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IL-QORTI TAL-ĠUSTIZZJA TAL-UNJONI EWROPEA  
HOF VAN JUSTITIE VAN DE EUROPESE UNIE  
TRYBUNAŁ SPRAWIEDLIWOŚCI UNII EUROPEJSKIEJ  
TRIBUNAL DE JUSTIÇA DA UNIÃO EUROPEIA  
CURTEA DE JUSTIȚIE A UNIUNII EUROPENE  
SÚDNY DVOR EURÓPSKEJ ÚNIE  
SODIŠČE EVROPSKE UNIJE  
EUROOPAN UNIONIN TUOMIOISTUIN  
EUROPEISKA UNIONENS DOMSTOL

## REPORT FOR THE HEARING

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(Draft Agreement creating a Unified Patent Litigation System (currently called the European and Community Patents Court)–Compatibility with the Treaty)

In Opinion 1/09,

REQUEST for an Opinion under Article 300(6) EC (now Article 218(11) TFEU) made on 9 July 2009 by the Council of the European Union, represented by J.-C. Piris, F. Florindo Gijón and G. Kimberley, acting as Agents,

after considering the observations submitted on behalf of:

- the European Parliament, by E. Perillo, K. Bradley and M. Dean, acting as Agents,
- the European Commission, by L. Romero Requeña, J.-P. Keppenne and H. Krämer, acting as Agents,
- the Czech Government, by M. Smolek, acting as Agent,
- the Danish Government, by V.P. Jørgensen and R. Holdgaard, acting as Agents,
- the German Government, by M. Lumma, acting as Agent,
- the Estonian Government, by L. Uibo, acting as Agent,
- Ireland, by D.J. O'Hagan, acting as Agent, and by E. Fitzsimons, Senior Counsel, and N. Travers, Barrister,
- the Greek Government, by K. Samoni, G. Alexaki and K. Boskovits, acting as Agents,
- the Spanish Government, by N. Diaz Abad, acting as Agent,
- the French Government, by E. Belliard, B. Beaupere-Manokha and G. de Bergues, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent,
- the Cypriot Government, by V. Christoforou and M. Katzigeorgiou, acting as Agents,
- the Lithuanian Government, by I. Jarukaitis, acting as Agent,
- the Luxembourg Government, by C. Schiltz, acting as Agent,
- the Netherlands Government, by C. Wissels and Y. de Vries, acting as Agents,
- the Polish Government, by M. Dowgielewicz, acting as Agent,
- the Portuguese Government, by L. Fernandez, J. Negrão and M.L. Duarte, acting as Agents,
- the Romanian Government, by A. Popescu, acting as Agent, and by E. Gane and A. Stoia, consilieri,
- the Slovenian Government, by V. Klemenc, acting as Agent,

- the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,
- the Swedish Government, by A. Falk, acting as Agent,
- the United Kingdom Government, by I. Rao, acting as Agent, and by A. Dashwood, Barrister.

### **The request for an opinion**

- 1 The request for an opinion submitted to the Court by the Council of the European Union is worded as follows:

Is the envisaged agreement creating a unified patent litigation system (currently named 'European and Community Patents Court') compatible with the provisions of the Treaty establishing the European Community?

- 2 The Council forwarded to the Court, as annexes to its request,
  - Council document 8588/09 of 7 April 2009 on a revised proposal for a Council Regulation on the Community patent, drawn up by the Presidency of the Council for submission to the Working Party on Intellectual Property (Patents);
  - Council document 7928/09 of 23 March 2009 on a revised Presidency text of a Draft Agreement on the European and Community Patents Court and Draft Statute, the latter containing a number of institutional and financial provisions;
  - Council document 7927/09 of 23 March 2009 concerning a recommendation from the Commission to the Council to authorise the Commission to open negotiations for the adoption of an Agreement creating a Unified Patent Litigation System.

### **The Draft Agreement on the European and Community Patents Court**

- 3 The European Patent Convention (hereinafter 'the EPC'), signed at Munich on 5 October 1973, is a treaty to which 36 States, including all the Member States of the European Union, are today parties. That convention provides for a single procedure for the grant of European patents by the European Patent Office (hereinafter 'the EPO'). Although there is a single procedure for the grant of that right, the European patent breaks down into an array of national patents, each governed by the domestic law of the States which the proprietor has designated.
- 4 In 2000, the discussions on a future Community patent were reopened by the European Council. On 5 July 2000, the Commission submitted a proposal for a Regulation on the Community patent, providing for Community accession to the

EPC, the creation of a unitary industrial property right applicable to the Community in its entirety and the grant of that right by the EPO.

- 5 Following the conclusions of the Competitiveness Council of 4 December 2006, and of the European Council of 8 and 9 March 2007, the Commission presented to the European Parliament and the Council, on 3 April 2007, a communication entitled 'Enhancing the patent system in Europe'.
- 6 Under Article 2 of the Revised Proposal for a Regulation on the Community Patent of 7 April 2009, the patent would be granted by the EPO under the provisions of the EPC. It would have a unitary and autonomous character, producing equal effect throughout the European Union, and could only be granted, transferred, declared invalid or lapse in respect of the whole of that territorial area. The provisions of the EPC would apply to the Community patent to the extent that the Regulation on the Community Patent does not provide for specific rules.
- 7 Within the preparatory bodies of the Council, a draft international agreement, to be concluded between the Member States, the European Union and the non-EU Member States of the EPO, was also drawn up, creating a court having jurisdiction in respect of litigation related to European and Community patents.
- 8 The proposed agreement would establish a European and Community Patents Court (hereinafter 'the Patents Court' or 'PC'), composed of a court of first instance, comprising a central division and local and regional divisions, and a court of appeal. The third body of the PC would be a registry.

### **Provisions of the draft agreement**

- 9 Article 14a of that draft provides:

'Applicable law

1. When hearing a case brought before it under this Agreement, the [Patent] Court shall respect Community law and base its decisions on:

- (a) this Agreement;
- (b) directly applicable Community law, in particular Council Regulation...on the Community patent, and national law of the Contracting States implementing Community law...;
- (c) the European Patent Convention and national law which has been adopted by the Contracting States in accordance with the European Patent Convention; and
- (d) any provision of international agreements applicable to patents and binding on all the Contracting Parties.

2. To the extent that the Court shall base its decisions on national law of the Contracting States, the applicable law shall be determined:

- (a) by directly applicable provisions of Community law, or
- (b) in the absence of directly applicable provisions of Community law, by international instruments on private international law to which all Contracting Parties are parties; or
- (c) in the absence of provisions referred to in (a) and (b), by national provisions on international private law as determined by the Court.

3. A Contracting State which is not a party to the Agreement on the European Economic Area shall bring into force the laws, regulations and administrative provisions necessary to comply with Community law relating to substantive patent law.'

10 Article 15 of the Draft Agreement is worded as follows:

#### Jurisdiction

1. The Court shall have exclusive jurisdiction in respect of:
  - (a) actions for actual or threatened infringements of patents and supplementary protection certificates and related defences, including counterclaims concerning licences;
    - (a1) actions for declarations of non-infringement;
  - (b) actions for provisional and protective measures and injunctions;
  - (c) actions or counterclaims for revocation of patents;
  - (d) actions for damages or compensation derived from the provisional protection conferred by a published patent application;
  - (e) actions 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;
  - (f) actions for the grant or revocation of compulsory licences in respect of Community patents; and
  - (g) actions on compensation for licences...
2. The national courts of the Contracting States shall have jurisdiction in actions related to Community patents and European patents which do not come within the exclusive jurisdiction of the [Patent] Court.'

11 Article 48 of that draft states:

1. When a question of interpretation of the [EC] Treaty or the validity and interpretation of acts of the institutions of the European Community is raised before the Court of First Instance, it may, if it considers this necessary to enable it to give a decision, request the Court of Justice...to decide on the question. Where such question is raised before the Court of Appeal, it shall request the Court of Justice...to decide on the question.

2. The decision of the Court of Justice...on the interpretation of the [EC] Treaty or the validity and interpretation of acts of the institutions of the European Community shall be binding on the Court of First Instance and the Court of Appeal.'

### **Assessments made by the Council in its request for an Opinion**

12 The Council states that 'a majority of [its members] believe that the envisaged Agreement constitutes a legally possible way to achieve the envisaged aims. However, a number of legal concerns have been expressed and discussed... The Council points out that 'the presentation of the various issues is intended to be neutral, making no reference to the degree of support received by the various approaches, and that the Council is taking side neither for one answer nor for the other'.

13 The Council notes that the proposed agreement does not change the essential character of the jurisdiction of the Court of Justice. In those circumstances, Member States should be able to organise the structure of the judicial system as they think fit, including by setting up a court which is international in nature.

14 The Council observes that the obligation for the PC to respect Community law is intended to have a very wide scope, since it covers not only the Treaty and acts of the institutions but also the general principles of the Community legal order and the case-law of the Court of Justice.

### **Interventions before the Court**

15 Observations were submitted to the Court by the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland, the European Parliament and the European Commission.

- 16 The observations submitted argue one of the following: (i) that the request for an opinion is inadmissible or (ii) that the draft agreement is incompatible with the Treaty or (iii) that it is necessary to make amendments to the draft agreement in order to ensure its conformity with the Treaty or (iv) that the draft agreement is compatible with the Treaty.
- 17 The observations submitted to the Court refer to the provisions of the EU and EC Treaties which were applicable before the entry into force of the TEU and TFEU.

**Observations to the effect that the request for an opinion is inadmissible**

- 18 The **Parliament** argues that the working document submitted by the Council is ‘a non-legislative document of a kind which is not recognised by the Treaty’ and that, consequently, the Court cannot rely on that document in order to evaluate the legal context of the proposed agreement. It is ‘extremely difficult, if not impossible, properly to examine the compatibility with the Treaty of an agreement which is intended to establish a complex and highly-developed jurisdictional system’.
- 19 In those circumstances, the Parliament argues that the request for an opinion as submitted to the Court is ‘premature and incomplete, given the uncertainty surrounding the legal context in which the proposed Agreement is likely to operate and the fact that Parliament has never had the opportunity to examine even a first sketch of this text’.
- 20 The **Spanish Government** takes the view that the submission of the request for an opinion on the jurisdictional system for the Community patent is premature when the Community patent itself is only at an embryonic stage and there are numerous difficulties preventing the conclusion of the agreement in question. Consequently, the condition laid down by the case-law in order for the Court of Justice to be able to rule on a request for an opinion, requiring that the subject-matter of the proposed agreement be known, is not satisfied.
- 21 The Spanish Government adds that, in any event, the conclusion of the international agreement which is the subject-matter of these proceedings is subject to the condition precedent of the adoption of the Regulation on the Community patent.

**Observations to the effect that the draft agreement is incompatible with the Treaty**

- 22 The **Greek Government** doubts whether it is possible to circumvent Article 229a EC (now Article 262 TFEU) and choose the method of an international agreement in order to regulate the procedures for disputes concerning Community patents. That provision lays down the only appropriate way of conferring jurisdiction on the Court of Justice in disputes relating to Community industrial property rights.

Even if it is considered that the adoption of an international agreement intended to create a unified judicial mechanism may be compatible with the Treaty, exclusion of the jurisdiction of the Court of Justice in such disputes is not consistent with that provision.

- 23 As regards the legal and technical training of the judges of the PC, the Greek Government submits that the rules laid down in that regard are not consistent with the corresponding requirements laid down by the Treaty in regard to the composition of the Community Courts. Even a proven knowledge of civil law and procedure does not, by itself, confer the competence required for the exercise of judicial functions. Consequently, in so far as the judicial mechanism envisaged by the draft agreement provides for the participation, with voting rights, in the PC of persons having a technical specialism who do not possess the skills required for the exercise of judicial functions, the requirements laid down by the Treaty as regards the settlement of disputes relating to the application of Community industrial property rights are not satisfied.
- 24 The Greek Government points out that, when international agreements are concluded, Member States are not free to limit the functioning and powers of the national courts which are responsible for safeguarding the rights arising from Community law. Consequently, apart from the question of exclusion or alteration of the powers of the Community Courts, Member States have an obligation not to organise the resolution of disputes relating to the interpretation and application of the Treaty in a way which excludes the jurisdiction of the national courts over Community industrial property rights.
- 25 The Greek Government notes that the disputes which will be brought before the PC are not international disputes to which the European Union and the Member States may be parties, but disputes relating to the enforcement of rights conferred on individuals in the internal market by Community industrial property rights. Exclusion of the jurisdiction both of the Community Courts and of the national courts in such disputes, which relate to the functioning of the internal market, is not justified.
- 26 In the alternative, the Greek Government points out that, even if it is considered that the Treaty does not preclude the settlement of such disputes from being entrusted, by means of an international agreement, to a court outside the judicial systems of the European Union and the Member States, such conferment of jurisdiction must take place in a manner which ensures the autonomy of the Community legal order and affords effective judicial protection of the rights conferred on individuals.
- 27 The Greek Government submits that the mechanisms provided for by the draft agreement do not place the PC in a similar position to that of the national courts. In the event of a breach or misapplication of Community law, the draft agreement does not provide for the necessary mechanisms and procedural remedies to enable



individuals to secure effective protection of the rights which are associated with the application of Community patents. This applies both where the PC fails to apply Community law as interpreted by the Court of Justice, and where it fails to refer a question for a preliminary ruling.

- 28 In the opinion of the Greek Government, apart from the question of the need for a uniform interpretation of Community law, the draft agreement raises serious issues regarding the guarantee of effective protection for individuals which is equivalent, from the point of view of Community law, to that ensured by the national courts. The validity and application of the Community rights issued, which confer rights on individuals within the territory of the European Union, would depend on the decisions of judicial bodies sitting in non-member States. However, the validity of Community law, in this case of acts which are adopted on the basis of the Treaty and which confer rights within the territory of the European Union, cannot depend on the decisions of such third-country judicial bodies which operate outside the territorial scope of the Community acts in question.
- 29 The Greek Government adds that the geographical location of courts sitting in non-member States is of decisive importance, in particular as regards the application of intellectual property rights which are governed by the fundamental principle of territoriality. Consequently, preservation of the autonomy of Community law requires that the validity and effects of patents applying within the European Union do not depend on courts sitting in non-member States.
- 30 The Greek Government further points out that the conferment of jurisdiction on the Court of Justice to give preliminary rulings on questions of interpretation does not resolve the issue of the autonomy of Community law from the point of view of the validity of Community industrial property rights. The validity and application of those rights within the territory of the European Union would depend at first instance, including interim measures, on the decisions of courts sitting outside the European Union.
- 31 Finally, the Greek Government observes that Articles 220 EC and 292 EC (now, respectively, Articles 19 TEU and 344 TFEU) lay down a binding framework within which the Community institutions and the Member States must act when they choose both the general method and the specific provisions relating to the settlement of disputes concerning Community industrial property rights.
- 32 **Ireland** has 'serious doubts', at least in the present state of development of Community law in the field of patents, as to whether the European Union has competence to conclude jointly with the Member States an agreement such as that envisaged. Moreover, it is not certain that there is any legal basis upon which such an agreement could be concluded.

- 33 Given that the draft Regulation on the Community patent has not yet been approved and that no instrument seeking to establish a litigation system internal to the European Union for private-party disputes concerning Community patents has been adopted, Ireland believes it to be premature to determine that the European Union has joint competence with its Member States to conclude the proposed agreement.
- 34 Ireland points out that, even if the European Union did in principle have such competence, that competence would not be exclusive. Neither Article 308 EC (now Article 352 TFEU) nor Article 229a EC (now Article 262 TFEU) provides a legal basis, either separately or jointly, for the adoption of the proposed agreement. Since there is no other legal basis, at least in the present state of development of Community law, the European Union lacks the competence to conclude the proposed agreement.
- 35 Ireland doubts that the possibility for the PC to refer questions to the Court of Justice for a preliminary ruling can be considered as constituting a form of exercise of the optional power provided for in Article 229a EC (now Article 262 TFEU). Measures adopted by the Council under that provision cannot be in the form of an international agreement with third countries, and/or with an international organisation such as the EPO as envisaged in the draft agreement, but, rather, must be in the form of an act of the Council itself.
- 36 In the opinion of Ireland, Article 229a EC (now Article 262 TFEU) does not permit the Council to adopt provisions conferring jurisdiction in the form of an international agreement. That is *a fortiori* the case where there is no guarantee that the measures thereby agreed upon with third countries and/or international organisations would be capable of being adopted by all the Member States in accordance with their respective constitutional requirements.
- 37 As regards the legal basis set out in Article 308 EC (now Article 352 TFEU), Ireland maintains that the creation of a unified patent litigation system cannot be considered to be an objective of the European Union. Nor has it been demonstrated that the effective functioning of the common market requires the conclusion of an agreement on the PC.
- 38 In the alternative, if it is considered that the European Union has competence to conclude such an agreement jointly with the Member States, Ireland expresses doubts as to whether the conclusion of an agreement like that envisaged would be compatible with the Treaties. The agreement could undermine the autonomy and effectiveness of the Community legal order, which affects not only the Community judicature but also the national courts as Community courts of general jurisdiction. The agreement would significantly change the Community legal order by depriving national courts of the jurisdiction that they would otherwise enjoy to hear and determine the various important types of private-party

actions in the field of patents and, where appropriate, to make references to the Court of Justice for preliminary rulings on questions of law in that field.

- 39 Ireland points out that national courts would be required to enforce the decisions of the PC on the basis of orders made by the latter, without even the need for the party seeking enforcement to obtain a declaration of enforceability. Such a system, which would go much further than the provisions for the enforcement in national courts of judgments of the Community judicature, would fundamentally alter the essential character of the relationship between the Court of Justice and national courts.
- 40 In Ireland's submission, it is unclear whether the PC would be obliged to consider Community law which is not directly applicable. No hierarchy is specified regarding the rules of law upon which the decisions of the PC would be based. There is no guarantee that the primacy of provisions of Community law which may arise in the disputes that come before the PC will be fully respected. Nor is there a guarantee that the PC would be subject to an interpretative obligation to avoid, as would a national court, to the maximum extent possible, clashes between the provisions of Community law that it applies and the other national or international legal provisions that it would be called upon to apply.
- 41 The **Spanish Government**, in the alternative, argues that the draft agreement is incompatible with the Treaty.
- 42 The Spanish Government points out that conferring on a judicial body other than the Community Courts jurisdiction to hear and determine disputes arising in connection with the Community patent is contrary to Articles 220 EC and 292 EC (now, respectively, Articles 19 TEU and 344 TFEU). The Treaty does not provide for the possibility of an external actor, such as the PC would be, being allowed access to such a system.
- 43 The Spanish Government notes that, under the proposed agreement, the judicial treatment of a Community patent is subject to an international court, thereby removing such cases from the jurisdiction of the Court of Justice, given that the PC will have exclusive jurisdiction to hear and determine actions for infringements of Community patents, counterclaims and other actions.
- 44 The Spanish Government submits that the draft agreement is such as to undermine the monopoly of jurisdiction enjoyed by the Court of Justice to hear and determine disputes in matters relating to Community law. Even though it is true that Community patents will be granted by a body such as the EPO, that nevertheless does not mean that this is not a Community act in so far as the EPO acts on behalf of the European Union.
- 45 The Spanish Government points out that, within the structure of the Treaty, the Court of Justice is required to ensure that in the interpretation and application of the Treaty the law is observed. However, the proposed agreement transfers that

function to another court of an international nature, the Court of Justice retaining only a residual jurisdiction through the preliminary ruling procedure provided for in Article 48 of the draft agreement.

- 46 The Spanish Government maintains that the questions of Community law at issue here are excluded from referral to the Court of Justice. The essential character of the latter's functions would then be changed, in so far as, by altering the system of jurisdiction under which it is for the Court of Justice to hear and determine disputes relating to acts subject to Community law, the autonomy of the Community legal system guaranteed by the Treaty is undermined.
- 47 As regards Article 229a EC (now Article 262 TFEU), the Spanish Government points out that the Treaty does not permit the existing judicial system to be changed in order to permit access by any actor other than those which make up the Community system. Jurisdiction to hear and determine disputes concerning Community patents lies exclusively with the Community judicial structure, to which the courts of the Member States belong.
- 48 The Spanish Government observes that, through the conferment on the PC of jurisdiction to decide this category of cases, the Court of Justice is deprived of exclusive jurisdiction in disputes relating to Community industrial property rights, so that the essential character of the function of the Court of Justice, which is to ensure the uniform application of Community law, is altered.
- 49 The Spanish Government also submits that the proposed agreement is contrary to the existing judicial system under which jurisdiction to interpret and apply Community law lies with the national courts, in so far as they act as courts of Community law, and with the Court of Justice. The European Union is not authorised to change that system, nor can the Member States confer judicial powers outside of what is established by the Treaty except by means of an amendment to the latter.
- 50 The Spanish Government is of the opinion that the proposed system does not guarantee the primacy of Community law, given that the PC is an international court which, consequently, is outside the judicial structure of any Member State, and any infringements of Community law committed by such a court would therefore not be subject to any type of sanction.
- 51 The Spanish Government points out that, to the extent that the courts in question are not courts of the Member States, they cannot be held financially liable in the event of failure to comply with the obligation to make a reference for a preliminary ruling. Consequently, the uniformity in the interpretation and application of Community law is compromised. In addition, the principle of the primacy of that law and the rights of individuals, in particular their right to effective judicial protection, are infringed. Furthermore, in the event of breach by

the PC of Community law, there is no possibility of an appeal on a point of law, which renders the power of review conferred on the Court of Justice incomplete.

- 52 As regards the preliminary ruling mechanism provided for in Article 48 of the draft agreement, the Spanish Government contends that the questions at issue here relate to Community matters in disputes which should be submitted to the Court of Justice itself and in respect of which the PC will nevertheless have jurisdiction. Conferment of jurisdiction in favour of that international court would therefore alter the essential character of the jurisdiction conferred on the Court of Justice by the Treaty.
- 53 The **Lithuanian Government** explains that the Treaty does not contemplate permitting the European Union to take action in the field of litigation concerning industrial property rights.
- 54 The Lithuanian Government notes that Article 225a EC (now Article 257 TFEU) mentions the creation of a specialised Community court, but not of an international judicial body. That provision is not an appropriate basis for the proposed agreement. Moreover, nor can Article 229a EC (now Article 262 TFEU), on its own or in conjunction with other Treaty provisions, be the legal basis for concluding that agreement.
- 55 The Lithuanian Government points out that the proposed agreement covers both legal proceedings relating to the Community patent and those relating to the European patent. By virtue of the fact that Article 229a EC (now Article 262 TFEU) expressly mentions disputes relating to Community industrial property rights, there is room for doubt as to whether that provision can constitute a legal basis for conferring power to hear and determine both disputes relating to the European patent and those relating to national patents.
- 56 The Lithuanian Government observes that judicial review of the Community patent will not even be entrusted to the Court of Justice, but to another court which does not act within the framework of the Treaty. Jurisdiction in the field of Community industrial property rights can be conferred, under Article 229a EC (now Article 262 TFEU), only on the Court of Justice, not on another court, and especially not on a court not belonging to the European Union.
- 57 With regard to Article 308 EC (now Article 352 TFEU), the Lithuanian Government states that the creation of a litigation system in the field of Community patents and concerning disputes related to those patents pertains to the operation of the common market, which is in itself one of the fundamental objectives of the European Union. However, there must be doubt as to the need for an international agreement which creates an international court responsible for examining disputes arising from Community patents.
- 58 The Lithuanian Government submits that the mechanism provided for in Article 48 of the draft agreement does not constitute a sufficient guarantee for the

autonomy of the Community legal order. The possibility that the PC could develop its own doctrine and conditions for making references to the Court of Justice cannot be discounted. In those circumstances, it is not certain that the Court of Justice could retain its power to give definitive rulings on the interpretation of Community law.

- 59 The Lithuanian Government is therefore of the opinion that the agreement does not sufficiently ensure that the PC will submit requests for preliminary rulings to the Court of Justice and comply with that Court's judgments given in response to such requests. Consequently, both the autonomy of Community law and its unity would be affected. The role of the Court of Justice in the development of Community law could be reduced due to the fact that the proposed agreement does not provide for any other instrument serving to guarantee or maintain the jurisdiction of the Court of Justice in the interpretation of Community law.
- 60 The Lithuanian Government adds that, owing to its specific scope, the possibility of the PC's case-law exerting an influence on the sharing of competences between the European Union and its Member States and on the autonomy of the Community legal order cannot be excluded.
- 61 The **Luxembourg Government** submits that the Treaty does not provide any legal basis for transferring jurisdiction such as that envisaged by the draft agreement to a court such as the PC. In addition, the provisions of Community law and the case-law of the Court of Justice preclude the creation of such a court, since they require that the jurisdiction which the proposed agreement plans to confer on the PC can be exercised only by the Court of Justice itself.
- 62 The Luxembourg Government points out that Article 308 EC (now Article 352 TFEU) cannot be adopted as a legal basis, since Article 229a EC (now Article 262 TFEU) precludes application of the first provision in this case.
- 63 The Luxembourg Government submits that the framers of the Treaty intended to establish a monopoly for the Court of Justice in the settlement of disputes relating to Community industrial property rights. Consequently, Article 229a EC (now Article 262 TFEU) creates an obligation to submit that category of disputes to the Court of Justice.
- 64 The Luxembourg Government further submits that the wording of Article 229a EC (now Article 262 TFEU) precludes recourse to the proposed preliminary ruling mechanism. In addition, the creation of the PC is incompatible with the principles of the primacy, autonomy and uniformity of the Community legal order and its judicial system.
- 65 The Luxembourg Government explains that Article 292 EC (now Article 344 TFEU) enshrines the jurisdictional monopoly of the Court of Justice in resolving disputes between Member States concerning the interpretation and application of the Treaty. The purpose of that provision is to ensure the uniform interpretation

and application of Community law. By adjudicating on the validity of Community patents, the PC would be ruling, directly or indirectly, on matters which fall within the competences of the European Union. The prohibition on submitting disputes to any other method of settlement also applies to judicial or arbitral bodies such as the PC.

- 66 The Luxembourg Government contends that extension of the benefit of preliminary ruling proceedings to courts of States which are not members of the European Union is incompatible with the integrity and autonomy of the Community legal order and, in particular, with the mechanism established by Article 234 EC (now Article 267 TFEU). Moreover, the PC, as envisaged by the draft agreement, cannot be regarded as a court of a State.
- 67 The **Italian Government** points out that the European Union is not authorised to legislate with regard to the European patent, because the latter was established by an international agreement and it is only when the European Union accedes to the EPC that it will be able to participate, together with the other Contracting States, in the preparation of the additions and amendments to be made to the Convention.
- 68 The Italian Government states that the PC acts as a Community court in respect of disputes relating to the Community patent and as an international court in respect of disputes relating to the European patent. So far as concerns disputes relating to the Community patent, the mixed agreement at issue should be described as an agreement on a Community court.
- 69 The Italian Government submits that Article 308 EC (now Article 352 TFEU) cannot serve as a legal basis for the conclusion of the agreement in question. The court governed by the future agreement cannot be described as a Community judicial body, given that Articles 200 EC, 225a EC and 229a EC (now, respectively, Articles 19 TEU, 257 TFEU and 262 TFEU) preclude such a description.
- 70 The Italian Government notes that Article 308 EC (now Article 352 TFEU), since it forms an integral part of an institutional system based on the principle of conferred powers, cannot constitute a basis for widening the sphere of competence of the European Union beyond the general framework resulting from the body of Treaty provisions, and in particular from those which define the tasks and activities of the European Union. In any event, it cannot serve as a basis for the adoption of provisions which would lead, in essence, in terms of their consequences, to an amendment of the Treaty by means other than the procedure which the Treaty lays down for that purpose.
- 71 In the opinion of the Italian Government, in so far as it aims to create a single court for both the Community patent and the European patent and will be concluded between the European Union and the Contracting States to the EPC, the

draft agreement on the PC falls outside the Community's competences, since the European patent is not governed by Community rules.

- 72 The Italian Government observes that the creation of a specific mechanism for the judicial protection of industrial property rights means that the conferment of such jurisdiction on the Community judicature requires a specific procedure in accordance with Article 229a EC (now Article 262 TFEU). However, the draft agreement cannot be described as a draft Council legislative act. As the law currently stands, the European Union cannot therefore transfer its judicial powers in the field under consideration to an international court.
- 73 The **Cypriot Government** takes the view that the proposed agreement falls within the exclusive competence of the European Union in the sphere of the common commercial policy. Consequently, the proposed agreement cannot be concluded in the form of a mixed agreement between the European Union, the Member States and certain non-member States.
- 74 The Cypriot Government submits that the creation of the PC as a unified court having exclusive jurisdiction in respect of actions for infringement, actions for revocation and counterclaims relating both to European patents and to Community patents, and in respect of actions for damages and other, related actions concerning them goes against the exclusive jurisdictions of the Court of Justice and the Court of First Instance.
- 75 The Cypriot Government maintains that it is inconceivable for the disputes in question to be submitted to an international court such as the PC. On the contrary, the authorisation contained in Article 229a EC (now Article 262 TFEU) demonstrates the intention of the European Union to entrust the Community judicial system with the task of guaranteeing the protection of rights arising from the substantive rules on intellectual property rights. The fact that, to date, common rules have not yet been adopted at Community level concerning the conditions and procedure for acquiring such rights is irrelevant in that regard.
- 76 Consequently, in the opinion of the Cypriot Government, at least as regards the resolution of disputes between individuals which concern issues relating either to the existence of Community industrial property rights or to the scope of the rights created by them, the Court of Justice and the Court of First Instance should be regarded as having exclusive jurisdiction.

**Observations to the effect that it is necessary to make amendments to the draft agreement in order to ensure its conformity with the Treaty**

- 77 Should the Court hold the Council's request to be admissible, the **Parliament** submits that, in order to avoid any ambiguity as regards the obligation for the PC to respect Community law, it would be preferable expressly to indicate in the text of the agreement itself the wide scope which that obligation is intended to have,



and to specify that the duty to respect the Court's case-law includes future judgments as well as those which will have been handed down before the proposed agreement is concluded. It would also be appropriate to clarify that the PC is required to ensure the protection of fundamental rights, as neither the European Union nor the Member States can rely on an international agreement to dispense itself or themselves from complying with higher-ranking Community law.

- 78 So far as concerns the proposed preliminary ruling mechanism, the Parliament observes that, in order to reduce the risk of the PC's failing to comply with the obligation to make references, it would be appropriate to strengthen that obligation and to introduce a mechanism whereby the Commission could intervene in proceedings before the PC in order to be able to provide information and guidance to that court in matters of Community law. It might also be helpful to provide for an express obligation on the PC to refer questions of validity of Community law provisions to the Court of Justice.
- 79 The **Commission** wonders whether the proposed agreement should include express provision for it to be denounced, at any time, not only by non-member States, as the current text provides, but also by the European Union and by the Member States. In that way, the fact that entry into force of the proposed agreement renders recourse to Article 229a EC (now Article 262 TFEU) impossible in respect of disputes relating to the Community patent would be reversible.
- 80 The **French Government** observes that no mechanism sufficiently guarantees compliance by the court of appeal with the obligation to make references for preliminary rulings to the Court of Justice and, more broadly, to respect Community law. In those circumstances, although conferment on the Court of Justice of jurisdiction to give preliminary rulings appears necessary in order to ensure the primacy of Community law, it nevertheless does not seem to be sufficient.
- 81 The French Government therefore submits that the preliminary ruling system provided for by the proposed agreement should be supplemented by a mechanism available to the parties and/or, where appropriate, to the Member States and to the Commission, in order to guarantee compliance with Community law by the PC. One of the possible mechanisms would consist in permitting parties to bring before the Court of Justice applications for review, limited to points of law, directed against judgments of the court of appeal.
- 82 The French Government contends that conferment of jurisdiction on the Court of Justice to set aside judgments, so far as the European patent is concerned, would fall, at least potentially, within the scope of the jurisdiction which the Court already has. The conferment of jurisdiction on the Court to set aside judgments in respect of the Community patent would strengthen the protection of the primacy

of Community law, while not altering the essential character of the Court's jurisdiction. Such conferment would also have the advantage of making the court of appeal subject to review by a court with general jurisdiction.

- 83 In the French Government's opinion, it is possible to envisage other mechanisms for the purpose of guaranteeing respect for that primacy. Thus, the creation of an appeal in the interest of the law, at the initiative of the Commission or of a Member State, could be envisaged. The creation of a procedure for review by the Court of Justice of judgments of the court of appeal, in the event of serious risk of impairment of the unity or consistency of Community law, could equally be envisaged.

### **Observations to the effect that the draft agreement is compatible with the Treaty**

- 84 The **Czech Government** observes that the agreement should be concluded by the Member States and the European Union, that is to say as a 'mixed' agreement.
- 85 The Czech Government notes that no provision of Community law expressly establishes European Union competence to create a judicial body responsible for adjudicating on patent disputes, nor can that competence be inferred from the provisions of the Treaty or from secondary legislation. Article 65 EC (now Article 81 TFEU) cannot be the legal basis for the negotiation of the agreement, given that it concerns only cooperation between the internal authorities of the Member States of the European Union. The scope of that provision cannot be extended beyond that context and the creation of an independent supranational institution cannot be based on that provision.
- 86 The Czech Government maintains that, although there is no express or implied European Union competence for the creation of the PC, the establishment of a unified patents court is essential to ensure the proper functioning of the common market which is at present affected by the divergent decisions adopted by the national courts in patent litigation.
- 87 The Czech Government points out that an international agreement cannot be negotiated on the basis of Article 308 EC (now Article 352 TFEU) unless comprehensive intra-Community rules exist for the field governed by the agreement, or unless such rules are adopted, at the latest, at the same time as the agreement negotiated. The Regulation on the Community patent would fulfil that condition if it was adopted, at the latest, at the same time as the agreement.
- 88 In the opinion of the Czech Government, in addition to Article 308 EC (now Article 352 TFEU), Article 229a EC (now Article 262 TFEU) also constitutes the legal basis for the conclusion of the agreement in so far as it concerns the field of intellectual property.

- 89 The Czech Government points out that it is likely that, apart from the Regulation on the Community patent, the PC, when adjudicating on disputes related to European patents, will also be called upon to interpret and apply other Community provisions which may affect or govern the subject-matter of the litigation. The proposed agreement does not in any way alter the essential character of the competences of the European Union and its institutions, as they are conceived in the Treaty. Nor does the proposed agreement have any bearing on the division of competences between the European Union and its Member States.
- 90 The Czech Government points out that the PC will not be a court which will adjudicate on disputes between the Contracting Parties, but will rule exclusively on private legal relations which are connected with the implementation of patents. The proposed agreement is therefore not incompatible with Article 292 EC (now Article 344 TFEU).
- 91 The Czech Government submits that the proposed preliminary ruling mechanism is a procedure similar to that provided for in Article 234 EC (now Article 267 TFEU), and that it constitutes a means of ensuring both the primacy and autonomy of Community law and the power of review of the Court of Justice over the interpretation of Community law. Moreover, Article 14a of the proposed agreement requires the PC to comply with the provisions of Community law.
- 92 The **Danish Government** makes the preliminary point that the procedure provided for in Article 300(6) EC (now Article 218(11) TFEU) is not intended to resolve the practical difficulties relating to the implementation of a mixed agreement.
- 93 The Danish Government submits that no provision of the Treaty expressly confers on the European Union competence to conclude all or part of the proposed agreement, but that the provisions of the Treaty, including those of Articles 65 EC and 95 EC (now, respectively, Articles 81 and 114 TFEU), confer an internal and implied competence in order to be able to conclude certain parts of the agreement.
- 94 In the opinion of the Danish Government, Article 229a EC (now Article 262 TFEU) is not a suitable legal basis for the conclusion of the proposed agreement. The powers conferred on the Court of Justice are not new powers and, consequently, do not in themselves constitute an objective of the agreement. The powers of the Court of Justice provided for by that agreement are, by contrast, a mere consequence of the need to maintain the autonomy of Community law in the context of the transfer to an international court of jurisdiction over the Community patent. Consequently, certain parts of the proposed agreement fall within the competence of the European Union, so that the latter must be able to become a party to that agreement.
- 95 The Danish Government submits that it is not in itself incompatible with the uniform application of Community law for the Member States to be parties to an

agreement concluded with non-member States for the purposes of judicial cooperation in civil matters and of improved legal certainty in a given field of law, whether or not that field is in fact governed by Community rules.

- 96 The Danish Government maintains that the establishment of a new international court which would have the task of applying Community rules does not, in itself, have any effect on those rules. The fact that the PC's judgments must comply with Community law and be recognised by the courts of the Member States does not mean that the creation of the PC affects the rules of Community law which that court is required to apply.
- 97 The Danish Government observes that Article 229a EC (now Article 262 TFEU) cannot be interpreted as conferring on the European Union exclusive competence with regard to the establishment of a mechanism for the resolution of disputes relating to Community patents. That provision therefore does not preclude the Member States from concluding, jointly with the European Union, agreements with non-member States for the purpose of enforcing more effectively the rules on Community patents.
- 98 The Danish Government further points out that, regardless of the fact that the European Union and the Member States are competent to conclude the proposed agreement as a mixed agreement, its provisions do not infringe those of the Treaty or the fundamental principles of Community law, in particular that of the autonomy of the Community legal order.
- 99 The Danish Government points out that it is only when the competences of the institutions are liable to be 'altered in their essential character' following the conclusion of an international agreement that that agreement is incompatible with the principle of the autonomy of the Community legal order. Nor does the proposed agreement infringe the exclusive jurisdiction of the Court of Justice under Article 292 EC (now Article 344 TFEU). The exclusive jurisdiction of the PC in intellectual property disputes falls outside the scope of any right or power conferred on the Court of Justice. The Community legal order does not preclude the European Union and the Member States from transferring to other courts the power to give decisions in disputes between private individuals relating to the application of Community law.
- 100 Should the Court hold that Community patents granted by the EPO must be regarded as being Community acts and as forming an integral part of the Community legal order, the Danish Government submits that it is possible to confer jurisdiction on the PC to determine the validity of those legal acts. The Court of Justice does not have exclusive jurisdiction to decide whether the conditions for validity laid down by that international agreement are satisfied.
- 101 The Danish Government points out that Article 229a EC (now Article 262 TFEU) does not require the European Union and the Member States to refrain from

creating courts other than that envisaged by that provision. The Council is therefore free to decide whether and, where appropriate, to what extent the competence envisaged by that provision should be used.

- 102 With regard to the preliminary ruling mechanism provided for, the Danish Government observes that, in the situations in which jurisdiction is conferred on the Court of Justice to answer questions referred by the PC for a preliminary ruling, the Court's decisions are binding. Consequently, the functions exercised by the Court under Articles 220 EC and 234 EC (now, respectively, Articles 19 TEU and 267 TFEU) are not altered in their essential character. In addition, the system envisaged does not in any way have the effect of imposing on the European Union and the Member States a particular interpretation of the rules of Community law and it does not infringe the principle of the primacy or effectiveness of Community law either.
- 103 The Danish Government notes that there is nothing in the proposed agreement which permits the European Union and the Member States to avoid their responsibilities should the PC act in breach of Community law. Both the European Union and the Member States are liable, whenever they confer a power on a body established by international agreement, for that body's failure to comply with Community law in the exercise of that power. The question of who must answer for the failure of an international organisation to comply with Community law in a specific case should be resolved on the basis of the circumstances of the particular case and the development of Community law.
- 104 The **German Government** submits that the proposed agreement is capable of being concluded on the basis of Article 308 EC (now Article 352 TFEU). By contrast, Article 229a EC (now Article 262 TFEU) cannot serve as a legal basis, since that provision is not intended to confer jurisdiction on the Court of Justice in patent disputes.
- 105 The German Government is of the opinion that neither Article 133 EC (now Article 207 TFEU), nor Article 95 EC (now Article 114 TFEU) in conjunction with Directive 2004/48/EC of the Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, constitutes a sufficient legal basis to permit the conclusion of the proposed agreement.
- 106 The German Government argues that neither Article 229a EC (now Article 262 TFEU) nor the primacy of Community law precludes the creation of a unified patents court as a judicial system placed outside the judicial systems of the European Union and the Member States. The enumeration of actions in the Treaty does not provide for any jurisdiction for the Community Courts in patent disputes between individuals.
- 107 The German Government infers from this that it is, in principle, open to Member States, when designating courts with jurisdiction, to confer the relevant

jurisdiction on a court created by international agreement, provided that the jurisdiction conferred on the Court of Justice is not undermined. Article 229a (now Article 262 TFEU) involves only a power to confer the jurisdiction referred to on the Community Courts by means of a simplified revision of the Treaty.

- 108 The German Government also submits that the system of judicial review provided for by the proposed agreement preserves the autonomy of the Community legal order. The unified patent litigation system envisaged does not alter the essential character of the competences of the European Union and its institutions, as they are conceived in the Treaty. Moreover, the proposed agreement avoids the imposition on the European Union and its institutions of a particular interpretation of the rules of Community law incorporated in that agreement.
- 109 The German Government points out that the obligation on the PC to comply with Community law is binding and formulated broadly, covering not only the written provisions of primary and secondary legislation and the general principles of Community law, but also the case-law of the Court of Justice. In the same way, that obligation encompasses the *acquis communautaire* predating the entry into force of the agreement, while also applying to all subsequent developments of Community law, including the judgments given by the Court of Justice.
- 110 The German Government also points out that Article 48 of the draft agreement does not give the Contracting States any latitude as regards references made by the PC for preliminary rulings. The fact that local or regional divisions of the PC may be located in a non-member State is irrelevant in that regard.
- 111 The **Estonian Government** contends that the Treaty does not confer direct competence on the European Union to regulate the field of patents. However, since the conclusion of the proposed agreement contributes to the strengthening of patent protection in the internal market, it would encourage the marketing without frontiers of goods, thereby contributing directly to the development of economic activity, to the objectives relating to competitiveness and to the achievement of the objective of an internal market based on the fundamental freedoms.
- 112 In the Estonian Government's submission, given that many of the provisions of the proposed agreement fall within the sphere of competence of the Member States, the proposed agreement must be concluded as a 'mixed' agreement. Given that the Treaty does not contain any legal basis giving competence to the European Union to conclude an agreement concerning patent litigation, it is necessary to apply, in this case, Article 308 EC (now Article 352 TFEU) as the legal basis.
- 113 In that regard, the Estonian Government submits that this is not a situation in which the use of Article 308 EC (now Article 352 TFEU) would lead to a widening of the sphere of competences of the European Union beyond the general framework resulting from the body of Treaty provisions, and in particular from those which define the tasks and activities of the European Union. Consequently,

Article 308 EC (now Article 352 TFEU) could, in this instance, be used for the exercise of an external competence, even if the European Union's internal competence has not yet been exercised.

- 114 The Estonian Government takes the view that the draft agreement does not affect the division of competences laid down in the Treaty, given that the PC does not have jurisdiction in disputes between the Member States or between the Member States and the institutions. Consequently, there is no conflict with Article 292 EC (now Article 344 TFEU).
- 115 The Estonian Government points out that the proposed agreement makes sufficient provision for measures ensuring the uniform application of Community law. In particular, the PC is required to comply with Community law and to base its decisions on the case-law of the Court of Justice.
- 116 In the view of the Estonian Government, the fact that a first-instance division of the PC will be able and the court of appeal will be obliged to refer to the Court of Justice on questions relating to the interpretation of Community law is sufficient to ensure the uniform application of Community law. In addition, the interpretation given by the Court of Justice is binding on the court which submitted the question for a preliminary ruling.
- 117 Nor does the Estonian Government see how the proposed agreement is contrary to the requirement arising from Article 292 EC (now Article 344 TFEU).
- 118 So far as concerns Article 229a EC (now Article 262 TFEU), the Estonian Government states that, at the present time, the Court of Justice does not have exclusive jurisdiction in the field of patents. Even on the assumption that the Regulation on the Community patent is adopted, it is for the Council to decide, by separate legal acts, whether and to what extent it wishes to give jurisdiction to the Court of Justice in litigation relating to such patents.
- 119 The Estonian Government points out that the role to be given to the Court of Justice by the proposed agreement enables it to ensure that the law is observed in the interpretation and application of the Treaty. The assignment of such a function should not be regarded as altering the essential character of the Court's jurisdiction, given that the role of the Court in the preliminary ruling procedure in fact remains the same as in the context of the application of Article 234 EC (now Article 267 TFEU). The Court's preliminary rulings are binding on the referring courts, which satisfies the requirements laid down by the Court in order to ensure the autonomy of the Community legal order.
- 120 The **French Government** is of the opinion that competence to conclude the proposed agreement is shared between the Council and the Member States. So far as concerns the European patent, competence to create an international court having jurisdiction in disputes which currently fall within the jurisdiction of the national courts lies mainly with the Member States. As to the future Community

patent, competence to conclude the proposed agreement is shared between the European Union and the Member States. While the common rules relating to the Community patent fall within the competence of the European Union, the organisation of the judicial system responsible for adjudicating on disputes relating to it falls, for its part, within the competence of the Member States.

- 121 The French Government points out that, since the Council has not exercised the power referred to in Article 229a EC (now Article 262 TFEU), the Member States remain competent to organise the judicial system for the Community patent, including transferring to an international court the functions which at present lie with the national courts. However, the Member States must ensure that such an international court will observe the primacy of Community law.
- 122 In the opinion of the French Government, the creation of an international court does not constitute a circumvention of Article 229a EC (now Article 262 TFEU). Although that provision gives the Council the power to confer jurisdiction, to the extent that it determines, on the Court of Justice in disputes relating to the application of acts which create Community industrial property rights, it does not in any way oblige it to confer such jurisdiction.
- 123 The French Government submits that the conferment of jurisdiction on the PC to invalidate Community patents is not contrary to the monopoly of the Court of Justice. The Community patent as an industrial property right does not, for that reason, constitute a Community act. Consequently, by providing that the Council may adopt provisions to confer jurisdiction on the Court of Justice in disputes relating to the application of acts which create Community industrial property rights, Article 229a EC (now Article 262 TFEU) distinguishes between, on the one hand, the acts which create such rights and, on the other, those rights themselves.
- 124 The French Government argues that the PC cannot be regarded as a court common to the Member States. However, Community law does not preclude the Court of Justice from having jurisdiction conferred on it, by an international agreement concluded by the European Union, to answer questions referred for a preliminary ruling concerning the validity or interpretation of Community law which are submitted to it by an international court, provided that the answers which it gives are binding. Consequently, the conferment by the proposed agreement of jurisdiction on the Court of Justice to give preliminary rulings does not alter the essential character of the Court's powers and is therefore compatible with Community law.
- 125 The **Netherlands Government** states that the European Union has a competence available to it enabling it to conclude treaties relating to intellectual property rights and to the settlement of disputes in that field, such as the proposed agreement, in so far as it has exercised its internal competences. However, in the field in question, the European Union has exercised its internal competences to



only a limited extent. It therefore follows that the law of intellectual property still falls partly within the Member States' competences. Consequently, the proposed agreement can only be a mixed agreement.

- 126 The Netherlands Government is of the opinion that Article 229a EC (now Article 262 TFEU) does not preclude the agreement. That provision applies without prejudice to the other provisions of the Treaty. The Council's competence to adopt such provisions is in any event discretionary.
- 127 The Netherlands Government submits that the Community legislature has considerable latitude in choosing to exercise that power and also in determining to what extent the Court of Justice can have jurisdiction in disputes relating to Community industrial property rights. The conferring of such jurisdiction on the Court presupposes the existence of such rights. Consequently, Article 229a EC (now Article 262 TFEU) does not constitute a basis for the conclusion of the agreement, but nor does it preclude it.
- 128 In the submission of the Netherlands Government, Article 308 EC (now Article 352 TFEU) is the only appropriate legal basis, since the Treaty does not currently provide any specific legal basis permitting the creation of a Community patent or any other intellectual property right and a uniform litigation system applicable both to European patents and to Community patents.
- 129 Finally, the Netherlands Government submits that the agreement does not undermine the unity and integrity of Community law. Nor does the agreement modify the system of legal protection and judicial review exercised by the national and Community courts, as provided for by the Treaty. The agreement contains various provisions which guarantee the primacy of Community law, including that of the case-law of the Court of Justice and that of the general principles of that legal order.
- 130 The **Polish Government** submits that the fact that the proposed international agreement confers jurisdiction on the new court in respect of European patents does not give rise to any doubts. Within the limits of the competences conferred on them in the matter, the Member States can, by way of an agreement, establish an international court having jurisdiction in disputes concerning European patents. The conferment of jurisdiction on the new court in disputes relating to Community patents cannot be regarded as incompatible with the Treaty, since it does not have the consequence of altering the essential character of the jurisdiction conferred on the Court of Justice.
- 131 The Polish Government points out that it is only in the fields which have been reserved to the Court of Justice under the Treaty that the Member States can no longer conclude any agreements capable of altering the essential character of that jurisdiction. If the Court does not have jurisdiction in a particular field, in the absence of any provisions of the Treaty to that effect or of any secondary acts

adopted pursuant to it, the Member States remain able to devise a judicial system in a particular field such that at issue here. In view of the absence of any Community act relating to the field of Community patents, the Court of Justice does not enjoy exclusive jurisdiction in the matter.

- 132 The Polish Government further submits that the proposed agreement and the fact of conferring jurisdiction on the PC in disputes relating both to European patents and to Community patents do not undermine the autonomy of the Community legal order. In addition, compliance with that system is ensured by means of the application of the preliminary ruling mechanism provided for.
- 133 In the view of the Polish Government, the proposed agreement sufficiently ensures that Community law and its primacy are observed by the PC. Even though the provisions of the proposed agreement do not expressly impose the obligation for the new court to apply that principle, it is bound by it. In addition, that obligation is characterised by a very wide scope and covers the whole of the *acquis communautaire*. Consequently, the position of that court is identical to that of the national courts, which are bound to apply not only the whole of the *acquis communautaire*, but also the relevant general principles of law and the case-law of the Court of Justice.
- 134 The Polish Government also takes the view that the proposed international agreement respects the autonomy of the Community legal order. The binding effect on the new court of the judgments given by the Court of Justice in response to questions referred for a preliminary ruling further strengthens the observance of that principle.
- 135 The Polish Government infers from this that the proposed agreement does not have the effect of altering the essential character of the jurisdiction which the Treaty confers on the Court of Justice. The latter's powers remain the same, whether the point in issue is the validity or the interpretation of acts adopted by the institutions.
- 136 Finally, as regards Article 229a EC (now Article 262 TFEU), the Polish Government notes that that provision is discretionary in character since it provides for a possibility and not the obligation to confer jurisdiction on the Court of Justice in disputes relating to Community industrial property rights.
- 137 The **Portuguese Government** submits that there is a specific legal basis in the Treaty, namely Article 229a EC (now Article 262 TFEU), which appears appropriate and sufficient in relation to disputes on the future Community patent. So far as concerns disputes arising from the application of European patent rights, Article 308 EC (now Article 352 TFEU) constitutes the legal basis. The Council's approval of the agreement in question thus requires a twofold legal basis.
- 138 The Portuguese Government also submits that Article 292 EC (now Article 344 TFEU) does not preclude or limit European Union competence to participate in

the creation of a court at European level, on which jurisdiction is conferred for the purpose of resolving disputes between individuals and in a matter which has not yet been brought within the sphere of the exclusive jurisdiction of the Court of Justice.

- 139 As regards the preliminary ruling mechanism provided for in the draft agreement, the Portuguese Government points out that it does not exclude the Court of Justice from the process of interpreting and applying the relevant Community rules on patents. That jurisdiction to give preliminary rulings, intended to be exercised by the Court, is compatible with the Treaty.
- 140 The Portuguese Government observes that the authorising provision of Article 229a EC (now Article 262 TFEU) does not preclude the draft agreement. In addition to the fact that the Council is free to assess the need to extend the jurisdiction referred to in that provision, whenever it deems it most appropriate to do so, it is free to carry out a balanced evaluation as to the most appropriate procedures for its implementation. If the Council were granted the power to extend the jurisdiction of the Court of Justice to cover any dispute in connection with the Community patent, it should also be granted the power to determine the procedures for the Court's intervention in relation to the process of referring questions for a preliminary ruling.
- 141 In the opinion of the Portuguese Government, there is nothing to prevent the provisions approved on the basis of Article 229a EC (now Article 262 TFEU) from arising from an act of international law. Not only are international agreements a source of law recognised by the Community legal order, but, moreover, the form of an international agreement constitutes the most appropriate means of ensuring the achievement of the European Union's objectives in the field of the judicial protection of patents.
- 142 Finally, the Portuguese Government submits that Article 48 of the draft agreement constitutes a sufficient guarantee of the judicial nature of the Court of Justice and of its role within the Community institutional framework, so that the risk of an alteration of the essential character of its jurisdiction is excluded. Furthermore, Articles 14a and 48 of the draft agreement deal with the requirements of the primacy and autonomy of the Community legal order.
- 143 The **Romanian Government** maintains that in the field of intellectual property the European Union has competence to harmonise the national laws and that it is entitled to use Article 308 EC (now Article 352 TFEU) in order to create new industrial property rights which overlap with national rights. Given that the harmonisation achieved up to now at Community level covers only a limited part of that field, the European Union and the Member States have a shared competence.

- 144 The Romanian Government submits that, in so far as the Court of Justice has not had jurisdiction conferred on it in respect of the Community patent, there is no risk of undermining its jurisdiction. Article 229a EC (now Article 262 TFEU) creates a power for the Council, but not an obligation, only in regard to Community rights. By concluding an international agreement establishing a court with jurisdiction in the field of the Community patent, the Council chooses not to exercise that power conferred by the Treaty. With regard to the European patent, the Court does not have exclusive jurisdiction either.
- 145 The Romanian Government makes the point that, in order to ensure the autonomy of the Community legal order and the uniformity of its interpretation, the draft agreement provides for sufficient guarantees. The PC is obliged to respect Community law and to base its judgments on the relevant Community legislation and on the national legislation of the Contracting States implementing the Community legislation. That obligation must be interpreted as referring not only to primary and secondary European Union law, but also to the Court's case-law.
- 146 The Romanian Government also states that, given the binding legal effects of the preliminary rulings given by the Court of Justice under the agreement, the competences of the European Union and its institutions are not altered in their essential character and the mechanisms relating to the interpretation of the rules in the agreement do not have the effect of imposing on the European Union and its institutions a particular interpretation of the rules of Community law.
- 147 The Romanian Government points out that no provision of the Treaty precludes an international agreement from conferring jurisdiction on the Court of Justice to interpret the provisions of such an agreement for the purposes of its application in non-member States. Consequently, the Court could rule on questions referred to it for a preliminary ruling by courts of non-member States. That conferment does not alter the essential character of the Court's function as conceived in the Treaty, provided that its decisions have binding effect.
- 148 The **Slovenian Government** points out that the question of the European Union's competence to conclude the proposed international agreement must be dealt with differently in the case of the European patent and in the case of the Community patent.
- 149 The Slovenian Government observes that the Treaty does not contain any legal basis giving the European Union competence to regulate the proposed judicial system. However, in so far as the European Union has already legislated in the field of intellectual property law and that law is affected by the conclusion of the proposed agreement, the European Union's competence to conclude such an agreement should be recognised.
- 150 In the Slovenian Government's submission, the objective pursued by the Regulation on the Community patent could not be attained in any way other than

by the conclusion of the proposed agreement. Nor could that objective be better attained by the introduction of separate rules, since the latter would mean an illogical splitting in two of the system of judicial protection. A unified court for the European patent and the Community patent would constitute equivalent legal protection for the two types of patents and ensure legal certainty in the matter.

- 151 In the alternative, should the Court not hold that the European Union has exclusive competence to conclude the proposed agreement so far as concerns the part relating to the Community patent, the Slovenian Government points out that Article 308 EC (now Article 352 TFEU) provides the European Union, regardless of the existence of any implied competences, with the necessary legal basis for the conclusion of the agreement in question. The setting up of a unified court system for European and Community patents is necessary in order to carry out a European Union task. The introduction of a new unified court for the two types of patent does not constitute a circumvention of the Treaty provisions governing the Community judicial system.
- 152 The Slovenian Government points out that the settlement of disputes in fields in respect of which the Court of Justice has not been granted exclusive jurisdiction by the Treaty is entrusted to the courts of the Member States. Consequently, and provided that the Court's rights and powers are not infringed, the Member States are entitled to provide for specific procedures relating to the judicial settlement of disputes related to patents. The Member States can also agree, on the basis of an international agreement, to entrust the settlement of certain types of disputes to an international court.
- 153 As regards Article 229a EC (now Article 262 TFEU), the Slovenian Government submits that that provision guarantees only the possibility of conferring jurisdiction in certain matters on the Court, but does not constitute an obligation. It therefore does not preclude the introduction of a system such as that provided for by the agreement. Moreover, nor is it possible to create the desired rules for a unified jurisdictional system for the European patent and the Community patent solely by the application of Article 229a EC (now Article 262 TFEU). That provision can be applied only for the purpose of conferring jurisdiction on the Court of Justice in respect of disputes relating to Community patents, but not in respect of disputes relating to European patents, since the latter fall within the jurisdiction of the courts of the Member States.
- 154 The Slovenian Government points out that the draft agreement does not alter the essential character of the function with which the Court is invested under the Treaty. Nor does the proposed unified litigation system for European and Community patents constitute a circumvention of the Treaty provisions governing the judicial system of the European Union.

- 155 The Slovenian Government submits that the agreement guarantees the principles of the primacy and autonomy of the Community legal order. In its decisions, the PC is bound to respect Community law in the same way as the national courts.
- 156 The Slovenian Government submits that the proposed agreement does not alter the essential characteristics of the competences of the Community institutions, as laid down by the Treaty. Furthermore, the courts established under that international agreement can refer to the Court of Justice requests for preliminary rulings and the Court's judgments relating to such requests are binding on those courts. Consequently, the Court is the final interpreter of Community law. The fact that the Court's jurisdiction to answer questions referred for a preliminary ruling is based on an international agreement, but not on the Treaty, can in no way affect its jurisdiction under the Treaty.
- 157 The **Finnish Government** submits that the proposed agreement is not in principle contrary to the jurisdiction and functions of the Court of Justice. The jurisdiction with which the PC will be invested does not in any way apply to legal relations between the Contracting States, but only to those existing between individuals. Consequently, nor can the proposed agreement be regarded as incompatible with Article 292 EC (now Article 344 TFEU).
- 158 The Finnish Government contends that the proposed agreement does not alter the essential character of the competences of the European Union and those of its institutions.
- 159 In the Finnish Government's submission, the existence of differences between the preliminary ruling system under the proposed agreement and that under Article 234 EC (now Article 267 TFEU) nevertheless cannot result in a finding that the agreement is incompatible with the jurisdiction conferred on the Court of Justice. The Court's judgments based on Article 48 of that agreement are binding on the court of first instance and the court of appeal.
- 160 The Finnish Government points out that the proposed agreement does not give the Contracting States freedom to authorise or not to authorise a reference to the Court of Justice for a preliminary ruling. The fact that the PC is not a court of a Contracting State does not actually affect the independence of the Court of Justice with regard to the interpretation of Community law. Nor does the absence, in the proposed agreement, of any legal means of obliging the PC to request the Court to give a preliminary ruling give rise to any conflict with that principle.
- 161 In the Finnish Government's submission, the scope of Article 14a of the proposed agreement is not limited to the judgments of the Court of Justice given under the procedure provided for by Article 48 of the proposed agreement, but the Community law which is referred to in that provision concerns more broadly the Court's case-law prior and subsequent to the conclusion of the agreement.

- 162 The Finnish Government submits that the mechanisms provided for by the proposed agreement, relating to the unity of interpretation of the respective rules of that agreement and of Community law, do not have the effect of imposing on the European Union and its institutions a particular interpretation of Community law.
- 163 With regard to the creation of a judicial system for matters concerning the European patent, the Finnish Government observes that the Treaty does not contain any provisions which can be an express or implied basis for Community competence to conclude the proposed agreement. The European patent is a form of protection of industrial property which is governed by the national laws of the Member States. In those circumstances, Article 308 EC (now Article 352 TFEU) does not confer competence on the European Union to conclude the proposed agreement, since the matter in question falls within the competence of the Member States.
- 164 The Finnish Government argues that Article 229a EC (now Article 262 TFEU) does not confer any express or implied competence on the European Union to conclude the proposed agreement in so far as that agreement concerns European patents. Nor does Article 65 EC (now Article 81 TFEU) confer any express or implied competence on the European Union to conclude an agreement the main purpose of which is the creation of an international judicial system.
- 165 As regards the creation of a jurisdictional system for matters concerning the Community patent, the Finnish Government observes that Article 229a EC (now Article 262 TFEU) does not allow of an interpretation according to which it confers a competence on the European Union to conclude an international agreement conferring the jurisdiction mentioned on a judicial body other than the Court of Justice. On the other hand, nothing precludes Article 229a EC (now Article 262 TFEU) from being interpreted as enabling the European Union to exercise the competence conferred by that provision by concluding an international agreement under which it is the Court of Justice which is invested with jurisdiction to hear and determine the disputes referred to by that provision, relating to Community industrial property rights.
- 166 The **Swedish Government** submits that the proposed agreement must be concluded jointly by the European Union and by the Member States.
- 167 The Swedish Government states that the Treaty does not provide any specific legal basis enabling the European Union to adopt measures concerning industrial property or to introduce a unified patent litigation system. It is nevertheless obvious that the establishment of such a system would strengthen the protection of industrial property and promote European competitiveness. In the light of the weaknesses of the present situation, such a measure is also necessary in order to achieve the Community objective of a high degree of competitiveness and convergence of economic performance. The conditions for the application of

Article 308 EC (now Article 352 TFEU) as a legal basis for action by the European Union in the field in question are therefore satisfied.

- 168 The Swedish Government finds it difficult to imagine how Article 229a EC (now Article 262 TFEU) could be used for that purpose, since that article does not provide for any competence enabling the European Union to adopt substantive rules on the matter. It therefore signifies neither express competence nor implied competence for the European Union to conclude international agreements concerning patents. Furthermore, the Council has the power, and not the obligation, to widen the jurisdiction of the Court of Justice in the manner indicated. That provision does not prejudice the choice of the judicial framework which may be put in place for dealing with disputes relating to the application of acts adopted on the basis of the Treaty which create Community industrial property rights.
- 169 The Swedish Government submits that the draft agreement satisfies the requirements concerning the autonomy of the Community legal order. Unlike other international agreements, the proposed agreement does not confer competence on any body to determine the relations between Member States and the European Union in their capacity as parties to the agreement. There is therefore no risk that an international body such as the proposed court could have an influence on the division of internal competences between Member States and institutions or on the manner in which the Member States resolve disputes as to the interpretation or application of the Treaty.
- 170 The Swedish Government maintains that the proposed agreement does not undermine the roles of the Commission and the Court of Justice either. The draft in question does not entail any impairment of the autonomy of the Community legal order, since it provides sufficient guarantees as regards the uniform interpretation of Community law and the function of the Court of Justice under Article 220 EC (now Article 19 TEU). The judgments given by the Court within the framework of the proposed court system are binding.
- 171 The Swedish Government submits that the essential character of the Court of Justice is not altered by the fact that local or regional divisions of the PC, which have the possibility of requesting a preliminary ruling from the Court of Justice, are located outside the European Union.
- 172 In the Swedish Government's submission, nor do the provisions relating to the implementation and application of the proposed agreement entail any impairment of the autonomy of the Community legal order. Three committees are set up for the implementation and application of the agreement. However, those committees are not able to impose on the European Union and its institutions a specific interpretation of the Community rules to which the agreement refers or to carry out, against the will of the European Union and the Member States, changes to the system provided for under the agreement.



- 173 The **United Kingdom Government** observes that, since European patents are in fact intellectual property rights created and protected by national law, the establishment and organisation of a specialised international court to determine disputes in relation to such patents is a matter that falls within Member States' competence. Participation by the Member States in the agreement is, therefore, indispensable.
- 174 The United Kingdom Government notes that patent law is not an area which is covered to a large extent by Community rules, such as to give rise to exclusive competence for the European Union. As regards the creation of a Community industrial property right and a judicial system relating to it, Community competence exists in respect of the proposed agreement, alongside the competence of the Member States. Accordingly, the agreement may be concluded as a mixed agreement.
- 175 The United Kingdom Government submits that the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered by the proposed agreement. The procedures provided for in it relating to uniform interpretation of the rules of the agreement and to the resolution of disputes do not have the effect of binding the European Union and its institutions to a particular interpretation of the rules of Community law. In addition, the autonomy of the Community legal order and the exclusive jurisdiction of the Court of Justice to entertain the actions made available in the Treaty are not undermined.
- 176 The United Kingdom Government points out that there is nothing in the Treaty to suggest that the Court of Justice is intended to have a monopoly of the jurisdiction to apply Community law: None of the heads of jurisdiction conferred on the Court by the Treaty enables it to hear and determine disputes between private parties. The terms of Article 229a EC (now Article 262 TFEU) are wide enough to permit the conferral on the Court of jurisdiction in disputes between individuals, which may arise in connection with the application of a future Regulation on the Community patent. The Council remains free to make other arrangements for the judicial resolution of disputes relating to Community patents, such as, for example, by way of the proposed agreement. Consequently, the appropriate legal basis for conclusion of the agreement as a whole would be Article 308 EC (now Article 352 TFEU).
- 177 The United Kingdom Government asserts that the binding nature of the Court's decisions, and hence the uniform application of Community law, are safeguarded by the provisions of Article 48 of the proposed agreement. The specific duty of the PC to accept the binding authority of rulings given by the Court of Justice in the framework of the preliminary ruling procedure is reinforced by its general duty, pursuant to Article 14a(1) of that agreement, to respect Community law.

- 178 The United Kingdom Government adds that the obligation imposed on Contracting States to bring into force the measures necessary to comply with the Community legislation relating to patent law also ensures the primacy and autonomy of Community law under the system at issue.
- 179 With regard to the legal basis of the proposed agreement, the **Commission** is of the opinion that disputes related to the application of acts which create the Community patent do not fall within an exclusive jurisdiction which is conferred on the Court of Justice by the Treaty. Article 229a EC (now Article 262 TFEU) merely authorises the Council to confer such an exclusive jurisdiction on the Court, which means that the Council may also refrain from exercising that power. Article 229a EC (now Article 262 TFEU) refers only to the situation in which the Community Courts have jurisdiction conferred on them to adjudicate themselves on disputes between private parties relating to the application of Community acts which create industrial property rights.
- 180 The Commission points out that the agreement as it is envisaged cannot be adopted solely on the basis of Article 229a EC (now Article 262 TFEU), given that it aims to create an international organisation, namely the PC, to lay down the organisational and procedural rules for that court and to confer on it jurisdiction in disputes relating to European and Community patents.
- 181 The Commission submits that the conferment on the PC of jurisdiction in disputes relating to the application of a Community act is compatible with the Treaty. Since the disputes assigned to the PC are disputes between individuals and not between Member States, the prohibition in Article 292 EC (now Article 344 TFEU) does not apply. The conferment of jurisdiction on that court to declare a Community patent invalid in consequence of a direct action or a counterclaim does not affect the jurisdiction conferred on the Court of Justice, so that that mechanism is compatible with the provisions of the Treaty.
- 182 As regards compliance with Community law by the PC and the remedies in the event of non-compliance, the Commission points out that the PC's obligation has very wide scope, in so far as it covers not only the Treaty and the acts adopted by the institutions, but also the general principles of Community law and the case-law.
- 183 The Commission submits that, in the event of breaches of Community law by the PC, the system introduced by the proposed agreement allows for the same penalties as those provided for by the Community legal order in the event of misapplication of Community law by a national court. The Member States cannot avoid, by transferring judicial functions to an international court, the requirements laid down by Community law as regards the functioning of the national courts.
- 184 Consequently, in the Commission's opinion, all the Member States collectively could be held liable for damage caused to an individual by a judicial decision

given by the PC in breach of Community law. Moreover, should breaches of Community law by the PC be repeated and persistent, the Member States would be failing to fulfil their obligations under Community law if they continued to allow the decisions given by the PC to produce effects within their territory.

- 185 The Commission points out that the Court of Justice has accepted that it can be asked for a preliminary ruling by a court common to several Member States. The Court has also held that it can have questions referred to it for a preliminary ruling by courts other than those of the Member States, provided that the answers which it gives to them are binding on the referring courts. Consequently, the preliminary ruling mechanism established in the proposed agreement is compatible with the Treaty.

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