

European Intellectual Property Review  
2007  
Legislative Comment  
**EUROPEAN PATENT LITIGATION: OUT OF THE IMPASSE**  
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Legislation: Agreement on the establishment of a European patent litigation system (Draft)

Proposal for a Council Regulation on the Community patent COM(2000) 412 final

European Parliament and Council Directive 2004/48 on the enforcement of intellectual property rights

Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Subject: INTELLECTUAL PROPERTY. Other related subjects: Administration of justice. European Union

Keywords: Community patents; Courts; EC law; European patents

Abstract: Considers the prospects for the acceptance of an European Patent Litigation Agreement (EPLA) or the adoption of a Community patent system. Discusses the Community's competence to enter into the EPLA, European Parliament concerns about potential conflict with national enforcement systems under European Parliament and Council Directive 2004/48 and Council Regulation 44/2001, and how to revise the EPLA to make it compatible.

**\*209** Background

Two proposals for reform of the way patent litigation is conducted in Europe could lead to radical changes to the European intellectual property landscape. The origins of the proposals differ but their fates have become intertwined. If progress is to be made, it may be necessary to disentangle them. Should that prove possible politically, a series of legal obstacles to reform would still have to be overcome.

The Draft European Patent Litigation Agreement

The first proposal is an initiative of the Contracting States of the European Patent Organisation set up by the European Patent Convention. [FN1] The Contracting States of that organisation now number 32. Although it is not part of the European Union, its membership includes all 27 of the Union's Member States following the accession of Malta on March 1, 2007. The European Patent Convention provides for the establishment of a European Patent Office with the power to grant so-called European patents conferring protection in the territory of the Contracting States designated by the applicant. The protection conferred by European patents may also be extended to the territories of five

"extension states". [FN2] As the European Patent Office explains on its website, [FN3] European patents are therefore capable of reaching a market of about 560 million people.

The effects of a European patent, once granted, are determined by the national laws of the states designated in the application. This has certain drawbacks, which were helpfully summarised in a report produced by the European Patent Office in 2006. [FN4] It means that a proprietor wishing to enforce a European patent granted for several Contracting States has to bring proceedings before the national courts of each of those states in which the patent has been infringed. This is expensive and occasionally leads to divergent outcomes. Moreover, differences between the national systems over such matters as the expertise of judges, procedural law and the duration of proceedings encourage forum shopping, as parties seek to initiate proceedings in the jurisdiction perceived as most favourable to their interests. A proprietor, for example, might bring proceedings in a country where high awards of damages are available, while an infringer may seek a declaration of non-infringement from an inexperienced court which is likely to take a long time to decide the case (a tactic known as a "torpedo"). The 2006 Report concludes that the consequence of differences between the national systems such as these:

"is a fragmentation of the European market, as it is impossible to ensure that a European patent yields a uniform level of protection throughout all states. The disparities between the national systems as regards the litigation of European patents are thus prejudicial to the free movement of goods in Europe and counteract progress towards the creation of an environment conducive to free competition". [FN5]

In order to address these problems, an intergovernmental conference of the Contracting States held in Paris on June 24 and 25, 1999 set up a Working Party on Litigation with the task of devising "an integrated judicial system, including uniform rules of procedure and a common court of appeal" for dealing with litigation concerning European patents. [FN6] The Working Party's mandate was confirmed by a further intergovernmental conference held in London on October 17, 2000. On November 20, 2003, the Working Party announced that it had reached agreement on a draft agreement on the establishment of a European patent litigation system [FN7] and a draft statute of a European Patent Court with jurisdiction to hear infringement and revocation actions concerning European patents. The Working Party announced that it considered the drafts "a suitable basis for an intergovernmental conference to establish a judiciary for the European Patent Organisation ...". [FN8] However, it noted that further work would have to be postponed "in view of the work being done by the European Union to introduce a Community patent with a judicial system of its own". [FN9] That is the second of the two proposals referred to at the outset.

The proposed Community patent

The idea of having a single European Community patent enforceable throughout the Member States has been \*210 around for some time, but attempts to create such a patent have hitherto come to nought. [FN10] Building on the lessons of earlier initiatives, the Commission in 2000 presented a new proposal for a Council Regulation on the Community patent. [FN11] The Commission envisaged that the Community patent would be unitary in nature, producing the same effect throughout the Community. It would be granted, transferred, declared invalid or allowed to lapse only for the Community as a whole. The Community patent would coexist with national patents and European patents, inventors being free to choose the form of patent protection which they considered most appropriate for them.

The Commission envisaged that the provisions of the regulation would apply only once

a Community patent had been granted. The European Patent Office would examine applications (which would formally be for a European patent designating the territory of the Community) and grant Community patents. Appeals against administrative decisions concerning Community patents would be dealt with in accordance with the procedures of the European Patent Convention. To make all this possible, it would be necessary to amend the European Patent Convention so that the Community could accede to it and the Office could take on the role the Commission intended it should play.

The Commission's proposal contained radical provisions on the judicial system which would apply in disputes between private parties. The Commission considered it essential to avoid the possibility of a national court with no experience of intellectual property matters deciding on the validity of a Community patent or whether such a patent had been infringed. In the Commission's view, the European Courts of Justice and First Instance lacked sufficient expertise and were in any event overloaded. It therefore proposed the establishment of a Community Intellectual Property Court, comprising chambers of first instance and appeal, with only limited oversight by the European Court of Justice.

The establishment of the new court would have required an amendment to the EC Treaty. An amendment, dealing with "the application of acts adopted on the basis of this Treaty which create Community industrial property rights", was duly made at Nice, [FN12] but it was less extensive in scope than the Commission had evidently been contemplating. [FN13] In 2003, the Commission therefore submitted a new proposal for a Community patent jurisdiction [FN14] involving the establishment, as a judicial panel within the meaning of Art.225a EC, [FN15] of a Community Patent Court comprising seven judges with experience in the field of patents to deal with disputes arising out of the proposed Council regulation. Appeals, on questions of both fact and law, would lie to a specialised patent chamber of the European Court of First Instance composed of three judges with special expertise in patent law. There would be a possibility of further review by the European Court of Justice in exceptional cases "where there is a serious risk of the unity or consistency of Community law being affected". [FN16]

Since the Commission's proposal for a new regulation was presented in 2000, it has become mired in the Community's decision-making process. [FN17] Moreover, there are doubts among patent users as to the practicality of the proposal and the likely cost of applying for a Community patent. Even if the Commission's proposal were adopted, many such users would probably continue to use the existing patent systems available under national law and the European Patent Convention.

### Relaunching EPLA

Against that background, attempts were made to relaunch EPLA. In September 2005, an amended version of the draft Statute of the European Patent Court was produced. This was followed in December of that year by an amended version of EPLA itself. The European Patent Organisation's Annual Report for 2005 noted [FN18]:

"The texts would in principle now be technically ready for discussion at an intergovernmental conference. Many leading patent judges have already advocated holding such a conference on the EPLA, and European industry has repeatedly stressed the urgent need for a unified litigation system."

Towards the end of 2006, a number of European patent judges approved a set of principles relating to the Rules of Procedure of the European Patent Court which EPLA would establish if adopted. [FN19]

According to Art.2 of the 2005 draft, EPLA is designed to establish:

"[a] system of law, common to the Contracting States, for the settlement of litigation concerning the infringement and validity [of patents granted under the European Patent Convention]".

EPLA would set up a European patent judiciary "to settle litigation concerning the infringement and validity of European patents effective in one or more of the Contracting States". [FN20] The organs of the European patent judiciary would include a European Patent Court comprising a Court of First Instance and a \*211 Court of Appeal, as well as a Registry. [FN21] Part III of the 2005 draft contains provisions on the substantive patent law to be applied by the European Patent Court and its jurisdiction. Part IV, on procedure before the court, includes provisions on the court's powers and provisional and protective measures.

EPLA would be open to accession by any Contracting State to the European Patent Convention [FN22] and possibly also to the European Community (although that is seen as raising a number of difficulties [FN23]). As far as Member States of the European Community and the Community itself are concerned, various questions of competence would need to be resolved before they could accede. Are Member States competent to do so? Is the Community competent to do so? If so, is that competence shared with the Member States or is it exclusive? To answer those questions, it is necessary to examine the case law of the European Court of Justice on the competence of the Community to enter into international agreements.

#### The European Community's competence to enter into international agreements

There appears to be no provision in the EC Treaty expressly authorising the Community to conclude an agreement like EPLA. [FN24] However, the case law of the European Court of Justice, beginning with the famous ERTA case, [FN25] makes it clear that the Community's competence to enter into international agreements may flow, not only from an express attribution by the EC Treaty, but also implicitly from that Treaty's provisions. In particular, such competence may derive by implication from measures adopted within the framework of the Treaty by the Community institutions. [FN26] The result is that:

"to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope". [FN27]

This implies "recognition of an exclusive competence for the Community in consequence of the adoption of internal measures". [FN28] In the ERTA case, [FN29] the Community powers at issue were held to:

"exclude the possibility of concurrent powers on the part of the Member States, since any steps taken outside the framework of the Community institutions would be incompatible with the unity of the Common Market and the uniform application of Community law".

The ERTA case concerned the field of transport, in which the Treaty envisaged the adoption of a common policy. Many of the court's remarks in that case were therefore concerned with the consequences for the Community's external competence of the adoption of common rules with a view to implementing a common policy. However, the court made it clear in Opinion 2/91 [FN30] that the ERTA decision was not confined to cases where the Community had adopted common rules within the framework of a common policy:

"The Community's tasks and the objectives of the Treaty would also be compromised if Member States were able to enter into international commitments containing rules capable of affecting rules already adopted in areas falling outside common policies or of altering their scope." [FN31]

Opinion 2/91 concerned the compatibility with the EEC Treaty of a convention of the International Labour Organization and, in particular, the Community's competence to conclude that convention and the consequences this would have for the Member States. The Community had adopted a number of directives in areas covered by certain provisions of the convention. The court stated that, while there was no contradiction between those provisions and the directives concerned, "it must nevertheless be accepted that [the relevant part of the convention] is concerned with an area which is already covered to a large extent by Community rules ...". [FN32] The court went on:

"In those circumstances, it must be considered that the commitments arising from [the relevant part of the convention], falling within the area covered by the directives cited above ... are of such a kind as to affect the Community rules laid down in those directives and that consequently Member States cannot undertake such commitments outside the framework of the Community institutions." [FN33]

In similar vein, the court stated in the Open Skies case [FN34] that the failure of the defendant Member State to fulfil its obligations lay "in the fact that it was not authorised to enter into such a commitment on its own, even if the substance of that commitment does not conflict with Community law". [FN35]

Much of this case law was cited by the court in Opinion 1/03, [FN36] which concerned the competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The original Lugano Convention of 1988 ran in parallel to the Brussels Convention. Its objective was to apply, in relations between a state party to the Brussels Convention and an EFTA Member State which was a party to the Lugano Convention, and in relations \*212 between the EFTA Member States which were parties to the Lugano Convention, inter se, a system which was broadly the same as that established by the Brussels Convention. The new Lugano Convention was intended to align the provisions of the original Lugano Convention with those of Regulation 44/2001, [FN37] which had in the meantime replaced the Brussels Convention.

In the course of concluding that the Community had exclusive competence to conclude the new Lugano Convention, the court observed:

"it is essential to ensure a uniform and consistent application of the Community rules and the proper functioning of the system which they establish in order to preserve the full effectiveness of Community law." [FN38]

The negotiating directives issued by the Council to the Commission provided for the inclusion in the new Lugano Convention of a "disconnection clause" to the effect essentially that the Member States were to apply inter se Regulation 44/2001 and not the new convention. The European Parliament argued that, even if such a clause were inserted in the new convention and there were no contradiction between that convention and Regulation 44/2001, the Member States would not have competence to conclude the convention. [FN39] The court agreed. Referring to [101] of the Open Skies case, it declared [FN40]:

"the existence in an agreement of a so-called 'disconnection clause' providing that the agreement does not affect the application by the Member States of the relevant provisions of Community law does not constitute a guarantee that the Community rules are not affected by the provisions of the agreement because their respective scopes are

properly defined but, on the contrary, may provide an indication that those rules are affected. Such a mechanism seeking to prevent any conflict in the enforcement of the agreement is not in itself a decisive factor in resolving the question whether the Community has exclusive competence to conclude that agreement or whether competence belongs to the Member States ..."

The position may therefore be summarised as follows:

- The Community's competence to conclude an international agreement may flow by implication from measures adopted within the framework of the EC Treaty by the Community institutions.

- The Member States cannot, outside the framework of the Community institutions, assume obligations which might affect Community rules laid down for the attainment of the objectives of the EC Treaty or alter the scope of such rules.

- A Member State may be in breach of its obligations under the EC Treaty if it infringes the Community's external competence by entering into international commitments on its own which are not authorised, even if the substance of those commitments does not conflict with Community law.

- The existence in an agreement of a so-called "disconnection clause", providing that the agreement does not affect the application by the Member States of relevant provisions of Community law, does not guarantee that the Community rules are not affected by the provisions of the agreement. On the contrary, such a clause may provide an indication that those rules are affected.

- The central question is whether the agreement is capable of undermining the uniform and consistent application of Community rules and the proper functioning of the system they establish.

#### The Intervention of the European Parliament

In the autumn of 2006, the European Parliament asked its Legal Service for an interim opinion on EU-related aspects of the possible conclusion of EPLA by the Member States. The opinion was released in early 2007. [FN41] The Legal Service drew particular attention to the overlap between EPLA and Directive 2004/48 on the enforcement of intellectual property rights. [FN42] Article 1 of that Directive provides:

"This Directive concerns the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights. For the purposes of this Directive, the term 'intellectual property rights' includes industrial property rights."

By virtue of Art.2(1), the Directive applies "to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned". Because European patents granted under the European Patent Convention operate as national patents for the states in which protection is sought, their enforcement in Member States is governed by Directive 2004/48.

As the Legal Service pointed out [FN43]:

"Part IV of the draft EPLA is the counterpart of Directive 2004/48 as it concerns measures, procedures and remedies for the enforcement of European patents. This governs a number of matters which are already governed by the Directive; in some cases the EPLA would lay down rules which are different from those provided in Directive 2004/48/EC, and therefore the agreement would ineluctably affect the obligations of the Member States in this area."

The overlap is in fact apparent from the marginal notes to Pt IV of EPLA which appear in the 2005 draft. The notes set out some of the corresponding provisions of Directive

2004/48 and discuss whether the draft should be amended to reflect them. Sometimes a negative conclusion is reached, [FN44] sometimes a positive one. [FN45] Sometimes the matter is left open. [FN46] The Legal Service itself identified a number of specific disparities between EPLA and the Directive.

**\*213** The Legal Service also considered the effect of EPLA on Regulation 44/2001. It began by noting the court's conclusion in Opinion 1/03, referred to above, that the new Lugano Convention would affect the uniform and consistent application of that Regulation, and the proper functioning of the system it establishes, even though the objectives and provisions of the two instruments were similar. The Legal Service concluded that EPLA would also affect the uniform and consistent application of Regulation 44/2001. It pointed out in particular that Art.43 EPLA would require any Contracting State to treat as decisions of a national court of that state the decisions of the European Patent Court. However, Art.43 evidently could not bind non-Contracting States. Member States which are not parties to EPLA would not therefore be bound to treat decisions of that court as judgments within the meaning of Chapter III of Regulation 44/2001, which deals with recognition and enforcement. The result would be that some aspects of judgments given in patent cases (e.g. damages) which, in the absence of EPLA, would be recognised and enforced throughout the Community under Regulation 44/2001 would no longer be so recognised and enforced if certain Member States acceded to EPLA. [FN47] The Legal Service observed [FN48]:

"Such a legal situation would obviously compromise the aims of the Brussels Regulation [44/2001], in particular the free movement of judgments in civil and commercial matters."

It is true that Art.38(3) EPLA provides that, "[i]n case of conflict between the provisions of the Brussels or Lugano Conventions and the provisions of this Agreement, the former shall prevail". By virtue of Art.39, the same applies, mutatis mutandis, to Regulation 44/2001 for Contracting States which are bound by it, who designate the European Patent Court as their national court for the purposes of that Regulation. As the Legal Service pointed out, however, it is clear from Opinion 1/93 that "disconnection clauses" of this type provide no guarantee that Community rules are not affected by an agreement and may even indicate the contrary.

The Legal Service concluded [FN49] that "the Community's competence is exclusive for the matters governed by EPLA and Member States therefore are not entitled on their own to conclude that Agreement". In view of the case law of the Court of Justice summarised above, that conclusion seems compelling.

#### Interim conclusion

A definitive opinion on the extent of the competence of the Community and the Member States to conclude EPLA could be sought from the European Court of Justice before it is concluded under Art.300(6) EC. [FN50] Requests for an opinion of the court under that provision may be sought by the European Parliament, the Council, the Commission or a Member State. If the view of the European Parliament's Legal Service were endorsed by the court, and unless the EC Treaty were amended, EPLA in its present form would have to be concluded by the Community. Because of the inclusion in EPLA of provisions which overlap with Regulation 44/2001, this would require a unanimous vote of the Council. [FN51]

If any Member State were to press ahead with EPLA in the absence of an opinion from

the court that it was entitled to do so, it could be the subject of infringement proceedings brought by the European Commission under Art.226 EC [FN52] or even by another Member State under Art.227 EC, though in practice proceedings under the latter article are rare. An infringement action would give the court an opportunity to address the issue of competence.

It is also possible that the compatibility of EPLA with Community law might, in the absence of an opinion under Art.300(6), be raised before a national court, or even the European Patent Court, and the issue referred to the European Court of Justice for a preliminary ruling. For the purposes of the preliminary rulings procedure, Art.40(1) EPLA designates the European Patent Court as a national court of Contracting States which are Member States of the European Community. Although that provision is not conclusive, because the status of a national court for these purposes is a question of Community law alone, [FN53] the European Court of Justice would be likely to treat the European Patent Court as competent to make references to it. In *Parfums Christian Dior v Evora*, [FN54] the court said in connection with the Benelux Court:

"[t]here is no good reason why such a court, common to a number of Member States, should not be able to submit questions to this Court, in the same way as courts or tribunals of any of those Member States."

A way forward?

The opposition of some Member States, notably France, to EPLA means that the unanimous support of the Council for Community accession is unlikely to be forthcoming. However, it might be possible to overcome the obstacles identified by the Legal Service of the European Parliament by amending EPLA (at least as far as EU Member States are concerned) so as to limit its \*214 scope to essentially institutional questions and exclude from it any provisions which might be considered inimical to the uniform application of Community rules and the proper functioning of the system they establish. This would mean avoiding provisions which overlap (or, worse, conflict) with Directive 2004/48 and Regulation 44/2001.

A revised EPLA might then require EU Member States who were parties to it to adopt national legislation conferring on the European Patent Court the status of a national court for the purposes of their domestic law. This might be done in national legislation adopted to give effect to EPLA. The effect would be that the European Patent Court would apply Regulation 44/2001 directly like any other national court of a Member State. National legislation implementing EPLA would also have to require the European Patent Court to apply the provisions of Directive 2004/48, the substantive provisions of which might even be set out in the national implementing legislation. This would avoid the risk of confusion resulting from disparities between different national measures adopted to implement the directive.

The result would be that EPLA would be concerned (at least as far as EU Member States were concerned) solely with questions of national judicial architecture, a matter falling outside the competence of the Community. It would contain no provisions liable to affect Community rules within the meaning of the ERTA case or to alter the scope of such rules. The European Patent Court would be a national court by virtue of national law. It would be bound directly by Regulation 44/2001 and, with regard to "the measures, procedures and remedies necessary to ensure the enforcement [of European patents]", would apply the provisions of Directive 2004/48. It would be obliged to follow the case

law of the European Court of Justice on the same basis and to the same extent as all other national courts of the Member States.

Each tier of the European Patent Court would constitute a court or tribunal of a Member State for the purposes of the preliminary rulings procedure. The Court of Appeal would be able--and, as a court against whose decisions there would be no judicial remedy under national law, obliged--to refer to the European Court of Justice questions on both Regulation 44/2001 and Directive 2004/48. The Court of First Instance would be able to refer questions on Directive 2004/48 but, like all other lower national courts, it would not be able to refer questions on Regulation 44/2001. This is because the Title of the Treaty under which that regulation was adopted [FN55] confines the right to refer to national courts of last resort. [FN56]

#### Concluding remarks

There is a pressing need for a way out of the imbroglio to be found soon. The present impasse is highly damaging to the functioning of the European internal market and the profitability of European industry. As the Preamble to Directive 2004/48 notes, [FN57] "without effective means of enforcing intellectual property rights, innovation and creativity are discouraged and investment diminished". The lack of progress on the Community patent and doubts about its viability may leave EPLA the only game in town. The Commission recently suggested an integrated approach combining elements of both EPLA and the Community patent jurisdiction initially proposed. [FN58] History suggests that political and stakeholder support for such an approach is unlikely to be forthcoming in the near future, if at all.

FN1. Convention on the Grant of European Patents, Munich, October 5, 1973.

FN2. Albania, Bosnia and Herzegovina, Croatia, Serbia and the former Yugoslav Republic of Macedonia.

FN3. [www.european-patent-office.org](http://www.european-patent-office.org), where many of the EPO documents referred to below may be found.

FN4. "Assessment of the Impact of the European Patent Litigation Agreement (EPLA) on Litigation of European Patents" (EPO, February 2006).

FN5. 2006 report, *ibid.*, para.8 (emphasis in the original).

FN6. See O.J. EPO, 8-9/1999, 545 at p.548.

FN7. Known as the European Patent Litigation Agreement, or EPLA.

FN8. Declaration of the Working Party on Litigation, November 20, 2003, para.2.

FN9. *ibid.*, para.3.

FN10. See further House of Lords Select Committee on the European Communities, "The Community Patent and the Patent System in Europe" (Session 1997-98, 26th Report, HL Paper 115).

FN11. See COM (2000) 412 final.

FN12. See Art.229a EC.

FN13. See A. Arnall, "Modernising the Community Courts" (2000) 3 Cambridge Yearbook of European Legal Studies 37 at pp.52-54.

FN14. Proposal for a Council decision establishing the Community Patent Court and concerning appeals before the Court of First Instance, COM (2003) 828 final. See also the Commission's proposal for a Council decision conferring jurisdiction on the Court of Justice in disputes relating to the Community patent, COM (2003) 827 final.

FN15. cf. the European Union Civil Service Tribunal established in 2005: see Dec. 2004/752, [2004] O.J. L333/7.

FN16. Art.225(2) EC.

FN17. The proposal is based on Art.308 EC, which requires the unanimous agreement of the Council.

FN18. At p.91.

FN19. See the second Venice resolution, San Servolo, November 4, 2006.

FN20. Art.3(1).

FN21. Art.3(2)(a).

FN22. See Art.89.

FN23. See the marginal note accompanying Art.89.

FN24. Unless it were regarded as falling under the Community's common commercial policy, which comes within the Community's exclusive competence but whose scope remains somewhat obscure. See in particular Art.133(5) and (7) EC; P. Eeckhout, *External Relations of the European Union* (2004), pp.48-53; Opinion 1/94 [1994] E.C.R. I-5267.

FN25. Case 22/70 Commission v Council (ERTA) [1971] E.C.R. 263 at [16].

FN26. ERTA, *ibid.*, [15] and [16].

FN27. *ibid.*, [22].

FN28. Case C-467/98 Commission v Denmark (Open Skies) [2002] E.C.R. I-9519 at [78].

FN29. *ibid.*, [31].

FN30. [1993] E.C.R. I-1061.

FN31. Opinion 2/91, at [11].

FN32. *ibid.*, [25].

FN33. *ibid.*, [26].

FN34. See above fn.28.

FN35. *ibid.*, [101]; see also [105].

FN36. Opinion 1/93 was decided on February 7, 2006, after the latest draft of EPLA had been drawn up.

FN37. Reg.44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the so-called Brussels Regulation) [2001] O.J. L12/1.

FN38. Above fn.36, [128].

FN39. See *ibid.*, [82].

FN40. *ibid.*, [130]; see also [154].

FN41. The text is available at [www.boek9.nl](http://www.boek9.nl).

FN42. [2004] O.J. L157/16.

FN43. Para.33 of its interim legal opinion.

FN44. See, e.g. the marginal note to Art.49.

FN45. See, e.g. the marginal note to Arts 54, 70(4) and (5).

FN46. See, e.g. the marginal note to Art.51(2).

FN47. See para.59 of the interim legal opinion.

FN48. *ibid.*, para.60.

FN49. *ibid.*, para.67(6).

FN50. cf. Opinion 2/91, cited above fn.30, [4]. See further I. MacLeod, I. Hendry and S. Hyett, *The External Relations of the European Communities* (1996), p.112.

FN51. See Art.300(2) EC, first subparagraph, second sentence, and Art.67(1) EC, which is one of the two legal bases of Reg.44/2001. Art.67(2) provides for the decision-making procedure laid down in Art.67(1) to be reviewed five years after the entry into force of the Treaty of Amsterdam. Some of the applicable procedures were altered in December 2004 (see Dec. 2004/927 providing for certain areas covered by Title IV of Pt Three of the Treaty establishing the European Community to be governed by the procedure laid down in Art.251 of that Treaty, [2004] O.J. 2004 L396/45). However, the procedure applicable to measures based on Art.61(c) EC (the other legal basis of reg.44/2001) was left unchanged. Even if EPLA were regarded as falling within the scope of the Community's common commercial policy, its adoption would still require a unanimous vote of the Council: see Art.133(5) and (7) EC.

FN52. See, e.g. the *Open Skies* case, cited above fn.28.

FN53. See, e.g. Case C-53/03, *Syfait v GlaxoSmithKline*, judgment of May 31, 2005, at [29].

FN54. Case C-337/95 [1997] E.C.R. I-6013 at [21].

FN55. Title IV of Pt 3.

FN56. See Art.68(1) EC.

FN57. See Recital 3.

FN58. See "Enhancing the Patent System in Europe", COM (2007) March 29, 2007.

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