

## **Preliminary set of provisions for the Rules of procedure of the European and Community Patents Court**

### **Status**

1. First draft dated 29 May 2009
  - discussed in expert meetings on 5 June and 19 June 2009
2. Second draft (Part 1, Chapter 1) dated 9 July 2009, Working paper from the Commission Services, Council working document 11813/09
  - discussed in Council Working Party on Intellectual Property (Patents) on 22 July 2009
3. Third draft dated 25 September 2009
  - discussed in expert meeting on 2 October 2009
4. Fourth draft dated 16 October 2009
  - submitted to 5<sup>th</sup> European Patent Judges' Forum on 30 and 31 October 2009

### **Introductory remarks**

The present document contains a preliminary set of provisions for the Rules of Procedure of the European and Community Patents Court (hereinafter "ECPC").

Basic principles of procedural law are already laid down in Part III of the draft Agreement on the ECPC (hereinafter "draft Agreement")<sup>1</sup>, for instance proportionality and fairness, case management, right to be heard, publicity, stages of the proceedings etc. The draft Agreement also contains general provisions on languages, parties, representation, means of evidence, experts, and defines the powers of the ECPC to order provisional measures (in particular preliminary injunctions), to issue orders to preserve evidence (*saisie-contrefaçon*), corrective measures etc.

However, in several places in the draft Agreement, references are made to "Rules of Procedure" which shall spell out procedural details. This is a tried and tested legal technique: only the basic principles have been included in the draft Agreement, many procedural details being left for secondary legal instruments (rules of procedure, practice directions).

In accordance with Article 22(2) draft Agreement, the Rules of Procedure of the ECPC shall be adopted by the Mixed Committee on a proposal from the Commission. The Commission shall draw up its proposal on the basis of broad consultations with the stakeholders and after having received an opinion of the ECPC.

It will be a tremendous task to draw up truly European Rules of Procedure which will guarantee that the ECPC adopts the most efficient and fair procedural practices, and thus becomes the attractive forum for resolving patent disputes that European businesses need. Nevertheless, a

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<sup>1</sup> See Council working document 7928/09 dated 23.3.2009, in particular Articles 21a to 56.

uniform procedural law is indispensable in order to achieve consistent handling of cases in the various divisions of the ECPC. In practice, this will constitute a major improvement as compared to today's fragmented patent litigation system where the same European patent is dealt with by national courts operating under their own procedural laws: since each judge must apply his national procedural rules, judgments in various jurisdictions are frequently based on different sets of facts and evidence, and different national rules on disclosure, cross-examination, hearings, the role of experts and technically qualified judges, if any, impinge on the eventual outcome and increase the risk of divergent decisions.

The eventual Rules of Procedure of the ECPC will be the result of a long and very thorough and collaborative process, involving judges, attorneys, experts from industry and other interested circles as well as Member States, over the coming months and years. Even after the new court system comes into operation, the Rules of Procedure will have to be regularly adjusted, in accordance with Article 22(2) draft Agreement.

Users of the patent system have repeatedly requested that work on the Rules of Procedure be started at an early stage. In order to enable a proper assessment of the functioning of the future Court in practice and to create trust and confidence in the new Court system, it does appear appropriate to start early and not to push aside this huge task for later times. Together with the draft Agreement, ongoing work on the Rules of Procedure will enable Member States and all users to better perceive how the future Court system will work in practice. And, as regards the overall architecture of the project, it will be crucial for achieving, in the final negotiations on the draft Agreement, the right balance between on the one side the broad principles in the draft Agreement and on the other side the level of details which should be left to the Rules of Procedure.

For all these reasons, a preliminary set of provisions for the Rules of Procedure has been prepared and is currently being discussed with stakeholders and Member States. It draws on the work carried out in the framework of the EPLA (most notably the "Second Venice Resolution" of 2006 and Jan Willems' "Third proposal for an EPLP" of 2001). For general procedural matters not specifically related to patent law, the Rules of the procedure of the European Court of Justice have served as a model.

## **Abbreviations**

EPC	European Patent Convention
EPLA RoP	"Annex I. Procedural law EPJ", prepared by Jan Willems, WPL/SUB 20/01, 27.8.2001
IPLA	Intellectual Property Lawyers' Association, Comments on Second Venice Resolution, <a href="http://www.ipla.org.uk/submissions.php?id=10">http://www.ipla.org.uk/submissions.php?id=10</a>
RoP CST	Rules of Procedure of the European Union Civil Service Tribunal
VR2	Second Venice Resolution, Principles relating to the Rules of Procedure of the European Patent Court, 4.11.2006

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## **PREAMBLE**

The Court shall conduct proceedings in accordance with these Rules of Procedure which shall be applied and interpreted on the basis of the principles of proportionality, fairness and equity.

Proportionality shall be ensured by giving due consideration to the nature and complexity of each case, its economic value and its importance to the parties.

Fairness shall be ensured by giving due consideration to the legitimate interests and expectations of the parties, including predictability of proceedings and the possibility to best present and defend their case.

Equity shall be ensured by giving due consideration to the necessary balance of interests of all parties including the prevention of abuse of procedure by one of the parties, as well as unnecessary costs and delays.

In accordance with these principles the Court shall apply and interpret the Rules of Procedure in a way which will ensure efficiency and cost-effectiveness of proceedings and decisions of the highest quality.

In accordance with these principles proceedings shall be conducted in a way which will normally allow deciding or otherwise concluding cases at first instance within one year. Case management shall be organised in accordance with this objective. Parties shall cooperate and set out their full case as early as possible in the proceedings.

The Court shall endeavour to ensure consistent application and interpretation of these Rules of Procedure by all first instance divisions and the Court of Appeal. Due consideration will be given to this objective in any decision concerning leave to appeal against procedural orders.

Practice Directions shall lay down further details of the proceedings before the Court. They may not contradict or alter the provisions of the Agreement, the Statute or these Rules of Procedure.

## **APPLICATION AND INTERPRETATION OF THE RULES OF PROCEDURE**

### **Rule 1 – Power of judge to perform functions of the Court**

Where these Rules provide for the Court to perform any act, that act may be performed by the presiding judge or the judge-rapporteur of the panel to which the case has been assigned.

### **Rule 2 – Power of Registry staff to perform functions of the Registry**

Where these Rules provide for the Registry to perform any act, that act may be performed by a member of the staff of the Registry or of any sub-registry.

### **Rule 3 – Use of electronic means of communication and official forms**

Written pleadings shall be lodged at the Registry in electronic form, in accordance with the Practice Directions. Parties shall make use of the official forms available on-line.

*[Relation with draft Agreement: Article 25]*

### **Rule 4 – Service of orders, decisions and written pleadings**

The Registry shall serve, in accordance with Rule <on Service>,

- (a) orders and decisions of the Court on the parties,
- (b) written pleadings of a party on the other party.

Where applicable, the Registry shall inform the parties of the opportunity to reply or to take any other action in the proceedings and of any time period for so doing.

### **Rule 5 – Language of written pleadings**

Written pleadings shall be drawn up in the language of the proceedings, unless otherwise provided.

### **Rule 6 – Party and party's representative**

Where these Rules provide that a party perform any act, that act shall be performed by a representative, unless otherwise provided.

### **Rule 7 – Powers of the Court**

1. The Court may, at any stage of the proceedings, of its own motion or on reasoned request by a party, order a party to answer any question or provide any clarification or evidence, within time periods to be specified.
2. The Court may disregard any request, fact, evidence or argument [= submissions] which a party, without reasonable grounds, has not submitted in due time.

## **PART 1 – PROCEDURE BEFORE THE COURT OF FIRST INSTANCE**

### **Rule 8 – Stages of the proceedings**

Proceedings before the Court of First Instance shall consist of one or more of the following stages:

- (a) the written procedure;
- (b) the interim procedure, which may include an interim conference with the parties;
- (c) the oral procedure, which shall include an oral hearing of the parties;
- (d) the procedure for the award of damages;
- (e) the procedure for a cost order.

*Relation with draft Agreement: Articles 32(1), 41 and 42*

### **Rule 9 – Settlement**

1. At any stage of the proceedings, if the Court is of the opinion that the dispute is suitable for a settlement, it may [without compromising its judicial position] propose that the parties make use of the facilities of the Patent Mediation and Arbitration centre in order to settle the dispute.
2. No opinion expressed, suggestion made, proposal put forward, concession made or document drawn up for the purposes of settlement may be relied on as evidence by the Court or the parties in proceedings before the Court.

*Relation with draft Agreement: Articles 17(3) and 52*

## **CHAPTER 1 – WRITTEN PROCEDURE**

### **SECTION 1 – INFRINGEMENT ACTION**

#### **Rule 10 – Exchange of written pleadings (infringement action)**

1. The written procedure shall consist of
  - (a) the lodging of a Statement of claim (by the plaintiff) [Rule 11] and
  - (b) the lodging of a Statement of defence (by the defendant) [Rules 20-21].
2. The Statement of defence may include a Counterclaim for revocation [Rule 22].
3. If a Counterclaim for revocation is lodged, the plaintiff may lodge a Reply to the counterclaim for revocation [Rule 28]. The Reply may include a Request to amend the claims [Rule 29].
4. If a Request to amend the claims is lodged, the defendant may lodge a Rejoinder to the request to amend the claims [Rule 30].
5. The judge-rapporteur may allow the exchange of further written pleadings, within periods to be specified [Rule 31].

## STATEMENT OF CLAIM

### **Rule 11 – Contents of the Statement of claim**

The plaintiff shall lodge a Statement of claim which shall contain

- (a) the names of the plaintiff and of the plaintiff's representative,
- (b) the name of the party against whom the Statement is made (the defendant),
- (c) postal and electronic addresses for service on the plaintiff and the names of the persons authorised to accept service,
- (d) postal and, where available, electronic addresses for service on the defendant and the names of the persons authorised to accept service,
- (e) the number of the patent concerned,
- (f) where applicable, information about any pending proceedings relating to that patent before the Court, the European Patent Office or any national authority,
- (g) an indication of the division which shall have jurisdiction in accordance with Article 15a(1) of the Agreement; where the parties have agreed in accordance with Article 15a(6) of the Agreement, the indication of the division which shall have jurisdiction shall be accompanied by evidence of the parties' agreement,
- (h) the nature of the claim, the order or the remedy sought by the plaintiff,
- (i) the facts relied on, in particular
  - (i) one or more examples of alleged infringements specifying the date and place of each,
  - (ii) the identification of the patent claims alleged to be infringed,
- (j) written evidence relied on, including any written witness statement [Rule 175], and where necessary an indication of any further evidence which will be offered in support and
- (k) the reasons why the facts relied on constitute infringements of the patent claims, including arguments of law and where appropriate an explanation of the proposed claim interpretation

## **Rule 12 – Language of the Statement of claim**

1. The Statement of claim shall be drawn up
  - (a) in one of the languages of the regional division or local division
    - (i) which the plaintiff has chosen in accordance with Article 15a(1)(a) or (b) or second sentence of the Agreement or
    - (ii) which the parties have agreed to bring the action before in accordance with Article 15a(6) of the Agreement, or
  - (b) in the language in which the patent was granted
    - (i) where the central division has jurisdiction in accordance with Article 15a(1) of the Agreement or
    - (ii) where the parties have agreed on the use of the language in which the patent was granted in accordance with Article 29(3) of the Agreement; where the parties have agreed in accordance with Article 29(3) of the Agreement, evidence of such agreement shall be lodged by the plaintiff together with the Statement of claim.
2. The language in which the Statement of claim is drawn up shall be the language of the proceedings, without prejudice to a decision of the Court under Rule 17(1)(c).
3. The plaintiff may lodge a translation of the Statement of claim in an official language of the State where the defendant is domiciled and request that the translation be served on the defendant.

*Relation with draft Agreement: Article 29*

## **Rule 13 – Fee for the infringement action**

1. The plaintiff shall pay the fee for the infringement action. Proof of payment of the fee shall be provided together with the Statement of claim.
2. Without prejudice to a decision on an application for legal aid under Article 44 of the Agreement, the Statement of claim shall not be deemed to have been lodged until the fee has been paid.

*Relation with draft Agreement: Articles 43, 44*

#### **Rule 14 – Examination as to formal requirements of the Statement of claim**

1. The Registry shall, within three working days of lodging of the Statement of claim, examine whether the requirements of Rules 11(a) to (g), 12 and 13(1) have been complied with.
2. If the plaintiff has not complied with the requirements referred to in paragraph 1, the Registry shall inform the President of the Court of First Instance who shall reject the action as inadmissible. He may hear the plaintiff.

#### **Rule 15 – Recording in the Register (Court of First Instance, infringement action)**

1. If the requirements referred to in Rule 14(1) have been complied with, the Registry shall immediately, in accordance with the Instructions to the Registrar,
  - (a) attribute a date of receipt to the Statement of claim and a case number to the file,
  - (b) record the file in the Register,
  - (c) inform the plaintiff of the case number of the file and the date of receipt and
  - (d) assign the case to a panel of the division indicated by the plaintiff [Rule 11(g)], in accordance with the business distribution scheme.
2. The action shall be regarded as pending before the Court as from the date of receipt attributed to the Statement of claim.

*Relation with draft Agreement: Articles 8 and 15a*

#### **Rule 16 – Designation of the judge-rapporteur**

The presiding judge of the panel to which the case has been assigned [Rule 15(1)(d)] shall designate one judge of the panel as judge-rapporteur.

## **PROCEDURE WHEN THE DEFENDANT RAISES A PRELIMINARY OBJECTION**

### **Rule 17 – Preliminary objection**

1. [At the latest together with the Statement of defence / Within two months of service of the Statement of claim], the defendant may lodge a Preliminary objection regarding
  - (a) the jurisdiction of the Court,
  - (b) the competence of the division indicated by the plaintiff [Rule 11(g)] or
  - (c) the language of the Statement of claim.
2. A Preliminary objection shall be lodged in separate written pleadings setting out
  - (a) the grounds upon which it is based,
  - (b) where appropriate, the facts and evidence relied on and
  - (c) the order sought by the defendant.
3. The Preliminary objection shall be drawn up
  - (a) in the language of the proceedings or
  - (b) in one of the official languages of the Contracting State where the defendant is domiciled.
4. The Registry shall
  - (a) invite the plaintiff to comment on the Preliminary objection and, where applicable, to correct of his own motion any deficiency, within one month, and
  - (b) inform the judge-rapporteur.
5. The period for lodging the Statement of defence under Rule 20(1) shall not be affected by the lodging of a Preliminary objection, unless the judge-rapporteur decides otherwise.

### **Rule 18 – Decision on Preliminary objection**

1. As soon as possible after the expiry of the period [of one month] referred to in Rule 17(4)(a), the judge-rapporteur shall decide whether the Preliminary objection shall be dealt with immediately or in the main proceedings.
2. Where the Preliminary objection is to be dealt with immediately, the judge-rapporteur shall present a report on the Preliminary objection to the panel which shall decide on the Preliminary objection in accordance with Rule <on Decision in written proceedings>. The decision shall include instructions to the parties and to the Registry concerning the next step in the proceedings.
3. Where the Preliminary objection is to be dealt with in the main proceedings, the judge-rapporteur shall inform the parties.

### **Rule 19 – Appeal against decision on Preliminary objection**

1. An appeal against a decision under Rule 18 may only be lodged together with an appeal against the final decision of the Court of First Instance, unless the Court grants leave to appeal [Rules 251-252].
2. If an appeal is lodged, proceedings at first instance may be stayed by the Court on a reasoned request by a party.

### **STATEMENT OF DEFENCE**

### **Rule 20 – Lodging of the Statement of defence**

The defendant shall lodge a Statement of defence within four months of service of the Statement of claim. The period may be extended by the judge-rapporteur on a reasoned request by the defendant.

### **Rule 21 – Contents of the Statement of defence**

The Statement of defence shall contain

- (a) the names of the defendant and of the defendant's representative,
- (b) postal and electronic addresses for service on the defendant and the names of the persons authorised to accept service,
- (c) the case number of the file,
- (d) an indication whether the defendant has lodged a Preliminary objection [Rule 17],
- (e) the facts relied on, including any challenge to the facts relied on by the plaintiff,
- (f) written evidence relied on, including any written witness statement [Rule 175], and where necessary an indication of any further evidence which will be offered in support;
- (g) the reasons why the action shall fail, including arguments of law and where appropriate any challenge to the plaintiff's proposed claim interpretation.

### **Rule 22 – Counterclaim for revocation**

The Statement of defence may include a Counterclaim for revocation of the patent alleged to be infringed. The Counterclaim for revocation shall contain submissions in accordance with Rule 42(c) to (f).

### **Rule 23 – Fee for the Counterclaim for revocation**

The defendant shall pay the fee for the Counterclaim for revocation. Proof of payment of the fee shall be provided together with the Statement of defence. Rule 13(2) shall apply *mutatis mutandis*.

### **Rule 24 – Further schedule**

1. At the latest ten working days after service of the Statement of defence, the judge-rapporteur shall, after consulting the parties and in accordance with the Practice Directions, set
  - (a) where appropriate, a date, time and place for an interim conference with the parties and
  - (b) a date for the oral hearing.
2. On a reasoned request by a party and after consulting the other party, the judge-rapporteur may convene an early hearing, in accordance with the Practice Directions.

### **REPLY TO THE COUNTERCLAIM FOR REVOCATION AND REQUEST TO AMEND THE CLAIMS**

### **Rule 28 – Lodging of the Reply to the counterclaim for revocation**

1. Within three months of service of a Statement of defence which includes a Counterclaim for revocation, the plaintiff may lodge a Reply to the counterclaim for revocation stating why the defendant's Counterclaim for revocation shall fail. The period [may / shall] be extended by the judge-rapporteur on a reasoned request by the plaintiff.
2. The Reply to the counterclaim for revocation shall contain submissions in accordance with Rule 21(e) to (g).

### **Rule 29 – Request to amend the claims**

1. The Reply to the counterclaim for revocation may include a Request to amend the claims which shall contain
  - (a) the proposed amendments of the claims of the patent in dispute, including where appropriate one or more alternative sets of claims (auxiliary requests),
  - (b) the grounds upon which the amendments are sought and
  - (c) an indication whether the proposals are definite or conditional; the proposed amendments, if conditional, must be reasonable in number in the circumstances of the case.
2. Any subsequent request to amend the claims may only be submitted with the leave of the judge-rapporteur.

### **REJOINDER TO THE REQUEST TO AMEND THE CLAIMS**

### **Rule 30 – Lodging of the Rejoinder to the request to amend the claims**

1. Within two months of service of a Request to amend the claims, the defendant may lodge a Rejoinder to the request to amend the claims stating why
  - (a) the proposed amendments are not allowable or
  - (b) the claims as amended remain invalid.The period may be extended by the judge-rapporteur on a reasoned request by the defendant.
2. Where appropriate in view of the proposed amendments, the Rejoinder to the request to amend the claims may contain submissions in accordance with Rule 42(d) to (f).

### **FURTHER EXCHANGES OF WRITTEN PLEADINGS**

### **Rule 31 – Further exchanges of written pleadings**

On a reasoned request by a party, the judge-rapporteur may allow the exchange of further written pleadings, within periods to be specified.

## **SECTION 2 – REVOCATION ACTION**

### **Rule 40 – Action to be directed against the patent proprietor**

In any action for the revocation of a patent, the proprietor of the patent shall be party to the proceedings.

### **Rule 41 – Exchange of written pleadings (revocation action)**

1. The written procedure shall consist of
  - (a) the lodging of a Statement for revocation (by the plaintiff) [Rule 42] and
  - (b) the lodging of a Defence to revocation (by the defendant) [Rule 50].
2. The Defence to revocation may include
  - (a) a Request to amend the claims and
  - (b) a Counterclaim for infringement.
3. If a Request to amend the claims is lodged, the plaintiff may lodge a Reply to the request to amend the claims.
4. If a Counterclaim for infringement is lodged, the plaintiff may lodge a Reply to the counterclaim for infringement [Rule 56].
5. Rule 10(5) shall apply.

## STATEMENT FOR REVOCATION

### **Rule 42 – Contents of the Statement for revocation**

The plaintiff shall lodge a Statement for revocation shall contain

- (a) particulars in accordance with Rule 11(a) to (f),
- (b) where the parties have agreed [to bring the action before a local division or a regional division] in accordance with Article 15a(6) of the Agreement, an indication of the division which shall have jurisdiction accompanied by evidence of the parties' agreement,
- (c) the nature of the claim, the order [revocation, partial revocation] or the remedy sought by the plaintiff,
- (d) one or more grounds for revocation, which may be supported by arguments of law,
- (e) the facts relied on and
- (f) written evidence relied on, including any written witness statement, and where necessary an indication of any further evidence which will be offered in support.

### **Rule 43 – Language of the Statement for revocation**

1. The Statement for revocation shall be drawn up in the language in which the patent was granted.
2. Where the parties have agreed [to bring the action before a regional division or a local division] in accordance with Article 15a(6) of the Agreement, the Statement for revocation shall be drawn up in one of the languages of the regional division or local division concerned.
3. Rule 12(2) and (3) shall apply *mutatis mutandis*.

*Relation with draft Agreement: Article 29*

### **Rule 44 – Fee for the revocation action**

The plaintiff shall pay the fee for the revocation action. Proof of payment of the fee shall be provided together with the Statement for revocation. Rule 13(2) shall apply *mutatis mutandis*.

*Relation with draft Agreement: Articles 43, 44*

<p><b>Rule 14 on Examination as to formal requirements of the Statement for claim</b> shall apply <i>mutatis mutandis</i></p>
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**Rule 46 – Recording in the Register (Court of First Instance, revocation action)**

1. Rule 15(1)(a) to (c) and (2) shall apply *mutatis mutandis*.
2. The Registry shall, in accordance with the business distribution scheme, assign the case to a panel
  - (a) of the central division or
  - (b) where the parties have agreed [to bring the action before a local division or a regional division] in accordance with Article 15a(6) of the Agreement, to a panel of the local division or the regional division concerned.

*Relation with draft Agreement: Articles 8 and 15a*

**Rule 16 on Designation of judge-rapporteur** shall apply *mutatis mutandis*  
**Rules 17, 18 and 19 on Procedure when the defendant raises a Preliminary objection** shall apply *mutatis mutandis*

**DEFENCE TO REVOCATION**

**Rule 50 – Lodging of the Defence to revocation**

1. The defendant shall lodge a Defence to revocation within four months of service of the Statement for revocation. The period [may / shall] be extended by the judge-rapporteur on a reasoned request by the defendant.
2. The Defence to revocation may include
  - (a) a Request to amend the claims and
  - (b) a Counterclaim for infringement.

### **Rule 51 – Contents of the Defence to revocation**

1. The Defence to revocation shall contain:

- (a) particulars in accordance with Rule 21(a) to (d) and
- (b) submissions in accordance with Rule 21(e) to (g).

2. Any Request to amend the claims shall contain submissions in accordance with Rule 29(1). Rule 29(2) shall apply.

3. Any Counterclaim for infringement shall contain submissions in accordance with Rule 11(h) to (k).

### **Rule 52 – Fee for the Request to amend the claims and the Counterclaim for infringement**

1. The defendant shall pay the fee for the Request to amend the claims and the fee for the Counterclaim for infringement. Proof of payment of the fee shall be provided together with the Defence to revocation. Rule 13(2) shall apply *mutatis mutandis*.

**Rule 24 on Further schedule** shall apply *mutatis mutandis*

### **REPLY TO THE REQUEST TO AMEND THE CLAIMS AND REPLY TO THE COUNTERCLAIM FOR INFRINGEMENT**

**Rule 30 on Lodging of the Rejoinder to the request to amend the claims** shall apply *mutatis mutandis*

### **Rule 56 – Lodging of the Reply to the counterclaim for infringement**

1. Within two months of service of a Counterclaim for infringement, the plaintiff may lodge a Reply to the counterclaim for infringement. The period may be extended by the judge-rapporteur on a reasoned request by the plaintiff.

2. Where appropriate in view of the submissions of the defendant [in the Counterclaim for revocation], the Reply may contain submissions in accordance with Rule 21(e) to (g).

**Rule 31 on Further exchanges of written pleadings** shall apply

## **SECTION 3 – ACTION FOR DECLARATION OF NON-INFRINGEMENT**

### **Rule 60 – Declaration of non-infringement**

A declaration that the performance of a specific act does not, or a proposed act would not, constitute an infringement of a patent may be made by the Court in proceedings between the person doing or proposing to do the act and the patent proprietor, notwithstanding that no assertion to the contrary has been made by the proprietor, if it is shown

- (a) that that person has applied in writing to the proprietor for a written acknowledgment to the effect of the declaration claimed, and has furnished him with full particulars in writing of the act in question and
- (b) that the proprietor has refused or failed to give any such acknowledgment.

### **Rule 61 – Exchange of written pleadings (action for declaration of non-infringement)**

1. The written procedure shall consist of

- (a) the lodging of a Statement for a declaration of non-infringement (by the plaintiff) [Rule 62] and
- (b) the lodging of a Defence to the declaration of non-infringement (by the defendant) [Rules 65-66].

2. The Defence to the declaration of non-infringement may include a Counterclaim for infringement.

3. If a Counterclaim for infringement is lodged, the plaintiff may lodge a Reply to the counterclaim for infringement.

4. Rule 10(5) shall apply.

### **Rule 62 – Contents of the Statement for a declaration of non-infringement**

1. The plaintiff shall lodge a Statement for a declaration of non-infringement shall contain

- (a) particulars in accordance with Rule 11(a) to (f),
- (b) where the parties have agreed [to bring the action before a local division or a regional division] in accordance with Article 15a(6) of the Agreement, an indication of the division which shall have jurisdiction accompanied by evidence of the parties' agreement,
- (c) the nature of the order or the remedy sought by the plaintiff,
- (d) the reasons why the performance of a specific act does not, or a proposed act would not, constitute an infringement of a patent, which may include arguments of law,
- (e) the facts relied on and
- (f) written evidence relied on, including any written witness statement, and where necessary an indication of any further evidence which will be offered in support.

**Rules 43, 44, 45, 46 and 47 on Statement for revocation** shall apply *mutatis mutandis*  
**Rule 14 on Examination as to formal requirements of the Statement for claim** shall apply *mutatis mutandis*  
**Rules 17, 18 and 19 on Procedure when the defendant raises a Preliminary objection** shall apply *mutatis mutandis*

#### **Rule 65 – Lodging of the Defence to the declaration of non-infringement**

The defendant shall lodge a Defence to the declaration of non-infringement within three months of service of the Statement for a declaration of non-infringement. The period may be extended by the judge-rapporteur on a reasoned request by the defendant.

#### **Rule 66 – Contents of the Defence to the declaration of non-infringement**

1. The Defence to the declaration of non-infringement shall contain:
  - (a) particulars in accordance with Rule 21(a) to (d) and
  - (b) submissions in accordance with Rule 21(e) to (g).
2. Where the Defence to the declaration of non-infringement include a Counterclaim for infringement, it shall contain submissions in accordance with Rule 11(h) to (k).

#### **Rule 67 – Fee for the Counterclaim for infringement**

The defendant shall pay the fee for the Counterclaim for infringement. Proof of payment of the fee shall be provided together with the Defence to the declaration of non-infringement.  
Rule 13(2) shall apply *mutatis mutandis*.

**Rule 24 on Further schedule** shall apply *mutatis mutandis*  
**Rule 56 on Lodging of the Reply to the counterclaim for infringement** shall apply *mutatis mutandis*  
**Rule 31 on Further exchanges of written pleadings** shall apply

**SECTION 4 – ACTION RELATING TO THE USE OF THE INVENTION PRIOR TO THE GRANTING OF THE PATENT OR TO THE RIGHT BASED ON PRIOR USE OF THE PATENT**

*[to be developed]*

**SECTION 5 – ACTION FOR THE GRANT OR REVOCATION OF A COMPULSORY LICENCE IN RESPECT OF A COMMUNITY PATENT**

**Rule 80 – Action to be directed against the patent proprietor**

In any action for the grant or revocation of a compulsory licence in respect of a Community patent, the proprietor of the patent shall be party to the proceedings.

**ACTION FOR THE GRANT OF A COMPULSORY LICENCE IN RESPECT OF A COMMUNITY PATENT**  
*[ex parte]*

*[to be developed]*

**ACTION FOR THE REVOCATION OF A COMPULSORY LICENCE IN RESPECT OF A COMMUNITY PATENT**  
*[inter partes]*

*[to be developed]*

**SECTION 6 – ACTION ON COMPENSATION FOR LICENCES WITHIN THE MEANING OF [ARTICLE 20, PARAGRAPH 1] OF COUNCIL REGULATION (EC) NO ... ON THE COMMUNITY PATENT**

*[to be developed]*

## **CHAPTER 2 – INTERIM PROCEDURE**

### **Rule 101 – Role of the judge-rapporteur (Case management)**

1. During the interim procedure, the judge-rapporteur shall make all necessary preparations for the oral hearing. He may in particular

- (a) hold an interim conference with the parties and
- (b) order the exchange of pleadings within time periods to be specified.

2. The judge-rapporteur shall have all authority to ensure fair, orderly and efficient interim procedure.

3. Without prejudice to the principle of proportionality, the judge-rapporteur shall endeavour to complete the interim procedure within two months.

*Relation with draft Agreement: Articles 24 and 32(2)*

### **Rule 102 – Referral to the panel**

1. The judge-rapporteur may refer any matter to the panel for decision.

2. Any party may request that a decision or order of the judge-rapporteur be referred to the panel for an early review. Pending review, the decision or order of the judge-rapporteur shall be effective.

### **Rule 103 – Preparation for the interim conference**

Before the interim conference, the judge-rapporteur may order the parties, within periods to be specified, to

- (a) provide further clarification on specific points,
- (b) answer specific questions,
- (c) produce evidence or
- (d) lodge specific documents.

## **INTERIM CONFERENCE**

### **Rule 104 – Aim of the interim conference**

The interim conference shall enable the judge-rapporteur to

- (a) identify main issues and determine which relevant facts are in dispute,
- (b) where necessary, clarify the position of the parties as regards those issues and facts,
- (c) establish a schedule for the further progress of the proceedings,
- (d) explore with the parties the possibilities to settle the dispute or to make use of the facilities of the Patent Mediation and Arbitration Centre,
- (e) where necessary, issue orders regarding production of documents, experts, experiments or inspections,
- (f) where appropriate, hold preparatory discussions with witnesses and experts with a view to properly prepare for the oral hearing and
- (g) make any other decision or order as he deems necessary for the preparation of the oral hearing.

*Relation with draft Agreement: Articles 17(3) and 32(2)*

### **Rule 105 – Telephone conference and video conference**

1. The interim conference shall be held by telephone conference or by video conference.
2. On request by a party and subject to the approval of the judge-rapporteur, the interim conference may be held in Court.

### **Rule 106 – Recording of the interim conference**

1. The interim conference shall be [audio / video] recorded, in accordance with the Practice Directions. The recording shall be made publicly available after the hearing, subject to paragraph 3.
2. An audience sheet shall be drawn up by the Registry in accordance with the Instructions to the Registrar [particulars regarding date, duration, persons attending].
3. After hearing the parties, the judge-rapporteur may order that the recording or parts thereof be kept confidential in the interest of the parties, other affected persons, public security, justice or public order.

*Relation with draft Agreement: Articles 25, 26*

## **PREPARATION FOR THE ORAL HEARING**

### **Rule 107 – Further instruction**

1. After the interim conference, the judge-rapporteur shall examine whether the state of preparation of the file is adequate, including where appropriate ensure that
  - (a) the parties have complied with orders made and
  - (b) the evidence produced is as complete as necessary for the efficient conduct of the oral hearing.
2. The judge-rapporteur shall set the dates and periods for any further procedural steps as soon as possible, including where appropriate set a date within which the parties may lodge final written submissions.

### **Rule 108 – Summons to the oral hearing**

1. The judge-rapporteur shall summon the parties to the oral hearing [which shall take place on the date set under Rule 24(1)(b)]. At least two months' notice of the summons shall be given, unless the parties agree to a shorter period.
2. The Practice Directions shall lay down rules on rescheduling an oral hearing [including listing the serious reasons which may justify a rescheduling].

### **Rule 109 – Closure of the interim procedure in view of the oral hearing**

1. As soon as the judge-rapporteur decides that the interim procedure is completed, he shall inform the presiding judge and the parties that the debate is declared closed in view of the oral hearing.
2. The presiding judge shall take over the management of the case.

## **CHAPTER 3 – ORAL PROCEDURE**

### **Rule 112 – Role of the presiding judge (Case management)**

The presiding judge shall

- (a) have all authority to ensure fair, orderly and efficient oral procedure and
- (b) ensure that the case is ready for decision at the end of the oral hearing.

### **Rule 113 – Conduct of the oral hearing**

1. The oral hearing shall be held before the panel and shall be directed by the presiding judge.
2. The oral hearing shall consist of
  - (a) the hearing of the parties' oral submissions and
  - (b) if necessary and under the control of the presiding judge, the hearing of witnesses and experts, including where appropriate questioning by one party of the other party's witnesses and experts.
3. The presiding judge and the judges of the panel may in the course of the oral hearing put questions to the parties, to the parties' representatives and to any witness or expert.

*Relation with draft Agreement: Article 33(1)(a)*

### **Rule 114 – Duration of the oral hearing**

1. Without prejudice to the principle of proportionality, the presiding judge shall endeavour to complete the oral hearing within one day. The presiding judge may set time limits for parties' oral submissions in advance of the oral hearing, in accordance with the Practice Directions.
2. Oral testimony at the oral hearing shall be limited to issues identified by the judge-rapporteur or the presiding judge as having to be decided by oral evidence.
3. The presiding judge may, after consulting the panel, limit a party's oral submissions if the panel is sufficiently informed.

### **Rule 115 – Adjournment where the Court considers that further evidence is required**

In exceptional cases, the Court may, after hearing the parties' oral submissions, decide to adjourn proceedings and call for further evidence.

### **Rule 116 – Recording of the oral hearing**

The oral hearing shall be [audio / video] recorded, in accordance with the Practice Directions. Rule 106 shall apply *mutatis mutandis*.

*Relation with draft Agreement: Article 26*

### **Rule 117 – Absence of a party from the oral hearing**

1. A party which does not wish to be present at the oral hearing shall inform the Registry in good time. Where both parties have informed the Registry that they do not wish to be present at the oral hearing, the Court may decide the case in accordance with Rule <on Decision in written proceedings>.
2. The Court shall not be obliged to delay any step in the procedure, including its decision, by reason only of the absence of a party from the oral hearing.
3. A party absent from the oral hearing shall be treated as relying only on its written case and not wishing to contest any new statement of fact that the other party may be allowed to make at the oral hearing.
4. If due to an exceptional occurrence a party is prevented from attending the oral hearing, it shall immediately inform the Registry. The Court shall decide whether adjournment of the oral hearing is justified.

### **Rule 118 – Decision**

The decision of the Court shall be given in writing as soon as possible after the closure of the oral hearing. The Court shall endeavour to give its decision in writing within six weeks of the oral hearing.

*Relation with draft Agreement: Article 50*

## **CHAPTER 4 – PROCEDURE FOR THE AWARD OF DAMAGES**

*Relation with draft Agreement: Article 41*

### **Rule 125 – Separate proceedings for the award of damages**

1. The award of damages to the successful party shall be the subject of separate proceedings following the decision on the merits.
2. In exceptional cases, the Court may order an interim award of damages to the successful party in the decision on the merits, subject to any conditions that the Court may order.

[VR2]

### **Rule 126 – Commencement of proceedings for the award of damages**

Where the successful party (hereinafter "the applicant") wishes to claim damages, it shall within one month of service of the decision on the merits lodge

- (a) an Application for the award of damages or
- (b) a Request to lay open books.

The period may be extended by the Registry on a reasoned request by the applicant.

## **SECTION 1 – APPLICATION FOR THE AWARD OF DAMAGES**

### **Rule 131 – Contents of the Application for the award of damages**

The Application for the award of damages shall contain

- (a) particulars in accordance with Rule 11(a) to (d),
- (b) the date of the decision on the merits and the case number of the file,
- (c) the kind of redress requested by the applicant,
- (d) the facts relied on, in particular calculations concerning lost profits or profits made by the unsuccessful party and
- (e) an indication of the evidence offered in support.

### **Rule 132 – Examination as to formal requirements of the Application for the award of damages**

1. The Registry shall, within three working days of lodging of the Application for the award of damages, examine whether the requirements of Rules 126 and 131(a) to (c) have been complied with.
2. If the Application for the award of damages does not comply with the requirements referred to in paragraph 1, the Registry shall invite the applicant to correct the deficiencies noted within a period to be specified.
3. Rule 14(2) shall apply *mutatis mutandis*.

### **Rule 133 – Recording in the Register (procedure for the award of damages)**

If the requirements referred to in Rule 132(1) have been complied with, the Registry shall immediately, in accordance with the Instructions to the Registrar,

- (a) attribute a date of receipt to the Application for the award of damages,
- (b) record the file in the Register,
- (c) inform the applicant of the date of receipt and
- (d) inform the panel which has given the decision on the merits that an Application for the award of damages has been lodged.

### **Rule 134 – Reply of the unsuccessful party**

1. If the unsuccessful party accepts the claim made in the Application for the award of damages, it shall inform the Registry who shall present a Report on damages to the judge-rapporteur. The judge-rapporteur shall make the order for the award of damages in accordance with the Application for the award of damages.
2. If the unsuccessful party contests the claim made in the Application for the award of damages [or any part of it], it shall within one month of service of the Application for the award of damages lodge a Defence to the application for the award of damages.

### **Rule 135 – Contents of the Defence to the application for the award of damages**

The Defence to the Application for the award of damages shall contain

- (a) the names of the unsuccessful party and of that party's representative,
- (b) postal and electronic addresses for service on the unsuccessful party and the names of the persons authorised to accept service,
- (c) the case number attributed to the file,
- (d) the reasons why the Application for the award of damages is contested,
- (e) the facts relied on and
- (f) written evidence relied on.

### **Rule 136 – Further procedure (Application for the award of damages)**

1. The judge who took part as judge-rapporteur in the proceedings of the panel which has given the decision on the merits may order further exchange of written pleadings within periods to be specified.
2. The provisions of Part 1, Chapters 2 (Interim procedure) and 3 (Oral procedure) shall apply *mutatis mutandis* [with a reduced timetable].

## **SECTION 2 – REQUEST TO LAY OPEN BOOKS**

### **Rule 141 – Contents of the Request to lay open books**

The Request to lay open books shall contain

- (a) particulars in accordance with Rule 131(a) and (b),
- (b) a description of the information held by the unsuccessful party to which the applicant requests access, in particular accounts, bank documents and any related document concerning the infringement,
- (c) the reasons why the applicant party needs access to this information,
- (d) the facts relied on and
- (e) an indication of the evidence offered in support.

**Rule 132 on Examination as to formal requirements of the Application for the award of damages** shall apply *mutatis mutandis*

**Rule 133 on Recording in the Register (Court of First Instance, procedure for the award of damages)** shall apply *mutatis mutandis*

### **Rule 142 – Reply of the unsuccessful party**

1. If the unsuccessful party accepts the Request to lay open books, it shall inform the Registry which shall present a Report on laying open books to the judge-rapporteur. The judge-rapporteur shall make the order to lay open books in accordance with the Request to lay open books.
2. If the unsuccessful party contests the Request to lay open books or any part of it, it shall within one month of service of the Request to lay open books lodge a Defence to the request to lay open books.

**Rule 135 on Contents of the Defence to the application for the award damages** shall apply *mutatis mutandis*

**Rule 136 on Further procedure (Application for the award damages)** shall apply *mutatis mutandis*

### **Rule 143 – Decision on the Request to lay open books**

1. Where the Request to lay open books is allowable, the Court shall
  - (a) order the unsuccessful party to open his books to the applicant within a period to be specified and
  - (b) inform the applicant and specify a period within which an Application for the award damages may be lodged.
2. Where the Request to lay open books is not allowable, the Court shall inform the applicant and specify a period within which an Application for the award of damages may be lodged.

## **CHAPTER 5 – PROCEDURE FOR COST ORDER**

*Relation with draft Agreement: Article 42*

### **Rule 150 – Separate proceedings for cost order**

1. A cost order shall be the subject of separate proceedings following the decision on the merits.
2. In exceptional cases, the Court may order an interim award of costs to the successful party in the decision on the merits, subject to any conditions that the Court may decide.

### **Rule 151 – Commencement of proceedings for cost order**

Where the successful party wishes to seek a cost order, it shall lodge an Application for cost order within one month of service of the decision on the merits.

*[to be developed]*

## **PART 2 – EVIDENCE**

*Relation with draft Agreement: Article 33*

### **Rule 170 – Means of evidence and means of obtaining evidence**

1. In proceedings before the Court, the means of evidence shall include the following:
  - (a) written evidence, whether printed, hand-written or drawn, in particular documents, written witness statements, plans, drawings, photographs;
  - (b) physical objects, in particular devices, products, embodiments, exhibits, models;
  - (c) expert reports and reports on experiments carried out for the purpose of the proceedings;
  - (d) electronic files and audio / video recordings.
  
2. Means of obtaining evidence shall include the following:
  - (a) hearing of the parties;
  - (b) summoning and hearing of witnesses;
  - (c) appointing and hearing of experts;
  - (d) ordering a party or a third party to produce evidence;
  - (e) ordering inspection of a place or a physical object;
  - (f) ordering measures to preserve evidence.

### **Rule 171 – Offering of evidence**

1. A party making a statement of fact that is contested or contestable by the other party has to indicate the means of evidence to prove it. In case of failure to indicate the means of evidence, the Court may disregard such statement of fact.
  
2. A statement of fact that is not contested by any party shall be held to be true between the parties.

### **Rule 172 – Duty to produce evidence**

1. Evidence available to a party regarding a statement of fact that is contested or contestable by the other party must be produced by the party making that statement of fact.
  
2. The Court may at any time during the proceedings order a party making a statement of fact to produce evidence that lies in the control of that party. If the party fails to produce the evidence, the Court shall take account of this fact in taking its decision on the merits of the case.

## **CHAPTER 1 – WITNESSES**

### **Rule 175 – Written witness statement**

1. A party seeking to offer witness evidence shall lodge a written witness statement.
2. A written witness statement shall be signed by the witness and shall include a statement of the witness that he is aware of his obligation to tell the truth and of his liability under applicable national law in the event of any breach of this obligation.

### **Rule 176 – Application for the hearing of a witness in person**

Where a party seeking to offer witness evidence cannot obtain a written witness statement or wishes that the Court hear the witness in person, it shall lodge an Application for the hearing of a witness in person which shall set out

- (a) the reasons why the witness shall be heard in person and
- (b) the facts which the party expects the witness to confirm.

### **Rule 177 – Power to disregard offer of witness evidence**

If a party does not lodge a written witness statement or an Application for the hearing of a witness in person, the Court may disregard the offer of witness evidence.

### **Rule 178 – Summoning of witnesses to the oral hearing**

1. The Court may order that a witness be heard in person
  - (a) of its own motion, in particular where a written witness statement is challenged by the other party or
  - (b) on Application for the hearing of a witness in person [Rule 176], in particular where a written witness statement has not been obtained from the witness.
2. An order of the Court summoning a witness to the oral hearing shall in particular indicate
  - (a) the name, address and description of the witness;
  - (b) the date and place of the oral hearing;
  - (c) an indication of the facts of the case about which the witness is to be examined;
  - (d) details of the reimbursement of expenses incurred by the witness and
  - (e) details on the sanctions which may be imposed on a defaulting witness.

### **Rule 179 – Hearing of witnesses**

1. After the identity of the witness has been established and before hearing his evidence, the presiding judge shall inform the witness that he is required to take the following oath:

"I swear that I shall tell the truth, the whole truth and nothing but the truth."

The Court may, after hearing the parties, exempt a witness from taking the oath.

2. The witness shall give his evidence to the Court.

3. The hearing of a witness who has signed a written witness statement shall begin with the confirmation of the evidence given therein. The witness may elaborate on the evidence contained in his written witness statement.

4. The presiding judge and the judges of the panel may put questions to the witness.

5. Under the control of the presiding judge, the representatives of the parties may put questions to the witness. The presiding judge may decide that a certain question is not admissible and does not need to be answered by the witness.

6. The Court may allow a witness to give evidence through electronic means, such as video conference. Paragraphs 1 to 5 shall apply.

### **Rule 180 – Duties of witnesses**

1. Witnesses who have been duly summoned shall obey the summons and attend the oral hearing.

2. Without prejudice to paragraph 3, if a witness who has been duly summoned fails to appear before the Court or refuses to give evidence or to take the oath, the Court may impose upon him a pecuniary sanction not exceeding EUR 5000 and may order that a further summons be served at the witness's own expense.

[3. Nobody shall be obliged to sign a written witness statement or to give evidence at an oral hearing if he/she is a spouse, partner equal to a spouse under applicable national law, descendant, sibling or parent of a party. A witness may also refuse to answer questions if answering them would violate a professional secret or expose him or his spouse, partner equal to a spouse under applicable national law, descendant, sibling or parent to criminal prosecution under applicable national law.]

[4. The Court may decide to report to the competent authorities of Contracting States whose courts have criminal jurisdiction in case of perjury on the part of a witness.]

### **Rule 181 – Reimbursement of expenses of witnesses**

1. A witness shall be entitled to reimbursement of

(a) expenses for travelling and stay and

(b) loss of income caused by his hearing in person.

After the witness has carried out his duties and upon his request, the Registry shall make a payment to the witness towards the expenses incurred.

2. Where a party has lodged an Application for the hearing of a witness in person, the Court shall make the summoning of the witness conditional upon the deposit of a sum sufficient to cover the costs referred to in paragraph 1.

3. Where the Court orders of its own motion that a witness be heard in person, the funds necessary shall be provided by the Court.

## **CHAPTER 2 – EXPERTS**

### **Rule 185 – Appointment of court experts**

1. Where the Court must resolve a specific technical question in relation to the case, it may appoint a court expert in accordance with Article 36 of the Agreement.
2. The parties may make suggestions regarding the identity of the court expert, his technical background and the questions to be put to him. The parties shall endeavour to agree on the identity of the court expert to be appointed by the Court.
3. The court expert shall answer only to the Court and shall possess the independence and impartiality required for being appointed as court expert.
4. The Court shall appoint a court expert by way of order which shall in particular indicate
  - (a) the name and address of the expert appointed,
  - (b) a short description of the facts of the case,
  - (c) the questions put to the expert, with the appropriate level of detail,
  - (d) when and under what conditions the expert may receive other necessary information to give his expert advice,
  - (e) the deadline for the presentation of the expert report,
  - (f) details of the reimbursement of expenses incurred by the expert and
  - (g) details of the sanctions which may be imposed on a defaulting expert.
5. The expert shall receive a copy of the order, together with the documents that the Court considers to be necessary for carrying out his task.
6. If an appointed court expert does not present his report within the period specified by the Court, the Court may appoint another expert in his place, without prejudice to the liability of the first expert for costs being made.

**Rule 186 – Duties of court experts**

1. The court expert shall be under the supervision of the Court and shall inform the Court of his progress in carrying out his task.
2. The court expert shall give expert advice only on questions which have been put to him.
3. On a reasoned request by a party, the Court may allow the parties to present to the court expert their explanations on the technical questions dealt with by the court expert.
4. The court expert shall present a preliminary report to the parties who shall be invited to comment on it. In the final report to be presented to the Court, the court expert shall endeavour to address the comments of the parties.
5. Once the final report of the court expert has been presented to the Court, the Court shall invite the parties to comment on it either in writing or during the oral hearing.

**Rule 187 – Hearing of court experts**

Rules 179, 180 and 181 shall apply *mutatis mutandis* in cases where a court expert is summoned to be heard in person in the oral hearing.

**Rule 188 – Expert evidence provided by the parties**

Any party may provide any expert evidence that it considers necessary.

## **CHAPTER 3 – ORDERS TO PRODUCE EVIDENCE, ORDERS FOR INSPECTION, ORDERS TO PRESERVE EVIDENCE**

### **ORDERS TO PRODUCE EVIDENCE**

#### **Rule 190 – Order to produce evidence**

1. Where a party has presented reasonably available evidence sufficient to support his claims and has, in substantiating those claims, specified evidence which lies in the control of the opposing party or a third party, the Court may, subject to the protection of confidential information, order that party to produce such evidence.
2. An order to produce evidence shall in particular specify
  - (a) under which conditions, in what form and within what period the production of evidence shall take place and
  - (b) any sanction which may be imposed if production of evidence does not take place according to the order.
3. Where the Court orders a third party to produce evidence, the interests of that third party shall be duly taken into account.
4. If an opposing party fails to produce evidence as requested by the Court in its order, the Court shall take account of this fact in taking its decision on the merits.

*[Article 35(1) draft Agreement] [Article 6 (1) Directive 2004/48/EC; Article 43(1) TRIPS]*

## ORDERS FOR INSPECTION

### Rule 191 – Order for inspection

1. Subject to the protection of confidential information, the Court may, either of its own motion or on a reasoned request by a party, order an inspection of products, devices, methods or local situations *in situ* at any time during the proceedings.
2. Where the Court orders an inspection at the premises of a third party, the interests of that third party shall be duly taken into account.
3. The date and time for an inspection shall be determined in an order of the Court taking into account the views of the parties.
4. The Court may decide to have
  - (a) copies made from documents,
  - (b) photographs taken,
  - (c) samples or specimens taken and
  - (d) audio or video recordings made.
5. The Court shall appoint a court expert to conduct an inspection in accordance with Rule 185.
6. An order for inspection shall in particular indicate:
  - (a) the date, time and place of the inspection;
  - (b) the name of the court expert appointed to conduct the inspection;
  - (c) the products, devices, methods or local situations to be inspected;
  - (d) where appropriate, the names of the representatives of the parties [who may be present at the inspection];
  - (e) the deadline for the court expert to present his report on the inspection.
- [7. In cases where it is necessary and allowed under the applicable national law, a bailiff shall be present at the inspection.]

## ORDERS TO PRESERVE EVIDENCE

### Rule 192 – Application for preserving evidence

1. An Application for preserving evidence shall be lodged by the party requesting such measures (hereinafter "the applicant") and shall comply with the requirements of Rule 11(a) to (g).
2. An Application for preserving evidence shall in addition contain
  - (a) a concise description of the action pending or going to be brought before the Court,
  - (b) the facts on which the applicant is relying,
  - (c) evidence to support the claim that the patent right has been infringed or is about to be infringed and that prompt measures are needed to preserve relevant evidence and
  - (d) a clear indication of the measures requested, including the exact location of the evidence to be preserved.
3. In cases where an applicant requests measures to preserve evidence to be ordered without hearing the defendant (*ex parte*), the Application for preserving evidence shall in addition contain
  - (a) reasons for the request to order measures to preserve evidence without hearing the defendant and
  - (b) information on pending related cases in other jurisdictions.
4. The applicant shall pay the fee for the Application for preserving evidence. Proof of payment shall be provided together with the Application for preserving evidence.

*[Article 35a(2) draft Agreement; Article 7 Directive 2004/48/EC; EPLA RoP §154]*

### Rule 193 – Appointment of a panel or a single judge

1. In cases where proceedings on the merits of the case are already pending before the Court, an Application for preserving evidence shall be immediately forwarded to the panel to which the case has been assigned. In urgent cases, the decision on the Application for preserving evidence may be taken by the presiding judge or by one of the judges of the panel, acting as single judge.
2. In cases where proceedings on the merits of the case have not yet been commenced before the Court, the case shall, immediately after the receipt of the Application for preserving evidence, be assigned to a panel in accordance with Rule 15(1)(d). In urgent cases, the presiding judge or an experienced judge of the panel, acting as single judge, shall decide on the Application.
3. The single judge deciding on an Application for preserving evidence shall have all necessary powers of the Court.

*[Article 6(7) draft Agreement, EPLA RoP §124+127, VR2]*

### **Rule 194 – Examination of the Application for preserving evidence**

1. The Court shall first ascertain the admissibility of the Application for preserving evidence in accordance with Rule 192.
2. Without prejudicing the outcome of the requested measures to preserve evidence and subject to the protection of confidential information, the Court shall have the discretion to decide whether to
  - (a) inform the defendant about the Application for preserving evidence and the period for lodging a Statement of defence,
  - (b) convene an oral hearing of the parties,
  - (c) convene an oral hearing without the presence of the defendant or
  - (d) immediately proceed with the decision on the Application for preserving evidence.
3. In exercising discretion, the Court shall take into account
  - (a) the urgency of the case,
  - (b) whether the applicant has requested measures to preserve evidence to be granted without hearing the defendant (*ex parte*), and
  - (c) the probability that evidence may be destroyed.

[VR2, EPLA RoP §155]

### **Rule 195 – Oral hearing of the parties**

1. In cases where the Court decides to convene an oral hearing of the parties, the Court shall set and immediately inform the parties of the date, time and place of an oral hearing. The Court shall endeavour to set the date of the oral hearing as soon as possible after the date of receipt of the Application for preserving evidence.
2. Rules 112 to 117 shall apply *mutatis mutandis* to an oral hearing of the parties convened on the basis of the Application for preserving evidence. Where the applicant is absent from the oral hearing, the Court shall reject the Application for preserving evidence.
3. Part 2 on Evidence shall be applicable only to the extent determined by the Court.
4. The decision of the Court shall be given in writing as soon as possible after the closure of the oral hearing convened on the basis of the Application for preserving evidence. If the Court deems appropriate, its decision may be given orally to the parties at the end of the oral hearing.

[Article 37(4) draft Agreement] [EPLA RoP §131-133, VR2]

### **Rule 196 – Decision on the Application for preserving evidence**

1. The Court may in particular decide to order the following:
  - (a) preserving evidence by detailed description, with or without the taking of samples;
  - (b) physical seizure of the infringing goods;
  - (c) physical seizure of the materials and implements used in the production and/or distribution of these goods and any related document.
2. The decision on preserving evidence shall specify that, unless otherwise ordered by the Court, the outcome of this measure may only be used in the proceedings on the merits of the case.
3. The decision on preserving evidence shall be enforceable immediately, unless the Court decides otherwise. The Court may also set conditions to the enforceability of the decision, indicating in particular who may represent the applicant requesting measures to preserve evidence and under what conditions. If necessary, the Court may indicate penalties applicable to the applicant if these conditions are not observed.
4. The decision on preserving evidence shall specify a person who shall carry out the measures to preserve evidence. This person may be a judge of the Court or any other official who guarantees independence and impartiality. In cases where it is necessary and allowed under the applicable national law, the Court may order that a bailiff be present at the inspection.
5. The decision on preserving evidence shall indicate that an appeal may be lodged in accordance with Article 45 of the Agreement.

[Article 35a(1)-(3) draft Agreement; Article 7 Directive 2004/48/EC; EPLA RoP §134+135; VR2]

### **Rule 197 – Decision on preserving evidence without hearing the defendant (*ex parte*)**

1. The Court may order measures to preserve evidence without the defendant having been heard (*ex parte*) in cases where any delay is likely to cause irreparable harm to the proprietor of the patent or where there is a demonstrable risk of evidence being destroyed.
2. Where measures to preserve evidence are ordered without the defendant having been heard, Rule 195 shall not apply. In such cases, the defendant shall be given notice, without delay and at the latest immediately after the execution of the measures. A review, including a right to be heard, shall take place upon request of the defendant with a view to decide, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.

[Article 37(5) draft Agreement; Article 7 Directive 2004/48/EC]

### **Rule 198 – Revocation of measures to preserve evidence**

1. The Court shall ensure that the measures to preserve evidence are revoked or otherwise cease to have effect, upon request of the defendant, without prejudice to the damages which may be claimed, if, within a period not exceeding 31 calendar days, the applicant does not initiate before the Court proceedings on the merits of the case.
2. Where the measures to preserve evidence are revoked, or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of the patent right, the Court may order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by those measures.
3. If requested by the defendant, the Court may also order the applicant to provide adequate security for the legal costs and other expenses incurred by the defendant which the applicant may be liable to bear. The Court shall decide whether it is appropriate to order the security by deposit or bank guarantee.

*[Article 37(6) and (7) draft Agreement; Article 7 Directive 2004/48/EC]*

## **CHAPTER 4 – OTHER EVIDENCE**

### **Rule 199 – Experiments**

1. Without prejudice to the possibility for the parties to carry out experiments, the Court may, on a reasoned request by a party, order an experiment to prove a statement of fact for the purpose of the proceedings before the Court.
2. The party requesting to be allowed to prove a statement of fact by means of experiments shall lodge a Request to carry out experiments which shall
  - (a) describe the proposed experiments,
  - (b) propose an expert to carry out such experiments and
  - (c) disclose any previous attempts to carry out analogous experiments.
3. Other parties to the proceedings shall be invited to comment on the Request, including the identity of the expert proposed.
4. The party requesting experiments shall initially bear the costs of the experiment.
5. The order of the Court allowing the experiments shall indicate in particular
  - (a) the name and address of the expert who is to carry out the experiments,
  - (b) the period for carrying out the experiments,
  - (c) the contents of the report on the experiment,
  - (d) where applicable, the exact time and place of the experiment,
  - (e) if necessary, other conditions for carrying out an experiment.
6. The experiments shall be carried out in the presence of the parties or their representatives.
7. Once the report on the experiments is presented to the Court, it shall invite the parties to comment on it either in writing or during the oral hearing.

## **Rule 200 – Letters rogatory**

1. The Court may, on application by a party or of its own motion, issue letters rogatory for the hearing of witnesses by other competent courts or authorities.
2. The Court shall draw up letters rogatory in the language of the competent court or authority or shall attach to such letters a translation into that language.
3. Subject to paragraphs 4 and 5, the competent court or authority shall apply national law as to the procedures to be followed in executing such requests and, in particular, as to the appropriate measures of compulsion.
4. The Court shall be informed of the time when, and the place where, the enquiry or other legal measure is to take place. It may inform the parties, witnesses and experts concerned.

*[Council Regulation No 1206/2001 of 28 May 2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters]*

## **PART 3 – PROVISIONAL MEASURES**

*[Article 35a, 35b and 37 draft Agreement]*

### **Rule 201 – Application for provisional measures**

1. An Application for provisional measures shall be lodged by the party requesting such measures (hereinafter "the applicant") and shall comply with the requirements of Rule 11(a) to (g).
2. An Application for provisional measures shall in addition contain
  - (a) a concise description of the action pending or going to be brought before the Court,
  - (b) the facts on which the applicant is relying,
  - (c) evidence to support the claim that provisional measures are necessary to prevent an impending infringement, to forbid the continuation of the alleged infringement or to make such continuation subject to the lodging of guarantees and
  - (d) a clear indication which provisional measures are being requested.
3. In cases where an applicant requests provisional measures to be ordered without hearing the defendant (*ex parte*), an Application for provisional measures shall in addition contain
  - (a) reasons for the request to order provisional measures without hearing the defendant,
  - (b) indication of any prior correspondence between the parties concerning the alleged infringement and
  - (c) information on pending related cases in other jurisdictions.
4. An Application for provisional measures shall be lodged within reasonable time of the discovery of the act against which provisional measures are requested by the applicant.
5. The applicant shall pay the fee for an Application for provisional measures. Proof of payment shall be provided together with the Application for provisional measures.

## **Rule 202 – Protective letter**

1. If a person entitled to commence proceedings under Article 27 of the Agreement considers it likely that an Application for provisional measures against him as a defendant may be lodged before the Court in the near future, he may file a Protective letter.
2. The Protective letter shall be filed with the Registry and shall contain in particular
  - (a) the name of the defendant filing the Protective letter [and of the defendant's representative],
  - (b) the name of the presumed applicant for provisional measures,
  - (c) postal and electronic addresses for service on the defendant filing the Protective letter and the names of the persons authorised to accept service,
  - (d) postal and, where available, electronic addresses for service on the presumed applicant for provisional measures and the names of the persons authorised to accept service,
  - (e) where available, the number of the patent concerned,
  - (f) the statement that the letter is a Protective letter,
  - (g) the facts relied on, which may include a challenge to the facts expected to be relied on by the presumed applicant,
  - (h) any available written evidence relied on and
  - (i) the arguments of law, including the grounds why any Application for provisional measures should be rejected.
3. The Registry shall [within one working day] examine whether the requirements of paragraph 2(a) to (e) have been complied with. If these requirements have been complied with, the Registry shall immediately [in accordance with the Instructions to the Registrar]
  - (a) attribute a date of receipt and a number to the Protective letter,
  - (b) record the Protective letter in the Register and
  - (c) where an Application for provisional measures has already been lodged, inform the panel or the single judge deciding upon the Application for provisional measures about the filing of the Protective letter.
4. If no Application for provisional measures has been filed within [3 months] as from the date of receipt attributed to the Protective letter, the Protective letter shall be removed from the Register.
5. The defendant shall pay the fee for filing of a Protective letter. Proof of payment of the fee shall be provided together with the Protective letter.

[Expenses incurred by filing a Protective letter should be reimbursable to the defendant under the cost order referred to in Rules 150 and 151 only if a Protective letter has been filed before the lodging of the Application for provisional measures and the latter has not been successful – to be developed in Part 1, Chapter 5.]

[VR2]

### **Rule 203 – Appointment of a panel or a single judge**

1. In cases where proceedings on the merits of the case are already pending before the Court, an Application for provisional measures shall be immediately forwarded to the panel already dealing with the case. In urgent cases, the decision on an Application for provisional measures may be taken by the presiding judge or by one of the judges of the panel, acting as single judge.
2. In cases where proceedings on the merits of the case have not yet been commenced before the Court, the case shall, immediately after the receipt of an Application for provisional measures, be assigned to a panel in accordance with Rule 15(1)(d). In urgent cases, the presiding judge or an experienced judge of the panel, acting as single judge, shall decide on the Application.
3. The single judge deciding on an Application for provisional measures shall have all necessary powers of the Court.

*[Article 6(7) draft Agreement, Article 14(3) draft Statute, EPLA RoP §124+127, VR2]*

### **Rule 204 – Examination of the Application for provisional measures**

1. The Court shall first ascertain the admissibility of the Application for provisional measures in accordance with Rule 201, including whether the requirement of lodging the Application for provisional measures within reasonable time [Rule 201(4)], has been complied with.
2. The Court shall also verify whether any Protective letter relevant for the Application for provisional measures is recorded in the Register.
3. The Court shall have the discretion to decide whether to
  - (a) inform the defendant about the Application for provisional measures and invite him to lodge a Statement of defence within a period to be specified,
  - (b) convene an oral hearing of the parties,
  - (c) convene an oral hearing without the presence of the defendant or
  - (d) immediately proceed with the decision on the Application for provisional measures.
4. In exercising discretion under paragraph 3, the Court shall take into account
  - (a) the urgency of the case,
  - (b) whether the applicant has requested provisional measures without hearing the defendant (*ex parte*) and
  - (c) any Protective letter filed by the defendant; the Court shall in particular consider convening an oral hearing of the parties if a relevant Protective letter has been filed by the defendant.

*[EPLA RoP §128+129, VR2]*

### **Rule 205 – Convening of an oral hearing of the parties**

1. In cases where the Court decides to convene an oral hearing of the parties, the Court shall set and immediately inform the parties of the date, time and place of an oral hearing. The Court shall endeavour to set the date of the oral hearing as soon as possible after the date of receipt of the Application for provisional measures.

2. The Court may order the parties to provide further information, documents and other evidence before or during the oral hearing, including any reasonable evidence to satisfy the Court with a sufficient degree of certainty that the applicant is the right-holder, that the patent in question is valid and that his right is being infringed, or that such infringement is imminent.

*[Article 37(4) draft Agreement] [EPLA RoP §130+131, VR2]*

### **Rule 206 – Oral hearing of the parties**

1. Rules 112 to 116 shall apply *mutatis mutandis* to an oral hearing of the parties convened on the basis of the Application for provisional measures. Where the applicant is absent from the oral hearing, the Court shall reject the Application for provisional measures. Rule 117 shall apply *mutatis mutandis*.

2. Part 2 on Evidence shall be applicable only to the extent determined by the Court.

3. The decision of the Court shall be given in writing as soon as possible after the closure of the oral hearing convened on the basis of the Application for provisional measures. If the Court deems appropriate, its decision may be given orally to the parties at the end of the oral hearing.

*[EPLA RoP §132+133, VR2]*

## **Rule 207 – Decision on provisional measures**

1. The Court may in particular order the following provisional measures:
  - (a) injunctions against a defendant or against a third party whose intermediary services are used;
  - (b) the seizure or delivery up of the goods suspected of infringing a patent right so as to prevent their entry into or movement within the channels of commerce;
  - (c) if an applicant demonstrates circumstances likely to endanger the recovery of damages, a precautionary seizure of the movable and immovable property of the defendant, including the blocking of his bank accounts and other assets.
2. In taking its decision on provisional measures, the Court shall have the discretion to weigh up the interests of the parties and in particular take into account the potential harm for either of the parties resulting from the ordering or the refusal of a provisional measure.
3. The decision on provisional measures shall be enforceable immediately unless the Court decides otherwise. The Court may also set conditions to the enforceability of the decision.
4. The decision on provisional measures shall indicate that an appeal may be brought in accordance with Article 45 of the Agreement.

*[Articl 37(2) and (3) draft Agreement] [EPLA RoP §134+135, VR2]*

## **Rule 208 – Decision on provisional measures without hearing the defendant (*ex parte*)**

1. The Court may order provisional measures without the defendant having been heard (*ex parte*) in cases where any delay is likely to cause irreparable harm to the proprietor of the patent.
2. Where provisional measures are ordered without the defendant having been heard, Rules 205 and 206 shall not apply. In such cases, the defendant shall be given notice, without delay and at the latest immediately after the execution of the measures. A review, including a right to be heard, shall take place upon request of the defendant with a view to decide, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.

### **Rule 209 – Revocation of provisional measures**

1. The Court shall ensure that provisional measures are revoked or otherwise cease to have effect, upon request of the defendant, without prejudice to the damages which may be claimed, if, within a period not exceeding 31 calendar days, the applicant does not initiate before the Court proceedings on the merits of the case.
2. Where provisional measures are revoked, or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of the patent right, the Court may order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by those measures.
3. If requested by the defendant, the Court may also order the applicant to provide adequate security for the legal costs and other expenses incurred by the defendant which the applicant may be liable to bear. The Court shall decide whether it is appropriate to order the security by deposit or bank guarantee.

## **PART 4 – PROCEDURE BEFORE THE COURT OF APPEAL**

### **Rule 251 – Appealable decisions**

1. An appeal may be brought against
  - (a) final decisions of the Court of First Instance,
  - (b) decisions terminating proceedings as regards one of the parties and
  - (c) decisions or orders referred to in Articles 29(4), 35, 35a, 35b, 37 or 39 of the Agreement.
2. Other decisions or orders may only be appealed together with the final decision, unless the Court [of Appeal] grants leave to appeal.

*Relation with draft Agreement: Article 45(1)*

### **Rule 252 – Application for leave to appeal**

1. A party adversely affected by a decision or order referred to in Rule 251(2) may lodge an Application for leave to appeal within one month of service of the decision or order of the Court of First Instance.
2. The Application for leave to appeal shall set out
  - (a) the reasons why the appeal should be heard before the final decision of the Court of First Instance is given and
  - (b) where necessary, facts, evidence and arguments relied on.
3. The Registry shall, in accordance with the business distribution scheme, assign the Application for leave to appeal to a panel which shall decide on the Application in accordance with Rule <on Decision in written proceedings>.
4. The panel may
  - (a) grant interlocutory revision if it considers the Application for leave to appeal to be admissible and well founded,
  - (b) reject the Application for leave to appeal if it does not consider the Application to be allowable.

*[VR2, ECJ Statute Annex on CST Article 10(3)]*

### **Rule 253 – Subject-matter of the proceedings before the Court of Appeal**

1. Requests, facts, evidence and arguments submitted by the parties under Rules 261, 262 and 281 shall, subject to paragraph 2, constitute the subject-matter of the proceedings before the Court of Appeal. The Court of Appeal may of its own motion consult the file of the proceedings before the Court of First Instance.
2. Requests, facts and evidence which have not been submitted by a party during proceedings before the Court of First Instance may be disregarded by the Court of Appeal.
3. When exercising discretion under paragraph 2, the Court of Appeal shall in particular take into account
  - (a) whether a party seeking to lodge new submissions is able to justify that the new submissions could not reasonably have been lodged during proceedings before the Court of First Instance;
  - (b) whether the new submissions are highly relevant for the decision on the appeal;
  - (c) the position of the other party regarding the lodging of the new submissions.
4. The Court may also take into account considerations of proportionality, including
  - (a) the value and technical complexity of the case,
  - (b) the societal impact of the decision and
  - (c) commercial aspects.

*Relation with draft Agreement: Article 45(4)  
[VR2, Article 114(2) EPC]*

## **CHAPTER 1 – WRITTEN PROCEDURE**

### **SECTION 1 – STATEMENT OF APPEAL, STATEMENT OF GROUNDS OF APPEAL**

#### **Rule 260 – Lodging of the Statement of appeal and of the Statement of the grounds of appeal**

1. A Statement of appeal shall be lodged by the appellant
  - (a) within two months of service of a decision referred to in Rule 251(1)(a) and (b) or
  - (b) within one month of service of a decision or order referred to in Rule 251(1)(c) and 252(4)(a).
2. The Statement of grounds of appeal shall be lodged within two months of lodging of the Statement of appeal.

*Relation with draft Agreement: Article 45(2)  
[EPLA RoP §175]*

### **Rule 261 – Contents of the Statement of appeal**

The Statement of appeal shall contain

- (a) the names of the appellant and of the appellant's representative,
- (b) the names of the respondent and of the respondent's representative,
- (c) postal and electronic addresses for service on the appellant and on the respondent, as well as the names of the persons authorised to accept service,
- (d) the date of the decision or order appealed against and the case number attributed to the file in proceedings before the Court of First Instance and
- (e) the order or remedy sought by the appellant.

*[EPLA RoP §177]*

### **Rule 262 – Contents of the Statement of grounds of appeal**

The Statement of grounds of appeal shall set out

- (a) which parts of the decision or order are impugned,
- (b) the reasons for setting aside the decision or order impugned and
- (c) the facts and evidence on which the appeal is based.

*[Rule 99 EPC]*

### **Rule 263 – Language of the Statement of appeal and of the Statement of Grounds of appeal**

1. The Statement of appeal and the Statement of grounds of appeal shall be drawn up

- (a) in the language of the proceedings before the Court of First Instance or
- (b) where the parties have agreed in accordance with Article 30(2) of the Agreement, in the language in which the patent was granted.

2. Where the parties have agreed in accordance with Article 30(2) of the Agreement, evidence of such agreement shall be lodged by the appellant together with the Statement of appeal.

3. The language in which the Statement of appeal and the Statement of grounds of appeal is drawn up shall be the language of the proceedings, without prejudice to any decision of the Court under Article 30(3) draft Agreement.

4. The appellant may lodge a translation of the Statement of appeal and of the Statement of grounds of appeal in an official language of the State where the defendant is domiciled and request that the translation be served on the respondent.

*Relationship with draft Agreement: Article 30*

### **Rule 264 – Fee for the appeal**

The appellant shall pay the fee for the appeal. Proof of payment of the fee shall be provided together with the Statement of appeal. Rule 13(2) shall apply *mutatis mutandis*.

[EPC Article 108 and Rule 101(2), EPLA RoP §111+112, IPLA]

### **Rule 265 – Examination as to formal requirements of the Statement of appeal**

1. The Registry shall, within three working days of lodging of the Statement of appeal, examine whether the requirements of Rules 260(1), 261(a) to (d), 263 and 264 have been complied with.

2. If the appellant has not complied with the requirements referred to in paragraph 1, the Registry shall inform the President of the Court of Appeal who shall reject the appeal as inadmissible. He may hear the appellant.

[EPLA RoP §108, 182, VR2, Article 90 EPC, IPLA]

### **Rule 266 – Recording in the Register (Court of Appeal)**

If the Statement of appeal complies the requirements referred to in Rule 265(1), the Registry shall, in accordance with the Instructions to the Registrar,

- (a) attribute a date of receipt to the Statement of appeal and a case number to the appeal file,
- (b) record the appeal file in the Register,
- (c) inform the appellant of the case number and the date of receipt and
- (d) assign the case to a panel, in accordance with the business distribution scheme.

[VR2, EPLA RoP §183, 102]

### **Rule 267 – Designation of the judge-rapporteur**

The presiding judge of the panel to which the case has been assigned [Rule 266(d)] shall designate one judge of the panel as judge-rapporteur.

[EPLA RoP §185]

## **Rule 268 – Translation of file**

1. If the language of the proceedings before the Court of Appeal is not the language of the proceedings before the Court of First Instance, the judge-rapporteur may order the appellant to lodge, within a period to be specified, translations into the language of the proceedings before the Court of Appeal of
  - (a) written pleadings lodged by the parties before the Court of First Instance, as determined by the judge-rapporteur and
  - (b) decisions or orders of the Court of First Instance.
2. The period under paragraph 1 may be extended once by the judge-rapporteur on a reasoned request by the appellant.
3. If the appellant fails to lodge the translations under paragraph 1 within the period specified, the judge-rapporteur shall inform the panel which shall reject the appeal as inadmissible. The panel may hear the appellant.
4. The appellant may request that documented costs of translations be taken into account when the Court fixes the amount of costs in accordance with Part 1, Chapter 5.

*Relation with draft Agreement: Article 30(2) and (3)  
[EPLA RoP §181(1)(3), IPLA]*

## **Rule 269 – Preliminary examination of the Statement of grounds of appeal**

1. The judge-rapporteur shall examine whether the Statement of grounds of appeal satisfy the requirements of Rule 262.
2. If the Statement of grounds of appeal do not satisfy the requirements of Rule 262, the judge-rapporteur shall inform the panel which shall reject the appeal as inadmissible. The panel may hear the appellant.
3. Grounds of appeal which are not raised in the Statement of grounds of appeal shall not be admissible.

*[EPLA RoP §179, 186, Rule 99 EPC, VR2, IPLA]*

### **Rule 270 – Challenge to the decision to reject an appeal as inadmissible**

1. The appellant may challenge a decision to reject the appeal as inadmissible [under Rules 265(2) or 269(2)] within one month of service of the decision, without providing new grounds of appeal.
2. The panel to which the case has been assigned under Rule 266(d) shall decide any challenge under paragraph 1 in accordance with Rule <on Decision in written proceedings>.
3. If a decision to reject an appeal as inadmissible is set aside, the appeal shall take its normal course.

*[EPLA RoP §187, IPLA]*

## **SECTION 2 – STATEMENT OF RESPONSE**

### **Rule 280 – Statement of response**

Within three months of service of the Statement of grounds of appeal, any party to proceedings before the Court of First Instance which has not lodged a Statement of appeal may lodge a Statement of response. The period may be extended once by the judge-rapporteur on a reasoned request by the respondent.

*[VR2, EPLA RoP §189]*

### **Rule 281 – Contents of the Statement of response**

1. The Statement of response shall contain
  - (a) the names of the respondent and the respondent's representative,
  - (b) postal and electronic addresses for service on the respondent and the names of the persons authorised to accept service,
  - (c) the case number of the appeal file and
  - (d) a response to the grounds of appeal.
2. The respondent may support the decision of the Court of First Instance on grounds other than those given in the decision.

*[EPLA RoP §192, VR2]*

### **Rule 282 – Statement of cross-appeal**

1. A party who has not lodged a Statement of appeal within the period referred to in Rule 260(1) may still bring an appeal by way of cross-appeal within the period referred to in Rule 280 if one of the other parties has lodged a Statement of appeal.
2. A Statement of cross-appeal shall be included in the Statement of response. It shall comply with the requirements of Rules 261 and 262. Rules 265 and 269 shall apply *mutatis mutandis* to the Statement of cross-appeal.
3. A Statement of cross-appeal shall not be admissible in any other way or at any other time.
4. A cross-appeal shall be treated as an appeal as far as the fee for the appeal is concerned. Rule 264 shall apply *mutatis mutandis*.
5. If the Statement of appeal is withdrawn, any Statement of cross-appeal shall be deemed to be withdrawn.

[EPLA RoP §176, VR2]

<b>Rule 24 on Further schedule</b> shall apply <i>mutatis mutandis</i>
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## **SECTION 3 – REPLY TO A STATEMENT OF CROSS-APPEAL**

### **Rule 285 – Reply to a statement of cross-appeal**

Where the Statement of response includes a statement of cross-appeal, the appellant may, within two months of service of the Statement of response, lodge a Reply to the Statement of cross-appeal which shall contain a response to the grounds of appeal raised in the Statement of cross-appeal. The period may be extended once by the judge-rapporteur on a reasoned request by the appellant.

[EPLA RoP §194]

## **CHAPTER 2 – INTERIM PROCEDURE**

**The following Rules** from Part 1, Chapter 2 shall apply *mutatis mutandis* in proceedings before the Court of Appeal:

- Rule 101 on Role of the judge-rapporteur (Case management)
- Rule 102 on Referral to the panel
- Rule 103 on Preparation for the interim conference
- Rule 104 on Aim of the interim conference
- Rule 105 on Telephone conference and video conference
- Rule 106 on Recording of the interim conference
- Rule 107 on Further instruction
- Rule 108 on Summons to the oral hearing
- Rule 109 on Closure of the interim procedure in view of the oral hearing

## **CHAPTER 3 – ORAL PROCEDURE**

**The following Rules** from Part 1, Chapter 3 shall apply *mutatis mutandis* in proceedings before the Court of Appeal:

- Rule 112 on Rule of the presiding judge (Case management)
- Rule 113 on Conduct of the oral hearing
- Rule 114 on Duration of the oral hearing
- Rule 115 on Adjournment where the Court considers that further evidence is required
- Rule 116 on Recording of the oral hearing
- Rule 117 on Absence of the parties from the oral hearing

## CHAPTER 4 – DECISIONS AND EFFECT OF DECISIONS

### Rule 290 – Decision of the Court of Appeal

1. Rule 118 shall apply *mutatis mutandis*.
2. The decision shall either confirm the decision or order under appeal or set it aside totally or in part:
  - (a) if the decision or order under appeal is confirmed, it shall become *res judicata* between the parties from the date of the decision of the Court of Appeal;
  - (b) if the appeal is well founded, the Court of Appeal shall set aside, wholly or in part, the decision or order of the Court of First Instance.
3. The Court of Appeal may
  - (a) exercise any power within the competence of the Court of First Instance or
  - (b) refer the case back to the Court of First Instance for further prosecution in accordance with Rule 292.

*Relation with draft Agreement: Article 50*  
*[EPLA RoP §66+196+197, VR2, EPC Article 111(1)]*

### Rule 291 – Final decision of the Court of Appeal

If a final decision of the Court of First Instance is set aside, the Court of Appeal may, where the state of the proceedings so permits, give a final decision in the matter.

### Rule 292 – Referral back

1. In exceptional circumstances, the Court of Appeal may refer the case back to the Court of First Instance for decision or for retrial.
2. The decision referring a case back to the Court of First Instance shall specify the panel of which shall deal further with the case, be it the same panel whose earlier decision or order is revoked or another panel.
3. Where a case is referred back to the Court of First Instance, the Court shall be bound by the decision of the Court of Appeal and its *ratio decidendi*.

*Relation with draft Agreement: Article 47*  
*[ECJ Statute Article 61, EPLA RoP §198, VR2 (§1, 3<sup>rd</sup> hyphen)]*

## **CHAPTER 5 – PROCEDURE FOR REQUEST FOR REHEARING**

### **Rule 295 – Lodging of a Request for rehearing**

1. A Request for rehearing may be lodged by any party adversely affected by a final decision of the Court of Appeal (hereinafter "the petitioner").
2. The Request for rehearing shall be lodged within the following periods:
  - (a) where the Request for rehearing is based on the ground of a fundamental procedural defect, within two months of the service of the final decision of the Court of Appeal;
  - (b) where the Request for rehearing is based on the ground of an act which was held, by a final court decision, to constitute a criminal offence, within two months of the date on which the criminal offence has been established but in any event no later than ten years of the service of the decision of the Court of Appeal.
3. The petitioner shall pay the fee for the rehearing.

*Relation with draft Agreement: Article 55(2)  
[EPLA RoP §175+200+202, Article 112a(4) EPC]*

### **Rule 296 – Contents of the Request for rehearing**

1. The Request for rehearing shall contain
  - (a) the names of the petitioner and of the petitioner's representative,
  - (b) postal and electronic addresses for service on the petitioner and the names of the persons authorised to accept service and
  - (c) an indication of the decision to be reviewed.
2. The Request for rehearing shall indicate the reasons for setting aside the final decision of the Court of Appeal, as well as the facts and evidence on which the Request is based.

*[EPLA RoP §177, Rule 107 EPC]*

### **Rule 297 – Definition of fundamental procedural defects**

A fundamental procedural defect under Article 55(1) of the Agreement may have occurred where

(a) a judge of the Court of Appeal took part in the decision in breach of Article 12 of the Agreement or Article 5 of the Statute,

(b) a person not appointed as a judge of the Court of Appeal sat on the panel which took the decision,

(c) a fundamental violation of Article 49 of the Agreement occurred or

(d) the Court of Appeal decided on the appeal without deciding on a request relevant to that decision.

*[Article 112a(2) EPC and Rule 104 EPC]*

### **Rule 298 – Obligation to raise objections**

A Request for rehearing based on the ground of a fundamental procedural defect is only admissible where an objection in respect of the procedural defect was raised during the proceedings before the Court of Appeal and dismissed by the Court, except where such objection could not be raised during the proceedings before the Court of Appeal.

*[Rule 106 EPC]*

### **Rule 299 – Definition of criminal offence**

A criminal offence shall only be considered to have occurred if it is finally established by a competent court or authority. A conviction is not necessary.

*[Rule 105 EPC]*

### **Rule 300 – Fee for the rehearing**

The petitioner shall pay the fee for the rehearing. Proof of payment of the fee shall be provided together with the Request for rehearing. Rule 13(2) shall apply *mutatis mutandis*.

<b>Rule 266(a), (b) and (c) on Recording in the Register (Court of Appeal)</b> shall apply <i>mutatis mutandis</i>
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### **Rule 301 – Suspensive effect**

The lodging of a Request for rehearing shall not have suspensive effect unless the Court of Appeal decides otherwise.

*Relation with draft Agreement: Article 55(2)  
[EPLA RoP §201, Article 112a(3) EPC]*

### **Rule 302 – Examination as to formal requirements of the Request for rehearing**

1. The Registry shall, within five working days of lodging of the Request for rehearing, examine whether the requirements of Rules 295, 296 and 300 have been complied with.
2. If the petitioner has not complied with the requirements referred to in paragraph 1, the Registry shall inform the President of the Court of Appeal who shall reject the Request for rehearing as inadmissible. He may hear the petitioner.
3. A decision to reject the Request for rehearing as inadmissible shall be notified to the parties to the proceedings before the Court of Appeal.

### **Rule 303 – Assignment of Request for rehearing to a panel**

1. Immediately after the Request for rehearing has been recorded in the Register, the Registry shall inform the President of the Court of Appeal that a Request for rehearing has been lodged.
2. The President of the Court of Appeal shall assign the case to a panel consisting of three legally qualified judges, in accordance with the business distribution scheme, designating one judge as judge-rapporteur. He may order that judges of the Court of Appeal who participated in taking the decision to be reviewed shall not sit on the panel.

*[EPLA RoP §185+203, Rule 108(3) EPC]*

### **Rule 304 – Examination of the Request for rehearing**

1. The judge-rapporteur shall examine the Request for rehearing. He may hear the petitioner and take any case management measure referred to in <Part 5, Chapter 6>.
2. If the judge-rapporteur considers that there is no basis for reviewing the decision, he shall present a Preliminary report to the presiding judge recommending that the panel rejects the Request for rehearing as not allowable.
3. If the judge-rapporteur considers that the Request for rehearing is allowable, he shall present a report to the presiding judge recommending that the decision be reviewed.
4. The panel shall decide what action to take upon the recommendations of the judge-rapporteur:
  - (a) a decision to reject the Request for rehearing as not allowable shall require unanimity; it shall not contain any reasons;
  - (b) a decision to allow the Request for rehearing shall entail setting aside the decision under review, in whole or in part, and re-opening the proceedings for a new trial and decision; where proceedings are re-opened, the provisions governing proceedings before the Court of Appeal shall apply.

*Relation with draft Agreement Article 55(3)  
[EPLA RoP §204+207]*

## **PART 5 – GENERAL PROVISIONS**

### **CHAPTER 1 – GENERAL PROCEDURAL PROVISIONS**

#### **Rule 351 – Date of pleadings**

All pleadings shall bear a date. In the reckoning of periods for taking steps in proceedings, the date of lodging of pleadings in electronic form at the Registry shall be taken into account.

*[VR2, CST RoP Article 34]*

#### **Rule 352 – Access to documents**

All pleadings shall be available to the public unless

- (a) a party requests that certain information be kept confidential and
- (b) the Court makes such an order.

*[Articles 8(3), 26 and 40 draft Agreement] [VR2]*

#### **Rule 353 – Leave to change claim or amend case**

1. A plaintiff may at any stage of the proceedings apply to the Court for leave to change his claim or to amend his case.
2. Leave shall not be granted if, all circumstances considered, the change or amendment would
  - (a) result in a fresh case,
  - (b) be in clear contradiction to the plaintiff's previous case or
  - (c) unreasonably hinder the defendant in his defence.
3. Leave to limit a claim shall always be granted.

*[EPLA RoP §8]*

### **Rule 354 – Withdrawal**

1. As long as there is no final decision in a case, a plaintiff may withdraw his action, without prejudice to any counterclaim.
2. In the event of a withdrawal, the Court shall
  - (a) give a decision declaring the proceedings closed,
  - (b) order the case to be removed from the Register and
  - (c) issue a cost order in accordance with Part 1, Chapter 5.

*[EPLA RoP §7, CST RoP Article 74]*

### **Rule 355 – Service<sup>2</sup>**

1. Immediately after written pleadings have been received at the Registry, the Registry shall serve the pleadings on the other party by means of electronic communication, in accordance with the Practice Directions.
2. Where service by means of electronic communication cannot be effected, the Registry shall serve the written pleading on the party by
  - (a) registered letter with advice of delivery, in accordance with the Practice Directions,
  - (b) fax, in accordance with the Practice Directions, or
  - (c) any method authorised by the Court under Rule <on Service by an alternative method or at an alternative place>.
3. Service under paragraph 2(a) shall be effected at the following place:
  - (a) where the party is a company or other legal person: at its statutory seat, central administration, principal place of business or at any place within the Contracting States where the company or other legal person carries on its activities and which has a real connection with the claim;
  - (b) where the party is an individual: at his usual or last known residence.

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<sup>2</sup> A general rule on service has been included in order to illustrate how service could be effected in the most straightforward cases. More detailed rules on service will be included in a later draft.

## **CHAPTER 2 – RIGHTS AND OBLIGATIONS OF REPRESENTATIVES**

### **Rule 360 – Powers of attorney**

1. A representative who claims to be representing a party shall be believed upon his word in that respect.
2. The Court may order a representative to produce a written authority if his representative powers are challenged by the party concerned or if another party to the proceedings has established reasonable doubt as regards those representative powers.

*[EPLA RoP §26]*

### **Rule 361 – Certificate that a representative is authorised to practice before the Court**

Any representative pursuant to Article 28(1) of the Agreement shall lodge at the Registry a certificate that he is authorised to practise before a court of a Member State or of another State party to the Agreement.

*[CST RoP Article 35(5); see also ECJ RoP Article 38(5)(a), CFI RoP Article 44(5)(a)]*

### **Rule 362 – Attorney-client privilege**

Where advice is sought from a representative in his capacity as such, all communications between the representative and his client or any other person, relating to that purpose and being of a confidential nature, are permanently privileged from disclosure in proceedings before the Court, unless such privilege is expressly waived by the client.

*[Rule 153 EPC]*

### **Rule 363 – Privileges, immunities and facilities**

1. Representatives appearing before the Court or before any judicial authority to which it has addressed letters rogatory [Rule 199] shall enjoy immunity in respect of words spoken or written by them concerning the case or the parties.

2. Representatives shall enjoy the following further privileges and facilities:

(a) papers and documents relating to the proceedings shall be exempt from both search and seizure;

(b) any allegedly infringing product or device relating to the proceedings shall be exempt from both search and seizure when brought to the Court for the purposes of the proceedings.

In the event of a dispute, the customs officials or police may seal those papers, documents or allegedly infringing products or devices. They shall then be immediately forwarded to the Court for inspection in the presence of the Registrar and of the person concerned;

3. Representatives shall be entitled to travel in the course of duty without hindrance.

4. The privileges, immunities and facilities specified in paragraphs 1 to 3 are granted exclusively in the interests of the proper conduct of proceedings.

5. The Court may waive the immunity where it considers that the proper conduct of proceedings will not be hindered thereby.

*[Article 28(4) draft Agreement] [ECJ RoP Article 32, CST RoP Article 30(3)(4)]*

### **Rule 364 – Powers of the Court as regards representatives**

As regards representatives who appear before it, the Court shall have the powers normally accorded to courts of law, under the conditions laid down in Rule 365.

*[ECJ Statute Article 19(5)]*

### **Rule 365 – Exclusion from the proceedings**

1. If the Court considers that the conduct of a party's representative towards the Court, towards any judge of the Court or towards any member of the staff of the Registry, is incompatible with the dignity of the Court or with the requirements of the proper administration of justice, or that such representative uses his rights for purposes other than those for which they were granted, it shall so inform the person concerned.

On the same grounds, the Court may at any time, after having heard the person concerned, exclude that person from the proceedings by order. That order shall have immediate effect.

2. Where a party's representative is excluded from the proceedings, the proceedings shall be suspended for a period fixed by the presiding judge in order to allow the party concerned to appoint another representative.

3. Decisions taken under this Rule may be rescinded.

*[ECJ RoP Article 35, CST RoP Article 32]*

### **Rule 366 – Change of a representative**

Any change of representative shall take effect from the moment where the new representative states in writing to the Registry that he shall in future be representing the party concerned. Until the moment where such statement is received, the former representative remains responsible for the conduct of the proceedings and for communications between the Court and the party concerned.

*[EPLA RoP §28]*

## **CHAPTER 3 – STAY OF PROCEEDINGS**

### **Rule 370 – Stay of proceedings**

1. The Court may stay proceedings

- (a) where it is seized of a case relating to a patent which is also the subject of opposition proceedings or limitation proceedings [including any subsequent appeal proceedings] before the European Patent Office;
- (b) where it is seized of a case relating to a supplementary protection certificate which is also the subject of proceedings before the European Patent Office or before a national court or authority;
- (c) where an appeal is brought before the Court of Appeal against a decision or order of the Court of First Instance
  - (i) disposing of the substantive issues in part only,
  - (ii) disposing of an admissibility issue [Rule 14] or a Preliminary objection [Rule 17];
  - (iii) dismissing an application to intervene;
- (d) at the joint request of the parties;
- (e) in other particular cases where the proper administration of justice so requires.

2. The decision to stay the proceedings shall be made by reasoned order of the judge-rapporteur after hearing the parties. The judge-rapporteur may refer the matter to the panel.

*[CST RoP Article 71]*

### **Rule 371 – Duration and effects of a stay of proceedings**

1. The stay of proceedings shall take effect on the date indicated in the order of stay or, in the absence of such an indication, on the date of that order.

2. Where the order of stay does not fix the length of the stay, it shall end on the date indicated in the order of resumption or, in the absence of such indication, on the date of the order of resumption.

3. While proceedings are stayed, time shall cease to run for the purposes of procedural periods. Time shall begin to run afresh from the beginning for the purposes of the periods from the date on which the stay of proceedings comes to an end.

*[CST RoP Article 72]*

### **Rule 372 – Resumption of proceedings**

Any decision referred to in Rule 371(2) or ordering the resumption of proceedings before the end of the stay shall be made by reasoned order of the judge-rapporteur after hearing the parties. The judge-rapporteur may refer the matter to the panel.

*[CST RoP Article 71]*

## **CHAPTER 4 – TIME PERIODS**

### **Rule 380 – Calculation of periods**

Any period of time prescribed by the Agreement, the Statute or these Rules of Procedure for the taking of any procedural step shall be reckoned as follows:

- (a) where a period expressed in days, weeks, months or years is to be calculated from the moment at which an event occurs or an action takes place, computation shall start on the day following the day on which the relevant event occurred or an action took place;
- (b) when a period is expressed as one year or a certain number of years, it shall expire in the relevant subsequent year in the month having the same name and on the day having the same number as the month and the day on which the said event occurred. If the relevant subsequent month has no day with the same number, the period shall expire on the last day of that month;
- (c) when a period is expressed as one month or a certain number of months, it shall expire in the relevant subsequent month on the day which has the same number as the day on which the said event occurred. If the relevant subsequent month has no day with the same number, the period shall expire on the last day of that month;
- (d) when a period is expressed as one week or a certain number of weeks, it shall expire in the relevant subsequent week on the day having the same name as the day on which the said event occurred;
- (e) periods shall include official holidays, Sundays and Saturdays;
- (f) periods shall not be suspended during the judicial vacations.

*[RoP CST Article 100, EPC Rule 131]*

## **Rule 381 – Extension and shortening of periods**

*[to be developed further]*

### **1. Automatic extension**

If a period expires on a Saturday, Sunday or official holiday of the Court, it shall be extended until the end of the first following working day. The list of official holidays drawn up by the Court of Justice and published in the Official Journal of the European Union shall apply to the Court.

### **2. Extension upon request**

- on reasoned request by a party, lodged before the expiry of the period to be extended
- to be decided by the judge-rapporteur or the panel
- other parties to proceedings need not be heard
- possibility of extension not available for all periods

### **3. Shortening of periods**

- on reasoned request by a party
- to be ordered by the Court, where appropriate

## **CHAPTER 5 – PARTIES TO PROCEEDINGS**

### **SECTION 1 – PLURALITY OF PARTIES**

#### **Rule 390 – Plurality of plaintiffs**

1. Proceedings may be commenced by a plurality of plaintiffs, provided that they take the same position and are represented by the same representative.

2. If the Court is of the opinion that the requirement in paragraph 1 is not met, it may separate the proceedings in two or more separate proceedings against the same defendant.

3. Where the Court orders a separation of proceedings under paragraph 2, the plaintiffs in the new proceedings shall pay a new court fee, unless the Court decides otherwise.

*[EPLA RoP §14]*

### **Rule 391 – Plurality of defendants**

1. Proceedings may be commenced against a plurality of defendants, provided that the claims against them are sufficiently related to justify a common decision.
2. If the Court is of the opinion that the requirement in paragraph 1 is not met, it may separate the proceedings in two or more separate proceedings against different defendants.
3. Where the Court orders a separation of proceedings under paragraph 2, the plaintiffs in the new proceedings shall pay a new court fee, unless the Court decides otherwise.

*[EPLA RoP §15]*

### **Rule 392 – Court fees in case of plurality of parties**

1. If and as long as a plurality of parties in a case are represented by one and the same representative and take the same positions, they shall be regarded as one party as far as the payment of court fees is concerned.
2. If an originally justified plurality of parties ceases, whether because
  - (i) some of the parties instruct another representative to represent them,
  - (ii) they start to defend different positions or
  - (iii) the proceedings are separated by the Court into two or more separate proceedings,a separate court fee shall be payable by the parties leaving the plurality of parties or the original proceedings, unless the Court decides otherwise.
3. Where appropriate, the Court may order that a separate fee be paid by one or more parties in a plurality of parties.

## **SECTION 2 – CHANGE IN PARTIES**

### **Rule 395 – Change in parties**

1. The Court may, on application by a party or any legal or natural person wishing to become a party, order a person to
  - (a) be added as a party,
  - (b) cease to be a party or
  - (c) be substituted for a party.
2. The Registry shall invite other parties to the proceedings to comment on the application, within ten working days of service of the application.
3. When ordering that a person shall become a party or shall cease to be a party, the Court may make appropriate orders as to payment of court fees and other matters of costs as regards such party.

*[EPLA RoP §18]*

### **Rule 396 – Consequences for the proceedings**

1. Where the Court orders that a party be added, removed or substituted under Rule 395(1), it shall give directions to regulate the consequences as to case management.
2. The Court shall also determine the extent to which the new party is bound by the proceedings as then constituted.

*[EPLA RoP §19]*

## **SECTION 3 – DEATH, DEMISE OR INSOLVENCY OF A PARTY**

### **Rule 400 – Death or demise of a party**

1. If a party dies or ceases to exist during proceedings, the proceedings shall be stayed until such party is replaced by his successor or successors. The Court may specify a period in this respect.
2. If there are more than two parties to the proceedings, the Court may decide that
  - (a) proceedings between the remaining parties be continued separately and
  - (b) the stay shall only concern the proceedings regarding the party that no longer exists.
3. If the successor or successors of the party that died or ceased to exist does not or do not continue the proceedings of his or their own motion, within a period specified by the Court, any other party may, of its own motion or on an order of the Court, file continuation proceedings against such successor or successors.
4. Continuation proceedings shall be brought before the Court in accordance with Part 1. In continuation proceedings, the Court shall decide whether, and if so, to what extent, the defendants will take the position of the party that died or ceased to exist in the main proceedings.
5. The costs of continuation proceedings shall be decided independently from the costs of the main proceedings and solely on the basis of the outcome of the continuation proceedings.

[EPLA RoP §20]

### **Rule 401 – Insolvency of a party**

1. If a defendant becomes insolvent under the national law of his State of domicile, proceedings shall be stayed *ex officio* until the competent national authority or person dealing with the insolvency has decided whether to continue the proceedings or not.
2. The plaintiff may withdraw the case against the defendant in accordance with Rule 354. Such withdrawal shall not prejudice the case against other defendants.
3. Any order concerning costs under Rule 354(2) shall be payable to the competent national authority or person dealing with the insolvency.
4. If proceedings are continued, the effect of a decision of the Court as regards the insolvent party in the case shall be determined by the national law of the bankrupt party.

[EPLA RoP §21]

## **SECTION 4 – TRANSFER OF PATENT**

### **Rule 402 – Transfer of the patent during proceedings**

1. If a patent is transferred, for one or more Contracting States, to another proprietor after proceedings have been commenced, the Court may authorise the new proprietor to take over the proceedings to the extent that the patent has been transferred to him.
2. If the new proprietor takes over the proceedings, no new court fee shall be payable, even if the new proprietor is represented by a new representative.
3. If the new proprietor chooses not to take over the proceedings, any decision in proceedings that have been recorded in the Register can nevertheless be held against him.

*[EPLA RoP §22]*

## **SECTION 5 – INTERVENTION**

### **Rule 405 – Application to intervene**

1. An Application to intervene may be lodged [at any stage of the proceedings before the Court of First Instance] by any person establishing an interest in the result of a case submitted to the Court (hereinafter "the intervener").
2. An Application to intervene shall be admissible only if it is made in support, in whole or in part, of a claim, order or remedy sought by one of the parties.
3. The intervener shall be represented in accordance with Article 28 of the Agreement.
4. The Application to intervene shall contain
  - (a) a reference to the case number of the file
  - (b) the names of the intervener and of the intervener's representative, as well as postal and electronic addresses for service and the names of the persons authorised to accept service,
  - (c) the claim, order or remedy sought by the intervener and
  - (d) a statement of the facts establishing the right to intervene under paragraphs 1 and 2.

*[ECJ Statute Article 40, CST RoP Articles 109+110(4), EPLA RoP §§163+164]*

#### **Rule 406 – Order on Application to intervene**

The judge-rapporteur (during the written procedure and the interim procedure) or the presiding judge (during the oral hearing) shall decide on the Application to intervene by way of order.

*[CST RoP Article 109(6)]*

#### **Rule 407 – Statement in intervention**

1. If an Application to intervene is allowable, the judge-rapporteur or the presiding judge shall specify a period within which the intervener may lodge a Statement in intervention.
2. The Registry shall serve on the intervener any written pleading served on the parties. On request by a party, secret or confidential documents may be omitted.
3. The Statement in intervention shall contain
  - (a) the issues involving the intervener and one or more of the parties, and their connection to the matters in dispute,
  - (b) the facts relied on and
  - (c) the arguments of law,
  - (c) written evidence relied on and, where necessary, an indication of any further evidence which will be offered in support.
4. For the purposes of these Rules of Procedure, the intervener shall be treated as a party, unless otherwise provided.

*[CST RoP Article 110, EPLA RoP §165]*

#### **Rule 408 – Invitation to intervene**

1. The judge-rapporteur or the presiding judge may, of his own motion or on a reasoned request from a party, invite any person concerned by the outcome of the dispute to inform the Court, within a period to be specified, whether he wishes to intervene in the proceedings.
2. If the person wishes to intervene, he shall present his Statement in intervention within two months of the service of the invitation. Rules 405 and 407 shall apply *mutatis mutandis*.

*[CST RoP Article 111, EPLA RoP §163]*

#### **Rule 409 – Appeal against an order on the Application to intervene**

1. An appeal to the Court of Appeal may be brought against the order on the Application to intervene within one month of service of the order to the parties, by any person adversely affected by the order.
2. The lodging of a Statement of appeal shall not stay the main proceedings.
3. As long as the Court of Appeal has not decided otherwise, a party allowed to intervene shall be treated as a party to the proceedings.
4. The decision of the Court of Appeal shall
  - (a) state from what date it shall take effect and
  - (b) include an order relating to court fees and costs.

*[ECJ Statute Article 57(2), EPLA RoP §172]*

#### **Rule 410 – Intervener's right to appeal**

An intervener may bring an appeal only where the decision of the Court of First Instance directly affects him.

*[ECJ Statute Article 56(2)]*

## **SECTION 6 – REMOVING OR SUBSTITUTING A PARTY**

### **Rule 415 – Application for removing a party from the proceedings**

An Application for removing a party from the proceedings may be lodged by any party (hereinafter "the applicant"). It shall contain

- (a) the names of the applicant and of the applicant's representative,
- (b) the names of the party to be removed and of his representative,
- (c) the case number of the file and
- (d) a concise statement of the grounds upon which the Application is based.

*[EPLA RoP §167+168]*

### **Rule 416 – Grounds for removing a party**

The grounds upon which the Application for removing a party is based shall set out the reasons

- (a) why it is desirable that a party be removed from the proceedings,
- (b) where applicable, why that party's interest or liability has ceased or
- (c) why its participation in the proceedings unnecessarily complicate or slow down the proceedings.

*[EPLA RoP §169]*

### **Rule 417 – Power of the Court to order proceedings to be continued as separate proceedings**

1. When removing a party from the proceedings, the Court may order that proceedings concerning this party shall continue as separate proceedings.
2. Where appropriate, separate proceedings may be treated jointly with the existing proceedings.

*[EPLA RoP §170]*

### **Rule 418 – Application for substitution of a party**

An application for a substitution of a party by one or more other persons shall be regarded as a combined application for adding a party and removing a party.

*[EPLA RoP §171]*

### **Rule 419 – Appeal against an order to remove or substitute a party**

1. An appeal to the Court of Appeal may be brought against an order to remove or substitute a party within two months of the notification of the order to the parties by any person adversely affected by the order.
2. The lodging of the Statement of appeal shall not stay the main proceedings.
3. As long as the Court of Appeal has not decided otherwise, a party removed from the proceedings shall be treated as a party to the proceedings.
4. The decision of the Court of Appeal shall
  - (a) state from what date it shall take effect and
  - (b) include an order relating to court fees and costs.

*[ECJ Statute Article 57(2), EPLA RoP §172]*

### **CHAPTER 6 – CASE MANAGEMENT (Measures of organisation of procedure)**

*[Article 24 draft Agreement, CST RoP Part 2, Chapter 3]*

### **Rule 421 – Responsibility for case management**

1. During the written procedure and the interim procedure, case management shall be the responsibility of the judge-rapporteur.
2. On account of the scope of an envisaged case management order or of its importance to the disposal of the case, the judge-rapporteur may refer the matter to the panel.
3. After the closure of the interim conference in view of the oral hearing, case management shall be the responsibility of the presiding judge.
4. The Registry shall serve any case management orders on the parties.

*[EPLA RoP §33, CST RoP Article 56]*

## **Rule 422 – General powers of case management**

Active case management includes:

- (a) encouraging the parties to co-operate with each other during the proceedings;
- (b) identifying the issues at an early stage;
- (c) deciding promptly which issues need full investigation and disposing summarily of other issues;
- (d) deciding the order in which issues are to be resolved;
- (e) encouraging the parties to make use of the patent mediation and arbitration centre and facilitating the use of the centre;
- (f) helping the parties to settle the whole or part of the case;
- (g) fixing timetables or otherwise controlling the progress of the case;
- (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
- (i) dealing with as many aspects of the case as the Court can on the same occasion;
- (j) dealing with the case without the parties needing to attend in person;
- (k) making use of available technical means; and
- (l) giving directions to ensure that the hearing of the case proceeds quickly and efficiently.

*[EPLA RoP §36]*

## **Rule 423 – Review of case management orders**

1. Case management orders taken by the judge-rapporteur or the presiding judge shall be reviewed by the panel, on a reasoned application by a party. The other party shall be invited to comment.
2. An Application for the review of a case management order shall be lodged within two weeks of service of the order to the party concerned.
3. The party shall pay the fee for the review of a case management order. Proof of payment of the fee shall be provided together with the Application for the review of a case management order.

*[EPLA RoP §34]*

#### **Rule 424 – Case management powers**

Except where the Agreement, the Statute, these Rules of Procedure or the Practice Directions provide otherwise, the judge-rapporteur, the presiding judge or the panel may

- (a) extend or shorten the period for compliance with any rule, practice direction or court order;
- (b) adjourn or bring forward the interim conference or the oral hearing;
- (c) communicate with the parties to instruct them about wishes or requirements of the Court;
- (d) direct a separate hearing of any issue;
- (e) decide the order in which issues are to be decided;
- (f) exclude an issue from consideration;
- (g) dismiss or decide on a claim after a decision on a preliminary issue makes a decision on further issues irrelevant to the outcome of the case.

*[EPLA RoP §37+43]*

#### **Rule 425 – Varying or revoking orders**

A power of the Court to make a case management order includes a power to vary or revoke such order.

*[EPLA RoP §38]*

#### **Rule 426 – Exercise of managing powers**

The Court may exercise its case management powers on the application by a party or of its own motion, unless otherwise provided.

*[EPLA RoP §39]*

#### **Rule 427 – Orders of the Court's own motion**

Where the judge-rapporteur or the presiding judge proposes to make an order of his own motion, he may invite any person likely to be affected by the order to comment within a period to be specified.

*[EPLA RoP §40]*

### **Rule 428 – Early hearing**

Where the judge-rapporteur proposes to convene an early hearing to decide whether to make a case management order, he shall summon the parties likely to be affected by the order. At least one week's notice of the summons shall be given, unless the parties agree to a shorter period.

*[EPLA RoP §41]*

### **Rule 429 – Orders made without hearing the parties**

1. The Court may make an order of its own motion without hearing the parties.
2. Any order under paragraph 1 shall include information concerning the right to apply to have it set aside, modified or stayed and specify a period for lodging the application.
3. Any party affected by the order may apply to have it set aside, modified or stayed.

*[EPLA RoP §42]*

### **Rule 430 – Connection — Joinder**

1. In the interests of the proper administration of justice, the President of the Court of First Instance or the President of the Court of Appeal may, at any time, after hearing the parties, order that two or more cases shall, on account of the connection between them, be joined. The cases may subsequently be disjoined.
2. Where cases assigned to different panels of the Court of First Instance or of the Court of Appeal are to be joined on account of the connection between them, the President of the Court of First Instance or the President of the Court of Appeal shall decide on their re-assignment.

*[CST RoP Article 46]*

## **CHAPTER 7 – GENERAL ORGANISATIONAL PROVISIONS**

### **Rule 440 – Precedence**

1. With the exception of the President of the Court of Appeal and the President of the Court of First Instance, the judges shall rank equally in precedence according to their seniority in office.
2. Where there is equal seniority in office, precedence shall be determined by age.
3. Retiring judges who are reappointed shall retain their former precedence.

*[RoP EU CST Rule 5]*

### **Rule 441 – Dates, times and place of the sittings of the Court**

1. The dates and times of the sittings of the Court shall be fixed by the President of the Court of Appeal, on a proposal from the Presidium.
2. The Court may choose to hold one or more particular sittings in a place other than that in which it has its seat.

*[Article 11 draft Statute] [CST RoP Article 23]*

### **Rule 442 – Order in which cases are to be dealt with**

1. The Court shall deal with the cases before it in the order in which they become ready for examination.
2. The President of the Court of First Instance or the President of the Court of Appeal may in special circumstances
  - (a) direct that a particular case be given priority;
  - (b) after hearing the parties, in particular with a view to facilitating an amicable settlement of the dispute, either on his own initiative or at the request of one of the parties, defer a case to be dealt with later.

*[CST RoP Article 47]*

### **Rule 443 – Deliberations**

1. The Court shall deliberate in closed session.
2. The presiding judge shall preside over the deliberations. Only those judges who were present at the oral hearing may take part in the deliberations.
3. Every judge taking part in the deliberations shall state his opinion and the reasons for it. The conclusions reached by the majority of the judges after final discussion shall determine the decision of the Court. Votes shall be cast in reverse order to the order of precedence under Rule 440. Differences of view on the substance, wording or order of questions, or on the interpretation of a vote, shall be settled by decision of the Court.
4. The deliberation of the Court shall take place as soon as possible after the closure of the oral hearing in view of the final decision.

*[CST RoP Article 27, EPLA RoP §65]*

## **CHAPTER 8 – DECISIONS AND ORDERS**

### **Rule 450 – Decisions**

1. Any decision shall contain:
  - (a) the statement that it is a decision of the Court,
  - (b) the date of its delivery,
  - (c) the names of the presiding judge and the judges taking part in it, with an indication of the judge-rapporteur,
  - (d) the names of the parties and of the parties' representatives,
  - (e) an indication of the claim, order or remedy sought by the parties,
  - (f) a summary of the facts,
  - (g) the grounds for the decision,
  - (h) any order of the Court consequential upon the decision (other than costs) including any order giving immediate effect to an injunction.
2. The Court shall endeavour to give a decision without dissenting opinion.

*[Article 34(4) draft Statute] [CST RoP Article 79, EPLA RoP §96, ECJ Statute Articles 36+37]*

## **Rule 451 – Orders**

1. Every order shall contain:

- (a) the statement that it is an order of the judge-rapporteur, of the presiding judge, of a President of the Court or of the Court,
- (b) the date of its adoption,
- (c) the names of any judge taking part in its adoption,
- (d) the names of the parties and of the parties' representatives,
- (e) the operative part of the order.

2. Where, in accordance with these Rules, an order must be reasoned, it shall in addition contain:

- (a) a statement of the forms of order sought by the parties,
- (b) a summary of the facts,
- (c) the grounds for the order.

## **Rule 452 – Binding effect**

Decisions and orders of the Court of First Instance shall be binding from the date of their delivery.

*[CST RoP Article 83(1)]*

## **Rule 453 – Rectification of decisions**

The Court may, by way of order, of its own motion or on application by a party made within one month of the service of the decision to be rectified, after hearing the parties, rectify clerical mistakes, errors in calculation and obvious slips in the decision.

*[CST RoP Article 84(1)]*

## **CHAPTER 9 – DECISION BY DEFAULT**

### **Rule 455 – Decision by default (Court of First Instance)**

1. If a defendant on whom a Statement of claim has been duly served fails to lodge a Statement of defence, the Court of First Instance shall give decision by default.
2. Before giving decision by default, the Court shall consider whether
  - (a) the Statement of claim is admissible,
  - (b) the appropriate formalities have been complied with and
  - (c) the application appears well founded.
3. A decision by default shall be enforceable. The Court may, however,
  - (a) grant a stay of enforcement until it has given its decision on any Application to set aside the decision by default under Rule 456, or
  - (b) make enforcement subject to the provision of security; this security shall be released if no Application to set aside a decision by default is lodged or if the Application fails.

*[CST RoP Article 116(1)(2)(3), EPLA RoP §118]*

### **Rule 456 – Application to set aside a decision by default**

1. The defendant may lodge an Application to set aside a decision by default within one month of the date of service of the decision by default.
2. The Application to set aside a decision by default shall satisfy the requirements of Rule 21. In addition, it shall mention the date and number of the decision by default. The defendant shall pay a fee for the Application.
3. The proceedings shall be conducted in accordance with Part 1.
4. The decision of the Court shall be annexed to the decision by default. A note of the decision on the Application to set aside the decision by default shall be made in the margin of the original of the decision by default.

*[Article 36 draft Statute] [ECJ Statute Article 41, EPLA RoP §119, CST RoP Article 116(4)-(6)]*

### **Rule 457 – Decision by default (Court of Appeal)**

Rules 455 and 456 shall apply *mutatis mutandis* where a respondent on whom a Statement of appeal has been duly served fails to lodge a Statement of response.

## **CHAPTER 10 – MANIFESTLY INADMISSIBLE ACTIONS**

### **Rule 460 – No need to adjudicate**

If the Court finds that an action has become devoid of purpose and that there is no longer any need to adjudicate on it, it may at any time, of its own motion, after hearing the parties, adopt a reasoned order.

*[CST RoP Article 75]*

### **Rule 461 – Action manifestly bound to fail**

Where it is clear that the Court has no jurisdiction to take cognisance of an action or of certain of the claims therein or where the action is, in whole or in part, manifestly inadmissible or manifestly lacking any foundation in law, the Court may, without taking further steps in the proceedings, give a decision by way of reasoned order.

*[CST RoP Article 76]*

### **Rule 462 –Orders on no need to adjudicate and on action manifestly bound to fail**

1. Orders under Rules 460 and 461 shall be taken by the President of the Court of First Instance or the President of the Court of Appeal, upon the recommendation of the judge-rapporteur or the panel to which the case has been assigned or the Registry.
2. Where the decision is taken by the President of the Court of First Instance, it is a final decision within the meaning of Rule 251(1)(a). The period for lodging a Statement of appeal shall be one month.

### **Rule 463 – Absolute bar to proceeding**

The Court may at any time, of its own motion, after hearing the parties, decide whether there exists any absolute bar to proceeding with an action. If the Court considers that it possesses sufficient information, it may, without taking further steps in the proceedings, give a decision by way of reasoned order.

*[CST RoP Article 77]*

## **CHAPTER 11 – SETTLEMENT**

### **Rule 470 – Confirmation by the Court of a settlement**

1. Where the parties have concluded their case by way of settlement before the Patent mediation and arbitration centre, they shall inform the judge-rapporteur who shall present to the presiding judge a report recommending that the panel confirm the settlement by decision of the Court.
2. On request by the parties, the decision of the Court shall set out the terms of the settlement.
3. On request by the parties, the case shall be removed from the Register.
4. The presiding judge shall give a decision as to costs in accordance with the terms of the settlement or, failing that, at his discretion.

*[Article 52 draft Agreement, Directive 2008/52/EC] [CST RoP Article 69]*