

29 (a) EU COMMUNITY PATENT CONVENTION 1975

**29 (a) EU CONVENTION FOR THE EUROPEAN PATENT
FOR THE COMMON MARKET**

Done at Luxembourg December 15, 1975

CELEX No. 41975A3490 ; 76/76 EEC

Editor's Note: Index added. Format standardized.

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**29 (a) EU CONVENTION FOR THE
EUROPEAN PATENT
FOR THE COMMON MARKET**

Preamble

THE HIGH CONTRACTING PARTIES to the Treaty establishing the European Economic Community,

DESIRING to give unitary and autonomous effect to European patents granted in respect of their territories under the Convention on the Grant of European Patents of 5 October 1973;

ANXIOUS to establish a Community patent system which contributes to the attainment of the objectives of the Treaty establishing the European Economic Community and in particular to the elimination within the Community of the distortion of competition which may result from the territorial aspect of national protection rights;

CONSIDERING that one of the fundamental objectives of the Treaty establishing the European Economic Community is the abolition of obstacles to the free movement of goods;

CONSIDERING that one of the most suitable means of ensuring that this objective will be achieved, as regards the free movement of goods protected by patents, is the creation of a Community patent system;

CONSIDERING that the creation of such a Community patent system is therefore inseparable from the attainment of the objectives of the Treaty and thus linked with the Community legal order;

CONSIDERING that it is necessary for these purposes for the High Contracting Parties to conclude an Agreement which constitutes a special agreement within the meaning of Article 142 of the Convention on the Grant of European Patents, a regional patent treaty within the meaning of Article 45 (1) of the Patent Cooperation Treaty of 19 June 1970, and a special agreement within the meaning of Article 19 of the Convention for the Protection of

Industrial Property, signed in Paris on 20 March 1883 and last revised on 14 July 1967;

CONSIDERING that it is essential that this convention be interpreted in a uniform manner so that the rights and obligations flowing from a Community patent be identical throughout the Community and that therefore jurisdiction be conferred on the court of justice of the European Communities ,

CONVINCED therefore that the conclusion of this convention is necessary to facilitate the achievement of the tasks of the European Economic Community and that therefore it is an appropriate measure to be taken by the member states, subject to national ratification procedures, to ensure fulfilment of Community obligations,

HAVE DECIDED to conclude this convention and to this end have designated as their plenipotentiaries :

Editor's Note: names not reproduced in this volume

Who , meeting in the Council of the European Communities, having exchanged their full powers, found in good and due form,

HAVE AGREED as follows:

**PART I
GENERAL AND INSTITUTIONAL
PROVISIONS**

**Chapter I
General Provisions**

Article 1: Common system of law for patents

(1) A system of law, common to the Contracting States, concerning patents for invention is hereby established.

(2) The common system of law shall govern the European patents granted for the Contracting States in accordance with the Convention on the Grant of European Patents, hereinafter referred to as 'the European Patent Convention', and the European patent applications in which such States are designated.

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Article 2: Community patent

(1) European patents granted for the Contracting States shall be called Community patents.

(2) Community patents shall have a unitary character. They shall have equal effect throughout the territories to which this Convention applies and may only be granted, transferred, revoked or allowed to lapse in respect of the whole of such territories. The same shall apply *mutatis mutandis* to applications for European patents in which the Contracting States are designated.

(3) Community patents shall have an autonomous character. They shall be subject only to the provisions of this Convention and those provisions of the European Patent Convention which are binding upon every European patent and which shall consequently be deemed to be provisions of this Convention.

Article 3: Joint designation

Designation of the States parties to this Convention in accordance with Article 79 of the European Patent Convention shall be effected jointly. Designation of one or some only of these States shall be deemed to be designation of all of these States.

Article 4: Setting up of special departments

For implementing the procedures laid down in this Convention, special departments which are set up within the European Patent Office and whose work shall be supervised by a Select Committee of the Administrative Council of the European Patent Organization .

Article 5: Jurisdiction of the Court of Justice of the European Communities

(1) The Court of Justice of the European Communities shall in respect of this Convention have the jurisdiction conferred on it by this Convention, the Protocol on the Statute of the Court of Justice of the European Economic Community and the rules of procedure of the Court of Justice shall apply.

(2) The rules of procedure shall be adapted and supplemented, as necessary, in conformity with article 188 of the Treaty establishing the European Economic Community .

Article 6: National patents

This Convention shall be without prejudice to the right of the Contracting States to grant national patents.

Chapter II

Special Departments of the European Patent Office

Article 7: The special departments

The special departments shall be as follows:

- (a) a Patent Administration Division;
- (b) one or more Revocation Divisions.
- (c) one or more Revocation Boards.

Article 8: Patent Administration Division

(1) The Patent Administration Division shall be responsible for all acts of the European Patent Office relating to Community patents, in so far as these acts are not the responsibility of other departments of the Office. It shall in particular be responsible for decisions in respects of entries in the Register of Community Patents.

(2) Decisions of the Patent Administration Division shall be taken by one legally qualified member.

(3) The members of the Patent Administration Division may not be members of the Boards of Appeal or the Enlarged Board of Appeal set up under the European Patent Convention nor of the Revocation Boards .

Article 9: Revocation Divisions

(1) The Revocation Divisions shall be responsible for the examination of requests for the limitation of and applications for the revocation of Community patents, and for determining compensation under Article 44 (5).

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(2) A Revocation Division shall consist of one legally qualified member who shall be the Chairman, and two technically qualified members. Prior to the taking of a final decision on the request or application, the Revocation Division may entrust the examination of the request or application to one of its members. Oral proceedings shall be before the Revocation Division itself.

Article 10: Revocation Boards

(1) The Revocation Boards shall be responsible for the examination of appeals from the decisions of the Revocation Divisions and the Patent Administration Division and for expressing an opinion on the extent of protection of a Community patent.

(2) For appeals from a decision of a Revocation Division, a Revocation Board shall consist of two legally qualified members, one of whom shall be the chairman, and three technically qualified members.

(3) For appeals from a decision of the Patent Administration Division, a Revocation Board shall consist of three legally qualified members.

(4) For the purposes of expressing an opinion on the extent of protection of a Community patent, a Revocation Board shall normally consist of two legally qualified members, one of whom shall be the chairman, and one technically qualified member. However, if the opinion has to be expressed in connection with an appeal from a Revocation Division or if the Revocation Board considers that the nature of the opinion so requires, the Revocation Board shall be composed as in paragraph 2.

Article 11: Appointment of members of the Revocation Boards

(1) The Select Committee of the Administrative Council shall appoint:

- (a) the chairmen of the Revocation Boards on a proposal from a member of that Committee, after the President of the European Patent Office has been consulted, or on his proposal;

(b) the other members of the Revocation Boards on a proposal from the President of the European Patent Office.

(2) the members of the Boards may be reappointed by decision of the Select Committee after the President of the European Patent Office has been consulted.

(3) subject to article 12(1), the Select Committee shall exercise disciplinary authority over the employees appointed in accordance with paragraph 1.

Article 12: Independence of the members of the Revocation Boards

(1) The members of the Revocation Boards shall be appointed for a term of five years and may not be removed from office during this term, unless there are serious grounds for such removal and the Court of Justice of the European Communities, before which the matter shall be brought by the President of the European Patent Office, takes a decision to this effect.

(2) The members of the Boards may not be members of the receiving section, examining divisions, opposition divisions or legal division set up under the European Patent Convention, nor of the Patent Administration Division or Revocation Divisions.

(3) In their decisions the members of the Boards shall not be bound by any instructions and shall comply only with the provisions of this convention.

(4) The rules of procedure of the Revocation Boards shall be adopted in accordance with the implementing regulations. They shall be subject to the approval of the Select Committee of the Administrative Council.

Article 13: Exclusion and objection

(1) Members of the Revocation Divisions and the Revocation Boards may not take part in any proceedings if they have any personal interest therein, if they have previously been involved as representatives of one of the parties, or if they

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have participated in the final decision on the case in the proceedings for grant or opposition proceedings. Furthermore, members of the Revocation Boards may not take part in appeal proceedings if they participated in the decision under appeal.

(2) If, for one of the reasons mentioned in paragraph 1 or for any other reason, a member of a Revocation Division or of a Revocation Board considers that he should not take part in any proceedings, he shall inform the division accordingly.

(3) Members of a Revocation Division or of a Revocation Board may be objected to by any party for one of the reasons mentioned in paragraph 1, or if suspected of partiality. An objection shall not be admissible if, while being aware of a reason for objection, the party has taken a procedural step. No objection may be based upon the nationality of members.

(4) The Revocation Divisions and Revocation Boards shall decide as to the action to be taken in the cases specified in paragraphs 2 and 3 without the participation of the member concerned. For the purpose of taking this decision the member objected to shall be replaced by his alternate.

Article 14: Languages for proceedings and publications

(1) The official languages of the European Patent Office shall also be the official languages of the special departments.

(2) Throughout the proceedings before the special departments, a translation filed in accordance with Article 14 (2), second sentence, of the European Patent Convention may be brought into conformity with the original text of the European patent application.

(3) The official language of the European Patent Office in which the Community patent is granted shall be used as the language of the proceedings in all proceedings before the special departments

concerning the Community patent, unless otherwise provided in the Implementing Regulations.

(4) However, natural or legal persons having their residence or principal place of business within the territory of a Contracting State having a language other than one of the official languages of the European Patent Office as an official language, and nationals of that State who are resident abroad, may file documents which have to be filed within a time limit in an official language of the Contracting State concerned. They must, however, file a translation in the language of the proceedings within the time limit prescribed in the Implementing Regulations; in the cases provided for in the Implementing Regulations, they may file a translation in a different official language of the European Patent Office.

(5) If any document is not filed in the language prescribed by this Convention, or if any translation required by virtue of this Convention is not filed in due time, the document shall be deemed not to have been received.

(6) New specifications of Community patents published following limitation or revocation proceedings shall be published in the language of the proceedings; they shall include a translation of the amended claims in one of the official languages of each of the Contracting States which do not have as an official language the language of the proceedings.

(7) The Community Patent Bulletin shall be published in the three official languages of the European Patent Office.

(8) Entries in the Register of Community Patents shall be made in the three official languages of the European Patent Office. In cases of doubt, the entry in the language of the proceedings shall be authentic.

(9) No Contracting State may avail itself of the authorizations given in Articles 65, 67 (3) and 70 (3) of the European Patent Convention.

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Chapter III

The Select Committee of the Administrative Council

Article 15: Membership

(1) The Select Committee of the Administrative Council shall be composed of the Representatives of the Contracting States, the Representative of the Commission of the European Communities and their alternate Representatives. Each Contracting State and the Commission shall be entitled to appoint one Representative and one alternate Representative to the Select Committee. The same members shall represent the Contracting States on the Administrative Council and on the Select Committee.

(2) The members of the Select Committee may, subject to the provisions of its Rules of Procedure, be assisted by advisers or experts.

Article 16: Chairmanship

(1) The Select Committee of the Administrative Council shall elect a Chairman and a Deputy Chairman from among the Representatives and alternate Representatives of the Contracting States. The Deputy Chairman shall *ex officio* replace the Chairman in the event of his being prevented from attending to his duties.

(2) The duration of the terms of office of the Chairman and the Deputy Chairman shall be three years. The terms of office shall be renewable.

Article 17: Board

(1) The Select Committee of the Administrative Council may set up a Board composed of five of its members.

(2) The chairman and the deputy chairman of the Select Committee shall be members of the board *ex officio*; the other three members shall be elected by the Select Committee.

(3) The term of office of the members elected by the Select Committee shall be three years. This term of office shall be three years. This term of office shall not be renewable.

(4) The board shall perform the duties given to it by the Select Committee in accordance with the Rules of Procedure.

Article 18: Meetings

(1) Meetings of the Select Committee of the Administrative Council shall be convened by its chairman.

(2) The President of the European Patent Office shall take part in the deliberations of the Select Committee.

(3) The Select Committee shall hold an ordinary meeting once each year. In addition, it shall meet on the initiative of its chairman or at the request of one-third of the Contracting States.

(4) The deliberations of the Select Committee shall be based on an agenda, and shall be held in accordance with its Rules of Procedure.

(5) The provisional agenda shall contain any question whose inclusion is requested by any Contracting State in accordance with the Rules of Procedure.

Article 19: Languages of the Select Committee

(1) The languages in use in the deliberations of the Select Committee of the Administrative Council shall be English, French and German.

(2) Documents submitted to the Select Committee, and the minutes of its deliberations, shall be drawn up in the three languages mentioned in paragraph 1.

Article 20: Competence of the Select Committee in certain cases

(1) The Select Committee of the Administrative Council shall be competent to amend the following provisions of this Convention:

- (a) the time limits laid down in the Convention which are to be observed *vis-à-vis* the European Patent Office;
- (b) the Implementing Regulations.

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(2) The Select Committee shall be competent, in conformity with this Convention, to adopt or amend the following provisions:

- (a) the Financial Regulations;
- (b) the Rules relating to Fees;
- (c) its Rules of Procedure.

Article 21: Voting rights

(1) The right to vote in the Select Committee of the Administrative Council shall be restricted to the Contracting States.

(2) Each Contracting State shall have one vote, subject to the application of the provisions of Article 23.

Article 22: Voting rules

(1) The Select Committee of the Administrative Council shall take its decisions other than those referred to in paragraph 2 by a simple majority of the Contracting States represented and voting.

(2) A majority of three-quarters of the votes of the Contracting States represented and voting shall be required for the decisions which the Select Committee is empowered to take under Article 20 and Article 25 (a).

(3) Abstentions shall not be considered as votes.

Article 23: Weighting of votes

In respect of the adoption or amendment of the rules relating to fees and, if the financial contribution to be made by the Contracting States would thereby be increased, the approval referred to in Article 25 (a), voting shall be conducted according to Article 36 of the European Patent Convention. The term 'Contracting States' in that Article shall be understood as meaning the States parties to this Convention.

**Chapter IV
Financial Provisions**

Article 24: Financial obligations and benefits

(1) The amount payable by the States parties to this Convention pursuant to Article 146 of the European Patent Convention shall be covered by

financial contributions determined in respect of each State in accordance with the scale laid down in Article 40 (3) of that Convention.

(2) Both the revenue derived from fees paid in accordance with the rules relating to fees, less the payments to the European Patent Organization pursuant to Articles 39 and 147 of the European Patent Convention, and all other receipts of the European Patent Organization obtained in implementation of this convention shall be distributed among the States parties to this convention in accordance with the scale mentioned in paragraph 1.

(3) Upon entry into force of this convention the necessary work shall be commenced in order to examine under what conditions and at what date the system of financing provided for in paragraphs 1 and 2 may be replaced by another system based, having regard to developments in the European Communities, on Community financing. This system may include the amounts payable by the States parties to this convention pursuant to the European Patent Convention and the amounts accruing to these States pursuant to that convention. When this work has been concluded, this article and , if appropriate, Article 23 may be amended by a decision of the Council of the European Communities acting unanimously on a proposal from the Commission.

Article 25: Powers of the Select Committee of the Administrative Council in budgetary matters

The Select Committee of the Administrative Council shall:

- (a) approve annually the forecasts of expenditure and revenue relating to the implementation of this Convention and any amendments or additions made to these forecasts, submitted to it by the President of the European Patent Office, and supervise the implementation thereof;
- (b) grant the authorization provided for in

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Article 47 (2) of the European Patent Convention, in so far as the expenditure involved relates to the implementation of this Convention;

(c) approve the annual accounts of the European Patent Organization which relate to the implementation of this Convention and that part of the report of the auditors appointed under Article 49 (1) of the European Patent Convention which relates to these accounts, and give the President of the European Patent Office a discharge.

Article 26: Rules relating to Fees

The Rules relating to Fees shall determine in particular the amounts of the fees and the ways in which they are to be paid.

**PART II
SUBSTANTIVE PATENT LAW**

**Chapter I
Right to the Community Patent**

Article 27: Claiming the right to the Community patent

(1) If a Community patent has been granted to a person who is not entitled to it under Article 60 (1) of the European Patent Convention, the person entitled to it under that provision may, without prejudice to any other remedy which may be open to him, claim to have the patent transferred to him.

(2) Where a person is entitled to only part of the Community patent, that person may, in accordance with paragraph 1, claim to be made a joint proprietor.

(3) Legal proceedings in respect of the rights specified in paragraphs 1 and 2 may be instituted only within a period of not more than two years after the date on which the European Patent Bulletin mentions the grant of the European patent. This provision shall not apply if the proprietor of the patent knew, at the time when the patent was granted or transferred to him, that he was not entitled to the patent.

(4) The fact that legal proceedings have been instituted shall be entered in the Register of Community Patents. Entry shall also be made of the final decision in, or of any other termination of, the proceedings

Article 28: Effect of change of proprietorship

(1) Where there is a complete change of proprietorship of a Community patent as a result of legal proceedings under Article 27, licences and other rights shall lapse upon the registration of the person entitled to the patent in the Register of Community Patents.

(2) If, before the institution of legal proceedings has been registered,

(a) the proprietor of the patent has used the invention within the territory of any of the Contracting States or made effective and serious preparations to do so, or

(b) a licensee of the patent has obtained his licence and has used the invention within the territory of any of the Contracting States or made effective and serious preparations to do so,

he may continue such use provided that he requests a non-exclusive licence of the patent from the new proprietor whose name is entered in the Register of Community Patents. Such request must be made within the period prescribed in the implementing regulations. The licence shall be granted for a reasonable period and upon reasonable terms.

(3) Paragraph 2 shall not apply if the proprietor of the patent or the licensee, as the case may be, was acting in bad faith at the time when he began to use the invention or to make preparations to do so.

**Chapter II
Effects of the Community Patent and the European Patent Application**

Article 29: Prohibition of direct use of the invention

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A Community patent shall confer on its proprietor the right to prevent all third parties not having his consent:

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

Article 30: Prohibition of indirect use of the invention

(1) A Community patent shall also confer on its proprietor the right to prevent all third parties not having his consent from supplying or offering to supply within the territories of the Contracting States a person, other than a party entitled to exploit the patented invention, with means, relating to an essential element of that invention, for putting it into effect therein, when the third party knows, or it is obvious in the circumstances, that these means are suitable and intended for putting that invention into effect.

(2) Paragraph 1 shall not apply when the means are staple commercial products, except when the third party induces the person supplied to commit acts prohibited by Article 29.

(3) Persons performing the acts referred to in Article 31 (a) to (c) shall not be considered to be parties entitled to exploit the invention within the meaning of paragraph 1.

Article 31: Limitation of the effects of the Community patent

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

- (a) acts done privately and for non-commercial purposes;
- (b) acts done for experimental purposes relating to the subject-matter of the patented invention;
- (c) the extemporaneous preparation for individual cases in a pharmacy of a medicine in accordance with a medical prescription or acts concerning the medicine so prepared;
- (d) the use on board vessels of the countries of the Union of Paris for the Protection of Industrial Property, other than the Contracting States, of the patented invention, in the body of the vessel, in the machinery, tackle, gear and other accessories, when such vessels temporarily or accidentally enter the waters of Contracting States, provided that the invention is used there exclusively for the needs of the vessel;
- (e) the use of the patented invention in the construction or operation of aircraft or land vehicles of countries of the Union of Paris for the Protection of Industrial Property, other than the Contracting States, or of accessories to such aircraft or land vehicles, when these temporarily or accidentally enter the territory of Contracting States;
- (f) the acts specified in Article 27 of the Convention on international civil aviation of 7 December 1944, where these acts concern the aircraft of a State, other than the Contracting States, benefiting from the provisions of that Article.

Article 32: Exhaustion of the rights conferred by the Community patent

The rights conferred by a Community patent shall not extend to acts concerning a product covered by that patent which are done within the territories of the Contracting States after that product has been put on the market in one of these States by the proprietor of the patent or with his express consent, unless there are grounds which, under Community law, would justify the extension to such acts of the rights conferred by the patent.

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Article 33: Translation of the claims in examination or opposition proceedings

(1) The applicant shall file with the European Patent Office within the time limit prescribed in the implementing regulations a translation of the claims on which the grant of the European patent is to be based in one of the official languages of each of the Contracting States which does not have English, French or German as an official language.

(2) Paragraph 1 shall apply *mutatis mutandis* in respect of claims which are amended during opposition proceedings.

(3) The translations of the claims shall be published by the European Patent Office.

(4) The applicant for or proprietor of the patent shall pay the fee for the publication of the translations of the claims within the time limits prescribed in the implementing regulations.

(5) If the translations prescribed in paragraphs 1 and 2 are not filed in due time or if the fee for the publication of the translations of the claims is not paid in due time, the Community patent shall be deemed to be void *ab initio*, unless these acts are done and the additional fee is paid within a further period as prescribed in the implementing regulations.

Article 33: Translation of the claims in examination or opposition proceedings

(1) The applicant shall file with the European Patent Office within the time limit prescribed in the implementing regulations a translation of the claims on which the grant of the European patent is to be based in one of the official languages of each of the Contracting States which does not have English, French or German as an official language.

(2) Paragraph 1 shall apply *mutatis mutandis* in respect of claims which are amended during opposition proceedings.

(3) The translations of the claims shall be published by the European Patent Office.

(4) The applicant for or proprietor of the patent shall pay the fee for the publication of the translations of the claims within the time limits prescribed in the implementing regulations.

(5) If the translations prescribed in paragraphs 1 and 2 are not filed in due time or if the fee for the publication of the translations of the claims is not paid in due time, the Community patent shall be deemed to be void *ab initio*, unless these acts are done and the additional fee is paid within a further period as prescribed in the implementing regulations.

Article 34: Rights conferred by a European patent application after publication

(1) Compensation reasonable in the circumstances may be claimed from a third party who, in the period between the date of publication of a European patent application in which the Contracting States are designated and the date of publication of the mention of the grant of the European patent, has made any use of the invention which, after that period, would be prohibited by virtue of the Community patent.

(2) Any Contracting State which does not have as an official language the language of the proceedings of a European patent application in which the Contracting States are designated, may prescribe that such application shall not confer, in respect of use of the invention within its territory, the right, referred to in paragraph 1 until such time as the applicant, at his option, has:

(a) supplied a translation of the claims in one of its official languages to the competent authority of that State and the translation has been published, or

(b) communicated such a translation to the person using the invention within that State.

Article 35: Effect of revocation of the Community patent

(1) A European patent application in which the Contracting States are designated and the

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resulting Community patent shall be deemed not to have had, as from the outset, the effects specified in this chapter, to the extent that the patent has been revoked.

(2) Subject to the national provisions relating either to claims for compensation for damage caused by negligence or lack of good faith on the part of the proprietor of the patent, or to unjust enrichment, the retroactive effect of the revocation of the patent as a result of opposition or revocation proceedings shall not affect:

- (a) any decision on infringement which has acquired the authority of a final decision and been enforced prior to the revocation decision;
- (b) any contract concluded prior to the revocation decision, in so far as it has been performed before that decision; however, repayment, to an extent justified by the circumstances, of sums paid under the relevant contract, may be claimed on grounds of equity.

Article 36: Complementary application of national law regarding infringement

(1) The effects of a Community patent shall be governed solely by the provisions of this Convention. In other respects, infringement of a Community patent shall be governed by the national law relating to infringement of a national patent in the Contracting State where the court hearing the action is located, in so far as the private international law of that State does not require application of the national law of another Contracting State.

(2) The Rules of Procedure applicable are those specified in Article 74.

(3) Paragraphs 1 and 2 shall apply *mutatis mutandis* to a European patent application in which the Contracting States are designated.

Chapter III National Rights

Article 37: National prior right

(1) With regard to a Community patent having a date of filing or, where priority has been

claimed, a date of priority later than that of a national patent application or national patent made public in a Contracting State on or after that date, the national patent application or patent shall, for that Contracting State, have the same prior right effect as a published European patent application designating that Contracting State.

(2) If, in a Contracting State, a national patent application or patent, which is unpublished by reason of the national law of that State concerning the secrecy of inventions, has a prior right effect with regard to a national patent in that State having a later date of filing, or where priority has been claimed a later date of priority, the same shall apply in that State with regard to a Community patent.

Article 38: Right based on prior use and right of personal possession

(1) Any person who, if a national patent had been granted in respect of an invention, would have had, in one of the Contracting States, a right based on prior use of that invention or a right of personal possession of that invention, shall enjoy, in that State, the same rights in respect of a Community patent for the same invention.

(2) The rights conferred by a Community patent shall not extend to acts concerning a product covered by that patent which are done within the territory of the State concerned after that product has been put on the market in that State by the person referred to in paragraph 1, in so far as the national law of that State makes provision to the same effect in respect of national patents.

Chapter IV

The Community Patent as an Object of Property

Article 39: Dealing with the Community patent as a national patent

(1) Unless otherwise specified in this Convention, a Community patent as an object of property shall be dealt with in its entirety, and

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for the whole of the territories in which it is effective, as a national patent of the Contracting State in which, according to the Register of European Patents provided for in the European Patent Convention:

- (a) the applicant for the patent had his residence or principal place of business on the date of filing of the European patent application,
- (b) where subparagraph (a) does not apply, the applicant had a place of business on that date, or
- (c) where neither subparagraph (a) nor subparagraph (b) applies, the applicant's representative whose name is entered first in the Register of European Patents had his place of business on the date of that entry.

(2) Where subparagraphs (a), (b) and (c) of paragraph 1 do not apply, the Contracting State referred to in that paragraph shall be the Federal Republic of Germany.

(3) If two or more persons are mentioned in the Register of European Patents as joint applicants, paragraph 1 shall apply to the joint applicant first mentioned; if this is not possible, it shall apply to the joint applicant next mentioned in respect of whom it is applicable. Where paragraph 1 does not apply to any of the joint applicants, paragraph 2 shall apply.

(4) If in a Contracting State as determined by the preceding paragraphs a right in respect of a national patent is effective only after entry in the national patent register, such a right in respect of a Community patent shall be effective only after entry in the Register of Community Patents.

Article 40: Transfer

(1) An assignment of a Community patent shall be made in writing and shall require the signature of the parties to the contract, except when it is a result of a judgment.

(2) Subject to Article 28 (1), a transfer shall not affect rights acquired by third parties before the date of transfer.

(3) A transfer shall, to the extent to which it is verified by the papers referred to in the implementing regulations, only have effect *vis-a-vis* third parties after entry in the Register of Community Patents. Nevertheless, a transfer, before it is so entered, shall have effect *vis-a-vis* third parties who have acquired rights after the date of the transfer but who knew of the transfer at the date on which the rights were acquired.

Article 41: Enforcement proceedings

The courts and other authorities of the Contracting State determined in accordance with Article 39 shall have exclusive jurisdiction in respect of proceedings relating to judgments or other official acts in so far as they are being enforced against Community patents.

Article 42: Bankruptcy or like proceedings

(1) Until such time as common rules for the Contracting States in this field enter into force, the only Contracting State in which a Community patent may be involved in bankruptcy or like proceedings shall be that in which such proceedings are opened first.

(2) Paragraph 1 shall apply *mutatis mutandis* in the case of joint proprietorship of a Community patent to the share of the joint proprietor.

Article 43: Contractual licensing

(1) A Community patent may be licensed in whole or in part for the whole or part of the territories in which it is effective. A licence may be exclusive or non-exclusive.

(2) The rights conferred by the Community patent may be invoked against a licensee who contravenes any restriction in his licence which is covered by paragraph 1:

(3) Article 40 (2) and (3) shall apply *mutatis mutandis* to the grant or transfer of a licence in respect of a Community patent.

Article 44: Licences of right

(1) Where the proprietor of a Community patent files a written statement with the European

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Patent Office that he is prepared to allow any person to use the invention as a licensee in return for appropriate compensation, the renewal fees for the Community patent which fall due after receipt of the statement shall be reduced; the amount of the reduction shall be fixed in the rules relating to fees. Where there is a complete change of proprietorship of the patent as a result of legal proceedings under Article 27, the statement shall be deemed withdrawn upon the entry of the name of the person entitled to the patent in the Register of Community Patents.

(2) The statement may be withdrawn at any time upon written notification to this effect to the European Patent Office, provided that no one has informed the proprietor of the patent of his intention to use the invention. Such withdrawal shall take effect from the date of its notification. The amount by which the renewal fees were reduced shall be paid within one month after withdrawal; Article 49 (2) shall apply, but the six-month period shall start upon expiry of the above period.

(3) The statement may not be filed while an exclusive licence is recorded in the Register of Community Patents or a request for the recording of such a licence is before the European Patent Office.

(4) On the basis of the statement, any person shall be entitled to use the invention as a licensee under the conditions laid down in the implementing regulations. A licence so obtained shall, for the purposes of this Convention, be treated as a contractual licence.

(5) On written request by one of the parties, a Revocation Division shall determine the appropriate compensation or review it if circumstances have arisen or become known which render the compensation determined obviously inappropriate. The provisions governing revocation proceedings shall apply *mutatis mutandis*, unless they are inapplicable as a result of the particular nature of revocation proceedings. The request shall not be deemed to

have been made until such time as an administrative fee has been paid.

(6) No request for recording an exclusive licence in the Register of Community Patents shall be admissible after the statement has been filed, unless it is withdrawn or deemed withdrawn.

Article 45: The European patent application as an object of property

(1) Articles 39 to 43 shall apply *mutatis mutandis* to a European patent application in which the Contracting States are designated, the references to the Register of Community Patents being understood as referring to the Register of European Patents provided for in the European Patent Convention.

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

Chapter V

Compulsory Licences in respect of a Community Patent

Article 46: Compulsory licences

(1) Any provision in the law of a Contracting State for the grant of compulsory licences in respect of national patents shall be applicable to Community patents. The extent and effect of compulsory licences granted in respect of Community patents shall be restricted to the territory of the State concerned. Article 32 shall not apply.

(2) Each Contracting State shall, at least in respect of compensation under a compulsory licence, provide for a final appeal to a court of law.

(3) As far as practicable national authorities shall notify the European Patent Office of the grant of any compulsory licence in respect of a Community patent.

(4) For the purposes of this Convention, the term 'compulsory licences' shall be construed as

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including official licences and any right to use patented inventions in the public interest.

Article 47: Compulsory licences for lack or insufficiency of exploitation

A compulsory licence may not be granted in respect of a Community patent on the ground of lack or insufficiency of exploitation if the product covered by the patent, which is manufactured in a Contracting State, is put on the market in the territory of any other Contracting State, for which such a licence has been requested, in sufficient quantity to satisfy needs in the territory of that other Contracting State. This provision shall not apply to compulsory licences granted in the public interest.

Article 48: Compulsory licences in respect of dependent patents

Any provision in the law of a Contracting State for the grant of compulsory licences in respect of earlier patents in favour of subsequent dependent patents shall be applicable to the relationship between Community patents and national patents and to the relationship between Community patents themselves.

**PART III
RENEWAL, LAPSE, LIMITATION AND
REVOCATION OF THE COMMUNITY
PATENT**

**Chapter I
Renewal and Lapse**

Article 49 Renewal fees

(1) Renewal fees in respect of Community patents shall be paid to the European Patent Office in accordance with the implementing regulations. These fees shall be due in respect of the years following the year referred to in Article 86 (4) of the European Patent Convention, provided that no renewal fees shall be due in respect of the first two years, calculated from the date of filing of the application.

(2) When a renewal fee has not been paid on or before the due date, the fee may be validly paid within six months of that date, provided that the additional fee is paid at the same time.

(3) Any renewal fee in respect of a Community patent falling due within two months after the publication of the mention of the grant of the European patent shall be deemed to have been validly paid if it is paid within that period. No additional fee shall be charged

Article 50: Surrender

(1) A Community patent may be surrendered only in its entirety.

(2) The surrender must be declared in writing to the European Patent Office by the proprietor of the patent. It shall not have effect until it is entered in the Register of Community Patents.

(3) Surrender will be entered in the Register of Community Patents only with the agreement of any third party who has a right *in rem* recorded in the register or in respect of whom there is an entry in the register pursuant to the first sentence of Article 27 (4). If a licence is recorded in the register, surrender will be entered only if the proprietor of the patent proves that he has previously informed the licensee of his intention to surrender; this entry will be made on expiry of the period laid down in the implementing regulations.

Article 51: Lapse

(1) A Community patent shall lapse:

- (a) at the end of the term laid down in Article 63 of the European Patent Convention;
- (b) if the proprietor of the patent surrenders it in accordance with Article 50;
- (c) if a renewal fee and any additional fee have not been paid in due time.

(2) The Community patent shall lapse on the date mentioned in Article 54 (4) to the extent that it is not maintained.

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(3) The lapse of a patent for failure to pay a renewal fee and any additional fee within the due period shall be deemed to have occurred on the date on which the renewal fee was due.

(4) The lapse of a Community patent shall, if necessary, be decided by the Patent Administration Division or, if proceedings in respect of that patent are pending before it, a Revocation Division or a Revocation Board.

(2) In the examination of the request, which shall be conducted in accordance with the implementing regulations, the Revocation Division shall invite the proprietor of the patent, as often as necessary, to file observations, within a period to be fixed by the Revocation Division, on communications issued by itself.

(3) If the proprietor of the patent fails to reply in due time to any invitation under paragraph 2, the request shall be deemed to be withdrawn.

**Chapter II
Limitation Procedure**

Article 52: Request for limitation

(1) At the request of the proprietor, a Community patent may be limited in the form of an amendment to the claims, the description or the drawings. Limitation in respect of one or some of the Contracting States may be requested only where Article 37 (1) applies.

(2) The request may not be filed during the period within which an opposition may be filed or while opposition proceedings or revocation proceedings are pending.

(3) The request shall be filed in writing with the European Patent Office. It shall not be deemed to have been filed until the fee for limitation has been paid.

(4) Article 50 (3) shall apply *mutatis mutandis* to the filing of the request.

(5) Where an application for revocation of the Community patent is filed during limitation proceedings, the Revocation Division shall stay the limitation proceedings until a final decision is given in respect of the application for revocation.

Article 53: Examination of the request

(1) The Revocation Division shall examine whether the grounds for revocation mentioned in Article 57 (1) (a) to (d), would prejudice the maintenance of the Community patent as amended.

Article 54: Rejection of the request or limitation of the Community patent

(1) If, following the examination provided for in Article 53, the Revocation Division is of the opinion that the amendments are not acceptable, it shall reject the request.

(2) If the Revocation Division is of the opinion that, taking into consideration the amendments made by the proprietor of the patent during the limitation proceedings, the grounds for revocation mentioned in Article 57 do not prejudice the maintenance of the Community patent, it shall decide to limit the patent accordingly, provided that:

- (a) it is established, in accordance with the implementing regulations, that the proprietor of the patent approves the text in which the Revocation Division intends to limit the patent;
- (b) a translation of any amended claims in one of the official languages of each of the Contracting States which do not have as an official language the language of the proceedings is filed within the time limit prescribed in the implementing regulations;
- (c) the fee for the printing of a new specification is paid within the time limit prescribed in the implementing regulations.

(3) If a translation is not filed in due time or if the fee for the printing of a new specification is not paid in due time, the request shall be deemed to be withdrawn, unless these acts are done and the additional fee is paid within a further period as prescribed in the implementing regulations.

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(4) The decision to limit a Community patent shall not take effect until the date on which the Community Patent Bulletin mentions the limitation.

Article 55: Publication of a new specification following limitation proceedings

If a Community patent is limited under Article 54 (2), the European Patent Office shall, at the same time as it publishes the mention of the decision to limit, publish a new specification of the Community patent containing the description, the claims and any drawings, in the amended form.

Chapter III

Revocation Procedure

Article 56: Application for revocation

(1) Any person may file with the European Patent Office an application for revocation of a Community patent; however, in the case specified in Article 57 (1) (e), the application may be filed only by a person entitled to be entered in the Register of Community Patents as the sole proprietor of the patent or by all the persons entitled to be entered as joint proprietors of it in accordance with Article 27 acting jointly.

(2) The application may not be filed in the cases specified in Article 57 (1) (a) to (d) during the period within which an opposition may be filed or while opposition proceedings are pending.

(3) An application may be filed even if the Community patent has lapsed.

(4) The application shall be filed in a written reasoned statement. It shall not be deemed to have been filed until the revocation fee has been paid.

(5) Applicants shall be parties to the revocation proceedings as well as the proprietor of the patent.

(6) If the applicant has neither his residence nor his principal place of business within the territory of one of the Contracting States, he

shall, at the request of the proprietor of the patent, furnish security for the costs of the proceedings. The Revocation Division shall fix at a reasonable figure the amount of the security and the period within which it must be deposited. If the security is not deposited within the period specified, the application shall be deemed to be withdrawn.

Article 57: Grounds for revocation

(1) An application for revocation of a Community patent may be filed only on the grounds that:

(a) the subject-matter of the patent is not patentable within the terms of Articles 52 to 57 of the European Patent Convention;

(b) the patent does not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art;

(c) the subject-matter of the patent extends beyond the content of the European patent application as filed, or if the patent was granted on a European divisional application or on a new European application filed in accordance with Article 61 of the European Patent Convention, beyond the content of the earlier application as filed;

(d) the protection conferred by the patent has been extended;

(e) the proprietor of the patent is not, having regard to a decision which has to be recognized in all the Contracting States, entitled under Article 60 (1) of the European Patent Convention;

(f) the subject-matter of the patent is not patentable within the terms of Article 37 (1).

(2) If the grounds for revocation affect the patent only partially, revocation shall be pronounced in the form of a corresponding limitation of the patent. The limitation may be effected in the form of an amendment to the claims, the description or the drawings.

(3) In the case specified in paragraph 1 (f), revocation shall be pronounced only in respect

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of the Contracting State in which the national patent application or national patent has been made public.

Article 58: Examination of the application

(1) If the application for revocation of the Community patent is admissible, the Revocation Division shall examine whether the grounds for revocation mentioned in Article 57 prejudice the maintenance of the patent.

(2) In the examination of the application, which shall be conducted in accordance with the implementing regulations, the Revocation Division shall invite the parties, as often as necessary, to file observations, within a period to be fixed by the Revocation Division, on communications from another party or issued by itself.

Article 59: Revocation or maintenance of the Community patent

(1) If the Revocation Division is of the opinion that the grounds for revocation mentioned in Article 57 prejudice the maintenance of the Community patent, it shall revoke the patent.

(2) If the Revocation Division is of the opinion that the grounds for revocation mentioned in Article 57 do not prejudice the maintenance of the patent unamended, it shall reject the application.

(3) If the Revocation Division is of the opinion that, taking into consideration the amendments made by the proprietor of the patent during the revocation proceedings, the grounds for revocation mentioned in Article 57 do not prejudice the maintenance of the patent, it shall decide to maintain the patent as amended, provided that:

(a) it is established, in accordance with the implementing regulations, that the proprietor of the patent approves the text in which the Revocation Division intends to maintain the patent;

(b) a translation of any amended claims in one of the official languages of each of the Contracting States which do not have as an official language the language of the proceedings is filed within the time limit prescribed in the implementing regulations;

(c) the fee for the printing of a new specification is paid within the time limit prescribed in the implementing regulations.

(4) If a translation is not filed in due time or if the fee for the printing of a new specification is not paid in due time, the patent shall be revoked, unless these acts are done and the additional fee is paid within a further period as prescribed in the implementing regulations.

Article 60: Publication of a new specification following revocation proceedings

If a Community patent is amended under Article 59 (3), the European Patent Office shall, at the same time as it publishes the mention of the decision on the application for revocation, publish a new specification of the Community patent containing the description, the claims and any drawings, in the amended form.

Article 61: Costs

(1) Each party to revocation proceedings shall meet the costs he has incurred unless a decision of a Revocation Division Or Revocation Board, for reasons of equity, orders, in accordance with the implementing regulations, a different apportionment of costs incurred during taking of evidence or in oral proceedings. A decision on the apportionment of the costs may also be taken on request when the application for revocation is withdrawn or when the Community patent lapses.

(2) On request, the registry of the Revocation Division shall fix the amount of the costs to be paid under a decision apportioning them. The fixing of the costs by the registry may be reviewed by a decision of the Revocation

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Division on a request filed within the period laid down in the implementing regulations.

(3) Article 104 (3) of the European Patent Convention shall apply *mutatis mutandis*.

**PART IV
APPEALS PROCEDURE**

Article 62: Appeal

(1) An appeal shall lie from decisions of the Revocation Divisions and the Patent Administration Division.

(2) Articles 106 to 111 of the European Patent Convention shall apply *mutatis mutandis* to this appeals procedure.

Article 63: Further appeal

(1) A further appeal to the Court of Justice of the European Communities shall lie from decisions of the Revocation Boards on appeals.. Such further appeal shall have suspensive effect.

(2) The further appeal may be lodged on grounds of infringement of an essential procedural requirement and of infringement of this Convention or any rule of law relating to its application, in so far as that rule of law is not a national provision. The Court of Justice shall not examine the facts as determined in the decision of the Revocation Board.

(3) The further appeal shall be open to any party to proceedings before a Revocation Board adversely affected by its decision.

(4) The further appeal shall be lodged with the Court of Justice within two months of the date of notification of the decision of the Revocation Board.

(5) The further appeal may be made even if the Community patent has lapsed.

(6) If the Court of Justice remits the case for further prosecution to the Revocation Board, that department shall be bound by the *ratio decidendi* of the Court of Justice, in so far as the facts are the same.

**PART V
COMMON PROVISIONS**

Article 64: Common provisions governing procedure and representation

(1) The provisions of Part VII, Chapters I and III, of the European Patent Convention, other than Articles 121 and 124, shall apply *mutatis mutandis* to this Convention, subject to the following:

(a) Article 114 (1) shall apply only to the Revocation Divisions and the Revocation Boards;

(b) Article 116 (2) and (3) shall apply only to the Patent Administration Division, and paragraph 4 shall apply only to the Revocation Divisions and the Revocation Boards;

(c) Article 122 shall also apply to all other parties to proceedings before the special departments;

(d) Article 123 (3) shall apply to limitation and revocation proceedings;

(e) the term ‘Contracting States’ shall be understood as meaning the States parties to this Convention.

(2) Notwithstanding paragraph 1 (e), a person whose name appears on the list of professional representatives maintained by the European Patent Office who is not a national of one of the States parties to this Convention or does not have his place of business or employment within the territory of one of these States, shall be entitled to act as a professional representative for a party to proceedings relating to a Community patent before the special departments, provided that:

(a) he was, according to the Register of European Patents, the person last authorized to act as the professional representative for the same party or his predecessor in title in proceedings pursuant to the European Patent Convention which relate to this Community patent or to the European patent application on which it is based; and

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(b) the State of which he is a national or within the territory of which he has his place of business or employment applies rules, as regards representation before the central industrial property office of the State concerned, which comply, in respect of reciprocity, with such conditions as the Select Committee of the Administrative Council may prescribe.

Article 65: Register of Community Patents

The European Patent Office shall keep a register, to be known as the Register of Community Patents, which shall contain those particulars the registration of which is provided for by this Convention. The Register shall be open to public inspection.

Article 66: Community Patent Bulletin

The European Patent Office shall periodically publish a Community Patent Bulletin containing entries made in the Register of Community Patents, as well as other particulars, the publication of which is prescribed by this Convention.

Article 67: Information to the public or official authorities

Articles 128 (4) and 130 to 132 of the European Patent Convention shall apply mutatis mutandis, the term ‘Contracting States’ being understood as meaning the States parties to this Convention.

**PART VI
JURISDICTION AND PROCEDURE IN
ACTIONS RELATING TO COMMUNITY
PATENTS**

**Chapter I
Jurisdiction and Enforcement**

Article 68: General provisions

Unless otherwise specified in this Convention, the Convention on jurisdiction and enforcement of judgments in civil and commercial matters, signed at Brussels on 27

September 1968, hereinafter referred to as ‘the Convention on jurisdiction and enforcement’, shall apply to actions relating to Community patents and to decisions given in respect of such actions.

Article 69: Jurisdiction of national courts concerning actions relating to Community patents

(1) Actions for infringement of a Community patent may be heard before the courts of the Contracting State in which the defendant has his residence or, if he is not so resident, an establishment. If the defendant has neither his residence nor an establishment in one of the Contracting States, such actions may, by way of derogation from Article 4 of the Convention on jurisdiction and enforcement, be heard before the courts of the Contracting State in which the plaintiff has his residence or, if he is not so resident, an establishment. If neither the defendant nor the plaintiff is so resident or has such an establishment, such actions may be brought before the courts of the Federal Republic of Germany. The court hearing the action shall have jurisdiction in respect of acts of infringement committed within the territory of any of the Contracting States.

(2) Actions for infringement of a Community patent may also be heard before the courts of the Contracting State in which an act of infringement was committed. The court hearing the action shall have jurisdiction only in respect of acts of infringement committed within the territory of that State.

(3) Article 5 (3) and (4) of the Convention on jurisdiction and enforcement shall not apply to actions for infringement of a Community patent.

(4) The following courts shall have exclusive jurisdiction, regardless of residence:

(a) in actions relating to compulsory licences in respect of a Community patent, the courts of the Contracting State the national law of which is applicable to the licence;

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(b) in actions relating to the right to a patent in which an employer and an employee are in dispute, the courts of the 'Contracting State under whose law the right to a European patent is determined in accordance with the second sentence of Article 60 (1) of the European Patent Convention. Any agreement conferring jurisdiction shall be valid only in so far as the national law governing the contract of employment allows the agreement in question.

(5) For the purposes of this Article, the residence of a party shall be determined by applying Articles 52 and 53 of the Convention on jurisdiction and enforcement.

Article 70: Supplementary provisions on jurisdiction

(1) Within the Contracting State whose courts have jurisdiction under Articles 68 and 69, those courts shall have jurisdiction which would have jurisdiction *ratione loci* and *ratione materiae* in the case of actions relating to a national patent granted in that State.

(2) Articles 68 and 69 shall apply to actions relating to a European patent application in which the Contracting States are designated, except in so far as the right to the grant of a European patent is claimed.

(3) Actions relating to a Community patent for which no court has jurisdiction under Articles 68 and 69 (1) and (2) may be heard before the courts of the Federal Republic of Germany.

Article 71: Supplementary provisions on recognition and enforcement

(1) Article 27 (3) and (4) of the Convention on jurisdiction and enforcement shall not apply to decisions relating to the right to the Community patent.

(2) In the case of irreconcilable decisions relating to the right to a Community patent given' in proceedings between the same parties, only the decision of the court first seised of the matter shall be recognized. Neither party may invoke any other decision even in the Contracting State in which it was given.

Article 72: National authorities

For actions relating to the right to a Community patent or to compulsory licences in respect of a Community patent the term 'courts' in this Convention and the Convention on jurisdiction and enforcement shall include authorities which, under the national law of a Contracting State, have jurisdiction to decide such actions relating to a national patent granted in that State. Any Contracting State shall notify the European Patent Office of any authority on which such jurisdiction is conferred and the European Patent Office shall inform the other Contracting States accordingly.

Article 73: Preliminary ruling by the Court of Justice of the European Communities

(1) In proceedings relating to a Community patent which are brought before a national court or tribunal, the Court of Justice of the European Communities shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Convention and of the provisions of the European Patent Convention which are binding upon every Community patent in accordance with Article 2 (3);

(b) the validity and interpretation of provisions enacted in implementation of this Convention, to the extent to which they are not national provisions.

(2) Where such a question is raised before a national court or tribunal, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice, of the European Communities to give a ruling thereon.

(3) Where any such question is raised in a case pending before a national court or tribunal, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice of the European Communities.

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**Chapter II
Procedure**

Article 74: Rules of procedure

Unless otherwise specified in this Convention, the actions referred to in Articles 68 to 70 shall be subject to the national rules of procedure governing the same type of action relating to a national patent.

Article 75: Burden of proof

(1) If the subject-matter of a Community patent is a process for obtaining a new product, the same product when produced by any other party shall, in the absence of proof to the contrary, be deemed to have been obtained by the patented process.

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

Article 76: Obligation of the national court

A national court which is dealing with an action relating to a Community patent shall treat the patent as valid.

Article 77: Stay of proceedings

(1) If the decision in an action before a national court relating to a European patent application in which the Contracting States are designated depends upon the patentability of the invention, that decision may be given only after the European Patent Office has granted a European patent or refused the European patent application. Paragraph 2 shall apply after the grant of the European patent.

(2) Where an opposition has been filed, or a request for the limitation or an application for the revocation of a Community patent as been made, the national court may, at the request of one of the parties and after hearing the other parties, stay proceedings relating to the Community patent, in so far as its decision depends upon validity. At the request of one of the parties the court shall instruct that the

documentary evidence of the opposition, limitation or revocation proceedings be communicated to it, in order to give a ruling on the request for a stay of proceedings.

Article 78: Opinion on the extent of protection

(1) When infringement proceedings are stayed in accordance with Article 77 (2) by a national court which has jurisdiction to determine the extent of protection conferred by the Community patent in relation to the alleged infringement, the European Patent Office shall, if it has decided to maintain the patent, express an opinion on the extent of protection conferred by the patent..

(2) In cases where Article 77 (2) does not apply, a national court before which proceedings for infringement of a Community patent are brought may, of its own motion or at the request of one of the parties and after hearing the other parties, obtain an opinion from the European Patent Office on the extent of protection conferred by the patent before giving a decision concerning the infringement.

(3) The opinion shall be given by a Revocation Board against payment of an appropriate fee and shall take into account the product or process which, in accordance with the findings of the national court, is alleged to infringe. This opinion shall not bind the national court. Article 116 (1) of the European Patent Convention shall apply.

(4) For the purposes of obtaining the opinion the national court shall transmit to the European Patent Office, in one of the three official languages of the European Patent Office, the findings and questions of the court as well as any other documents considered useful by it.

Article 79: Penal sanctions for infringement

The national penal provisions in the matter of infringement shall be applicable in the case of infringement of a 'Community patent, to the extent that like acts of infringement would

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be punishable if they similarly affected a national patent.

**PART VII
IMPACT ON NATIONAL LAW**

Article 80: Prohibition of simultaneous protection

(1) Where a national patent granted in a Contracting State relates to an invention for which a Community patent has been granted to the same inventor or to his successor in title with the same date of filing, or, if priority has been claimed, with the same date of priority, that national patent shall be ineffective to the extent that it covers the same invention as the Community patent, from the date on which:

- (a) the period for filing an opposition to the Community patent has expired without any opposition being filed;
- (b) the opposition proceedings are concluded with a decision to maintain the Community patent; or
- (c) the national patent is granted, where this date is subsequent to the date referred to in subparagraph (a) or (b), as the case may be.

(2) The subsequent lapse or revocation of the Community patent shall not affect the provisions of paragraph 1.

(3) Each Contracting State may prescribe the procedure whereby the loss of effect of the national patent is determined and, where appropriate, the extent of that loss. It may also prescribe that the loss of effect shall, apply as from the outset.

(4) Prior to the date applicable under paragraph 1, simultaneous protection by a Community patent or a European patent application and a national patent or a national patent application shall exist unless any Contracting State provides otherwise.

Article 81: Exhaustion of the rights conferred by a national patent

(1) The rights conferred by a national patent in a Contracting State shall not extend to acts concerning a product covered by that patent which are done within the territory of that Contracting State after that product has been put on the market in any Contracting State by the proprietor of the patent or with his express consent, unless there are grounds which, under Community law, would justify the extension to such acts of the rights conferred by the patent.

(2) Paragraph 1 shall also apply with regard to a product put on the market by the proprietor of a national patent, granted for the same invention in another Contracting State, who has economic connections with the proprietor of the patent referred to in paragraph 1. For the purpose of this paragraph, two persons shall be deemed to have economic connections where one of them is in a position to exert a decisive influence on the other, directly or indirectly, with regard to the exploitation of a patent, or where a third party is in a position to exercise such an influence on both persons.

(3) The preceding paragraphs shall not apply in the case of a product put on the market under a compulsory licence.

Article 82: Compulsory licences in respect of national patents

Article 47 shall apply *mutatis mutandis* to the grant of compulsory licences for lack or insufficiency of exploitation of a national patent.

Article 83: Effect of unpublished national applications or patents

(1) Where Article 37 (2) applies, the Community patent shall be ineffective in the Contracting State concerned to the extent that it covers the same invention as the national patent application or patent.

(2) The procedure confirming that, pursuant to paragraph 1, the Community patent is ineffective in the Contracting State shall, in that State, be that according to which, if the Community

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patent had been a national patent, it could have been revoked or made ineffective.

Article 84: National utility models and utility certificates

(1) Articles 37, 80 and 81 shall apply to utility models and utility certificates and to applications for utility models and utility certificates in the Contracting States whose laws make provision for such models or certificates.

(2) If a Contracting State provides in its law that a person may not exercise the rights conferred by a patent so long as there exists a utility model having an earlier date of filing or, where priority has been claimed, an earlier date of priority, the same shall, notwithstanding paragraph 1, apply also to the Community patent in that State.

**PART VIII
TRANSITIONAL PROVISIONS**

Article 85: Application of the Convention on Jurisdiction and Enforcement

The provisions of the Convention on jurisdiction and enforcement rendered applicable by the preceding Articles shall not have effect in respect of any Contracting State for which that Convention has not yet entered into force until such entry into force.

Article 86: Option between a Community patent and a European patent

(1) This Convention shall, subject to paragraph 3, not apply to a European patent application filed during a transitional period nor to any resulting European patent, provided that the request for grant contains a statement that the applicant does not wish to obtain a Community patent. This statement may not be withdrawn.

(2) Article 54 (3) and (4) of the European Patent Convention shall apply where a European patent application in which the Contracting States are designated or a Community patent has a date of filing or, where priority has been claimed, a date

of priority later than that of a European patent application in which one or some of the Contracting States are designated. In the event of limitation or revocation of the Community patent on this ground, limitation or revocation shall be pronounced only in respect of the Contracting States designated in the earlier European patent application as published.

(3) Articles 80 to 82 and 84 shall apply to a European patent as referred to in paragraph 1, the references in Articles 80 and 84 to a Community patent and the references in Articles 81 and 82 to a national patent being understood as references to such a European patent.

(4) The transitional period referred to in paragraph 1 may be terminated by decision of the Council of the European Communities, acting on a proposal from the Commission of the European Communities or from a Contracting State.

(5) The decision referred to in paragraph 4 shall require:

- (a) unanimity during the first 10 years from the date of entry into force of this Convention;
- (b) a qualified majority after expiry of that period. This majority shall be that specified in the second indent of the second subparagraph of Article 148 (2) of the Treaty establishing the European Economic Community.

Article 87: Subsequent choice of a Community patent

This Convention shall apply to a European patent granted in respect of a European patent application in which all the Contracting States are designated and which is filed prior to the entry into force of this Convention, provided that prior to the expiry of the time limit mentioned in Article 97 (2) (b) of the European Patent Convention, the applicant files with the European Patent Office a written statement that he wishes to obtain a Community patent.

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Article 88: Reservation concerning the translation of the specification of a Community patent

(1) Notwithstanding Article 14 (9), any Contracting State may, at the time of signature or when depositing its instrument of ratification, declare that it reserves the right to provide that, if the specification of a Community patent has been published in a language which is not one of the official languages of that State, the proprietor of the patent may, subject to the following paragraphs, avail himself, in that State, of the rights conferred by that patent, only under the condition that he files with the European Patent Office a translation of the specification, except for the claims, in one of the official languages of that State.

(2) If the translation is filed within three months of the date of publication of the mention of the grant of the patent, the proprietor of the patent may avail himself from that date of the rights conferred by the patent.

(3) If the translation is filed after the period referred to in paragraph 2, the proprietor of the patent may avail himself of the rights conferred by the patent from the date of filing of the translation. In respect of use of the invention without his consent in the period between the date of the publication of the mention of the grant of the patent and the date of filing of the translation, the proprietor may avail himself of the rights conferred by the patent only to the extent that he may, after the filing of the translation, claim reasonable compensation.

(4) If the translation is filed more than three years after the expiry of the period mentioned in Article 99 (1) of the European Patent Convention, any person who has used or made effective and serious preparations for using the invention, within the period mentioned in the second sentence of paragraph 3, may continue use of the invention upon reasonable terms.

(5) Any reservation made by a Contracting State under paragraph 1 shall cease to apply when the

Council of the European Communities, acting unanimously on a proposal from the Commission of the European Communities or from a Contracting State, decides to terminate it.

(6) Any Contracting State that has made a reservation under paragraph 1 may withdraw it at any time. Such withdrawal shall be made by notification addressed to the Secretary-General of the Council of the European Communities and shall take effect one month from the date of receipt of such notification.

(7) Termination of the effect of the reservation shall not apply to Community patents granted before the date on which the reservation ceased to have effect.

Article 89: Reservation in respect of compulsory licences

(1) Any Contracting State may, at the time of signature or when depositing its instrument of ratification, declare that it reserves the right to provide that Articles 47 and 82 shall not apply within its territory to Community patents or to European patents granted for, or to national patents granted by, that State.

(2) Any reservation made by a Contracting State under paragraph 1 shall have effect for a period of not more than 10 years from the entry into force of this Convention. However, the Council of the European Communities may, acting by a qualified majority on a proposal from a Contracting State, extend the period in respect of a Contracting State making such a reservation by not more than five years. This majority shall be that specified in Article 86 (5) (b).

(3) Any reservation made under paragraph 1 shall cease to apply when common rules on the granting of compulsory licences in respect of Community patents have become operative.

(4) Any Contracting State that has made a reservation under paragraph 1 may withdraw it at any time. Such withdrawal shall be made by notification addressed to the Secretary-General

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of the Council of the European Communities and shall take effect one month from the date of receipt of such notification.

(5) Termination of the effect of the reservation shall not affect compulsory licences granted before the date on which the reservation ceased to have effect.

Article 90: Reservation in respect of infringement proceedings

(1) Notwithstanding Article 76, any Contracting State whose national law makes provision for a decision to be taken in infringement proceedings as to the validity of national patents may, at the time of signature or when depositing its instrument of ratification, declare that it reserves the right to provide that its courts dealing with infringement relating to a Community patent may, with the agreement of the parties, decide upon the effect of the Community patent in the territory of the State in which the court is located. However:

(a) the court shall, in so far as the facts are the same, be bound by a prior decision of the European Patent Office concerning the validity of the Community patent;

(b) the court shall be limited to the grounds for revocation specified in Article 57 and be governed by the other provisions of this Convention.

(2) The Community patent shall not have effect in the territory of a Contracting State which has made a reservation pursuant to paragraph 1, to the extent to which a court in that State has decided that the patent is ineffective.

(3) The procedure for determining the effect of the Community patent in a Contracting State which has made a reservation pursuant to paragraph 1 shall be that which would have been implemented if the Community patent had been a national patent.

(4) Any reservation made by a Contracting State under paragraph 1 shall have effect for a period of not more than 10 years from the entry into

force of this Convention. However, the Council of the European Communities may, acting by a qualified majority on a proposal from a Contracting State, extend the period in respect of a Contracting State making such a reservation by not more than five years. This majority shall be that specified in Article 86 (5) .(b).

(5) Any reservation made under paragraph 1 shall cease to apply when special arrangements for litigation of Community patents have become operative.

(6) Any Contracting State that has made a reservation under paragraph 1 may withdraw it at any time. Such withdrawal shall be made by notification addressed to the Secretary-General of the Council of the European Communities and shall take effect one month from the date of receipt of such notification.

(7) A court exercising jurisdiction under this Article shall have jurisdiction only in respect of acts of infringement committed within the territory of the Contracting State in which it is situated. Articles 21 to 23 of the Convention on jurisdiction and enforcement shall not apply.

Article 91: Other transitional provisions

(1) Articles 159, 160 (2), 161 and 163 of the European Patent Convention shall apply mutatis mutandis subject to the following:

(a) the first meeting of the Select Committee of the Administrative Council shall be on the invitation of the Secretary-General of the Council of the European Communities;

(b) the term 'Contracting States' shall be understood as meaning the States parties to this Convention.

(2) Notwithstanding paragraph 1 (b), Article 64 (2) shall apply.

**PART IX
FINAL PROVISIONS**

Article 92: Implementing regulations

(1) The implementing regulations shall be an integral part of this Convention.

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(2) In the case of conflict between the provisions of this Convention and those of the implementing regulations, the provisions of this Convention shall prevail.

Article 93: Precedence of the provisions of the Treaty establishing the European Economic Community

No provision of this Convention may be invoked against the application of any provision of the Treaty establishing the European Economic Community.

Article 94: Ratification

This Convention shall be subject to ratification by the signatory States; instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.

Article 95: Accession

(1) This Convention shall be open to accession by States becoming Member States of the European Economic Community.

(2) Instruments of accession to this Convention shall be deposited with the Secretary-General of the Council of the European Communities. Accession shall take effect on the first day of the third month following the deposit of the instrument of accession, provided that the ratification by the State concerned of the European Patent Convention or its accession thereto has become effective.

(3) The Contracting States hereby recognize that any State which becomes a member of the European Economic Community must accede to this Convention.

(4) A special agreement may be concluded between the Contracting States and the acceding State, to determine the details of application of this Convention necessitated by the accession of that State.

Article 96: Participation of third States

The Council of the European Communities may, acting by a unanimous decision, invite a State party to the European Patent Convention which forms a customs union or a free trade area with the European Economic Community to enter into negotiations with a view to enabling that third State to participate in this Convention on the basis of a special agreement, to be concluded between the States parties to this Convention and the third State concerned, determining the conditions and details for applying this Convention to that State.

Article 97: Territorial field of application

(1) This Convention shall apply to the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the French Republic including its overseas departments and territories, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the European territory of the Kingdom of the Netherlands and to the United Kingdom of Great Britain and Northern Ireland.

(2) For the purposes of paragraph 1, the United Kingdom of Great Britain and Northern Ireland means England and Wales, Scotland and Northern Ireland.

(3) This Convention shall not apply to the Faroe Islands. The Kingdom of Denmark may at any time declare by notification addressed to the Secretary-General of the Council of the European Communities that this Convention shall be applicable to the Faroe Islands.

(4) The Kingdom of the Netherlands may declare in its instrument of ratification or by notification addressed to the Secretary-General of the Council of the European Communities at any later time that this Convention shall be applicable to the Netherlands Antilles.

(5) The United Kingdom of Great Britain and Northern Ireland may declare in its instrument of ratification or by notification addressed to the Secretary-General of the Council of the Eur-

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opean Communities at any later time that this Convention shall be applicable to one or more of the European territories for the external relations of which it is responsible.

(6) If a declaration referred to in paragraph 3, 4 or 5 is contained in the instrument of ratification, it shall take effect on the same date as the ratification; if the declaration is made in a notification after the deposit of the instrument of ratification, it shall take effect six months after the date of receipt by the Secretary-General of the Council of the European Communities.

(7) The States referred to in paragraphs 4 and 5 may, at any time, declare that the Convention shall cease to apply to one or more of the territories in respect of which they have made a declaration pursuant to paragraph 4 or 5. Such declarations of termination shall take effect one year after the date on which the Secretary-General of the Council of the European Communities received notification thereof.

(8) For the purposes of implementing this Convention, that part of the Continental Shelf adjacent to a territory referred to in paragraph 1, 3, 4 or 5 shall be deemed to be included in this territory, within the limits of the sovereign rights of coastal States as laid down in the Geneva Convention on the Continental Shelf of 29 April 1958, or any other Convention amending or replacing that Convention for the Contracting States.

Article 98: Entry into force

This Convention shall enter into force three months after the deposit of the instrument of ratification by the last signatory State to take this step; however, if the European Patent Convention enters into force with respect to the States signatories to this Convention at a later date, this Convention shall enter into force on the latter date.

Article 99: Duration of the Convention

This Convention is concluded for an unlimited period.

Article 100: Revision

If a majority of the Contracting States requests the revision of this Convention, a revision conference shall be convened by the President of the Council of the European Communities. The conference shall be prepared by the Select Committee of the Administrative Council.

Article 101: Disputes between Contracting States

(1) Any dispute between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be submitted, at the request of one of the States concerned, to the Select Committee of the Administrative Council, which shall endeavour to bring about agreement between the States concerned.

(2) If agreement is not reached within six months from the date when the Select Committee was seised of the dispute, any one of the States concerned may submit the dispute to the Court of Justice of the European Communities.

(3) If the Court of Justice finds that a Contracting State has failed to fulfil an obligation under this Convention, that State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

Article 102: Original of the Convention

This Convention, drawn up in a single original in the Danish, Dutch, English, French, German, Irish and Italian languages, all seven texts being equally authentic, shall be deposited in the archives of the Secretariat of the Council of the European Communities. The Secretary-General shall transmit a certified copy to the Government of each signatory State.

Article 103: Notification

The Secretary-General of the Council of the European Communities shall notify the signatory States of:

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- (a) the deposit of each instrument of ratification and accession;
- (b) any reservation or withdrawal of reservation pursuant to Article 88, 89 or 90;
- (c) the date of entry into force of this Convention;
- (d) any declaration or notification received pursuant to Article 97.

In witness whereof, the undersigned Plenipotentiaries have affixed their signatures below this Convention.

Editor's Note: All members signed but names not reproduced in this volume

Done at Luxembourg on the fifteenth day of December in the year one thousand nine hundred and seventy-five.

Status

Not in force