

WPL/4/02

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SUBJECT: Draft Statute of the European Patent Court

DRAWN UP BY: European Patent Office acting on behalf of the sub-group of the Working Party on Litigation

ADDRESSEES: Working Party on Litigation (for opinion)

SUMMARY

The present document contains the Draft Statute of the European Patent Court, which is an integral part of the Draft Agreement on the establishment of a European patent litigation system (WPL/3/02).

SUMMARY OF CONTENTS OF THE DRAFT STATUTE OF THE EUROPEAN PATENT COURT

The European Patent Court shall be constituted and shall function in accordance with the Statute.

Chapter I Judges (Arts. 2 to 10)

Provisions on the requirements for office: command of at least one EPO official language, sufficient experience of patent law, experience as judge or Board of Appeal member, or other equivalent experience; persons who have insufficient experience of patent law may be appointed as assessors.

Legally and technically qualified judges, appointed by the Administrative Committee for a term of six years.

Provisions on oath, incompatibility of other functions, end of term of office, removal from office and impartiality.

Chapter II Registrar (Arts. 11 to 13)

Provisions on appointment and removal from office.

List of duties of the Registrar who shall be responsible for the management of the Registry and for providing administrative and secretarial assistance to the European Patent Court.

Chapter III European Patent Court Section 1 Common provisions (Arts. 14 to 18)

Provisions on the Presidents of the European Patent Court, the Presidiums, the Executive Committee, the Common Presidium.

The Court of First Instance and the Court of Appeal shall both have a President, elected by the judges of each court, and a Presidium, composed of several judges of each Court.

The Presidiums shall advise and assist the Presidents of the court and the Executive Committee with regards to administrative, organisational, budgetary, personnel and legal matters.

The Executive Committee, composed of the Presidents of each Court and the Registrar, shall be responsible for the management of the European Patent Court; it shall draw up proposals for the Administrative Committee regarding the Rules of Procedure and prepare the annual budget, accounts and report.

The Common Presidium, composed of the members of the Presidiums and the Registrar, shall draw up proposals for appointment or re-appointment.

Sections 2 and 3 Court of First Instance (Arts. 19 to 26) and Court of Appeal (Art. 27)

One or more Contracting States may file a request for setting up a Regional Division that will ensure the local presence in the first instance of the European Patent Court.

If, over three successive years, the national courts or the Regional Division set up in a Contracting State have dealt with more than 100 cases concerning European patents in a year, that Contracting State may request that a further Regional Division of the Court of First Instance be set up in that State (up to a maximum of three Regional Divisions for one State).

Provisions on discontinuance of a Regional Division, on assignment of judges, on divisional presidents and on rotation of legally qualified judges.

Provisions on the composition of panels:

- cases shall be heard by an odd number of judges
- at least one judge shall be a technically qualified judge at least two shall be legally qualified judges
- the legally qualified judges shall be of at least two different nationalities
- the Court of Appeal will also have both technically and legally qualified judges

Chapter IV Procedural provisions (Arts. 28 to 39)

Provisions on delegation, majority decisions, reasoning and dissenting opinions.

The language regime is based on the time-honoured language regime of the EPO (English, French and German), as refined by the London Agreement on the application of Article 65 EPC:

- before the Court of Appeal, the language of the proceedings will always be the language of the first-instance proceedings

- before the Central Division of the Court of First Instance, the language of the proceedings will be the language of the European patent or the European patent application
- before a Regional Division of the Court of First Instance, the language of the proceedings will be the official language of the EPO designated by that Regional Division
- if the parties agree, the Court may allow the use of another language during all or part of the proceedings

Representation before the European Patent Court is compulsory and entrusted to lawyers registered as European patent counsel, assisted by European patent attorneys who will be allowed to speak at hearings of the European Patent Court.

Chapter V Transitional provisions (Arts. 40 and 41)

The first judges of the European Patent Court shall be appointed by the Administrative Committee on proposals from the Governments of the Contracting States.

During a period of seven years, judges shall be able to work in both the Court of First Instance and the Court of Appeal, to ensure that there is a sufficient number of judges for the new Court.

DRAFT STATUTE OF THE EUROPEAN PATENT COURT

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**DRAFT STATUTE
OF THE EUROPEAN PATENT COURT**

See Art. 1 COPAC Statute

Article 1 Contents of the Statute

The European Patent Court set up under Article 3 of the Agreement on the establishment of a European patent litigation system, hereinafter referred to as "the Agreement", shall be constituted and shall function in accordance with this Statute.

CHAPTER I JUDGES

Article 2 Requirements for office

[UK: nationality should not be a requirement]

Any person who [is a national of one of the Contracting States to the European Patent Convention and] has a good command of at least one of the official languages of the European Patent Office may be appointed as a judge of the European Patent Court, provided that he has sufficient experience of patent law and

DK: opposes that a person be member of a BoA and judge of the European Patent Court at the same time (see also Art. 6(1) Draft Statute)

(a) has been or is a judge in one of the Contracting States to the European Patent Convention,

(b) has been or is a member of a board of appeal of the European Patent Office or a national patent office of one of the Contracting States to the European Patent Convention, or

(c) has other equivalent experience enabling him to act as a judge of the European Patent Court.

Article 3 Legally and technically qualified judges

The European Patent Court shall comprise both legally and technically qualified judges.

See Art. 11(3) EPC

Redundancy payment schemes for judges who are not re-appointed and would not be able to obtain full-time employment as judges elsewhere will be provided for in the Service Regulations

See Art. 2 COPAC Statute

See Art. 3 COPAC Statute

CH: it should be possible to appoint as technical judges persons (such as patent attorneys) pursuing gainful occupation, without the authorisation of the Executive Committee

Article 4 Appointment

(1) Judges shall be appointed by the Administrative Committee as legally or technically qualified judges for a term of six years, on a proposal from the Common Presidium. They may be re-appointed.

(2) The decision appointing a judge shall state the court for which a legally qualified judge is appointed and the fields of technology for which a technically qualified judge is appointed.

[(3) Judges whose term of office has expired shall be reappointed by the Administrative Committee unless the Common Presidium proposes not to reappoint them, in which case the Administrative Committee may reappoint them of its own motion.]

Article 5 Oath

Before taking up office, each judge shall take an oath in open court that he will perform his duties impartially and conscientiously.

Article 6 Incompatibility of other functions

(1) Apart from being members of other courts or boards of appeal of the European Patent Office or national patent offices, judges of the European Patent Court shall not pursue any gainful occupation unless authorised by the Executive Committee. Nor shall they occupy any political or administrative office.

(2) Members of the Executive Committee shall pursue no other gainful occupation.

See Art. 4 COPAC Statute

Article 7 End of term of office

(1) A judge's term of office shall terminate:

- (a) on the last day of the month in which he reaches his seventieth birthday,
- (b) when the period of his appointment ends,
- (c) if he resigns,
- (d) if he is removed from office, or
- (e) on his death.

(2) The retirement age may be changed by decision of the Administrative Committee, but any such change shall only affect judges appointed for the first time after that decision.

See Art. 5 COPAC Statute

Article 8 Removal from office

(1) A judge may be removed from office only if he no longer meets the obligations arising from his office and if the Administrative Committee, on a proposal from a three-quarters majority of the Common Presidium, takes a decision to that effect.

(2) Proceedings to that end shall be initiated by the Executive Committee in accordance with the Service Regulations.

Article 9 Assessors

(1) A person who has insufficient experience of patent law but otherwise complies with the requirements of Article 2 may be appointed as an assessor to the European Patent Court.

(2) An assessor shall be appointed by the Administrative Committee for a term of up to six years on a proposal from a Government of a Contracting State. The appointment shall terminate automatically on the date on which he is appointed as a judge of the European Patent Court.

(3) An assessor may be appointed as a supernumerary member of a panel. He may partake in deliberations and may assist the rapporteur. He shall have no vote and shall be bound not to disclose what is said during the deliberations.

See Art. 11 COPAC Statute

Article 10 Impartiality

(1) A judge or assessor may not take part in the hearing of any case in which he has previously

(a) taken part as adviser,

(b) acted for one of the parties, or

(c) been called upon to pronounce as a member of a court, tribunal or board of appeal, of a commission of inquiry or in any other capacity.

(2) If, for some special reason, a judge or assessor considers that he should not take part in the examination of a particular case, he shall inform the President of his Court accordingly. If, for some special reason, the President of a Court considers that a judge or assessor should not sit on a particular case, he shall notify him accordingly.

See Art. 24(3) EPC

(3) Any party to the proceedings may object to a judge or assessor for any of the reasons mentioned in paragraph 1 or if he is suspected with good reason of partiality. A party may not object to the composition of a panel on the grounds of either the

nationality of a judge or assessor or the absence from the panel of a judge or assessor of the nationality of that party.

(4) Any decision under this Article shall be taken, in accordance with the Rules of Procedure, by a panel of the Court without the participation of the judge or assessor concerned.

CHAPTER II REGISTRAR

Article 11 Appointment

The Administrative Committee shall appoint the Registrar of the European Patent Court for a term of six years on a proposal from the Common Presidium. He may be re-appointed.

Article 12 Removal from office

The Registrar may be removed from office by the Administrative Committee on a proposal from the Common Presidium.

Article 13 Duties of the Registrar

(1) The Registrar shall be responsible for all aspects of the management of the Registry not taken on by the Executive Committee.

(2) The Registrar shall provide administrative and secretarial assistance to the European Patent Court. In particular, he shall:

(a) co-ordinate the division of work between the Registry and the sub-registries in cases allocated to Regional Divisions of the Court of First Instance,

(b) receive the fees payable to the Court and send communications to parties to proceedings and to third parties,

- (c) keep a register of cases,
 - (d) administer the funds and manage the buildings and other material assets of the Court,
 - (e) provide for the publication of decisions and opinions of the Court, and
 - (f) publish decisions of the Administrative Committee setting up or discontinuing Regional Divisions of the Court of First Instance.
- (3) The Registrar shall place at the disposal of the Administrative Committee, and of any body established by it, such staff, premises and equipment as may be necessary for the performance of their duties.

CHAPTER III EUROPEAN PATENT COURT

SECTION 1 COMMON PROVISIONS

Article 14 Presidents

- (1) The Court of First Instance and the Court of Appeal shall both have a President presiding over the respective Court and Presidium.
- (2) The judges of each Court shall elect the Presidents and their substitutes for a term of three years from among the legally qualified judges of the Court. They may be re-elected once.
- (3) In the event of a tied vote in a Presidium, the President shall have the casting vote.

Article 15 Presidiums

(1) The Court of First Instance and the Court of Appeal shall each have a Presidium.

(2) The Presidium of the Court of First Instance shall be composed of the President of the Court, the divisional presidents and two members, elected by the judges of the Court.

(3) The Presidium of the Court of Appeal shall be composed of the President of the Court and two members, elected by the judges of the Court.

(4) The elected members of the Presidiums shall hold office for four years. They may be re-elected once.

(5) A member of a Presidium may not take part in deliberations or decisions concerning himself.

Article 16 Duties of the Presidiums

(1) The Presidiums shall:

(a) advise and assist the Presidents of the European Patent Court with regard to administrative, organisational, budgetary and personnel matters

(b) advise the Executive Committee about proposals for the Practice Directions of the Court

(c) carry out any task assigned to it by the Executive Committee.

(2) The Presidiums may delegate duties wholly or in part to the President of the respective Court. The Presidium of the Court of First Instance [shall co-ordinate the work of the different divisions of the Court and] may delegate duties wholly or in part to the divisional presidents.

DE: what is left to be "co-ordinated"? Everything should be dealt with in RoP, practice directions and business distribution schemes

Article 17 Executive Committee

(1) The Executive Committee shall be composed of the President of the Court of Appeal, who shall act as chairman, the President of the Court of First Instance and the Registrar, or their substitutes.

(2) The Executive Committee shall be responsible for the management of the European Patent Court. It may, without prejudice to its own responsibility, delegate certain tasks to one of its members or to the Presidiums.

(3) The Executive Committee shall in particular:

(a) draw up proposals for the Administrative Committee, having heard the Common Presidium, regarding the Rules of Procedure of the European Patent Court, the fees to be charged in proceedings before the Court and the Practice Directions of the Court

(b) prepare the annual budget, the annual accounts and the annual report of the Court and submit them to the Administrative Committee.

(4) The Executive Committee can take valid decisions only when all three members, or their substitutes, are present. Decisions shall be taken by a majority of votes. The members of the Presidiums may take part in the deliberations of the Executive Committee; they shall have no vote.

Article 18 Common Presidium

(1) The Common Presidium shall be composed of the Registrar and the members of the Presidiums of the Court of First Instance and the Court of Appeal. The President of the Court of Appeal shall act as chairman.

(2) The Common Presidium shall draw up proposals concerning the appointment, re-appointment and removal of the judges and the Registrar.

(3) A member of the Common Presidium may not take part in deliberations or decisions concerning himself.

SECTION 2 COURT OF FIRST INSTANCE

Article 19 Request for the setting up of a Regional Division

(1) The Administrative Committee shall at the request of a Contracting State or a group of Contracting States set up a Regional Division for that State or group of States. The request shall:

(a) indicate where the Regional Division and the sub-registry are located, and

(b) name at least two persons who satisfy the requirements of Article 2 and agree to be appointed as legally qualified judges of the Court of First Instance and assigned as permanent members to the Regional Division to be set up.

(2) The Common Presidium shall propose that the persons concerned be appointed as judges of the Court of First Instance if they comply with the requirements laid down in Article 2.

Article 20 Request for the setting up of further Regional Divisions

(1) If, over three successive years, the national courts or the Regional Division set up in a Contracting State or for a group of Contracting States have dealt with more than one hundred cases concerning European patents in a year, the Administrative Committee shall at the request of that State or group of States set up a further Regional Division of the Court of First Instance in that State or for that group of States, but no more than three Regional Divisions in any Contracting State.

(2) Article 19 shall apply to any such request, which shall also state:

(a) the number of cases concerning European patents that have been heard during each of the last three years preceding the request, and

(b) the local competence of the Regional Divisions within the Contracting State or group of Contracting States.

Article 21 Number of judges

(1) The decision to set up a Regional Division shall specify the number of legally qualified judges to be permanently assigned to it.

(2) The Presidium of the Court of First Instance may change this number, but only with the assent of the Administrative Committee if the number is to be reduced below the original number.

Article 22 Discontinuance of a Regional Division

(1) The Administrative Committee, having heard the Presidium of the Court of First Instance, may decide unanimously to discontinue a Regional Division.

(2) The decision to discontinue a Regional Division shall state the date from which no new cases may be brought before that Division and the date on which it will cease to exist.

(3) As from the date on which the Regional Division ceases to exist, the judges assigned as permanent members of the Regional Division shall

be assigned to the Central Division, and cases still pending before the Regional Division shall be transferred to the Central Division without a change in the panel composed for those cases.

Article 23 Assignment of judges

(1) The Presidium of the Court of First Instance may assign legally qualified judges to a Regional Division as permanent members. The assignment shall only be valid after being accepted by the judge concerned.

(2) All technically qualified judges and those legally qualified judges not permanently assigned to a Regional Division shall be permanently assigned to the Central Division.

Article 24 Divisional presidents

(1) The Presidium of the Court of First Instance, having heard the permanent members of the Regional Division, shall elect one of the members of that Division as its President, and his substitute.

(2) Divisional presidents and their substitutes shall be elected for a term of six years. They may be re-elected.

(3) A divisional president of the Court of First Instance shall perform the functions of President of the Court of First Instance for the Regional Division concerned.

Article 25 Rotation of legally qualified judges

(1) Legally qualified judges of Regional Divisions may with their consent be assigned to the Central Division for a period of at least six months.

(2) Any decision under paragraph 1 shall be made by the Presidium of the Court of First Instance after hearing the judges of the Regional Division concerned.

Article 26 Composition of panels

(1) Unless the Rules of Procedure provide otherwise, the Court of First Instance shall sit in panels comprising an odd number of judges. At least one of these shall be a technically qualified judge and at least two shall be legally qualified judges. The legally qualified judges shall be of at least two different nationalities.

(2) One member of the panel shall act as chairman and at least one other member as rapporteur. The chairman and, if there is only one rapporteur, the rapporteur shall be legally qualified judges. The chairman may appoint another member as co-rapporteur at any stage of the proceedings if the nature of the case so requires.

(3) If a provisional hearing of witnesses has already taken place, the judge who heard the witnesses shall as far as possible be appointed as a member of the panel.

(4) Without prejudice to paragraph 3, each division of the Court of First Instance shall compose its panels in accordance with the rules laid down by the Presidium of the Court to rule out the arbitrary composition of panels.

The RoP may provide that a single judge reject clearly inadmissible actions

These rules will be drafted in such a way that the composition will be legally pre-determined (compare the German requirement of a "gesetzlicher Richter")

SECTION 3 COURT OF APPEAL

Article 27 Composition of panels

Article 26, paragraphs 1, 2 and 4, shall apply mutatis mutandis to the Court of Appeal.

CHAPTER IV PROCEDURAL PROVISIONS

Article 28 Delegation

Without prejudice to the principle of collegiate decision-making, the panels of the European Patent Court may delegate, in accordance with the Rules of Procedure, certain functions to one or more of their members for such time and under such conditions as they see fit.

Article 29 Majority decisions

Decisions of the European Patent Court shall be taken by a majority of the panel.

Article 30 Reasoned decisions in writing

Decisions shall be reasoned and given in writing.

Article 31 Concurring or dissenting opinions

Any member of the panel may express his opinion separately in the decision, whether that opinion be concurring or dissenting.

Article 32 Language of the proceedings

(1) The language of the proceedings shall be:

(a) in proceedings before the Central Division of the Court of First Instance, the language of the proceedings before the European Patent Office

(b) in proceedings before a Regional Division located in a Contracting State having an official language which is one of the official languages of the European Patent Office, that official language

(c) in proceedings before a Regional Division located in a Contracting State having either more than one or no official language which is one of the official languages of the European Patent Office, any official language of the European Patent Office designated by that State and communicated to the Registrar

(d) in proceedings before the Court of Appeal, the language of the proceedings before the Court of First Instance.

However, the parties and the panel hearing the case may agree that any official language of the European Patent Office other than the language under subparagraphs (a) to (d) is to be used as the language of the proceedings.

(2) The term "Contracting State" in paragraph 1 shall include a group of States which has set up a Regional Division.

(3) If the parties agree, the European Patent Court may allow the use of a language other than the language of the proceedings during all or part of the proceedings.

(4) The Rules of Procedure shall lay down rules for the translation of the file where a language other than an official language of the European Patent Office has been used during part of the proceedings.

[UNICE-proposal:

(3) Whatever would be the language of the proceedings under paragraph 1, the parties should always be entitled to use English.]

See Art. 12 COPAC Statute

UK: representation should not be compulsory; the term "lawyer" should be replaced by "person", leaving it to the RoP to define the requirements to be met by European patent counsel

See Art. 12(3) COPAC Statute

Article 33 Language of decisions

Decisions of the European Patent Court shall be drawn up in the language of the proceedings.

Article 34 European patent counsel

(1) In accordance with the Rules of Procedure, parties shall be represented before the European Patent Court by a [lawyer] registered by the Registrar as a European patent counsel.

(2) The Registrar shall register as a European patent counsel any [lawyer] who is entitled to practise and represent parties in civil proceedings before a court in any Contracting State and who applies for such registration.

(3) The Administrative Committee may require registered European patent counsel to pay an annual contribution towards the cost of administering the counsel registration system.

Article 35 Professional representative

A European patent counsel may be assisted by a professional representative entered on the list maintained by the European Patent Office. A professional representative shall be allowed to speak at hearings of the European Patent Court in accordance with the Rules of Procedure.

Article 36 Obligation to tell the truth

European patent counsel and professional representatives shall be obliged not to misrepresent cases or facts before the European Patent Court either knowingly or with good reason to know.

See Art. 134a(1)(d) and
Rule 101a(1) Draft
Implementing Regulations
EPC 2000

See Art. 12(4) COPAC
Statute

**Article 37 Rights of European patent
counsel and professional
representatives**

(1) European patent counsel and professional representatives appearing before the European Patent Court shall enjoy the rights and immunities necessary for the independent exercise of their duties.

(2) Where advice is sought from a European patent counsel or a professional representative in his capacity as such, all communications between the European patent counsel or the professional representative and his client or any other person, relating to that purpose, are permanently privileged from disclosure in proceedings before the European Patent Court.

(3) The Rules of Procedure shall lay down provisions governing the obligation of confidentiality of European patent counsel and professional representatives.

**Article 38 Powers in respect of European
patent counsel and professional
representatives**

The European Patent Court shall have the powers normally accorded to a national court, in respect of European patent counsel and professional representatives, as laid down in rules adopted to that effect by the Administrative Committee.

CHAPTER V TRANSITIONAL PROVISIONS

Article 39 First appointments

SE: Art. 39(1) and (2) should be applied permanently (not as transitional provisions only)

(1) The first judges and the first Registrar shall be appointed by the Administrative Committee on proposals from the Governments of the Contracting States.

(2) At least one legally qualified judge or assessor and one technically qualified judge or assessor from each Contracting State shall be appointed to the Court of First Instance and the Court of Appeal.

(3) The first judges appointed shall take the oath under Article 5 in a public meeting of the Administrative Committee.

DK: reservation

Article 40 Membership of both the Court of First Instance and the Court of Appeal

(1) During the first seven calendar years after this Statute has entered into force, judges may be members of both the Court of First Instance and the Court of Appeal at the same time, if this is necessary in order to staff the European Patent Court with judges having sufficient experience of patent law. [A majority of two-thirds of the votes of the Contracting States represented and voting in the Administrative Committee shall be required for decisions appointing judges as members of both the Court of First Instance and the Court of Appeal.]

(2) Five years after this Statute has entered into force, the Administrative Committee shall evaluate the situation and may decide to terminate or extend the transitional period under paragraph 1. If no

unanimous decision to that effect is taken, the transitional period shall expire at the end of the seventh calendar year after this Statute has entered into force.

(3) Any judge whose term of office ends after the transitional period expires, and who wishes to be re-appointed, shall indicate whether he wants to be re-appointed as a judge of the Court of First Instance or the Court of Appeal.
