common political approach reached agreement on a number of key issues of the Community patent system including the jurisdictional aspects calling for the establishment of the Community Patent Court on the basis of Article 225a of the EC Treaty.