

O.Cherniak, M.Stefanchuk

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ON
INTELLECTUAL
PROPERTY
LAW**

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This book is a collection of EU Acquis on intellectual property law, that can be used by experts to adaptation national legislation with EU law in accordance with the Association Agreement between the European Union and the European Atomic Energy Community and their member states, of the one part, and Ukraine, of the other part.

The collection contains the EU Acquis on copyright and industrial property rights. The collection is recommended for specialists who analyze the domestic legislation and adapting it to the EU law, as well as will be useful for scientists who carry out scientific research in this field and for students of legal educational institutions in studying specialized disciplines.

All acts are submitted as of March 1, 2019.

The book is designed for experts, professional lawyers, students of law faculties, as well as a wide reader.

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PREFACE

For several decades, intellectual property rights are dynamic in the EU. This is due to integration processes in the EU, aimed at maximizing the possibility of implementing and protecting the rights of authors, inventors and the protection of intellectual property objects.

The EU intellectual property right at the present stage of development unifies copyright and neighbouring rights and industrial property rights of EU member states. To this end, the EU has adopted a series of regulations and directives requiring Member States to take certain measures to transpose them into national legal systems.

The *acquis* on intellectual property law specifies harmonised rules for protection of copyright and neighbouring rights, for industrial property rights and contains provisions on civil enforcement.

The EU needs modern copyright rules fit for the digital age. The European Parliament has approved the legislative proposals that will make sure consumers and creators can make the most of the digital world, the Directive on Copyright in the Digital Single Market and the Directive on television and radio programmes.

The reviewed EU copyright rules consists of a regulation and directive on copyright in the Digital Single Market. It also contains a Directive and a Regulation to implement the Marrakesh treaty in EU law.

In the area of copyrights and neighbouring rights, the objectives of the directives on the harmonisation of certain aspects of copyright and related rights in the information society are to adapt legislation on copyright and related rights to reflect technological developments and to transpose into EU law the main international obligations arising from the two treaties on copyright and related rights adopted within the framework of the World Intellectual Property Organisation (WIPO).

In the field of industrial property rights, the *acquis* sets out harmonised rules for the legal protection of trademarks and designs, as well as a partially harmonised regime for patents. The latter relates to the accession to the European Patent Convention; specific provisions on biotechnological inventions, supplementary protection certificates (SPCs) for medicinal and plant protection products and compulsory licences. The *acquis* also establishes a Community trademark and a Community design system.

The Association Agreement between Ukraine and the European Union, the European Atomic Energy Community and their member states, concluded in 2014, contains a significant amount of obligations of the parties to intellectual property protection (Chapter 9 «Intellectual Property» of Section IV of the Agreement). The provisions of Section IV of the Association Agreement provide for the functioning of the Intellectual Property Dialogue. The Dialogue operates in accordance with Article 252 (3) of the Association Agreement for the purpose of considering issues concerning the protection of intellectual property rights, in particular, covered by Chapter 9, Intellectual Property, of Section IV of the Agreement.

The proposed collection is based on the satisfaction of the interests and requirements of the professional environment, which is actively involved in bringing national legislation in line with EU legislation in the field of intellectual property rights.

The collection consists of two parts: copyrights and neighboring rights and industrial property rights.

The collection is recommended for specialists who analyse the domestic legislation and adapting it to the EU law, as well as will be useful for scientists who carry out scientific research in this field and for students of legal educational institutions in studying specialized disciplines.

All acts are submitted as of March 1, 2019.

PART I

COPYRIGHTS AND NEIGHBOURING RIGHTS

Brussels, 6.5.2015 COM(2015) 192 final

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

A DIGITAL SINGLE MARKET STRATEGY FOR EUROPE

Extract from the Political Guidelines for the next European Commission – A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change (15 July 2014)

Priority n°2: A Connected Digital Single Market

«I believe that we must make much better use of the great opportunities offered by digital technologies, which know no borders. To do so, we will need to have the courage to break down national silos in telecoms regulation, in copyright and data protection legislation, in the management of radio waves and in the application of competition law.

If we do this, we can ensure that European citizens will soon be able to use their mobile phones across Europe without having to pay roaming charges. We can ensure that consumers can access services, music, movies and sports events on their electronic devices wherever they are in Europe and regardless of borders. We can create a fair level playing field where all companies offering their goods or services in the European Union are subject to the same data protection and consumer rules, regardless of where their server is based. By creating a connected digital single market, we can generate up to EUR 250 billion of additional growth in Europe in the course of the mandate of the next Commission, thereby creating hundreds of thousands of new jobs, notably for younger job-seekers, and a vibrant knowledge-based society.

To achieve this, I intend to take, within the first six months of my mandate, ambitious legislative steps towards a connected digital single

market, notably by swiftly concluding negotiations on common European data protection rules; by adding more ambition to the ongoing reform of our telecoms rules; by modernising copyright rules in the light of the digital revolution and changed consumer behaviour; and by modernising and simplifying consumer rules for online and digital purchases. This should go hand-in-hand with efforts to boost digital skills and learning across society and to facilitate the creation of innovative start-ups. Enhancing the use of digital technologies and online services should become a horizontal policy, covering all sectors of the economy and of the public sector».

Jean-Claude Juncker

... 2.4. Better access to digital content - A modern, more European copyright framework

Copyright underpins creativity and the cultural industry in Europe. The EU strongly relies on creativity to compete globally and is a world leader in certain copyright-intensive sectors. Digital content is one of the main drivers of the growth of the digital economy. 56% of Europeans use the internet for cultural purposes and spending on digital entertainment and media is predicted to see double digit growth rates (around 12%) for the next five years. Behaviour is changing as consumers increasingly view content on mobile devices and expect to be able to access content from everywhere and wherever they are.

Barriers to cross-border access to copyright-protected content services and their portability are still common, particularly for audiovisual programmes. As regards portability, when consumers cross an internal EU border they are often prevented, on grounds of copyright, from using the content services (e.g. video services) which they have acquired in their home country.

45% of companies considering selling digital services online to individuals stated that copyright restrictions preventing them from selling abroad are a problem.

Less than 4% of all video on demand content in the EU is accessible cross-border.

In addition, when trying to access or purchase online copyright-protected content from another Member State, consumers are sometimes told that it is unavailable or cannot be accessed from their own country. This situation is partly linked to the territoriality of copyright and

difficulties associated with the clearing of rights. In other cases, the lack of availability and/or access may result from contractual restrictions between rights holders and distributors, or from business decisions taken by distributors. This may sometimes be due to the role territorial exclusivity plays in the financing of certain types of (audiovisual) works.

Innovation in research for both non-commercial and commercial purposes, based on the use of text and data mining (e.g. copying of text and datasets in search of significant correlations or occurrences) may be hampered because of an unclear legal framework and divergent approaches at national level. The need for greater legal certainty to enable researchers and educational institutions to make wider use of copyright-protected material, including across borders, so that they can benefit from the potential of these technologies and from cross-border collaboration will be assessed, as with all parts of the copyright proposals in the light of its impact on all interested parties.

An effective and balanced civil enforcement system against commercial scale infringements of copyright is central to investment in innovation and job creation. In addition the rules applicable to activities of online intermediaries in relation to copyright protected works require clarification, given in particular the growing involvement of these intermediaries in content distribution. Measures to safeguard fair remuneration of creators also need to be considered in order to encourage the future generation of content.

Europe needs a more harmonised copyright regime which provides incentives to create and invest while allowing transmission and consumption of content across borders, building on our rich cultural diversity. To this end, the Commission will propose solutions which maximise the offers available to users and open up new opportunities for content creators, while preserving the financing of EU media and innovative content. Furthermore, the Commission will review the satellite and cable directive 6 to assess the need to enlarge its scope to broadcasters' online transmissions and the need to tackle further measures to ensure enhanced cross-border access to broadcasters' services in Europe.

The Commission will make legislative proposals before the end of 2015 to reduce the differences between national copyright regimes and allow for wider online access to works by users across the EU, including through further harmonisation measures. The proposals will include: (i)

portability of legally acquired content, (ii) ensuring cross-border access to legally purchased online services while respecting the value of rights in the audiovisual sector, (iii) greater legal certainty for the cross-border use of content for specific purposes (e.g. research, education, text and data mining, etc.) through harmonised exceptions, (iv) clarifying the rules on the activities of intermediaries in relation to copyright-protected content and, in 2016, (v) modernising enforcement of intellectual property rights, focusing on commercial-scale infringements (the 'follow the money' approach) as well as its cross-border applicability.

Brussels, 9.12.2015 COM(2015) 626 final

**COMMUNICATION FROM THE COMMISSION TO THE
EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN
ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE
OF THE REGIONS**

**TOWARDS A MODERN, MORE EUROPEAN COPYRIGHT
FRAMEWORK**

Digital technologies, widespread broadband connections and reliance on the internet in daily life have transformed the way creative content is produced, distributed and used.

The internet has become a key distribution channel. In 2014, 49 % of EU internet users accessed music, video and games online.¹ Business models unheard of only 15 years ago and new economic players like online platforms have become well established and today online services are a mainstream channel for consumers to enjoy creative content, alongside physical formats like books and DVDs. Making copies of content digitally is easy and quick. People often expect access to digital content on multiple devices, anytime and anywhere in the single market. When this does not happen, they find it hard to understand why.

EU copyright rules need to be adapted so that all market players and citizens can seize the opportunities of this new environment. A more European framework is needed to overcome fragmentation and frictions within a functioning single market.

The modernisation of EU copyright rules was first announced in President Juncker's Political Guidelines for the incoming Commission and further outlined in the digital single market strategy.² It aims to achieve a wide availability of creative content across the EU, to make sure that EU copyright rules continue to provide a high level of protection for right holders, and to maintain a good balance with other public policy goals, like education, research and innovation, or equal access for persons with disabilities,³ in the digital environment.

¹ Eurostat, 'Community survey on ICT usage in households and by individuals', 2014.

² COM(2015) 192 final.

³ In line with the UN Convention on the Rights of Persons with Disabilities to which the EU is a party.

These objectives play an important part in Europe's economic and societal progress, international competitiveness and cultural diversity. They all address the needs of right holders and users of copyright-protected content alike.

Copyright rewards creativity and investment in creative content. A copyright framework that offers a high level of protection is the basis of the global competitiveness of Europe's creative industries.¹ Along with the internal market principles of free movement of goods and services, EU competition rules, and our media and cultural policies, copyright is an integral part of the set of rules which govern the circulation of creative content across the EU. The interaction between copyright and these other policy areas determines how value is generated from the production and dissemination of works² and how it is shared among market participants.

Developing actions announced in the digital single market strategy, this Communication sets out how the Commission intends to achieve the goal of 'a more modern, more European copyright framework'. It presents a plan that includes targeted actions with proposals for the very short term, including a proposal on the 'portability' of online content services presented together with this Communication, a set of proposals planned for 2016, and a long-term vision. The plan will be brought forward in line with the Better Regulation principles and is based on preparatory work carried out over the past few years on the current framework,³ which included a comprehensive public consultation in 2013-2014.⁴ It takes into account the views of the European Parliament expressed in its recent resolution on the implementation of the Directive on Copyright in the

¹ Between 2008 and 2010, industries primarily responsible for creating and producing copyright works accounted for 3.2 % of total employment and for 4.2 % of GDP in the EU (European Patent Office/Office for Harmonization in the Internal Market, 'Intellectual property rights intensive industries: contribution to economic performance and employment in the EU', September 2013).

² 'Works' is used in this document to mean both works protected by copyright and other subject matter protected by related rights, as relevant to the context.

³ The framework is a set of 10 directives, including the Directive on Copyright in the Information Society (2001/29/EC, the 'InfoSoc Directive') and the Directive on the Enforcement of Intellectual Property Rights (2004/48/EC, the 'IPRED Directive', relevant for intellectual property in general). The framework also reflects international obligations deriving from international treaties to which the EU and/or its Member States are parties.

⁴ Final report available at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf.

Information Society¹ and the conclusions of the European Council meeting of 25-26 June 2015.²

Against this background, the Commission considers it necessary to:

- inject more single market and, where warranted, a higher level of harmonisation into the current EU copyright rules, particularly by addressing aspects related to the territoriality of copyright;

- where required, adapt copyright rules to new technological realities so that the rules continue to meet their objectives.

Copyright and related legislation do not deliver on their objectives in isolation. Films, drama, music, literature, scientific writings, cultural heritage and the rest of Europe's creative output will continue to flourish and play a meaningful role in Europe's growth, identity and social progress only if competitive creative industries and the required market mechanisms are in place. Financial and other support measures from public authorities, as permitted by competition law, also play a role in achieving this. The support provided by the EU includes its 'Creative Europe' programme and research and innovation funding, notably via the 'Horizon 2020' programme. Furthermore, to be effective, EU copyright rules need to be up-to-date, properly transposed, enforced and understood on the ground.

The EU should strive for a broad availability of online content services 'without frontiers' to deliver more choice and diversity to people. A better functioning digital single market will also provide opportunities for creators and the cultural industries to expand their audiences and business and help them to stand up to international competition.

However, when it comes to copyright-protected content crossing borders, the digital single market is not yet a reality. When people travel to another Member State, they frequently cannot access content they have subscribed to or acquired at home (i.e. the content is not 'portable').³ The range of online content available in one's home country does not reflect the breadth of Europe's cultural production and legal content

¹ <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2015-0273&language=EN>.

² <http://data.consilium.europa.eu/doc/document/ST-22-2015-INIT/en/pdf>.

³ In a recent survey, 33 % of respondents (a figure rising to 65 % in the 15-24 age bracket) who do not currently have a paying subscription for accessing content said that if they were to take up such a subscription they would find it important to be able to use it while travelling or staying temporarily in another Member State ('Flash Eurobarometer 411 — Cross-border access to online content', August 2015).

offers online of European works are still far from realising their full potential. This is particularly the case for European audiovisual works, which in many instances struggle to be distributed, including online, beyond one Member State.¹ Even when available, works are difficult to discover and find. Furthermore, users often cannot access content distribution services available in other Member States.²

In an inherently borderless internet, this is not understood by people. This situation may lead to the use of technical 'workarounds', like virtual private networks (VPNs), to get access to content that cannot be found at home, and it can fuel piracy³. Another illustration of the current situation is the number of works that would benefit from wider exposure across the EU, but which cannot be found on any commercial distribution channel.

The causes of this situation are multiple. They can partially be traced to copyright and its territorial⁴ application. The territoriality of rights does not prevent the granting of multiterritorial licences,⁵ but there are instances where these are difficult or impossible to obtain. Right holders may decide to limit the territorial scope of licences granted to service providers and, as a result, services are limited to one or only certain territories. Service providers can also decide to confine a service to a particular territory, even when they have a licence to cover a broader territory, including the whole EU, or such licence is available to them. In

¹ In a study covering a sample of 50 European films across six online providers in seven Member States, average availability reached only 19 % (Commission's calculations based on data in 'Annex — On-demand audiovisual markets in the EU', a report by the European Audiovisual Observatory for DG CONNECT, April 2014).

² In a recent survey, more than half (53 %) of those who reported trying to access or download digital content from an online service meant for users in another Member State (up to 30 % of people in one Member State) said that they did so because they were looking for content not available in their own country; approximately the same amount (56 %) said that they experienced problems in trying to do this ('Flash Eurobarometer 411 — Cross-border access to online content', August 2015).

³ According to a recent survey, 22 % of Europeans consider it is acceptable to download or access copyright-protected content illegally when there is no legal alternative in their country (Office for Harmonization in the Internal Market, 'European citizens and intellectual property: perception, awareness and behaviour', November 2013).

⁴ The rights of authors and other right holders (performers, producers and broadcasters) are largely harmonised at EU level. However copyright remains territorial. This means that instead of there being a single copyright title valid simultaneously across the whole of the EU, there are 28 separate national ones. The use of a work in all Member States requires the conclusion of a licence, or several licences, covering each of the national territories.

⁵ Efforts to make multi-territorial licensing easier have been made through the Directive on Collective Rights Management (2014/26/EU).

addition, acquired licences, in particular for online rights, can remain unexploited.

The financing of new European productions in the audiovisual sector is, to a large extent, based on territorial licensing combined with territorial exclusivity granted to individual distributors or service providers. This is considered necessary by the European audiovisual industry to preserve sustainable financing, but can prevent service providers and distributors from providing cross-border ‘portability’ of services or from offering their services in other

Member States. For out-of-commerce works, legal issues affecting their cross-border accessibility add to more general difficulties in having them licensed for digitisation and for making them available domestically in the first place. This limits the availability of heritage online.

For television and radio broadcasting services, the Satellite and Cable Directive¹ already includes rules that aim to facilitate the rights clearance required for certain cross-border activities. These rules were devised well before the advent of the internet as a distribution channel for broadcasters and only apply to satellite broadcasting and to cable re-transmissions. The Commission is currently carrying out a review of this directive for its potential application in the online environment.

Other factors are also at play. For example in the audiovisual sector, a key role is played by the ‘market-readiness’ of works, i.e. how visible they are for potential licensees, and how easy it is to license them, as well as their availability in formats and in catalogues that are ready for use. Another issue is the gap between content offers and their actual uptake by potential audiences. Works need to be easily discovered and found by people in the first place,² even if they are already distributed online, and they must be understood in a known language. In general, there is a disconnect between the resources supporting culturally diverse production and the efforts put into its circulation and access.³

Ensuring wider access to creative content online and stimulating its circulation across Europe therefore involves combining a wide array of

¹ Directive on Satellite Broadcasting and Cable Retransmission (93/83/EEC).

² The Commission is also looking at how European audiovisual content, including non-national content, can be promoted as part of its assessment of the Directive on Audiovisual Media Services (2010/13/EU).

³ This is addressed by the EU’s ‘Creative Europe’ programme (its MEDIA sub-programme in particular), which focuses strongly on promotion and distribution.

policy instruments. Along with a review of the current copyright legislation, the support the EU provides through its 'Creative Europe' programme and research and innovation programmes can also play a part. Having the creative and distribution industries and the Member States on board will also play a vital role in making content more widely available across the EU. The creative and distribution industries have the keys to evolving business models, while the Member States are primarily responsible for cultural policies in the EU. Member States also provide and manage most of the public funds directly supporting the European audiovisual industry, amounting to EUR 2.1 billion a year.¹

The ultimate objective of full cross-border access for all types of content across Europe needs to be balanced with the readiness of markets to respond rapidly to legal and policy changes and the need to ensure viable financing models for those who are primarily responsible for content creation. The Commission is therefore proposing a gradual approach to removing obstacles to cross-border access to content and to the circulation of works.

As a first step, the Commission is presenting together with this Communication a proposal for a regulation on the 'portability' of online content services, to ensure that users who have subscribed to or acquired content in their home country can access it when they are temporarily in another Member State.

Furthermore, in order to allow for wider online access to works by users across the EU, the Commission is assessing options and will consider legislative proposals for adoption in spring 2016 including:

Enhancing cross-border distribution of television and radio programmes online in the light of the results of the review of the Satellite and Cable Directive;

Supporting right holders and distributors to reach agreement on licences that allow for cross-border access to content, including catering for cross-border requests from other Member States, for the benefit of both European citizens and stakeholders in the audiovisual chain. In this context, the role of mediation, or similar alternative dispute resolution mechanisms, to help the granting of such licences, will be considered;

¹ European Audiovisual Observatory, 'Public Funding for Film and Audiovisual Works in Europe', October 2011. This figure refers to 2009 and only includes direct support (including EU-level support, which was however a small fraction of the total).

Making it easier to digitise out-of-commerce works and make them available, including across the EU.

The Commission will also, by leveraging its 'Creative Europe' programme and other policy instruments:

Further promote tools to bring more European works into the single market, including the creation of ready-to-offer catalogues of European films, the development of licensing hubs (to help the licensing of works that are not yet available in a given Member State), and a larger use of standard identifiers of works (including by exploring links with the MEDIA sub-programme);

Support the development of a European aggregator of online search tools²⁰ destined to end users (online indexation of available legal offers) and of national search tools, as well as promote more efficient funding for, and use of, subtitling and dubbing supported by public funds;

Intensify its dialogue with the audiovisual industry to promote legal offers and the discoverability and findability of films (in its new partnership with national film funds), to find ways for a more sustained exploitation of existing European films (with the European Film Forum), and to explore alternative models of financing, production and distribution in the animation sector that are scalable at European level (in a structured industry cooperation forum).

The fragmentation of copyright rules in the EU is particularly visible in the area of exceptions. The exceptions set out in EU law are, in most cases, optional for Member States to implement. Often exceptions are not defined in detail. As a consequence, an exception in the law of one Member State may not exist in a neighbouring one, or be subject to different conditions or vary in scope. In some cases the implementation of a given exception in Member States' law is narrower than what EU law permits. Most exceptions do not have effect beyond a given Member State. Some of them may also need to be reassessed in the light of today's technological realities.

This situation seems to be posing problems in particular for those exceptions that are closely related to education, research and access to knowledge. The EU exception on illustration in teaching is a good example of how Member States implement exceptions in different ways, particularly when we look at Member States' understanding of how the exception should apply in digital environments. These differences could act as a brake on education trends like online courses, in-classroom use

of technologies and digital materials and cross-border learning which have gained considerable ground in recent years¹. In addition, the heterogeneous national implementation of the exception commonly referred to as 'panorama exception', which lets people take and upload pictures of works such as buildings or sculptures permanently located in public spaces, may give rise to uncertainties.

Similarly, the optional nature and the lack of cross-border effect for the disability exception raise problems. For instance, they make it difficult for people with print disabilities to access special formats made under the copyright exception of another Member State. The EU has given an international commitment to address this issue by signing up to the Marrakesh Treaty,² which now needs to be ratified and implemented.

The need to better reflect technological advances and avoid uneven situations in the single market is also clear with text-and-data mining (TDM), through which vast amounts of digital content are read and analysed by machines in the context of science and research. The lack of a clear EU provision on TDM for scientific research purposes creates uncertainties in the research community. This harms the EU's competitiveness and scientific leadership at a time when research and innovation (R&I) activities within the EU must increasingly take place through cross-border and cross-discipline collaboration and on a larger scale, in response to the major societal challenges that R&I addresses. Similarly, the EU exception authorising libraries and other institutions to allow on-screen consultation of works for research and private study only applies to terminals on the libraries' physical premises, which does not take into account today's technological possibilities for remote consultation. Lastly, the EU exception on preservation activities by cultural heritage institutions also needs attention, notably because Member States often do not take digital formats into account when implementing the exception at national level.³

¹ In a 2013 survey of higher education, 82 % of institutions indicated that they offer online courses, and 40 % estimated that at least half of their students were engaged in e-learning (European Universities Association, 'Elearning in European Higher Education Institutions', November 2014).

² The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or otherwise Print Disabled, signed on behalf of the EU on 30 April 2014.

³ 90 % of institutional respondents to a 2015 survey declared that they have collections that need to be preserved for future generations, and an average of 60 % said that they collect

The Commission will take action to ensure that the EU framework on exceptions that is relevant for access to knowledge, education and research is effective in the digital age and across borders.

As a first step, the Commission will propose the legislation required to implement the Marrakesh Treaty.

The Commission is assessing options and will consider legislative proposals on other EU exceptions by spring 2016, in order to:

- allow public interest research organisations to carry out text and data mining of content they have lawful access to, with full legal certainty, for scientific research purposes;

- provide clarity on the scope of the EU exception for ‘illustration for teaching’, and its application to digital uses and to online learning;

- provide a clear space for preservation by cultural heritage institutions, reflecting the use of digital technologies for preservation and the needs of born-digital and digitised works;

- support remote consultation, in closed electronic networks, of works held in research and academic libraries and other relevant institutions, for research and private study;

- clarify the current EU exception permitting the use of works that were made to be permanently located in the public space (the ‘panorama exception’), to take into account new dissemination channels.

The general objective is to increase the level of harmonisation, make relevant exceptions mandatory for Member States to implement and ensure that they function across borders within the EU.

In preparing the proposals, the Commission will take into account the relevant market situation and licensing practices for the uses concerned, and care will be taken to comply with international obligations, including the ‘three-step’ test. The aim is to give users and right holders a legally certain and predictable system.

Levies that compensate right holders for the reprography and private copying exceptions can be a significant source of revenue but also raise single market issues. Many Member States impose these levies on a wide range of media and devices, and they are set, applied and administered in a variety of different ways.

This has caused considerable legal uncertainty. The substantial case law of the Court of Justice of the EU (CJEU) has clarified some of

‘born-digital’ material (ENUMERATE, ‘Survey Report on Digitisation in European Cultural Heritage Institutions 2015’, June 2015).

the issues signalled by the 2013 Vitorino Report^{1 2} as detrimental to the free movement of goods and services. However, persisting national disparities can be problematic, especially when products subject to levies are traded across the EU. Levies are sometimes imposed by Member States irrespective of payments already made in other Member States, or without proper exemption or refund schemes. Undue payments may also occur when products for professional use are levied. Consumers are confronted with lack of clarity and transparency. There can also be discriminatory practices in the distribution of collected levies favouring national right holders. This situation may warrant intervention at EU level to provide greater clarity and put an end to major distortions.

The Commission will assess the need for action to ensure that, when Member States impose levies for private copying and reprography to compensate right holders, their different systems work well in the single market and do not raise barriers to the free movement of goods and services. Issues that may need to be addressed include the link between compensation and harm to right holders, the relation between contractual agreements and the sharing of levies, double payments, transparency towards consumers, exemptions and the principles governing refund schemes, and non-discrimination between nationals and nonnationals in the distribution of any levies collected. The Commission will also promote a reflection on how levies can be more efficiently distributed to right holders

A precondition for a well-functioning market place for copyright is the possibility for right holders to license and be paid for the use of their content, including content distributed online. The production of rich and diverse creative content and innovative online services are part of the same equation. Both — creative content and online services — are important for growth and jobs and the success of the internet economy.

There is, however, growing concern about whether the current EU copyright rules make sure that the value generated by some of the new forms of online content distribution is fairly shared, especially where right holders cannot set licensing terms and negotiate on a fair basis with potential users. This state of affairs is not compatible with the digital

¹ The 'three-step' test, enshrined in the main international treaties on copyright, provides that exceptions shall only be applied in certain special cases which do not conflict with a normal exploitation of a work or other subject matter and do not unreasonably prejudice the legitimate interests of the right holder.

² This was the outcome of a mediation process led by Mr Antonio Vitorino.

single market's ambition to deliver opportunities for all and to recognise the value of content and of the investment that goes into it. It also means the playing field is not level for different market players engaging in equivalent forms of distribution.

Currently, these discussions centre on certain online platforms and aggregation services. They are, however, likely to continue to arise for all online activities involving the commercial reuse or retransmission of copyright-protected content.

There are various reasons for this situation, both legal and market-related (including the relative market power of the parties involved). From a copyright perspective, an important aspect is the definition of the rights of communication to the public and of making available. These rights govern the use of copyright-protected content in digital transmissions. Their definition therefore determines what constitutes an act on the internet over which creators and the creative industries can claim rights and can negotiate licences and remuneration. There are contentious grey areas and uncertainty about the way these concepts are defined in EU law, in particular about which online acts are considered 'communication to the public' (and therefore require authorisation by right holders), and under what conditions.¹ These questions create on the one hand uncertainty in the market and, on the other, put into question the ability of these rights to transpose into the online world the basic principle of copyright that acts of exploitation need to be authorised and remunerated. Apart from its significance for the fair distribution of value in the online market place, lack of clarity on the definition of these rights can also generate uncertainty for ordinary internet users.

More broadly, the situation raises questions about whether the current set of rights recognised in EU law is sufficient and well-designed. For news aggregators, in particular, solutions have been attempted in certain Member States, but they carry the risk of more fragmentation in the digital single market.

In addition, platforms can also consider that they are not engaging in copyright-relevant acts at all, or that their activities are of a merely technical, automatic and passive nature, allowing them to benefit from the liability exemption of the e-Commerce Directive.² This has prompted

¹ This uncertainty has resulted in a number of questions being referred to the CJEU for preliminary rulings.

² Directive 2000/31/EC.

a growing debate on the scope of this exemption and its application to the fast- evolving roles and activities of new players, and on whether these go beyond simple hosting or mere conduit of content.

Another relevant issue is fair remuneration of authors and performers, who can be particularly affected by differences in bargaining power when licensing or transferring their rights. Mechanisms which stakeholders raise in this context include the regulation of certain contractual practices, unwaivable remuneration rights, collective bargaining and collective management of rights.

The Commission is reflecting and consulting on the different factors around the sharing of the value created by new forms of online distribution of copyright-protected works among the various market players. The Commission will consider measures in this area by spring 2016. The objective will be to ensure that the players that contribute to generating such value have the ability to fully ascertain their rights, thus contributing to a fair allocation of this value and to the adequate remuneration of copyright-protected content for online uses.

In this context, the Commission will examine whether action is needed on the definition of the rights of ‘communication to the public’ and of ‘making available’. It will also consider whether any action specific to news aggregators is needed, including intervening on rights. The role of alternative dispute resolution mechanisms will also be assessed. The Commission will take into account the different factors that influence this situation beyond copyright law, to ensure consistent and effective policy responses. Initiatives in this area will be consistent with the Commission's work on online platforms as part of the digital single market strategy.

The Commission will also consider whether solutions at EU level are required to increase legal certainty, transparency and balance in the system that governs the remuneration of authors and performers in the EU, taking national competences into account.

Respect for copyright, as for any other intellectual property right, is essential to promote creativity and innovation and create trust in the market place. Rights that cannot be effectively enforced have little economic value, particularly when infringements occur on a commercial scale that free-rides on the work and investment of creators, the creative industries and legal distribution services. Such commercial-scale infringements are currently very frequent and harmful, not only to right

holders but also to the EU economy as a whole. An effective and balanced civil enforcement¹ system, which takes full account of fundamental rights, is required to reduce the costs of fighting infringements, particularly for small businesses, and keep up with their increasing cross-border nature.

An effective response to these challenges calls for a renewed effort and for a possible review of certain aspects of the existing legal framework. A ‘follow-the-money’ approach, which sees the involvement of different types of intermediary service providers, seems to be a particularly promising method that the Commission² and Member States have started to apply in certain areas. It can deprive those engaging in commercial infringements of the revenue streams (for example from consumer payments and advertising) emanating from their illegal activities, and therefore act as a deterrent. Furthermore, the current legal framework seems not to be fully fit for the challenges of the digital single market, particularly with regard to applying the right of information, injunctions and their cross-border effect, calculating damages and reimbursing legal costs. The Commission is currently evaluating the functioning of the broader intellectual property rights framework and is consulting the public³ on these matters, in line with the digital single market strategy and the internal market strategy^{4 5} objectives. It is also important that systems that allow illegal content to be removed by hosting services, once identified, are effective and transparent and prevent legal content from being taken down erroneously. These systems, which apply horizontally to all types of illegal content, are very relevant for the enforcement of copyright, as copyrighted material accounts for a large portion of the content subject to notices.

The Commission will take immediate action to engage, with all parties concerned, in setting up and applying ‘follow-the-money’ mechanisms, based on a self-regulatory approach, with the objective of reaching agreements by spring 2016. Codes of conduct at EU level could be backed by legislation, if required to ensure their full effectiveness.

¹ The EU legal framework for the enforcement of copyright is set out in the IPRED Directive, and in some provisions of the InfoSoc Directive.

² COM(2013) 209 final.

³ http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8580.

⁴ COM(2015) 550 final.

⁵ <https://ec.europa.eu/eusurvey/runner/Platforms>.

As regards the legal framework for the enforcement of intellectual property rights, including copyright, the Commission will assess options and consider by autumn 2016 the need to amend the legal framework focussing on commercial-scale infringements, inter alia to clarify, as appropriate, the rules for identifying infringers, the application of provisional and precautionary measures and injunctions and their cross-border effect, the calculation and allocation of damages and legal costs.

The Commission is also carrying out a comprehensive assessment and a public consultation on online platforms,³⁵ which also covers ‘notice and action’ mechanisms and the issue of action remaining effective over time (the ‘take down and stay down’ principle).

Copyright will continue to matter to the economy, society and culture in the long term. In some areas, the promise of market-led solutions in response to emerging uses, particularly as regards the cross-border dimension, will need to be monitored. More generally, the EU should stand ready to respond to the need for its national copyright systems to further converge as content markets become closer and user behaviour further evolves, underpinned by rapid technological developments.

The effective and uniform application of copyright legislation across the EU, both by national legislators and the courts, will continue to be as important as the rules themselves. Potential difficulties and barriers to the single market should be identified as early as possible and addressed through proper mechanisms. The Commission will facilitate a structured dialogue between Member States to ensure a shared understanding of EU copyright law and foster convergence of national laws, including as regards enforcement.

The Commission will also continue to be vigilant about aligning the legal framework, including exceptions and licensing mechanisms, with market developments and consumer behaviour. It will do so with particular regard to emerging issues that require further analysis and monitoring. It will undertake stakeholder dialogues and further consultation where appropriate.

This approach is incremental, moving towards the realisation of a long-term vision for copyright in the EU: one where authors and performers, the creative industries, users and all those concerned by copyright are subject to the very same rules, irrespective of where they

are in the EU. In this context, the Commission may call upon experts to assist it with defining further need for reform of EU copyright rules.

The full harmonisation of copyright in the EU, in the form of a single copyright code and a single copyright title, would require substantial changes in the way our rules work today. Areas that have so far been left to the discretion of national legislators would have to be harmonised. Uniform application of the rules would call for a single copyright jurisdiction with its own tribunal, so that inconsistent case law does not lead to more fragmentation.

These complexities cannot be a reason to relinquish this vision as a long-term target. Notwithstanding the particularities of copyright and its link with national cultures, difficulties and long lead-times have also accompanied the creation of single titles and single rulebooks in other areas of intellectual property, notably trademarks and patents, where they are now a reality.

The EU should pursue this vision for the very same reason it has given itself common copyright legislation: to build the EU's single market, a thriving European economy and a space where the diverse cultural, intellectual and scientific production of Europe travel across the EU as freely as possible.

**REGULATION (EU) 2017/1563 OF THE EUROPEAN
PARLIAMENT AND OF THE COUNCIL
of 13 September 2017 on the cross-border exchange between the
Union and third countries of accessible format copies of certain
works and other subject matter protected by copyright and
related rights for the benefit of persons who are blind, visually
impaired or otherwise print-disabled**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE
EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European
Union, and in particular Article 114 thereof, Having regard to the
proposal from the European Commission,

After transmission of the draft legislative act to the national
parliaments,

Having regard to the opinion of the European Economic and Social
Committee ⁽¹⁾,

Acting in accordance with the ordinary legislative procedure ⁽²⁾,

Whereas:

(1) The Marrakesh Treaty to Facilitate Access to Published Works
for Persons Who Are Blind, Visually Impaired, or Otherwise Print
Disabled (the ‘Marrakesh Treaty’) was signed on behalf of the Union on
30 April 2014 ⁽³⁾. It requires contracting parties to provide for exceptions
or limitations to copyright and related rights for the making and
dissemination of copies, in accessible formats, of certain works and other
protected subject matter, and for the cross-border exchange of those
copies.

(2) The beneficiaries of the Marrakesh Treaty are persons who are
blind, persons who have a visual impairment which cannot be improved
so as to give them visual function substantially equivalent to that of a
person who has no such impairment, persons who have a perceptual or
reading disability, including dyslexia or any other learning disability
preventing them from reading printed works to substantially the same

¹ Opinion of 5 July 2017 (not yet published in the Official Journal).

² Position of the European Parliament of 6 July 2017 (not yet published in the Official
Journal) and decision of the Council of 17 July

³ Council Decision 2014/221/EU of 14 April 2014 on the signing, on behalf of the European
Union, of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are
Blind, Visually Impaired, or otherwise Print Disabled (OJ L 115, 17.4.2014, p. 1)

degree as persons without such disability, and persons who are unable, due to a physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading, insofar as, as a result of such impairments or disabilities, those persons are unable to read printed works to substantially the same degree as persons without such impairments or disabilities.

(3) Persons who are blind, visually impaired or otherwise print-disabled continue to face many barriers to accessing books and other printed material which are protected by copyright and related rights. The need to increase the number of works and other protected subject matter in accessible formats available to such persons, and to significantly improve the circulation and dissemination of such works and other protected subject matter has been recognised at international level.

(4) According to Opinion 3/15 of the Court of Justice of the European Union ⁽¹⁾, the exceptions or limitations to copyright and related rights for the making and dissemination of copies, in accessible formats, of certain works and other subject matter, provided for by the Marrakesh Treaty, have to be implemented within the field harmonised by Directive 2001/29/EC of the European Parliament and of the Council ⁽²⁾. The same is true of the export and import arrangements prescribed by that treaty, inasmuch as they are ultimately intended to permit the communication to the public or the distribution, in the territory of a party, of accessible format copies published in the territory of another party, without the consent of the rightholders being obtained.

(5) Directive (EU) 2017/1564 of the European Parliament and of the Council ⁽³⁾ aims to implement the obligations that the Union has to meet under the Marrakesh Treaty in a harmonised manner in order to improve the availability of accessible format copies for beneficiary persons in all of the Member States of the Union and the circulation of

¹ Opinion of the Court of Justice of 14 February 2017, 3/15, ECLI:EU:C:2017:114, paragraph 112

² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10).

³ Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (see page 6 of this Official Journal).

such copies within the internal market, and requires Member States to introduce a mandatory exception to certain rights that are harmonised by Union law. This Regulation aims to implement the obligations under the Marrakesh Treaty with respect to the export and import arrangements for accessible format copies for non-commercial purposes for the benefit of beneficiary persons between the Union and third countries that are parties to the Marrakesh Treaty, and to lay down the conditions for such export and import in a uniform manner within the field harmonised by Directives 2001/29/EC and (EU) 2017/1564 in order to ensure that those measures are applied consistently throughout the internal market and do not jeopardise the harmonisation of exclusive rights and exceptions contained within those Directives.

(6) This Regulation should ensure that accessible format copies of books, including e-books, journals, newspapers, magazines and other kinds of writing, notation, including sheet music, and other printed material, including in audio form, whether digital or analogue, which have been made in any Member State in accordance with the national provisions adopted pursuant to Directive (EU) 2017/1564 can be distributed, communicated, or made available, to a beneficiary person or authorised entity, as referred to in the Marrakesh Treaty, in third countries that are parties to the Marrakesh Treaty. Accessible formats include, for example, Braille, large print, adapted e-books, audio books and radio broadcasts. Taking into account the ‘non-commercial objective of the Marrakesh Treaty’⁽¹⁾, the distribution, communication to the public or making available to the public of accessible format copies to persons who are blind, visually impaired or otherwise print-disabled or to authorised entities in the third country should only be carried out on a non-profit basis by authorised entities established in a Member State.

(7) This Regulation should also allow for the importation of, and access to, accessible format copies made in accordance with the implementation of the Marrakesh Treaty, from a third country, by beneficiary persons in the Union and authorised entities established in a Member State, for non-commercial purposes for the benefit of persons who are blind, visually impaired or otherwise print-disabled. It should be possible for those accessible format copies to circulate in the internal

¹ Opinion of the Court of Justice of 14 February 2017, 3/15, ECLI:EU:C:2017:114, paragraph 90.

market under the same conditions as accessible format copies made in the Union in accordance with Directive (EU) 2017/1564.

(8) In order to improve the availability of accessible format copies and to prevent the unauthorised dissemination of works or other subject matter, authorised entities which engage in the distribution, communication to the public or making available to the public of accessible format copies should comply with certain obligations. Initiatives by Member States to promote the objectives of the Marrakesh Treaty and the exchange of accessible format copies with third countries that are parties to that treaty, and to support authorised entities to exchange and make information available, should be encouraged. Such initiatives could include the development of guidelines or best practices on the making and dissemination of accessible format copies in consultation with representatives of authorised entities, beneficiary persons and rightholders.

(9) It is essential that any processing of personal data under this Regulation respect fundamental rights, including the right to respect for private and family life and the right to protection of personal data under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union (the ‘Charter’), and it is imperative that any such processing also be in compliance with Directives 95/46/EC ⁽¹⁾ and 2002/58/EC ⁽²⁾ of the European Parliament and of the Council, which govern the processing of personal data, as may be carried out by authorised entities within the framework of this Regulation and under the supervision of the Member States’ competent authorities, in particular the public independent authorities designated by the Member States.

(10) The United Nations Convention on the Rights of Persons with Disabilities (the ‘UNCRPD’), to which the Union is a party, guarantees persons with disabilities the right of access to information and education

¹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31). That Directive will be repealed and replaced, with effect from 25 May 2018, by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

² Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

and the right to participate in cultural, economic and social life, on an equal basis with others. The UNCRPD requires parties to the Convention to take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.

(11) Under the Charter, all forms of discrimination, including on grounds of disability, are prohibited and the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community is recognised and respected by the Union.

(12) Since the objective of this Regulation, namely to implement in a uniform manner the obligations under the Marrakesh Treaty with respect to the export and import between the Union and third countries that are parties to the Marrakesh Treaty of accessible format copies of certain works and other subject matter for noncommercial purposes for the benefit of beneficiary persons, and to lay down the conditions for such export and import, cannot be sufficiently achieved by the Member States, but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

(13) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter and the UNCRPD. This Regulation should be interpreted and applied in accordance with those rights and principles,

HAVE ADOPTED THIS REGULATION:

Article 1

Subject matter and scope

This Regulation lays down uniform rules on the cross-border exchange of accessible format copies of certain works and other subject matter between the Union and third countries that are parties to the Marrakesh Treaty without the authorisation of the rightholder, for the benefit of persons who are blind, visually impaired or otherwise print-disabled, within the field harmonised by Directives 2001/29/EC and (EU)

2017/1564, in order to prevent jeopardising the harmonisation of exclusive rights and exceptions in the internal market.

Article 2
Definitions

For the purposes of this Regulation the following definitions apply:

(1) ‘work or other subject matter’ means a work in the form of a book, journal, newspaper, magazine or other kind of writing, notation, including sheet music, and related illustrations, in any media, including in audio form such as audiobooks and in digital format, which is protected by copyright or related rights and which is published or otherwise lawfully made publicly available;

(2) ‘beneficiary person’ means, regardless of any other disabilities, a person who:

(a) is blind;

(b) has a visual impairment which cannot be improved so as to give the person visual function substantially equivalent to that of a person who has no such impairment, and who is, as a result, unable to read printed works to substantially the same degree as a person without such an impairment;

(c) has a perceptual or reading disability and is, as a result, unable to read printed works to substantially the same degree as a person without such disability; or

(d) is otherwise unable, due to a physical disability, to hold or manipulate a book or to focus or move their eyes to the extent that would be normally acceptable for reading;

(3) ‘accessible format copy’ means a copy of a work or other subject matter in an alternative manner or form that gives a beneficiary person access to the work or other subject matter, including allowing such person to have access as feasibly and comfortably as a person without any of the impairments or disabilities referred to in point 2;

(4) ‘authorised entity established in a Member State’ means an entity that is authorised or recognised by a Member State to provide education, instructional training, adaptive reading or information access to beneficiary persons on a nonprofit basis. It also includes a public institution or non-profit organisation that provides the same services to beneficiary persons as one of its primary activities, institutional obligations or as part of its public-interest missions.

Article 3

Export of accessible format copies to third countries

An authorised entity established in a Member State may distribute, communicate or make available to beneficiary persons or to an authorised entity established in a third country that is a party to the Marrakesh Treaty an accessible format copy of a work or other subject matter made in accordance with the national legislation adopted pursuant to Directive (EU) 2017/1564.

Article 4

Import of accessible format copies from third countries

A beneficiary person or an authorised entity established in a Member State may import or otherwise obtain or access and thereafter use, in accordance with the national legislation adopted pursuant to Directive (EU) 2017/1564, an accessible format copy of a work or other subject matter that has been distributed, communicated or made available to beneficiary persons or to authorised entities, by an authorised entity in a third country that is a party to the Marrakesh Treaty.

Article 5

Obligations of authorised entities

1. An authorised entity established in a Member State carrying out the acts referred to in Articles 3 and 4 shall establish and follow its own practices to ensure that it:

(a) distributes, communicates and makes available accessible format copies only to beneficiary persons or other authorised entities;

(b) takes appropriate steps to discourage the unauthorised reproduction, distribution, communication to the public and making available to the public of accessible format copies;

(c) demonstrates due care in, and maintains records of, its handling of works or other subject matter and of accessible format copies thereof; and

(d) publishes and updates, on its website if appropriate, or through other online or offline channels, information on how it complies with the obligations laid down in points (a) to (c).

An authorised entity established in a Member State shall establish and follow the practices referred to in the first subparagraph in full

respect of the rules applicable to the processing of personal data of beneficiary persons referred to in Article 6.

2. An authorised entity established in a Member State carrying out the acts referred to in Articles 3 and 4 shall provide the following information in an accessible way, on request, to beneficiary persons, other authorised entities or rightholders:

(a) the list of works or other subject matter for which it has accessible format copies and the available formats; and

(b) the name and contact details of the authorised entities with which it has engaged in the exchange of accessible format copies pursuant to Articles 3 and 4.

Article 6

Protection of personal data

The processing of personal data carried out within the framework of this Regulation shall be carried out in compliance with Directives 95/46/EC and 2002/58/EC.

Article 7

Review

By 11 October 2023, the Commission shall carry out an evaluation of this Regulation and present the main findings in a report to the European Parliament, the Council and the European Economic and Social Committee, accompanied, where appropriate, by proposals for amending this Regulation.

Member States shall provide the Commission with the necessary information for the preparation of the evaluation report.

Article 8

Entry into force and application

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

It shall apply from 12 October 2018.

This Regulation shall be binding in its entirety and directly applicable in all Member States. Done at Strasbourg, 13 September 2017.

**REGULATION (EU) 2017/1128 OF THE EUROPEAN
PARLIAMENT AND OF THE COUNCIL
of 14 June 2017 on cross-border portability of online content
services in the internal market**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE
EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof, Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Having regard to the opinion of the Committee of the Regions ⁽²⁾,

Acting in accordance with the ordinary legislative procedure ⁽³⁾,

Whereas:

(1) Seamless access throughout the Union to online content services that are lawfully provided to consumers in their Member State of residence is important for the smooth functioning of the internal market and for the effective application of the principles of free movement of persons and services. Since the internal market comprises an area without internal borders relying, inter alia, on the free movement of persons and services, it is necessary to ensure that consumers can use portable online content services which offer access to content such as music, games, films, entertainment programmes or sports events, not only in their Member State of residence but also when they are temporarily present in another Member State for purposes such as leisure, travel, business trips or learning mobility. Therefore, barriers that hamper access to and use of such online content services in such cases should be eliminated.

(2) The technological developments that have led to a proliferation of portable devices such as laptops, tablets and smartphones are increasingly facilitating the use of online content services by providing

¹ OJ C 264, 20.7.2016, p. 86.

² OJ C 240, 1.7.2016, p. 72.

³ Position of the European Parliament of 18 May 2017 (not yet published in the Official Journal) and decision of the Council of 8 June 2017

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access to them regardless of the location of consumers. There is a rapidly growing demand on the part of consumers for access to content and innovative online services not only in their Member State of residence but also when they are temporarily present in another Member State.

(3) Consumers increasingly enter into contractual arrangements with service providers for the provision of online content services. However, consumers that are temporarily present in a Member State other than their Member State of residence often cannot continue to access and use the online content services that they have lawfully acquired the right to access and use in their Member State of residence.

(4) There are a number of barriers which hinder the provision of online content services to consumers temporarily present in a Member State other than their Member State of residence. Certain online services include content such as music, games, films or entertainment programmes which are protected by copyright or related rights under Union law. At present, the barriers to cross-border portability of online content services differ from one sector to another. The barriers stem from the fact that the rights for the transmission of content protected by copyright or related rights, such as audiovisual works, are often licensed on a territorial basis, as well as from the fact that providers of online content services might choose to serve specific markets only.

(5) The same applies to content, such as sports events, which is not protected by copyright or related rights under Union law but which could be protected by copyright or related rights under national law or by virtue of other specific national legislation and which is often also licensed by the organisers of such events or offered by providers of online content services on a territorial basis. Transmissions of such content by broadcasting organisations are protected by related rights which have been harmonised at Union level. Moreover, transmissions of such content often include copyright-protected elements such as music, opening or closing video sequences or graphics. Also, certain aspects of transmissions of such content, specifically those relating to broadcasting events of major importance for society as well as to short news reports on events of high interest to the public, have been harmonised by Directive 2010/13/ EU of the European Parliament and of the Council ⁽¹⁾. Finally,

¹ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media

audiovisual media services within the meaning of Directive 2010/13/EU include services which provide access to content such as sports events, news or current affairs.

(6) Increasingly, online content services are marketed in a package in which content which is not protected by copyright or related rights is not separable from content which is protected by copyright or related rights without substantially lessening the value of the service provided to consumers. This is especially the case with premium content such as sports events or other events of significant interest to consumers. In order to enable providers of online content services to provide to consumers full access to their online content services when consumers are temporarily present in a Member State other than their Member State of residence, it is indispensable that this Regulation also covers such content used by online content services and therefore that it applies to audiovisual media services within the meaning of Directive 2010/13/EU as well as to transmissions of broadcasting organisations in their entirety.

(7) The rights in works protected by copyright and in subject-matter protected by related rights ('works and other protected subject-matter') are harmonised, inter alia, in Directives 96/9/EC ⁽¹⁾, 2001/29/EC ⁽²⁾, 2006/115/EC ⁽³⁾ and 2009/24/EC ⁽⁴⁾ of the European Parliament and of the Council. The provisions of international agreements in the area of copyright and related rights concluded by the Union in particular the Agreement on Trade-Related Aspects of Intellectual Property Rights annexed as Annex 1C to the Agreement establishing the World Trade Organization of 15 April 1994, the WIPO Copyright Treaty of 20 December 1996, and the WIPO Performances and Phonograms Treaty of 20 December 1996, as amended, form an integral part of the Union legal

Services Directive) (OJ L 95, 15.4.2010, p. 1).

¹ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p. 20).

² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10).

³ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 376, 27.12.2006, p. 28).

⁴ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ L 111, 5.5.2009, p. 16).

order. Union law should, insofar as is possible, be interpreted in a manner that is consistent with international law.

(8) It is essential that providers of online content services that make use of works or other protected subject-matter, such as books, audiovisual works, recorded music or broadcasts have the right to use such content for the relevant territories.

(9) The transmission by providers of online content services of content that is protected by copyright or related rights requires the authorisation of the relevant rightholders, such as authors, performers, producers or broadcasting organisations, regarding the content included in the transmission. This is equally true when such transmission takes place for the purpose of allowing a consumer to carry out a download in order to use an online content service.

(10) The acquisition of a licence for relevant rights is not always possible, in particular when rights in content are licensed on an exclusive basis. In order to ensure that territorial exclusivity is effectively complied with, providers of online content services often undertake, in their licence contracts with rightholders, including broadcasting organisations or events organisers, to prevent their subscribers from accessing and using their services outside the territory for which the providers hold the licence. Such contractual restrictions imposed on providers require them to take measures such as disallowing access to their services from internet protocol (IP) addresses located outside the territory concerned. Therefore, one of the obstacles to the cross-border portability of online content services is to be found in the contracts concluded between the providers of online content services and their subscribers, which reflect the territorial restriction clauses included in contracts concluded between those providers and the rightholders.

(11) The case law of the Court of Justice of the European Union should be taken into account when balancing the objective of protecting intellectual property rights with the fundamental freedoms guaranteed by the Treaty on the Functioning of the European Union (TFEU).

(12) Therefore, the objective of this Regulation is to adapt the harmonised legal framework on copyright and related rights and to provide a common approach to the provision of online content services to subscribers temporarily present in a Member State other than their Member State of residence by removing barriers to cross-border portability of online content services which are lawfully provided. This

Regulation should ensure cross-border portability of online content services in all sectors concerned and hence provide consumers with an additional means of accessing online content lawfully, without affecting the high level of protection guaranteed by copyright and related rights in the Union, without changing the existing licensing models, such as territorial licensing, and without affecting the existing financing mechanisms. The concept of cross-border portability of online content services should be distinguished from that of cross-border access by consumers to online content services provided in a Member State other than their Member State of residence, which is not covered by this Regulation.

(13) Given the Union instruments that exist in the field of taxation, it is necessary to exclude the field of taxation from the scope of this Regulation. Therefore, this Regulation should not affect the application of any provision related to taxation.

(14) This Regulation defines several concepts necessary for its application, including the Member State of residence. The Member State of residence should be determined taking into account the objectives of this Regulation and the necessity to ensure its uniform application in the Union. The definition of the Member State of residence implies that the subscriber has his or her actual and stable residence in that Member State. A provider of an online content service who has verified the Member State of residence in accordance with this Regulation should be allowed to assume, for the purposes of this Regulation, that the Member State of residence as verified is the only Member State of residence of the subscriber. Providers should not be obliged to verify whether their subscribers are also subscribers to an online content service in another Member State.

(15) This Regulation should apply to online content services that providers, after having obtained the relevant rights from rightholders in a given territory, provide to their subscribers on the basis of a contract, by any means including streaming, downloading, through applications or any other technique which allows use of that content. For the purposes of this Regulation, the term contract should be regarded as covering any agreement between a provider and a subscriber, including any arrangement by which the subscriber accepts the provider's terms and conditions for the provision of online content services, whether against payment of money or without such payment. A registration to receive

content alerts or a mere acceptance of HTML cookies should not be regarded as a contract for the provision of online content services for the purposes of this Regulation.

(16) An online service which is not an audiovisual media service within the meaning of Directive 2010/13/EU and which uses works, other protected subject-matter or transmissions of broadcasting organisations in a merely ancillary manner should not be covered by this Regulation. Such services include websites that use works or other protected subject-matter only in an ancillary manner such as graphical elements or music used as background, where the main purpose of such websites is, for example, the sale of goods.

(17) This Regulation should apply only to online content services which subscribers can effectively access and use in their Member State of residence without being limited to a specific location, as it is not appropriate to require providers of online content services that do not offer portable online content services in the Member State of residence of a subscriber to do so across borders.

(18) This Regulation should apply to online content services which are provided against payment of money. Providers of such services are in a position to verify the Member State of residence of their subscribers. The right to use an online content service should be regarded as acquired against payment of money, whether such payment is made directly to the provider of the online content service, or to another party such as a provider offering a package combining an electronic communications service and an online content service operated by another provider. For the purposes of this Regulation, the payment of a mandatory fee for public broadcasting services should not be regarded as a payment of money for an online content service.

(19) Providers of online content services should not subject their subscribers to any additional charges for the provision of cross-border portability of online content services in accordance with this Regulation. It is possible however that subscribers, in order to access and use online content services in Member States other than their Member State of residence, could be subject to fees payable to operators of electronic communications networks used to access such services.

(20) Providers of online content services which are provided without payment of money generally do not verify the Member State of residence of their subscribers. The inclusion of such online content services in the

scope of this Regulation would involve a major change to the way those services are delivered and involve disproportionate costs. However, the exclusion of those services from the scope of this Regulation would mean that providers of those services would not be able to take advantage of the legal mechanism which is provided for in this Regulation and which enables providers of online content services to offer cross-border portability of such services, even when they decide to invest in means that allow them to verify their subscribers' Member State of residence. Accordingly, providers of online content services which are provided without payment of money should be able to opt to be included in the scope of this Regulation provided that they comply with the requirements on the verification of the Member State of residence of their subscribers. If such providers exercise that option, they should comply with the same obligations as imposed under this Regulation upon the providers of online content services which are provided against payment of money. Furthermore, they should inform the subscribers, the relevant holders of copyright and related rights and the relevant holders of any other rights in the content of the online content service of their decision to exercise that option in a timely manner. Such information could be provided on the provider's website.

(21) In order to ensure the cross-border portability of online content services, it is necessary to require providers of online content services covered by this Regulation to enable subscribers to use such services in the Member State in which they are temporarily present in the same manner as in their Member State of residence. Subscribers should have access to online content services offering the same content on the same range and number of devices, for the same number of users and with the same range of functionalities as those offered in their Member State of residence. It is essential that the obligation to provide cross-border portability of online content services be mandatory and therefore the parties should not be able to exclude it, derogate from it or vary its effect. Any action by a provider which would prevent subscribers from accessing or using the service while temporarily present in a Member State other than their Member State of residence, for example restrictions to the functionalities of the service or to the quality of its delivery should be considered to be a circumvention of the obligation to provide cross-border portability of online content services and therefore contrary to this Regulation.

(22) Requiring that the delivery of online content services to subscribers temporarily present in a Member State other than their Member State of residence be of the same quality as in the Member State of residence could result in high costs for providers of online content services and thus ultimately for subscribers. Therefore, it is not appropriate for this Regulation to require that providers ensure a quality of delivery of such services that would be beyond the quality available via the local online access chosen by a subscriber while temporarily present in another Member State. In such cases the provider should not be liable if the quality of delivery of the service is lower. Nevertheless, if the provider expressly guarantees a certain quality of delivery to subscribers while temporarily present in another Member State, it should be bound by that guarantee. The provider, on the basis of the information in its possession, should provide its subscribers in advance with information concerning the quality of delivery of an online content service in Member States other than their Member State of residence, in particular the fact that the quality of delivery could differ from that applicable in their Member State of residence. The provider should not be under an obligation to actively seek information on the quality of delivery of a service in Member States other than the subscriber's Member State of residence. The relevant information could be provided on the provider's website.

(23) In order to ensure that providers of online content services covered by this Regulation comply with the obligation to provide cross-border portability of their services, without acquiring the relevant rights in another Member State, it is necessary to stipulate that those providers should always be entitled to provide such services to subscribers when they are temporarily present in a Member State other than their Member State of residence. This should be achieved by establishing that the provision of, access to and use of such online content services should be deemed to occur in the subscriber's Member State of residence. This legal mechanism should apply for the sole purpose of ensuring the cross-border portability of online content services. An online content service should be considered to be provided lawfully if both the service and the content are provided in a lawful manner in the Member State of residence. This Regulation, and in particular the legal mechanism by which the provision of, access to and use of an online content service are deemed to occur in the subscriber's Member State of residence, does not prevent a

provider from enabling the subscriber to additionally access and use the content lawfully offered by the provider in the Member State where the subscriber is temporarily present.

(24) For the licensing of copyright or related rights, the legal mechanism laid down in this Regulation means that relevant acts of reproduction, communication to the public and making available of works and other protected subject-matter, as well as the acts of extraction or re-utilization in relation to databases protected by sui generis rights, which occur when the service is provided to subscribers when they are temporarily present in a Member State other than their Member State of residence, should be deemed to occur in the subscribers' Member State of residence. Providers of online content services covered by this Regulation, therefore, should be deemed to carry out such acts on the basis of the respective authorisations from the rightholders concerned for the Member State of residence of their subscribers. Whenever providers have the right to carry out acts of communication to the public or reproduction in their subscribers' Member State of residence on the basis of an authorisation from the rightholders concerned, subscribers who are temporarily present in a Member State other than their Member State of residence should be able to access and use the service and where necessary carry out any relevant acts of reproduction, such as downloading, which they would be entitled to do in their Member State of residence. The provision of an online content service by providers to subscribers temporarily present in a Member State other than their Member State of residence and the access to and use of the service by such subscribers in accordance with this Regulation should not constitute a breach of copyright or related rights or any other rights relevant for the provision of, access to and use of the online content service.

(25) Providers of online content services covered by this Regulation should not be liable for the breach of any contractual provisions that are contrary to the obligation to enable their subscribers to use such services in the Member State in which they are temporarily present. Therefore, clauses in contracts designed to prohibit or limit the cross-border portability of such online content services should be unenforceable. The providers and holders of rights relevant for the provision of online content services should not be allowed to circumvent the application of this Regulation by choosing the law of a third country as the law

applicable to contracts between them. The same should apply to contracts concluded between providers and subscribers.

(26) This Regulation should enable subscribers to enjoy online content services to which they have subscribed in their Member State of residence when they are temporarily present in another Member State. Subscribers should be eligible for cross-border portability of online content services only if they reside in a Member State of the Union. Therefore, this Regulation should oblige providers of online content services to make use of reasonable, proportionate and effective means in order to verify the Member State of residence of their subscribers. To that end, providers should use the means of verification listed in this Regulation. This does not preclude agreement between providers and rightholders on those means of verification within the limits of this Regulation. The objective of the list is to provide legal certainty as to the means of verification to be used by providers as well as to limit interference with subscribers' privacy. In each case, account should be taken of the effectiveness and proportionality of a particular means of verification in a given Member State and for a given type of online content service. Unless the subscriber's Member State of residence can be verified with sufficient certainty on the basis of a single means of verification, providers should rely on two means of verification. In cases where the provider has reasonable doubts concerning the subscriber's Member State of residence, the provider should be able to repeat the verification of the subscriber's Member State of residence. The provider should implement the necessary technical and organisational measures required under applicable data protection rules for the processing of personal data collected for the purpose of verification of the subscriber's Member State of residence under this Regulation. Examples of such measures include providing transparent information to the individuals about the methods used for, and the purpose of, the verification, and appropriate security measures.

(27) In order to verify the subscriber's Member State of residence, the provider of an online content service should rely, if possible, on information which is in the provider's possession, such as billing information. As regards contracts concluded prior to the date of application of this Regulation and as regards the verification carried out upon renewal of a contract, the provider should be allowed to request the subscriber to provide the information necessary to verify the subscriber's

Member State of residence only when it cannot be determined on the basis of information which is already in the provider's possession.

(28) IP address checks performed under this Regulation should be conducted in accordance with Directives 95/46/EC ⁽¹⁾ and 2002/58/EC ⁽²⁾ of the European Parliament and of the Council. In addition, for the purpose of verification of the subscriber's Member State of residence what matters is not the precise location of the subscriber, but rather the Member State in which the subscriber is accessing the service. Accordingly, data on the subscriber's precise location or any other personal data should neither be collected nor processed for that purpose. Where the provider has reasonable doubts concerning the subscriber's Member State of residence and carries out an IP address check to verify the Member State of residence, the sole purpose of such checks should be to establish whether the subscriber is accessing or using the online content service within or outside the Member State of residence. Therefore, in such cases, the data resulting from the checking of IP addresses should only be collected in binary format and in compliance with applicable data protection rules. The provider should not exceed that level of detail.

(29) A holder of copyright, related rights, or any other rights in the content of an online content service should remain able to exercise contractual freedom to authorise such content to be provided, accessed and used under this Regulation without verification of the Member State of residence. This can be particularly relevant in sectors such as music and e-books. Each rightholder should be able to take such decisions freely when entering into contracts with providers of online content services. Contracts between providers and rightholders should not restrict the possibility for rightholders to withdraw such authorisation subject to giving reasonable notice to the provider. The authorisation given by an

¹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31). Directive 95/46/EC is repealed and replaced, with effect from 25 May 2018, by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

² Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

individual rightholder does not as such release the provider from the obligation to verify the subscriber's Member State of residence. It is only in cases where all the holders of copyright, related rights or any other rights in the content used by the provider decide to authorise their content to be provided, accessed and used without verification of the subscriber's Member State of residence that the obligation to verify should not apply, and the contract between the provider and the subscriber for the provision of an online content service should be used to determine the latter's Member State of residence. All other aspects of this Regulation should remain applicable in such cases.

(30) This Regulation respects fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union ('Charter'). Accordingly, this Regulation should be interpreted and applied in accordance with those rights and principles, in particular the right to respect for private and family life, the right to protection of personal data, the right to freedom of expression, the freedom to conduct a business and the right to property, including intellectual property. Any processing of personal data under this Regulation should respect fundamental rights, including the right to respect for private and family life and the right to protection of personal data under Articles 7 and 8 of the Charter, and it is essential that such processing be in compliance with Directives 95/46/EC and 2002/58/EC. In particular, providers of online content services should ensure that any processing of personal data under this Regulation is necessary, reasonable and proportionate in order to achieve the relevant purpose. Where authentication of a subscriber is sufficient in order to provide the service, identification of the subscriber should not be required. Data collected pursuant to this Regulation for the purposes of verification of the Member State of residence should not be stored by the provider longer than necessary to complete such verification. Such data should be immediately and irreversibly destroyed after the verification is completed. However, this is without prejudice to the storage of data which was collected for another legitimate purpose, subject to applicable data protection rules, including rules concerning the storage of that data.

(31) Contracts under which content is licensed are usually concluded for a relatively long duration. Consequently, and in order to ensure that all consumers residing in the Union can enjoy cross-border portability of online content services on an equal basis in time and

without any undue delay, this Regulation should also apply to contracts concluded and rights acquired before the date of its application if those contracts and rights are relevant for the cross-border portability of an online content service provided after that date. Such application of this Regulation is also necessary in order to ensure a level playing field for providers of online content services covered by this Regulation operating in the internal market, particularly for SMEs, by enabling providers that concluded contracts with rightholders for a long duration to offer cross-border portability to their subscribers, independently of the provider's ability to renegotiate such contracts. Moreover, such application of this Regulation should ensure that when providers make arrangements necessary for the cross-border portability of their services, they will be able to offer such portability with regard to the entirety of their online content. This should also apply to providers of online content services that offer packages combining electronic communications services and online content services. Finally, such application of this Regulation should also allow rightholders not to have to renegotiate their existing licensing contracts in order to enable providers to offer cross-border portability of their services.

(32) Accordingly, since this Regulation will apply to some contracts concluded and rights acquired before the date of its application, it is also appropriate to provide for a reasonable period between the date of entry into force of this Regulation and the date of its application, so as to allow rightholders and providers of online content services covered by this Regulation to make the arrangements necessary to adapt to the new situation, as well as to allow providers to amend the terms of use of their services. Changes to the terms of use of online content services offered in packages combining an electronic communications service and an online content service that are made strictly in order to comply with the requirements of this Regulation should not trigger for subscribers any right under national laws transposing the regulatory framework for electronic communications networks and services to withdraw from contracts for the provision of such electronic communications services.

(33) This Regulation is aimed at improving competitiveness by fostering innovation in online content services and attracting more consumers. This Regulation should not affect the application of the rules of competition, and in particular Articles 101 and 102 TFEU. The rules

provided for in this Regulation should not be used to restrict competition in a manner contrary to the TFEU.

(34) This Regulation should not affect the application of Directive 2014/26/EU of the European Parliament and of the Council ⁽¹⁾ and in particular Title III thereof. This Regulation is consistent with the objective of facilitating the lawful access to content, which is protected by copyright or related rights, as well as services linked thereto.

(35) In order to achieve the objective of ensuring cross-border portability of online content services in the Union, it is appropriate to adopt a regulation, which is directly applicable in Member States. This is necessary in order to guarantee a uniform application of the cross-border portability rules across Member States and their entry into force at the same time with regard to all online content services. Only a regulation ensures the degree of legal certainty which is necessary in order to enable consumers to fully benefit from cross-border portability across the Union.

(36) Since the objective of this Regulation, namely the adaptation of the legal framework so that cross-border portability of online content services is provided in the Union, cannot be sufficiently achieved by the Member States but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective. In particular, this Regulation does not substantially affect the way the rights are licensed and does not oblige rightholders and providers to renegotiate contracts. Moreover, this Regulation does not require that providers take measures to ensure the quality of delivery of online content services outside the Member State of residence of the subscribers. Finally, this Regulation does not apply to providers that offer online content services without payment of money and who do not exercise the option to enable the cross-border portability of their services. Therefore, it does not impose any disproportionate costs,

HAVE ADOPTED THIS REGULATION:

¹ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (OJ L 84, 20.3.2014, p. 72)

Article 1

Subject matter and scope

1. This Regulation introduces a common approach in the Union to the cross-border portability of online content services, by ensuring that subscribers to portable online content services which are lawfully provided in their Member State of residence can access and use those services when temporarily present in a Member State other than their Member State of residence.

2. This Regulation shall not apply to the field of taxation.

Article 2

Definitions

For the purposes of this Regulation, the following definitions apply:

(1) ‘subscriber’ means any consumer who, on the basis of a contract for the provision of an online content service with a provider whether against payment of money or without such payment, is entitled to access and use such service in the Member State of residence;

(2) ‘consumer’ means any natural person who, in contracts covered by this Regulation, is acting for purposes which are outside that person’s trade, business, craft or profession;

(3) ‘Member State of residence’ means the Member State, determined on the basis of Article 5, where the subscriber has his or her actual and stable residence;

(4) ‘temporarily present in a Member State’ means being present in a Member State other than the Member State of residence for a limited period of time;

(5) ‘online content service’ means a service as defined in Articles 56 and 57 TFEU that a provider lawfully provides to subscribers in their Member State of residence on agreed terms and online, which is portable and which is:

(i) an audiovisual media service as defined in point (a) of Article 1 of Directive 2010/13/EU, or

(ii) a service the main feature of which is the provision of access to, and the use of, works, other protected subject-matter or transmissions of broadcasting organisations, whether in a linear or an on-demand manner;

(6) ‘portable’ means a feature of an online content service whereby subscribers can effectively access and use the online content service in

their Member State of residence without being limited to a specific location.

Article 3

Obligation to enable cross-border portability of online content services

1. The provider of an online content service provided against payment of money shall enable a subscriber who is temporarily present in a Member State to access and use the online content service in the same manner as in the Member State of residence, including by providing access to the same content, on the same range and number of devices, for the same number of users and with the same range of functionalities.

2. The provider shall not impose any additional charges on the subscriber for the access to and the use of the online content service pursuant to paragraph 1.

3. The obligation set out in paragraph 1 shall not extend to any quality requirements applicable to the delivery of an online content service that the provider is subject to when providing that service in the Member State of residence, unless otherwise expressly agreed between the provider and the subscriber.

The provider shall not take any action to reduce the quality of delivery of the online content service when providing the online content service in accordance with paragraph 1.

4. The provider shall, on the basis of the information in its possession, provide the subscriber with information concerning the quality of delivery of the online content service provided in accordance with paragraph 1. The information shall be provided to the subscriber prior to providing the online content service in accordance with paragraph 1 and by means which are adequate and proportionate.

Article 4

Localisation of the provision of, access to and use of online content services

The provision of an online content service under this Regulation to a subscriber who is temporarily present in a Member State, as well as the access to and the use of that service by the subscriber, shall be deemed to occur solely in the subscriber's Member State of residence.

Article 5

Verification of the Member State of residence

1. At the conclusion and upon the renewal of a contract for the provision of an online content service provided against payment of money, the provider shall verify the Member State of residence of the subscriber by using not more than two of the following means of verification and shall ensure that the means used are reasonable, proportionate and effective:

(a) an identity card, electronic means of identification, in particular those falling under the electronic identification schemes notified in accordance with Regulation (EU) No 910/2014 of the European Parliament and of the Council ⁽¹⁾, or any other valid identity document confirming the subscriber's Member State of residence;

(b) payment details such as the bank account or credit or debit card number of the subscriber;

(c) the place of installation of a set top box, a decoder or a similar device used for supply of services to the subscriber;

(d) the payment by the subscriber of a licence fee for other services provided in the Member State, such as public service broadcasting;

(e) an internet or telephone service supply contract or any similar type of contract linking the subscriber to the Member State;

(f) registration on local electoral rolls, if the information concerned is publicly available;

(g) payment of local taxes, if the information concerned is publicly available;

(h) a utility bill of the subscriber linking the subscriber to the Member State;

(i) the billing address or the postal address of the subscriber;

(j) a declaration by the subscriber confirming the subscriber's address in the Member State;

(k) an internet protocol (IP) address check, to identify the Member State where the subscriber accesses the online content service.

The means of verification under points (i) to (k) shall only be used in combination with one of the means of verification under points (a) to (h), unless the postal address under point (i) is included in a publicly available official register.

2. If the provider has reasonable doubts about the subscriber's Member State of residence in the course of the duration of the contract

for the provision of an online content service, the provider may repeat the verification of the Member State of residence of the subscriber, in accordance with paragraph 1. In such a case, however, the means of verification under point (k) may be used as a sole means. Data resulting from the use of the means of verification under point (k) shall be collected in binary format only.

3. The provider shall be entitled to request the subscriber to provide the information necessary to determine the subscriber's Member State of residence in accordance with paragraphs 1 and 2. If the subscriber fails to provide that information, and as a result the provider is unable to verify the subscriber's Member State of residence, the provider shall not, on the basis of this Regulation, enable the subscriber to access or use the online content service when the subscriber is temporarily present in a Member State.

4. The holders of copyright or related rights or those holding any other rights in the content of an online content service may authorise the provision of, access to and use of their content under this Regulation without verification of the Member State of residence. In such cases, the contract between the provider and the subscriber for the provision of an online content service shall be sufficient to determine the subscriber's Member State of residence.

The holders of copyright or related rights or those holding any other rights in the content of an online content service shall be entitled to withdraw the authorisation given pursuant to the first subparagraph subject to giving reasonable notice to the provider.

5. The contract between the provider and the holders of copyright or related rights or those holding any other rights in the content of an online content service shall not restrict the possibility for such holders of rights to withdraw the authorisation referred to in paragraph 4.

Article 6

Cross-border portability of online content services provided without payment of money

1. The provider of an online content service provided without payment of money may decide to enable its subscribers who are temporarily present in a Member State to access and use the online content service on condition that the provider verifies the subscriber's Member State of residence in accordance with this Regulation.

2. The provider shall inform its subscribers, the relevant holders of copyright and related rights and the relevant holders of any other rights in the content of the online content service of its decision to provide the online content service in accordance with paragraph 1, prior to providing that service. The information shall be provided by means which are adequate and proportionate.

3. This Regulation shall apply to providers that provide an online content service in accordance with paragraph 1.

Article 7

Contractual provisions

1. Any contractual provisions, including those between providers of online content services and holders of copyright or related rights or those holding any other rights in the content of online content services, as well as those between such providers and their subscribers, which are contrary to this Regulation, including those which prohibit cross-border portability of online content services or limit such portability to a specific time period, shall be unenforceable.

2. This Regulation shall apply irrespective of the law applicable to contracts concluded between providers of online content services and holders of copyright or related rights or those holding any other rights in the content of online content services, or to contracts concluded between such providers and their subscribers.

Article 8

Protection of personal data

1. The processing of personal data carried out within the framework of this Regulation including, in particular, for the purposes of verification of the subscriber's Member State of residence under Article 5, shall be carried out in compliance with Directives 95/46/EC and 2002/58/EC. In particular, the use of the means of verification in accordance with Article 5 and any processing of personal data under this Regulation, shall be limited to what is necessary and proportionate in order to achieve its purpose.

2. Data collected pursuant to Article 5 shall be used solely for the purpose of verifying the subscriber's Member State of residence. They shall not be communicated, transferred, shared, licensed or otherwise transmitted or disclosed to holders of copyright or related rights or to

those holding any other rights in the content of online content services, or to any other third parties.

3. Data collected pursuant to Article 5 shall not be stored by the provider of an online content service longer than necessary to complete a verification of a subscriber's Member State of residence pursuant to Article 5(1) or (2). On completion of each verification, the data shall be immediately and irreversibly destroyed.

Article 9

Application to existing contracts and rights acquired

1. This Regulation shall apply also to contracts concluded and rights acquired before the date of its application if they are relevant for the provision of, access to and use of an online content service, in accordance with Articles 3 and 6, after that date.

2. By 21 May 2018, the provider of an online content service provided against payment of money shall verify, in accordance with this Regulation, the Member State of residence of those subscribers who concluded contracts for the provision of the online content service before that date.

Within two months of the date upon which the provider of an online content service provided without payment of money first provides the service in accordance with Article 6, the provider shall verify, in accordance with this Regulation, the Member State of residence of those subscribers who concluded contracts for the provision of the online content service before that date.

Article 10

Review

By 21 March 2021, and as required thereafter, the Commission shall assess the application of this Regulation in the light of legal, technological and economic developments, and submit to the European Parliament and to the Council a report thereon.

The report referred to in the first paragraph shall include, inter alia, an assessment of the application of the verification means of the Member State of residence referred to in Article 5, taking into account newly developed technologies, industry standards and practices, and, if necessary, consider the need for a review. The report shall pay special attention to the impact of this Regulation on SMEs and the protection of

personal data. The Commission's report shall be accompanied, if appropriate, by a legislative proposal.

Article 11

Final provisions

1. This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

2. It shall apply from 20 March 2018.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

**DIRECTIVE (EU) 2017/1564 OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL**

of 13 September 2017

**on certain permitted uses of certain works and other subject
matter protected by copyright and related rights for the benefit
of persons who are blind, visually impaired or otherwise print-
disabled and amending Directive 2001/29/EC on the
harmonisation of certain aspects of copyright and related
rights in the information society**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE
EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European
Union, and in particular Article 114 thereof, Having regard to the
proposal from the European Commission,

After transmission of the draft legislative act to the national
parliaments,

Having regard to the opinion of the European Economic and Social
Committee ⁽¹⁾,

Acting in accordance with the ordinary legislative procedure ⁽²⁾,

Whereas:

(1) Union legal acts in the area of copyright and related rights
provide legal certainty and a high level of protection for rightholders, and
constitute a harmonised legal framework. That framework contributes
to the proper functioning of the internal market and stimulates
innovation, creation, investment and the production of new content,
including in the digital environment. It also aims to promote access to
knowledge and culture by protecting works and other subject matter and
by permitting exceptions or limitations that are in the public interest. A
fair balance of rights and interests between rightholders and users
should be safeguarded.

¹ OJ C 125, 21.4.2017, p. 27

² Position of the European Parliament of 6 July 2017 (not yet published in the Official
Journal) and decision of the Council of 17 July 2017

(2) Directives 96/9/EC ⁽¹⁾, 2001/29/EC ⁽²⁾, 2006/115/EC ⁽³⁾ and 2009/24/EC ⁽⁴⁾ of the European Parliament and of the Council harmonise the rights of rightholders in the area of copyright and related rights. Those Directives, together with Directive 2012/28/EU of the European Parliament and of the Council ⁽⁵⁾, provide for an exhaustive list of exceptions and limitations to those rights, which allow the use of content without the rightholders' authorisation under certain conditions in order to achieve certain policy objectives.

(3) Persons who are blind, visually impaired or otherwise print-disabled continue to face many barriers to accessing books and other printed material which are protected by copyright and related rights. Taking into consideration the rights of blind, visually impaired or otherwise print-disabled persons as recognised in the Charter of Fundamental Rights of the European Union (the 'Charter') and the United Nations Convention on the Rights of Persons with Disabilities (the 'UNCRPD'), measures should be taken to increase the availability of books and other printed material in accessible formats, and to improve their circulation in the internal market.

(4) The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (the 'Marrakesh Treaty') was signed on behalf of the Union on 30 April 2014 ⁽⁶⁾. Its aim is to improve the availability and cross-border exchange of certain works and other protected subject matter in accessible formats for persons who are blind, visually impaired or otherwise print-disabled. The Marrakesh Treaty requires contracting parties to provide for exceptions or limitations to copyright and related rights for the making and dissemination of copies, in accessible formats,

¹ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p. 20).

² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10).

³ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 376, 27.12.2006, p. 28).

⁴ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ L 111, 5.5.2009, p. 16).

⁵ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (OJ L 299, 27.10.2012, p. 5).

⁶ Council Decision 2014/221/EU of 14 April 2014 on the signing, on behalf of the European Union, of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled (OJ L 115, 17.4.2014, p. 1).

of certain works and other protected subject matter, and for the cross-border exchange of those copies. The conclusion of the Marrakesh Treaty by the Union requires the adaptation of Union law by establishing a mandatory and harmonised exception for uses, works and beneficiary persons covered by that treaty.

(5) According to Opinion 3/15 of the Court of Justice of the European Union ⁽¹⁾, the exceptions or limitations to copyright and related rights for the making and dissemination of copies, in accessible formats, of certain works and other subject matter, provided for by the Marrakesh Treaty, have to be implemented within the field harmonised by Directive 2001/29/EC.

(6) This Directive implements the obligations that the Union has to meet under the Marrakesh Treaty in a harmonised manner, with a view to ensuring that the corresponding measures are applied consistently throughout the internal market. This Directive should therefore provide for a mandatory exception to the rights that are harmonised by Union law and are relevant for the uses and works covered by the Marrakesh Treaty. Such rights include, in particular, the rights of reproduction, communication to the public, making available to the public, distribution and lending, as provided for in Directives 2001/29/EC, 2006/115/EC and 2009/24/EC, as well as the corresponding rights provided for in Directive 96/9/EC. As the scope of the exceptions or limitations required by the Marrakesh Treaty also includes works in audio form, like audiobooks, the mandatory exception provided for under this Directive should also apply to related rights.

(7) This Directive concerns persons who are blind, persons who have a visual impairment which cannot be improved so as to give them visual function substantially equivalent to that of a person who has no such impairment, persons who have a perceptual or reading disability, including dyslexia or any other learning disability preventing them from reading printed works to substantially the same degree as persons without such disability, and persons who are unable, due to a physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading, insofar as, as a result of such impairments or disabilities, those persons are unable to read printed works to substantially the same degree as persons without

¹ Opinion of the Court of Justice of 14 February 2017, 3/15, ECLI:EU:C:2017:114, paragraph 112.

such impairments or disabilities. This Directive therefore aims to improve the availability of books, including e-books, journals, newspapers, magazines and other kinds of writing, notation, including sheet music, and other printed material, including in audio form, whether digital or analogue, online or offline, in formats that make those works and other subject matter accessible to those persons to substantially the same degree as to persons without such impairment or disability. Accessible formats include, for example, Braille, large print, adapted e-books, audio books and radio broadcasts.

(8) The mandatory exception provided for in this Directive should limit the right of reproduction so as to allow for any act that is necessary in order to make changes to or convert or adapt a work or other subject matter in such a way as to produce an accessible format copy that makes it possible for beneficiary persons to access that work or other subject matter. This includes providing the necessary means to navigate information in an accessible format copy. It also includes changes that might be required in cases in which the format of a work or of other subject matter is already accessible to certain beneficiary persons while it might not be accessible to other beneficiary persons, due to different impairments or disabilities, or the different degree of such impairments or disabilities.

(9) The permitted uses laid down in this Directive should include the making of accessible format copies by either beneficiary persons or authorised entities serving their needs, whether those authorised entities be public or private organisations, in particular libraries, educational establishments and other non-profit organisations, that serve persons with a print disability as one of their primary activities, institutional obligations or as part of their public interest missions. The uses laid down in this Directive should also include the making of accessible format copies, for the exclusive use of beneficiary persons, by a natural person who does so on behalf of a beneficiary person or who assists the beneficiary person making such copies. Accessible format copies should only be made of works or other subject matter to which beneficiary persons or authorised entities have lawful access. Member States should ensure that any contractual provision which seeks to prevent or limit the application of the exception in any way is void of legal effect.

(10) The exception provided for in this Directive should allow

authorised entities to make and disseminate, online and offline within the Union, accessible format copies of works or other subject matter covered by this Directive. This Directive should not impose an obligation on authorised entities to make and disseminate such copies.

(11) It should be possible for accessible format copies made in one Member State to be available in all Member States, in order to ensure their greater availability across the internal market. This would reduce the demand for duplication of work in producing accessible format copies of one and the same work or other subject matter across the Union, thus generating savings and efficiency gains. This Directive should therefore ensure that accessible format copies made by authorised entities in any Member State can be circulated and accessed by beneficiary persons and authorised entities throughout the Union. In order to foster such cross-border exchange and to facilitate authorised entities' mutual identification and cooperation, the voluntary sharing of information regarding the names and contact details of authorised entities established in the Union, including websites if available, should be encouraged. Member States should therefore provide the information received from authorised entities to the Commission. This should not imply an obligation for Member States to check the completeness and accuracy of such information or its compliance with their national law transposing this Directive. Such information should be made available online by the Commission on a central information access point at Union level. This would also assist authorised entities, as well as beneficiary persons and rightholders in contacting authorised entities to receive further information, in line with the provisions set out in this Directive and in Regulation (EU) 2017/1563 of the European Parliament and of the Council ⁽¹⁾. The aforementioned central information access point should be complementary to the information access point to be established by the International Bureau of the World Intellectual Property Organisation (WIPO), as provided for in the Marrakesh Treaty, aiming to facilitate the identification of, and cooperation among, authorised entities at international level.

(12) In order to improve the availability of accessible format copies

¹ Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled (see page 1 of this Official Journal).

and to prevent the unauthorised dissemination of works or other subject matter, authorised entities which engage in the distribution, communication to the public or making available to the public of accessible format copies should comply with certain obligations.

(13) Authorisation or recognition requirements that Member States may apply to authorised entities, such as those relating to the provision of services of a general nature to beneficiary persons, should not have the effect of preventing entities that are covered by the definition of authorised entity under this Directive from undertaking the uses allowed under this Directive.

(14) In view of the specific nature of the exception provided for under this Directive, its specific scope and the need for legal certainty for its beneficiaries, Member States should not be allowed to impose additional requirements for the application of the exception, such as the prior verification of the commercial availability of works in accessible formats, other than those laid down in this Directive. Member States should only be allowed to provide for compensation schemes regarding the permitted uses of works or other subject matter by authorised entities. In order to avoid burdens for beneficiary persons, prevent barriers to the cross-border dissemination of accessible format copies and excessive requirements on authorised entities, it is important that the possibility for Member States to provide for such compensation schemes be limited. Consequently, compensation schemes should not require payments by beneficiary persons. They should only apply to uses by authorised entities established in the territory of the Member State providing for such a scheme, and they should not require payments by authorised entities established in other Member States or third countries that are parties to the Marrakesh Treaty. Member States should ensure that there are not more burdensome requirements for the crossborder exchange of accessible format copies under such compensation schemes than for non-cross border situations, including with regard to the form and possible level of compensation. When determining the level of compensation, due account should be taken of the non-profit nature of the activities of authorised entities, of the public interest objectives pursued by this Directive, of the interests of beneficiaries of the exception, of the possible harm to rightholders and of the need to ensure cross-border dissemination of accessible format copies. Account should also be taken of the particular circumstances of each case, resulting from

the making of a particular accessible format copy. Where the harm to a rightholder is minimal, no obligation for payment of compensation should arise.

(15) It is essential that any processing of personal data under this Directive respect fundamental rights, including the right to respect for private and family life and the right to protection of personal data under Articles 7 and 8 of the Charter, and it is imperative that any such processing also be in compliance with Directives 95/46/EC ⁽¹⁾ and 2002/58/EC ⁽²⁾ of the European Parliament and of the Council, which govern the processing of personal data, as may be carried out by authorised entities within the framework of this Directive and under the supervision of the Member States' competent authorities, in particular the public independent authorities designated by the Member States.

(16) The UNCRPD, to which the Union is a party, guarantees persons with disabilities the right of access to information and education and the right to participate in cultural, economic and social life, on an equal basis with others. The UNCRPD requires parties to the Convention to take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.

(17) Under the Charter, all forms of discrimination, including on grounds of disability, are prohibited and the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community is recognised and respected by the Union.

(18) With the adoption of this Directive, the Union aims to ensure that beneficiary persons have access to books and other printed material in accessible formats across the internal market. Accordingly, this

¹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31). That Directive will be repealed and replaced, with effect from 25 May 2018, by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

² Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

Directive is an essential first step in improving access to works for persons with disabilities.

(19) The Commission should assess the situation regarding the availability in accessible formats of works and other subject matter other than those covered by this Directive, as well as the availability of works and other subject matter in accessible formats for persons with other disabilities. It is important that the Commission review the situation in that regard closely. Changes to the scope of this Directive could be considered, if necessary, on the basis of a report presented by the Commission.

(20) Member States should be allowed to continue to provide for an exception or limitation for the benefit of persons with a disability in cases which are not covered by this Directive, in particular as regards works and other subject matter and disabilities other than those covered by this Directive, pursuant to point (b) of Article 5(3) of Directive 2001/29/EC. This Directive does not prevent Member States from providing for exceptions or limitations to rights that are not harmonised in the copyright framework of the Union.

(21) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter and the UNCRPD. This Directive should be interpreted and applied in accordance with those rights and principles.

(22) The Marrakesh Treaty imposes certain obligations regarding the exchange of accessible format copies between the Union and third countries that are parties to that Treaty. The measures taken by the Union to fulfil those obligations are contained in Regulation (EU) 2017/1563 which should be read in conjunction with this Directive.

(23) Since the objective of this Directive, namely to improve access in the Union to works and other subject matter protected by copyright and related rights for persons who are blind, visually impaired or otherwise print-disabled, cannot be sufficiently achieved by the Member States but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(24) In accordance with the Joint Political Declaration of 28

September 2011 of Member States and the Commission on explanatory documents ⁽¹⁾, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter and scope

This Directive aims to further harmonise Union law applicable to copyright and related rights in the framework of the internal market, by establishing rules on the use of certain works and other subject matter without the authorisation of the rightholder, for the benefit of persons who are blind, visually impaired or otherwise print-disabled.

Article 2

Definitions

For the purposes of this Directive the following definitions apply:

(1) ‘work or other subject matter’ means a work in the form of a book, journal, newspaper, magazine or other kind of writing, notation, including sheet music, and related illustrations, in any media, including in audio form such as audiobooks and in digital format, which is protected by copyright or related rights and which is published or otherwise lawfully made publicly available;

(2) ‘beneficiary person’ means, regardless of any other disabilities, a person who:

(a) is blind;

(b) has a visual impairment which cannot be improved so as to give the person visual function substantially equivalent to that of a person who has no such impairment, and who is, as a result, unable to read printed works to substantially the same degree as a person without such an impairment;

(c) has a perceptual or reading disability and is, as a result, unable to read printed works to substantially the same degree as a person

¹ OJ C 369, 17.12.2011, p. 14

without such disability; or

(d) is otherwise unable, due to a physical disability, to hold or manipulate a book or to focus or move their eyes to the extent that would be normally acceptable for reading.

(3) ‘accessible format copy’ means a copy of a work or other subject matter in an alternative manner or form that gives a beneficiary person access to the work or other subject matter, including allowing such person to have access as feasibly and comfortably as a person without any of the impairments or disabilities referred to in point 2;

(4) ‘authorised entity’ means an entity that is authorised or recognised by a Member State to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a public institution or non-profit organisation that provides the same services to beneficiary persons as one of its primary activities, institutional obligations or as part of its public-interest missions.

Article 3

Permitted uses

1. Member States shall provide for an exception to the effect that no authorisation of the rightholder of any copyright or related right in a work or other subject matter is required pursuant to Articles 5 and 7 of Directive 96/9/EC, Articles 2, 3 and 4 of Directive 2001/29/EC, Article 1(1), Article 8(2) and (3) and Article 9 of Directive 2006/115/EC and Article 4 of Directive 2009/24/EC for any act necessary for:

(a) a beneficiary person, or a person acting on their behalf, to make an accessible format copy of a work or other subject matter to which the beneficiary person has lawful access for the exclusive use of the beneficiary person; and

(b) an authorised entity to make an accessible format copy of a work or other subject matter to which it has lawful access, or to communicate, make available, distribute or lend an accessible format copy to a beneficiary person or another authorised entity on a non-profit basis for the purpose of exclusive use by a beneficiary person.

2. Member States shall ensure that each accessible format copy respects the integrity of the work or other subject matter, with due consideration given to the changes required to make the work or other subject matter accessible in the alternative format.

3. The exception provided for in paragraph 1 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.

4. The first, third and fifth subparagraphs of Article 6(4) of Directive 2001/29/EC shall apply to the exception provided for in paragraph 1 of this Article.

5. Member States shall ensure that the exception provided for in paragraph 1 cannot be overridden by contract.

6. Member States may provide that uses permitted under this Directive, if undertaken by authorised entities established in their territory, be subject to compensation schemes within the limits provided for in this Directive.

Article 4

Accessible format copies in the internal market

Member States shall ensure that an authorised entity established in their territory may carry out the acts referred to in point (b) of Article 3(1) for a beneficiary person or another authorised entity established in any Member State. Member States shall also ensure that a beneficiary person or an authorised entity established in their territory may obtain or may have access to an accessible format copy from an authorised entity established in any Member State.

Article 5

Obligations of authorised entities

1. Member States shall provide that an authorised entity established in their territory carrying out the acts referred to in Article 4 establishes and follows its own practices to ensure that it:

(a) distributes, communicates and makes available accessible format copies only to beneficiary persons or other authorised entities;

(b) takes appropriate steps to discourage the unauthorised reproduction, distribution, communication to the public or making available to the public of accessible format copies;

(c) demonstrates due care in, and maintains records of, its handling of works or other subject matter and of accessible format copies thereof; and

(d) publishes and updates, on its website if appropriate, or through

other online or offline channels, information on how it complies with the obligations laid down in points (a) to (c).

(e) Member States shall ensure that the practices referred to in the first subparagraph are established and followed in full respect of the rules applicable to the processing of personal data of beneficiary persons referred to in Article 7.

2. Member States shall ensure that an authorised entity established in their territory carrying out the acts referred to in Article 4 provides the following information in an accessible way, on request, to beneficiary persons, other authorised entities or rightholders:

(a) the list of works or other subject matter for which it has accessible format copies and the available formats; and

(b) the name and contact details of the authorised entities with which it has engaged in the exchange of accessible format copies pursuant to Article 4.

Article 6

Transparency and exchange of information

1. Member States shall encourage authorised entities established in their territory carrying out the acts referred to in Article 4 of this Directive and Articles 3 and 4 of Regulation (EU) 2017/1563 to communicate to them, on a voluntary basis, their names and contact details.

2. Member States shall provide the information they have received pursuant to paragraph 1 to the Commission. The Commission shall make such information publicly available online on a central information access point and keep it up to date.

Article 7

Protection of personal data

The processing of personal data carried out within the framework of this Directive shall be carried out in compliance with Directives 95/46/EC and 2002/58/EC.

Article 8

Amendment to Directive 2001/29/EC

In Article 5(3) of Directive 2001/29/EC, point (b) is replaced by the following:

(b) uses, for the benefit of people with a disability, which are directly related to the disability and of a noncommercial nature, to the extent required by the specific disability, without prejudice to the obligations of Member States under Directive (EU) 2017/1564 of the European Parliament and of the Council (1);

Article 9

Report

By 11 October 2020, the Commission shall present a report to the European Parliament, the Council and the European Economic and Social Committee on the availability, in accessible formats, of works and other subject matter other than those defined in point 1 of Article 2 for beneficiary persons, and of works and other subject matter for persons with disabilities other than those referred to in point 2 of Article 2, in the internal market. The report shall take into account developments concerning relevant technology and shall contain an assessment of the appropriateness of broadening the scope of this Directive in order to improve access to other types of works and other subject matter and to improve access for persons with disabilities other than those covered by this Directive.

Article 10

Review

1. By 11 October 2023, the Commission shall carry out an evaluation of this Directive and present the main findings in a report to the European Parliament, the Council and the European Economic and Social Committee, accompanied, where appropriate, by proposals for amending this Directive. Such evaluation shall include an assessment of the impact of compensation schemes, provided for by Member States pursuant to Article 3(6), on the availability of accessible format copies for beneficiary persons and on their cross-border exchange. The Commission's report shall take into account the views of relevant civil society actors and of non-governmental organisations, including organisations representing persons with disabilities and those

1 Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 242, 20.9.2017, p. 6).

representing older persons.

2. Member States shall provide the Commission with the necessary information for the preparation of the report referred to in paragraph 1 of this Article and the preparation of the report referred to in Article 9.

3. A Member State that has valid reasons to consider that the implementation of this Directive has had a significant negative impact on the commercial availability of works or other subject matter in accessible formats for beneficiary persons may bring the matter to the attention of the Commission providing all relevant evidence. The Commission shall take that evidence into account when drawing up the report referred to in paragraph 1.

Article 11

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 11 October 2018. They shall immediately inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main measures of national law which they adopt in the field covered by this Directive.

Article 12

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 13

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 13 September 2017.

**DIRECTIVE 2014/26/EU OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL
of 26 February 2014
on collective management of copyright and related rights and
multi-territorial licensing of rights in musical works for online
use in the internal market**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 50(1) and 53(1) and Article 62 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Acting in accordance with the ordinary legislative procedure ⁽²⁾,

Whereas:

(1) The Union Directives which have been adopted in the area of copyright and related rights already provide a high level of protection for rightholders and thereby a framework wherein the exploitation of content protected by those rights can take place. Those Directives contribute to the development and maintenance of creativity. In an internal market where competition is not distorted, protecting innovation and intellectual creation also encourages investment in innovative services and products.

(2) The dissemination of content which is protected by copyright and related rights, including books, audiovisual productions and recorded music, and services linked thereto, requires the licensing of rights by different holders of copyright and related rights, such as authors, performers, producers and publishers. It is normally for the rightholder to choose between the individual or collective management of his rights, unless Member States provide otherwise, in compliance with Union law and the international obligations of the Union and its Member States. Management of copyright and related rights includes granting of licences

¹ OJ C 44, 15.2.2013, p. 104.

² Position of the European Parliament of 4 February 2014 (not yet published in the Official Journal) and decision of the Council of 20 February 2014.

to users, auditing of users, monitoring of the use of rights, enforcement of copyright and related rights, collection of rights revenue derived from the exploitation of rights and the distribution of the amounts due to rightholders. Collective management organisations enable rightholders to be remunerated for uses which they would not be in a position to control or enforce themselves, including in non-domestic markets.

(3) Article 167 of the Treaty on the Functioning of the European Union (TFEU) requires the Union to take cultural diversity into account in its action and to contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore. Collective management organisations play, and should continue to play, an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services for the benefit of their rightholders and the public.

(4) When established in the Union, collective management organisations should be able to enjoy the freedoms provided by the Treaties when representing rightholders who are resident or established in other Member States or granting licences to users who are resident or established in other Member States.

(5) There are significant differences in the national rules governing the functioning of collective management organisations, in particular as regards their transparency and accountability to their members and rightholders. This has led in a number of instances to difficulties, in particular for non-domestic rightholders when they seek to exercise their rights, and to poor financial management of the revenues collected. Problems with the functioning of collective management organisations lead to inefficiencies in the exploitation of copyright and related rights across the internal market, to the detriment of the members of collective management organisations, rightholders and users.

(6) The need to improve the functioning of collective management organisations has already been identified in Commission Recommendation 2005/737/EC ⁽¹⁾. That Recommendation set out a number of principles, such as the freedom of rightholders to choose their

¹ Commission Recommendation 2005/737/EC of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (OJ L 276, 21.10.2005, p. 54).

collective management organisations, equal treatment of categories of rightholders and equitable distribution of royalties. It called on collective management organisations to provide users with sufficient information on tariffs and repertoire in advance of negotiations between them. It also contained recommendations on accountability, rightholder representation in the decision-making bodies of collective management organisations and dispute resolution. However, the Recommendation has been unevenly followed.

(7) The protection of the interests of the members of collective management organisations, rightholders and third parties requires that the laws of the Member States relating to copyright management and multi-territorial licensing of online rights in musical works should be coordinated with a view to having equivalent safeguards throughout the Union. Therefore, this Directive should have as a legal base Article 50(1) TFEU.

(8) The aim of this Directive is to provide for coordination of national rules concerning access to the activity of managing copyright and related rights by collective management organisations, the modalities for their governance, and their supervisory framework, and it should therefore also have as a legal base Article 53(1) TFEU. In addition, since it is concerned with a sector offering services across the Union, this Directive should have as a legal base Article 62 TFEU.

(9) The aim of this Directive is to lay down requirements applicable to collective management organisations, in order to ensure a high standard of governance, financial management, transparency and reporting. This should not, however, prevent Member States from maintaining or imposing, in relation to collective management organisations established in their territories, more stringent standards than those laid down in Title II of this Directive, provided that such more stringent standards are compatible with Union law.

(10) Nothing in this Directive should preclude a Member State from applying the same or similar provisions to collective management organisations which are established outside the Union but which operate in that Member State.

(11) Nothing in this Directive should preclude collective management organisations from concluding representation agreements with other collective management organisations — in compliance with the competition rules laid down by Articles 101 and 102 TFEU — in the

area of rights management in order to facilitate, improve and simplify the procedures for granting licences to users, including for the purposes of single invoicing, under equal, non-discriminatory and transparent conditions, and to offer multi-territorial licences also in areas other than those referred to in Title III of this Directive

(12) This Directive, while applying to all collective management organisations, with the exception of Title III, which applies only to collective management organisations managing authors' rights in musical works for online use on a multi-territorial basis, does not interfere with arrangements concerning the management of rights in the Member States such as individual management, the extended effect of an agreement between a representative collective management organisation and a user, i.e. extended collective licensing, mandatory collective management, legal presumptions of representation and transfer of rights to collective management organisations.

(13) This Directive does not affect the possibility for Member States to determine by law, by regulation or by any other specific mechanism to that effect, rightholders' fair compensation for exceptions or limitations to the reproduction right provided for in Directive 2001/29/EC of the European Parliament and of the Council ⁽¹⁾ and rightholders' remuneration for derogations from the exclusive right in respect of public lending provided for in Directive 2006/115/EC of the European Parliament and of the Council ⁽²⁾ applicable in their territory as well as the conditions applicable for their collection.

(14) This Directive does not require collective management organisations to adopt a specific legal form. In practice, those organisations operate in various legal forms such as associations, cooperatives or limited liability companies, which are controlled or owned by holders of copyright and related rights or by entities representing such rightholders. In some exceptional cases, however, due to the legal form of a collective management organisation, the element of ownership or control is not present. This is, for example, the case for foundations, which do not have members. None the less, the provisions

¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10).

² Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 376, 27.12.2006, p. 28).

of this Directive should also apply to those organisations. Similarly, Member States should take appropriate measures to prevent the circumvention of the obligations under this Directive through the choice of legal form. It should be noted that entities which represent rightholders, and which are members of collective management organisations, may be other collective management organisations, associations of rightholders, unions or other organisations.

(15) Rightholders should be free to entrust the management of their rights to independent management entities. Such independent management entities are commercial entities which differ from collective management organisations, *inter alia*, because they are not owned or controlled by rightholders. However, to the extent that such independent management entities carry out the same activities as collective management organisations, they should be obliged to provide certain information to the rightholders they represent, collective management organisations, users and the public.

(16) Audiovisual producers, record producers and broadcasters license their own rights, in certain cases alongside rights that have been transferred to them by, for instance, performers, on the basis of individually negotiated agreements, and act in their own interest. Book, music or newspaper publishers license rights that have been transferred to them on the basis of individually negotiated agreements and act in their own interest. Therefore audiovisual producers, record producers, broadcasters and publishers should not be regarded as ‘independent management entities’. Furthermore, authors’ and performers’ managers and agents acting as intermediaries and representing rightholders in their relations with collective management organisations should not be regarded as ‘independent management entities’ since they do not manage rights in the sense of setting tariffs, granting licences or collecting money from users.

(17) Collective management organisations should be free to choose to have certain of their activities, such as the invoicing of users or the distribution of amounts due to rightholders, carried out by subsidiaries or by other entities that they control. In such cases, those provisions of this Directive that would be applicable if the relevant activity were carried out directly by a collective management organisation should be applicable to the activities of the subsidiaries or other entities.

(18) In order to ensure that holders of copyright and related rights can benefit fully from the internal market when their rights are being managed collectively and that their freedom to exercise their rights is not unduly affected, it is necessary to provide for the inclusion of appropriate safeguards in the statute of collective management organisations. Moreover, a collective management organisation should not, when providing its management services, discriminate directly or indirectly between rightholders on the basis of their nationality, place of residence or place of establishment.

(19) Having regard to the freedoms established in the TFEU, collective management of copyright and related rights should entail a rightholder being able freely to choose a collective management organisation for the management of his rights, whether those rights be rights of communication to the public or reproduction rights, or categories of rights related to forms of exploitation such as broadcasting, theatrical exhibition or reproduction for online distribution, provided that the collective management organisation that the rightholder wishes to choose already manages such rights or categories of rights.

The rights, categories of rights or types of works and other subject-matter managed by the collective management organisation should be determined by the general assembly of members of that organisation if they are not already determined in its statute or prescribed by law. It is important that the rights and categories of rights be determined in a manner that maintains a balance between the freedom of rightholders to dispose of their works and other subject-matter and the ability of the organisation to manage the rights effectively, taking into account in particular the category of rights managed by the organisation and the creative sector in which it operates. Taking due account of that balance, rightholders should be able easily to withdraw such rights or categories of rights from a collective management organisation and to manage those rights individually or to entrust or transfer the management of all or part of them to another collective management organisation or another entity, irrespective of the Member State of nationality, residence or establishment of the collective management organisation, the other entity or the rightholder. Where a Member State, in compliance with Union law and the international obligations of the Union and its Member States, provides for mandatory collective management of rights,

rightholders' choice would be limited to other collective management organisations.

Collective management organisations managing different types of works and other subject-matter, such as literary, musical or photographic works, should also allow this flexibility to rightholders as regards the management of different types of works and other subject-matter. As far as non-commercial uses are concerned, Member States should provide that collective management organisations take the necessary steps to ensure that their rightholders can exercise the right to grant licences for such uses. Such steps should include, inter alia, a decision by the collective management organisation on the conditions attached to the exercise of that right as well as the provision to their members of information on those conditions. Collective management organisations should inform rightholders of their choices and allow them to exercise the rights related to those choices as easily as possible. Rightholders who have already authorised the collective management organisation may be informed via the website of the organisation. A requirement for the consent of rightholders in the authorisation to the management of each right, category of rights or type of works and other subject-matter should not prevent the rightholders from accepting proposed subsequent amendments to that authorisation by tacit agreement in accordance with the conditions set out in national law. Neither contractual arrangements according to which a termination or withdrawal by rightholders has an immediate effect on licences granted prior to such termination or withdrawal, nor contractual arrangements according to which such licences remain unaffected for a certain period of time after such termination or withdrawal, are, as such, precluded by this Directive. Such arrangements should not, however, create an obstacle to the full application of this Directive. This Directive should not prejudice the possibility for rightholders to manage their rights individually, including for non-commercial uses.

(20) Membership of collective management organisations should be based on objective, transparent and non-discriminatory criteria, including as regards publishers who by virtue of an agreement on the exploitation of rights are entitled to a share of the income from the rights managed by collective management organisations and to collect such income from the collective management organisations. Those criteria should not oblige collective management organisations to accept

members the management of whose rights, categories of rights or types of works or other subject-matter falls outside their scope of activity. The records kept by a collective management organisation should allow for the identification and location of its members and rightholders whose rights the organisation represents on the basis of authorisations given by those rightholders.

(21) In order to protect those rightholders whose rights are directly represented by the collective management organisation but who do not fulfil its membership requirements, it is appropriate to require that certain provisions of this Directive relating to members be also applied to such rightholders. Member States should be able also to provide such rightholders with rights to participate in the decision-making process of the collective management organisation.

(22) Collective management organisations should act in the best collective interests of the rightholders they represent. It is therefore important to provide for systems which enable the members of a collective management organisation to exercise their membership rights by participating in the organisation's decision-making process. Some collective management organisations have different categories of members, which may represent different types of rightholders, such as producers and performers. The representation in the decision-making process of those different categories of members should be fair and balanced. The effectiveness of the rules on the general assembly of members of collective management organisations would be undermined if there were no provisions on how the general assembly should be run. Thus, it is necessary to ensure that the general assembly is convened regularly, and at least annually, and that the most important decisions in the collective management organisation are taken by the general assembly.

(23) All members of collective management organisations should be allowed to participate and vote in the general assembly of members. The exercise of those rights should be subject only to fair and proportionate restrictions. In some exceptional cases, collective management organisations are established in the legal form of a foundation, and thus have no members. In such cases, the powers of the general assembly of members should be exercised by the body entrusted with the supervisory function. Where collective management organisations have entities representing rightholders as their members, as may be the case where a

collective management organisation is a limited liability company and its members are associations of rightholders, Member States should be able to provide that some or all powers of the general assembly of members are to be exercised by an assembly of those rightholders. The general assembly of members should, at least, have the power to set the framework of the activities of the management, in particular with respect to the use of rights revenue by the collective management organisation. This should, however, be without prejudice to the possibility for Member States to provide for more stringent rules on, for example, investments, mergers or taking out loans, including a prohibition on any such transactions. Collective management organisations should encourage the active participation of their members in the general assembly. The exercise of voting rights should be facilitated for members who attend the general assembly and also for those who do not. In addition to being able to exercise their rights by electronic means, members should be allowed to participate and vote in the general assembly of members through a proxy. Proxy voting should be restricted in cases of conflicts of interest. At the same time, Member States should provide for restrictions as regards proxies only if this does not prejudice the appropriate and effective participation of members in the decision-making process. In particular, the appointment of proxy-holders contributes to the appropriate and effective participation of members in the decision-making process and allows rightholders to have a true opportunity to opt for a collective management organisation of their choice, irrespective of the Member State of establishment of the organisation.

(24) Members should be allowed to participate in the continuous monitoring of the management of collective management organisations. To that end, those organisations should have a supervisory function appropriate to their organisational structure and should allow members to be represented in the body that exercises that function. Depending on the organisational structure of the collective management organisation, the supervisory function may be exercised by a separate body, such as a supervisory board, or by some or all of the directors in the administrative board who do not manage the business of the collective management organisation. The requirement of fair and balanced representation of members should not prevent the collective management organisation from appointing third parties to exercise the supervisory function, including persons with relevant professional expertise and rightholders

who do not fulfil the membership requirements or who are represented by the organisation not directly but via an entity which is a member of the collective management organisation.

(25) For reasons of sound management, the management of a collective management organisation must be independent. Managers, whether elected as directors or hired or employed by the organisation on the basis of a contract, should be required to declare, prior to taking up their position and thereafter on a yearly basis, whether there are conflicts between their interests and those of the rightholders that are represented by the collective management organisation. Such annual statements should be also made by persons exercising the supervisory function. Member States should be free to require collective management organisations to make such statements public or to submit them to public authorities.

(26) Collective management organisations collect, manage and distribute revenue from the exploitation of the rights entrusted to them by rightholders. That revenue is ultimately due to rightholders, who may have a direct legal relationship with the organisation, or may be represented via an entity which is a member of the collective management organisation or via a representation agreement. It is therefore important that a collective management organisation exercise the utmost diligence in collecting, managing and distributing that revenue. Accurate distribution is only possible where the collective management organisation maintains proper records of membership, licences and use of works and other subject-matter. Relevant data that are required for the efficient collective management of rights should also be provided by rightholders and users and verified by the collective management organisation.

(27) Amounts collected and due to rightholders should be kept separately in the accounts from any own assets the organisation may have. Without prejudice to the possibility for Member States to provide for more stringent rules on investment, including a prohibition of investment of the rights revenue, where such amounts are invested, this should be carried out in accordance with the general investment and risk management policy of the collective management organisation. In order to maintain a high level of protection of the rights of rightholders and to ensure that any income that may arise from the exploitation of such rights accrues to their benefit, the investments made and held by the

collective management organisation should be managed in accordance with criteria which would oblige the organisation to act prudently, while allowing it to decide on the most secure and efficient investment policy. This should allow the collective management organisation to opt for an asset allocation that suits the precise nature and duration of any exposure to risk of any rights revenue invested and does not unduly prejudice any rights revenue owed to rightholders.

(28) Since rightholders are entitled to be remunerated for the exploitation of their rights, it is important that management fees do not exceed justified costs of the management of the rights and that any deduction other than in respect of management fees, for example a deduction for social, cultural or educational purposes, should be decided by the members of the collective management organisation. The collective management organisations should be transparent towards rightholders regarding the rules governing such deductions. The same requirements should apply to any decision to use the rights revenue for collective distribution, such as scholarships. Rightholders should have access, on a non-discriminatory basis, to any social, cultural or educational service funded through such deductions. This Directive should not affect deductions under national law, such as deductions for the provision of social services by collective management organisations to rightholders, as regards any aspects that are not regulated by this Directive, provided that such deductions are in compliance with Union law.

(29) The distribution and payment of amounts due to individual rightholders or, as the case may be, to categories of rightholders, should be carried out in a timely manner and in accordance with the general policy on distribution of the collective management organisation concerned, including when they are performed via another entity representing the rightholders. Only objective reasons beyond the control of a collective management organisation can justify delay in the distribution and payment of amounts due to rightholders. Therefore, circumstances such as the rights revenue having been invested subject to a maturity date should not qualify as valid reasons for such a delay. It is appropriate to leave it to Member States to decide on rules ensuring timely distribution and the effective search for, and identification of, rightholders in cases where such objective reasons occur. In order to ensure that the amounts due to rightholders are appropriately and

effectively distributed, without prejudice to the possibility for Member States to provide for more stringent rules, it is necessary to require collective management organisations to take reasonable and diligent measures, on the basis of good faith, to identify and locate the relevant rightholders. It is also appropriate that members of a collective management organisation, to the extent allowed for under national law, should decide on the use of any amounts that cannot be distributed in situations where rightholders entitled to those amounts cannot be identified or located.

(30) Collective management organisations should be able to manage rights and collect revenue from their exploitation under representation agreements with other organisations. To protect the rights of the members of the other collective management organisation, a collective management organisation should not distinguish between the rights it manages under representation agreements and those it manages directly for its rightholders. Nor should the collective management organisation be allowed to apply deductions to the rights revenue collected on behalf of another collective management organisation, other than deductions in respect of management fees, without the express consent of the other organisation. It is also appropriate to require collective management organisations to distribute and make payments to other organisations on the basis of such representation agreements no later than when they distribute and make payments to their own members and to non-member rightholders whom they represent. Furthermore, the recipient organisation should in turn be required to distribute the amounts due to the rightholders it represents without delay.

(31) Fair and non-discriminatory commercial terms in licensing are particularly important to ensure that users can obtain licences for works and other subject-matter in respect of which a collective management organisation represents rights, and to ensure the appropriate remuneration of rightholders. Collective management organisations and users should therefore conduct licensing negotiations in good faith and apply tariffs which should be determined on the basis of objective and non-discriminatory criteria. It is appropriate to require that the licence fee or remuneration determined by collective management organisations be reasonable in relation to, inter alia, the economic value of the use of the rights in a particular context. Finally, collective management

organisations should respond without undue delay to users' requests for licences.

(32) In the digital environment, collective management organisations are regularly required to license their repertoire for totally new forms of exploitation and business models. In such cases, and in order to foster an environment conducive to the development of such licences, without prejudice to the application of competition law rules, collective management organisations should have the flexibility required to provide, as swiftly as possible, individualised licences for innovative online services, without the risk that the terms of those licences could be used as a precedent for determining the terms for other licences.

(33) In order to ensure that collective management organisations can comply with the obligations set out in this Directive, users should provide those organisations with relevant information on the use of the rights represented by the collective management organisations. This obligation should not apply to natural persons acting for purposes outside their trade, business, craft or profession, who therefore fall outside the definition of user as laid down in this Directive. Moreover, the information required by collective management organisations should be limited to what is reasonable, necessary and at the users' disposal in order to enable such organisations to perform their functions, taking into account the specific situation of small and medium-sized enterprises. That obligation could be included in an agreement between a collective management organisation and a user; this does not preclude national statutory rights to information. The deadlines applicable to the provision of information by users should be such as to allow collective management organisations to meet the deadlines set for the distribution of amounts due to rightholders. This Directive should be without prejudice to the possibility for Member States to require collective management organisations established in their territory to issue joint invoices.

(34) In order to enhance the trust of rightholders, users and other collective management organisations in the management of rights by collective management organisations, each collective management organisation should comply with specific transparency requirements. Each collective management organisation or its member being an entity responsible for attribution or payment of amounts due to rightholders should therefore be required to provide certain information to individual rightholders at least once a year, such as the amounts attributed or paid

to them and the deductions made. Collective management organisations should also be required to provide sufficient information, including financial information, to the other collective management organisations whose rights they manage under representation agreements.

(35) In order to ensure that rightholders, other collective management organisations and users have access to information on the scope of activity of the organisation and the works or other subject-matter that it represents, a collective management organisation should provide information on those issues in response to a duly justified request. The question whether, and to what extent, reasonable fees can be charged for providing this service should be left to national law. Each collective management organisation should also make public information on its structure and on the way in which it carries out its activities, including in particular its statutes and general policies on management fees, deductions and tariffs.

(36) In order to ensure that rightholders are in a position to monitor and compare the respective performances of collective management organisations, such organisations should make public an annual transparency report comprising comparable audited financial information specific to their activities. Collective management organisations should also make public an annual special report, forming part of the annual transparency report, on the use of amounts dedicated to social, cultural and educational services. This Directive should not prevent a collective management organisation from publishing the information required by the annual transparency report in a single document, for example as part of its annual financial statements, or in separate reports.

(37) Providers of online services which make use of musical works, such as music services that allow consumers to download music or to listen to it in streaming mode, as well as other services providing access to films or games where music is an important element, must first obtain the right to use such works. Directive 2001/29/EC requires that a licence be obtained for each of the rights in the online exploitation of musical works. In respect of authors, those rights are the exclusive right of reproduction and the exclusive right of communication to the public of musical works, which includes the right of making available. Those rights may be managed by the individual rightholders themselves, such as authors or music publishers, or by collective management

organisations that provide collective management services to rightholders. Different collective management organisations may manage authors' rights of reproduction and communication to the public. Furthermore, there are cases where several rightholders have rights in the same work and may have authorised different organisations to license their respective shares of rights in the work. Any user wishing to provide an online service offering a wide choice of musical works to consumers needs to aggregate rights in works from different rightholders and collective management organisations.

(38) While the internet knows no borders, the online market for music services in the Union is still fragmented, and a digital single market has not yet been fully achieved. The complexity and difficulty associated with the collective management of rights in Europe has, in a number of cases, exacerbated the fragmentation of the European digital market for online music services. This situation is in stark contrast to the rapidly growing demand on the part of consumers for access to digital content and associated innovative services, including across national borders.

(39) Commission Recommendation 2005/737/EC promoted a new regulatory environment better suited to the management, at Union level, of copyright and related rights for the provision of legitimate online music services. It recognised that, in an era of online exploitation of musical works, commercial users need a licensing policy that corresponds to the ubiquity of the online environment and is multi-territorial. However, the Recommendation has not been sufficient to encourage the widespread multi-territorial licensing of online rights in musical works or to address the specific demands of multi-territorial licensing.

(40) In the online music sector, where collective management of authors' rights on a territorial basis remains the norm, it is essential to create conditions conducive to the most effective licensing practices by collective management organisations in an increasingly cross-border context. It is therefore appropriate to provide a set of rules prescribing basic conditions for the provision by collective management organisations of multi-territorial collective licensing of authors' rights in musical works for online use, including lyrics. The same rules should apply to such licensing for all musical works, including musical works incorporated in audiovisual works. However, online services solely providing access to musical works in sheet music form should not be

covered. The provisions of this Directive should ensure the necessary minimum quality of cross-border services provided by collective management organisations, notably in terms of transparency of repertoire represented and accuracy of financial flows related to the use of the rights. They should also set out a framework for facilitating the voluntary aggregation of music repertoire and rights, thus reducing the number of licences a user needs to operate a multi-territory, multi-repertoire service. Those provisions should enable a collective management organisation to request another organisation to represent its repertoire on a multi-territorial basis where it cannot or does not wish to fulfil the requirements itself. There should be an obligation on the requested organisation, provided that it already aggregates repertoire and offers or grants multi-territorial licences, to accept the mandate of the requesting organisation. The development of legal online music services across the Union should also contribute to the fight against online infringements of copyright.

(41) The availability of accurate and comprehensive information on musical works, rightholders and the rights that each collective management organisation is authorised to represent in a given territory is of particular importance for an effective and transparent licensing process, for the subsequent processing of the users' reports and the related invoicing of service providers, and for the distribution of amounts due. For that reason, collective management organisations granting multi-territorial licences for musical works should be able to process such detailed data quickly and accurately. This requires the use of databases on ownership of rights that are licensed on a multi-territorial basis, containing data that allow for the identification of works, rights and rightholders that a collective management organisation is authorised to represent and of the territories covered by the authorisation. Any changes to that information should be taken into account without undue delay and the databases should be continually updated. Those databases should also help to match information on works with information on phonograms or any other fixation in which the work has been incorporated. It is also important to ensure that prospective users and rightholders, as well as collective management organisations, have access to the information they need in order to identify the repertoire that those organisations are representing. Collective management organisations should be able to take measures to protect the accuracy

and integrity of the data, to control their reuse or to protect commercially sensitive information.

(42) In order to ensure that the data on the music repertoire they process are as accurate as possible, collective management organisations granting multi-territorial licences in musical works should be required to update their databases continuously and without delay as necessary. They should establish easily accessible procedures to enable online service providers, as well as rightholders and other collective management organisations, to inform them of any inaccuracy that the organisations' databases may contain in respect of works they own or control, including rights — in whole or in part — and territories for which they have mandated the relevant collective management organisation to act, without however jeopardising the veracity and integrity of the data held by the collective management organisation. Since Directive 95/46/EC of the European Parliament and of the Council ⁽¹⁾ grants to every data subject the right to obtain rectification, erasure or blocking of inaccurate or incomplete data, this Directive should also ensure that inaccurate information regarding rightholders or other collective management organisations in the case of multi-territorial licences is to be corrected without undue delay. Collective management organisations should also have the capacity to process electronically the registration of works and authorisations to manage rights. Given the importance of information automation for the fast and effective processing of data, collective management organisations should provide for the use of electronic means for the structured communication of that information by rightholders. Collective management organisations should, as far as possible, ensure that such electronic means take into account the relevant voluntary industry standards or practices developed at international or Union level.

(43) Industry standards for music use, sales reporting and invoicing are instrumental in improving efficiency in the exchange of data between collective management organisations and users. Monitoring the use of licences should respect fundamental rights, including the right to respect for private and family life and the right to protection of personal data. In order to ensure that these efficiency gains result in faster financial

¹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

processing and ultimately in earlier payments to rightholders, collective management organisations should be required to invoice service providers and to distribute amounts due to rightholders without delay. For this requirement to be effective, it is necessary that users provide collective management organisations with accurate and timely reports on the use of works. Collective management organisations should not be required to accept users' reports in proprietary formats when widely used industry standards are available. Collective management organisations should not be prevented from outsourcing services relating to the granting of multi-territorial licences for online rights in musical works. Sharing or consolidation of back-office capabilities should help the organisations to improve management services and rationalise investments in data management tools.

(44) Aggregating different music repertoires for multi-territorial licensing facilitates the licensing process and, by making all repertoires accessible to the market for multi-territorial licensing, enhances cultural diversity and contributes to reducing the number of transactions an online service provider needs in order to offer services. This aggregation of repertoires should facilitate the development of new online services, and should also result in a reduction of transaction costs being passed on to consumers. Therefore, collective management organisations that are not willing or not able to grant multi-territorial licences directly in their own music repertoire should be encouraged on a voluntary basis to mandate other collective management organisations to manage their repertoire on a non-discriminatory basis. Exclusivity in agreements on multi-territorial licences would restrict the choices available to users seeking multi-territorial licences and also restrict the choices available to collective management organisations seeking administration services for their repertoire on a multi-territorial basis. Therefore, all representation agreements between collective management organisations providing for multi-territorial licensing should be concluded on a non-exclusive basis.

(45) The transparency of the conditions under which collective management organisations manage online rights is of particular importance to members of collective management organisations. Collective management organisations should therefore provide sufficient information to their members on the main terms of any agreement mandating any other collective management organisation to represent

those members' online music rights for the purposes of multi-territorial licensing.

(46) It is also important to require any collective management organisations that offer or grant multi-territorial licences to agree to represent the repertoire of any collective management organisations that decide not to do so directly. To ensure that this requirement is not disproportionate and does not go beyond what is necessary, the requested collective management organisation should only be required to accept the representation if the request is limited to the online right or categories of online rights that it represents itself. Moreover, this requirement should only apply to collective management organisations which aggregate repertoire and should not extend to collective management organisations which provide multi-territorial licences for their own repertoire only. Nor should it apply to collective management organisations which merely aggregate rights in the same works for the purpose of being able to license jointly both the right of reproduction and the right of communication to the public in respect of such works. To protect the interests of the rightholders of the mandating collective management organisation and to ensure that small and less well-known repertoires in Member States can access the internal market on equal terms, it is important that the repertoire of the mandating collective management organisation be managed on the same conditions as the repertoire of the mandated collective management organisation and that it is included in offers addressed by the mandated collective management organisation to online service providers. The management fee charged by the mandated collective management organisation should allow that organisation to recoup the necessary and reasonable investments incurred. Any agreement whereby a collective management organisation mandates another organisation or organisations to grant multi-territorial licences in its own music repertoire for online use should not prevent the first-mentioned collective management organisation from continuing to grant licences limited to the territory of the Member State where that organisation is established, in its own repertoire and in any other repertoire it may be authorised to represent in that territory.

(47) The objectives and effectiveness of the rules on multi-territorial licensing by collective management organisations would be significantly jeopardised if rightholders were not able to exercise such rights in respect of multi-territorial licences when the collective management

organisation to which they have granted their rights did not grant or offer multi-territorial licences and furthermore did not want to mandate another collective management organisation to do so. For this reason, it would be important in such circumstances to enable rightholders to exercise the right to grant the multi-territorial licences required by online service providers themselves or through another party or parties, by withdrawing from their original collective management organisation their rights to the extent necessary for multi-territorial licensing for online uses, and to leave the same rights with their original organisation for the purposes of mono-territorial licensing.

(48) Broadcasting organisations generally rely on a licence from a local collective management organisation for their own broadcasts of television and radio programmes which include musical works. That licence is often limited to broadcasting activities. A licence for online rights in musical works would be required in order to allow such television or radio broadcasts to be also available online. To facilitate the licensing of online rights in musical works for the purposes of simultaneous and delayed transmission online of television and radio broadcasts, it is necessary to provide for a derogation from the rules that would otherwise apply to the multi-territorial licensing of online rights in musical works. Such a derogation should be limited to what is necessary in order to allow access to television or radio programmes online and to material having a clear and subordinate relationship to the original broadcast produced for purposes such as supplementing, previewing or reviewing the television or radio programme concerned. That derogation should not operate so as to distort competition with other services which give consumers access to individual musical or audiovisual works online, nor lead to restrictive practices, such as market or customer sharing, which would be in breach of Article 101 or 102 TFEU.

(49) It is necessary to ensure the effective enforcement of the provisions of national law adopted pursuant to this Directive. Collective management organisations should offer their members specific procedures for handling complaints. Those procedures should also be made available to other rightholders directly represented by the organisation and to other collective management organisations on whose behalf it manages rights under a representation agreement. Furthermore, Member States should be able to provide that disputes

between collective management organisations, their members, rightholders or users as to the application of this Directive can be submitted to a rapid, independent and impartial alternative dispute resolution procedure. In particular, the effectiveness of the rules on multi-territorial licensing of online rights in musical works could be undermined if disputes between collective management organisations and other parties were not resolved quickly and efficiently. As a result, it is appropriate to provide, without prejudice to the right of access to a tribunal, for the possibility of easily accessible, efficient and impartial out-of-court procedures, such as mediation or arbitration, for resolving conflicts between, on the one hand, collective management organisations granting multi-territorial licences and, on the other, online service providers, rightholders or other collective management organisations. This Directive neither prescribes a specific manner in which such alternative dispute resolution should be organised, nor determines which body should carry it out, provided that its independence, impartiality and efficiency are guaranteed. Finally, it is also appropriate to require that Member States have independent, impartial and effective dispute resolution procedures, via bodies possessing expertise in intellectual property law or via courts, suitable for settling commercial disputes between collective management organisations and users on existing or proposed licensing conditions or on a breach of contract.

(50) Member States should establish appropriate procedures by means of which it will be possible to monitor compliance by collective management organisations with this Directive. While it is not appropriate for this Directive to restrict the choice of Member States as to competent authorities, nor as regards the *ex-ante* or *ex-post* nature of the control over collective management organisations, it should be ensured that such authorities are capable of addressing in an effective and timely manner any concern that may arise in the application of this Directive. Member States should not be obliged to set up new competent authorities. Moreover, it should also be possible for members of a collective management organisation, rightholders, users, collective management organisations and other interested parties to notify a competent authority in respect of activities or circumstances which, in their opinion, constitute a breach of law by collective management organisations and, where relevant, users. Member States should ensure that competent authorities have the power to impose sanctions or

measures where provisions of national law implementing this Directive are not complied with. This Directive does not provide for specific types of sanctions or measures, provided that they are effective, proportionate and dissuasive. Such sanctions or measures may include orders to dismiss directors who have acted negligently, inspections at the premises of a collective management organisation or, in cases where an authorisation is issued for an organisation to operate, the withdrawal of such authorisation. This Directive should remain neutral as regards the prior authorisation and supervision regimes in the Member States, including a requirement for the representativeness of the collective management organisation, in so far as those regimes are compatible with Union law and do not create an obstacle to the full application of this Directive.

(51) In order to ensure that the requirements for multi-territorial licensing are complied with, specific provisions on the monitoring of their implementation should be laid down. The competent authorities of the Member States and the Commission should cooperate with each other to that end. Member States should provide each other with mutual assistance by way of exchange of information between their competent authorities in order to facilitate the monitoring of collective management organisations.

(52) It is important for collective management organisations to respect the rights to private life and personal data protection of any rightholder, member, user and other individual whose personal data they process. Directive 95/46/EC governs the processing of personal data carried out in the Member States in the context of that Directive and under the supervision of the Member States' competent authorities, in particular the public independent authorities designated by the Member States. Rightholders should be given appropriate information about the processing of their data, the recipients of those data, time limits for the retention of such data in any database, and the way in which rightholders can exercise their rights to access, correct or delete their personal data concerning them in accordance with Directive 95/46/EC. In particular, unique identifiers which allow for the indirect identification of a person should be treated as personal data within the meaning of that Directive.

(53) Provisions on enforcement measures should be without prejudice to the competencies of national independent public authorities

established by the Member States pursuant to Directive 95/46/EC to monitor compliance with national provisions adopted in implementation of that Directive.

(54) This Directive respects the fundamental rights and observes the principles enshrined in the Charter of Fundamental Rights of the European Union ('the Charter'). Provisions in this Directive relating to dispute resolution should not prevent parties from exercising their right of access to a tribunal as guaranteed in the Charter.

(55) Since the objectives of this Directive, namely to improve the ability of their members to exercise control over the activities of collective management organisations, to guarantee sufficient transparency by collective management organisations and to improve the multi-territorial licensing of authors' rights in musical works for online use, cannot be sufficiently achieved by Member States but can rather, by reason of their scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives

(56) The provisions of this Directive are without prejudice to the application of rules on competition, and any other relevant law in other areas including confidentiality, trade secrets, privacy, access to documents, the law of contract and private international law relating to the conflict of laws and the jurisdiction of courts, and workers' and employers' freedom of association and their right to organise.

(57) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents ⁽¹⁾, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified. The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 of the European Parliament and of the

¹ OJ C 369, 17.12.2011, p. 14

Council ⁽¹⁾ and delivered an opinion on 9 October 2012, HAVE ADOPTED THIS DIRECTIVE:

TITLE I. GENERAL PROVISIONS

Article 1

Subject-matter

This Directive lays down requirements necessary to ensure the proper functioning of the management of copyright and related rights by collective management organisations. It also lays down requirements for multi-territorial licensing by collective management organisations of authors' rights in musical works for online use.

Article 2

Scope

1. Titles I, II, IV and V with the exception of Article 34(2) and Article 38 apply to all collective management organisations established in the Union.

2. Title III and Article 34(2) and Article 38 apply to collective management organisations established in the Union managing authors' rights in musical works for online use on a multi-territorial basis.

3. The relevant provisions of this Directive apply to entities directly or indirectly owned or controlled, wholly or in part, by a collective management organisation, provided that such entities carry out an activity which, if carried out by the collective management organisation, would be subject to the provisions of this Directive.

4. Article 16(1), Articles 18 and 20, points (a), (b), (c), (e), (f) and (g) of Article 21(1) and Articles 36 and 42 apply to all independent management entities established in the Union.

¹ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1)

Article 3
Definitions

For the purposes of this Directive, the following definitions shall apply:

(a) ‘collective management organisation’ means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils one or both of the following criteria:

- (i) it is owned or controlled by its members;
- (ii) it is organised on a not-for-profit basis;

(b) ‘independent management entity’ means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which is:

- (i) neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and
- (ii) organised on a for-profit basis;

(c) ‘rightholder’ means any person or entity, other than a collective management organisation, that holds a copyright or related right or, under an agreement for the exploitation of rights or by law, is entitled to a share of the rights revenue;

(d) ‘member’ means a rightholder or an entity representing rightholders, including other collective management organisations and associations of rightholders, fulfilling the membership requirements of the collective management organisation and admitted by it;

(e) ‘statute’ means the memorandum and articles of association, the statute, the rules or documents of constitution of a collective management organisation;

(f) ‘general assembly of members’ means the body in the collective management organisation wherein members participate and exercise their voting rights, regardless of the legal form of the organisation;

(g) ‘director’ means:

- (i) where national law or the statute of the collective management organisation provides for a unitary board, any member of the administrative board;

(ii) where national law or the statute of the collective management organisation provides for a dual board, any member of the management board or the supervisory board;

(h) 'rights revenue' means income collected by a collective management organisation on behalf of rightholders, whether deriving from an exclusive right, a right to remuneration or a right to compensation;

(i) 'management fees' means the amounts charged, deducted or offset by a collective management organisation from rights revenue or from any income arising from the investment of rights revenue in order to cover the costs of its management of copyright or related rights;

(j) 'representation agreement' means any agreement between collective management organisations whereby one collective management organisation mandates another collective management organisation to manage the rights it represents, including an agreement concluded under Articles 29 and 30;

(k) 'user' means any person or entity that is carrying out acts subject to the authorisation of rightholders, remuneration of rightholders or payment of compensation to rightholders and is not acting in the capacity of a consumer;

(l) 'repertoire' means the works in respect of which a collective management organisation manages rights;

(m) 'multi-territorial licence' means a licence which covers the territory of more than one Member State;

Rightholders shall have the right to terminate the authorisation to manage rights, categories of rights or types of works and other subject-matter granted by them to a collective management organisation or to withdraw from a collective management organisation any of the rights, categories of rights or types of works and other subject-matter of their choice, as determined pursuant to paragraph 2, for the territories of their choice, upon serving reasonable notice not exceeding six months. The collective management organisation may decide that such termination or withdrawal is to take effect only at the end of the financial year.

(n) 'online rights in musical works' means any of the rights of an author in a musical work provided for under Articles 2 and 3 of Directive 2001/29/EC which are required for the provision of an online service.

TITLE II. COLLECTIVE MANAGEMENT ORGANISATIONS
CHAPTER 1. Representation of rightholders and
membership and organisation of collective management
organisations

Article 4

General principles

Member States shall ensure that collective management organisations act in the best interests of the rightholders whose rights they represent and that they do not impose on them any obligations which are not objectively necessary for the protection of their rights and interests or for the effective management of their rights.

Article 5

Rights of rightholders

1. Member States shall ensure that rightholders have the rights laid down in paragraphs 2 to 8 and that those rights are set out in the statute or membership terms of the collective management organisation.

2. Rightholders shall have the right to authorise a collective management organisation of their choice to manage the rights, categories of rights or types of works and other subject-matter of their choice, for the territories of their choice, irrespective of the Member State of nationality, residence or establishment of either the collective management organisation or the rightholder. Unless the collective management organisation has objectively justified reasons to refuse management, it shall be obliged to manage such rights, categories of rights or types of works and other subject-matter, provided that their management falls within the scope of its activity.

3. Rightholders shall have the right to grant licences for non-commercial uses of any rights, categories of rights or types of works and other subject-matter that they may choose.

4. Rightholders shall have the right to terminate the authorisation to manage rights, categories of rights or types of works and other subject-matter granted by them to a collective management organisation or to withdraw from a collective management organisation any of the rights, categories of rights or types of works and other subject-matter of their choice, as determined pursuant to paragraph 2, for the territories of their choice, upon serving reasonable notice not exceeding six months. The collective management organisation may decide that such termination or

withdrawal is to take effect only at the end of the financial year. If there are amounts due to a rightholder for acts of exploitation which occurred before the termination of the authorisation or the withdrawal of rights took effect, or under a licence granted before such termination or withdrawal took effect, the rightholder shall retain his rights under Articles 12, 13, 18, 20, 28 and 33. A collective management organisation shall not restrict the exercise of rights provided for under paragraphs 4 and 5 by requiring, as a condition for the exercise of those rights, that the management of rights or categories of rights or types of works and other subject-matter which are subject to the termination or the withdrawal be entrusted to another collective management organisation. In cases where a rightholder authorises a collective management organisation to manage his rights, he shall give consent specifically for each right or category of rights or type of works and other subject-matter which he authorises the collective management organisation to manage. Any such consent shall be evidenced in documentary form. A collective management organisation shall inform rightholders of their rights under paragraphs 1 to 7, as well as of any conditions attached to the right set out in paragraph 3, before obtaining their consent to its managing any right or category of rights or type of works and other subject-matter. A collective management organisation shall inform those rightholders who have already authorised it of their rights under paragraphs 1 to 7, as well as of any conditions attached to the right set out in paragraph 3, by 10 October 2016.

Article 6

Membership rules of collective management organisations

1. Member States shall ensure that collective management organisations comply with the rules laid down in paragraphs 2 to 5.

2. A collective management organisation shall accept rightholders and entities representing rightholders, including other collective management organisations and associations of rightholders, as members if they fulfil the membership requirements, which shall be based on objective, transparent and non-discriminatory criteria. Those membership requirements shall be included in the statute or membership terms of the collective management organisation and shall be made publicly available. In cases where a collective management

organisation refuses to accept a request for membership, it shall provide the rightholder with a clear explanation of the reasons for its decision.

3. The statute of a collective management organisation shall provide for appropriate and effective mechanisms for the participation of its members in the organisation's decision-making process. The representation of the different categories of members in the decision-making process shall be fair and balanced.

4. A collective management organisation shall allow its members to communicate with it by electronic means, including for the purposes of exercising members' rights.

5. A collective management organisation shall keep records of its members and shall regularly update those records.

Article 7

Rights of rightholders who are not members of the collective management organisation

1. Member States shall ensure that collective management organisations comply with the rules laid down in Article 6(4), Article 20, Article 29(2) and Article 33 in respect of rightholders who have a direct legal relationship by law or by way of assignment, licence or any other contractual arrangement with them but are not their members.

2. Member States may apply other provisions of this Directive to the rightholders referred to in paragraph 1.

Article 8

General assembly of members of the collective management organisation

1. Member States shall ensure that the general assembly of members is organised in accordance with the rules laid down in paragraphs 2 to 10.

2. A general assembly of members shall be convened at least once a year.

3. The general assembly of members shall decide on any amendments to the statute and to the membership terms of the collective management organisation, where those terms are not regulated by the statute.

4. The general assembly of members shall decide on the appointment or dismissal of the directors, review their general

performance and approve their remuneration and other benefits such as monetary and non-monetary benefits, pension awards and entitlements, rights to other awards and rights to severance pay.

In a collective management organisation with a dual board system, the general assembly of members shall not decide on the appointment or dismissal of members of the management board or approve their remuneration and other benefits where the power to take such decisions is delegated to the supervisory board.

5. In accordance with the provisions laid down in Chapter 2 of Title II, the general assembly of members shall decide at least on the following issues:

- (a) the general policy on the distribution of amounts due to rightholders;
- (b) the general policy on the use of non-distributable amounts;
- (c) the general investment policy with regard to rights revenue and to any income arising from the investment of rights revenue;
- (d) the general policy on deductions from rights revenue and from any income arising from the investment of rights revenue;
- (e) the use of non-distributable amounts;
- (f) the risk management policy;
- (g) the approval of any acquisition, sale or hypothecation of immovable property;
- (h) the approval of mergers and alliances, the setting-up of subsidiaries, and the acquisition of other entities or shares or rights in other entities;
- (i) the approval of taking out loans, granting loans or providing security for loans.

6. The general assembly of members may delegate the powers listed in points (f), (g), (h) and (i) of paragraph 5, by a resolution or by a provision in the statute, to the body exercising the supervisory function.

7. For the purposes of points (a) to (d) of paragraph 5, Member States may require the general assembly of members to determine more detailed conditions for the use of the rights revenue and the income arising from the investment of rights revenue.

8. The general assembly of members shall control the activities of the collective management organisation by, at least, deciding on the appointment and removal of the auditor and approving the annual transparency report referred to in Article 22.

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Member States may allow alternative systems or modalities for the appointment and removal of the auditor, provided that those systems or modalities are designed to ensure the independence of the auditor from the persons who manage the business of the collective management organisation.

9. All members of the collective management organisation shall have the right to participate in, and the right to vote at, the general assembly of members. However, Member States may allow for restrictions on the right of the members of the collective management organisation to participate in, and to exercise voting rights at, the general assembly of members, on the basis of one or both of the following criteria:

(a) duration of membership;

(b) amounts received or due to a member, provided that such criteria are determined and applied in a manner that is fair and proportionate.

The criteria laid down in points (a) and (b) of the first subparagraph shall be included in the statute or the membership terms of the collective management organisation and shall be made publicly available in accordance with Articles 19 and 21.

10. Every member of a collective management organisation shall have the right to appoint any other person or entity as a proxy holder to participate in, and vote at, the general assembly of members on his behalf, provided that such appointment does not result in a conflict of interest which might occur, for example, where the appointing member and the proxy holder belong to different categories of rightholders within the collective management organisation.

However, Member States may provide for restrictions concerning the appointment of proxy holders and the exercise of the voting rights of the members they represent if such restrictions do not prejudice the appropriate and effective participation of members in the decision-making process of a collective management organisation.

Each proxy shall be valid for a single general assembly of members. The proxy holder shall enjoy the same rights in the general assembly of members as those to which the appointing member would be entitled. The proxy holder shall cast votes in accordance with the instructions issued by the appointing member.

11. Member States may decide that the powers of the general

assembly of members may be exercised by an assembly of delegates elected at least every four years by the members of the collective management organisation, provided that:

(a) appropriate and effective participation of members in the collective management organisation's decision-making process is ensured; and

(b) the representation of the different categories of members in the assembly of delegates is fair and balanced.

The rules laid down in paragraphs 2 to 10 shall apply to the assembly of delegates *mutatis mutandis*.

12. Member States may decide that where a collective management organisation, by reason of its legal form, does not have a general assembly of members, the powers of that assembly are to be exercised by the body exercising the supervisory function. The rules laid down in paragraphs 2 to 5, 7 and 8 shall apply *mutatis mutandis* to such body exercising the supervisory function.

13. Member States may decide that where a collective management organisation has members who are entities representing rightholders, all or some of the powers of the general assembly of members are to be exercised by an assembly of those rightholders. The rules laid down in paragraphs 2 to 10 shall apply *mutatis mutandis* to the assembly of rightholders.

Article 9

Supervisory function

1. Member States shall ensure that each collective management organisation has in place a supervisory function for continuously monitoring the activities and the performance of the duties of the persons who manage the business of the organisation.

2. There shall be fair and balanced representation of the different categories of members of the collective management organisation in the body exercising the supervisory function.

3. Each person exercising the supervisory function shall make an annual individual statement on conflicts of interest, containing the information referred to in the second subparagraph of Article 10(2), to the general assembly of members.

4. The body exercising the supervisory function shall meet regularly and shall have at least the following powers:

(a) to exercise the powers delegated to it by the general assembly of members, including under Article 8(4) and (6);

(b) to monitor the activities and the performance of the duties of the persons referred to in Article 10, including the implementation of the decisions of the general assembly of members and, in particular, of the general policies listed in points (a) to (d) of Article 8(5).

5. The body exercising the supervisory function shall report on the exercise of its powers to the general assembly of members at least once a year.

Article 10

Obligations of the persons who manage the business of the collective management organisation

1. Member States shall ensure that each collective management organisation takes all necessary measures so that the persons who manage its business do so in a sound, prudent and appropriate manner, using sound administrative and accounting procedures and internal control mechanisms.

2. Member States shall ensure that collective management organisations put in place and apply procedures to avoid conflicts of interest, and where such conflicts cannot be avoided, to identify, manage, monitor and disclose actual or potential conflicts of interest in such a way as to prevent them from adversely affecting the collective interests of the rightholders whom the organisation represents.

The procedures referred to in the first subparagraph shall include an annual individual statement by each of the persons referred to in paragraph 1 to the general assembly of members, containing the following information:

(a) any interests in the collective management organisation;

(b) any remuneration received in the preceding financial year from the collective management organisation, including in the form of pension schemes, benefits in kind and other types of benefits;

(c) any amounts received in the preceding financial year as a rightholder from the collective management organisation;

(d) a declaration concerning any actual or potential conflict between any personal interests and those of the collective management organisation or between any obligations owed to the collective management organisation and any duty owed to any other natural or legal person.

CHAPTER 2. Management of rights revenue

Article 11

Collection and use of rights revenue

1. Member States shall ensure that collective management organisations comply with the rules laid down in paragraphs 2 to 5.

2. A collective management organisation shall be diligent in the collection and management of rights revenue.

3. A collective management organisation shall keep separate in its accounts:

(a) rights revenue and any income arising from the investment of rights revenue; and

(b) any own assets it may have and income arising from such assets, from management fees or from other activities.

4. A collective management organisation shall not be permitted to use rights revenue or any income arising from the investment of rights revenue for purposes other than distribution to rightholders, except where it is allowed to deduct or offset its management fees in compliance with a decision taken in accordance with point (d) of Article 8(5) or to use the rights revenue or any income arising from the investment of rights revenue in compliance with a decision taken in accordance with Article 8(5).

5. Where a collective management organisation invests rights revenue or any income arising from the investment of rights revenue, it shall do so in the best interests of the rightholders whose rights it represents, in accordance with the general investment and risk management policy referred to in points

(c) and (f) of Article 8(5) and having regard to the following rules:

(a) where there is any potential conflict of interest, the collective management organisation shall ensure that the investment is made in the sole interest of those rightholders;

(b) the assets shall be invested in order to ensure the security, quality, liquidity and profitability of the portfolio as a whole;

(c) the assets shall be properly diversified in order to avoid excessive reliance on any particular asset and accumulations of risks in the portfolio as a whole.

Article 12
Deductions

1. Member States shall ensure that where a rightholder authorises a collective management organisation to manage his rights, the collective management organisation is required to provide the rightholder with information on management fees and other deductions from the rights revenue and from any income arising from the investment of rights revenue, before obtaining his consent to its managing his rights.¹

2. Management fees shall not exceed the justified and documented costs incurred by the collective management organisation in managing copyright and related rights.

Member States shall ensure that the requirements applicable to the use and the transparency of the use of amounts deducted or offset in respect of management fees apply to any other deductions made in order to cover the costs of managing copyright and related rights.

3. Where a collective management organisation provides social, cultural or educational services funded through deductions from rights revenue or from any income arising from the investment of rights revenue, such services shall be provided on the basis of fair criteria, in particular as regards access to, and the extent of, those services.

**CHAPTER 3. Management of rights on behalf of other
collective management organisations**

Article 13

Distribution of amounts due to rightholders

1. Without prejudice to Article 15(3) and Article 28,

Member States shall ensure that each collective management organisation regularly, diligently and accurately distributes and pays amounts due to rightholders in accordance with the general policy on distribution referred to in point (a) of Article 8(5).

Member States shall also ensure that collective management organisations or their members who are entities representing rightholders distribute and pay those amounts to rightholders as soon as possible but no later than nine months from the end of the financial year in which the rights revenue was collected, unless objective reasons

¹ Deductions shall be reasonable in relation to the services provided by the collective management organisation to rightholders, including, where appropriate, the services referred to in paragraph 4, and shall be established on the basis of objective criteria.

relating in particular to reporting by users, identification of rights, rightholders or matching of information on works and other subject-matter with rightholders prevent the collective management organisation or, where applicable, its members from meeting that deadline.

2. Where the amounts due to rightholders cannot be distributed within the deadline set in paragraph 1 because the relevant rightholders cannot be identified or located and the exception to that deadline does not apply, those amounts shall be kept separate in the accounts of the collective management organisation.

3. The collective management organisation shall take all necessary measures, consistent with paragraph 1, to identify and locate the rightholders. In particular, at the latest three months after the expiry of the deadline set in paragraph 1, the collective management organisation shall make available information on works and other subject-matter for which one or more rightholders have not been identified or located to:

(a) the rightholders that it represents or the entities representing rightholders, where such entities are members of the collective management organisation; and

(b) all collective management organisations with which it has concluded representation agreements.

The information referred to in the first subparagraph shall include, where available, the following:

(a) the title of the work or other subject-matter;

(b) the name of the rightholder;

(c) the name of the relevant publisher or producer; and

(d) any other relevant information available which could assist in identifying the rightholder

The collective management organisation shall also verify the records referred to in Article 6(5) and other readily available records. If the abovementioned measures fail to produce results, the collective management organisation shall make that information available to the public at the latest one year after the expiry of the three-month period.

4. Where the amounts due to rightholders cannot be distributed after three years from the end of the financial year in which the collection of the rights revenue occurred, and provided that the collective management organisation has taken all necessary measures to identify

and locate the rightholders referred to in paragraph 3, those amounts shall be deemed non-distributable.

5. The general assembly of members of a collective management organisation shall decide on the use of the non-distributable amounts in accordance with point (b) of Article 8(5), without prejudice to the right of rightholders to claim such amounts from the collective management organisation in accordance with the laws of the Member States on the statute of limitations of claims.

6. Member States may limit or determine the permitted uses of non-distributable amounts, inter alia, by ensuring that such amounts are used in a separate and independent way in order to fund social, cultural and educational activities for the benefit of rightholders.

Article 15

Deductions and payments in representation agreements

1. Member States shall ensure that a collective management organisation does not make deductions, other than in respect of management fees, from the rights revenue derived from the rights it manages on the basis of a representation agreement, or from any income arising from the investment of that rights revenue, unless the other collective management organisation that is party to the representation agreement expressly consents to such deductions.

2. The collective management organisation shall regularly, diligently and accurately distribute and pay amounts due to other collective management organisations.

3. The collective management organisation shall carry out such distribution and payments to the other collective management organisation as soon as possible but no later than nine months from the end of the financial year in which the rights revenue was collected, unless objective reasons relating in particular to reporting by users, identification of rights, rightholders or matching of information on works and other subject-matter with rightholders prevent the collective management organisation from meeting that deadline

The other collective management organisation, or, where it has as members entities representing rightholders, those members, shall distribute and pay the amounts due to rightholders as soon as possible but no later than six months from receipt of those amounts, unless objective reasons relating in particular to reporting by users,

identification of rights, rightholders or matching of information on works and other subject-matter with rightholders prevent the collective management organisation or, where applicable, its members from meeting that deadline.

CHAPTER 4. Relations with users

Article 16

Licensing

1. Member States shall ensure that collective management organisations and users conduct negotiations for the licensing of rights in good faith. Collective management organisations and users shall provide each other with all necessary information.

2. Licensing terms shall be based on objective and non-discriminatory criteria. When licensing rights, collective management organisations shall not be required to use, as a precedent for other online services, licensing terms agreed with a user where the user is providing a new type of online service which has been available to the public in the Union for less than three years.

Rightholders shall receive appropriate remuneration for the use of their rights. Tariffs for exclusive rights and rights to remuneration shall be reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject-matter, as well as in relation to the economic value of the service provided by the collective management organisation. Collective management organisations shall inform the user concerned of the criteria used for the setting of those tariffs.

3. Collective management organisations shall reply without undue delay to requests from users, indicating, inter alia, the information needed in order for the collective management organisation to offer a licence.

Upon receipt of all relevant information, the collective management organisation shall, without undue delay, either offer a licence or provide the user with a reasoned statement explaining why it does not intend to license a particular service.

4. A collective management organisation shall allow users to communicate with it by electronic means, including, where appropriate, for the purpose of reporting on the use of the licence.

Article 17
Users' obligations

Member States shall adopt provisions to ensure that users provide a collective management organisation, within an agreed or pre-established time and in an agreed or pre-established format, with such relevant information at their disposal on the use of the rights represented by the collective management organisation as is necessary for the collection of rights revenue and for the distribution and payment of amounts due to rightholders. When deciding on the format for the provision of such information, collective management organisations and users shall take into account, as far as possible, voluntary industry standards.

CHAPTER 5. Transparency and reporting

Article 18

Information provided to rightholders on the management of their rights

1. Without prejudice to paragraph 2 of this Article and Article 19 and Article 28(2), Member States shall ensure that a collective management organisation makes available, not less than once a year, to each rightholder to whom it has attributed rights revenue or made payments in the period to which the information relates, at least the following information:

(a) any contact details which the rightholder has authorised the collective management organisation to use in order to identify and locate the rightholder;

(b) the rights revenue attributed to the rightholder;

(c) the amounts paid by the collective management organisation to the rightholder per category of rights managed and per type of use;

(d) the period during which the use took place for which amounts were attributed and paid to the rightholder, unless objective reasons relating to reporting by users prevent the collective management organisation from providing this information;

(e) deductions made in respect of management fees;

(f) deductions made for any purpose other than in respect of management fees, including those that may be required by national law for the provision of any social, cultural or educational services;

(g) any rights revenue attributed to the rightholder which is outstanding for any period.

2. Where a collective management organisation attributes rights revenue and has as members entities which are responsible for the distribution of rights revenue to rightholders, the collective management organisation shall provide the information listed in paragraph 1 to those entities, provided that they do not have that information in their possession. Member States shall ensure that the entities make at least the information listed in paragraph 1 available, not less than once a year, to each rightholder to whom they have attributed rights revenue or made payments in the period to which the information relates.

Article 19

Information provided to other collective management organisations on the management of rights under representation agreements

Member States shall ensure that a collective management organisation makes at least the following information available, not less than once a year and by electronic means, to collective management organisations on whose behalf it manages rights under a representation agreement, for the period to which the information relates:

(a) the rights revenue attributed, the amounts paid by the collective management organisation per category of rights managed, and per type of use, for the rights it manages under the representation agreement, and any rights revenue attributed which is outstanding for any period;

(b) deductions made in respect of management fees;

(c) deductions made for any purpose other than in respect of management fees as referred to in Article 15;

(d) information on any licences granted or refused with regard to works and other subject-matter covered by the representation agreement;

(e) resolutions adopted by the general assembly of members in so far as those resolutions are relevant to the management of the rights under the representation agreement.

Article 20

Information provided to rightholders, other collective management organisations and users on request

Without prejudice to Article 25, Member States shall ensure that, in response to a duly justified request, a collective management organisation makes at least the following information available by electronic means and without undue delay to any collective management organisation on whose behalf it manages rights under a representation agreement or to any rightholder or to any user:

(a) the works or other subject-matter it represents, the rights it manages, directly or under representation agreements, and the territories covered; or

(b) where, due to the scope of activity of the collective management organisation, such works or other subject-matter cannot be determined, the types of works or of other subject-matter it represents, the rights it manages and the territories covered.

Article 21

Disclosure of information to the public

1. Member States shall ensure that a collective management organisation makes public at least the following information:

(a) its statute;

(b) its membership terms and the terms of termination of authorisation to manage rights, if these are not included in the statute;

(c) standard licensing contracts and standard applicable tariffs, including discounts;

(d) the list of the persons referred to in Article 10;

(e) its general policy on distribution of amounts due to rightholders;

(f) its general policy on management fees;

(g) its general policy on deductions, other than in respect of management fees, from rights revenue and from any income arising from the investment of rights revenue, including deductions for the purposes of social, cultural and educational services;

(h) a list of the representation agreements it has entered into, and the names of the collective management organisations with which those representation agreements have been concluded;

(i) the general policy on the use of non-distributable amounts;

(j) the complaint handling and dispute resolution procedures available in accordance with Articles 33, 34 and 35.

2. The collective management organisation shall publish, and keep up to date, on its public website the information referred to in paragraph 1.

Article 22

Annual transparency report

1. Member States shall ensure that a collective management organisation, irrespective of its legal form under national law, draws up and makes public an annual transparency report, including the special report referred to in paragraph 3, for each financial year no later than eight months following the end of that financial year.

The collective management organisation shall publish on its website the annual transparency report, which shall remain available to the public on that website for at least five years.

2. The annual transparency report shall contain at least the information set out in the Annex.

3. A special report shall address the use of the amounts deducted for the purposes of social, cultural and educational services and shall contain at least the information set out in point 3 of the Annex.

4. The accounting information included in the annual transparency report shall be audited by one or more persons empowered by law to audit accounts in accordance with Directive 2006/43/EC of the European Parliament and of the Council ⁽¹⁾.

The audit report, including any qualifications thereto, shall be reproduced in full in the annual transparency report.

For the purposes of this paragraph, accounting information shall comprise the financial statements referred to in point 1(a) of the Annex and any financial information referred to in points (g) and (h) of point 1 and in point 2 of the Annex.

¹ Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated account, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC (OJ L 157, 9.6.2006, p. 87).

TITLE III. MULTI-TERRITORIAL LICENSING OF ONLINE RIGHTS IN MUSICAL WORKS BY COLLECTIVE MANAGEMENT ORGANISATIONS

Article 23

Multi-territorial licensing in the internal market

Member States shall ensure that collective management organisations established in their territory comply with the requirements of this Title when granting multi-territorial licences for online rights in musical works.

Article 24

Capacity to process multi-territorial licences

1. Member States shall ensure that a collective management organisation which grants multi-territorial licences for online rights in musical works has sufficient capacity to process electronically, in an efficient and transparent manner, data needed for the administration of such licences, including for the purposes of identifying the repertoire and monitoring its use, invoicing users, collecting rights revenue and distributing amounts due to rightholders.

2. For the purposes of paragraph 1, a collective management organisation shall comply, at least, with the following conditions:

(a) to have the ability to identify accurately the musical works, wholly or in part, which the collective management organisation is authorised to represent;

(b) to have the ability to identify accurately, wholly or in part, with respect to each relevant territory, the rights and their corresponding rightholders for each musical work or share therein which the collective management organisation is authorised to represent;

(c) to make use of unique identifiers in order to identify rightholders and musical works, taking into account, as far as possible, voluntary industry standards and practices developed at international or Union level;

(d) to make use of adequate means in order to identify and resolve in a timely and effective manner inconsistencies in data held by other collective management organisations granting multi-territorial licences for online rights in musical works.

Article 25

Transparency of multi-territorial repertoire information

1. Member States shall ensure that a collective management organisation which grants multi-territorial licences for online rights in musical works provides to online service providers, to rightholders whose rights it represents and to other collective management organisations, by electronic means, in response to a duly justified request, up-to-date information allowing the identification of the online music repertoire it represents. This shall include:

- (a) the musical works represented;
- (b) the rights represented wholly or in part; and
- (c) the territories covered.

2. The collective management organisation may take reasonable measures, where necessary, to protect the accuracy and integrity of the data, to control their reuse and to protect commercially sensitive information.

Article 26

Accuracy of multi-territorial repertoire information

1. Member States shall ensure that a collective management organisation which grants multi-territorial licences for online rights in musical works has in place arrangements to enable rightholders, other collective management organisations and online service providers to request a correction of the data referred to in the list of conditions under Article 24(2) or the information provided under Article 25, where such rightholders, collective management organisations and online service providers, on the basis of reasonable evidence, believe that the data or the information are inaccurate in respect of their online rights in musical works. Where the claims are sufficiently substantiated, the collective management organisation shall ensure that the data or the information are corrected without undue delay.

2. The collective management organisation shall provide rightholders whose musical works are included in its own music repertoire and rightholders who have entrusted the management of their online rights in musical works to it in accordance with Article 31 with the means of submitting to it in electronic form information concerning their musical works, their rights in those works and the territories in respect of which the rightholders authorise the organisation. When doing

so, the collective management organisation and the rightholders shall take into account, as far as possible, voluntary industry standards or practices regarding the exchange of data developed at international or Union level, allowing rightholders to specify the musical work, wholly or in part, the online rights, wholly or in part, and the territories in respect of which they authorise the organisation.

3. Where a collective management organisation mandates another collective management organisation to grant multi-territorial licences for the online rights in musical works under Articles 29 and 30, the mandated collective management organisation shall also apply paragraph 2 of this Article with respect to the rightholders whose musical works are included in the repertoire of the mandating collective management organisation, unless the collective management organisations agree otherwise.

Article 27

Accurate and timely reporting and invoicing

1. Member States shall ensure that a collective management organisation monitors the use of online rights in musical works which it represents, wholly or in part, by online service providers to which it has granted a multi-territorial licence for those rights.

2. The collective management organisation shall offer online service providers the possibility of reporting by electronic means the actual use of online rights in musical works and online service providers shall accurately report the actual use of those works. The collective management organisation shall offer the use of a least one method of reporting which takes into account voluntary industry standards or practices developed at international or Union level for the electronic exchange of such data. The collective management organisation may refuse to accept reporting by the online service provider in a proprietary format if the organisation allows for reporting using an industry standard for the electronic exchange of data.

3. The collective management organisation shall invoice the online service provider by electronic means. The collective management organisation shall offer the use of a least one format which takes into account voluntary industry standards or practices developed at international or Union level. The invoice shall identify the works and rights which are licensed, wholly or in part, on the basis of the data

referred to in the list of conditions under Article 24(2), and the corresponding actual uses, to the extent that this is possible on the basis of the information provided by the online service provider and the format used to provide that information. The online service provider may not refuse to accept the invoice because of its format if the collective management organisation is using an industry standard.

4. The collective management organisation shall invoice the online service provider accurately and without delay after the actual use of the online rights in that musical work is reported, except where this is not possible for reasons attributable to the online service provider.

5. The collective management organisation shall have in place adequate arrangements enabling the online service provider to challenge the accuracy of the invoice, including when the online service provider receives invoices from one or more collective management organisations for the same online rights in the same musical work.

Article 28

Accurate and timely payment to rightholders

1. Without prejudice to paragraph 3, Member States shall ensure that a collective management organisation which grants multi-territorial licences for online rights in musical works distributes amounts due to rightholders accruing from such licences accurately and without delay after the actual use of the work is reported, except where this is not possible for reasons attributable to the online service provider.

2. Without prejudice to paragraph 3, the collective management organisation shall provide at least the following information to rightholders together with each payment it makes under paragraph 1:

(a) the period during which the uses took place for which amounts are due to rightholders and the territories in which the uses took place;

(b) the amounts collected, deductions made and amounts distributed by the collective management organisation for each online right in any musical work which rightholders have authorised the collective management organisation, wholly or in part, to represent;

(c) the amounts collected for rightholders, deductions made, and amounts distributed by the collective management organisation in respect of each online service provider.

Where a collective management organisation mandates another collective management organisation to grant multi-territorial licences for

the online rights in musical works under Articles 29 and 30, the mandated collective management organisation shall distribute the amounts referred to in paragraph 1 accurately and without delay, and shall provide the information referred to in paragraph 2 to the mandating collective management organisation. The mandating collective management organisation shall be responsible for the subsequent distribution of such amounts and the provision of such information to rightholders, unless the collective management organisations agree otherwise.

Article 29

Agreements between collective management organisations for multi-territorial licensing

1. Member States shall ensure that any representation agreement between collective management organisations whereby a collective management organisation mandates another collective management organisation to grant multi-territorial licences for the online rights in musical works in its own music repertoire is of a non-exclusive nature. The mandated collective management organisation shall manage those online rights on a non-discriminatory basis.

2. The mandating collective management organisation shall inform its members of the main terms of the agreement, including its duration and the costs of the services provided by the mandated collective management organisation.

3. The mandated collective management organisation shall inform the mandating collective management organisation of the main terms according to which the latter's online rights are to be licensed, including the nature of the exploitation, all provisions which relate to or affect the licence fee, the duration of the licence, the accounting periods and the territories covered.

Article 30

Obligation to represent another collective management organisation for multi-territorial licensing

1. Member States shall ensure that where a collective management organisation which does not grant or offer to grant multi-territorial licences for the online rights in musical works in its own repertoire requests another collective management organisation to enter into a

representation agreement to represent those rights, the requested collective management organisation is required to agree to such a request if it is already granting or offering to grant multi-territorial licences for the same category of online rights in musical works in the repertoire of one or more other collective management organisations.

2. The requested collective management organisation shall respond to the requesting collective management organisation in writing and without undue delay.

3. Without prejudice to paragraphs 5 and 6, the requested collective management organisation shall manage the represented repertoire of the requesting collective management organisation on the same conditions as those which it applies to the management of its own repertoire.

4. The requested collective management organisation shall include the represented repertoire of the requesting collective management organisation in all offers it addresses to online service providers.

5. The management fee for the service provided by the requested collective management organisation to the requesting organisation shall not exceed the costs reasonably incurred by the requested collective management organisation.

6. The requesting collective management organisation shall make available to the requested collective management organisation information relating to its own music repertoire required for the provision of multi-territorial licences for online rights in musical works. Where information is insufficient or provided in a form that does not allow the requested collective management organisation to meet the requirements of this Title, the requested collective management organisation shall be entitled to charge for the costs reasonably incurred in meeting such requirements or to exclude those works for which information is insufficient or cannot be used.

Article 31

Access to multi-territorial licensing

Member States shall ensure that where a collective management organisation does not grant or offer to grant multi-territorial licences for online rights in musical works or does not allow another collective management organisation to represent those rights for such purpose by 10 April 2017, rightholders who have authorised that collective

management organisation to represent their online rights in musical works can withdraw from that collective management organisation the online rights in musical works for the purposes of multi-territorial licensing in respect of all territories without having to withdraw the online rights in musical works for the purposes of mono-territorial licensing, so as to grant multi-territorial licences for their online rights in musical works themselves or through any other party they authorise or through any collective management organisation complying with the provisions of this Title.

Article 32

Derogation for online music rights required for radio and television programmes

The requirements under this Title shall not apply to collective management organisations when they grant, on the basis of the voluntary aggregation of the required rights, in compliance with the competition rules under Articles 101 and 102 TFEU, a multi-territorial licence for the online rights in musical works required by a broadcaster to communicate or make available to the public its radio or television programmes simultaneously with or after their initial broadcast as well as any online material, including previews, produced by or for the broadcaster which is ancillary to the initial broadcast of its radio or television programme.

TITLE IV. ENFORCEMENT MEASURES

Article 33

Complaints procedures

1. Member States shall ensure that collective management organisations make available to their members, and to collective management organisations on whose behalf they manage rights under a representation agreement, effective and timely procedures for dealing with complaints, particularly in relation to authorisation to manage rights and termination or withdrawal of rights, membership terms, the collection of amounts due to rightholders, deductions and distributions.

2. Collective management organisations shall respond in writing to complaints by members or by collective management organisations on whose behalf they manage rights under a representation agreement.

Where the collective management organisation rejects a complaint, it shall give reasons.

Article 34

Alternative dispute resolution procedures

1. Member States may provide that disputes between collective management organisations, members of collective management organisations, rightholders or users regarding the provisions of national law adopted pursuant to the requirements of this Directive can be submitted to a rapid, independent and impartial alternative dispute resolution procedure.

2. Member States shall ensure, for the purposes of Title III, that the following disputes relating to a collective management organisation established in their territory which grants or offers to grant multi-territorial licences for online rights in musical works can be submitted to an independent and impartial alternative dispute resolution procedure:

(a) disputes with an actual or potential online service provider regarding the application of Articles 16, 25, 26 and 27;

(b) disputes with one or more rightholders regarding the application of Articles 25, 26, 27, 28, 29, 30 and 31;

(c) disputes with another collective management organisation regarding the application of Articles 25, 26, 27, 28, 29 and 30.

Article 35

Dispute resolution

1. Member States shall ensure that disputes between collective management organisations and users concerning, in particular, existing and proposed licensing conditions or a breach of contract can be submitted to a court, or if appropriate, to another independent and impartial dispute resolution body where that body has expertise in intellectual property law.

2. Articles 33 and 34 and paragraph 1 of this Article shall be without prejudice to the right of parties to assert and defend their rights by bringing an action before a court.

Article 36
Compliance

1. Member States shall ensure that compliance by collective management organisations established in their territory with the provisions of national law adopted pursuant to the requirements laid down in this Directive is monitored by competent authorities designated for that purpose.

2. Member States shall ensure that procedures exist enabling members of a collective management organisation, rightholders, users, collective management organisations and other interested parties to notify the competent authorities designated for that purpose of activities or circumstances which, in their opinion, constitute a breach of the provisions of national law adopted pursuant to the requirements laid down in this Directive.

3. Member States shall ensure that the competent authorities designated for that purpose have the power to impose appropriate sanctions or to take appropriate measures where the provisions of national law adopted in implementation of this Directive have not been complied with. Those sanctions and measures shall be effective, proportionate and dissuasive.

Member States shall notify the Commission of the competent authorities referred to in this Article and in Articles 37 and 38 by 10 April 2016. The Commission shall publish the information received in that regard.

Article 37

Exchange of information between competent authorities

1. In order to facilitate the monitoring of the application of this Directive, each Member State shall ensure that a request for information received from a competent authority of another Member State, designated for that purpose, concerning matters relevant to the application of this Directive, in particular with regard to the activities of collective management organisations established in the territory of the requested Member State, is responded to without undue delay by the competent authority designated for that purpose, provided that the request is duly justified.

2. Where a competent authority considers that a collective management organisation established in another Member State but

acting within its territory may not be complying with the provisions of the national law of the Member State in which that collective management organisation is established which have been adopted pursuant to the requirements laid down in this Directive, it may transmit all relevant information to the competent authority of the Member State in which the collective management organisation is established, accompanied where appropriate by a request to that authority that it take appropriate action within its competence. The requested competent authority shall provide a reasoned reply within three months.

3. Matters as referred to in paragraph 2 may also be referred by the competent authority making such a request to the expert group established in accordance with Article 41.

Article 38

Cooperation for the development of multi-territorial licensing

1. The Commission shall foster a regular exchange of information between the competent authorities designated for that purpose in Member States, and between those authorities and the Commission, on the situation and development of multi-territorial licensing.

2. The Commission shall conduct regular consultations with representatives of rightholders, collective management organisations, users, consumers and other interested parties on their experience with the application of the provisions of Title III of this Directive. The Commission shall provide competent authorities with all relevant information that emerges from those consultations, within the framework of the exchange of information provided for in paragraph 1.

3. Member States shall ensure that by 10 October 2017, their competent authorities provide the Commission with a report on the situation and development of multi-territorial licensing in their territory. The report shall include information on, in particular, the availability of multi-territorial licences in the Member State concerned and compliance by collective management organisations with the provisions of national law adopted in implementation of Title III of this Directive, together with an assessment of the development of multi-territorial licensing of online rights in musical works by users, consumers, rightholders and other interested parties.

4. On the basis of the reports received pursuant to paragraph 3 and the information gathered pursuant to paragraphs 1 and 2, the

Commission shall assess the application of Title III of this Directive. If necessary, and where appropriate on the basis of a specific report, it shall consider further steps to address any identified problems. That assessment shall cover, in particular, the following:

(a) the number of collective management organisations meeting the requirements of Title III;

(b) the application of Articles 29 and 30, including the number of representation agreements concluded by collective management organisations pursuant to those Articles;

(c) the proportion of repertoire in the Member States which is available for licensing on a multi-territorial basis.

TITLE V. REPORTING AND FINAL PROVISIONS

Article 39

Notification of collective management organisations

By 10 April 2016, Member States shall provide the Commission, on the basis of the information at their disposal, with a list of the collective management organisations established in their territories.

Member States shall notify any changes to that list to the Commission without undue delay.

The Commission shall publish that information and keep it up to date.

Article 40

Report

By 10 April 2021, the Commission shall assess the application of this Directive and submit to the European Parliament and to the Council a report on the application of this Directive. That report shall include an assessment of the impact of this Directive on the development of cross-border services, on cultural diversity, on the relations between collective management organisations and users and on the operation in the Union of collective management organisations established outside the Union, and, if necessary, on the need for a review. The Commission's report shall be accompanied, if appropriate, by a legislative proposal.

Article 41

Expert group

An expert group is hereby established. It shall be composed of representatives of the competent authorities of the Member States. The expert group shall be chaired by a representative of the Commission and shall meet either on the initiative of the chairman or at the request of the delegation of a Member State. The tasks of the group shall be as follows:

(a) to examine the impact of the transposition of this Directive on the functioning of collective management organisations and independent management entities in the internal market, and to highlight any difficulties;

(b) to organise consultations on all questions arising from the application of this Directive;

(c) to facilitate the exchange of information on relevant developments in legislation and case-law, as well as relevant economic, social, cultural and technological developments, especially in relation to the digital market in works and other subject-matter.

Article 42

Protection of personal data

The processing of personal data carried out within the framework of this Directive shall be subject to Directive 95/46/EC.

Article 43

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 10 April 2016. They shall immediately inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main measures of national law which they adopt in the field covered by this Directive.

Article 44

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 45

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 26 February 2014.

ANNEX

1. Information to be provided in the annual transparency report referred to in Article 22(2):

(a) financial statements comprising a balance-sheet or a statement of assets and liabilities, an income and expenditure account for the financial year and a cash-flow statement;

(b) a report on the activities in the financial year;

(c) information on refusals to grant a licence pursuant to Article 16(3);

(d) a description of the legal and governance structure of the collective management organisation;

(e) information on any entities directly or indirectly owned or controlled, wholly or in part, by the collective management organisation;

(f) information on the total amount of remuneration paid to the persons referred in Article 9(3) and Article 10 in the previous year, and on other benefits granted to them;

(g) the financial information referred to in point 2 of this Annex;

(h) a special report on the use of any amounts deducted for the purposes of social, cultural and educational services, containing the information referred to in point 3 of this Annex.

2. Financial information to be provided in the annual transparency report:

(a) financial information on rights revenue, per category of rights managed and per type of use (e.g. broadcasting, online, public performance), including information on the income arising from the investment of rights revenue and the use of such income (whether it is distributed to rightholders or other collective management organisations, or otherwise used);

(b) financial information on the cost of rights management and other services provided by the collective management organisation to rightholders, with a comprehensive description of at least the following items:

(i) all operating and financial costs, with a breakdown per category of rights managed and, where costs are indirect and cannot be attributed to one or more categories of rights, an explanation of the method used to allocate such indirect costs;

(ii) operating and financial costs, with a breakdown per category of rights managed and, where costs are indirect and cannot be attributed to one or more categories of rights, an explanation of the method used to allocate such indirect costs, only with regard to the management of rights, including management fees deducted from or offset against rights revenue or any income arising from the investment of rights revenue in accordance with Article 11(4) and Article 12(1), (2) and (3);

(iii) operating and financial costs with regard to services other than the management of rights, but including social, cultural and educational services;

(iv) resources used to cover costs;

(v) deductions made from rights revenues, with a breakdown per category of rights managed and per type of use and the purpose of the deduction, such as costs relating to the management of rights or to social, cultural or educational services;

(vi) the percentages that the cost of the rights management and other services provided by the collective management organisation to rightholders represents compared to the rights revenue in the relevant financial year, per category of rights managed, and, where costs are indirect and cannot be attributed to one or more categories of rights, an explanation of the method used to allocate such indirect costs;

(c) financial information on amounts due to rightholders, with a comprehensive description of at least the following items:

(i) the total amount attributed to rightholders, with a breakdown per category of rights managed and type of use;

(ii) the total amount paid to rightholders, with a breakdown per category of rights managed and type of use;

(iii) the frequency of payments, with a breakdown per category of rights managed and per type of use;

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(iv) the total amount collected but not yet attributed to rightholders, with a breakdown per category of rights managed and type of use, and indicating the financial year in which those amounts were collected;

(v) the total amount attributed to but not yet distributed to rightholders, with a breakdown per category of rights managed and type of use, and indicating the financial year in which those amounts were collected;

(vi) where a collective management organisation has not carried out the distribution and payments within the deadline set in Article 13(1), the reasons for the delay;

(vii) the total non-distributable amounts, along with an explanation of the use to which those amounts have been put;

(d) information on relationships with other collective management organisations, with a description of at least the following items:

(i) amounts received from other collective management organisations and amounts paid to other collective management organisations, with a breakdown per category of rights, per type of use and per organisation\$

(ii) management fees and other deductions from the rights revenue due to other collective management organisations, with a breakdown per category of rights, per type of use and per organisation;

(iii) management fees and other deductions from the amounts paid by other collective management organisations, with a breakdown per category of rights and per organisation;

(iv) amounts distributed directly to rightholders originating from other collective management organisations, with a breakdown per category of rights and per organisation.

3. Information to be provided in the special report referred to in Article 22(3):

(a) the amounts deducted for the purposes of social, cultural and educational services in the financial year, with a breakdown per type of purpose and, for each type of purpose, with a breakdown per category of rights managed and per type of use;

(b) an explanation of the use of those amounts, with a breakdown per type of purpose including the costs of managing amounts deducted to fund social, cultural and educational services and of the separate amounts used for social, cultural and educational services.

**DIRECTIVE 2012/28/EU OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL
of 25 October 2012
on certain permitted uses of orphan works**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 53(1), 62 and 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee (),

Acting in accordance with the ordinary legislative procedure (),

Whereas:

(1) Publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States, are engaged in large-scale digitisation of their collections or archives in order to create European Digital Libraries. They contribute to the preservation and dissemination of European cultural heritage, which is also important for the creation of European Digital Libraries, such as Europeana. Technologies for mass digitisation of print materials and for search and indexing enhance the research value of the libraries' collections. Creating large online libraries facilitates electronic search and discovery tools which open up new sources of discovery for researchers and academics who would otherwise have to content themselves with more traditional and analogue search methods.

(2) The need to promote free movement of knowledge and innovation in the internal market is an important component of the Europe 2020 Strategy, as set out in the Communication from the Commission entitled 'Europe 2020: A strategy for smart, sustainable and inclusive growth', which includes as one of its flagship initiatives the development of a Digital Agenda for Europe.

(3) Creating a legal framework to facilitate the digitisation and dissemination of works and other subject-matter which are protected by copyright or related rights and for which no rightholder is identified or

for which the rightholder, even if identified, is not located — so-called orphan works — is a key action of the Digital Agenda for Europe, as set out in the Communication from the Commission entitled ‘A Digital Agenda for Europe’. This Directive targets the specific problem of the legal determination of orphan work status and its consequences in terms of the permitted users and permitted uses of works or phonograms considered to be orphan works.

(4) This Directive is without prejudice to specific solutions being developed in the Member States to address larger mass digitisation issues, such as in the case of so-called ‘out-of-commerce’ works. Such solutions take into account the specificities of different types of content and different users and build upon the consensus of the relevant stakeholders. This approach has also been followed in the Memorandum of Understanding on key principles on the digitisation and making available of out-of-commerce works, signed on 20 September 2011 by representatives of European libraries, authors, publishers and collecting societies and witnessed by the Commission. This Directive is without prejudice to that Memorandum of Understanding, which calls on Member States and the Commission to ensure that voluntary agreements concluded between users, rightholders and collective rights management organisations to licence the use of out-of-commerce works on the basis of the principles contained therein benefit from the requisite legal certainty in a national and cross-border context.

(5) Copyright is the economic foundation for the creative industry, since it stimulates innovation, creation, investment and production. Mass digitisation and dissemination of works is therefore a means of protecting Europe's cultural heritage. Copyright is an important tool for ensuring that the creative sector is rewarded for its work.

(6) The rightholders' exclusive rights of reproduction of their works and other protected subject-matter and of making them available to the public, as harmonised under Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (), necessitate the prior consent of rightholders to the digitisation and the making available to the public of a work or other protected subject-matter.

(7) In the case of orphan works, it is not possible to obtain such prior consent to the carrying-out of acts of reproduction or of making available to the public.

(8) Different approaches in the Member States to the recognition of orphan work status can present obstacles to the functioning of the internal market and the use of, and cross-border access to, orphan works. Such different approaches can also result in restrictions on the free movement of goods and services which incorporate cultural content. Therefore, ensuring the mutual recognition of such status is appropriate, since it will allow access to orphan works in all Member States.

(9) In particular, a common approach to determining the orphan work status and the permitted uses of orphan works is necessary in order to ensure legal certainty in the internal market with respect to the use of orphan works by publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations.

(10) Cinematographic or audiovisual works and phonograms in the archives of public-service broadcasting organisations and produced by them include orphan works. Taking into account the special position of broadcasters as producers of phonograms and audiovisual material and the need to adopt measures to limit the phenomenon of orphan works in the future, it is appropriate to set a cut-off date for the application of this Directive to works and phonograms in the archives of broadcasting organisations.

(11) Cinematographic and audiovisual works and phonograms contained in the archives of public-service broadcasting organisations and produced by them, should for the purposes of this Directive be regarded as including cinematographic and audiovisual works and phonograms which are commissioned by such organisations for the exclusive exploitation by them or other co-producing public-service broadcasting organisations. Cinematographic and audiovisual works and phonograms contained in the archives of public-service broadcasting organisations which have not been produced or commissioned by such organisations, but which those organisations have been authorised to use under a licensing agreement, should not fall within the scope of this Directive.

(12) For reasons of international comity, this Directive should apply only to works and phonograms that are first published in the territory of

a Member State or, in the absence of publication, first broadcast in the territory of a Member State or, in the absence of publication or broadcast, made publicly accessible by the beneficiaries of this Directive with the consent of the rightholders. In the latter case, this Directive should only apply provided that it is reasonable to assume that the rightholders would not oppose the use allowed by this Directive.

(13) Before a work or phonogram can be considered an orphan work, a diligent search for the rightholders in the work or phonogram, including rightholders in works and other protected subject-matter that are embedded or incorporated in the work or phonogram, should be carried out in good faith. Member States should be permitted to provide that such diligent search may be carried out by the organisations referred to in this Directive or by other organisations. Such other organisations may charge for the service of carrying out a diligent search.

(14) It is appropriate to provide for a harmonised approach concerning such diligent search in order to ensure a high level of protection of copyright and related rights in the Union. A diligent search should involve the consultation of sources that supply information on the works and other protected subject-matter as determined, in accordance with this Directive, by the Member State where the diligent search has to be carried out. In so doing, Member States could refer to the diligent search guidelines agreed in the context of the High Level Working Group on Digital Libraries established as part of the i2010 digital library initiative.

(15) In order to avoid duplication of search efforts, a diligent search should be carried out in the Member State where the work or phonogram was first published or, in cases where no publication has taken place, where it was first broadcast. The diligent search in respect of cinematographic or audiovisual works the producer of which has his headquarters or habitual residence in a Member State should be carried out in that Member State. In the case of cinematographic or audiovisual works which are co-produced by producers established in different Member States, the diligent search should be carried out in each of those Member States. With regard to works and phonograms which have neither been published nor broadcast but which have been made publicly accessible by the beneficiaries of this Directive with the consent of the rightholders, the diligent search should be carried out in the Member State where the organisation that made the work or phonogram publicly

accessible with the consent of the rightholder is established. Diligent searches for the rightholders in works and other protected subject-matter that are embedded or incorporated in a work or phonogram should be carried out in the Member State where the diligent search for the work or phonogram containing the embedded or incorporated work or other protected subject-matter is carried out. Sources of information available in other countries should also be consulted if there is evidence to suggest that relevant information on rightholders is to be found in those other countries. The carrying-out of diligent searches may generate various kinds of information, such as a search record and the result of the search. The search record should be kept on file in order for the relevant organisation to be able to substantiate that the search was diligent.

(16) Member States should ensure that the organisations concerned keep records of their diligent searches and that the results of such searches, consisting in particular of any finding that a work or phonogram is to be considered an orphan work within the meaning of this Directive, as well as information on the change of status and on the use which those organisations make of orphan works, are collected and made available to the public at large, in particular through the recording of the relevant information in an online database. Considering in particular the pan-European dimension, and in order to avoid duplication of efforts, it is appropriate to make provision for the creation of a single online database for the Union containing such information and for making it available to the public at large in a transparent manner. This can enable both the organisations which are carrying out diligent searches and the rightholders easily to access such information. The database could also play an important role in preventing and bringing to an end possible copyright infringements, particularly in the case of changes to the orphan work status of the works and phonograms. Under Regulation (EU) No 386/2012 (), the Office for Harmonization in the Internal Market (the Office) is entrusted with certain tasks and activities, financed by making use of its own budgetary means, aimed at facilitating and supporting the activities of national authorities, the private sector and the Union institutions in the fight against, including the prevention of, infringement of intellectual property rights.

In particular, pursuant to point (g) of Article 2(1) of that Regulation, those tasks include providing mechanisms which help to improve the online exchange of relevant information between the Member States'

authorities concerned and fostering cooperation between those authorities. It is therefore appropriate to rely on the Office to establish and manage the European database containing information related to orphan works referred to in this Directive.

(17) There can be several rightholders in respect of a particular work or phonogram, and works and phonograms can themselves include other works or protected subject-matter. This Directive should not affect the rights of identified and located rightholders. If at least one rightholder has been identified and located, a work or phonogram should not be considered an orphan work. The beneficiaries of this Directive should only be permitted to use a work or phonogram one or more of the rightholders in which are not identified or not located, if they are authorised to carry out the acts of reproduction and of making available to the public covered by Articles 2 and 3 respectively of Directive 2001/29/EC by those rightholders that have been identified and located, including the rightholders of works and other protected subject-matter which are embedded or incorporated in the works or phonograms. Rightholders that have been identified and located can give this authorisation only in relation to the rights that they themselves hold, either because the rights are their own rights or because the rights were transferred to them, and should not be able to authorise under this Directive any use on behalf of rightholders that have not been identified and located. Correspondingly, when previously non-identified or non-located rightholders come forward in order to claim their rights in the work or phonogram, the lawful use of the work or phonogram by the beneficiaries can continue only if those rightholders give their authorisation to do so under Directive 2001/29/EC in relation to the rights that they hold.

(18) Rightholders should be entitled to put an end to the orphan work status in the event that they come forward to claim their rights in the work or other protected subject-matter. Rightholders that put an end to the orphan work status of a work or other protected subject-matter should receive fair compensation for the use that has been made of their works or other protected subject-matter under this Directive, to be determined by the Member State where the organisation that uses an orphan work is established. Member States should be free to determine the circumstances under which the payment of such compensation may be organised, including the point in time at which the payment is due.

For the purposes of determining the possible level of fair compensation, due account should be taken, inter alia, of Member States' cultural promotion objectives, of the non-commercial nature of the use made by the organisations in question in order to achieve aims related to their public-interest missions, such as promoting learning and disseminating culture, and of the possible harm to rightholders.

(19) If a work or phonogram has been wrongly found to be an orphan work, following a search which was not diligent, the remedies for copyright infringement in Member States' legislation, provided for in accordance with the relevant national provisions and Union law, remain available.

(20) In order to promote learning and the dissemination of culture, Member States should provide for an exception or limitation in addition to those provided for in Article 5 of Directive 2001/29/EC. That exception or limitation should permit certain organisations, as referred to in point (c) of Article 5(2) of Directive 2001/29/EC and film or audio heritage institutions which operate on a non-profit making basis, as well as public-service broadcasting organisations, to reproduce and make available to the public, within the meaning of that Directive, orphan works, provided that such use fulfils their public interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, their collections, including their digital collections. Film or audio heritage institutions should, for the purposes of this Directive, cover organisations designated by Member States to collect, catalogue, preserve and restore films and other audiovisual works or phonograms forming part of their cultural heritage. Public-service broadcasters should, for the purposes of this Directive, cover broadcasters with a public-service remit as conferred, defined and organised by each Member State. The exception or limitation established by this Directive to permit the use of orphan works is without prejudice to the exceptions and limitations provided for in Article 5 of Directive 2001/29/EC. It can be applied only in certain special cases which do not conflict with the normal exploitation of the work or other protected subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

(21) In order to incentivise digitisation, the beneficiaries of this Directive should be allowed to generate revenues in relation to their use of orphan works under this Directive in order to achieve aims related to

their public-interest missions, including in the context of public-private partnership agreements.

(22) Contractual arrangements may play a role in fostering the digitisation of European cultural heritage, it being understood that publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations, should be allowed, with a view to undertaking the uses permitted under this Directive, to conclude agreements with commercial partners for the digitisation and making available to the public of orphan works. Those agreements may include financial contributions by such partners. Such agreements should not impose any restrictions on the beneficiaries of this Directive as to their use of orphan works and should not grant the commercial partner any rights to use, or control the use of, the orphan works.

(23) In order to foster access by the Union's citizens to Europe's cultural heritage, it is also necessary to ensure that orphan works which have been digitised and made available to the public in one Member State may also be made available to the public in other Member States. Publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations that use an orphan work in order to achieve their public-interest missions should be able to make the orphan work available to the public in other Member States.

(24) This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences, legal presumptions of representation or transfer, collective management or similar arrangements or a combination of them, including for mass digitisation.

(25) Since the objective of this Directive, namely ensuring legal certainty with respect to the use of orphan works, cannot be sufficiently achieved by the Member States and can therefore, by reason of the need for uniformity of the rules governing the use of orphan works, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject-matter and scope

1. This Directive concerns certain uses made of orphan works by publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States, in order to achieve aims related to their public-interest missions.

2. This Directive applies to:

(a) works published in the form of books, journals, newspapers, magazines or other writings contained in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or of film or audio heritage institutions;

(b) cinematographic or audiovisual works and phonograms contained in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or of film or audio heritage institutions; and

(c) cinematographic or audiovisual works and phonograms produced by public-service broadcasting organisations up to and including 31 December 2002 and contained in their archives;

which are protected by copyright or related rights and which are first published in a Member State or, in the absence of publication, first broadcast in a Member State.

3. This Directive also applies to works and phonograms referred to in paragraph 2 which have never been published or broadcast but which have been made publicly accessible by the organisations referred to in paragraph 1 with the consent of the rightholders, provided that it is reasonable to assume that the rightholders would not oppose the uses referred to in Article 6. Member States may limit the application of this paragraph to works and phonograms which have been deposited with those organisations before 29 October 2014.

4. This Directive shall also apply to works and other protected subject-matter that are embedded or incorporated in, or constitute an integral part of, the works or phonograms referred to in paragraphs 2 and 3.

5. This Directive does not interfere with any arrangements concerning the management of rights at national level.

Article 2
Orphan works

1. A work or a phonogram shall be considered an orphan work if none of the rightholders in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a diligent search for the rightholders having been carried out and recorded in accordance with Article 3.

2. Where there is more than one rightholder in a work or phonogram, and not all of them have been identified or, even if identified, located after a diligent search has been carried out and recorded in accordance with Article 3, the work or phonogram may be used in accordance with this Directive provided that the rightholders that have been identified and located have, in relation to the rights they hold, authorised the organisations referred to in Article 1(1) to carry out the acts of reproduction and making available to the public covered respectively by Articles 2 and 3 of Directive 2001/29/EC.

3. Paragraph 2 shall be without prejudice to the rights in the work or phonogram of rightholders that have been identified and located.

4. Article 5 shall apply *mutatis mutandis* to the rightholders that have not been identified and located in the works referred to in paragraph 2.

5. This Directive shall be without prejudice to national provisions on anonymous or pseudonymous works.

Article 3
Diligent search

1. For the purposes of establishing whether a work or phonogram is an orphan work, the organisations referred to in Article 1(1) shall ensure that a diligent search is carried out in good faith in respect of each work or other protected subject-matter, by consulting the appropriate sources for the category of works and other protected subject-matter in question. The diligent search shall be carried out prior to the use of the work or phonogram.

2. The sources that are appropriate for each category of works or phonogram in question shall be determined by each Member State, in consultation with rightholders and users, and shall include at least the relevant sources listed in the Annex.

3. A diligent search shall be carried out in the Member State of first publication or, in the absence of publication, first broadcast, except in the case of cinematographic or audiovisual works the producer of which has his headquarters or habitual residence in a Member State, in which case the diligent search shall be carried out in the Member State of his headquarters or habitual residence.

In the case referred to in Article 1(3), the diligent search shall be carried out in the Member State where the organisation that made the work or phonogram publicly accessible with the consent of the rightholder is established.

4. If there is evidence to suggest that relevant information on rightholders is to be found in other countries, sources of information available in those other countries shall also be consulted.

5. Member States shall ensure that the organisations referred to in Article 1(1) maintain records of their diligent searches and that those organisations provide the following information to the competent national authorities:

(a) the results of the diligent searches that the organisations have carried out and which have led to the conclusion that a work or a phonogram is considered an orphan work;

(b) the use that the organisations make of orphan works in accordance with this Directive;

(c) any change, pursuant to Article 5, of the orphan work status of works and phonograms that the organisations use;

(d) the relevant contact information of the organisation concerned.

6. Member States shall take the necessary measures to ensure that the information referred to in paragraph 5 is recorded in a single publicly accessible online database established and managed by the Office for Harmonization in the Internal Market (the Office) in accordance with Regulation (EU) No 386/2012. To that end, they shall forward that information to the Office without delay upon receiving it from the organisations referred to in Article 1(1).

Article 4

Mutual recognition of orphan work status

A work or phonogram which is considered an orphan work according to Article 2 in a Member State shall be considered an orphan work in all Member States. That work or phonogram may be used and accessed in

accordance with this Directive in all Member States. This also applies to works and phonograms referred to in Article 2(2) in so far as the rights of the non-identified or non-located rightholders are concerned.

Article 5

End of orphan work status

Member States shall ensure that a rightholder in a work or phonogram considered to be an orphan work has, at any time, the possibility of putting an end to the orphan work status in so far as his rights are concerned.

Article 6

Permitted uses of orphan works

1. Member States shall provide for an exception or limitation to the right of reproduction and the right of making available to the public provided for respectively in Articles 2 and 3 of Directive 2001/29/EC to ensure that the organisations referred to in Article 1(1) are permitted to use orphan works contained in their collections in the following ways:

(a) by making the orphan work available to the public, within the meaning of Article 3 of Directive 2001/29/EC;

(b) by acts of reproduction, within the meaning of Article 2 of Directive 2001/29/EC, for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.

2. The organisations referred to in Article 1(1) shall use an orphan work in accordance with paragraph 1 of this Article only in order to achieve aims related to their public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection. The organisations may generate revenues in the course of such uses, for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public.

3. Member States shall ensure that the organisations referred to in Article 1(1) indicate the name of identified authors and other rightholders in any use of an orphan work.

4. This Directive is without prejudice to the freedom of contract of such organisations in the pursuit of their public-interest missions, particularly in respect of public-private partnership agreements.

5. Member States shall provide that a fair compensation is due to rightholders that put an end to the orphan work status of their works or other protected subject-matter for the use that has been made by the organisations referred to in Article 1(1) of such works and other protected subject-matter in accordance with paragraph 1 of this Article. Member States shall be free to determine the circumstances under which the payment of such compensation may be organised. The level of the compensation shall be determined, within the limits imposed by Union law, by the law of the Member State in which the organisation which uses the orphan work in question is established.

Article 7

Continued application of other legal provisions

This Directive shall be without prejudice to provisions concerning, in particular, patent rights, trade marks, design rights, utility models, the topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, the protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract, and rules on the freedom of the press and freedom of expression in the media.

Article 8

Application in time

1. This Directive shall apply in respect of all works and phonograms referred to in Article 1 which are protected by the Member States' legislation in the field of copyright on or after 29 October 2014.

2. This Directive shall apply without prejudice to any acts concluded and rights acquired before 29 October 2014.

Article 9

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 29 October 2014. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 10

Review clause

The Commission shall keep under constant review the development of rights information sources and shall by 29 October 2015, and at annual intervals thereafter, submit a report concerning the possible inclusion in the scope of application of this Directive of publishers and of works or other protected subject-matter not currently included in its scope, and in particular stand-alone photographs and other images.

By 29 October 2015, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive, in the light of the development of digital libraries.

When necessary, in particular to ensure the functioning of the internal market, the Commission shall submit proposals for amendment of this Directive.

A Member State that has valid reasons to consider that the implementation of this Directive hinders one of the national arrangements concerning the management of rights referred to in Article 1(5) may bring the matter to the attention of the Commission together with all relevant evidence. The Commission shall take such evidence into account when drawing up the report referred to in the second paragraph of this Article and when assessing whether it is necessary to submit proposals for amendment of this Directive.

Article 11

Entry into force

This Directive shall enter into force on the day following that of its publication in the Official Journal of the European Union.

Article 12
Addressees

This Directive is addressed to the Member States.
Done at Strasbourg, 25 October 2012.

ANNEX

The sources referred to in Article 3(2) include the following:

(1) for published books:

(a) legal deposit, library catalogues and authority files maintained by libraries and other institutions;

(b) the publishers' and authors' associations in the respective country;

(c) existing databases and registries, WATCH (Writers, Artists and their Copyright Holders), the ISBN (International Standard Book Number) and databases listing books in print;

(d) the databases of the relevant collecting societies, in particular reproduction rights organisations;

(e) sources that integrate multiple databases and registries, including VIAF (Virtual International Authority Files) and ARROW (Accessible Registries of Rights Information and Orphan Works);

(2) for newspapers, magazines, journals and periodicals:

(a) the ISSN (International Standard Serial Number) for periodical publications;

(b) indexes and catalogues from library holdings and collections;

(c) legal deposit;

(d) the publishers' associations and the authors' and journalists' associations in the respective country;

(e) the databases of relevant collecting societies including reproduction rights organisations;

(3) for visual works, including fine art, photography, illustration, design, architecture, sketches of the latter works and other such works that are contained in books, journals, newspapers and magazines or other works:

(a) the sources referred to in points (1) and (2);

(b) the databases of the relevant collecting societies, in particular for visual arts, and including reproduction rights organisations;

(c) the databases of picture agencies, where applicable;

(4) for audiovisual works and phonograms:

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- (a) legal deposit;
- (b) the producers' associations in the respective country;
- (c) databases of film or audio heritage institutions and national libraries;
- (d) databases with relevant standards and identifiers such as ISAN (International Standard Audiovisual Number) for audiovisual material, ISWC (International Standard Music Work Code) for musical works and ISRC (International Standard Recording Code) for phonograms;
- (e) the databases of the relevant collecting societies, in particular for authors, performers, phonogram producers and audiovisual producers;
- (f) credits and other information appearing on the work's packaging;
- (g) databases of other relevant associations representing a specific category of rightholders.

**DIRECTIVE 2011/77/EU OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL
of 27 September 2011
amending Directive 2006/116/EC on the term of protection of
copyright and certain related rights**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 53(1), 62 and 114 thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Acting in accordance with the ordinary legislative procedure ⁽²⁾,

Whereas:

(1) Under Directive 2006/116/EC of the European Parliament and of the Council ⁽³⁾, the term of protection for performers and producers of phonograms is 50 years.

(2) In the case of performers this period starts with the performance or, when the fixation of the performance is lawfully published or lawfully communicated to the public within 50 years after the performance is made, with the first such publication or the first such communication to the public, whichever is the earliest.

(3) For phonogram producers the period starts with the fixation of the phonogram or its lawful publication within 50 years after fixation, or, if it is not so published, its lawful communication to the public within 50 years after fixation.

(4) The socially recognised importance of the creative contribution of performers should be reflected in a level of protection that acknowledges their creative and artistic contribution.

(5) Performers generally start their careers young and the current term of protection of 50 years applicable to fixations of performances often does not protect their performances for their entire lifetime. Therefore, some performers face an income gap at the end of their

¹ OJ C 182, 4.8.2009, p. 36.

² Position of the European Parliament of 23 April 2009 (OJ C 184 E, 8.7.2010, p. 331) and Decision of the Council of 12 September 2011.

³ OJ L 372, 27.12.2006, p. 12.

lifetime. In addition, performers are often unable to rely on their rights to prevent or restrict an objectionable use of their performances that may occur during their lifetime.

(6) The revenue derived from the exclusive rights of reproduction and making available, as provided for in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ⁽¹⁾, as well as fair compensation for reproductions for private use within the meaning of that Directive, and from the exclusive rights of distribution and rental within the meaning of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property ⁽²⁾, should be available to performers for at least their lifetime.

(7) The term of protection for fixations of performances and for phonograms should therefore be extended to 70 years after the relevant event.

(8) The rights in the fixation of the performance should revert to the performer if a phonogram producer refrains from offering for sale in sufficient quantity, within the meaning of the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, copies of a phonogram which, but for the term extension, would be in the public domain, or refrains from making such a phonogram available to the public. That option should be available on expiry of a reasonable period of time for the phonogram producer to carry out both of these acts of exploitation. The rights of the phonogram producer in the phonogram should therefore expire, in order to avoid a situation in which these rights would coexist with those of the performer in the fixation of the performance while the latter rights are no longer transferred or assigned to the phonogram producer.

(9) Upon entering into a contractual relationship with a phonogram producer, performers normally have to transfer or assign to the phonogram producer their exclusive rights of reproduction, distribution, rental and making available of fixations of their performances. In exchange, some performers are paid an advance on royalties and enjoy payments only once the phonogram producer has

¹ OJ L 167, 22.6.2001, p. 10.

² OJ L 376, 27.12.2006, p. 28.

recouped the initial advance and made any contractually defined deductions. Other performers transfer or assign their exclusive rights in return for a one-off payment (non-recurring remuneration). This is particularly the case for performers who play in the background and do not appear in the credits (non-featured performers) but sometimes also for performers who appear in the credits (featured performers).

(10) In order to ensure that performers who have transferred or assigned their exclusive rights to phonogram producers actually benefit from the term extension, a series of accompanying measures should be introduced.

(11) A first accompanying measure should be the imposition on phonogram producers of an obligation to set aside, at least once a year, a sum corresponding to 20 % of the revenue from the exclusive rights of distribution, reproduction and making available of phonograms. 'Revenue' means the revenue derived by the phonogram producer before deducting costs.

(12) Payment of those sums should be reserved solely for the benefit of performers whose performances are fixed in a phonogram and who have transferred or assigned their rights to the phonogram producer in return for a one-off payment. The sums set aside in this manner should be distributed to non-featured performers at least once a year on an individual basis. Such distribution should be entrusted to collecting societies and national rules on non-distributable revenue may be applied. In order to avoid the imposition of a disproportionate burden in the collection and administration of that revenue, Member States should be able to regulate the extent to which micro-enterprises are subject to the obligation to contribute where such payments would appear unreasonable in relation to the costs of collecting and administering such revenue.

(13) However, Article 5 of Directive 2006/115/EC already grants performers an unwaivable right to equitable remuneration for the rental of, inter alia, phonograms. Likewise, in contractual practice performers do not usually transfer or assign to phonogram producers their rights to claim a single equitable remuneration for broadcasting and communication to the public under Article 8(2) of Directive 2006/115/EC and to fair compensation for reproductions for private use under point (b) of Article 5(2) of Directive 2001/29/EC. Therefore, in the calculation of the overall amount to be dedicated by a phonogram producer to payments

of the supplementary remuneration, no account should be taken of revenue which the phonogram producer has derived from the rental of phonograms, of the single equitable remuneration received for broadcasting and communication to the public or of the fair compensation received for private copying.

(14) A second accompanying measure designed to rebalance contracts whereby performers transfer their exclusive rights on a royalty basis to a phonogram producer, should be a 'clean slate' for those performers who have assigned their above-mentioned exclusive rights to phonogram producers in return for royalties or remuneration. In order for performers to benefit fully from the extended term of protection, Member States should ensure that, under agreements between phonogram producers and performers, a royalty or remuneration rate unencumbered by advance payments or contractually defined deductions is paid to performers during the extended period.

(15) For the sake of legal certainty it should be provided that, in the absence of clear indications to the contrary in the contract, a contractual transfer or assignment of rights in the fixation of the performance concluded before the date by which Member States are to adopt measures implementing this Directive shall continue to produce its effects for the extended term.

(16) Member States should be able to provide that certain terms in those contracts which provide for recurring payments can be renegotiated for the benefit of performers. Member States should have procedures in place to cover the eventuality that the renegotiation fails.

(17) This Directive should not affect national rules and agreements which are compatible with its provisions, such as collective agreements concluded in Member States between organisations representing performers and organisations representing producers.

(18) In some Member States, musical compositions with words are given a single term of protection, calculated from the death of the last surviving author, while in other Member States separate terms of protection apply for music and lyrics. Musical compositions with words are overwhelmingly co-written. For example, an opera is often the work of a librettist and a composer. Moreover, in musical genres such as jazz, rock and pop music, the creative process is often collaborative in nature.

(19) Consequently, the harmonisation of the term of protection in respect of musical compositions with words the lyrics and music of which

were created in order to be used together is incomplete, giving rise to obstacles to the free movement of goods and services, such as cross-border collective management services. In order to ensure the removal of such obstacles, all such works in protection at the date by which the Member States are required to transpose this Directive should have the same harmonised term of protection in all Member States.

(20) Directive 2006/116/EC should therefore be amended accordingly.

(21) Since the objectives of the accompanying measures cannot be sufficiently achieved by the Member States, inasmuch as national measures in that field would either lead to distortion of competition or affect the scope of exclusive rights of the phonogram producer which are defined by Union legislation, and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(22) In accordance with point 34 of the interinstitutional agreement on better law-making ⁽¹⁾, Member States are encouraged to draw up, for themselves and in the interests of the Union, their own tables which will, as far as possible, illustrate the correlation between this Directive and their transposition measures, and to make them public,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2006/116/EC

Directive 2006/116/EC is hereby amended as follows:

(1) The following paragraph shall be added to Article 1:

‘7. The term of protection of a musical composition with words shall expire 70 years after the death of the last of the following persons to survive, whether or not those persons are designated as co-authors: the author of the lyrics and the composer of the musical composition, provided that both contributions were specifically created for the respective musical composition with words.’

Article 3 shall be amended as follows:

¹ OJ C 321, 31.12.2003, p. 1.

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in paragraph 1, the second sentence shall be replaced by the following:

(a) 'However,

- if a fixation of the performance otherwise than in a phonogram is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier,

- if a fixation of the performance in a phonogram is lawfully published or lawfully communicated to the public within this period, the rights shall expire 70 years from the date of the first such publication or the first such communication to the public, whichever is the earlier.';

(b) in the second and third sentences of paragraph 2, the number '50' shall be replaced by '70';

(c) the following paragraphs shall be inserted:

'2a. If, 50 years after the phonogram was lawfully published or, failing such publication, 50 years after it was lawfully communicated to the public, the phonogram producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public, by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them, the performer may terminate the contract by which the performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter a "contract on transfer or assignment"). The right to terminate the contract on transfer or assignment may be exercised if the producer, within a year from the notification by the performer of his intention to terminate the contract on transfer or assignment pursuant to the previous sentence, fails to carry out both of the acts of exploitation referred to in that sentence. This right to terminate may not be waived by the performer. Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment in accordance with applicable national law. If the contract on transfer or assignment is terminated pursuant to this paragraph, the rights of the phonogram producer in the phonogram shall expire.

2b. Where a contract on transfer or assignment gives the performer a right to claim a non-recurring remuneration, the performer shall have the right to obtain an annual supplementary remuneration from the

phonogram producer for each full year immediately following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public. The right to obtain such annual supplementary remuneration may not be waived by the performer.

2c. The overall amount to be set aside by a phonogram producer for payment of the annual supplementary remuneration referred to in paragraph 2b shall correspond to 20 % of the revenue which the phonogram producer has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of the phonogram in question, following the 50th year after it was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public.

Member States shall ensure that phonogram producers are required on request to provide to performers who are entitled to the annual supplementary remuneration referred to in paragraph 2b any information which may be necessary in order to secure payment of that remuneration.

2d. Member States shall ensure that the right to obtain an annual supplementary remuneration as referred to in paragraph 2b is administered by collecting societies.

2e. Where a performer is entitled to recurring payments, neither advance payments nor any contractually defined deductions shall be deducted from the payments made to the performer following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public.’

(3) The following paragraphs shall be added to Article 10:

‘5. Article 3(1) to (2e) in the version thereof in force on 31 October 2011 shall apply to fixations of performances and phonograms in regard to which the performer and the phonogram producer are still protected, by virtue of those provisions in the version thereof in force on 30 October 2011, as at 1 November 2013 and to fixations of performances and phonograms which come into being after that date.

6. Article 1(7) shall apply to musical compositions with words of which at least the musical composition or the lyrics are protected in at least one Member State on 1 November 2013, and to musical compositions with words which come into being after that date.

PART I. COPYRIGHTS AND NEIGHBOURING RIGHTS

The first subparagraph of this paragraph shall be without prejudice to any acts of exploitation performed before 1 November 2013. Member States shall adopt the necessary provisions to protect, in particular, acquired rights of third parties.’

(4) The following Article shall be inserted:

‘Article 10a

Transitional measures

1. In the absence of clear contractual indications to the contrary, a contract on transfer or assignment concluded before 1 November 2013 shall be deemed to continue to produce its effects beyond the moment at which, by virtue of Article 3(1) in the version thereof in force on 30 October 2011, the performer would no longer be protected.

2. Member States may provide that contracts on transfer or assignment which entitle a performer to recurring payments and which are concluded before 1 November 2013 can be modified following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public.’

Article 2

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 November 2013. They shall forthwith inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

Reporting

1. By 1 November 2016, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive in the light of the development of the digital market, accompanied, where

appropriate, by a proposal for the further amendment of Directive 2006/116/EC.

2. By 1 January 2012, the Commission shall submit a report to the European Parliament, the Council and the European Economic and Social Committee, assessing the possible need for an extension of the term of protection of rights to performers and producers in the audiovisual sector. If appropriate, the Commission shall submit a proposal for the further amendment of Directive 2006/116/EC.

Article 4

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 5

Addressees

This Directive is addressed to the Member States.
Done at Strasbourg, 27 September 2011.

**DIRECTIVE 2009/24/EC OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL
of 23 April 2009
on the legal protection of computer programs**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽²⁾,

Whereas:

(1) The content of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs ⁽³⁾ has been amended. In the interests of clarity and rationality the said Directive should be codified.

(2) The development of computer programs requires the investment of considerable human, technical and financial resources while computer programs can be copied at a fraction of the cost needed to develop them independently.

(3) Computer programs are playing an increasingly important role in a broad range of industries and computer program technology can accordingly be considered as being of fundamental importance for the Community's industrial development.

(4) Certain differences in the legal protection of computer programs offered by the laws of the Member States have direct and negative effects on the functioning of the internal market as regards computer programs.

(5) Existing differences having such effects need to be removed and new ones prevented from arising, while differences not adversely affecting the functioning of the internal market to a substantial degree need not be removed or prevented from arising.

¹ OJ C 204, 9.8.2008, p. 24.

² Opinion of the European Parliament of 17 June 2008 (not yet published in the Official Journal) and Council Decision of 23 March 2009.

³ OJ L 122, 17.5.1991, p. 42.

(6) The Community's legal framework on the protection of computer programs can accordingly in the first instance be limited to establishing that Member States should accord protection to computer programs under copyright law as literary works and, further, to establishing who and what should be protected, the exclusive rights on which protected persons should be able to rely in order to authorise or prohibit certain acts and for how long the protection should apply.

(7) For the purpose of this Directive, the term 'computer program' shall include programs in any form, including those which are incorporated into hardware. This term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage.

(8) In respect of the criteria to be applied in determining whether or not a computer program is an original work, no tests as to the qualitative or aesthetic merits of the program should be applied.

(9) The Community is fully committed to the promotion of international standardisation.

(10) The function of a computer program is to communicate and work together with other components of a computer system and with users and, for this purpose, a logical and, where appropriate, physical interconnection and interaction is required to permit all elements of software and hardware to work with other software and hardware and with users in all the ways in which they are intended to function. The parts of the program which provide for such interconnection and interaction between elements of software and hardware are generally known as 'interfaces'. This functional interconnection and interaction is generally known as 'interoperability'; such interoperability can be defined as the ability to exchange information and mutually to use the information which has been exchanged.

(11) For the avoidance of doubt, it has to be made clear that only the expression of a computer program is protected and that ideas and principles which underlie any element of a program, including those which underlie its interfaces, are not protected by copyright under this Directive. In accordance with this principle of copyright, to the extent that logic, algorithms and programming languages comprise ideas and principles, those ideas and principles are not protected under this Directive. In accordance with the legislation and case-law of the Member

States and the international copyright conventions, the expression of those ideas and principles is to be protected by copyright.

(12) For the purposes of this Directive, the term 'rental' means the making available for use, for a limited period of time and for profit-making purposes, of a computer program or a copy thereof. This term does not include public lending, which, accordingly, remains outside the scope of this Directive.

(13) The exclusive rights of the author to prevent the unauthorised reproduction of his work should be subject to a limited exception in the case of a computer program to allow the reproduction technically necessary for the use of that program by the lawful acquirer. This means that the acts of loading and running necessary for the use of a copy of a program which has been lawfully acquired, and the act of correction of its errors, may not be prohibited by contract. In the absence of specific contractual provisions, including when a copy of the program has been sold, any other act necessary for the use of the copy of a program may be performed in accordance with its intended purpose by a lawful acquirer of that copy.

(14) A person having a right to use a computer program should not be prevented from performing acts necessary to observe, study or test the functioning of the program, provided that those acts do not infringe the copyright in the program.

(15) The unauthorised reproduction, translation, adaptation or transformation of the form of the code in which a copy of a computer program has been made available constitutes an infringement of the exclusive rights of the author. Nevertheless, circumstances may exist when such a reproduction of the code and translation of its form are indispensable to obtain the necessary information to achieve the interoperability of an independently created program with other programs. It has therefore to be considered that, in these limited circumstances only, performance of the acts of reproduction and translation by or on behalf of a person having a right to use a copy of the program is legitimate and compatible with fair practice and must therefore be deemed not to require the authorisation of the rightholder. An objective of this exception is to make it possible to connect all components of a computer system, including those of different manufacturers, so that they can work together. Such an exception to the author's exclusive rights may not be used in a way which prejudices the

legitimate interests of the rightholder or which conflicts with a normal exploitation of the program.

(16) Protection of computer programs under copyright laws should be without prejudice to the application, in appropriate cases, of other forms of protection. However, any contractual provisions contrary to the provisions of this Directive laid down in respect of decompilation or to the exceptions provided for by this Directive with regard to the making of a back-up copy or to observation, study or testing of the functioning of a program should be null and void.

(17) The provisions of this Directive are without prejudice to the application of the competition rules under Articles 81 and 82 of the Treaty if a dominant supplier refuses to make information available which is necessary for interoperability as defined in this Directive.

(18) The provisions of this Directive should be without prejudice to specific requirements of Community law already enacted in respect of the publication of interfaces in the telecommunications sector or Council Decisions relating to standardisation in the field of information technology and telecommunication.

(19) This Directive does not affect derogations provided for under national legislation in accordance with the Berne Convention on points not covered by this Directive.

(20) This Directive should be without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives set out in Annex I, Part B,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Object of protection

1. In accordance with the provisions of this Directive, Member States shall protect computer programs, by copyright, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works. For the purposes of this Directive, the term 'computer programs' shall include their preparatory design material.

2. Protection in accordance with this Directive shall apply to the expression in any form of a computer program. Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive.

3. A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection.

4. The provisions of this Directive shall apply also to programs created before 1 January 1993, without prejudice to any acts concluded and rights acquired before that date.

Article 2

Authorship of computer programs

1. The author of a computer program shall be the natural person or group of natural persons who has created the program or, where the legislation of the Member State permits, the legal person designated as the rightholder by that legislation.

Where collective works are recognised by the legislation of a Member State, the person considered by the legislation of the Member State to have created the work shall be deemed to be its author.

2. In respect of a computer program created by a group of natural persons jointly, the exclusive rights shall be owned jointly.

3. Where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract.

Article 3

Beneficiaries of protection

Protection shall be granted to all natural or legal persons eligible under national copyright legislation as applied to literary works.

Article 4

Restricted acts

1. Subject to the provisions of Articles 5 and 6, the exclusive rights of the rightholder within the meaning of Article 2 shall include the right to do or to authorise:

(a) the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole; in so far as loading, displaying, running, transmission or storage of the computer program

necessitate such reproduction, such acts shall be subject to authorisation by the rightholder;

(b) the translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof, without prejudice to the rights of the person who alters the program;

(c) any form of distribution to the public, including the rental, of the original computer program or of copies thereof.

2. The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.

Article 5

Exceptions to the restricted acts

1. In the absence of specific contractual provisions, the acts referred to in points (a) and (b) of Article 4(1) shall not require authorisation by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.

2. The making of a back-up copy by a person having a right to use the computer program may not be prevented by contract in so far as it is necessary for that use.

3. The person having a right to use a copy of a computer program shall be entitled, without the authorisation of the rightholder, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do.

Article 6

Decompilation

1. The authorisation of the rightholder shall not be required where reproduction of the code and translation of its form within the meaning of points (a) and (b) of Article 4(1) are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met:

(a) those acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorised to do so;

(b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in point (a); and

(c) those acts are confined to the parts of the original program which are necessary in order to achieve interoperability.

2. The provisions of paragraph 1 shall not permit the information obtained through its application:

(a) to be used for goals other than to achieve the interoperability of the independently created computer program;

(b) to be given to others, except when necessary for the interoperability of the independently created computer program; or

(c) to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.

3. In accordance with the provisions of the Berne Convention for the protection of Literary and Artistic Works, the provisions of this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the rightholder's legitimate interests or conflicts with a normal exploitation of the computer program.

Article 7

Special measures of protection

1. Without prejudice to the provisions of Articles 4, 5 and 6, Member States shall provide, in accordance with their national legislation, appropriate remedies against a person committing any of the following acts:

(a) any act of putting into circulation a copy of a computer program knowing, or having reason to believe, that it is an infringing copy;

(b) the possession, for commercial purposes, of a copy of a computer program knowing, or having reason to believe, that it is an infringing copy;

(c) any act of putting into circulation, or the possession for commercial purposes of, any means the sole intended purpose of which is

to facilitate the unauthorised removal or circumvention of any technical device which may have been applied to protect a computer program.

2. Any infringing copy of a computer program shall be liable to seizure in accordance with the legislation of the Member State concerned.

3. Member States may provide for the seizure of any means referred to in point (c) of paragraph 1.

Article 8

Continued application of other legal provisions

The provisions of this Directive shall be without prejudice to any other legal provisions such as those concerning patent rights, trade-marks, unfair competition, trade secrets, protection of semi-conductor products or the law of contract.

Any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5(2) and (3) shall be null and void.

Article 9

Communication

Member States shall communicate to the Commission the provisions of national law adopted in the field governed by this Directive.

Article 10

Repeal

Directive 91/250/EEC, as amended by the Directive indicated in Annex I, Part A, is repealed, without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives set out in Annex I, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

Article 11

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

PART I. COPYRIGHTS AND NEIGHBOURING RIGHTS

Article 12

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 23 April 2009.

ANNEX I

PART A. Repealed Directive with its amendment (referred to in Article 10)

Council Directive 91/250/EEC	
Council Directive 93/98/EEC	Article 11(1) only

PART B. List of time-limits for transposition into national law (referred to in Article 10)

Directive	Time-limit for transposition
91/250/EEC	31 December 1992
93/98/EEC	30 June 1995

ANNEX II

Correlation table

Directive 91/250/EEC	This Directive
Article 1(1), (2) and (3)	Article 1(1), (2) and (3)
Article 2(1), first sentence	Article 2(1), first subparagraph
Article 2(1), second sentence	Article 2(1), second subparagraph
Article 2(2) and (3)	Article 2(2) and (3)
Article 3	Article 3
Article 4, introductory words	Article 4(1), introductory words
Article 4(a)	Article 4(1), point (a)

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Article 4(b)	Article 4(1), point (b)
Article 4(c), first sentence	Article 4(1), point (c)
Article 4(c), second sentence	Article 4(2)
Articles 5, 6 and 7	Articles 5, 6 and 7
Article 9(1), first sentence	Article 8, first paragraph
Article 9(1), second sentence	Article 8, second paragraph
Article 9(2)	Article 1(4)
Article 10(1)	—
Article 10(2)	Article 9
—	Article 10
—	Article 11
Article 11	Article 12
—	Annex I
—	Annex II

**DIRECTIVE 2006/115/EC OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL**

of 12 December 2006

**on rental right and lending right and on certain rights related
to copyright in the field of intellectual property**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE
EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,
and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social
Committee,

Acting in accordance with the procedure laid down in Article 251 of
the Treaty ⁽¹⁾,

Whereas:

(1) Council Directive 92/100/EEC of 19 November 1992 on rental
right and lending right and on certain rights related to copyright in the
field of intellectual property ⁽²⁾ has been substantially amended several
times ⁽³⁾. In the interests of clarity and rationality the said Directive
should be codified.

(2) Rental and lending of copyright works and the subject matter
of related rights protection is playing an increasingly important role in
particular for authors, performers and producers of phonograms and
films. Piracy is becoming an increasing threat.

(3) The adequate protection of copyright works and subject matter
of related rights protection by rental and lending rights as well as the
protection of the subject matter of related rights protection by the
fixation right, distribution right, right to broadcast and communication
to the public can accordingly be considered as being of fundamental
importance for the economic and cultural development of the
Community.

(4) Copyright and related rights protection must adapt to new
economic developments such as new forms of exploitation.

¹ Opinion of the European Parliament delivered on 12 October 2006 (not yet published in the
Official Journal).

² OJ L 346, 27.11.1992, p. 61. Directive as last amended by Directive 2001/29/EC of the
European Parliament and of the Council (OJ L 167, 22.6.2001, p. 10).

³ See Annex I, Part A.

(5) The creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky. The possibility of securing that income and recouping that investment can be effectively guaranteed only through adequate legal protection of the rightholders concerned.

(6) These creative, artistic and entrepreneurial activities are, to a large extent, activities of self-employed persons. The pursuit of such activities should be made easier by providing a harmonised legal protection within the Community. To the extent that these activities principally constitute services, their provision should equally be facilitated by a harmonised legal framework in the Community.

(7) The legislation of the Member States should be approximated in such a way as not to conflict with the international conventions on which the copyright and related rights laws of many Member States are based.

(8) The legal framework of the Community on the rental right and lending right and on certain rights related to copyright can be limited to establishing that Member States provide rights with respect to rental and lending for certain groups of rightholders and further to establishing the rights of fixation, distribution, broadcasting and communication to the public for certain groups of rightholders in the field of related rights protection.

(9) It is necessary to define the concepts of rental and lending for the purposes of this Directive.

(10) It is desirable, with a view to clarity, to exclude from rental and lending within the meaning of this Directive certain forms of making available, as for instance making available phonograms or films for the purpose of public performance or broadcasting, making available for the purpose of exhibition, or making available for on-the-spot reference use. Lending within the meaning of this Directive should not include making available between establishments which are accessible to the public.

(11) Where lending by an establishment accessible to the public gives rise to a payment the amount of which does not go beyond what is necessary to cover the operating costs of the establishment, there is no direct or indirect economic or commercial advantage within the meaning of this Directive.

PART I. COPYRIGHTS AND NEIGHBOURING RIGHTS

(12) It is necessary to introduce arrangements ensuring that an unwaivable equitable remuneration is obtained by authors and performers who must remain able to entrust the administration of this right to collecting societies representing them.

(13) The equitable remuneration may be paid on the basis of one or several payments at any time on or after the conclusion of the contract. It should take account of the importance of the contribution of the authors and performers concerned to the phonogram or film.

(14) It is also necessary to protect the rights at least of authors as regards public lending by providing for specific arrangements. However, any measures taken by way of derogation from the exclusive public lending right should comply in particular with Article 12 of the Treaty.

(15) The provisions laid down in this Directive as to rights related to copyright should not prevent Member States from extending to those exclusive rights the presumption provided for in this Directive with regard to contracts concerning film production concluded individually or collectively by performers with a film producer. Furthermore, those provisions should not prevent Member States from providing for a rebuttable presumption of the authorisation of exploitation in respect of the exclusive rights of performers provided for in the relevant provisions of this Directive, in so far as such presumption is compatible with the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (hereinafter referred to as the Rome Convention).

(16) Member States should be able to provide for more far-reaching protection for owners of rights related to copyright than that required by the provisions laid down in this Directive in respect of broadcasting and communication to the public.

(17) The harmonised rental and lending rights and the harmonised protection in the field of rights related to copyright should not be exercised in a way which constitutes a disguised restriction on trade between Member States or in a way which is contrary to the rule of media exploitation chronology, as recognised in the judgment handed down in *Société Cinéthèque v. FNCF*.

(18) This Directive should be without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives as set out in Part B of Annex I,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I. RENTAL AND LENDING RIGHT

Article 1

Object of harmonisation

1. In accordance with the provisions of this Chapter, Member States shall provide, subject to Article 6, a right to authorise or prohibit the rental and lending of originals and copies of copyright works, and other subject matter as set out in Article 3(1).

2. The rights referred to in paragraph 1 shall not be exhausted by any sale or other act of distribution of originals and copies of copyright works and other subject matter as set out in Article 3(1).

Article 2

Definitions

1. For the purposes of this Directive the following definitions shall apply:

(a) 'rental' means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage;

(b) 'lending' means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public;

(c) 'film' means a cinematographic or audiovisual work or moving images, whether or not accompanied by sound.

2. The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors.

Article 3

Rightholders and subject matter of rental and lending right

1. The exclusive right to authorise or prohibit rental and lending shall belong to the following:

(a) the author in respect of the original and copies of his work;

(b) the performer in respect of fixations of his performance;

(c) the phonogram producer in respect of his phonograms;

(d) the producer of the first fixation of a film in respect of the original and copies of his film.

2. This Directive shall not cover rental and lending rights in relation to buildings and to works of applied art.

3. The rights referred to in paragraph 1 may be transferred, assigned or subject to the granting of contractual licences.

4. Without prejudice to paragraph 6, when a contract concerning film production is concluded, individually or collectively, by performers with a film producer, the performer covered by this contract shall be presumed, subject to contractual clauses to the contrary, to have transferred his rental right, subject to Article 5.

5. Member States may provide for a similar presumption as set out in paragraph 4 with respect to authors.

6. Member States may provide that the signing of a contract concluded between a performer and a film producer concerning the production of a film has the effect of authorising rental, provided that such contract provides for an equitable remuneration within the meaning of Article 5. Member States may also provide that this paragraph shall apply *mutatis mutandis* to the rights included in Chapter II.

Article 4

Rental of computer programs

This Directive shall be without prejudice to Article 4(c) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs ⁽⁵⁾.

Article 5

Unwaivable right to equitable remuneration

1. Where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer shall retain the right to obtain an equitable remuneration for the rental.

2. The right to obtain an equitable remuneration for rental cannot be waived by authors or performers.

3. The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers.

4. Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected.

Article 6

Derogation from the exclusive public lending right

1. Member States may derogate from the exclusive right provided for in Article 1 in respect of public lending, provided that at least authors obtain a remuneration for such lending. Member States shall be free to determine this remuneration taking account of their cultural promotion objectives.

2. Where Member States do not apply the exclusive lending right provided for in Article 1 as regards phonograms, films and computer programs, they shall introduce, at least for authors, a remuneration.

3. Member States may exempt certain categories of establishments from the payment of the remuneration referred to in paragraphs 1 and 2.

CHAPTER II. RIGHTS RELATED TO COPYRIGHT

Article 7

Fixation right

1. Member States shall provide for performers the exclusive right to authorise or prohibit the fixation of their performances.

2. Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the fixation of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. A cable distributor shall not have the right provided for in paragraph 2 where it merely retransmits by cable the broadcasts of broadcasting organisations.

Article 8

Broadcasting and communication to the public

1. Member States shall provide for performers the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation.

2. Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the

relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them.

3. Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

Article 9

Distribution right

1. Member States shall provide the exclusive right to make available to the public, by sale or otherwise, the objects indicated in points (a) to (d), including copies thereof, hereinafter ‘the distribution right’:

- (a) for performers, in respect of fixations of their performances;
- (b) for phonogram producers, in respect of their phonograms;
- (c) for producers of the first fixations of films, in respect of the original and copies of their films;
- (d) for broadcasting organisations, in respect of fixations of their broadcasts as set out in Article 7(2).

2. The distribution right shall not be exhausted within the Community in respect of an object as referred to in paragraph 1, except where the first sale in the Community of that object is made by the rightholder or with his consent.

3. The distribution right shall be without prejudice to the specific provisions of Chapter I, in particular Article 1(2).

4. The distribution right may be transferred, assigned or subject to the granting of contractual licences.

Article 10

Limitations to rights

1. Member States may provide for limitations to the rights referred to in this Chapter in respect of:

- (a) private use;
- (b) use of short excerpts in connection with the reporting of current events;

(c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;

(d) use solely for the purposes of teaching or scientific research.

2. Irrespective of paragraph 1, any Member State may provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms, broadcasting organisations and of producers of the first fixations of films, as it provides for in connection with the protection of copyright in literary and artistic works.

However, compulsory licences may be provided for only to the extent to which they are compatible with the Rome Convention.

3. The limitations referred to in paragraphs 1 and 2 shall be applied only in certain special cases which do not conflict with a normal exploitation of the subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.

CHAPTER III. COMMON PROVISIONS

Article 11

Application in time

1. This Directive shall apply in respect of all copyright works, performances, phonograms, broadcasts and first fixations of films referred to in this Directive which were, on 1 July 1994, still protected by the legislation of the Member States in the field of copyright and related rights or which met the criteria for protection under this Directive on that date.

2. This Directive shall apply without prejudice to any acts of exploitation performed before 1 July 1994.

3. Member States may provide that the rightholders are deemed to have given their authorisation to the rental or lending of an object referred to in points (a) to (d) of Article 3(1) which is proven to have been made available to third parties for this purpose or to have been acquired before 1 July 1994.

However, in particular where such an object is a digital recording, Member States may provide that rightholders shall have a right to obtain an adequate remuneration for the rental or lending of that object.

4. Member States need not apply the provisions of Article 2(2) to cinematographic or audiovisual works created before 1 July 1994.

5. This Directive shall, without prejudice to paragraph 3 and subject to paragraph 7, not affect any contracts concluded before 19 November 1992.

6. Member States may provide, subject to the provisions of paragraph 7, that when rightholders who acquire new rights under the national provisions adopted in implementation of this Directive have, before 1 July 1994, given their consent for exploitation, they shall be presumed to have transferred the new exclusive rights.

7. For contracts concluded before 1 July 1994, the unwaivable right to an equitable remuneration provided for in Article 5 shall apply only where authors or performers or those representing them have submitted a request to that effect before 1 January 1997. In the absence of agreement between rightholders concerning the level of remuneration, Member States may fix the level of equitable remuneration.

Article 12

Relation between copyright and related rights

Protection of copyright-related rights under this Directive shall leave intact and shall in no way affect the protection of copyright.

Article 13

Communication

Member States shall communicate to the Commission the main provisions of national law adopted in the field covered by this Directive.

Article 14

Repeal

Directive 92/100/EEC is hereby repealed, without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives as set out in Part B of Annex I.

References made to the repealed Directive shall be construed as being made to this Directive and should be read in accordance with the correlation table in Annex II.

Article 15

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 16

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 12 December 2006.

ANNEX I

PART A

Repealed Directive with its successive amendments

Council Directive 92/100/EEC	
Council Directive 93/98/EEC	Article 11(2) only
Directive 2001/29/EC of the European Parliament and of the Council (OJ L 167, 22.6.2001, p. 10)	Article 11(1) only

PART B. List of time-limits for transposition into national law
(referred to in Article 14)

Directive	Time-limit for transposition
92/100/EEC	1 July 1994
93/98/EEC	30 June 1995
2001/29/EC	21 December 2002

**ANNEX II
CORRELATION TABLE**

Directive 92/100/EEC	This Directive
Article 1(1)	Article 1(1)
Article 1(2)	Article 2(1), introductory words and point (a)
Article 1(3)	Article 2(1), point (b)
Article 1(4)	Article 1(2)
Article 2(1), introductory words	Article 3(1), introductory words
Article 2(1), first indent	Article 3(1)(a)
Article 2(1), second indent	Article 3(1)(b)
Article 2(1), third indent	Article 3(1)(c)
Article 2(1), fourth indent, first sentence	Article 3(1)(d)
Article 2(1), fourth indent, second sentence	Article 2(1), point (c)
Article 2(2)	Article 2 (2)
Article 2(3)	Article 3(2)
Article 2(4)	Article 3(3)
Article 2(5)	Article 3(4)
Article 2(6)	Article 3(5)
Article 2(7)	Article 3(6)
Article 3	Article 4
Article 4	Article 5

THE EU ACQUIS ON INTELLECTUAL PROPERTY LAW

Article 5(1) to (3)	Article 6(1) to (3)
Article 5(4)	—
Article 6	Article 7
Article 8	Article 8
Article 9(1), introductory words and final words	Article 9(1), introductory words
Article 9(1), first indent	Article 9(1)(a)
Article 9(1), second indent	Article 9(1)(b)
Article 9(1), third indent	Article 9(1)(c)
Article 9(1), fourth indent	Article 9(1)(d)
Article 9(2), (3) and (4)	Article 9(2), (3) and (4)
Article 10(1)	Article 10(1)
Article 10(2), first sentence	Article 10(2), first subparagraph
Article 10(2), second sentence	Article 10(2), second subparagraph
Article 10(3)	Article 10(3)
Article 13(1) and (2)	Article 11(1) and (2)
Article 13(3), first sentence	Article 11(3), first subparagraph
Article 13(3), second sentence	Article 11(3), second subparagraph
Article 13(4)	Article 11(4)
Article 13(5)	—
Article 13(6)	Article 11(5)

PART I. COPYRIGHTS AND NEIGHBOURING RIGHTS

Article 13(7)	Article 11(6)
Article 13(8)	—
Article 13(9)	Article 11(7)
Article 14	Article 12
Article 15(1)	—
Article 15(2)	Article 13
—	Article 14
—	Article 15
Article 16	Article 16
—	Annex I
—	Annex II

**DIRECTIVE 2004/48/EC OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL
of 29 April 2004
on the enforcement of intellectual property rights**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee ⁽¹⁾,

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽²⁾,

Whereas:

(1) The achievement of the Internal Market entails eliminating restrictions on freedom of movement and distortions of competition, while creating an environment conducive to innovation and investment. In this context, the protection of intellectual property is an essential element for the success of the Internal Market. The protection of intellectual property is important not only for promoting innovation and creativity, but also for developing employment and improving competitiveness.

(2) The protection of intellectual property should allow the inventor or creator to derive a legitimate profit from his invention or creation. It should also allow the widest possible dissemination of works, ideas and new know-how. At the same time, it should not hamper freedom of expression, the free movement of information, or the protection of personal data, including on the Internet.

(3) However, without effective means of enforcing intellectual property rights, innovation and creativity are discouraged and investment diminished. It is therefore necessary to ensure that the substantive law on intellectual property, which is nowadays largely part of the *acquis communautaire*, is applied effectively in the Community. In

¹ OJ C 32, 5.2.2004, p. 15

² Opinion of the European Parliament of 9 March 2004 (not yet published in the Official Journal) and Council Decision of 26 April 2004

this respect, the means of enforcing intellectual property rights are of paramount importance for the success of the Internal Market.

(4) At international level, all Member States, as well as the Community itself as regards matters within its competence, are bound by the Agreement on Trade-Related Aspects of Intellectual Property (the "TRIPS Agreement"), approved, as part of the multilateral negotiations of the Uruguay Round, by Council Decision 94/800/EC ⁽¹⁾ and concluded in the framework of the World Trade Organisation.

(5) The TRIPS Agreement contains, in particular, provisions on the means of enforcing intellectual property rights, which are common standards applicable at international level and implemented in all Member States. This Directive should not affect Member States' international obligations, including those under the TRIPS Agreement.

(6) There are also international conventions to which all Member States are parties and which also contain provisions on the means of enforcing intellectual property rights. These include, in particular, the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

(7) It emerges from the consultations held by the Commission on this question that, in the Member States, and despite the TRIPS Agreement, there are still major disparities as regards the means of enforcing intellectual property rights. For instance, the arrangements for applying provisional measures, which are used in particular to preserve evidence, the calculation of damages, or the arrangements for applying injunctions, vary widely from one Member State to another. In some Member States, there are no measures, procedures and remedies such as the right of information and the recall, at the infringer's expense, of the infringing goods placed on the market.

(8) The disparities between the systems of the Member States as regards the means of enforcing intellectual property rights are prejudicial to the proper functioning of the Internal Market and make it impossible to ensure that intellectual property rights enjoy an equivalent level of protection throughout the Community. This situation does not

¹ OJ L 336, 23.12.1994, p. 1.

promote free movement within the Internal Market or create an environment conducive to healthy competition.

(9) The current disparities also lead to a weakening of the substantive law on intellectual property and to a fragmentation of the Internal Market in this field. This causes a loss of confidence in the Internal Market in business circles, with a consequent reduction in investment in innovation and creation. Infringements of intellectual property rights appear to be increasingly linked to organised crime. Increasing use of the Internet enables pirated products to be distributed instantly around the globe. Effective enforcement of the substantive law on intellectual property should be ensured by specific action at Community level. Approximation of the legislation of the Member States in this field is therefore an essential prerequisite for the proper functioning of the Internal Market.

(10) The objective of this Directive is to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the Internal Market.

(11) This Directive does not aim to establish harmonised rules for judicial cooperation, jurisdiction, the recognition and enforcement of decisions in civil and commercial matters, or deal with applicable law. There are Community instruments which govern such matters in general terms and are, in principle, equally applicable to intellectual property.

(12) This Directive should not affect the application of the rules of competition, and in particular Articles 81 and 82 of the Treaty. The measures provided for in this Directive should not be used to restrict unduly competition in a manner contrary to the Treaty.

(13) It is necessary to define the scope of this Directive as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field and/or by the national law of the Member State concerned. Nevertheless, that requirement does not affect the possibility, on the part of those Member States which so wish, to extend, for internal purposes, the provisions of this Directive to include acts involving unfair competition, including parasitic copies, or similar activities.

(14) The measures provided for in Articles 6(2), 8(1) and 9(2) need to be applied only in respect of acts carried out on a commercial scale. This is without prejudice to the possibility for Member States to apply those measures also in respect of other acts. Acts carried out on a

commercial scale are those carried out for direct or indirect economic or commercial advantage; this would normally exclude acts carried out by end-consumers acting in good faith.

(15) This Directive should not affect substantive law on intellectual property, Directive 95/46/EC of 24 October 1995 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data ⁽¹⁾, Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures ⁽²⁾ and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ⁽³⁾.

(16) The provisions of this Directive should be without prejudice to the particular provisions for the enforcement of rights and on exceptions in the domain of copyright and related rights set out in Community instruments and notably those found in Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs ⁽⁴⁾ or in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ⁽⁵⁾.

(17) The measures, procedures and remedies provided for in this Directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case, including the specific features of each intellectual property right and, where appropriate, the intentional or unintentional character of the infringement.

(18) The persons entitled to request application of those measures, procedures and remedies should be not only the rightholders but also persons who have a direct interest and legal standing in so far as permitted by and in accordance with the applicable law, which may include professional organisations in charge of the management of those

¹ OJ L 281, 23.11.1995, p. 31. Directive as amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1).

² OJ L 13, 19.1.2000, p. 12

³ OJ L 178, 17.7.2000, p. 1

⁴ OJ L 122, 17.5.1991, p. 42. Directive as amended by Directive 93/98/EEC (OJ L 290, 24.11.1993, p. 9).

⁵ OJ L 167, 22.6.2001, p. 10.

rights or for the defence of the collective and individual interests for which they are responsible.

(19) Since copyright exists from the creation of a work and does not require formal registration, it is appropriate to adopt the rule laid down in Article 15 of the Berne Convention, which establishes the presumption whereby the author of a literary or artistic work is regarded as such if his name appears on the work. A similar presumption should be applied to the owners of related rights since it is often the holder of a related right, such as a phonogram producer, who will seek to defend rights and engage in fighting acts of piracy.

(20) Given that evidence is an element of paramount importance for establishing the infringement of intellectual property rights, it is appropriate to ensure that effective means of presenting, obtaining and preserving evidence are available. The procedures should have regard to the rights of the defence and provide the necessary guarantees, including the protection of confidential information. For infringements committed on a commercial scale it is also important that the courts may order access, where appropriate, to banking, financial or commercial documents under the control of the alleged infringer.

(21) Other measures designed to ensure a high level of protection exist in certain Member States and should be made available in all the Member States. This is the case with the right of information, which allows precise information to be obtained on the origin of the infringing goods or services, the distribution channels and the identity of any third parties involved in the infringement.

(22) It is also essential to provide for provisional measures for the immediate termination of infringements, without awaiting a decision on the substance of the case, while observing the rights of the defence, ensuring the proportionality of the provisional measures as appropriate to the characteristics of the case in question and providing the guarantees needed to cover the costs and the injury caused to the defendant by an unjustified request. Such measures are particularly justified where any delay would cause irreparable harm to the holder of an intellectual property right.

(23) Without prejudice to any other measures, procedures and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary whose services are being used by a third party to infringe the rightholder's industrial property right.

The conditions and procedures relating to such injunctions should be left to the national law of the Member States. As far as infringements of copyright and related rights are concerned, a comprehensive level of harmonisation is already provided for in Directive 2001/29/EC. Article 8(3) of Directive 2001/29/EC should therefore not be affected by this Directive.

(24) Depending on the particular case, and if justified by the circumstances, the measures, procedures and remedies to be provided for should include prohibitory measures aimed at preventing further infringements of intellectual property rights. Moreover there should be corrective measures, where appropriate at the expense of the infringer, such as the recall and definitive removal from the channels of commerce, or destruction, of the infringing goods and, in appropriate cases, of the materials and implements principally used in the creation or manufacture of these goods. These corrective measures should take account of the interests of third parties including, in particular, consumers and private parties acting in good faith.

(25) Where an infringement is committed unintentionally and without negligence and where the corrective measures or injunctions provided for by this Directive would be disproportionate, Member States should have the option of providing for the possibility, in appropriate cases, of pecuniary compensation being awarded to the injured party as an alternative measure. However, where the commercial use of counterfeit goods or the supply of services would constitute an infringement of law other than intellectual property law or would be likely to harm consumers, such use or supply should remain prohibited.

(26) With a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer who engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the rightholder should take account of all appropriate aspects, such as loss of earnings incurred by the rightholder, or unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the rightholder. As an alternative, for example where it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in

question. The aim is not to introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion while taking account of the expenses incurred by the rightholder, such as the costs of identification and research.

(27) To act as a supplementary deterrent to future infringers and to contribute to the awareness of the public at large, it is useful to publicise decisions in intellectual property infringement cases.

(28) In addition to the civil and administrative measures, procedures and remedies provided for under this Directive, criminal sanctions also constitute, in appropriate cases, a means of ensuring the enforcement of intellectual property rights.

(29) Industry should take an active part in the fight against piracy and counterfeiting. The development of codes of conduct in the circles directly affected is a supplementary means of bolstering the regulatory framework. The Member States, in collaboration with the Commission, should encourage the development of codes of conduct in general. Monitoring of the manufacture of optical discs, particularly by means of an identification code embedded in discs produced in the Community, helps to limit infringements of intellectual property rights in this sector, which suffers from piracy on a large scale. However, these technical protection measures should not be misused to protect markets and prevent parallel imports.

(30) In order to facilitate the uniform application of this Directive, it is appropriate to provide for systems of cooperation and the exchange of information between Member States, on the one hand, and between the Member States and the Commission on the other, in particular by creating a network of correspondents designated by the Member States and by providing regular reports assessing the application of this Directive and the effectiveness of the measures taken by the various national bodies.

(31) Since, for the reasons already described, the objective of this Directive can best be achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(32) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental

Rights of the European Union. In particular, this Directive seeks to ensure full respect for intellectual property, in accordance with Article 17(2) of that Charter,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I. Objective and scope

Article 1

Subject-matter

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

Article 2

Scope

1. Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for rightholders, the measures, procedures and remedies provided for by this Directive shall apply, in accordance with Article 3, to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned.

2. This Directive shall be without prejudice to the specific provisions on the enforcement of rights and on exceptions contained in Community legislation concerning copyright and rights related to copyright, notably those found in Directive 91/250/EEC and, in particular, Article 7 thereof or in Directive 2001/29/EC and, in particular, Articles 2 to 6 and Article 8 thereof.

3. This Directive shall not affect:

(a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC, in general, and Articles 12 to 15 of Directive 2000/31/EC in particular;

(b) Member States' international obligations and notably the TRIPS Agreement, including those relating to criminal procedures and penalties;

(c) any national provisions in Member States relating to criminal procedures or penalties in respect of infringement of intellectual property rights.

CHAPTER II. Measures, procedures and remedies

Section 1. General provisions

Article 3

General obligation

1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

Article 4

Persons entitled to apply for the application of the measures, procedures and remedies

1. Member States shall recognise as persons entitled to seek application of the measures, procedures and remedies referred to in this Chapter:

(a) the holders of intellectual property rights, in accordance with the provisions of the applicable law,

(b) all other persons authorised to use those rights, in particular licensees, in so far as permitted by and in accordance with the provisions of the applicable law,

(c) intellectual property collective rights management bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the provisions of the applicable law,

(d) professional defence bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the provisions of the applicable law.

Article 5

Presumption of authorship or ownership

For the purposes of applying the measures, procedures and remedies provided for in this Directive,

(a) for the author of a literary or artistic work, in the absence of proof to the contrary, to be regarded as such, and consequently to be entitled to institute infringement proceedings, it shall be sufficient for his name to appear on the work in the usual manner;

(b) the provision under (a) shall apply *mutatis mutandis* to the holders of rights related to copyright with regard to their protected subject matter.

Section 2. Evidence

Article 6

Evidence

1. Member States shall ensure that, on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information. For the purposes of this paragraph, Member States may provide that a reasonable sample of a substantial number of copies of a work or any other protected object be considered by the competent judicial authorities to constitute reasonable evidence.

2. Under the same conditions, in the case of an infringement committed on a commercial scale Member States shall take such measures as are necessary to enable the competent judicial authorities to order, where appropriate, on application by a party, the communication of banking, financial or commercial documents under the control of the opposing party, subject to the protection of confidential information.

Article 7

Measures for preserving evidence

1. Member States shall ensure that, even before the commencement of proceedings on the merits of the case, the competent judicial authorities may, on application by a party who has presented reasonably

available evidence to support his claims that his intellectual property right has been infringed or is about to be infringed, order prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement, subject to the protection of confidential information. Such measures may include the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto. Those measures shall be taken, if necessary without the other party having been heard, in particular where any delay is likely to cause irreparable harm to the rightholder or where there is a demonstrable risk of evidence being destroyed.

Where measures to preserve evidence are adopted without the other party having been heard, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the parties affected with a view to deciding, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.

2. Member States shall ensure that the measures to preserve evidence may be subject to the lodging by the applicant of adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant as provided for in paragraph 4.

3. Member States shall ensure that the measures to preserve evidence are revoked or otherwise cease to have effect, upon request of the defendant, without prejudice to the damages which may be claimed, if the applicant does not institute, within a reasonable period, proceedings leading to a decision on the merits of the case before the competent judicial authority, the period to be determined by the judicial authority ordering the measures where the law of a Member State so permits or, in the absence of such determination, within a period not exceeding 20 working days or 31 calendar days, whichever is the longer.

4. Where the measures to preserve evidence are revoked, or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the

defendant, to provide the defendant appropriate compensation for any injury caused by those measures.

5. Member States may take measures to protect witnesses' identity.

Section 3. Right of information

Article 8

Right of information

1. Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who:

(a) was found in possession of the infringing goods on a commercial scale;

(b) was found to be using the infringing services on a commercial scale;

(c) was found to be providing on a commercial scale services used in infringing activities; or

(d) was indicated by the person referred to in point (a), (b) or (c) as being involved in the production, manufacture or distribution of the goods or the provision of the services.

2. The information referred to in paragraph 1 shall, as appropriate, comprise:

(a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers;

(b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question.

3. Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which:

(a) grant the rightholder rights to receive fuller information;

(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;

(c) govern responsibility for misuse of the right of information; or

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to his own participation or that of his close relatives in an infringement of an intellectual property right; or

(e) govern the protection of confidentiality of information sources or the processing of personal data.

Section 4. Provisional and precautionary measures

Article 9

Provisional and precautionary measures

1. Member States shall ensure that the judicial authorities may, at the request of the applicant:

(a) issue against the alleged infringer an interlocutory injunction intended to prevent any imminent infringement of an intellectual property right, or to forbid, on a provisional basis and subject, where appropriate, to a recurring penalty payment where provided for by national law, the continuation of the alleged infringements of that right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the rightholder; an interlocutory injunction may also be issued, under the same conditions, against an intermediary whose services are being used by a third party to infringe an intellectual property right; injunctions against intermediaries whose services are used by a third party to infringe a copyright or a related right are covered by Directive 2001/29/EC;

(b) order the seizure or delivery up of the goods suspected of infringing an intellectual property right so as to prevent their entry into or movement within the channels of commerce.

2. In the case of an infringement committed on a commercial scale, the Member States shall ensure that, if the injured party demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his bank accounts and other assets. To that end, the competent authorities may order the communication of bank, financial or commercial documents, or appropriate access to the relevant information.

3. The judicial authorities shall, in respect of the measures referred to in paragraphs 1 and 2, have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves

with a sufficient degree of certainty that the applicant is the rightholder and that the applicant's right is being infringed, or that such infringement is imminent.

4. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 2 may, in appropriate cases, be taken without the defendant having been heard, in particular where any delay would cause irreparable harm to the rightholder. In that event, the parties shall be so informed without delay after the execution of the measures at the latest.

A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable time after notification of the measures, whether those measures shall be modified, revoked or confirmed.

5. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 2 are revoked or otherwise cease to have effect, upon request of the defendant, if the applicant does not institute, within a reasonable period, proceedings leading to a decision on the merits of the case before the competent judicial authority, the period to be determined by the judicial authority ordering the measures where the law of a Member State so permits or, in the absence of such determination, within a period not exceeding 20 working days or 31 calendar days, whichever is the longer.

6. The competent judicial authorities may make the provisional measures referred to in paragraphs 1 and 2 subject to the lodging by the applicant of adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant as provided for in paragraph 7.

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by those measures.

Section 5. Measures resulting from a decision on the merits of the case

Article 10

Corrective measures

1. Without prejudice to any damages due to the rightholder by reason of the infringement, and without compensation of any sort, Member States shall ensure that the competent judicial authorities may order, at the request of the applicant, that appropriate measures be taken with regard to goods that they have found to be infringing an intellectual property right and, in appropriate cases, with regard to materials and implements principally used in the creation or manufacture of those goods. Such measures shall include:

- (a) recall from the channels of commerce,
- (b) definitive removal from the channels of commerce, or
- (c) destruction.

2. The judicial authorities shall order that those measures be carried out at the expense of the infringer, unless particular reasons are invoked for not doing so.

3. In considering a request for corrective measures, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account.

Article 11

Injunctions

Member States shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC.

Article 12

Alternative measures

Member States may provide that, in appropriate cases and at the request of the person liable to be subject to the measures provided for in this Section, the competent judicial authorities may order pecuniary compensation to be paid to the injured party instead of applying the measures provided for in this Section if that person acted unintentionally and without negligence, if execution of the measures in question would cause him disproportionate harm and if pecuniary compensation to the injured party appears reasonably satisfactory.

Section 6. Damages and legal costs

Article 13

Damages

1. Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to the actual prejudice suffered by him as a result of the infringement.

When the judicial authorities set the damages:

(a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement; or

(b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.

2. Where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established.

Article 14
Legal costs

Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this.

Section 7. Publicity measures

Article 15
Publication of judicial decisions

Member States shall ensure that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part. Member States may provide for other additional publicity measures which are appropriate to the particular circumstances, including prominent advertising.

CHAPTER III. Sanctions by Member States

Article 16
Sanctions by Member States

Without prejudice to the civil and administrative measures, procedures and remedies laid down by this Directive, Member States may apply other appropriate sanctions in cases where intellectual property rights have been infringed.

CHAPTER IV. Codes of conduct and administrative cooperation

Article 17
Codes of conduct

Member States shall encourage:

(a) the development by trade or professional associations or organisations of codes of conduct at Community level aimed at contributing towards the enforcement of the intellectual property rights, particularly by recommending the use on optical discs of a code enabling the identification of the origin of their manufacture;

(b) the submission to the Commission of draft codes of conduct at national and Community level and of any evaluations of the application of these codes of conduct.

Article 18
Assessment

1. Three years after the date laid down in Article 20(1), each Member State shall submit to the Commission a report on the implementation of this Directive.

On the basis of those reports, the Commission shall draw up a report on the application of this Directive, including an assessment of the effectiveness of the measures taken, as well as an evaluation of its impact on innovation and the development of the information society. That report shall then be transmitted to the European Parliament, the Council and the European Economic and Social Committee. It shall be accompanied, if necessary and in the light of developments in the Community legal order, by proposals for amendments to this Directive.

2. Member States shall provide the Commission with all the aid and assistance it may need when drawing up the report referred to in the second subparagraph of paragraph 1.

Article 19
Exchange of information and correspondents

For the purpose of promoting cooperation, including the exchange of information, among Member States and between Member States and the Commission, each Member State shall designate one or more national correspondents for any question relating to the implementation of the measures provided for by this Directive. It shall communicate the details of the national correspondent(s) to the other Member States and to the Commission.

CHAPTER V. Final provisions

Article 20

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ...⁽¹⁾. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field governed by this Directive.

Article 21

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 22

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 29.4.2004.

¹ Twenty-four months after the date of adoption of this Directive.

**DIRECTIVE 2001/84/EC OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL
of 27 September 2001
on the resale right for the benefit of the author of an original
work of art**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁽³⁾, and in the light of the joint text approved by the Conciliation Committee on 6 June 2001,

Whereas:

(1) In the field of copyright, the resale right is an unassignable and inalienable right, enjoyed by the author of an original work of graphic or plastic art, to an economic interest in successive sales of the work concerned.

(2) The resale right is a right of a productive character which enables the author/artist to receive consideration for successive transfers of the work. The subject-matter of the resale right is the physical work, namely the medium in which the protected work is incorporated.

(3) The resale right is intended to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art. It helps to redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works.

(4) The resale right forms an integral part of copyright and is an essential prerogative for authors. The imposition of such a right in all

¹ OJ C 178, 21.6.1996, p. 16 and OJ C 125, 23.4.1998, p. 8

² OJ C 75, 10.3.1997, p. 17.

³ Opinion of the European Parliament of 9 April 1997 (OJ C 132, 28.4.1997, p. 88), confirmed on 27 October 1999, Council Common Position of 19 June 2000 (OJ C 300, 20.10.2000, p. 1) and Decision of the European Parliament of 13 December 2000 (OJ C 232, 17.8.2001, p. 173). Decision of the European Parliament of 3 July 2001 and Decision of the Council of 19 July 2001.

Member States meets the need for providing creators with an adequate and standard level of protection.

(5) Under Article 151⁽¹⁾ of the Treaty the Community is to take cultural aspects into account in its action under other provisions of the Treaty.

(6) The Berne Convention for the Protection of Literary and Artistic Works provides that the resale right is available only if legislation in the country to which the author belongs so permits. The right is therefore optional and subject to the rule of reciprocity. It follows from the case-law of the Court of Justice of the European Communities on the application of the principle of non-discrimination laid down in Article 12 of the Treaty, as shown in the judgment of 20 October 1993 in Joined Cases C-92/92 and C-326/92 *Phil Collins and Others*⁽²⁾, that domestic provisions containing reciprocity clauses cannot be relied upon in order to deny nationals of other Member States rights conferred on national authors. The application of such clauses in the Community context runs counter to the principle of equal treatment resulting from the prohibition of any discrimination on grounds of nationality.

(7) The process of internationalisation of the Community market in modern and contemporary art, which is now being speeded up by the effects of the new economy, in a regulatory context in which few States outside the EU recognise the resale right, makes it essential for the European Community, in the external sphere, to open negotiations with a view to making Article 14b of the Berne Convention compulsory.

(8) The fact that this international market exists, combined with the lack of a resale right in several Member States and the current disparity as regards national systems which recognise that right, make it essential to lay down transitional provisions as regards both entry into force and the substantive regulation of the right, which will preserve the competitiveness of the European market.

(9) The resale right is currently provided for by the domestic legislation of a majority of Member States. Such laws, where they exist, display certain differences, notably as regards the works covered, those entitled to receive royalties, the rate applied, the transactions subject to payment of a royalty, and the basis on which these are calculated. The application or non-application of such a right has a significant impact on

¹ [1993] ECR I-5145.

² [1993] ECR I-5145.

the competitive environment within the internal market, since the existence or absence of an obligation to pay on the basis of the resale right is an element which must be taken into account by each individual wishing to sell a work of art. This right is therefore a factor which contributes to the creation of distortions of competition as well as displacement of sales within the Community.

(10) Such disparities with regard to the existence of the resale right and its application by the Member States have a direct negative impact on the proper functioning of the internal market in works of art as provided for by Article 14 of the Treaty. In such a situation Article 95 of the Treaty constitutes the appropriate legal basis.

(11) The objectives of the Community as set out in the Treaty include laying the foundations of an ever closer union among the peoples of Europe, promoting closer relations between the Member States belonging to the Community, and ensuring their economic and social progress by common action to eliminate the barriers which divide Europe. To that end the Treaty provides for the establishment of an internal market which presupposes the abolition of obstacles to the free movement of goods, freedom to provide services and freedom of establishment, and for the introduction of a system ensuring that competition in the common market is not distorted. Harmonisation of Member States' laws on the resale right contributes to the attainment of these objectives.

(12) The Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - common system of value added tax: uniform basis of assessment⁽¹⁾, progressively introduces a Community system of taxation applicable inter alia to works of art. Measures confined to the tax field are not sufficient to guarantee the harmonious functioning of the art market. This objective cannot be attained without harmonisation in the field of the resale right.

(13) Existing differences between laws should be eliminated where they have a distorting effect on the functioning of the internal market, and the emergence of any new differences of that kind should be prevented. There is no need to eliminate, or prevent the emergence of,

¹ OJ L 145, 13.6.1977, p. 1. Directive as last amended by Directive 1999/85/EC (OJ L 277, 28.10.1999, p. 34).

differences which cannot be expected to affect the functioning of the internal market.

(14) A precondition of the proper functioning of the internal market is the existence of conditions of competition which are not distorted. The existence of differences between national provisions on the resale right creates distortions of competition and displacement of sales within the Community and leads to unequal treatment between artists depending on where their works are sold. The issue under consideration has therefore transnational aspects which cannot be satisfactorily regulated by action by Member States. A lack of Community action would conflict with the requirement of the Treaty to correct distortions of competition and unequal treatment.

(15) In view of the scale of divergences between national provisions it is therefore necessary to adopt harmonising measures to deal with disparities between the laws of the Member States in areas where such disparities are liable to create or maintain distorted conditions of competition. It is not however necessary to harmonise every provision of the Member States' laws on the resale right and, in order to leave as much scope for national decision as possible, it is sufficient to limit the harmonisation exercise to those domestic provisions that have the most direct impact on the functioning of the internal market.

(16) This Directive complies therefore, in its entirety, with the principles of subsidiarity and proportionality as laid down in Article 5 of the Treaty.

(17) Pursuant to Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights⁽¹⁾, the term of copyright runs for 70 years after the author's death. The same period should be laid down for the resale right. Consequently, only the originals of works of modern and contemporary art may fall within the scope of the resale right. However, in order to allow the legal systems of Member States which do not, at the time of the adoption of this Directive, apply a resale right for the benefit of artists to incorporate this right into their respective legal systems and, moreover, to enable the economic operators in those Member States to adapt gradually to the aforementioned right whilst maintaining their economic viability, the Member States concerned should be allowed a limited transitional period

¹ OJ L 290, 24.11.1993, p. 9.

during which they may choose not to apply the resale right for the benefit of those entitled under the artist after his death.

(18) The scope of the resale right should be extended to all acts of resale, with the exception of those effected directly between persons acting in their private capacity without the participation of an art market professional. This right should not extend to acts of resale by persons acting in their private capacity to museums which are not for profit and which are open to the public. With regard to the particular situation of art galleries which acquire works directly from the author, Member States should be allowed the option of exempting from the resale right acts of resale of those works which take place within three years of that acquisition. The interests of the artist should also be taken into account by limiting this exemption to such acts of resale where the resale price does not exceed EUR 10000.

(19) It should be made clear that the harmonisation brought about by this Directive does not apply to original manuscripts of writers and composers.

(20) Effective rules should be laid down based on experience already gained at national level with the resale right. It is appropriate to calculate the royalty as a percentage of the sale price and not of the increase in value of works whose original value has increased.

(21) The categories of works of art subject to the resale right should be harmonised.

(22) The non-application of royalties below the minimum threshold may help to avoid disproportionately high collection and administration costs compared with the profit for the artist. However, in accordance with the principle of subsidiarity, the Member States should be allowed to establish national thresholds lower than the Community threshold, so as to promote the interests of new artists. Given the small amounts involved, this derogation is not likely to have a significant effect on the proper functioning of the internal market.

(23) The rates set by the different Member States for the application of the resale right vary considerably at present. The effective functioning of the internal market in works of modern and contemporary art requires the fixing of uniform rates to the widest possible extent.

(24) It is desirable to establish, with the intention of reconciling the various interests involved in the market for original works of art, a system consisting of a tapering scale of rates for several price bands. It

is important to reduce the risk of sales relocating and of the circumvention of the Community rules on the resale right.

(25) The person by whom the royalty is payable should, in principle, be the seller. Member States should be given the option to provide for derogations from this principle in respect of liability for payment. The seller is the person or undertaking on whose behalf the sale is concluded.

(26) Provision should be made for the possibility of periodic adjustment of the threshold and rates. To this end, it is appropriate to entrust to the Commission the task of drawing up periodic reports on the actual application of the resale right in the Member States and on the impact on the art market in the Community and, where appropriate, of making proposals relating to the amendment of this Directive.

(27) The persons entitled to receive royalties must be specified, due regard being had to the principle of subsidiarity. It is not appropriate to take action through this Directive in relation to Member States' laws of succession. However, those entitled under the author must be able to benefit fully from the resale right after his death, at least following the expiry of the transitional period referred to above.

(28) The Member States are responsible for regulating the exercise of the resale right, particularly with regard to the way this is managed. In this respect management by a collecting society is one possibility. Member States should ensure that collecting societies operate in a transparent and efficient manner. Member States must also ensure that amounts intended for authors who are nationals of other Member States are in fact collected and distributed. This Directive is without prejudice to arrangements in Member States for collection and distribution.

(29) Enjoyment of the resale right should be restricted to Community nationals as well as to foreign authors whose countries afford such protection to authors who are nationals of Member States. A Member State should have the option of extending enjoyment of this right to foreign authors who have their habitual residence in that Member State.

(30) Appropriate procedures for monitoring transactions should be introduced so as to ensure by practical means that the resale right is effectively applied by Member States. This implies also a right on the part of the author or his authorised representative to obtain any necessary information from the natural or legal person liable for payment of royalties. Member States which provide for collective

management of the resale right may also provide that the bodies responsible for that collective management should alone be entitled to obtain information,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I. SCOPE

Article 1

Subject matter of the resale right

1. Member States shall provide, for the benefit of the author of an original work of art, a resale right, to be defined as an inalienable right, which cannot be waived, even in advance, to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author.

2. The right referred to in paragraph 1 shall apply to all acts of resale involving as sellers, buyers or intermediaries art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art.

3. Member States may provide that the right referred to in paragraph 1 shall not apply to acts of resale where the seller has acquired the work directly from the author less than three years before that resale and where the resale price does not exceed EUR 10000.

4. The royalty shall be payable by the seller. Member States may provide that one of the natural or legal persons referred to in paragraph 2 other than the seller shall alone be liable or shall share liability with the seller for payment of the royalty.

Article 2

Works of art to which the resale right relates

1. For the purposes of this Directive, "original work of art" means works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs, provided they are made by the artist himself or are copies considered to be original works of art.

2. Copies of works of art covered by this Directive, which have been made in limited numbers by the artist himself or under his authority, shall be considered to be original works of art for the purposes of this Directive. Such copies will normally have been numbered, signed or otherwise duly authorised by the artist.

CHAPTER II. PARTICULAR PROVISIONS

Article 3

Threshold

1. It shall be for the Member States to set a minimum sale price from which the sales referred to in Article 1 shall be subject to resale right.

2. This minimum sale price may not under any circumstances exceed EUR 3000.

Article 4

Rates

1. The royalty provided for in Article 1 shall be set at the following rates:

(a) 4 % for the portion of the sale price up to EUR 50000;

(b) 3 % for the portion of the sale price from EUR 50000,01 to EUR 200000;

(c) 1 % for the portion of the sale price from EUR 200000,01 to EUR 350000;

(d) 0,5 % for the portion of the sale price from EUR 350000,01 to EUR 500000;

(e) 0,25 % for the portion of the sale price exceeding EUR 500000.

However, the total amount of the royalty may not exceed EUR 12500.

2. By way of derogation from paragraph 1, Member States may apply a rate of 5 % for the portion of the sale price referred to in paragraph 1(a).

3. If the minimum sale price set should be lower than EUR 3000, the Member State shall also determine the rate applicable to the portion of the sale price up to EUR 3000; this rate may not be lower than 4 %.

Article 5

Calculation basis

The sale prices referred to in Articles 3 and 4 are net of tax.

Article 6

Persons entitled to receive royalties

1. The royalty provided for under Article 1 shall be payable to the author of the work and, subject to Article 8(2), after his death to those entitled under him/her.

2. Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1.

Article 7

Third-country nationals entitled to receive royalties

1. Member States shall provide that authors who are nationals of third countries and, subject to Article 8(2), their successors in title shall enjoy the resale right in accordance with this Directive and the legislation of the Member State concerned only if legislation in the country of which the author or his/her successor in title is a national permits resale right protection in that country for authors from the Member States and their successors in title.

2. On the basis of information provided by the Member States, the Commission shall publish as soon as possible an indicative list of those third countries which fulfil the condition set out in paragraph 1. This list shall be kept up to date.

3. Any Member State may treat authors who are not nationals of a Member State but who have their habitual residence in that Member State in the same way as its own nationals for the purpose of resale right protection.

Article 8

Term of protection of the resale right

1. The term of protection of the resale right shall correspond to that laid down in Article 1 of Directive 93/98/EEC.

2. By way of derogation from paragraph 1, those Member States which do not apply the resale right on (the entry into force date referred to in Article 13), shall not be required, for a period expiring not later than 1 January 2010, to apply the resale right for the benefit of those entitled under the artist after his/her death.

3. A Member State to which paragraph 2 applies may have up to two more years, if necessary to enable the economic operators in that Member State to adapt gradually to the resale right system while maintaining their economic viability, before it is required to apply the resale right for the benefit of those entitled under the artist after his/her death. At least 12 months before the end of the period referred to in paragraph 2, the Member State concerned shall inform the Commission giving its reasons, so that the Commission can give an opinion, after appropriate

consultations, within three months following the receipt of such information. If the Member State does not follow the opinion of the Commission, it shall within one month inform the Commission and justify its decision. The notification and justification of the Member State and the opinion of the Commission shall be published in the Official Journal of the European Communities and forwarded to the European Parliament.

4. In the event of the successful conclusion, within the periods referred to in Article 8(2) and (3), of international negotiations aimed at extending the resale right at international level, the Commission shall submit appropriate proposals.

Article 9

Right to obtain information

The Member States shall provide that for a period of three years after the resale, the persons entitled under Article 6 may require from any art market professional mentioned in Article 1(2) to furnish any information that may be necessary in order to secure payment of royalties in respect of the resale.

CHAPTER III. FINAL PROVISIONS

Article 10

Application in time

This Directive shall apply in respect of all original works of art as defined in Article 2 which, on 1 January 2006, are still protected by the legislation of the Member States in the field of copyright or meet the criteria for protection under the provisions of this Directive at that date.

Article 11

Revision clause

1. The Commission shall submit to the European Parliament, the Council and the Economic and Social Committee not later than 1 January 2009 and every four years thereafter a report on the implementation and the effect of this Directive, paying particular attention to the competitiveness of the market in modern and contemporary art in the Community, especially as regards the position of the Community in relation to relevant markets that do not apply the resale right and the fostering of artistic creativity and the management

procedures in the Member States. It shall examine in particular its impact on the internal market and the effect of the introduction of the resale right in those Member States that did not apply the right in national law prior to the entry into force of this Directive. Where appropriate, the Commission shall submit proposals for adapting the minimum threshold and the rates of royalty to take account of changes in the sector, proposals relating to the maximum amount laid down in Article 4(1) and any other proposal it may deem necessary in order to enhance the effectiveness of this Directive.

2. A Contact Committee is hereby established. It shall be composed of representatives of the competent authorities of the Member States. It shall be chaired by a representative of the Commission and shall meet either on the initiative of the Chairman or at the request of the delegation of a Member State.

3. The task of the Committee shall be as follows:

- to organise consultations on all questions deriving from application of this Directive,

- to facilitate the exchange of information between the Commission and the Member States on relevant developments in the art market in the Community.

Article 12

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 2006. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field covered by this Directive.

Article 13

Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 14
Addressees

This Directive is addressed to the Member States.
Done at Brussels, 27 September 2001.

**DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL**

of 22 May 2001

**on the harmonisation of certain aspects of copyright and
related rights in the information society**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE
EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,
and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission⁽¹⁾,

Having regard to the opinion of the Economic and Social
Committee⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of
the Treaty⁽³⁾,

Whereas:

(1) The Treaty provides for the establishment of an internal market
and the institution of a system ensuring that competition in the internal
market is not distorted. Harmonisation of the laws of the Member States
on copyright and related rights contributes to the achievement of these
objectives.

(2) The European Council, meeting at Corfu on 24 and 25 June 1994,
stressed the need to create a general and flexible legal framework at
Community level in order to foster the development of the information
society in Europe. This requires, inter alia, the existence of an internal
market for new products and services. Important Community legislation
to ensure such a regulatory framework is already in place or its adoption
is well under way. Copyright and related rights play an important role
in this context as they protect and stimulate the development and
marketing of new products and services and the creation and exploitation
of their creative content.

(3) The proposed harmonisation will help to implement the four
freedoms of the internal market and relates to compliance with the

¹ OJ C 108, 7.4.1998, p. 6 and OJ C 180, 25.6.1999, p. 6.

² OJ C 407, 28.12.1998, p. 30.

³ Opinion of the European Parliament of 10 February 1999 (OJ C 150, 28.5.1999, p. 171),
Council Common Position of 28 September 2000 (OJ C 344, 1.12.2000, p. 1) and Decision of
the European Parliament of 14 February 2001 (not yet published in the Official Journal).
Council Decision of 9 April 2001.

fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.

(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.

(5) Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.

(6) Without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. This development will and should further increase. Significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.

(7) The Community legal framework for the protection of copyright and related rights must, therefore, also be adapted and supplemented as far as is necessary for the smooth functioning of the internal market. To that end, those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the internal market and the proper development of the information society in Europe should be adjusted, and inconsistent national responses to the technological developments should be avoided, whilst differences not adversely

affecting the functioning of the internal market need not be removed or prevented.

(8) The various social, societal and cultural implications of the information society require that account be taken of the specific features of the content of products and services.

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

(11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.

(12) Adequate protection of copyright works and subject-matter of related rights is also of great importance from a cultural standpoint. Article 151 of the Treaty requires the Community to take cultural aspects into account in its action.

(13) A common search for, and consistent application at European level of, technical measures to protect works and other subject-matter and to provide the necessary information on rights are essential insofar as the ultimate aim of these measures is to give effect to the principles and guarantees laid down in law.

(14) This Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.

(15) The Diplomatic Conference held under the auspices of the World Intellectual Property Organisation (WIPO) in December 1996 led to the adoption of two new Treaties, the "WIPO Copyright Treaty" and the "WIPO Performances and Phonograms Treaty", dealing respectively with the protection of authors and the protection of performers and phonogram producers. Those Treaties update the international protection for copyright and related rights significantly, not least with regard to the so-called "digital agenda", and improve the means to fight piracy world-wide. The Community and a majority of Member States have already signed the Treaties and the process of making arrangements for the ratification of the Treaties by the Community and the Member States is under way. This Directive also serves to implement a number of the new international obligations.

(16) Liability for activities in the network environment concerns not only copyright and related rights but also other areas, such as defamation, misleading advertising, or infringement of trademarks, and is addressed horizontally in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ("Directive on electronic commerce")⁽¹⁾, which clarifies and harmonises various legal issues relating to information society services including electronic commerce. This Directive should be implemented within a timescale similar to that for the implementation of the Directive on electronic commerce, since that Directive provides a harmonised framework of principles and provisions relevant inter alia to important parts of this Directive. This Directive is without prejudice to provisions relating to liability in that Directive.

(17) It is necessary, especially in the light of the requirements arising out of the digital environment, to ensure that collecting societies achieve a higher level of rationalisation and transparency with regard to compliance with competition rules.

(18) This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences.

(19) The moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne

¹ OJ L 178, 17.7.2000, p. 1.

Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive.

(20) This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular Directives 91/250/EEC⁽¹⁾, 92/100/EEC⁽²⁾, 93/83/EEC⁽³⁾, 93/98/EEC⁽⁴⁾ and 96/9/EC⁽⁵⁾, and it develops those principles and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.

(21) This Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries. This should be done in conformity with the *acquis communautaire*. A broad definition of these acts is needed to ensure legal certainty within the internal market.

(22) The objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.

(23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.

(24) The right to make available to the public subject-matter referred to in Article 3(2) should be understood as covering all acts of making available such subject-matter to members of the public not

¹ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ L 122, 17.5.1991, p. 42). Directive as amended by Directive 93/98/EEC.

² Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 346, 27.11.1992, p. 61). Directive as amended by Directive 93/98/EEC.

³ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ L 248, 6.10.1993, p. 15).

⁴ Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ L 290, 24.11.1993, p. 9).

⁵ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p. 20).

present at the place where the act of making available originates, and as not covering any other acts.

(25) The legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission of copyright works and subject-matter protected by related rights over networks should be overcome by providing for harmonised protection at Community level. It should be made clear that all rightholders recognised by this Directive should have an exclusive right to make available to the public copyright works or any other subject-matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.

(26) With regard to the making available in on-demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral part thereof, collective licensing arrangements are to be encouraged in order to facilitate the clearance of the rights concerned.

(27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.

(28) Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community. This right should not be exhausted in respect of the original or of copies thereof sold by the rightholder or with his consent outside the Community. Rental and lending rights for authors have been established in Directive 92/100/EEC. The distribution right provided for in this Directive is without prejudice to the provisions relating to the rental and lending rights contained in Chapter I of that Directive.

(29) The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an

item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides.

(30) The rights referred to in this Directive may be transferred, assigned or subject to the granting of contractual licences, without prejudice to the relevant national legislation on copyright and related rights.

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.

(32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.

(33) The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made. The acts of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception should include acts which enable browsing as

well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorised by the rightholder or not restricted by law.

(34) Member States should be given the option of providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings.

(35) In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.

(36) The Member States may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation.

(37) Existing national schemes on reprography, where they exist, do not create major barriers to the internal market. Member States should be allowed to provide for an exception or limitation in respect of reprography.

(38) Member States should be allowed to provide for an exception or limitation to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation. This may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders.

Although differences between those remuneration schemes affect the functioning of the internal market, those differences, with respect to analogue private reproduction, should not have a significant impact on the development of the information society. Digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them.

(39) When applying the exception or limitation on private copying, Member States should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available. Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention.

(40) Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives. However, this should be limited to certain special cases covered by the reproduction right. Such an exception or limitation should not cover uses made in the context of on-line delivery of protected works or other subject-matter. This Directive should be without prejudice to the Member States' option to derogate from the exclusive public lending right in accordance with Article 5 of Directive 92/100/EEC. Therefore, specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.

(41) When applying the exception or limitation in respect of ephemeral recordings made by broadcasting organisations it is understood that a broadcaster's own facilities include those of a person acting on behalf of and under the responsibility of the broadcasting organisation.

(42) When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect.

(43) It is in any case important for the Member States to adopt all necessary measures to facilitate access to works by persons suffering from a disability which constitutes an obstacle to the use of the works themselves, and to pay particular attention to accessible formats.

(44) When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter. The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter.

(45) The exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law.

(46) Recourse to mediation could help users and rightholders to settle disputes. The Commission, in cooperation with the Member States within the Contact Committee, should undertake a study to consider new legal ways of settling disputes concerning copyright and related rights.

(47) Technological development will allow rightholders to make use of technological measures designed to prevent or restrict acts not authorised by the rightholders of any copyright, rights related to copyright or the sui generis right in databases. The danger, however, exists that illegal activities might be carried out in order to enable or facilitate the circumvention of the technical protection provided by these measures. In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against circumvention of effective technological measures and against provision of devices and products or services to this effect.

(48) Such legal protection should be provided in respect of technological measures that effectively restrict acts not authorised by the rightholders of any copyright, rights related to copyright or the sui generis right in databases without, however, preventing the normal

operation of electronic equipment and its technological development. Such legal protection implies no obligation to design devices, products, components or services to correspond to technological measures, so long as such device, product, component or service does not otherwise fall under the prohibition of Article 6. Such legal protection should respect proportionality and should not prohibit those devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection. In particular, this protection should not hinder research into cryptography.

(49) The legal protection of technological measures is without prejudice to the application of any national provisions which may prohibit the private possession of devices, products or components for the circumvention of technological measures.

(50) Such a harmonised legal protection does not affect the specific provisions on protection provided for by Directive 91/250/EEC. In particular, it should not apply to the protection of technological measures used in connection with computer programs, which is exclusively addressed in that Directive. It should neither inhibit nor prevent the development or use of any means of circumventing a technological measure that is necessary to enable acts to be undertaken in accordance with the terms of Article 5(3) or Article 6 of Directive 91/250/EEC. Articles 5 and 6 of that Directive exclusively determine exceptions to the exclusive rights applicable to computer programs.

(51) The legal protection of technological measures applies without prejudice to public policy, as reflected in Article 5, or public security. Member States should promote voluntary measures taken by rightholders, including the conclusion and implementation of agreements between rightholders and other parties concerned, to accommodate achieving the objectives of certain exceptions or limitations provided for in national law in accordance with this Directive. In the absence of such voluntary measures or agreements within a reasonable period of time, Member States should take appropriate measures to ensure that rightholders provide beneficiaries of such exceptions or limitations with appropriate means of benefiting from them, by modifying an implemented technological measure or by other means. However, in order to prevent abuse of such measures taken by rightholders, including within the framework of agreements, or taken by

a Member State, any technological measures applied in implementation of such measures should enjoy legal protection.

(52) When implementing an exception or limitation for private copying in accordance with Article 5(2)(b), Member States should likewise promote the use of voluntary measures to accommodate achieving the objectives of such exception or limitation. If, within a reasonable period of time, no such voluntary measures to make reproduction for private use possible have been taken, Member States may take measures to enable beneficiaries of the exception or limitation concerned to benefit from it. Voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, as well as measures taken by Member States, do not prevent rightholders from using technological measures which are consistent with the exceptions or limitations on private copying in national law in accordance with Article 5(2)(b), taking account of the condition of fair compensation under that provision and the possible differentiation between various conditions of use in accordance with Article 5(5), such as controlling the number of reproductions. In order to prevent abuse of such measures, any technological measures applied in their implementation should enjoy legal protection.

(53) The protection of technological measures should ensure a secure environment for the provision of interactive on-demand services, in such a way that members of the public may access works or other subject-matter from a place and at a time individually chosen by them. Where such services are governed by contractual arrangements, the first and second subparagraphs of Article 6(4) should not apply. Non-interactive forms of online use should remain subject to those provisions.

(54) Important progress has been made in the international standardisation of technical systems of identification of works and protected subject-matter in digital format. In an increasingly networked environment, differences between technological measures could lead to an incompatibility of systems within the Community. Compatibility and interoperability of the different systems should be encouraged. It would be highly desirable to encourage the development of global systems.

(55) Technological development will facilitate the distribution of works, notably on networks, and this will entail the need for rightholders to identify better the work or other subject-matter, the author or any other rightholder, and to provide information about the terms and

conditions of use of the work or other subject-matter in order to render easier the management of rights attached to them. Rightholders should be encouraged to use markings indicating, in addition to the information referred to above, *inter alia* their authorisation when putting works or other subject-matter on networks.

(56) There is, however, the danger that illegal activities might be carried out in order to remove or alter the electronic copyright-management information attached to it, or otherwise to distribute, import for distribution, broadcast, communicate to the public or make available to the public works or other protected subject-matter from which such information has been removed without authority. In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against any of these activities.

(57) Any such rights-management information systems referred to above may, depending on their design, at the same time process personal data about the consumption patterns of protected subject-matter by individuals and allow for tracing of on-line behaviour. These technical means, in their technical functions, should incorporate privacy safeguards in accordance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data ⁽¹⁾.

(58) Member States should provide for effective sanctions and remedies for infringements of rights and obligations as set out in this Directive. They should take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for should be effective, proportionate and dissuasive and should include the possibility of seeking damages and/or injunctive relief and, where appropriate, of applying for seizure of infringing material.

(59) In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who

¹ OJ L 281, 23.11.1995, p. 31.

carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.

(60) The protection provided under this Directive should be without prejudice to national or Community legal provisions in other areas, such as industrial property, data protection, conditional access, access to public documents, and the rule of media exploitation chronology, which may affect the protection of copyright or related rights.

(61) In order to comply with the WIPO Performances and Phonograms Treaty, Directives 92/100/EEC and 93/98/EEC should be amended,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I. OBJECTIVE AND SCOPE

Article 1

Scope

1. This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.

2. Except in the cases referred to in Article 11, this Directive shall leave intact and shall in no way affect existing Community provisions relating to:

- (a) the legal protection of computer programs;
- (b) rental right, lending right and certain rights related to copyright in the field of intellectual property;
- (c) copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission;
- (d) the term of protection of copyright and certain related rights;
- (e) the legal protection of databases.

CHAPTER II. RIGHTS AND EXCEPTIONS

Article 2

Reproduction right

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

- (a) for authors, of their works;
- (b) for performers, of fixations of their performances;
- (c) for phonogram producers, of their phonograms;
- (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
- (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

Article 3

Right of communication to the public of works and right of making available to the public other subject-matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

- (a) for performers, of fixations of their performances;
- (b) for phonogram producers, of their phonograms;
- (c) for the producers of the first fixations of films, of the original and copies of their films;
- (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

Article 4

Distribution right

1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.

2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.

Article 5

Exceptions and limitations

1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;

(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;

(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;

(d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;

(e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;

(b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;

(c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

(e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;

(f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;

(g) use during religious celebrations or official celebrations organised by a public authority;

(h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;

(i) incidental inclusion of a work or other subject-matter in other material;

(j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;

(k) use for the purpose of caricature, parody or pastiche;

(l) use in connection with the demonstration or repair of equipment;

(m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;

(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;

(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

4. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

CHAPTER III. PROTECTION OF TECHNOLOGICAL MEASURES AND RIGHTS-MANAGEMENT INFORMATION

Article 6

Obligations as to technological measures

1. Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.

PART I. COPYRIGHTS AND NEIGHBOURING RIGHTS

2. Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:

(a) are promoted, advertised or marketed for the purpose of circumvention of, or

(b) have only a limited commercially significant purpose or use other than to circumvent, or

(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures.

3. For the purposes of this Directive, the expression "technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

4. Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions

of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

The technological measures applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.

The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

When this Article is applied in the context of Directives 92/100/EEC and 96/9/EC, this paragraph shall apply *mutatis mutandis*.

Article 7

Obligations concerning rights-management information

1. Member States shall provide for adequate legal protection against any person knowingly performing without authority any of the following acts:

(a) the removal or alteration of any electronic rights-management information;

(b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected under this Directive or under Chapter III of Directive 96/9/EC from which electronic rights-management information has been removed or altered without authority, if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law, or of the *sui generis* right provided for in Chapter III of Directive 96/9/EC.

2. For the purposes of this Directive, the expression "rights-management information" means any information provided by rightholders which identifies the work or other subject-matter referred to in this Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC, the author or any other rightholder, or information about the terms and conditions of use of the work or other

subject-matter, and any numbers or codes that represent such information.

The first subparagraph shall apply when any of these items of information is associated with a copy of, or appears in connection with the communication to the public of, a work or other subjectmatter referred to in this Directive or covered by the sui generis right provided for in Chapter III of Directive 96/9/EC.

CHAPTER IV. COMMON PROVISIONS

Article 8

Sanctions and remedies

1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).

3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

Article 9

Continued application of other legal provisions

This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract.

Article 10

Application over time

1. The provisions of this Directive shall apply in respect of all works and other subject-matter referred to in this Directive which are, on 22 December 2002, protected by the Member States' legislation in the field of copyright and related rights, or which meet the criteria for protection under the provisions of this Directive or the provisions referred to in Article 1(2).

2. This Directive shall apply without prejudice to any acts concluded and rights acquired before 22 December 2002.

Article 11

Technical adaptations

1. Directive 92/100/EEC is hereby amended as follows:

(a) Article 7 shall be deleted;

(b) Article 10(3) shall be replaced by the following: "3. The limitations shall only be applied in certain special cases which do not conflict with a normal exploitation of the subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder."

2. Article 3(2) of Directive 93/98/EEC shall be replaced by the following: "2. The rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the phonogram has been lawfully published within this period, the said rights shall expire 50 years from the date of the first lawful publication. If no lawful publication has taken place within the period mentioned in the first sentence, and if the phonogram has been lawfully communicated to the public within this period, the said rights shall expire 50 years from the date of the first lawful communication to the public.

However, where through the expiry of the term of protection granted pursuant to this paragraph in its version before amendment by Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society⁽¹¹⁾ the rights of producers of phonograms are no longer protected on 22 December 2002, this paragraph shall not have the effect of protecting those rights anew."

Article 12

Final provisions

1. Not later than 22 December 2004 and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, in which, inter alia, on the basis of specific information supplied by the Member States, it shall examine in particular the application of Articles 5, 6 and 8 in the light of the development of the digital market. In the case of Article 6, it shall examine in particular whether that Article confers a sufficient level of protection and whether acts which are permitted by law are being adversely affected by the use of effective technological measures. Where necessary, in particular to ensure the functioning of the internal market pursuant to Article 14 of the Treaty, it shall submit proposals for amendments to this Directive.

2. Protection of rights related to copyright under this Directive shall leave intact and shall in no way affect the protection of copyright.

3. A contact committee is hereby established. It shall be composed of representatives of the competent authorities of the Member States. It shall be chaired by a representative of the Commission and shall meet either on the initiative of the chairman or at the request of the delegation of a Member State.

4. The tasks of the committee shall be as follows:

(a) to examine the impact of this Directive on the functioning of the internal market, and to highlight any difficulties;

(b) to organise consultations on all questions deriving from the application of this Directive;

(c) to facilitate the exchange of information on relevant developments in legislation and case-law, as well as relevant economic, social, cultural and technological developments;

(d) to act as a forum for the assessment of the digital market in works and other items, including private copying and the use of technological measures.

Article 13

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 22 December 2002. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive.

Article 14

Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 15

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 22 May 2001.

**COUNCIL DIRECTIVE 93/83/EEC
of 27 September 1993
on the coordination of certain rules concerning copyright and
rights related to copyright applicable to satellite broadcasting
and cable retransmission**

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57(2) and 66 thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

In cooperation with the European Parliament ⁽²⁾,

Having regard to the opinion of the Economic and Social Committee ⁽³⁾,

(1) Whereas the objectives of the Community as laid down in the Treaty include establishing an ever closer union among the peoples of Europe, fostering closer relations between the States belonging to the Community and ensuring the economic and social progress of the Community countries by common action to eliminate the barriers which divide Europe;

(2) Whereas, to that end, the Treaty provides for the establishment of a common market and an area without internal frontiers; whereas measures to achieve this include the abolition of obstacles to the free movement of services and the institution of a system ensuring that competition in the common market is not distorted; whereas, to that end, the Council may adopt directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons;

(3) Whereas broadcasts transmitted across frontiers within the Community, in particular by satellite and cable, are one of the most important ways of pursuing these Community objectives, which are at the same time political, economic, social, cultural and legal;

(4) Whereas the Council has already adopted Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States

¹ OJ No C 255, 1. 10. 1991, p. 3 and OJ No C 25, 28. 1. 1993, p. 43

² OJ No C 305, 23. 11. 1992, p. 129 and OJ No C 255, 20. 9. 1993

³ OJ No C 98, 21. 4. 1992, p. 44

concerning the pursuit of television broadcasting activities ⁽¹⁾, which makes provision for the promotion of the distribution and production of European television programmes and for advertising and sponsorship, the protection of minors and the right of reply;

(5) Whereas, however, the achievement of these objectives in respect of cross-border satellite broadcasting and the cable retransmission of programmes from other Member States is currently still obstructed by a series of differences between national rules of copyright and some degree of legal uncertainty; whereas this means that holders of rights are exposed to the threat of seeing their works exploited without payment of remuneration or that the individual holders of exclusive rights in various Member States block the exploitation of their rights; whereas the legal uncertainty in particular constitutes a direct obstacle in the free circulation of programmes within the Community;

(6) Whereas a distinction is currently drawn for copyright purposes between communication to the public by direct satellite and communication to the public by communications satellite; whereas, since individual reception is possible and affordable nowadays with both types of satellite, there is no longer any justification for this differing legal treatment;

(7) Whereas the free broadcasting of programmes is further impeded by the current legal uncertainty over whether broadcasting by a satellite whose signals can be received directly affects the rights in the country of transmission only or in all countries of reception together; whereas, since communications satellites and direct satellites are treated alike for copyright purposes, this legal uncertainty now affects almost all programmes broadcast in the Community by satellite;

(8) Whereas, furthermore, legal certainty, which is a prerequisite for the free movement of broadcasts within the Community, is missing where programmes transmitted across frontiers are fed into and retransmitted through cable networks;

(9) Whereas the development of the acquisition of rights on a contractual basis by authorization is already making a vigorous contribution to the creation of the desired European audiovisual area; whereas the continuation of such contractual agreements should be

¹ OJ No L 298, 17. 10. 1989, p. 23

PART I. COPYRIGHTS AND NEIGHBOURING RIGHTS

ensured and their smooth application in practice should be promoted wherever possible;

(10) Whereas at present cable operators in particular cannot be sure that they have actually acquired all the programme rights covered by such an agreement;

(11) Whereas, lastly, parties in different Member States are not all similarly bound by obligations which prevent them from refusing without valid reason to negotiate on the acquisition of the rights necessary for cable distribution or allowing such negotiations to fail;

(12) Whereas the legal framework for the creation of a single audiovisual area laid down in Directive 89/552/EEC must, therefore, be supplemented with reference to copyright;

(13) Whereas, therefore, an end should be put to the differences of treatment of the transmission of programmes by communications satellite which exist in the Member States, so that the vital distinction throughout the Community becomes whether works and other protected subject matter are communicated to the public; whereas this will also ensure equal treatment of the suppliers of cross-border broadcasts, regardless of whether they use a direct broadcasting satellite or a communications satellite;

(14) Whereas the legal uncertainty regarding the rights to be acquired which impedes cross-border satellite broadcasting should be overcome by defining the notion of communication to the public by satellite at a Community level; whereas this definition should at the same time specify where the act of communication takes place; whereas such a definition is necessary to avoid the cumulative application of several national laws to one single act of broadcasting; whereas communication to the public by satellite occurs only when, and in the Member State where, the programme-carrying signals are introduced under the control and responsibility of the broadcasting organization into an uninterrupted chain of communication leading to the satellite and down towards the earth; whereas normal technical procedures relating to the programme-carrying signals should not be considered as interruptions to the chain of broadcasting;

(15) Whereas the acquisition on a contractual basis of exclusive broadcasting rights should comply with any legislation on copyright and rights related to copyright in the Member State in which communication to the public by satellite occurs;

(16) Whereas the principle of contractual freedom on which this Directive is based will make it possible to continue limiting the exploitation of these rights, especially as far as certain technical means of transmission or certain language versions are concerned;

(17) Whereas, in arriving at the amount of the payment to be made for the rights acquired, the parties should take account of all aspects of the broadcast, such as the actual audience, the potential audience and the language version;

(18) Whereas the application of the country-of-origin principle contained in this Directive could pose a problem with regard to existing contracts; whereas this Directive should provide for a period of five years for existing contracts to be adapted, where necessary, in the light of the Directive; whereas the said country-of-origin principle should not, therefore, apply to existing contracts which expire before 1 January 2000; whereas if by that date parties still have an interest in the contract, the same parties should be entitled to renegotiate the conditions of the contract;

(19) Whereas existing international co-production agreements must be interpreted in the light of the economic purpose and scope envisaged by the parties upon signature; whereas in the past international co-production agreements have often not expressly and specifically addressed communication to the public by satellite within the meaning of this Directive a particular form of exploitation; whereas the underlying philosophy of many existing international co-production agreements is that the rights in the co-production are exercised separately and independently by each co-producer, by dividing the exploitation rights between them along territorial lines; whereas, as a general rule, in the situation where a communication to the public by satellite authorized by one co-producer would prejudice the value of the exploitation rights of another co-producer, the interpretation of such an existing agreement would normally suggest that the latter co-producer would have to give his consent to the authorization, by the former co-producer, of the communication to the public by satellite; whereas the language exclusivity of the latter co-producer will be prejudiced where the language version or versions of the communication to the public, including where the version is dubbed or subtitled, coincide(s) with the language or the languages widely understood in the territory allotted by the agreement to the latter co-producer; whereas the notion of exclusivity

should be understood in a wider sense where the communication to the public by satellite concerns a work which consists merely of images and contains no dialogue or subtitles; whereas a clear rule is necessary in cases where the international co-production agreement does not expressly regulate the division of rights in the specific case of communication to the public by satellite within the meaning of this Directive;

(20) Whereas communications to the public by satellite from non-member countries will under certain conditions be deemed to occur within a Member State of the Community;

(21) Whereas it is necessary to ensure that protection for authors, performers, producers of phonograms and broadcasting organizations is accorded in all Member States and that this protection is not subject to a statutory licence system; whereas only in this way is it possible to ensure that any difference in the level of protection within the common market will not create distortions of competition;

(22) Whereas the advent of new technologies is likely to have an impact on both the quality and the quantity of the exploitation of works and other subject matter;

(23) Whereas in the light of these developments the level of protection granted pursuant to this Directive to all rightholders in the areas covered by this Directive should remain under consideration;

(24) Whereas the harmonization of legislation envisaged in this Directive entails the harmonization of the provisions ensuring a high level of protection of authors, performers, phonogram producers and broadcasting organizations; whereas this harmonization should not allow a broadcasting organization to take advantage of differences in levels of protection by relocating activities, to the detriment of audiovisual productions;

(25) Whereas the protection provided for rights related to copyright should be aligned on that contained in Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property for the purposes of communication to the public by satellite; whereas, in particular, this will ensure that performers and phonogram producers are guaranteed an appropriate remuneration for the communication to the public by satellite of their performances or phonograms;

(26) Whereas the provisions of Article 4 do not prevent Member States from extending the presumption set out in Article 2 (5) of Directive 92/100/EEC to the exclusive rights referred to in Article 4; whereas, furthermore, the provisions of Article 4 do not prevent Member States from providing for a rebut-table presumption of the authorization of exploitation in respect of the exclusive rights of performers referred to in that Article, in so far as such presumption is compatible with the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations;

(27) Whereas the cable retransmission of programmes from other Member States is an act subject to copyright and, as the case may be, rights related to copyright; whereas the cable operator must, therefore, obtain the authorization from every holder of rights in each part of the programme retransmitted; whereas, pursuant to this Directive, the authorizations should be granted contractually unless a temporary exception is provided for in the case of existing legal licence schemes;

(28) Whereas, in order to ensure that the smooth operation of contractual arrangements is not called into question by the intervention of outsiders holding rights in individual parts of the programme, provision should be made, through the obligation to have recourse to a collecting society, for the exclusive collective exercise of the authorization right to the extent that this is required by the special features of cable retransmission; whereas the authorization right as such remains intact and only the exercise of this right is regulated to some extent, so that the right to authorize a cable retransmission can still be assigned; whereas this Directive does not affect the exercise of moral rights;

(29) Whereas the exemption provided for in Article 10 should not limit the choice of holders of rights to transfer their rights to a collecting society and thereby have a direct share in the remuneration paid by the cable distributor for cable retransmission;

(30) Whereas contractual arrangements regarding the authorization of cable retransmission should be promoted by additional measures; whereas a party seeking the conclusion of a general contract should, for its part, be obliged to submit collective proposals for an agreement; whereas, furthermore, any party shall be entitled, at any moment, to call upon the assistance of impartial mediators whose task is to assist negotiations and who may submit proposals; whereas any such proposals and any opposition thereto should be served on the parties

PART I. COPYRIGHTS AND NEIGHBOURING RIGHTS

concerned in accordance with the applicable rules concerning the service of legal documents, in particular as set out in existing international conventions; whereas, finally, it is necessary to ensure that the negotiations are not blocked without valid justification or that individual holders are not prevented without valid justification from taking part in the negotiations; whereas none of these measures for the promotion of the acquisition of rights calls into question the contractual nature of the acquisition of cable retransmission rights;

(31) Whereas for a transitional period Member States should be allowed to retain existing bodies with jurisdiction in their territory over cases where the right to retransmit a programme by cable to the public has been unreasonably refused or offered on unreasonable terms by a broadcasting organization; whereas it is understood that the right of parties concerned to be heard by the body should be guaranteed and that the existence of the body should not prevent the parties concerned from having normal access to the courts;

(32) Whereas, however, Community rules are not needed to deal with all of those matters, the effects of which perhaps with some commercially insignificant exceptions, are felt only inside the borders of a single Member State;

(33) Whereas minimum rules should be laid down in order to establish and guarantee free and uninterrupted cross-border broadcasting by satellite and simultaneous, unaltered cable retransmission of programmes broadcast from other Member States, on an essentially contractual basis;

(34) Whereas this Directive should not prejudice further harmonization in the field of copyright and rights related to copyright and the collective administration of such rights; whereas the possibility for Member States to regulate the activities of collecting societies should not prejudice the freedom of contractual negotiation of the rights provided for in this Directive, on the understanding that such negotiation takes place within the framework of general or specific national rules with regard to competition law or the prevention of abuse of monopolies;

(35) Whereas it should, therefore, be for the Member States to supplement the general provisions needed to achieve the objectives of this Directive by taking legislative and administrative measures in their domestic law, provided that these do not run counter to the objectives of this Directive and are compatible with Community law;

(36) Whereas this Directive does not affect the applicability of the competition rules in Articles 85 and 86 of the Treaty,
HAS ADOPTED THIS DIRECTIVE:

CHAPTER I. DEFINITIONS

Article 1

Definitions

1. For the purpose of this Directive, 'satellite' means any satellite operating on frequency bands which, under telecommunications law, are reserved for the broadcast of signals for reception by the public or which are reserved for closed, point-to-point communication. In the latter case, however, the circumstances in which individual reception of the signals takes place must be comparable to those which apply in the first case.

2. (a) For the purpose of this Directive, 'communication to the public by satellite' means the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.

(b) The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.

(c) If the programme-carrying signals are encrypted, then there is communication to the public by satellite on condition that the means for decrypting the broadcast are provided to the public by the broadcasting organization or with its consent.

(d) Where an act of communication to the public by satellite occurs in a non-Community State which does not provide the level of protection provided for under Chapter II,

(i) if the programme-carrying signals are transmitted to the satellite from an uplink situation situated in a Member State, that act of communication to the public by satellite shall be deemed to have occurred in that Member State and the rights provided for under Chapter II shall be exercisable against the person operating the uplink station; or

(ii) if there is no use of an uplink station situated in a Member State but a broadcasting organization established in a Member State has commissioned the act of communication to the public by satellite, that

act shall be deemed to have occurred in the Member State in which the broadcasting organization has its principal establishment in the Community and the rights provided for under Chapter II shall be exercisable against the broadcasting organization.

3. For the purposes of this Directive, 'cable retransmission' means the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public.

4. For the purposes of this Directive 'collecting society' means any organization which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes.

5. For the purposes of this Directive, the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors.

CHAPTER II. BROADCASTING OF PROGRAMMES BY SATELLITE

Article 2

Broadcasting right

Member States shall provide an exclusive right for the author to authorize the communication to the public by satellite of copyright works, subject to the provisions set out in this chapter.

Article 3

Acquisition of broadcasting rights

1. Member States shall ensure that the authorization referred to in Article 2 may be acquired only by agreement.

2. A Member State may provide that a collective agreement between a collecting society and a broadcasting organization concerning a given category of works may be extended to rightholders of the same category who are not represented by the collecting society, provided that:

- the communication to the public by satellite simulcasts a terrestrial broadcast by the same broadcaster, and

- the unrepresented rightholder shall, at any time, have the possibility of excluding the extension of the collective agreement to his works and of exercising his rights either individually or collectively.

3. Paragraph 2 shall not apply to cinematographic works, including works created by a process analogous to cinematography.

4. Where the law of a Member State provides for the extension of a collective agreement in accordance with the provisions of paragraph 2, that Member States shall inform the Commission which broadcasting organizations are entitled to avail themselves of that law. The Commission shall publish this information in the *Official Journal of the European Communities* (C series).

Article 4

Rights of performers, phonogram producers and broadcasting organizations

1. For the purposes of communication to the public by satellite, the rights of performers, phonogram producers and broadcasting organizations shall be protected in accordance with the provisions of Articles 6, 7, 8 and 10 of Directive 92/100/EEC.

2. For the purposes of paragraph 1, 'broadcasting by wireless means' in Directive 92/100/EEC shall be understood as including communication to the public by satellite.

3. With regard to the exercise of the rights referred to in paragraph 1, Articles 2 (7) and 12 of Directive 92/100/EEC shall apply.

Article 5

Relation between copyright and related rights

Protection of copyright-related rights under this Directive shall leave intact and shall in no way affect the protection of copyright.

Article 6

Minimum protection

1. Member States may provide for more far-reaching protection for holders of rights related to copyright than that required by Article 8 of Directive 92/100/EEC.

2. In applying paragraph 1 Member States shall observe the definitions contained in Article 1 (1) and (2).

Article 7

Transitional provisions

1. With regard to the application in time of the rights referred to in Article 4 (1) of this Directive, Article 13 (1), (2), (6) and (7) of Directive 92/100/EEC shall apply. Article 13 (4) and (5) of Directive 92/100/EEC shall apply *mutatis mutandis*.

2. Agreements concerning the exploitation of works and other protected subject matter which are in force on the date mentioned in Article 14 (1) shall be subject to the provisions of Articles 1 (2), 2 and 3 as from 1 January 2000 if they expire after that date.

3. When an international co-production agreement concluded before the date mentioned in Article 14 (1) between a co-producer from a Member State and one or more co-producers from other Member States or third countries expressly provides for a system of division of exploitation rights between the co-producers by geographical areas for all means of communication to the public, without distinguishing the arrangement applicable to communication to the public by satellite from the provisions applicable to the other means of communication, and where communication to the public by satellite of the co-production would prejudice the exclusivity, in particular the language exclusivity, of one of the co-producers or his assignees in a given territory, the authorization by one of the co-producers or his assignees for a communication to the public by satellite shall require the prior consent of the holder of that exclusivity, whether co-producer or assignee.

CHAPTER III. CABLE RETRANSMISSION

Article 8

Cable retransmission right

1. Member States shall ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and related rights are observed and that such retransmission takes place on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable operators.

2. Notwithstanding paragraph 1, Member States may retain until 31 December 1997 such statutory licence systems which are in operation or expressly provided for by national law on 31 July 1991.

Article 9

Exercise of the cable retransmission right

1. Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society.

2. Where a rightholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. Where more than one collecting society manages rights of that category, the rightholder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights. A rightholder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator and the collecting society which is deemed to be mandated to manage his rights as the rightholders who have mandated that collecting society and he shall be able to claim those rights within a period, to be fixed by the Member State concerned, which shall not be shorter than three years from the date of the cable retransmission which includes his work or other protected subject matter.

3. A Member State may provide that, when a right-holder authorizes the initial transmission within its territory of a work or other protected subject matter, he shall be deemed to have agreed not to exercise his cable retransmission rights on an individual basis but to exercise them in accordance with the provisions of this Directive.

Article 10

Exercise of the cable retransmission right by broadcasting organizations

Member States shall ensure that Article 9 does not apply to the rights exercised by a broadcasting organization in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners and/or holders of related rights.

Article 11
Mediators

1. Where no agreement is concluded regarding authorization of the cable retransmission of a broadcast. Member States shall ensure that either party may call upon the assistance of one or more mediators.

2. The task of the mediators shall be to provide assistance with negotiation. They may also submit proposals to the parties.

3. It shall be assumed that all the parties accept a proposal as referred to in paragraph 2 if none of them expresses its opposition within a period of three months. Notice of the proposal and of any opposition thereto shall be served on the parties concerned in accordance with the applicable rules concerning the service of legal documents.

4. The mediators shall be so selected that their independence and impartiality are beyond reasonable doubt.

Article 12
Prevention of the abuse of negotiating positions

1. Member States shall ensure by means of civil or administrative law, as appropriate, that the parties enter and conduct negotiations regarding authorization for cable retransmission in good faith and do not prevent or hinder negotiation without valid justification.

2. A Member State which, on the date mentioned in Article 14 (1), has a body with jurisdiction in its territory over cases where the right to retransmit a programme by cable to the public in that Member State has been unreasonably refused or offered on unreasonable terms by a broadcasting organization may retain that body.

3. Paragraph 2 shall apply for a transitional period of eight years from the date mentioned in Article 14 (1).

CHAPTER IV. GENERAL PROVISIONS

Article 13
Collective administration of rights

This Directive shall be without prejudice to the regulation of the activities of collecting societies by the Member States.

Article 14

Final provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1995. They shall immediately inform the Commission thereof.

When Member States adopt these measures, the latter shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field covered by this Directive.

3. Not later than 1 January 2000, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive and, if necessary, make further proposals to adapt it to developments in the audio and audiovisual sector.

Article 15

This Directive is addressed to the Member States.

Done at Brussels, 27 September 1993.

PART II
INDUSTRIAL PROPERTY RIGHTS

CONVENTION ON THE GRANT OF EUROPEAN PATENTS
(THE EUROPEAN PATENT CONVENTION)
and the rules relating to fees have been amended by the
following decisions of the administrative council
since the publication of the 16th edition
(June 2016)

PREAMBLE

The Contracting States,

DESIRING to strengthen co-operation between the States of Europe in respect of the protection of inventions,

DESIRING that such protection may be obtained in those States by a single procedure for the grant of patents and by the establishment of certain standard rules governing patents so granted,

DESIRING, for this purpose, to conclude a Convention which establishes a European Patent Organisation and which constitutes a special agreement within the meaning of Article 19 of the Convention for the Protection of Industrial Property, signed in Paris on 20 March 1883 and last revised on 14 July 1967, and a regional patent treaty within the meaning of Article 45, paragraph 1, of the Patent Cooperation Treaty of 19 June 1970,

HAVE AGREED on the following provisions:

PART I. GENERAL AND INSTITUTIONAL PROVISIONS

Chapter I. General provisions

Article 1

European law for the grant of patents

A system of law, common to the Contracting States², for the grant of patents for invention is established by this Convention.

Article 2

European patent

(1) Patents granted under this Convention shall be called European patents.

(2) The European patent shall, in each of the Contracting States for which it is granted, have the effect of and be subject to the same conditions as a national patent granted by that State, unless this Convention provides otherwise.

Article 3

Territorial effect

The grant of a European patent may be requested for one or more of the Contracting States.

Article 4

European Patent Organisation

(1) A European Patent Organisation, hereinafter referred to as the Organisation, is established by this Convention. It shall have administrative and financial autonomy.

(2) The organs of the Organisation shall be:

(a) the European Patent Office;

(b) the Administrative Council.

(3) The task of the Organisation shall be to grant European patents. This shall be carried out by the European Patent Office supervised by the Administrative Council.

Article 4a.

Conference of ministers of the Contracting States

A conference of ministers of the Contracting States responsible for patent matters shall meet at least every five years to discuss issues pertaining to the Organisation and to the European patent system.

Chapter II. The European Patent Organisation

Article 5

Legal status

(1) The Organisation shall have legal personality.

(2) In each of the Contracting States, the Organisation shall enjoy the most extensive legal capacity accorded to legal persons under the

national law of that State; it may in particular acquire or dispose of movable and immovable property and may be a party to legal proceedings.

(3) The President of the European Patent Office shall represent the Organisation.

Article 6

Headquarters

(1) The Organisation shall have its headquarters in Munich.

(2) The European Patent Office shall be located in Munich. It shall have a branch at The Hague.

Article 7

Sub-offices of the European Patent Office

By decision of the Administrative Council, sub-offices of the European Patent Office may be created, if need be, for the purpose of information and liaison, in the Contracting States and with intergovernmental organisations in the field of industrial property, subject to the approval of the Contracting State or organisation concerned.

Article 8

Privileges and immunities

The Protocol on Privileges and Immunities annexed to this Convention shall define the conditions under which the Organisation, the members of the Administrative Council, the employees of the European Patent Office, and such other persons specified in that Protocol as take part in the work of the Organisation, shall enjoy, in each Contracting State, the privileges and immunities necessary for the performance of their duties.

Article 9

Liability

(1) The contractual liability of the Organisation shall be governed by the law applicable to the contract in question.

(2) The non-contractual liability of the Organisation in respect of any damage caused by it or by the employees of the European Patent Office in the performance of their duties shall be governed by the law of

the Federal Republic of Germany. Where the damage is caused by the branch at The Hague or a sub-office or employees attached thereto, the law of the Contracting State in which such branch or sub-office is located shall apply.

(3) The personal liability of the employees of the European Patent Office towards the Organisation shall be governed by their Service Regulations or conditions of employment.

(4) The courts with jurisdiction to settle disputes under paragraphs 1 and 2 shall be:

(a) for disputes under paragraph 1, the courts of the Federal Republic of Germany, unless the contract concluded between the parties designates a court of another State;

(b) for disputes under paragraph 2, the courts of the Federal Republic of Germany, or of the State in which the branch or sub-office is located.

Chapter III. The European Patent Office

Article 10

Management

(1) The European Patent Office shall be managed by the President, who shall be responsible for its activities to the Administrative Council.

(2) To this end, the President shall have in particular the following functions and powers:

(a) he shall take all necessary steps to ensure the functioning of the European Patent Office, including the adoption of internal administrative instructions and information to the public;

(b) unless this Convention provides otherwise, he shall prescribe which acts are to be performed at the European Patent Office in Munich and its branch at The Hague respectively;

(c) he may submit to the Administrative Council any proposal for amending this Convention, for general regulations, or for decisions which come within the competence of the Administrative Council;

(d) he shall prepare and implement the budget and any amending or supplementary budget;

(e) he shall submit a management report to the Administrative Council each year;

(f) he shall exercise supervisory authority over the staff;

(g) subject to Article 11, he shall appoint the employees and decide on their promotion;

(h) he shall exercise disciplinary authority over the employees other than those referred to in Article 11, and may propose disciplinary action to the Administrative Council with regard to employees referred to in Article 11, paragraphs 2 and 3;

(i) he may delegate his functions and powers.

(3) The President shall be assisted by a number of Vice-Presidents. If the President is absent or indisposed, one of the Vice-Presidents shall take his place in accordance with the procedure laid down by the Administrative Council.

(2) The Vice-Presidents shall be appointed by the Administrative Council after the President of the European Patent Office has been consulted.

(3) The members, including the Chairmen, of the Boards of Appeal and of the Enlarged Board of Appeal shall be appointed by the Administrative Council on a proposal from the President of the European Patent Office. They may be re-appointed by the Administrative Council after the President of the European Patent Office has been consulted.

(4) The Administrative Council shall exercise disciplinary authority over the employees referred to in paragraphs 1 to 3.

(5) The Administrative Council, after consulting the President of the European Patent Office, may also appoint as members of the Enlarged Board of Appeal legally qualified members of the national courts or quasi-judicial authorities of the Contracting States, who may continue their judicial activities at the national level. They shall be appointed for a term of three years and may be re-appointed.

Article 12

Duties of office

Employees of the European Patent Office shall be bound, even after the termination of their employment, neither to disclose nor to make use of information which by its nature is a professional secret.

Article 13

Disputes between the Organisation and the employees of the European Patent Office

(1) Employees and former employees of the European Patent Office or their successors in title may apply to the Administrative Tribunal of the International Labour Organization in the case of disputes with the European Patent Organisation, in accordance with the Statute of the Tribunal and within the limits and subject to the conditions laid down in the Service Regulations for permanent employees or the Pension Scheme Regulations or arising from the conditions of employment of other employees.

(2) An appeal shall only be admissible if the person concerned has exhausted such other means of appeal as are available to him under the Service Regulations, the Pension Scheme Regulations or the conditions of employment.

Article 14

Languages of the European Patent Office, European patent applications and other documents

(1) The official languages of the European Patent Office shall be English, French and German.

(2) A European patent application shall be filed in one of the official languages or, if filed in any other language, translated into one of the official languages in accordance with the Implementing Regulations. Throughout the proceedings before the European Patent Office, such translation may be brought into conformity with the application as filed. If a required translation is not filed in due time, the application shall be deemed to be withdrawn.

(3) The official language of the European Patent Office in which the European patent application is filed or into which it is translated shall be used as the language of the proceedings in all proceedings before the European Patent Office, unless the Implementing Regulations provide otherwise.

(4) Natural or legal persons having their residence or principal place of business within a Contracting State having a language other than English, French or German as an official language, and nationals of that State who are resident abroad, may file documents which have to be filed within a time limit in an official language of that State. They shall,

however, file a translation in an official language of the European Patent Office in accordance with the Implementing Regulations. If any document, other than those documents making up the European patent application, is not filed in the prescribed language, or if any required translation is not filed in due time, the document shall be deemed not to have been filed.

(5) European patent applications shall be published in the language of the proceedings.

(6) Specifications of European patents shall be published in the language of the proceedings and shall include a translation of the claims in the other two official languages of the European Patent Office.

(7) The following shall be published in the three official languages of the European Patent Office:

- (a) the European Patent Bulletin;
- (b) the Official Journal of the European Patent Office.

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

Article 15

Departments entrusted with the procedure

To carry out the procedures laid down in this Convention, the following shall be set up within the European Patent Office:

- (a) a Receiving Section;
- (b) Search Divisions;
- (c) Examining Divisions;
- (d) Opposition Divisions;
- (e) a Legal Division;
- (f) Boards of Appeal;
- (g) an Enlarged Board of Appeal.

Article 16

Receiving Section

The Receiving Section shall be responsible for the examination on filing and the examination as to formal requirements of European patent applications.

Article 17

Search Divisions

The Search Divisions shall be responsible for drawing up European search reports.

Article 18

Examining Divisions

(1) The Examining Divisions shall be responsible for the examination of European patent applications.

(2) An Examining Division shall consist of three technically qualified examiners. However, before a decision is taken on a European patent application, its examination shall, as a general rule, be entrusted to one member of the Examining Division. Oral proceedings shall be before the Examining Division itself. If the Examining Division considers that the nature of the decision so requires, it shall be enlarged by the addition of a legally qualified examiner. In the event of parity of votes, the vote of the Chairman of the Examining Division shall be decisive.

Article 19

Opposition Divisions

(1) The Opposition Divisions shall be responsible for the examination of oppositions against any European patent.

(2) An Opposition Division shall consist of three technically qualified examiners, at least two of whom shall not have taken part in the proceedings for grant of the patent to which the opposition relates. An examiner who has taken part in the proceedings for the grant of the European patent may not be the Chairman. Before a decision is taken on the opposition, the Opposition Division may entrust the examination of the opposition to one of its members. Oral proceedings shall be before the Opposition Division itself. If the Opposition Division considers that the nature of the decision so requires, it shall be enlarged by the addition of a legally qualified examiner who shall not have taken part in the proceedings for grant of the patent. In the event of parity of votes, the vote of the Chairman of the Opposition Division shall be decisive.

Article 20

Legal Division

(1) The Legal Division shall be responsible for decisions in respect of entries in the Register of European Patents and in respect of registration on, and deletion from, the list of professional representatives.

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

Article 21

Boards of Appeal

(1) The Boards of Appeal shall be responsible for the examination of appeals from decisions of the Receiving Section, the Examining Divisions and Opposition Divisions, and the Legal Division.

(2) For appeals from decisions of the Receiving Section or the Legal Division, a Board of Appeal shall consist of three legally qualified members.

(3) For appeals from a decision of an Examining Division, a Board of Appeal shall consist of:

(a) two technically qualified members and one legally qualified member, when the decision concerns the refusal of a European patent application or the grant, limitation or revocation of a European patent, and was taken by an Examining Division consisting of less than four members;

(b) three technically and two legally qualified members, when the decision was taken by an Examining Division consisting of four members, or when the Board of Appeal considers that the nature of the appeal so requires;

(c) three legally qualified members in all other cases.

(4) For appeals from a decision of an Opposition Division, a Board of Appeal shall consist of:

(a) two technically qualified members and one legally qualified member, when the decision was taken by an Opposition Division consisting of three members;

(b) three technically and two legally qualified members, when the decision was taken by an Opposition Division consisting of four members, or when the Board of Appeal considers that the nature of the appeal so requires.

Article 22

Enlarged Board of Appeal

(1) The Enlarged Board of Appeal shall be responsible for:

(a) deciding on points of law referred to it by Boards of Appeal under Article 112;

(b) giving opinions on points of law referred to it by the President of the European Patent Office under Article 112;

(c) deciding on petitions for review of decisions of the Boards of Appeal under Article 112a.

(2) In proceedings under paragraph 1(a) and (b), the Enlarged Board of Appeal shall consist of five legally and two technically qualified members. In proceedings under paragraph 1(c), the Enlarged Board of Appeal shall consist of three or five members as laid down in the Implementing Regulations. In all proceedings, a legally qualified member shall be the Chairman.

Article 23

Independence of the members of the Boards

(1) The members of the Enlarged Board of Appeal and of the Boards of Appeal shall be appointed for a term of five years and may not be removed from office during this term, except if there are serious grounds for such removal and if the Administrative Council, on a proposal from the Enlarged Board of Appeal, takes a decision to this effect. Notwithstanding sentence 1, the term of office of members of the Boards shall end if they resign or are retired in accordance with the Service Regulations for permanent employees of the European Patent Office.

(2) The members of the Boards may not be members of the Receiving Section, Examining Divisions, Opposition Divisions or Legal Division.

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

(4) The Rules of Procedure of the Boards of Appeal and the Enlarged Board of Appeal shall be adopted in accordance with the Implementing Regulations. They shall be subject to the approval of the Administrative Council.

Article 24

Exclusion and objection

(1) Members of the Boards of Appeal or of the Enlarged Board of Appeal may not take part in a case in which they have any personal interest, or if they have previously been involved as representatives of one of the parties, or if they participated in the decision under appeal.

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

(3) Members of a Board of Appeal or of the Enlarged Board of Appeal may be objected to by any party for one of the reasons mentioned in paragraph 1, or if suspected of partiality. An objection shall not be admissible if, while being aware of a reason for objection, the party has taken a procedural step. An objection may not be based upon the nationality of members.

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

Article 25

Technical opinion

At the request of the competent national court hearing an infringement or revocation action, the European Patent Office shall be obliged, on payment of an appropriate fee [27], to give a technical opinion concerning the European patent which is the subject of the action. The Examining Division shall be responsible for issuing such opinions.

Chapter IV. The Administrative Council

Article 26

Membership

(1) The Administrative Council shall be composed of the Representatives and the alternate Representatives of the Contracting States. Each Contracting State shall be entitled to appoint one Representative and one alternate Representative to the Administrative Council.

(2) The members of the Administrative Council may, in accordance with the Rules of Procedure of the Administrative Council, be assisted by advisers or experts.

Article 27
Chairmanship

(1) The Administrative Council shall elect a Chairman and a Deputy Chairman from among the Representatives and alternate Representatives of the Contracting States. The Deputy Chairman shall ex officio replace the Chairman if he is prevented from carrying out his duties.

(2) The terms of office of the Chairman and the Deputy Chairman shall be three years. They may be re-elected.

Article 28
Board

(1) When there are at least eight Contracting States, the Administrative Council may set up a Board composed of five of its members.

(2) The Chairman and the Deputy Chairman of the Administrative Council shall be members of the Board ex officio; the other three members shall be elected by the Administrative Council.

(3) The term of office of the members elected by the Administrative Council shall be three years. They may not be re-elected.

(4) The Board shall perform the duties assigned to it by the Administrative Council in accordance with the Rules of Procedure.

Article 29
Meetings

(1) Meetings of the Administrative Council shall be convened by its Chairman.

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

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

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

PART II. INDUSTRIAL PROPERTY RIGHTS

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

Article 30

Attendance of observers

(1) The World Intellectual Property Organization shall be represented at the meetings of the Administrative Council, in accordance with an agreement between the Organisation and the World Intellectual Property Organization.

(2) Other intergovernmental organisations entrusted with carrying out international procedures in the field of patents, with which the Organisation has concluded an agreement, shall be represented at the meetings of the Administrative Council, in accordance with such agreement.

(3) Any other intergovernmental and international non-governmental organisations carrying out an activity of interest to the Organisation may be invited by the Administrative Council to be represented at its meetings during any discussion of matters of mutual interest.

Article 31

Languages of the Administrative Council

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

(2) Documents submitted to the Administrative Council, and the minutes of its deliberations, shall be drawn up in the three languages specified in paragraph 1.

Article 32

Staff, premises and equipment

The European Patent Office shall place at the disposal of the Administrative Council, and of any committee established by it, such staff, premises and equipment as may be necessary for the performance of their duties.

Article 33

Competence of the Administrative Council in certain cases

(1) The Administrative Council shall be competent to amend:

(a) the time limits laid down in this Convention;

(b) Parts II to VIII and Part X of this Convention, to bring them into line with an international treaty relating to patents or European Community legislation relating to patents;

(c) the Implementing Regulations.

(2) The Administrative Council shall be competent, in conformity with this Convention, to adopt or amend:

(a) the Financial Regulations;

(b) the Service Regulations for permanent employees and the conditions of employment of other employees of the European Patent Office, the salary scales of the said permanent and other employees, and also the nature of any supplementary benefits and the rules for granting them;

(c) the Pension Scheme Regulations and any appropriate increases in existing pensions to correspond to increases in salaries;

(d) the Rules relating to Fees;

(e) its Rules of Procedure.

(3) Notwithstanding Article 18, paragraph 2, the Administrative Council shall be competent to decide, in the light of experience, that in certain categories of cases Examining Divisions shall consist of one technically qualified examiner only. Such decision may be rescinded.

(4) The Administrative Council shall be competent to authorise the President of the European Patent Office to negotiate and, subject to its approval, to conclude agreements on behalf of the European Patent Organisation with States, with intergovernmental organisations and with documentation centres set up on the basis of agreements with such organisations.

(5) The Administrative Council may not take a decision under paragraph 1(b):

- concerning an international treaty, before its entry into force;

- concerning European Community legislation, before its entry into force or, where that legislation lays down a period for its implementation, before the expiry of that period.

Article 34
Voting rights

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

(2) Each Contracting State shall have one vote, except where Article 36 applies.

Article 35
Voting rules

(1) The Administrative Council shall take its decisions, other than those referred to in paragraphs 2 and 3, by a simple majority of the Contracting States represented and voting.

(2) A majority of three-quarters of the votes of the Contracting States represented and voting shall be required for the decisions which the Administrative Council is empowered to take under Article 7, Article 11, paragraph 1, Article 33, paragraphs 1(a) and (c), and 2 to 4, Article 39, paragraph 1, Article 40, paragraphs 2 and 4, Article 46, Article 134a, Article 149a, paragraph 2, Article 152, Article 153, paragraph 7, Article 166 and Article 172.

(3) Unanimity of the Contracting States voting shall be required for the decisions which the Administrative Council is empowered to take under Article 33, paragraph 1(b). The Administrative Council shall take such decisions only if all the Contracting States are represented. A decision taken on the basis of Article 33, paragraph 1(b), shall not take effect if a Contracting State declares, within twelve months of the date of the decision, that it does not wish to be bound by that decision.

(4) Abstentions shall not be considered as votes.

Article 36
Weighting of votes

(1) In respect of the adoption or amendment of the Rules relating to Fees and, if the financial contribution to be made by the Contracting States would thereby be increased, the adoption of the budget of the Organisation and of any amending or supplementary budget, any Contracting State may require, following a first ballot in which each Contracting State shall have one vote, and whatever the result of this ballot, that a second ballot be taken immediately, in which votes shall be

given to the States in accordance with paragraph 2. The decision shall be determined by the result of this second ballot.

(2) The number of votes that each Contracting State shall have in the second ballot shall be calculated as follows:

(a) the percentage obtained for each Contracting State in respect of the scale for the special financial contributions, pursuant to Article 40, paragraphs 3 and 4, shall be multiplied by the number of Contracting States and divided by five;

(b) the number of votes thus given shall be rounded upwards to the next whole number;

(c) five additional votes shall be added to this number;

(d) nevertheless, no Contracting State shall have more than 30 votes.

Chapter V. Financial provisions

Article 37

Budgetary funding

The budget of the Organisation shall be financed:

(a) by the Organisation's own resources;

(b) by payments made by the Contracting States in respect of renewal fees for European patents levied in these States;

(c) where necessary, by special financial contributions made by the Contracting States;

(d) where appropriate, by the revenue provided for in Article 146;

(e) where appropriate, and for tangible assets only, by third-party borrowings secured on land or buildings;

(f) where appropriate, by third-party funding for specific projects.

Article 38

The Organisation's own resources

The Organisation's own resources shall comprise:

(a) all income from fees and other sources and also the reserves of the Organisation;

(b) the resources of the Pension Reserve Fund, which shall be treated as a special class of asset of the Organisation, designed to support the Organisation's pension scheme by providing the appropriate reserves.

Article 39

**Payments by the Contracting States in respect of renewal fees
for European patents**

(1) Each Contracting State shall pay to the Organisation in respect of each renewal fee received for a European patent in that State an amount equal to a proportion of that fee, to be fixed by the Administrative Council; the proportion shall not exceed 75% and shall be the same for all Contracting States. However, if the said proportion corresponds to an amount which is less than a uniform minimum amount fixed by the Administrative Council, the Contracting State shall pay that minimum to the Organisation.

(2) Each Contracting State shall communicate to the Organisation such information as the Administrative Council considers to be necessary to determine the amount of these payments.

(3) The due dates for these payments shall be determined by the Administrative Council.

(4) If a payment is not remitted fully by the due date, the Contracting State shall pay interest from the due date on the amount remaining unpaid.

Article 40

Level of fees and payments – Special financial contributions

(1) The amounts of the fees referred to in Article 38 and the proportion referred to in Article 39 shall be fixed at such a level as to ensure that the revenue in respect thereof is sufficient for the budget of the Organisation to be balanced.

(2) However, if the Organisation is unable to balance its budget under the conditions laid down in paragraph 1, the Contracting States shall remit to the Organisation special financial contributions, the amount of which shall be determined by the Administrative Council for the accounting period in question.

(3) These special financial contributions shall be determined in respect of any Contracting State on the basis of the number of patent applications filed in the last year but one prior to that of entry into force of this Convention, and calculated in the following manner:

(a) one half in proportion to the number of patent applications filed in that Contracting State;

(b) one half in proportion to the second highest number of patent applications filed in the other Contracting States by natural or legal persons having their residence or principal place of business in that Contracting State.

However, the amounts to be contributed by States in which the number of patent applications filed exceeds 25 000 shall then be taken as a whole and a new scale drawn up in proportion to the total number of patent applications filed in these States.

(4) Where the scale position of any Contracting State cannot be established in accordance with paragraph 3, the Administrative Council shall, with the consent of that State, decide its scale position.

(5) Article 39, paragraphs 3 and 4, shall apply *mutatis mutandis* to the special financial contributions.

(6) The special financial contributions shall be repaid with interest at a rate which shall be the same for all Contracting States. Repayments shall be made in so far as it is possible to provide for this purpose in the budget; the amount thus provided shall be distributed among the Contracting States in accordance with the scale referred to in paragraphs 3 and 4.

(7) The special financial contributions remitted in any accounting period shall be repaid in full before any such contributions or parts thereof remitted in any subsequent accounting period are repaid.

Article 41

Advances

(1) At the request of the President of the European Patent Office, the Contracting States shall grant advances to the Organisation, on account of their payments and contributions, within the limit of the amount fixed by the Administrative Council. The amount of such advances shall be determined in proportion to the amounts due from the Contracting States for the accounting period in question.

(2) Article 39, paragraphs 3 and 4, shall apply *mutatis mutandis* to the advances.

Article 42

Budget

(1) The budget of the Organisation shall be balanced. It shall be drawn up in accordance with the generally accepted accounting

principles laid down in the Financial Regulations. If necessary, there may be amending or supplementary budgets.

(2) The budget shall be drawn up in the unit of account fixed in the Financial Regulations.

Article 43

Authorisation for expenditure

(1) The expenditure entered in the budget shall be authorised for the duration of one accounting period, unless the Financial Regulations provide otherwise.

(2) In accordance with the Financial Regulations, any appropriations, other than those relating to staff costs, which are unexpended at the end of the accounting period may be carried forward, but not beyond the end of the following accounting period.

(3) Appropriations shall be set out under different headings according to type and purpose of the expenditure and subdivided, as far as necessary, in accordance with the Financial Regulations.

Article 44

Appropriations for unforeseeable expenditure

(1) The budget of the Organisation may contain appropriations for unforeseeable expenditure.

(2) The employment of these appropriations by the Organisation shall be subject to the prior approval of the Administrative Council.

Article 45

Accounting period

The accounting period shall commence on 1 January and end on 31 December.

Article 46

Preparation and adoption of the budget

(1) The President of the European Patent Office shall submit the draft budget to the Administrative Council no later than the date prescribed in the Financial Regulations.

(2) The budget and any amending or supplementary budget shall be adopted by the Administrative Council.

Article 47

Provisional budget

(1) If, at the beginning of the accounting period, the budget has not been adopted by the Administrative Council, expenditures may be effected on a monthly basis per heading or other division of the budget, in accordance with the Financial Regulations, up to one-twelfth of the budget appropriations for the preceding accounting period, provided that the appropriations thus made available to the President of the European Patent Office shall not exceed one-twelfth of those provided for in the draft budget.

(2) The Administrative Council may, subject to the observance of the other provisions laid down in paragraph 1, authorise expenditure in excess of one-twelfth of the appropriations.

(3) The payments referred to in Article 37(b) shall continue to be made, on a provisional basis, under the conditions determined under Article 39 for the year preceding that to which the draft budget relates.

(4) The Contracting States shall pay each month, on a provisional basis and in accordance with the scale referred to in Article 40, paragraphs 3 and 4, any special financial contributions necessary to ensure implementation of paragraphs 1 and 2. Article 39, paragraph 4, shall apply *mutatis mutandis* to these contributions.

Article 48

Budget implementation

(1) The President of the European Patent Office shall implement the budget and any amending or supplementary budget on his own responsibility and within the limits of the allocated appropriations.

(2) Within the budget, the President of the European Patent Office may, in accordance with the Financial Regulations, transfer funds between the various headings or sub-headings.

Article 49

Auditing of accounts

(1) The income and expenditure account and a balance sheet of the Organisation shall be examined by auditors whose independence is beyond doubt, appointed by the Administrative Council for a period of five years, which shall be renewable or extensible.

PART II. INDUSTRIAL PROPERTY RIGHTS

(2) The audit shall be based on vouchers and shall take place, if necessary, in situ. The audit shall ascertain whether all income has been received and all expenditure effected in a lawful and proper manner and whether the financial management is sound. The auditors shall draw up a report containing a signed audit opinion after the end of each accounting period.

(3) The President of the European Patent Office shall annually submit to the Administrative Council the accounts of the preceding accounting period in respect of the budget and the balance sheet showing the assets and liabilities of the Organisation together with the report of the auditors.

(4) The Administrative Council shall approve the annual accounts together with the report of the auditors and shall discharge the President of the European Patent Office in respect of the implementation of the budget.

Article 50

Financial Regulations

The Financial Regulations shall lay down in particular:

(a) the arrangements relating to the establishment and implementation of the budget and for the rendering and auditing of accounts;

(b) the method and procedure whereby the payments and contributions provided for in Article 37 and the advances provided for in Article 41 are to be made available to the Organisation by the Contracting States;

(c) the rules concerning the responsibilities of authorising and accounting officers and the arrangements for their supervision;

(d) the rates of interest provided for in Articles 39, 40 and 47;

(e) the method of calculating the contributions payable by virtue of Article 146;

(f) the composition of and duties to be assigned to a Budget and Finance Committee which should be set up by the Administrative Council;

(g) the generally accepted accounting principles on which the budget and the annual financial statements shall be based.

Article 51

Fees

(1) The European Patent Office may levy fees for any official task or procedure carried out under this Convention.

(2) Time limits for the payment of fees other than those fixed by this Convention shall be laid down in the Implementing Regulations.

(3) Where the Implementing Regulations provide that a fee shall be paid, they shall also lay down the legal consequences of failure to pay such fee in due time.

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

PART II. SUBSTANTIVE PATENT LAW

Chapter I. Patentability

Article 52

Patentable inventions

(1) European patents shall be granted for any inventions, in all fields of technology, provided that they are new, involve an inventive step and are susceptible of industrial application.

(2) The following in particular shall not be regarded as inventions within the meaning of paragraph 1:

- (a) discoveries, scientific theories and mathematical methods;
- (b) aesthetic creations;
- (c) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers;
- (d) presentations of information.

(3) Paragraph 2 shall exclude the patentability of the subject-matter or activities referred to therein only to the extent to which a European patent application or European patent relates to such subject-matter or activities as such.

Article 53

Exceptions to patentability

European patents shall not be granted in respect of:

- (a) inventions the commercial exploitation of which would be contrary to "ordre public" or morality; such exploitation shall not be

deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States;

(b) plant or animal varieties or essentially biological processes for the production of plants or animals; this provision shall not apply to microbiological processes or the products thereof;

(c) methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practised on the human or animal body; this provision shall not apply to products, in particular substances or compositions, for use in any of these methods.

Article 54

Novelty

(1) An invention shall be considered to be new if it does not form part of the state of the art.

(2) The state of the art shall be held to comprise everything made available to the public by means of a written or oral description, by use, or in any other way, before the date of filing of the European patent application.

(3) Additionally, the content of European patent applications as filed, the dates of filing of which are prior to the date referred to in paragraph 2 and which were published on or after that date, shall be considered as comprised in the state of the art.

(4) Paragraphs 2 and 3 shall not exclude the patentability of any substance or composition, comprised in the state of the art, for use in a method referred to in Article 53(c), provided that its use for any such method is not comprised in the state of the art.

(5) Paragraphs 2 and 3 shall also not exclude the patentability of any substance or composition referred to in paragraph 4 for any specific use in a method referred to in Article 53(c), provided that such use is not comprised in the state of the art.

Article 55

Non-prejudicial disclosures

(1) For the application of Article 54, a disclosure of the invention shall not be taken into consideration if it occurred no earlier than six months preceding the filing of the European patent application and if it was due to, or in consequence of:

(a) an evident abuse in relation to the applicant or his legal predecessor, or

(b) the fact that the applicant or his legal predecessor has displayed the invention at an official, or officially recognised, international exhibition falling within the terms of the Convention on international exhibitions signed at Paris on 22 November 1928 and last revised on 30 November 1972.

(2) In the case of paragraph 1(b), paragraph 1 shall apply only if the applicant states, when filing the European patent application, that the invention has been so displayed and files a supporting certificate within the time limit and under the conditions laid down in the Implementing Regulations.

Article 56

Inventive step

An invention shall be considered as involving an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art. If the state of the art also includes documents within the meaning of Article 54, paragraph 3, these documents shall not be considered in deciding whether there has been an inventive step.

Article 57

Industrial application

An invention shall be considered as susceptible of industrial application if it can be made or used in any kind of industry, including agriculture.

Chapter II. Persons entitled to apply for and obtain a European patent – Mention of the inventor

Article 58

Entitlement to file a European patent application

A European patent application may be filed by any natural or legal person, or any body equivalent to a legal person by virtue of the law governing it.

Article 59

Multiple applicants

A European patent application may also be filed either by joint applicants or by two or more applicants designating different Contracting States.

Article 60

Right to a European patent

(1) The right to a European patent shall belong to the inventor or his successor in title. If the inventor is an employee, the right to a European patent shall be determined in accordance with the law of the State in which the employee is mainly employed; if the State in which the employee is mainly employed cannot be determined, the law to be applied shall be that of the State in which the employer has the place of business to which the employee is attached.

(2) If two or more persons have made an invention independently of each other, the right to a European patent therefor shall belong to the person whose European patent application has the earliest date of filing, provided that this first application has been published.

(3) In proceedings before the European Patent Office, the applicant shall be deemed to be entitled to exercise the right to a European patent.

Article 61

European patent applications filed by non-entitled persons

(1) If by a final decision it is adjudged that a person other than the applicant is entitled to the grant of the European patent, that person may, in accordance with the Implementing Regulations:

(a) prosecute the European patent application as his own application in place of the applicant;

(b) file a new European patent application in respect of the same invention; or

(c) request that the European patent application be refused.

(2) Article 76, paragraph 1, shall apply *mutatis mutandis* to a new European patent application filed under paragraph 1(b).

Article 62

Right of the inventor to be mentioned

The inventor shall have the right, vis-à-vis the applicant for or proprietor of a European patent, to be mentioned as such before the European Patent Office.

**Chapter III. Effects of the European patent and the
European patent application**

Article 63

Term of the European patent

(1) The term of the European patent shall be 20 years from the date of filing of the application.

(2) Nothing in the preceding paragraph shall limit the right of a Contracting State to extend the term of a European patent, or to grant corresponding protection which follows immediately on expiry of the term of the patent, under the same conditions as those applying to national patents:

(a) in order to take account of a state of war or similar emergency conditions affecting that State;

(b)

if the subject-matter of the European patent is a product or a process for manufacturing a product or a use of a product which has to undergo an administrative authorisation procedure required by law before it can be put on the market in that State.

(3) Paragraph 2 shall apply mutatis mutandis to European patents granted jointly for a group of Contracting States in accordance with Article 142.

(4) A Contracting State which makes provision for extension of the term or corresponding protection under paragraph 2(b) may, in accordance with an agreement concluded with the Organisation, entrust to the European Patent Office tasks associated with implementation of the relevant provisions.

Article 64

Rights conferred by a European patent

(1) A European patent shall, subject to the provisions of paragraph 2, confer on its proprietor from the date on which the mention of its grant is published in the European Patent Bulletin, in each Contracting State

in respect of which it is granted, the same rights as would be conferred by a national patent granted in that State.

(2) If the subject-matter of the European patent is a process, the protection conferred by the patent shall extend to the products directly obtained by such process.

(3) Any infringement of a European patent shall be dealt with by national law.

Article 65

Translation of the European patent

(1) Any Contracting State may, if the European patent as granted, amended or limited by the European Patent Office is not drawn up in one of its official languages, prescribe that the proprietor of the patent shall supply to its central industrial property office a translation of the patent as granted, amended or limited in one of its official languages at his option or, where that State has prescribed the use of one specific official language, in that language. The period for supplying the translation shall end three months after the date on which the mention of the grant, maintenance in amended form or limitation of the European patent is published in the European Patent Bulletin, unless the State concerned prescribes a longer period.

(2) Any Contracting State which has adopted provisions pursuant to paragraph 1 may prescribe that the proprietor of the patent must pay all or part of the costs of publication of such translation within a period laid down by that State.

(3) Any Contracting State may prescribe that in the event of failure to observe the provisions adopted in accordance with paragraphs 1 and 2, the European patent shall be deemed to be void ab initio in that State.

Article 66

Equivalence of European filing with national filing

A European patent application which has been accorded a date of filing shall, in the designated Contracting States, be equivalent to a regular national filing, where appropriate with the priority claimed for the European patent application.

Article 67

Rights conferred by a European patent application after publication

(1) A European patent application shall, from the date of its publication, provisionally confer upon the applicant the protection provided for by Article 64, in the Contracting States designated in the application.

(2) Any Contracting State may prescribe that a European patent application shall not confer such protection as is conferred by Article 64. However, the protection attached to the publication of the European patent application may not be less than that which the laws of the State concerned attach to the compulsory publication of unexamined national patent applications. In any event, each State shall ensure at least that, from the date of publication of a European patent application, the applicant can claim compensation reasonable in the circumstances from any person who has used the invention in that State in circumstances where that person would be liable under national law for infringement of a national patent.

(3) Any Contracting State which does not have as an official language the language of the proceedings may prescribe that provisional protection in accordance with paragraphs 1 and 2 above shall not be effective until such time as a translation of the claims in one of its official languages at the option of the applicant or, where that State has prescribed the use of one specific official language, in that language:

(a) has been made available to the public in the manner prescribed by national law, or

(b) has been communicated to the person using the invention in the said State.

(4) The European patent application shall be deemed never to have had the effects set out in paragraphs 1 and 2 when it has been withdrawn, deemed to be withdrawn or finally refused. The same shall apply in respect of the effects of the European patent application in a Contracting State the designation of which is withdrawn or deemed to be withdrawn.

Article 68

Effect of revocation or limitation of the European patent

The European patent application and the resulting European patent shall be deemed not to have had, from the outset, the effects specified in Articles 64 and 67, to the extent that the patent has been revoked or limited in opposition, limitation or revocation proceedings.

Article 69

Extent of protection

(1) The extent of the protection conferred by a European patent or a European patent application shall be determined by the claims. Nevertheless, the description and drawings shall be used to interpret the claims.

(2) For the period up to grant of the European patent, the extent of the protection conferred by the European patent application shall be determined by the claims contained in the application as published. However, the European patent as granted or as amended in opposition, limitation or revocation proceedings shall determine retroactively the protection conferred by the application, in so far as such protection is not thereby extended.

Article 70

Authentic text of a European patent application or European patent

(1) The text of a European patent application or a European patent in the language of the proceedings shall be the authentic text in any proceedings before the European Patent Office and in any Contracting State.

(2) If, however, the European patent application has been filed in a language which is not an official language of the European Patent Office, that text shall be the application as filed within the meaning of this Convention.

(3) Any Contracting State may provide that a translation into one of its official languages, as prescribed by it according to this Convention, shall in that State be regarded as authentic, except for revocation proceedings, in the event of the European patent application or European patent in the language of the translation conferring protection which is narrower than that conferred by it in the language of the proceedings.

(4) Any Contracting State which adopts a provision under paragraph 3:

(a) shall allow the applicant for or proprietor of the patent to file a corrected translation of the European patent application or European patent. Such corrected translation shall not have any legal effect until any conditions established by the Contracting State under Article 65, paragraph 2, or Article 67, paragraph 3, have been complied with;

(b) may prescribe that any person who, in that State, in good faith has used or has made effective and serious preparations for using an invention the use of which would not constitute infringement of the application or patent in the original translation, may, after the corrected translation takes effect, continue such use in the course of his business or for the needs thereof without payment.

Chapter IV. The European patent application as an object of property

Article 71

Transfer and constitution of rights

A European patent application may be transferred or give rise to rights for one or more of the designated Contracting States.

Article 72

Assignment

An assignment of a European patent application shall be made in writing and shall require the signature of the parties to the contract.

Article 73

Contractual licensing

A European patent application may be licensed in whole or in part for the whole or part of the territories of the designated Contracting States.

Article 74

Law applicable

Unless this Convention provides otherwise, the European patent application as an object of property shall, in each designated Contracting State and with effect for such State, be subject to the law applicable in that State to national patent applications.

PART III. THE EUROPEAN PATENT APPLICATION

Chapter I. Filing and requirements of the European patent application

Article 75

Filing of a European patent application

(1) A European patent application may be filed:

(a) with the European Patent Office, or

(b) if the law of a Contracting State so permits, and subject to Article 76, paragraph 1, with the central industrial property office or other competent authority of that State. Any application filed in this way shall have the same effect as if it had been filed on the same date with the European Patent Office.

(2) Paragraph 1 shall not preclude the application of legislative or regulatory provisions which, in any Contracting State:

(a) govern inventions which, owing to the nature of their subject-matter, may not be communicated abroad without the prior authorisation of the competent authorities of that State, or

(b) prescribe that any application is to be filed initially with a national authority, or make direct filing with another authority subject to prior authorisation.

Article 76

European divisional applications

(1) A European divisional application shall be filed directly with the European Patent Office in accordance with the Implementing Regulations. It may be filed only in respect of subject-matter which does not extend beyond the content of the earlier application as filed; in so far as this requirement is complied with, the divisional application shall be deemed to have been filed on the date of filing of the earlier application and shall enjoy any right of priority.

(2) All the Contracting States designated in the earlier application at the time of filing of a European divisional application shall be deemed to be designated in the divisional application.

Article 77

Forwarding of European patent applications

(1) The central industrial property office of a Contracting State shall forward to the European Patent Office any European patent application filed with it or any other competent authority in that State, in accordance with the Implementing Regulations.

(2) A European patent application the subject of which has been made secret shall not be forwarded to the European Patent Office.

(3) A European patent application not forwarded to the European Patent Office in due time shall be deemed to be withdrawn.

Article 78

Requirements of a European patent application

A European patent application shall contain:

- (a) a request for the grant of a European patent;
- (b) a description of the invention;
- (c) one or more claims;
- (d) any drawings referred to in the description or the claims;
- (e) an abstract,

and satisfy the requirements laid down in the Implementing Regulations.

(2) A European patent application shall be subject to the payment of the filing fee and the search fee. If the filing fee or the search fee is not paid in due time, the application shall be deemed to be withdrawn.

Article 79

Designation of Contracting States

(1) All the Contracting States party to this Convention at the time of filing of the European patent application shall be deemed to be designated in the request for grant of a European patent.

(2) The designation of a Contracting State may be subject to the payment of a designation fee.

(3) The designation of a Contracting State may be withdrawn at any time up to the grant of the European patent.

Article 80

Date of filing

The date of filing of a European patent application shall be the date on which the requirements laid down in the Implementing Regulations are fulfilled.

Article 81

Designation of the inventor

The European patent application shall designate the inventor. If the applicant is not the inventor or is not the sole inventor, the designation shall contain a statement indicating the origin of the right to the European patent.

Article 82

Unity of invention

The European patent application shall relate to one invention only or to a group of inventions so linked as to form a single general inventive concept.

Article 83

Disclosure of the invention

The European patent application shall disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

Article 84

Claims

The claims shall define the matter for which protection is sought. They shall be clear and concise and be supported by the description.

Article 85

Abstract

The abstract shall serve the purpose of technical information only; it may not be taken into account for any other purpose, in particular for interpreting the scope of the protection sought or applying Article 54, paragraph 3.

Article 86

Renewal fees for the European patent application

(1) Renewal fees for the European patent application shall be paid to the European Patent Office in accordance with the Implementing Regulations. These fees shall be due in respect of the third year and each subsequent year, calculated from the date of filing of the application. If a renewal fee is not paid in due time, the application shall be deemed to be withdrawn.

(2) The obligation to pay renewal fees shall terminate with the payment of the renewal fee due in respect of the year in which the mention of the grant of the European patent is published in the European Patent Bulletin.

Chapter II. Priority

Article 87

Priority right

(1) Any person who has duly filed, in or for

(a) any State party to the Paris Convention for the Protection of Industrial Property or

(b) any Member of the World Trade Organization, an application for a patent, a utility model or a utility certificate, or his successor in title, shall enjoy, for the purpose of filing a European patent application in respect of the same invention, a right of priority during a period of twelve months from the date of filing of the first application.

(2) Every filing that is equivalent to a regular national filing under the national law of the State where it was made or under bilateral or multilateral agreements, including this Convention, shall be recognised as giving rise to a right of priority.

(3) A regular national filing shall mean any filing that is sufficient to establish the date on which the application was filed, whatever the outcome of the application may be.

(4) A subsequent application in respect of the same subject-matter as a previous first application and filed in or for the same State shall be considered as the first application for the purposes of determining priority, provided that, at the date of filing the subsequent application, the previous application has been withdrawn, abandoned or refused, without being open to public inspection and without leaving any rights outstanding, and has not served as a basis for claiming a right of priority.

The previous application may not thereafter serve as a basis for claiming a right of priority.

(5) If the first filing has been made with an industrial property authority which is not subject to the Paris Convention for the Protection of Industrial Property or the Agreement Establishing the World Trade Organization, paragraphs 1 to 4 shall apply if that authority, according to a communication issued by the President of the European Patent Office, recognises that a first filing made with the European Patent Office gives rise to a right of priority under conditions and with effects equivalent to those laid down in the Paris Convention.

Article 88

Claiming priority

(1) An applicant desiring to take advantage of the priority of a previous application shall file a declaration of priority and any other document required, in accordance with the Implementing Regulations.

(2) Multiple priorities may be claimed in respect of a European patent application, notwithstanding the fact that they originated in different countries. Where appropriate, multiple priorities may be claimed for any one claim. Where multiple priorities are claimed, time limits which run from the date of priority shall run from the earliest date of priority.

(3) If one or more priorities are claimed in respect of a European patent application, the right of priority shall cover only those elements of the European patent application which are included in the application or applications whose priority is claimed.

(4) If certain elements of the invention for which priority is claimed do not appear among the claims formulated in the previous application, priority may nonetheless be granted, provided that the documents of the previous application as a whole specifically disclose such elements.

Article 89

Effect of priority right

The right of priority shall have the effect that the date of priority shall count as the date of filing of the European patent application for the purposes of Article 54, paragraphs 2 and 3, and Article 60, paragraph 2.

PART IV. PROCEDURE UP TO GRANT

Article 90

Examination on filing and examination as to formal requirements

(1) The European Patent Office shall examine, in accordance with the Implementing Regulations, whether the application satisfies the requirements for the accordancy of a date of filing.

(2) If a date of filing cannot be accorded following the examination under paragraph 1, the application shall not be dealt with as a European patent application.

(3) If the European patent application has been accorded a date of filing, the European Patent Office shall examine, in accordance with the Implementing Regulations, whether the requirements in Articles 14, 78 and 81, and, where applicable, Article 88, paragraph 1, and Article 133, paragraph 2, as well as any other requirement laid down in the Implementing Regulations, have been satisfied.

(4) Where the European Patent Office in carrying out the examination under paragraphs 1 or 3 notes that there are deficiencies which may be corrected, it shall give the applicant an opportunity to correct them.

(5) If any deficiency noted in the examination under paragraph 3 is not corrected, the European patent application shall be refused unless a different legal consequence is provided for by this Convention. Where the deficiency concerns the right of priority, this right shall be lost for the application.

Article 91

(deleted)

Article 92

Drawing up of the European search report

The European Patent Office shall, in accordance with the Implementing Regulations, draw up and publish a European search report in respect of the European patent application on the basis of the claims, with due regard to the description and any drawings.

Article 93

Publication of the European patent application

(1) The European Patent Office shall publish the European patent application as soon as possible

(a) after the expiry of a period of eighteen months from the date of filing or, if priority has been claimed, from the date of priority, or

(b) at the request of the applicant, before the expiry of that period.

(2) The European patent application shall be published at the same time as the specification of the European patent when the decision to grant the patent becomes effective before the expiry of the period referred to in paragraph 1(a).

Article 94

Examination of the European patent application

(1) The European Patent Office shall, in accordance with the Implementing Regulations, examine on request whether the European patent application and the invention to which it relates meet the requirements of this Convention. The request shall not be deemed to be filed until the examination fee has been paid.

(2) If no request for examination has been made in due time, the application shall be deemed to be withdrawn.

(3) If the examination reveals that the application or the invention to which it relates does not meet the requirements of this Convention, the Examining Division shall invite the applicant, as often as necessary, to file his observations and, subject to Article 123, paragraph 1, to amend the application.

(4) If the applicant fails to reply in due time to any communication from the Examining Division, the application shall be deemed to be withdrawn.

Article 95

(deleted)

Article 96

(deleted)

Article 97

Grant or refusal

(1) If the Examining Division is of the opinion that the European patent application and the invention to which it relates meet the requirements of this Convention, it shall decide to grant a European patent, provided that the conditions laid down in the Implementing Regulations are fulfilled.

(2) If the Examining Division is of the opinion that the European patent application or the invention to which it relates does not meet the requirements of this Convention, it shall refuse the application unless this Convention provides for a different legal consequence.

(3) The decision to grant a European patent shall take effect on the date on which the mention of the grant is published in the European Patent Bulletin.

Article 98

Publication of the specification of the European patent

The European Patent Office shall publish the specification of the European patent as soon as possible after the mention of the grant of the European patent has been published in the European Patent Bulletin.

PART V. OPPOSITION AND LIMITATION PROCEDURE

Article 99

Opposition

(1) Within nine months of the publication of the mention of the grant of the European patent in the European Patent Bulletin, any person may give notice to the European Patent Office of opposition to that patent, in accordance with the Implementing Regulations. Notice of opposition shall not be deemed to have been filed until the opposition fee has been paid.

(2) The opposition shall apply to the European patent in all the Contracting States in which that patent has effect.

(3) Opponents shall be parties to the opposition proceedings as well as the proprietor of the patent.

(4) Where a person provides evidence that in a Contracting State, following a final decision, he has been entered in the patent register of such State instead of the previous proprietor, such person shall, at his

request, replace the previous proprietor in respect of such State. Notwithstanding Article 118, the previous proprietor and the person making the request shall not be regarded as joint proprietors unless both so request.

Article 100

Grounds for opposition

Opposition may only be filed on the grounds that:

(a) the subject-matter of the European patent is not patentable under Articles 52 to 57;

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

(c) the subject-matter of the European patent extends beyond the content of the application as filed, or, if the patent was granted on a divisional application or on a new application filed under Article 61, beyond the content of the earlier application as filed.

Article 101

**Examination of the opposition – Revocation or
maintenance of the European patent**

(1) If the opposition is admissible, the Opposition Division shall examine, in accordance with the Implementing Regulations, whether at least one ground for opposition under Article 100 prejudices the maintenance of the European patent. During this examination, the Opposition Division shall invite the parties, as often as necessary, to file observations on communications from another party or issued by itself.

(2) If the Opposition Division is of the opinion that at least one ground for opposition prejudices the maintenance of the European patent, it shall revoke the patent. Otherwise, it shall reject the opposition.

(3) If the Opposition Division is of the opinion that, taking into consideration the amendments made by the proprietor of the European patent during the opposition proceedings, the patent and the invention to which it relates

(a) meet the requirements of this Convention, it shall decide to maintain the patent as amended, provided that the conditions laid down in the Implementing Regulations are fulfilled;

(b) do not meet the requirements of this Convention, it shall revoke the patent.

**Article 102
(deleted)**

Article 103

Publication of a new specification of the European patent

If the European patent is maintained as amended under Article 101, paragraph 3(a), the European Patent Office shall publish a new specification of the European patent as soon as possible after the mention of the opposition decision has been published in the European Patent Bulletin.

**Article 104
Costs**

(1) Each party to the opposition proceedings shall bear the costs it has incurred, unless the Opposition Division, for reasons of equity, orders, in accordance with the Implementing Regulations, a different apportionment of costs.

(2) The procedure for fixing costs shall be laid down in the Implementing Regulations.

(3) Any final decision of the European Patent Office fixing the amount of costs shall be dealt with, for the purpose of enforcement in the Contracting States, in the same way as a final decision given by a civil court of the State in which enforcement is to take place. Verification of such decision shall be limited to its authenticity.

Article 105

Intervention of the assumed infringer

(1) Any third party may, in accordance with the Implementing Regulations, intervene in opposition proceedings after the opposition period has expired, if the third party proves that

(a) proceedings for infringement of the same patent have been instituted against him, or

(b) following a request of the proprietor of the patent to cease alleged infringement, the third party has instituted proceedings for a ruling that he is not infringing the patent.

(2) An admissible intervention shall be treated as an opposition

Article 105a

Request for limitation or revocation

(1) At the request of the proprietor, the European patent may be revoked or be limited by an amendment of the claims. The request shall be filed with the European Patent Office in accordance with the Implementing Regulations. It shall not be deemed to have been filed until the limitation or revocation fee has been paid.

(2) The request may not be filed while opposition proceedings in respect of the European patent are pending.

Article 105b

Limitation or revocation of the European patent

(1) The European Patent Office shall examine whether the requirements laid down in the Implementing Regulations for limiting or revoking the European patent have been met.

(2) If the European Patent Office considers that the request for limitation or revocation of the European patent meets these requirements, it shall decide to limit or revoke the European patent in accordance with the Implementing Regulations. Otherwise, it shall reject the request.

(3) The decision to limit or revoke the European patent shall apply to the European patent in all the Contracting States in respect of which it has been granted. It shall take effect on the date on which the mention of the decision is published in the European Patent Bulletin.

Article 105c

Publication of the amended specification of the European patent

If the European patent is limited under Article 105b, paragraph 2, the European Patent Office shall publish the amended specification of the European patent as soon as possible after the mention of the limitation has been published in the European Patent Bulletin.

PART VI. APPEALS PROCEDURE

Article 106

Decisions subject to appeal

(1) An appeal shall lie from decisions of the Receiving Section, Examining Divisions, Opposition Divisions and the Legal Division. It shall have suspensive effect.

(2) A decision which does not terminate proceedings as regards one of the parties can only be appealed together with the final decision, unless the decision allows a separate appeal.

(3) The right to file an appeal against decisions relating to the apportionment or fixing of costs in opposition proceedings may be restricted in the Implementing Regulations.

Article 107

Persons entitled to appeal and to be parties to appeal proceedings

Any party to proceedings adversely affected by a decision may appeal. Any other parties to the proceedings shall be parties to the appeal proceedings as of right.

Article 108

Time limit and form

Notice of appeal shall be filed, in accordance with the Implementing Regulations, at the European Patent Office within two months of notification of the decision. Notice of appeal shall not be deemed to have been filed until the fee for appeal has been paid. Within four months of notification of the decision, a statement setting out the grounds of appeal shall be filed in accordance with the Implementing Regulations.

Article 109

Interlocutory revision

(1) If the department whose decision is contested considers the appeal to be admissible and well founded, it shall rectify its decision. This shall not apply where the appellant is opposed by another party to the proceedings.

(2) If the appeal is not allowed within three months of receipt of the statement of grounds, it shall be remitted to the Board of Appeal without delay, and without comment as to its merit.

Article 110

Examination of appeals

If the appeal is admissible, the Board of Appeal shall examine whether the appeal is allowable. The examination of the appeal shall be conducted in accordance with the Implementing Regulations.

Article 111

Decision in respect of appeals

(1) Following the examination as to the allowability of the appeal, the Board of Appeal shall decide on the appeal. The Board of Appeal may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution.

(2) If the Board of Appeal remits the case for further prosecution to the department whose decision was appealed, that department shall be bound by the ratio decidendi of the Board of Appeal, in so far as the facts are the same. If the decision under appeal was taken by the Receiving Section, the Examining Division shall also be bound by the ratio decidendi of the Board of Appeal.

Article 112

Decision or opinion of the Enlarged Board of Appeal

(1) In order to ensure uniform application of the law, or if a point of law of fundamental importance arises:

(a) the Board of Appeal shall, during proceedings on a case and either of its own motion or following a request from a party to the appeal, refer any question to the Enlarged Board of Appeal if it considers that a decision is required for the above purposes. If the Board of Appeal rejects the request, it shall give the reasons in its final decision;

(b) the President of the European Patent Office may refer a point of law to the Enlarged Board of Appeal where two Boards of Appeal have given different decisions on that question.

(2) In the cases referred to in paragraph 1(a) the parties to the appeal proceedings shall be parties to the proceedings before the Enlarged Board of Appeal.

(3) The decision of the Enlarged Board of Appeal referred to in paragraph 1(a) shall be binding on the Board of Appeal in respect of the appeal in question.

Article 112a

Petition for review by the Enlarged Board of Appeal

(1) Any party to appeal proceedings adversely affected by the decision of the Board of Appeal may file a petition for review of the decision by the Enlarged Board of Appeal.

(2) The petition may only be filed on the grounds that:

(a) a member of the Board of Appeal took part in the decision in breach of Article 24, paragraph 1, or despite being excluded pursuant to a decision under Article 24, paragraph 4;

(b) the Board of Appeal included a person not appointed as a member of the Boards of Appeal;

(c) a fundamental violation of Article 113 occurred;

(d) any other fundamental procedural defect defined in the Implementing Regulations occurred in the appeal proceedings; or

(e) a criminal act established under the conditions laid down in the Implementing Regulations may have had an impact on the decision.

(3) The petition for review shall not have suspensive effect.

(4) The petition for review shall be filed in a reasoned statement, in accordance with the Implementing Regulations. If based on paragraph 2(a) to (d), the petition shall be filed within two months of notification of the decision of the Board of Appeal. If based on paragraph 2(e), the petition shall be filed within two months of the date on which the criminal act has been established and in any event no later than five years from notification of the decision of the Board of Appeal. The petition shall not be deemed to have been filed until after the prescribed fee has been paid.

(5) The Enlarged Board of Appeal shall examine the petition for review in accordance with the Implementing Regulations. If the petition is allowable, the Enlarged Board of Appeal shall set aside the decision and shall re-open proceedings before the Boards of Appeal in accordance with the Implementing Regulations.

(6) Any person who, in a designated Contracting State, has in good faith used or made effective and serious preparations for using an invention which is the subject of a published European patent

PART II. INDUSTRIAL PROPERTY RIGHTS

application or a European patent in the period between the decision of the Board of Appeal and publication in the European Patent Bulletin of the mention of the decision of the Enlarged Board of Appeal on the petition, may without payment continue such use in the course of his business or for the needs thereof.

PART VII. COMMON PROVISIONS

Chapter I. Common provisions governing procedure

Article 113

Right to be heard and basis of decisions

(1) The decisions of the European Patent Office may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments.

(2) The European Patent Office shall examine, and decide upon, the European patent application or the European patent only in the text submitted to it, or agreed, by the applicant or the proprietor of the patent.

Article 114

Examination by the European Patent Office of its own motion

(1) In proceedings before it, the European Patent Office shall examine the facts of its own motion; it shall not be restricted in this examination to the facts, evidence and arguments provided by the parties and the relief sought.

(2) The European Patent Office may disregard facts or evidence which are not submitted in due time by the parties concerned.

Article 115

Observations by third parties

In proceedings before the European Patent Office, following the publication of the European patent application, any third party may, in accordance with the Implementing Regulations, present observations concerning the patentability of the invention to which the application or patent relates. That person shall not be a party to the proceedings.

Article 116

Oral proceedings

(1) Oral proceedings shall take place either at the instance of the European Patent Office if it considers this to be expedient or at the request of any party to the proceedings. However, the European Patent Office may reject a request for further oral proceedings before the same department where the parties and the subject of the proceedings are the same.

(2) Nevertheless, oral proceedings shall take place before the Receiving Section at the request of the applicant only where the Receiving Section considers this to be expedient or where it intends to refuse the European patent application.

(3) Oral proceedings before the Receiving Section, the Examining Divisions and the Legal Division shall not be public.

(4) Oral proceedings, including delivery of the decision, shall be public, as regards the Boards of Appeal and the Enlarged Board of Appeal, after publication of the European patent application, and also before the Opposition Divisions, in so far as the department before which the proceedings are taking place does not decide otherwise in cases where admission of the public could have serious and unjustified disadvantages, in particular for a party to the proceedings.

Article 117

Means and taking of evidence

(1) In proceedings before the European Patent Office the means of giving or obtaining evidence shall include the following:

- (a) hearing the parties;
- (b) requests for information;
- (c) production of documents;
- (d) hearing witnesses;
- (e) opinions by experts;
- (f) inspection;
- (g) sworn statements in writing.

(2) The procedure for taking such evidence shall be laid down in the Implementing Regulations.

Article 118

Unity of the European patent application or European patent

Where the applicants for or proprietors of a European patent are not the same in respect of different designated Contracting States, they shall be regarded as joint applicants or proprietors for the purposes of proceedings before the European Patent Office. The unity of the application or patent in these proceedings shall not be affected; in particular the text of the application or patent shall be uniform for all designated Contracting States, unless this Convention provides otherwise.

Article 119

Notification

Decisions, summonses, notices and communications shall be notified by the European Patent Office of its own motion in accordance with the Implementing Regulations. Notification may, where exceptional circumstances so require, be effected through the intermediary of the central industrial property offices of the Contracting States.

Article 120

Time limits

The Implementing Regulations shall specify:

- (a) the time limits which are to be observed in proceedings before the European Patent Office and are not fixed by this Convention;
- (b) the manner of computation of time limits and the conditions under which time limits may be extended;
- (c) the minima and maxima for time limits to be determined by the European Patent Office

Article 121

Further processing of the European patent application

(1) If an applicant fails to observe a time limit vis-à-vis the European Patent Office, he may request further processing of the European patent application.

(2) The European Patent Office shall grant the request, provided that the requirements laid down in the Implementing Regulations are met. Otherwise, it shall reject the request.

(3) If the request is granted, the legal consequences of the failure to observe the time limit shall be deemed not to have ensued.

(4) Further processing shall be ruled out in respect of the time limits in Article 87, paragraph 1, Article 108 and Article 112a, paragraph 4, as well as the time limits for requesting further processing or re-establishment of rights. The Implementing Regulations may rule out further processing for other time limits.

Article 122

Re-establishment of rights

(1) An applicant for or proprietor of a European patent who, in spite of all due care required by the circumstances having been taken, was unable to observe a time limit vis-à-vis the European Patent Office shall have his rights re-established upon request if the non-observance of this time limit has the direct consequence of causing the refusal of the European patent application or of a request, or the deeming of the application to have been withdrawn, or the revocation of the European patent, or the loss of any other right or means of redress.

(2) The European Patent Office shall grant the request, provided that the conditions of paragraph 1 and any other requirements laid down in the Implementing Regulations are met. Otherwise, it shall reject the request.

(3) If the request is granted, the legal consequences of the failure to observe the time limit shall be deemed not to have ensued.

(4) Re-establishment of rights shall be ruled out in respect of the time limit for requesting re-establishment of rights. The Implementing Regulations may rule out re-establishment for other time limits.

(5) Any person who, in a designated Contracting State, has in good faith used or made effective and serious preparations for using an invention which is the subject of a published European patent application or a European patent in the period between the loss of rights referred to in paragraph 1 and publication in the European Patent Bulletin of the mention of re-establishment of those rights, may without payment continue such use in the course of his business or for the needs thereof.

(6) Nothing in this Article shall limit the right of a Contracting State to grant re-establishment of rights in respect of time limits provided for in this Convention and to be observed vis-à-vis the authorities of such State.

Article 123

Amendments

(1) The European patent application or European patent may be amended in proceedings before the European Patent Office, in accordance with the Implementing Regulations. In any event, the applicant shall be given at least one opportunity to amend the application of his own volition.

(2) The European patent application or European patent may not be amended in such a way that it contains subject-matter which extends beyond the content of the application as filed.

(3) The European patent may not be amended in such a way as to extend the protection it confers.

Article 124

Information on prior art

(1) The European Patent Office may, in accordance with the Implementing Regulations, invite the applicant to provide information on prior art taken into consideration in national or regional patent proceedings and concerning an invention to which the European patent application relates.

(2) If the applicant fails to reply in due time to an invitation under paragraph 1, the European patent application shall be deemed to be withdrawn.

Article 125

Reference to general principles

In the absence of procedural provisions in this Convention, the European Patent Office shall take into account the principles of procedural law generally recognised in the Contracting States.

Article 126

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**CHAPTER II. INFORMATION TO THE PUBLIC OR TO
OFFICIAL AUTHORITIES**

Article 127

European Patent Register

The European Patent Office shall keep a European Patent Register, in which the particulars specified in the Implementing Regulations shall be recorded. No entry shall be made in the European Patent Register before the publication of the European patent application. The European Patent Register shall be open to public inspection.

Article 128

Inspection of files

(1) Files relating to European patent applications which have not yet been published shall not be made available for inspection without the consent of the applicant.

(2) Any person who can prove that the applicant has invoked the rights under the European patent application against him may obtain inspection of the files before the publication of that application and without the consent of the applicant.

(3) Where a European divisional application or a new European patent application filed under Article 61, paragraph 1, is published, any person may obtain inspection of the files of the earlier application before the publication of that application and without the consent of the applicant.

(4) After the publication of the European patent application, the files relating to the application and the resulting European patent may be inspected on request, subject to the restrictions laid down in the Implementing Regulations.

(5) Even before the publication of the European patent application, the European Patent Office may communicate to third parties or publish the particulars specified in the Implementing Regulations.

Article 129

Periodical publications

The European Patent Office shall periodically publish:

(a) a European Patent Bulletin containing the particulars the publication of which is prescribed by this Convention, the Implementing Regulations or the President of the European Patent Office;

(b) an Official Journal containing notices and information of a general character issued by the President of the European Patent Office, as well as any other information relevant to this Convention or its implementation.

Article 130

Exchange of information

(1) Unless this Convention or national laws provide otherwise, the European Patent Office and the central industrial property office of any Contracting State shall, on request, communicate to each other any useful information regarding European or national patent applications and patents and any proceedings concerning them.

(2) Paragraph 1 shall apply to the communication of information by virtue of working agreements between the European Patent Office and

(a) the central industrial property offices of other States;

(b) any intergovernmental organisation entrusted with the task of granting patents;

(c) any other organisation.

(3) Communications under paragraphs 1 and 2(a) and (b) shall not be subject to the restrictions laid down in Article 128. The Administrative Council may decide that communications under paragraph 2(c) shall not be subject to such restrictions, provided that the organisation concerned treats the information communicated as confidential until the European patent application has been published.

Article 131

Administrative and legal co-operation

(1) Unless this Convention or national laws provide otherwise, the European Patent Office and the courts or authorities of Contracting States shall on request give assistance to each other by communicating information or opening files for inspection. Where the European Patent Office makes files available for inspection by courts, Public Prosecutors' Offices or central industrial property offices, the inspection shall not be subject to the restrictions laid down in Article 128.

(2) At the request of the European Patent Office, the courts or other competent authorities of Contracting States shall undertake, on behalf of the Office and within the limits of their jurisdiction, any necessary enquiries or other legal measures.

Article 132

Exchange of publications

(1) The European Patent Office and the central industrial property offices of the Contracting States shall despatch to each other on request and for their own use one or more copies of their respective publications free of charge.

(2) The European Patent Office may conclude agreements relating to the exchange or supply of publications.

CHAPTER III. REPRESENTATION

Article 133

General principles of representation

(1) Subject to paragraph 2, no person shall be compelled to be represented by a professional representative in proceedings established by this Convention.

(2) Natural or legal persons not having their residence or principal place of business in a Contracting State shall be represented by a professional representative and act through him in all proceedings established by this Convention, other than in filing a European patent application; the Implementing Regulations may permit other exceptions.

(3) Natural or legal persons having their residence or principal place of business in a Contracting State may be represented in proceedings established by this Convention by an employee, who need not be a professional representative but who shall be authorised in accordance with the Implementing Regulations. The Implementing Regulations may provide whether and under what conditions an employee of a legal person may also represent other legal persons which have their principal place of business in a Contracting State and which have economic connections with the first legal person.

(4) The Implementing Regulations may lay down special provisions concerning the common representation of parties acting in common.

Article 134

Representation before the European Patent Office

(1) Representation of natural or legal persons in proceedings established by this Convention may only be undertaken by professional representatives whose names appear on a list maintained for this purpose by the European Patent Office.

(2) Any natural person who

(a) is a national of a Contracting State,

(b) has his place of business or employment in a Contracting State and

(c) has passed the European qualifying examination may be entered on the list of professional representatives.

(3) During a period of one year from the date on which the accession of a State to this Convention takes effect, entry on that list may also be requested by any natural person who

(a) is a national of a Contracting State,

(b) has his place of business or employment in the State having acceded to the Convention and

(c) is entitled to represent natural or legal persons in patent matters before the central industrial property office of that State. Where such entitlement is not conditional upon the requirement of special professional qualifications, the person shall have regularly so acted in that State for at least five years.

(4) Entry shall be effected upon request, accompanied by certificates indicating that the conditions laid down in paragraph 2 or 3 are fulfilled.

(5) Persons whose names appear on the list of professional representatives shall be entitled to act in all proceedings established by this Convention.

(6) For the purpose of acting as a professional representative, any person whose name appears on the list of professional representatives shall be entitled to establish a place of business in any Contracting State in which proceedings established by this Convention may be conducted, having regard to the Protocol on Centralisation annexed to this Convention. The authorities of such State may remove that entitlement in individual cases only in application of legal provisions adopted for the purpose of protecting public security and law and order. Before such action is taken, the President of the European Patent Office shall be consulted.

(7) The President of the European Patent Office may grant exemption from:

(a) the requirement of paragraphs 2(a) or 3(a) in special circumstances;

(b) the requirement of paragraph 3(c), second sentence, if the applicant furnishes proof that he has acquired the requisite qualification in another way.

(8) Representation in proceedings established by this Convention may also be undertaken, in the same way as by a professional representative, by any legal practitioner qualified in a Contracting State and having his place of business in that State, to the extent that he is entitled in that State to act as a professional representative in patent matters. Paragraph 6 shall apply *mutatis mutandis*.

Article 134a

Institute of Professional Representatives before the European Patent Office

(1) The Administrative Council shall be competent to adopt and amend provisions governing:

(a) the Institute of Professional Representatives before the European Patent Office, hereinafter referred to as the Institute;

(b) the qualifications and training required of a person for admission to the European qualifying examination and the conduct of such examination;

(c) the disciplinary power exercised by the Institute or the European Patent Office in respect of professional representatives;

(d) the obligation of confidentiality on the professional representative and the privilege from disclosure in proceedings before the European Patent Office in respect of communications between a professional representative and his client or any other person.

(2) Any person entered on the list of professional representatives referred to in Article 134, paragraph 1, shall be a member of the Institute.

PART VIII. IMPACT ON NATIONAL LAW

Chapter I. Conversion into a national patent application

Article 135

Request for conversion

(1) The central industrial property office of a designated Contracting State shall, at the request of the applicant for or proprietor of a European patent, apply the procedure for the grant of a national patent in the following circumstances:

(a) where the European patent application is deemed to be withdrawn under Article 77, paragraph 3;

(b) in such other cases as are provided for by the national law, in which the European patent application is refused or withdrawn or deemed to be withdrawn, or the European patent is revoked under this Convention.

(2) In the case referred to in paragraph 1(a), the request for conversion shall be filed with the central industrial property office with which the European patent application has been filed. That office shall, subject to the provisions governing national security, transmit the request directly to the central industrial property offices of the Contracting States specified therein.

(3) In the cases referred to in paragraph 1(b), the request for conversion shall be submitted to the European Patent Office in accordance with the Implementing Regulations. It shall not be deemed to be filed until the conversion fee has been paid. The European Patent Office shall transmit the request to the central industrial property offices of the Contracting States specified therein.

(4) The effect of the European patent application referred to in Article 66 shall lapse if the request for conversion is not submitted in due time.

Article 136

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Article 137

Formal requirements for conversion

(1) A European patent application transmitted in accordance with Article 135, paragraph 2 or 3, shall not be subjected to formal

requirements of national law which are different from or additional to those provided for in this Convention.

(2) Any central industrial property office to which the European patent application is transmitted may require that the applicant shall, within a period of not less than two months:

(a) pay the national application fee; and

(b) file a translation of the original text of the European patent application in an official language of the State in question and, where appropriate, of the text as amended during proceedings before the European Patent Office which the applicant wishes to use as the basis for the national procedure.

Chapter II. Revocation and prior rights

Article 138

Revocation of European patents

(1) Subject to Article 139, a European patent may be revoked with effect for a Contracting State only on the grounds that:

(a) the subject-matter of the European patent is not patentable under Articles 52 to 57;

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

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

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

(e) the proprietor of the European patent is not entitled under Article 60, paragraph 1.

(2) If the grounds for revocation affect the European patent only in part, the patent shall be limited by a corresponding amendment of the claims and revoked in part.

(3) In proceedings before the competent court or authority relating to the validity of the European patent, the proprietor of the patent shall have the right to limit the patent by amending the claims. The patent as thus limited shall form the basis for the proceedings.

Article 139

Prior rights and rights arising on the same date

(1) In any designated Contracting State a European patent application and a European patent shall have with regard to a national patent application and a national patent the same prior right effect as a national patent application and a national patent.

(2) A national patent application and a national patent in a Contracting State shall have with regard to a European patent designating that Contracting State the same prior right effect as if the European patent were a national patent.

(3) Any Contracting State may prescribe whether and on what terms an invention disclosed in both a European patent application or patent and a national application or patent having the same date of filing or, where priority is claimed, the same date of priority, may be protected simultaneously by both applications or patents.

Chapter III. Miscellaneous effects

Article 140

National utility models and utility certificates

Articles 66, 124, 135, 137 and 139 shall apply to utility models and utility certificates and to applications for utility models and utility certificates registered or deposited in the Contracting States whose laws make provision for such models or certificates.

Article 141

Renewal fees for European patents

(1) Renewal fees for a European patent may only be imposed for the years which follow that referred to in Article 86, paragraph 2.

(2) Any renewal fees falling due within two months of the publication in the European Patent Bulletin of the mention of the grant of the European patent shall be deemed to have been validly paid if they are paid within that period. Any additional fee provided for under national law shall not be charged.

PART IX. SPECIAL AGREEMENTS

Article 142

Unitary patents

(1) Any group of Contracting States, which has provided by a special agreement that a European patent granted for those States has a unitary character throughout their territories, may provide that a European patent may only be granted jointly in respect of all those States.

(2) Where any group of Contracting States has availed itself of the authorisation given in paragraph 1, the provisions of this Part shall apply.

Article 143

Special departments of the European Patent Office

(1) The group of Contracting States may give additional tasks to the European Patent Office.

(2) Special departments common to the Contracting States in the group may be set up within the European Patent Office in order to carry out the additional tasks. The President of the European Patent Office shall direct such special departments; Article 10, paragraphs 2 and 3, shall apply *mutatis mutandis*.

Article 144

Representation before special departments

The group of Contracting States may lay down special provisions to govern representation of parties before the departments referred to in Article 143, paragraph 2.

Article 145

Select committee of the Administrative Council

(1) The group of Contracting States may set up a select committee of the Administrative Council for the purpose of supervising the activities of the special departments set up under Article 143, paragraph 2; the European Patent Office shall place at its disposal such staff, premises and equipment as may be necessary for the performance of its duties. The President of the European Patent Office shall be responsible for the activities of the special departments to the select committee of the Administrative Council.

(2) The composition, powers and functions of the select committee shall be determined by the group of Contracting States.

Article 146

Cover for expenditure for carrying out special tasks

Where additional tasks have been given to the European Patent Office under Article 143, the group of Contracting States shall bear the expenses incurred by the Organisation in carrying out these tasks. Where special departments have been set up in the European Patent Office to carry out these additional tasks, the group shall bear the expenditure on staff, premises and equipment chargeable in respect of these departments. Article 39, paragraphs 3 and 4, Article 41 and Article 47 shall apply mutatis mutandis.

Article 147

Payments in respect of renewal fees for unitary patents

If the group of Contracting States has fixed a common scale of renewal fees in respect of European patents, the proportion referred to in Article 39, paragraph 1, shall be calculated on the basis of the common scale; the minimum amount referred to in Article 39, paragraph 1, shall apply to the unitary patent. Article 39, paragraphs 3 and 4, shall apply mutatis mutandis.

Article 148

The European patent application as an object of property

(1) Article 74 shall apply unless the group of Contracting States has specified otherwise.

(2) The group of Contracting States may provide that a European patent application for which these Contracting States are designated may only be transferred, mortgaged or subjected to any legal means of execution in respect of all the Contracting States of the group and in accordance with the provisions of the special agreement.

Article 149

Joint designation

(1) The group of Contracting States may provide that these States may only be designated jointly, and that the designation of one or some

only of such States shall be deemed to constitute the designation of all the States of the group.

(2) Where the European Patent Office acts as a designated Office under Article 153, paragraph 1, paragraph 1 shall apply if the applicant has indicated in the international application that he wishes to obtain a European patent for one or more of the designated States of the group. The same shall apply if the applicant designates in the international application one of the Contracting States in the group, whose national law provides that the designation of that State shall have the effect of the application being for a European patent.

Article 149a

Other agreements between the Contracting States

(1) Nothing in this Convention shall be construed as limiting the right of some or all of the Contracting States to conclude special agreements on any matters concerning European patent applications or European patents which under this Convention are subject to and governed by national law, such as, in particular

(a) an agreement establishing a European patent court common to the Contracting States party to it;

(b) an agreement establishing an entity common to the Contracting States party to it to deliver, at the request of national courts or quasi-judicial authorities, opinions on issues of European or harmonised national patent law;

(c) an agreement under which the Contracting States party to it dispense fully or in part with translations of European patents under Article 65;

(d) an agreement under which the Contracting States party to it provide that translations of European patents as required under Article 65 may be filed with, and published by, the European Patent Office.

(2) The Administrative Council shall be competent to decide that:

(a) the members of the Boards of Appeal or the Enlarged Board of Appeal may serve on a European patent court or a common entity and take part in proceedings before that court or entity in accordance with any such agreement;

(b) the European Patent Office shall provide a common entity with such support staff, premises and equipment as may be necessary for the

performance of its duties, and the expenses incurred by that entity shall be borne fully or in part by the Organisation.

**PART X. INTERNATIONAL APPLICATIONS UNDER THE
PATENT COOPERATION TREATY – EURO-PCT
APPLICATIONS**

Article 150

Application of the Patent Cooperation Treaty

(1) The Patent Cooperation Treaty of 19 June 1970, hereinafter referred to as the PCT, shall be applied in accordance with the provisions of this Part.

(2) International applications filed under the PCT may be the subject of proceedings before the European Patent Office. In such proceedings, the provisions of the PCT and its Regulations shall be applied, supplemented by the provisions of this Convention. In case of conflict, the provisions of the PCT or its Regulations shall prevail.

Article 151

The European Patent Office as a receiving Office

The European Patent Office shall act as a receiving Office within the meaning of the PCT, in accordance with the Implementing Regulations. Article 75, paragraph 2, shall apply.

Article 152

**The European Patent Office as an International Searching
Authority or International Preliminary Examining Authority**

The European Patent Office shall act as an International Searching Authority and International Preliminary Examining Authority within the meaning of the PCT, in accordance with an agreement between the Organisation and the International Bureau of the World Intellectual Property Organization, for applicants who are residents or nationals of a State party to this Convention. This agreement may provide that the European Patent Office shall also act for other applicants.

Article 153

**The European Patent Office as designated Office
or elected Office**

(1) The European Patent Office shall be

(a) a designated Office for any State party to this Convention in respect of which the PCT is in force, which is designated in the international application and for which the applicant wishes to obtain a European patent, and

(b) an elected Office, if the applicant has elected a State designated pursuant to letter (a).

(2) An international application for which the European Patent Office is a designated or elected Office, and which has been accorded an international date of filing, shall be equivalent to a regular European application (Euro-PCT application).

(3) The international publication of a Euro-PCT application in an official language of the European Patent Office shall take the place of the publication of the European patent application and shall be mentioned in the European Patent Bulletin.

(4) If the Euro-PCT application is published in another language, a translation into one of the official languages shall be filed with the European Patent Office, which shall publish it. Subject to Article 67, paragraph 3, the provisional protection under Article 67, paragraphs 1 and 2, shall be effective from the date of that publication.

(5) The Euro-PCT application shall be treated as a European patent application and shall be considered as comprised in the state of the art under Article 54, paragraph 3, if the conditions laid down in paragraph 3 or 4 and in the Implementing Regulations are fulfilled.

(6) The international search report drawn up in respect of a Euro-PCT application or the declaration replacing it, and their international publication, shall take the place of the European search report and the mention of its publication in the European Patent Bulletin.

(7) A supplementary European search report shall be drawn up in respect of any Euro-PCT application under paragraph 5. The Administrative Council may decide that the supplementary search report is to be dispensed with or that the search fee is to be reduced.

Article 154

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PART II. INDUSTRIAL PROPERTY RIGHTS

Article 155
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Article 156
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Article 157
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Article 158
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PART XII. FINAL PROVISIONS

Article 164

Implementing Regulations and Protocols

(1) The Implementing Regulations, the Protocol on Recognition, the Protocol on Privileges and Immunities, the Protocol on Centralisation, the Protocol on the Interpretation of Article 69 and the Protocol on Staff Complement shall be integral parts of this Convention.

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

Article 165

Signature – Ratification

(1) This Convention shall be open for signature until 5 April 1974 by the States which took part in the Inter-Governmental Conference for the setting up of a European System for the Grant of Patents or were informed of the holding of that conference and offered the option of taking part therein.

(2) This Convention shall be subject to ratification; instruments of ratification shall be deposited with the Government of the Federal Republic of Germany.

Article 166

Accession

(1) This Convention shall be open to accession by:

(a) the States referred to in Article 165, paragraph 1;
(b) any other European State at the invitation of the Administrative Council.

(2) Any State which has been a party to the Convention and has ceased to be so as a result of the application of Article 172, paragraph 4, may again become a party to the Convention by acceding to it.

(3) Instruments of accession shall be deposited with the Government of the Federal Republic of Germany.

**Article 167
(deleted)**

**Article 168
Territorial field of application**

(1) Any Contracting State may declare in its instrument of ratification or accession, or may inform the Government of the Federal Republic of Germany by written notification at any time thereafter, that this Convention shall be applicable to one or more of the territories for the external relations of which it is responsible. European patents granted for that Contracting State shall also have effect in the territories for which such a declaration has taken effect.

(2) If the declaration referred to in paragraph 1 is contained in the instrument of ratification or accession, it shall take effect on the same date as the ratification or accession; if the declaration is notified after the deposit of the instrument of ratification or accession, such notification shall take effect six months after the date of its receipt by the Government of the Federal Republic of Germany.

(3) Any Contracting State may at any time declare that the Convention shall cease to apply to some or to all of the territories in respect of which it has given notification pursuant to paragraph 1. Such declaration shall take effect one year after the date on which the Government of the Federal Republic of Germany received notification thereof.

**Article 169
Entry into force**

(1) This Convention shall enter into force three months after the deposit of the last instrument of ratification or accession by six States on

PART II. INDUSTRIAL PROPERTY RIGHTS

whose territory the total number of patent applications filed in 1970 amounted to at least 180 000 for all the said States.

(2) Any ratification or accession after the entry into force of this Convention shall take effect on the first day of the third month after the deposit of the instrument of ratification or accession.

Article 170

Initial contribution

(1) Any State which ratifies or accedes to this Convention after its entry into force shall pay to the Organisation an initial contribution, which shall not be refunded.

(2) The initial contribution shall be 5% of an amount calculated by applying the percentage obtained for the State in question, on the date on which ratification or accession takes effect, in accordance with the scale provided for in Article 40, paragraphs 3 and 4, to the sum of the special financial contributions due from the other Contracting States in respect of the accounting periods preceding the date referred to above.

(3) In the event that special financial contributions were not required in respect of the accounting period immediately preceding the date referred to in paragraph 2, the scale of contributions referred to in that paragraph shall be the scale that would have been applicable to the State concerned in respect of the last year for which financial contributions were required.

Article 171

Duration of the Convention

The present Convention shall be of unlimited duration.

Article 172

Revision

(1) This Convention may be revised by a Conference of the Contracting States.

(2) The Conference shall be prepared and convened by the Administrative Council. The Conference shall not be validly constituted unless at least three-quarters of the Contracting States are represented at it. Adoption of the revised text shall require a majority of three-quarters of the Contracting States represented and voting at the Conference. Abstentions shall not be considered as votes.

(3) The revised text shall enter into force when it has been ratified or acceded to by the number of Contracting States specified by the Conference, and at the time specified by that Conference.

(4) Such States as have not ratified or acceded to the revised text of the Convention at the time of its entry into force shall cease to be parties to this Convention as from that time.

Article 173

Disputes between Contracting States

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

(2) If such agreement is not reached within six months from the date when the dispute was referred to the Administrative Council, any one of the States concerned may submit the dispute to the International Court of Justice for a binding decision.

Article 174

Denunciation

Any Contracting State may at any time denounce this Convention. Denunciation shall be notified to the Government of the Federal Republic of Germany. It shall take effect one year after the date of receipt of such notification.

Article 175

Preservation of acquired rights

(1) In the event of a State ceasing to be party to this Convention in accordance with Article 172, paragraph 4, or Article 174, rights already acquired pursuant to this Convention shall not be impaired.

(2) A European patent application which is pending when a designated State ceases to be party to the Convention shall be processed by the European Patent Office, as far as that State is concerned, as if the Convention in force thereafter were applicable to that State.

(3) Paragraph 2 shall apply to European patents in respect of which, on the date mentioned in that paragraph, an opposition is pending or the opposition period has not expired.

(4) Nothing in this Article shall affect the right of any State that has ceased to be a party to this Convention to treat any European patent in accordance with the text to which it was a party.

Article 176

Financial rights and obligations of former Contracting States

(1) Any State which has ceased to be a party to this Convention in accordance with Article 172, paragraph 4, or Article 174, shall have the special financial contributions which it has paid pursuant to Article 40, paragraph 2, refunded to it by the Organisation only at the time when and under the conditions whereby the Organisation refunds special financial contributions paid by other States during the same accounting period.

(2) The State referred to in paragraph 1 shall, even after ceasing to be a party to this Convention, continue to pay the proportion pursuant to Article 39 of renewal fees in respect of European patents remaining in force in that State, at the rate current on the date on which it ceased to be a party.

Article 177

Languages of the Convention

(1) This Convention, drawn up in a single original, in the English, French and German languages, shall be deposited in the archives of the Government of the Federal Republic of Germany, the three texts being equally authentic.

(2) The texts of this Convention drawn up in official languages of Contracting States other than those specified in paragraph 1 shall, if they have been approved by the Administrative Council, be considered as official texts. In the event of disagreement on the interpretation of the various texts, the texts referred to in paragraph 1 shall be authentic.

Article 178

Transmission and notifications

(1) The Government of the Federal Republic of Germany shall draw up certified true copies of this Convention and shall transmit them to the Governments of all signatory or acceding States.

(2) The Government of the Federal Republic of Germany shall notify to the Governments of the States referred to in paragraph 1:

- (a) the deposit of any instrument of ratification or accession;
- (b) any declaration or notification received pursuant to Article 168;
- (c) any denunciation received pursuant to Article 174 and the date on which such denunciation comes into force.

(3) The Government of the Federal Republic of Germany shall register this Convention with the Secretariat of the United Nations.

IN WITNESS WHEREOF, the Plenipotentiaries authorised thereto, having presented their Full Powers, found to be in good and due form, have signed this Convention.

Done at Munich this fifth day of October one thousand nine hundred and seventy-three

**IMPLEMENTING REGULATIONS
TO THE CONVENTION ON THE GRANT OF EUROPEAN
PATENTS**

of 5 October 1973

**as adopted by decision of the Administrative Council of the
European Patent Organisation of 7 december 2006 and as last
amended by decision of the Administrative Council of the
European Patent Organisation of 28 june 2018**

**PART I. IMPLEMENTING REGULATIONS TO PART I OF
THE CONVENTION**

Chapter I. General provisions

Rule 1

Written proceedings

In written proceedings before the European Patent Office, the requirement to use the written form shall be satisfied if the content of the documents can be reproduced in a legible form on paper.

Rule 2

Filing of and formal requirements for documents

(1) In proceedings before the European Patent Office, documents may be filed by delivery by hand, by postal services or by means of electronic communication. The President of the European Patent Office shall lay down the details and conditions and, where appropriate, any special formal or technical requirements for the filing of documents. In particular, he may specify that confirmation must be supplied. If such confirmation is not supplied in due time, the European patent application shall be refused; documents filed subsequently shall be deemed not to have been received.

(2) Where the Convention provides that a document must be signed, the authenticity of the document may be confirmed by handwritten signature or other appropriate means the use of which has been permitted by the President of the European Patent Office. A document authenticated by such other means shall be deemed to meet the legal requirements of signature in the same way as a document bearing a handwritten signature which has been filed in paper form.

Rule 3

Language in written proceedings

(1) In written proceedings before the European Patent Office, any party may use any official language of the European Patent Office. The translation referred to in Article 14, paragraph 4, may be filed in any official language of the European Patent Office.

(2) Amendments to a European patent application or European patent shall be filed in the language of the proceedings.

(3) Documentary evidence and, in particular, publications may be filed in any language. The European Patent Office may, however, require that a translation in one of its official languages be filed, within a period to be specified. If a required translation is not filed in due time, the European Patent Office may disregard the document in question.

Rule 4

Language in oral proceedings

(1) Any party to oral proceedings before the European Patent Office may use an official language of the European Patent Office other than the language of the proceedings, if such party gives notice to the European Patent Office at least one month before the date of such oral proceedings or provides for interpretation into the language of the proceedings. Any party may use an official language of a Contracting State, if he provides for interpretation into the language of the proceedings. The European Patent Office may permit derogations from these provisions.

(2) In the course of oral proceedings, employees of the European Patent Office may use an official language of the European Patent Office other than the language of the proceedings.

(3) Where evidence is taken, any party, witness or expert to be heard who is unable to express himself adequately in an official language of the European Patent Office or of a Contracting State may use another language. Where evidence is taken upon request of a party, parties, witnesses or experts expressing themselves in a language other than an official language of the European Patent Office shall be heard only if that party provides for interpretation into the language of the proceedings. The European Patent Office may, however, permit interpretation into one of its other official languages.

(4) If the parties and the European Patent Office agree, any language may be used.

(5) The European Patent Office shall, if necessary, provide at its own expense interpretation into the language of the proceedings, or, where appropriate, into its other official languages, unless such interpretation is the responsibility of one of the parties.

(6) Statements by employees of the European Patent Office, parties, witnesses or experts, made in an official language of the European Patent Office, shall be entered in the minutes in that language. Statements made in any other language shall be entered in the official language into which they are translated. Amendments to a European patent application or European patent shall be entered in the minutes in the language of the proceedings.

Rule 5

Certification of translations

Where the translation of a document is required, the European Patent Office may require that a certificate that the translation corresponds to the original text be filed within a period to be specified. If the certificate is not filed in due time, such document shall be deemed not to have been filed, unless otherwise provided.

Rule 6

Filing of translations and reduction of fees

(1) A translation under Article 14, paragraph 2, shall be filed within two months of filing the European patent application.

(2) A translation under Article 14, paragraph 4, shall be filed within one month of filing the document. This shall also apply to requests under Article 105a. Where the document is a notice of opposition or appeal, or a statement of grounds of appeal, or a petition for review, the translation may be filed within the period for filing such a notice or statement or petition, if that period expires later.

(3) Where a person referred to in Article 14, paragraph 4, files a European patent application or a request for examination in a language admitted in that provision, the filing fee or examination fee shall be reduced in accordance with the Rules relating to Fees.

(4) The reduction referred to in paragraph 3 shall be available for:

(a) small and medium-sized enterprises;

- (b) natural persons; or
- (c) non-profit organisations, universities or public research organisations.

(5) For the purposes of paragraph 4(a), Commission recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises as published in the Official Journal of the European Union L 124, p. 36 of 20 May 2003 shall apply.

(6) An applicant wishing to benefit from the fee reduction referred to in paragraph 3 shall declare himself to be an entity or a natural person within the meaning of paragraph 4. In case of reasonable doubt as to the veracity of such declaration, the Office may require evidence.

(7) In case of multiple applicants, each applicant shall be an entity or a natural person within the meaning of paragraph 4.

Rule 7

Legal authenticity of the translation of the European patent application

Unless evidence is provided to the contrary, the European Patent Office shall assume, for the purpose of determining whether the subject-matter of the European patent application or European patent extends beyond the content of the application as filed, that the translation filed under Article 14, paragraph 2, or Rule 40, paragraph 3, is in conformity with the original text of the application.

Chapter II. Organisation of the European Patent Office

Section 1 General matters

Rule 8

Patent classification

The European Patent Office shall use the classification referred to in Article 1 of the Strasbourg Agreement concerning the International Patent Classification of 24 March 1971, hereinafter referred to as the international classification.

Rule 9

Administrative structure of the European Patent Office

(1) The European Patent Office shall be divided administratively into Directorates-General, to which the departments specified in Article

15(a) to (e), and the services set up to deal with legal matters and the internal administration of the Office, shall be assigned.

(2) Each Directorate-General shall be directed by a Vice-President. The assignment of a Vice-President to a Directorate-General shall be decided by the Administrative Council, after the President of the European Patent Office has been consulted.

Rule 10

Responsibility of the Receiving Section and the Examining Division

(1) The Receiving Section shall be responsible for the examination on filing and the examination as to formal requirements of a European patent application up to the time when the Examining Division becomes responsible for the examination of the European patent application under Article 94, paragraph 1.

(2) Subject to paragraphs 3 and 4, the Examining Division shall be responsible for the examination of a European patent application under Article 94, paragraph 1, from the time when a request for examination is filed.

(3) If a request for examination is filed before the European search report has been transmitted to the applicant, the Examining Division shall, subject to paragraph 4, be responsible from the time when the European Patent Office receives the indication under Rule 70, paragraph 2.

(4) If a request for examination is filed before the European search report has been transmitted to the applicant, and if the applicant has waived the right under Rule 70, paragraph 2, the Examining Division shall be responsible from the time when the search report is transmitted to the applicant.

Rule 11

Allocation of duties to the departments of first instance

(1) Technically qualified examiners acting as members of Search, Examining or Opposition Divisions shall be assigned to Directorates. The President of the European Patent Office shall allocate duties to these Directorates by reference to the international classification.

(2) The President of the European Patent Office may allocate further duties to the Receiving Section, the Search, Examining and Opposition

Divisions, and the Legal Division, in addition to the responsibilities vested in them under the Convention.

(3) The President of the European Patent Office may entrust to employees who are not technically or legally qualified examiners the execution of duties falling to the Search, Examining or Opposition Divisions and involving no technical or legal difficulties.

Section 2. Organisation of the Boards of Appeal and the Enlarged Board of Appeal

**Rule 12
(deleted)**

Rule 12a

Organisation and management of the Boards of Appeal Unit and President of the Boards of Appeal

(1) The Boards of Appeal and the Enlarged Board of Appeal, including their registries and support services, shall be organised as a separate unit (the "Boards of Appeal Unit") and be directed by the President of the Boards of Appeal. The Chairman of the Enlarged Board of Appeal shall act as President of the Boards of Appeal. The President of the Boards of Appeal shall be appointed by the Administrative Council on a joint proposal made by the Committee established under Rule 12c, paragraph 1, and the President of the European Patent Office. If the President of the Boards of Appeal is absent or indisposed, one of the members of the Enlarged Board of Appeal shall take his place in accordance with the procedure laid down by the Administrative Council.

(2) The President of the Boards of Appeal shall manage the Boards of Appeal Unit and, to this end, have the functions and powers delegated to him by the President of the European Patent Office. In exercising the delegated functions and powers, the President of the Boards of Appeal shall be responsible solely to the Administrative Council and shall be subject to its hierarchical and disciplinary authority.

(3) Without prejudice to Article 10, paragraph 2(d), and Article 46, the President of the Boards of Appeal shall prepare a substantiated budget request for the Boards of Appeal Unit. This request shall be examined and discussed with the relevant departments of the European Patent Office, and be presented by the President of the Boards of Appeal to the Committee established under Rule 12c, paragraph 1, for opinion,

before being forwarded to the President of the European Patent Office for consideration for the yearly draft budget. The President of the European Patent Office shall provide the President of the Boards of Appeal with the necessary resources, as set out in the adopted budget.

(4) The President of the European Patent Office shall make the services mentioned in Rule 9, paragraph 1, available to the President of the Boards of Appeal as far as necessary and within the limits of the adopted budget.

Rule 12b

**Presidium of the Boards of Appeal and business
distribution scheme for the Boards of Appeal**

(1) The autonomous authority within the Boards of Appeal Unit (the "Presidium of the Boards of Appeal") shall consist of the President of the Boards of Appeal, who shall act as chairman, and twelve members of the Boards of Appeal, six being Chairmen and six being other members.

(2) All members of the Presidium shall be elected by the Chairmen and members of the Boards of Appeal for two working years. If the full composition of the Presidium cannot be reached, the vacancies shall be filled by designating the most senior Chairmen and members.

(3) The Presidium shall:

(a) adopt the Rules of Procedure for the election and designation of its members;

(b) adopt, without prejudice to regulations adopted in accordance with Article 10, paragraph 2(c), and Article 33, paragraph 2(b), a Code of Conduct for the members and Chairmen of the Boards of Appeal and of the Enlarged Board of Appeal, which shall be subject to the approval of the Administrative Council;

(c) advise the President of the Boards of Appeal on proposals for amendments to the Rules of Procedure of the Boards of Appeal and of the Enlarged Board of Appeal;

(d) advise the President of the Boards of Appeal on matters concerning the functioning of the Boards of Appeal Unit in general.

(4) Before the beginning of each working year, the Presidium, extended to include all Chairmen, shall allocate duties to the Boards of Appeal. In the same composition, it shall decide on conflicts regarding the allocation of duties between two or more Boards of Appeal. The extended Presidium shall designate the regular and alternate members

of the various Boards of Appeal. Any member of a Board of Appeal may be designated as a member of more than one Board of Appeal. These measures may, where necessary, be amended during the course of the working year in question.

(5) The Presidium may only take a decision if at least five of its members are present; these must include the President of the Boards of Appeal or his deputy, and the Chairmen of two Boards of Appeal. Where the tasks mentioned in paragraph 4 are concerned, nine members must be present, including the President of the Boards of Appeal or his deputy, and the Chairmen of three Boards of Appeal. Decisions shall be taken by a majority vote; in the event of parity of votes, the Chairman or his deputy shall have the casting vote. Abstentions shall not be considered as votes.

(6) The Administrative Council may allocate duties under Article 134a, paragraph 1(c), to the Boards of Appeal.

Rule 12c

Boards of Appeal Committee and procedure for adoption of the Rules of Procedure of the Boards of Appeal and of the Enlarged Board of Appeal

(1) The Administrative Council shall set up a committee (the "Boards of Appeal Committee") to advise it and the President of the Boards of Appeal on the Boards of Appeal Unit in general and to adopt the Rules of Procedure of the Boards of Appeal and of the Enlarged Board of Appeal. The Committee shall be composed of six members appointed by the Administrative Council, three from among the delegations of the Contracting States within the meaning of Article 26, and three from among serving or former judges of international or European courts or of national courts of the Contracting States. The President of the European Patent Office and the President of the Boards of Appeal shall have the right to attend the Committee's meetings. Further details, in particular as to the Committee's composition, alternate members, working arrangements and functions in advising the Boards of Appeal Unit, shall be determined by the Administrative Council in the decision setting up the Committee.

(2) On a proposal from the President of the Boards of Appeal and after the President of the European Patent Office has been given the opportunity to comment, the Committee set up under paragraph 1 shall

adopt the Rules of Procedure of the Boards of Appeal and of the Enlarged Board of Appeal.

Rule 12d

**Appointment and re-appointment of the members,
including the Chairmen, of the Boards of Appeal and of the
Enlarged Board of Appeal**

(1) The Chairman of the Enlarged Board of Appeal shall, on his appointment, also be appointed as a legally qualified member of the Boards of Appeal.

(2) Upon delegation from the President of the European Patent Office, the President of the Boards of Appeal shall exercise the right to propose the members, including the Chairmen, of the Boards of Appeal and the members of the Enlarged Board of Appeal for appointment by the Administrative Council, and the right to be consulted on their re-appointment (Article 11, paragraph 3) and on the appointment and re-appointment of external legally qualified members (Article 11, paragraph 5).

(3) The President of the Boards of Appeal shall exercise the right under paragraph 2 to be consulted on re appointments by submitting a reasoned opinion, including an evaluation of the member's or Chairman's performance, to the Administrative Council. The criteria for evaluating performance shall be set by the President of the Boards of Appeal in consultation with the Committee established under Rule 12c, paragraph 1. Subject to a positive opinion and performance evaluation and the number of posts under Article 11, paragraph 3, available in the adopted budget for the Boards of Appeal Unit, the members, including the Chairmen, of the Boards of Appeal and the members of the Enlarged Board of Appeal shall be re-appointed at the end of their five-year term under Article 23, paragraph 1.

Rule 13

**Business distribution scheme for the Enlarged Board of
Appeal**

Before the beginning of each working year, the members of the Enlarged Board of Appeal appointed under Article 11, paragraph 3, shall designate the regular and alternate members of the Enlarged Board of Appeal in proceedings under Article 22, paragraph 1(a) and (b), and the

regular and alternate members in proceedings under Article 22, paragraph 1(c). Decisions may only be taken if at least five members are present, including the Chairman of the Enlarged Board of Appeal or his deputy; in the event of parity of votes, the Chairman or his deputy shall have the casting vote. Abstentions shall not be considered as votes.

PART II. IMPLEMENTING REGULATIONS TO PART II OF THE CONVENTION

Chapter I. Procedure where the applicant is not entitled

Rule 14

Stay of proceedings

(1) If a third party provides evidence that he has instituted proceedings against the applicant seeking a decision within the meaning of Article 61, paragraph 1, the proceedings for grant shall be stayed unless the third party communicates to the European Patent Office in writing his consent to the continuation of such proceedings. Such consent shall be irrevocable. However, proceedings for grant shall not be stayed before the publication of the European patent application.

(2) Where evidence is provided that a final decision within the meaning of Article 61, paragraph 1, has been taken, the European Patent Office shall inform the applicant and any other party that the proceedings for grant shall be resumed as from the date stated in the communication, unless a new European patent application under Article 61, paragraph 1(b), has been filed for all the designated Contracting States. If the decision is in favour of the third party, the proceedings may not be resumed earlier than three months after the decision has become final, unless the third party requests the resumption.

(3) Upon staying the proceedings for grant, or thereafter, the European Patent Office may set a date on which it intends to resume the proceedings for grant, regardless of the stage reached in the national proceedings instituted under paragraph 1. It shall communicate this date to the third party, the applicant and any other party. If no evidence has been provided by that date that a final decision has been taken, the European Patent Office may resume proceedings.

(4) All periods other than those for the payment of renewal fees, running at the date of the stay of proceedings, shall be interrupted by such stay. The time which has not yet elapsed shall begin to run from the

date on which proceedings are resumed. However, the time still to run after such resumption shall not be less than two months.

Rule 15

Limitation on withdrawals

From the date on which a third party provides evidence that he has instituted national proceedings under Rule 14, paragraph 1, and up to the date on which the proceedings for grant are resumed, neither the European patent application nor the designation of any Contracting State may be withdrawn.

Rule 16

Procedure under Article 61, paragraph 1

(1) A person entitled to the grant of a European patent may only avail himself of the remedies under Article 61, paragraph 1, if:

- (a) he does so no later than three months after the decision recognising his entitlement has become final, and
- (b) the European patent has not yet been granted.

(2) Such remedies shall only apply in respect of Contracting States designated in the European patent application in which the decision has been taken or recognised or must be recognised on the basis of the Protocol on Recognition.

Rule 17

Filing of a new European patent application by the entitled person

(1) Where the person adjudged by a final decision to be entitled to the grant of the European patent files a new European patent application under Article 61, paragraph 1(b), the original application shall be deemed to be withdrawn on the date of filing the new application for the Contracting States designated therein in which the decision has been taken or recognised or must be recognised on the basis of the Protocol on Recognition.

(2) The filing fee and search fee shall be paid within one month of filing the new application. If the filing fee or search fee is not paid in due time, the application shall be deemed to be withdrawn.

(3) The designation fee shall be paid within six months of the date on which the European Patent Bulletin mentions the publication of the

European search report drawn up in respect of the new application. Rule 39, paragraphs 2 and 3, shall apply.

Rule 18

Partial transfer of the right to the European patent

(1) If a final decision determines that a third party is entitled to the grant of a European patent in respect of only part of the subject-matter disclosed in the original European patent application, Article 61 and Rules 16 and 17 shall apply to such part.

(2) Where appropriate, the original European patent application shall contain, for the designated Contracting States in which the decision was taken or recognised or must be recognised on the basis of the Protocol on Recognition, claims, a description and drawings which are different from those for the other designated Contracting States.

Rule 19

Designation of the inventor

(1) The request for grant of a European patent shall contain the designation of the inventor. However, if the applicant is not the inventor or is not the sole inventor, the designation shall be filed in a separate document. The designation shall state the family name, given names and full address of the inventor, contain the statement referred to in Article 81 and bear the signature of the applicant or his representative.

(2) The European Patent Office shall not verify the accuracy of the designation of the inventor.

(3) If the applicant is not the inventor or is not the sole inventor, the European Patent Office shall communicate to the designated inventor the information in the document designating him and the following data:

- (a) the number of the European patent application;
- (b) the date of filing of the European patent application and, if priority has been claimed, the date, State and file number of the previous application;
- (c) the name of the applicant;
- (d) the title of the invention;
- (e) the Contracting States designated.

(4) The applicant and the inventor may invoke neither the omission of the communication under paragraph 3 nor any errors contained therein

Rule 20

Publication of the mention of the inventor

(1) The designated inventor shall be mentioned in the published European patent application and the European patent specification, unless he informs the European Patent Office in writing that he has waived his right to be thus mentioned.

(2) Paragraph 1 shall apply where a third party files with the European Patent Office a final decision determining that the applicant for or proprietor of a European patent is required to designate him as an inventor.

Rule 21

Rectification of the designation of an inventor

(1) An incorrect designation of an inventor shall be rectified upon request and only with the consent of the wrongly designated person and, where such a request is filed by a third party, the consent of the applicant for or proprietor of the patent. Rule 19 shall apply mutatis mutandis.

(2) Where an incorrect designation of the inventor has been recorded in the European Patent Register or published in the European Patent Bulletin, its rectification or cancellation shall also be recorded or published therein.

Chapter III. Registration of transfers, licences and other rights

Rule 22

Registration of transfers

(1) The transfer of a European patent application shall be recorded in the European Patent Register at the request of an interested party, upon production of documents providing evidence of such transfer.

(2) The request shall not be deemed to have been filed until an administrative fee has been paid. It may be rejected only if paragraph 1 has not been complied with.

(3) A transfer shall have effect vis-à-vis the European Patent Office only at the date when and to the extent that the documents referred to in paragraph 1 have been produced.

Rule 23

Registration of licences and other rights

(1) Rule 22, paragraphs 1 and 2, shall apply *mutatis mutandis* to the registration of the grant or transfer of a licence, the establishment or transfer of a right in rem in respect of a European patent application and any legal means of execution affecting such an application.

(2) A registration under paragraph 1 shall be cancelled upon request, supported by documents providing evidence that the right has lapsed, or by the written consent of the proprietor of the right to the cancellation of the registration. Rule 22, paragraph 2, shall apply *mutatis mutandis*.

Rule 24

Special entries for licence registrations

A licence in respect of a European patent application shall be recorded

- (a) as an exclusive licence if the applicant and the licensee so request;
- (b) as a sub-licence where it is granted by a licensee whose licence is recorded in the European Patent Register.

Chapter IV. Certificate of exhibition

Rule 25

Certificate of exhibition

Within four months of filing the European patent application, the applicant shall file the certificate referred to in Article 55, paragraph 2, which:

- (a) is issued at the exhibition by the authority responsible for the protection of industrial property at that exhibition;
- (b) states that the invention was in fact displayed there;
- (c) states the opening date of the exhibition and, where the invention was disclosed later than on that date, the date on which the invention was first disclosed; and
- (d) is accompanied by an identification of the invention, duly authenticated by the above-mentioned authority.

Chapter V. Biotechnological inventions

Rule 26

General and definitions

(1) For European patent applications and patents concerning biotechnological inventions, the relevant provisions of the Convention shall be applied and interpreted in accordance with the provisions of this Chapter. Directive 98/44/EC of 6 July 1998 [35] on the legal protection of biotechnological inventions shall be used as a supplementary means of interpretation.

(2) "Biotechnological inventions" are inventions which concern a product consisting of or containing biological material or a process by means of which biological material is produced, processed or used.

(3) "Biological material" means any material containing genetic information and capable of reproducing itself or being reproduced in a biological system.

(4) "Plant variety" means any plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a plant variety right are fully met, can be:

(a) defined by the expression of the characteristics that results from a given genotype or combination of genotypes,

(b) distinguished from any other plant grouping by the expression of at least one of the said characteristics, and

(c) considered as a unit with regard to its suitability for being propagated unchanged.

(5) A process for the production of plants or animals is essentially biological if it consists entirely of natural phenomena such as crossing or selection.

(6) "Microbiological process" means any process involving or performed upon or resulting in microbiological material.

Rule 27

Patentable biotechnological inventions

Biotechnological inventions shall also be patentable if they concern:

(a) biological material which is isolated from its natural environment or produced by means of a technical process even if it previously occurred in nature;

(b) without prejudice to Rule 28, paragraph 2, plants or animals if the technical feasibility of the invention is not confined to a particular plant or animal variety;

(c) a microbiological or other technical process, or a product obtained by means of such a process other than a plant or animal variety.

Rule 28

Exceptions to patentability

(1) Under Article 53(a), European patents shall not be granted in respect of biotechnological inventions which, in particular, concern the following:

(a) processes for cloning human beings;

(b) processes for modifying the germ line genetic identity of human beings;

(c) uses of human embryos for industrial or commercial purposes;

(d) processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit to man or animal, and also animals resulting from such processes.

(2) Under Article 53(b), European patents shall not be granted in respect of plants or animals exclusively obtained by means of an essentially biological process.

Rule 29

The human body and its elements

(1) The human body, at the various stages of its formation and development, and the simple discovery of one of its elements, including the sequence or partial sequence of a gene, cannot constitute patentable inventions.

(2) An element isolated from the human body or otherwise produced by means of a technical process, including the sequence or partial sequence of a gene, may constitute a patentable invention, even if the structure of that element is identical to that of a natural element.

(3) The industrial application of a sequence or a partial sequence of a gene must be disclosed in the patent application.

Rule 30

Requirements of European patent applications relating to nucleotide and amino acid sequences

(1) If nucleotide or amino acid sequences are disclosed in the European patent application, the description shall contain a sequence listing conforming to the rules laid down by the President of the European Patent Office for the standardised representation of nucleotide and amino acid sequences.

(2) A sequence listing filed after the date of filing shall not form part of the description.

(3) Where the applicant has not filed a sequence listing complying with the requirements under paragraph 1 at the date of filing, the European Patent Office shall invite the applicant to furnish such a sequence listing and pay the late furnishing fee. If the applicant does not furnish the required sequence listing and pay the required late furnishing fee within a period of two months after such an invitation, the application shall be refused.

Rule 31

Deposit of biological material

(1) If an invention involves the use of or concerns biological material which is not available to the public and which cannot be described in the European patent application in such a manner as to enable the invention to be carried out by a person skilled in the art, the invention shall only be regarded as being disclosed as prescribed in Article 83 if:

(a) a sample of the biological material has been deposited with a recognised depositary institution on the same terms as those laid down in the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure of 28 April 1977 not later than the date of filing of the application;

(b) the application as filed gives such relevant information as is available to the applicant on the characteristics of the biological material;

(c) the depositary institution and the accession number of the deposited biological material are stated in the application, and

(d) where the biological material has been deposited by a person other than the applicant, the name and address of the depositor are stated in the application and a document is submitted to the European Patent Office providing evidence that the depositor has authorised the

applicant to refer to the deposited biological material in the application and has given his unreserved and irrevocable consent to the deposited material being made available to the public in accordance with Rule 33.

(2) The information referred to in paragraph 1(c) and (d) may be submitted

(a) within sixteen months after the date of filing of the application or, if priority has been claimed, after the priority date, this period being deemed to have been observed if the information is communicated before completion of the technical preparations for publication of the European patent application;

(b) up to the date of submission of a request under Article 93, paragraph 1(b);

(c) within one month after the European Patent Office has communicated to the applicant that the right to inspect the files under Article 128, paragraph 2, exists.

The ruling period shall be the one which is the first to expire. The communication of this information shall be considered as constituting the unreserved and irrevocable consent of the applicant to the deposited biological material being made available to the public in accordance with Rule 33.

Rule 32

Expert solution

(1) Until completion of the technical preparations for publication of the European patent application, the applicant may inform the European Patent Office that,

(a) until the publication of the mention of the grant of the European patent or, where applicable,

(b) for twenty years from the date of filing, if the application is refused or withdrawn or deemed to be withdrawn,

the availability referred to in Rule 33 shall be effected only by the issue of a sample to an independent expert nominated by the requester.

(2) Any natural person may be nominated as an expert, provided that he complies with the requirements and obligations laid down by the President of the European Patent Office.

The nomination shall be accompanied by a declaration from the expert that he undertakes to comply with the aforementioned requirements and obligations and that he knows of no circumstances

which might give rise to justified doubts as to his independence or which might conflict in any other way with his function as expert.

The nomination shall also be accompanied by a declaration from the expert vis-à-vis the applicant in which he enters into the undertaking given under Rule 33 until either the date on which the patent expires in all the designated States or, where the application is refused, withdrawn or deemed to be withdrawn, the date referred to in paragraph 1(b), the requester being regarded as a third party.

Rule 33

Availability of biological material

(1) Biological material deposited in accordance with Rule 31 shall be available upon request to any person from the date of publication of the European patent application and to any person having the right to inspect the files under Article 128, paragraph 2, prior to that date. Subject to Rule 32, such availability shall be effected by the issue of a sample of the biological material to the person making the request (hereinafter referred to as "the requester").

(2) Said issue shall be made only if the requester has undertaken vis-à-vis the applicant for or proprietor of the patent not to make the biological material or any biological material derived therefrom available to any third party and to use that material for experimental purposes only, until such time as the patent application is refused or withdrawn or deemed to be withdrawn, or before the European patent has expired in all the designated States, unless the applicant for or proprietor of the patent expressly waives such an undertaking.

The undertaking to use the biological material for experimental purposes only shall not apply in so far as the requester is using that material under a compulsory licence. The term "compulsory licence" shall be construed as including ex officio licences and the right to use patented inventions in the public interest.

(3) For the purposes of paragraph 2, derived biological material shall mean any material which still exhibits those characteristics of the deposited material which are essential to carrying out the invention. The undertaking under paragraph 2 shall not impede any deposit of derived biological material necessary for the purpose of patent procedure.

(4) The request referred to in paragraph 1 shall be submitted to the European Patent Office on a form recognised by that Office. The

European Patent Office shall certify on the form that a European patent application referring to the deposit of the biological material has been filed, and that the requester or the expert nominated by him under Rule 32 is entitled to the issue of a sample of that material. After grant of the European patent, the request shall also be submitted to the European Patent Office.

(5) The European Patent Office shall transmit a copy of the request, with the certification provided for in paragraph 4, to the depositary institution and to the applicant for or the proprietor of the patent.

(6) The European Patent Office shall publish in its Official Journal the list of depositary institutions recognised for the purpose of Rules 31, 33 and 34.

Rule 34

New deposit of biological material

If biological material deposited in accordance with Rule 31 ceases to be available from the recognised depositary institution, an interruption in availability shall be deemed not to have occurred if a new deposit of that material is made with a recognised depositary institution on the same terms as those laid down in the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure of 28 April 1977, and if a copy of the receipt of the new deposit issued by the depositary institution is forwarded to the European Patent Office within four months of the date of the new deposit, stating the number of the European patent application or of the European patent.

PART III. IMPLEMENTING REGULATIONS TO PART III OF THE CONVENTION

Chapter I. Filing of the European patent application

Rule 35

General provisions

(1) European patent applications may be filed in writing with the European Patent Office in Munich, The Hague or Berlin, or the authorities referred to in Article 75, paragraph 1(b).

(2) The authority with which the European patent application is filed shall mark the documents making up the application with the date

of their receipt, and issue without delay a receipt to the applicant including at least the application number and the nature, number and date of receipt of the documents.

(3) If the European patent application is filed with an authority referred to in Article 75, paragraph 1(b), such authority shall without delay inform the European Patent Office of the receipt of the application, and, in particular, of the nature and date of receipt of the documents, the application number and any priority date claimed.

(4) Upon receipt of a European patent application forwarded by the central industrial property office of a Contracting State, the European Patent Office shall inform the applicant accordingly, indicating the date of its receipt.

Rule 36

European divisional applications

(1) The applicant may file a divisional application relating to any pending earlier European patent application.

(2) A divisional application shall be filed in the language of the proceedings for the earlier application. If the latter was not in an official language of the European Patent Office, the divisional application may be filed in the language of the earlier application; a translation into the language of the proceedings for the earlier application shall then be filed within two months of the filing of the divisional application. The divisional application shall be filed with the European Patent Office in Munich, The Hague or Berlin.

(3) The filing fee and search fee shall be paid within one month of filing the divisional application. If the filing fee or search fee is not paid in due time, the application shall be deemed to be withdrawn.

(4) The designation fee shall be paid within six months of the date on which the European Patent Bulletin mentions the publication of the European search report drawn up in respect of the divisional application. Rule 39, paragraphs 2 and 3, shall apply.

Rule 37

Forwarding of European patent applications

(1) The central industrial property office of a Contracting State shall forward European patent applications to the European Patent Office in the shortest time compatible with its national law relating to the secrecy

of inventions in the interests of the State, and shall take all appropriate steps to ensure such forwarding within:

(a) six weeks of filing, where the subject of the application is evidently not liable to secrecy under the national law; or

(b) four months of filing or, if priority has been claimed, fourteen months of the date of priority, where the application requires further examination as to its liability to secrecy.

(2) A European patent application not received by the European Patent Office within fourteen months of filing or, if priority has been claimed, of the date of priority, shall be deemed to be withdrawn. Any fees paid in respect of this application shall be refunded.

Rule 38

Filing fee and search fee

(1) The filing fee and search fee shall be paid within one month of filing the European patent application.

(2) The Rules relating to Fees may provide for an additional fee as part of the filing fee if the application comprises more than 35 pages.

(3) The additional fee referred to in paragraph 2 shall be paid within one month of filing the European patent application or one month of filing the first set of claims or one month of filing the certified copy referred to in Rule 40, paragraph 3, whichever period expires last.

(4) The Rules relating to Fees may provide for an additional fee as part of the filing fee in the case of a divisional application filed in respect of any earlier application which is itself a divisional application.

Rule 39

Designation fees

(1) The designation fee shall be paid within six months of the date on which the European Patent Bulletin mentions the publication of the European search report.

(2) Where the designation fee is not paid in due time or the designations of all the Contracting States are withdrawn, the European patent application shall be deemed to be withdrawn.

(3) Without prejudice to Rule 37, paragraph 2, second sentence, the designation fee shall not be refunded.

Rule 40

Date of filing

(1) The date of filing of a European patent application shall be the date on which the documents filed by the applicant contain:

- (a) an indication that a European patent is sought;
- (b) information identifying the applicant or allowing the applicant to be contacted; and
- (c) a description or reference to a previously filed application.

(2) A reference to a previously filed application under paragraph 1(c) shall state the filing date and number of that application and the Office with which it was filed. Such reference shall indicate that it replaces the description and any drawings.

(3) Where the application contains a reference under paragraph 2, a certified copy of the previously filed application shall be filed within two months of filing the application. Where the previously filed application is not in an official language of the European Patent Office, a translation thereof in one of these languages shall be filed within the same period. Rule 53, paragraph 2, shall apply mutatis mutandis.

Chapter II. Provisions governing the application

Rule 41

Request for grant

(1) The request for grant of a European patent shall be filed on a form drawn up by the European Patent Office.

(2) The request shall contain:

- (a) a petition for the grant of a European patent;
- (b) the title of the invention, which shall clearly and concisely state the technical designation of the invention and shall exclude all fancy names;

(c) the name, address and nationality of the applicant and the State in which his residence or principal place of business is located. Names of natural persons shall be indicated by the person's family name, followed by his given names. Names of legal persons, as well as of bodies equivalent to legal persons under the law governing them, shall be indicated by their official designations. Addresses shall be indicated in accordance with applicable customary requirements for prompt postal delivery and shall comprise all the relevant administrative units,

including the house number, if any. It is recommended that the fax and telephone numbers be indicated;

(d) if the applicant has appointed a representative, his name and the address of his place of business as prescribed in sub-paragraph (c);

(e) where appropriate, an indication that the application constitutes a divisional application and the number of the earlier European patent application;

(f) in cases covered by Article 61, paragraph 1(b), the number of the original European patent application;

(g) where applicable, a declaration claiming the priority of an earlier application and indicating the date on which and the country in or for which the earlier application was filed;

(h) the signature of the applicant or his representative;

(i) a list of the documents accompanying the request. This list shall also indicate the number of sheets of the description, claims, drawings and abstract filed with the request;

(j) the designation of the inventor, where the applicant is the inventor.

(3) If there is more than one applicant, the request shall preferably contain the appointment of one applicant or representative as common representative.

Rule 42

Content of the description

(1) The description shall:

(a) specify the technical field to which the invention relates;

(b) indicate the background art which, as far as is known to the applicant, can be regarded as useful to understand the invention, draw up the European search report and examine the European patent application, and, preferably, cite the documents reflecting such art;

(c) disclose the invention, as claimed, in such terms that the technical problem, even if not expressly stated as such, and its solution can be understood, and state any advantageous effects of the invention with reference to the background art;

(d) briefly describe the figures in the drawings, if any;

(e) describe in detail at least one way of carrying out the invention claimed, using examples where appropriate and referring to the drawings, if any;

(f) indicate explicitly, when it is not obvious from the description or nature of the invention, the way in which the invention is industrially applicable.

(2) The description shall be presented in the manner and order specified in paragraph 1, unless, owing to the nature of the invention, a different presentation would afford a better understanding or be more concise.

Rule 43

Form and content of claims

(1) The claims shall define the matter for which protection is sought in terms of the technical features of the invention. Wherever appropriate, claims shall contain:

(a) a statement indicating the designation of the subject-matter of the invention and those technical features which are necessary for the definition of the claimed subject-matter but which, in combination, form part of the prior art;

(b) a characterising portion, beginning with the expression "characterised in that" or "characterised by" and specifying the technical features for which, in combination with the features stated under subparagraph (a), protection is sought.

(2) Without prejudice to Article 82, a European patent application may contain more than one independent claim in the same category (product, process, apparatus or use) only if the subject-matter of the application involves one of the following:

(a) a plurality of interrelated products,
(b) different uses of a product or apparatus,
(c) alternative solutions to a particular problem, where it is inappropriate to cover these alternatives by a single claim.

(3) Any claim stating the essential features of an invention may be followed by one or more claims concerning particular embodiments of that invention.

(4) Any claim which includes all the features of any other claim (dependent claim) shall contain, if possible at the beginning, a reference to the other claim and then state the additional features. A dependent claim directly referring to another dependent claim shall also be admissible. All dependent claims referring back to a single previous claim, and all dependent claims referring back to several previous claims,

shall be grouped together to the extent and in the most appropriate way possible.

(5) The number of claims shall be reasonable with regard to the nature of the invention claimed. The claims shall be numbered consecutively in Arabic numerals.

(6) Except where absolutely necessary, claims shall not rely on references to the description or drawings in specifying the technical features of the invention. In particular, they shall not contain such expressions as "as described in part ... of the description", or "as illustrated in figure ... of the drawings".

(7) Where the European patent application contains drawings including reference signs, the technical features specified in the claims shall preferably be followed by such reference signs relating to these features, placed in parentheses, if the intelligibility of the claim can thereby be increased. These reference signs shall not be construed as limiting the claim.

Rule 44

Unity of invention

(1) Where a group of inventions is claimed in a European patent application, the requirement of unity of invention under Article 82 shall be fulfilled only when there is a technical relationship among those inventions involving one or more of the same or corresponding special technical features. The expression "special technical features" shall mean those features which define a contribution which each of the claimed inventions considered as a whole makes over the prior art.

(2) The determination whether a group of inventions is so linked as to form a single general inventive concept shall be made without regard to whether the inventions are claimed in separate claims or as alternatives within a single claim.

Rule 45

Claims incurring fees

(1) Any European patent application comprising more than fifteen claims shall, in respect of the sixteenth and each subsequent claim, incur payment of claims fees as laid down in the Rules relating to Fees.

(2) The claims fees shall be paid within one month of filing the first set of claims. If the claims fees have not been paid in due time, they may

still be paid within one month of a communication concerning the failure to observe the time limit.

(3) If a claims fee is not paid in due time, the claim concerned shall be deemed to be abandoned.

Rule 46

Form of the drawings

(1) On sheets containing drawings, the usable surface area shall not exceed 26.2 cm x 17 cm. The usable or used surface shall not be surrounded by frames. The minimum margins shall be as follows:

top - 2.5 cm

left side - 2.5 cm

right side - 1.5 cm

bottom - 1 cm

(2) Drawings shall be executed as follows:

(a) Drawings shall be executed without colourings in durable, black, sufficiently dense and dark, uniformly thick and well-defined lines and strokes.

(b) Cross-sections shall be indicated by hatching which should not impede the clear reading of the reference signs and leading lines.

(c) The scale of the drawings and their graphical execution shall be such that electronic or photographic reproduction with a linear reduction in size to two-thirds will allow all details to be distinguished without difficulty. If, exceptionally, the scale is given on a drawing, it shall be represented graphically.

(d) All numbers, letters, and reference signs appearing on the drawings shall be simple and clear. Brackets, circles or inverted commas shall not be used in association with numbers and letters.

(e) Generally, all lines in the drawings shall be drawn with the aid of drafting instruments.

(f) Elements of the same figure shall be proportional to one another, unless a difference in proportion is indispensable for the clarity of the figure.

(g) The height of the numbers and letters shall not be less than 0.32 cm. For the lettering of drawings, the Latin and, where customary, the Greek alphabets shall be used.

(h) The same sheet of drawings may contain several figures. Where figures drawn on two or more sheets are intended to form a single figure,

the figures on the several sheets shall be so arranged that the whole figure can be assembled without concealing any part of the partial figures. The different figures shall be arranged without wasting space, preferably in an upright position, clearly separated from one another. Where the figures are not arranged in an upright position, they shall be presented sideways with the top of the figures at the left side of the sheet. The different figures shall be numbered consecutively in Arabic numerals, independently of the numbering of the sheets.

(i) Reference signs not mentioned in the description and claims shall not appear in the drawings, and vice versa. Reference signs to features shall be consistent throughout the application.

(j) The drawings shall not contain text matter. Where indispensable to understand the drawings, a few short keywords, such as "water", "steam", "open", "closed" or "section on AB", may be included. Any such keywords shall be placed in such a way that, if required, they can be replaced by their translations without interfering with any lines of the drawings.

(3) Flow sheets and diagrams shall be deemed to be drawings.

Rule 47

Form and content of the abstract

(1) The abstract shall indicate the title of the invention.

(2) The abstract shall contain a concise summary of the disclosure as contained in the description, the claims and any drawings. The summary shall indicate the technical field to which the invention pertains, and shall be drafted in a manner allowing the clear understanding of the technical problem, the gist of the solution of that problem through the invention, and the principal use or uses of the invention. The abstract shall, where applicable, contain the chemical formula which, among those contained in the application, best characterises the invention. It shall not contain statements on the alleged merits or value of the invention or on speculative applications thereof.

(3) The abstract shall preferably not contain more than one hundred and fifty words.

(4) If the European patent application contains drawings, the applicant shall indicate the figure or, exceptionally, the figures of the drawings which should be published with the abstract. The European

Patent Office may decide to publish one or more other figures if it considers that they better characterise the invention. Each essential feature mentioned in the abstract and illustrated by a drawing shall be followed by a reference sign placed in parentheses.

(5) The abstract shall be drafted in such a manner as to constitute an efficient instrument for the purpose of searching in the particular technical field. In particular, it shall make it possible to assess whether consultation of the European patent application itself is necessary.

Rule 48

Prohibited matter

(1) The European patent application shall not contain:

(a) statements or other matter contrary to "ordre public" or morality;
(b) statements disparaging the products or processes of any third party or the merits or validity of the applications or patents of any such party. Mere comparisons with the prior art shall not be considered disparaging per se;

(c) any statement or other matter obviously irrelevant or unnecessary under the circumstances.

(2) If the application contains matter prohibited under paragraph 1(a), the European Patent Office may omit such matter from the application as published, indicating the place and number of words or drawings omitted.

(3) If the application contains statements referred to in paragraph 1(b), the European Patent Office may omit them from the application as published, indicating the place and number of words omitted. Upon request, the European Patent Office shall furnish a copy of the passages omitted.

Rule 49

General provisions governing the presentation of the application documents

(1) Any translation filed under Article 14, paragraph 2, or Rule 40, paragraph 3, shall be deemed to be a document making up the European patent application.

(2) The documents making up the application shall be presented so as to allow electronic and direct reproduction, in particular by scanning, photography, electrostatic processes, photo offset and microfilming, in an

unlimited number of copies. All sheets shall be free from cracks, creases and folds. Only one side of the sheet shall be used.

(3) The documents making up the application shall be on A4 paper (29.7 cm x 21 cm) which shall be pliable, strong, white, smooth, matt and durable. Subject to paragraph 9 and Rule 46, paragraph 2(h), each sheet shall be used with its short sides at the top and bottom (upright position).

(4) Each of the documents making up the application (request, description, claims, drawings and abstract) shall commence on a new sheet. The sheets shall be connected in such a way that they can easily be turned over, separated and joined together again.

(5) Subject to Rule 46, paragraph 1, the minimum margins shall be as follows:

- top - 2 cm
- left side - 2.5 cm
- right side - 2 cm
- bottom - 2 cm

The recommended maximum for the margins quoted above is as follows:

- top - 4 cm
- left side - 4 cm
- right side - 3 cm
- bottom - 3 cm

(6) All the sheets contained in the application shall be numbered in consecutive Arabic numerals. These shall be centred at the top of the sheet, but not placed in the top margin.

(7) The lines of each sheet of the description and of the claims shall preferably be numbered in sets of five, the numbers appearing on the left side, to the right of the margin.

(8) The request for grant of a European patent, the description, the claims and the abstract shall be typed or printed. Only graphic symbols and characters and chemical or mathematical formulae may, if necessary, be drawn or written by hand. The typing shall be 1½ spaced. All text matter shall be in characters, the capital letters of which are not less than 0.21 cm high, and shall be in a dark, indelible colour.

(9) The request for grant of a European patent, the description, the claims and the abstract shall not contain drawings. The description, claims and abstract may contain chemical or mathematical formulae. The description and abstract may contain tables. The claims may contain

tables only if their subject-matter makes the use of tables desirable. Tables and chemical or mathematical formulae may be placed sideways on the sheet if they cannot be presented satisfactorily in an upright position. Tables or chemical or mathematical formulae presented sideways shall be placed so that the tops of the tables or formulae are at the left-hand side of the sheet.

(10) Values shall be expressed in units conforming to international standards, wherever appropriate in terms of the metric system using SI units. Any data not meeting this requirement shall also be expressed in units conforming to international standards. Only the technical terms, formulae, signs and symbols generally accepted in the field in question shall be used.

(11) The terminology and the signs shall be consistent throughout the European patent application.

(12) Each sheet shall be reasonably free from erasures and shall be free from alterations. Non-compliance with this rule may be authorised if the authenticity of the content is not impugned and the requirements for good reproduction are not thereby jeopardised.

Rule 50

Documents filed subsequently

(1) Rules 42, 43 and 46 to 49 shall apply to documents replacing documents making up the European patent application. Rule 49, paragraphs 2 to 12, shall also apply to the translation of the claims referred to in Rule 71.

(2) All documents other than those making up the application shall generally be typewritten or printed. There shall be a margin of about 2.5 cm on the left-hand side of each page.

(3) Documents filed after filing the application shall be signed, with the exception of annexed documents. If a document has not been signed, the European Patent Office shall invite the party concerned to do so within a time limit to be specified. If signed in due time, the document shall retain its original date of receipt; otherwise it shall be deemed not to have been filed.

Chapter III. Renewal fees

Rule 51

Payment of renewal fees

(1) A renewal fee for the European patent application in respect of the coming year shall be due on the last day of the month containing the anniversary of the date of filing of the European patent application. The renewal fee in respect of the third year may not be validly paid more than six months before it falls due. All other renewal fees may not be validly paid more than three months before they fall due.

(2) If a renewal fee is not paid on the due date under paragraph 1, the fee may still be paid within six months of the said date, provided that an additional fee is also paid within that period. The legal consequence laid down in Article 86, paragraph 1, shall ensue upon expiry of the six-month period.

(3) Renewal fees already due in respect of an earlier application at the date on which a divisional application is filed shall also be paid for the divisional application and shall be due on its filing. These fees and any renewal fee due within four months of filing the divisional application may be paid within that period without an additional fee. Paragraph 2 shall apply.

(4) If a European patent application has been refused or deemed to be withdrawn as a result of non-observance of a time limit, and if the applicant's rights are re-established under Article 122, a renewal fee

(a) which would have fallen due under paragraph 1 in the period starting on the date on which the loss of rights occurred, up to and including the date of the notification of the decision re-establishing the rights, shall be due on that latter date.

This fee and any renewal fee due within four months from that latter date may still be paid within four months of that latter date without an additional fee. Paragraph 2 shall apply.

(b) which, on the date on which the loss of rights has occurred, was already due but the period provided for in paragraph 2 has not yet expired, may still be paid within six months from the date of the notification of the decision re-establishing the rights, provided that the additional fee pursuant to paragraph 2 is also paid within that period.

(5) If the Enlarged Board of Appeal re-opens proceedings before the Board of Appeal under Article 112a, paragraph 5, second sentence, a renewal fee

(a) which would have fallen due under paragraph 1 in the period starting on the date when the decision of the Board of Appeal subject to the petition for review was taken, up to and including the date of the notification of the decision of the Enlarged Board of Appeal re-opening proceedings before the Board of Appeal, shall be due on that latter date.

This fee and any renewal fee due within four months from that latter date may still be paid within four months of that latter date without an additional fee. Paragraph 2 shall apply.

(b) which, on the day on which the decision of the Board of Appeal was taken, was already due but the period provided for in paragraph 2 has not yet expired, may still be paid within six months from the date of the notification of the decision of the Enlarged Board of Appeal re-opening proceedings before the Board of Appeal, provided that the additional fee pursuant to paragraph 2 is also paid within that period.

(6) A renewal fee shall not be payable for a new European patent application filed under Article 61, paragraph 1(b), in respect of the year in which it was filed and any preceding year.

Chapter IV. Priority

Rule 52

Declaration of priority

(1) The declaration of priority referred to in Article 88, paragraph 1, shall indicate the date of the previous filing, the State party to the Paris Convention or Member of the World Trade Organization in or for which it was made and the file number. In the case referred to in Article 87, paragraph 5, the first sentence shall apply *mutatis mutandis*.

(2) The declaration of priority shall preferably be made on filing the European patent application. It may still be made within sixteen months from the earliest priority date claimed.

(3) The applicant may correct the declaration of priority within sixteen months from the earliest priority date claimed, or, where the correction would cause a change in the earliest priority date claimed, within sixteen months from the corrected earliest priority date, whichever sixteen-month period expires first, provided that such a correction may be submitted until the expiry of four months from the date of filing accorded to the European patent application.

(4) However, a declaration of priority may not be made or corrected after a request under Article 93, paragraph 1(b), has been filed.

(5) The particulars of the declaration of priority shall appear in the published European patent application and the European patent specification.

Rule 53

Priority documents

(1) An applicant claiming priority shall file a copy of the previous application within sixteen months of the earliest priority date claimed. This copy and the date of filing of the previous application shall be certified as correct by the authority with which that application was filed.

(2) The copy of the previous application shall be deemed to be duly filed if a copy of that application available to the European Patent Office is to be included in the file of the European patent application under the conditions determined by the President of the European Patent Office.

(3) Where the previous application is not in an official language of the European Patent Office and the validity of the priority claim is relevant to the determination of the patentability of the invention concerned, the European Patent Office shall invite the applicant for or proprietor of the European patent to file a translation of that application into one of the official languages within a period to be specified. Alternatively, a declaration may be submitted that the European patent application is a complete translation of the previous application. Paragraph 2 shall apply *mutatis mutandis*. If a requested translation of a previous application is not filed in due time, the right of priority for the European patent application or for the European patent with respect to that application shall be lost. The applicant for or proprietor of the European patent shall be informed accordingly.

Rule 54

Issuing priority documents

On request, the European Patent Office shall issue to the applicant a certified copy of the European patent application (priority document), under the conditions determined by the President of the European Patent Office, including the form of the priority document and the circumstances under which an administrative fee shall be paid.

**PART IV. IMPLEMENTING REGULATIONS TO PART IV
OF THE CONVENTION**

Chapter I. Examination by the Receiving Section

Rule 55

Examination on filing

If the examination under Article 90, paragraph 1, reveals that the application fails to meet the requirements laid down in Rule 40, paragraph 1(a) or (c), paragraph 2 or paragraph 3, first sentence, the European Patent Office shall inform the applicant of any deficiencies and advise him that the application will not be dealt with as a European patent application unless such deficiencies are remedied within two months. If the applicant does this, he shall be informed of the date of filing accorded by the Office.

Rule 56

Missing parts of the description or missing drawings

(1) If the examination under Article 90, paragraph 1, reveals that parts of the description, or drawings referred to in the description or in the claims, appear to be missing, the European Patent Office shall invite the applicant to file the missing parts within two months. The applicant may not invoke the omission of such a communication.

(2) If missing parts of the description or missing drawings are filed later than the date of filing, but within two months of the date of filing or, if a communication is issued under paragraph 1, within two months of that communication, the application shall be re-dated to the date on which the missing parts of the description or missing drawings were filed. The European Patent Office shall inform the applicant accordingly.

(3) If the missing parts of the description or missing drawings are filed within the period under paragraph 2, and the application claims priority of an earlier application, the date of filing shall, provided that the missing parts of the description or the missing drawings are completely contained in the earlier application, remain the date on which the requirements laid down in Rule 40, paragraph 1, were fulfilled, where the applicant so requests and files, within the period under paragraph 2:

(a) a copy of the earlier application, unless such copy is available to the European Patent Office under Rule 53, paragraph 2;

(b) where the earlier application is not in an official language of the European Patent Office, a translation thereof in one of these languages, unless such copy is available to the European Patent Office under Rule 53, paragraph 3; and

(c) an indication as to where the missing parts of the description or the missing drawings are completely contained in the earlier application and, where applicable, in the translation thereof.

(4) If the applicant:

(a) fails to file the missing parts of the description or the missing drawings within the period under paragraph 1 or 2,

or

(b) withdraws under paragraph 6 any missing part of the description or missing drawing filed under paragraph 2,

any references referred to in paragraph 1 shall be deemed to be deleted, and any filing of the missing parts of the description or missing drawings shall be deemed not to have been made. The European Patent Office shall inform the applicant accordingly.

(5) If the applicant fails to comply with the requirements referred to in paragraph 3(a) to (c) within the period under paragraph 2, the application shall be re-dated to the date on which the missing parts of the description or missing drawings were filed. The European Patent Office shall inform the applicant accordingly.

(6) Within one month of the notification referred to in paragraph 2 or 5, last sentence, the applicant may withdraw the missing parts of the description or the missing drawings filed, in which case the re-dating shall be deemed not to have been made. The European Patent Office shall inform the applicant accordingly.

Rule 57

Examination as to formal requirements

If the European patent application has been accorded a date of filing, the European Patent Office shall examine, in accordance with Article 90, paragraph 3, whether:

(a) a translation of the application required under Article 14, paragraph 2, under Rule 36, paragraph 2, second sentence, or under Rule 40, paragraph 3, second sentence, has been filed in due time;

(b) the request for grant of a European patent satisfies the requirements of Rule 41;

(c) the application contains one or more claims in accordance with Article 78, paragraph 1(c), or a reference to a previously filed application in accordance with Rule 40, paragraphs 1(c), 2 and 3, indicating that it replaces also the claims;

(d) the application contains an abstract in accordance with Article 78, paragraph 1(e);

(e) the filing fee and the search fee have been paid in accordance with Rule 17, paragraph 2, Rule 36, paragraph 3, or Rule 38;

(f) the designation of the inventor has been made in accordance with Rule 19, paragraph 1;

(g) where appropriate, the requirements laid down in Rules 52 and 53 concerning the claim to priority have been satisfied;

(h) where appropriate, the requirements of Article 133, paragraph 2, have been satisfied;

(i) the application meets the requirements laid down in Rule 46 and Rule 49, paragraphs 1 to 9 and 12;

(j) the application meets the requirements laid down in Rule 30.

Rule 58

Correction of deficiencies in the application documents

If the European patent application does not comply with the requirements of Rule 57(a) to (d), (h) and (i), the European Patent Office shall inform the applicant accordingly and invite him to correct the deficiencies noted within two months. The description, claims and drawings may be amended only to an extent sufficient to remedy such deficiencies.

Rule 59

Deficiencies in claiming priority

If the file number of the previous application under Rule 52, paragraph 1, or the copy of that application under Rule 53, paragraph 1, have not been filed in due time, the European Patent Office shall inform the applicant accordingly and invite him to file them within a period to be specified.

Rule 60

Subsequent designation of the inventor

(1) If the designation of the inventor has not been made in accordance with Rule 19, the European Patent Office shall inform the applicant that the European patent application will be refused unless the designation is made within sixteen months of the date of filing of the application or, if priority is claimed, of the date of priority, this period being deemed to have been observed if the information is communicated before completion of the technical preparations for the publication of the European patent application.

(2) Where, in a divisional application or a new application under Article 61, paragraph 1(b), the designation of the inventor has not been made in accordance with Rule 19, the European Patent Office shall invite the applicant to make the designation within a period to be specified.

Chapter II. European search report

Rule 61

Content of the European search report

(1) The European search report shall mention those documents, available to the European Patent Office at the time of drawing up the report, which may be taken into consideration in deciding whether the invention to which the European patent application relates is new and involves an inventive step.

(2) Each citation shall be referred to the claims to which it relates. Where appropriate, relevant parts of the documents cited shall be identified.

(3) The European search report shall distinguish between cited documents published before the date of priority claimed, between such date of priority and the date of filing, and on or after the date of filing.

(4) Any document which refers to an oral disclosure, a use or any other means of disclosure which took place before the date of filing of the European patent application shall be mentioned in the European search report, together with an indication of the date of publication, if any, of the document and the date of the non-written disclosure.

(5) The European search report shall be drawn up in the language of the proceedings.

(6) The European search report shall contain the classification of the subject-matter of the European patent application in accordance with the international classification.

Rule 62

Extended European search report

(1) The European search report shall be accompanied by an opinion on whether the application and the invention to which it relates seem to meet the requirements of this Convention, unless a communication under Rule 71, paragraph 1 or 3, can be issued.

(2) The opinion under paragraph 1 shall not be published together with the search report.

Rule 62a

Applications containing a plurality of independent claims

(1) If the European Patent Office considers that the claims as filed do not comply with Rule 43, paragraph 2, it shall invite the applicant to indicate, within a period of two months, the claims complying with Rule 43, paragraph 2, on the basis of which the search is to be carried out. If the applicant fails to provide such an indication in due time, the search shall be carried out on the basis of the first claim in each category.

(2) The Examining Division shall invite the applicant to restrict the claims to the subject-matter searched unless it finds that the objection under paragraph 1 was not justified.

Rule 63

Incomplete search

(1) If the European Patent Office considers that the European patent application fails to such an extent to comply with this Convention that it is impossible to carry out a meaningful search regarding the state of the art on the basis of all or some of the subject-matter claimed, it shall invite the applicant to file, within a period of two months, a statement indicating the subject-matter to be searched.

(2) If the statement under paragraph 1 is not filed in due time, or if it is not sufficient to overcome the deficiency noted under paragraph 1, the European Patent Office shall either issue a reasoned declaration stating that the European patent application fails to such an extent to comply with this Convention that it is impossible to carry out a

meaningful search regarding the state of the art on the basis of all or some of the subject-matter claimed or, as far as is practicable, draw up a partial search report. The reasoned declaration or the partial search report shall be considered, for the purposes of subsequent proceedings, as the European search report.

(3) When a partial search report has been drawn up, the Examining Division shall invite the applicant to restrict the claims to the subject-matter searched unless it finds that the objection under paragraph 1 was not justified.

Rule 64

European search report where the invention lacks unity

(1) If the European Patent Office considers that the European patent application does not comply with the requirement of unity of invention, it shall draw up a partial search report on those parts of the application which relate to the invention, or the group of inventions within the meaning of Article 82, first mentioned in the claims. It shall inform the applicant that, for the European search report to cover the other inventions, a further search fee must be paid, in respect of each invention involved, within a period of two months. The European search report shall be drawn up for the parts of the application relating to inventions in respect of which search fees have been paid.

(2) Any fee paid under paragraph 1 shall be refunded if, during the examination of the European patent application, the applicant requests a refund and the Examining Division finds that the communication under paragraph 1 was not justified.

Rule 65

Transmittal of the European search report

Immediately after it has been drawn up, the European search report shall be transmitted to the applicant together with copies of any cited documents.

Rule 66

Definitive content of the abstract

Upon drawing up the European search report, the European Patent Office shall determine the definitive content of the abstract and transmit it to the applicant together with the search report.

Chapter III. Publication of the European patent application

Rule 67

Technical preparations for publication

(1) The President of the European Patent Office shall determine when the technical preparations for publication of the European patent application are deemed to have been completed.

(2) The application shall not be published if it has been finally refused or withdrawn or is deemed to be withdrawn before the termination of the technical preparations for publication.

Rule 68

**Form of the publication of European patent applications
and European search reports**

(1) The publication of the European patent application shall contain the description, the claims and any drawings as filed, and the abstract, or, if these documents making up the application were not filed in an official language of the European Patent Office, a translation in the language of the proceedings, and, in an annex, the European search report, where it is available before the termination of the technical preparations for publication. If the search report or the abstract is not published at the same time as the application, it shall be published separately.

(2) The President of the European Patent Office shall determine the form of the publication of the application and the data to be included. The same shall apply where the European search report and the abstract are published separately.

(3) The designated Contracting States shall be indicated in the published application.

(4) If the claims were not filed on the date of filing of the application, this shall be indicated when the application is published. If, before the termination of the technical preparations for publication of the application, the claims have been amended under Rule 137, paragraph 2, the new or amended claims shall be included in the publication in addition to the claims as filed.

Rule 69

Information about publication

(1) The European Patent Office shall inform the applicant of the date on which the European Patent Bulletin mentions the publication of the European search report and shall draw his attention to Rule 70, paragraph 1, Article 94, paragraph 2, and Rule 70a, paragraph 1.

(2) If a date of publication is specified in the communication under paragraph 1 which is later than the actual date of publication, that later date shall be the decisive date as regards the periods referred to in Rule 70, paragraph 1, and Rule 70a, paragraph 1, unless the error is obvious.

Rule 70

Request for examination

(1) The applicant may request examination of the European patent application up to six months after the date on which the European Patent Bulletin mentions the publication of the European search report. The request may not be withdrawn.

(2) If the request for examination has been filed before the European search report has been transmitted to the applicant, the European Patent Office shall invite the applicant to indicate, within a period to be specified, whether he wishes to proceed further with the application, and shall give him the opportunity to comment on the search report and to amend, where appropriate, the description, claims and drawings.

(3) If the applicant fails to reply in due time to the invitation under paragraph 2, the application shall be deemed to be withdrawn.

Chapter IV. Examination by the Examining Division

Rule 70a

Response to the extended European search report

(1) In the opinion accompanying the European search report the European Patent Office shall give the applicant the opportunity to comment on the extended European search report and, where appropriate, invite him to correct any deficiencies noted in the opinion accompanying the European search report and to amend the description, claims and drawings within the period referred to in Rule 70, paragraph 1.

(2) In the case referred to in Rule 70, paragraph 2, or if a supplementary European search report is drawn up on a Euro-PCT

application, the European Patent Office shall give the applicant the opportunity to comment on the extended European search report and, where appropriate, invite him to correct any deficiencies noted in the opinion accompanying the European search report and to amend the description, claims and drawings within the period specified for indicating whether he wishes to proceed further with the application.

(3) If the applicant neither complies with nor comments on an invitation in accordance with paragraph 1 or 2, the application shall be deemed to be withdrawn.

Rule 70b

Request for a copy of search results

(1) Where the European Patent Office notes, at the time the Examining Division assumes responsibility, that a copy referred to in Rule 141, paragraph 1, has not been filed by the applicant and is not deemed to be duly filed under Rule 141, paragraph 2, it shall invite the applicant to file, within a period of two months, the copy or a statement that the results of the search referred to in Rule 141, paragraph 1, are not available to him.

(2) If the applicant fails to reply in due time to the invitation under paragraph 1, the European patent application shall be deemed to be withdrawn.

Rule 71

Examination procedure

(1) In any communication under Article 94, paragraph 3, the Examining Division shall, where appropriate, invite the applicant to correct any deficiencies noted and to amend the description, claims and drawings within a period to be specified.

(2) Any communication under Article 94, paragraph 3, shall contain a reasoned statement covering, where appropriate, all the grounds against the grant of the European patent.

(3) Before the Examining Division decides to grant the European patent, it shall inform the applicant of the text in which it intends to grant it and of the related bibliographic data. In this communication the Examining Division shall invite the applicant to pay the fee for grant and publishing and to file a translation of the claims in the two official

languages of the European Patent Office other than the language of the proceedings within four months.

(4) If the European patent application in the text intended for grant comprises more than fifteen claims, the Examining Division shall invite the applicant to pay claims fees in respect of the sixteenth and each subsequent claim within the period under paragraph 3 unless the said fees have already been paid under Rule 45 or Rule 162.

(5) If the applicant, within the period laid down in paragraph 3, pays the fees under paragraph 3 and, where applicable, paragraph 4 and files the translations under paragraph 3, he shall be deemed to have approved the text communicated to him under paragraph 3 and verified the bibliographic data.

(6) If the applicant, within the period under paragraph 3, requests reasoned amendments or corrections to the communicated text or keeps to the latest text submitted by him, the Examining Division shall issue a new communication under paragraph 3 if it gives its consent; otherwise it shall resume the examination proceedings.

(7) If the fee for grant and publishing or the claims fees are not paid in due time, or if the translations are not filed in due time, the European patent application shall be deemed to be withdrawn.

Rule 71a

Conclusion of the grant procedure

(1) The decision to grant the European patent shall be issued if all fees have been paid, a translation of the claims in the two official languages of the European Patent Office other than the language of the proceedings has been filed and there is agreement as to the text to be granted. It shall state which text of the European patent application forms the basis for the decision.

(2) Until the decision to grant the European patent, the Examining Division may resume the examination proceedings at any time.

(3) If the designation fee becomes due after the communication under Rule 71, paragraph 3, the mention of the grant of the European patent shall not be published until the designation fee has been paid. The applicant shall be informed accordingly.

(4) If a renewal fee becomes due after the communication under Rule 71, paragraph 3, and before the next possible date for publication of the mention of the grant of the European patent, the mention shall not be

published until the renewal fee has been paid. The applicant shall be informed accordingly.

(5) If, in response to an invitation under Rule 71, paragraph 3, the applicant has already paid the fee for grant and publishing or the claims fees, the paid amount shall be credited if a further such invitation is issued.

(6) If the European patent application is refused, withdrawn prior to notification of the decision on the grant of a European patent or, at that time, deemed to be withdrawn, the fee for grant and publishing shall be refunded.

Rule 72

Grant of the European patent to different applicants

Where different persons are recorded in the European Patent Register as applicants in respect of different Contracting States, the European Patent Office shall grant the European patent for each Contracting State accordingly.

Chapter V. The European patent specification

Rule 73

Content and form of the specification

(1) The specification of the European patent shall include the description, the claims and any drawings. It shall also indicate the period for opposing the European patent.

(2) The President of the European Patent Office shall determine the form of the publication of the specification and the data to be included.

(3) The designated Contracting States shall be indicated in the specification.

Rule 74

Certificate for a European patent

As soon as the specification of the European patent has been published, the European Patent Office shall issue to the proprietor of the patent a certificate for a European patent. The President of the European Patent Office shall prescribe the content, form and means of communication of the certificate and determine the circumstances in which an administrative fee is payable.

**PART V. IMPLEMENTING REGULATIONS TO PART V OF
THE CONVENTION**

Chapter I. Opposition procedure

Rule 75

Surrender or lapse of the patent

An opposition may be filed even if the European patent has been surrendered in all the designated Contracting States or has lapsed in all those States.

Rule 76

Form and content of the opposition

(1) Notice of opposition shall be filed in a written reasoned statement.

(2) The notice of opposition shall contain:

(a) particulars of the opponent as provided in Rule 41, paragraph 2(c);

(b) the number of the European patent against which opposition is filed, the name of the proprietor of the patent and the title of the invention;

(c) a statement of the extent to which the European patent is opposed and of the grounds on which the opposition is based, as well as an indication of the facts and evidence presented in support of these grounds;

(d) if the opponent has appointed a representative, particulars as provided in Rule 41, paragraph 2(d).

(3) Part III of the Implementing Regulations shall apply *mutatis mutandis* to the notice of opposition.

Rule 77

Rejection of the opposition as inadmissible

(1) If the Opposition Division notes that the notice of opposition does not comply with Article 99, paragraph 1, or Rule 76, paragraph 2(c), or does not sufficiently identify the patent against which opposition has been filed, it shall reject the opposition as inadmissible, unless these deficiencies have been remedied before expiry of the opposition period.

(2) If the Opposition Division notes that the notice of opposition does not comply with provisions other than those referred to in paragraph 1, it shall communicate this to the opponent and shall invite him to remedy

the deficiencies noted within a period to be specified. If the deficiencies are not remedied in due time, the Opposition Division shall reject the opposition as inadmissible.

(3) The decision to reject an opposition as inadmissible shall be communicated to the proprietor of the patent, together with a copy of the notice of opposition.

Rule 78

Procedure where the proprietor of the patent is not entitled

(1) If a third party provides evidence, during opposition proceedings or during the opposition period, that he has instituted proceedings against the proprietor of the European patent, seeking a decision within the meaning of Article 61, paragraph 1, opposition proceedings shall be stayed unless the third party communicates to the European Patent Office in writing his consent to the continuation of such proceedings. Such consent shall be irrevocable. However, proceedings shall not be stayed until the Opposition Division has deemed the opposition admissible. Rule 14, paragraphs 2 to 4, shall apply *mutatis mutandis*.

(2) Where a third party has, in accordance with Article 99, paragraph 4, replaced the previous proprietor for one or some of the designated Contracting States, the patent as maintained in opposition proceedings may, for these States, contain claims, a description and drawings different from those for the other designated States.

Rule 79

Preparation of the examination of the opposition

(1) The Opposition Division shall communicate the notice of opposition to the proprietor of the patent and shall give him the opportunity to file his observations and to amend, where appropriate, the description, claims and drawings within a period to be specified.

(2) If several notices of opposition have been filed, the Opposition Division shall communicate them to the other opponents at the same time as the communication under paragraph 1.

(3) The Opposition Division shall communicate any observations and amendments filed by the proprietor of the patent to the other parties, and shall invite them, if it considers this expedient, to reply within a period to be specified.

(4) In the case of an intervention under Article 105, the Opposition Division may dispense with the application of paragraphs 1 to 3.

Rule 80

Amendment of the European patent

Without prejudice to Rule 138, the description, claims and drawings may be amended, provided that the amendments are occasioned by a ground for opposition under Article 100, even if that ground has not been invoked by the opponent.

Rule 81

Examination of opposition

(1) The Opposition Division shall examine those grounds for opposition which are invoked in the opponent's statement under Rule 76, paragraph 2(c). Grounds for opposition not invoked by the opponent may be examined by the Opposition Division of its own motion if they would prejudice the maintenance of the European patent.

(2) Communications under Article 101, paragraph 1, second sentence, and all replies thereto shall be sent to all parties. If the Opposition Division considers this expedient, it shall invite the parties to reply within a period to be specified.

(3) In any communication under Article 101, paragraph 1, second sentence, the proprietor of the European patent shall, where necessary, be given the opportunity to amend, where appropriate, the description, claims and drawings. Where necessary, the communication shall contain a reasoned statement covering the grounds against the maintenance of the European patent.

Rule 82

Maintenance of the European patent in amended form

(1) Before the Opposition Division decides to maintain the European patent as amended, it shall inform the parties of the text in which it intends to maintain the patent, and shall invite them to file their observations within two months if they disapprove of that text.

(2) If a party disapproves of the text communicated by the Opposition Division, examination of the opposition may be continued. Otherwise, the Opposition Division shall, on expiry of the period under paragraph 1, invite the proprietor of the patent to pay the prescribed fee

and to file a translation of any amended claims in the official languages of the European Patent Office other than the language of the proceedings, within a period of three months. Where, in oral proceedings, decisions under Article 106, paragraph 2, or Article 111, paragraph 2, have been based on documents not complying with Rule 49, paragraph 8, the proprietor of the patent shall be invited to file the amended text in a form compliant with Rule 49, paragraph 8, within the three-month period.

(3) If the acts required under paragraph 2 are not performed in due time, they may still be performed within two months of a communication concerning the failure to observe the time limit, provided that a surcharge is paid within this period. Otherwise, the patent shall be revoked.

(4) The decision to maintain the European patent as amended shall state which text of the patent forms the basis for the decision.

Rule 83

Request for documents

Documents referred to by a party to opposition proceedings shall be filed together with the notice of opposition or the written submissions. If such documents are neither enclosed nor filed in due time upon invitation by the European Patent Office, it may decide not to take into account any arguments based on them.

Rule 84

Continuation of the opposition proceedings by the European Patent Office of its own motion

(1) If the European patent has been surrendered in all the designated Contracting States or has lapsed in all those States, the opposition proceedings may be continued at the request of the opponent filed within two months of a communication from the European Patent Office informing him of the surrender or lapse.

(2) In the event of the death or legal incapacity of an opponent, the opposition proceedings may be continued by the European Patent Office of its own motion, even without the participation of the heirs or legal representatives. The same shall apply where the opposition is withdrawn.

Rule 85

Transfer of the European patent

Rule 22 shall apply to any transfer of the European patent made during the opposition period or during opposition proceedings.

Rule 86

Documents in opposition proceedings

Part III of the Implementing Regulations shall apply mutatis mutandis to documents filed in opposition proceedings.

Rule 87

Content and form of the new specification of the European patent

The new specification of the European patent shall include the description, claims and drawings as amended. Rule 73, paragraphs 2 and 3, and Rule 74 shall apply

Rule 88

Costs

(1) The apportionment of costs shall be dealt with in the decision on the opposition. Such apportionment shall only take into consideration the expenses necessary to assure proper protection of the rights involved. The costs shall include the remuneration of the representatives of the parties.

(2) The Opposition Division shall, on request, fix the amount of costs to be paid under a final decision apportioning them. A bill of costs, with supporting evidence, shall be attached to the request. Costs may be fixed once their credibility is established.

(3) A request for a decision by the Opposition Division may be filed within one month of the communication on the fixing of costs under paragraph 2. The request shall be filed in writing and state the grounds on which it is based. It shall not be deemed to be filed until the prescribed fee has been paid.

(4) The Opposition Division shall decide on the request under paragraph 3 without oral proceedings.

Rule 89

Intervention of the assumed infringer

(1) Notice of intervention shall be filed within three months of the date on which proceedings referred to in Article 105 are instituted.

(2) Notice of intervention shall be filed in a written reasoned statement; Rules 76 and 77 shall apply *mutatis mutandis*. The notice of intervention shall not be deemed to have been filed until the opposition fee has been paid.

Chapter II. Procedure for limitation or revocation

Rule 90

Subject of proceedings

The subject of limitation or revocation proceedings under Article 105a shall be the European patent as granted or as amended in opposition or limitation proceedings before the European Patent Office.

Rule 91

Responsibility for proceedings

Decisions on requests for limitation or revocation of the European patent under Article 105a shall be taken by the Examining Division. Article 18, paragraph 2, shall apply *mutatis mutandis*.

Rule 92

Requirements of the request

(1) The request for limitation or revocation of a European patent shall be filed in writing in one of the official languages of the European Patent Office. It may also be filed in an official language of a Contracting State, provided that a translation is filed in one of the official languages of the European Patent Office within the period specified in Rule 6, paragraph 2. Part III of the Implementing Regulations shall apply *mutatis mutandis* to documents filed in limitation or revocation proceedings.

(2) The request shall contain:

(a) particulars of the proprietor of the European patent making the request (the requester) as provided in Rule 41, paragraph 2(c), and an indication of the Contracting States for which the requester is the proprietor of the patent;

(b) the number of the patent whose limitation or revocation is requested, and a list of the Contracting States in which the patent has taken effect;

(c) where appropriate, the names and addresses of the proprietors of the patent for those Contracting States in which the requester is not the proprietor of the patent, and evidence that the requester is entitled to act on their behalf in the proceedings;

(d) where limitation of the patent is requested, the complete version of the amended claims and, as the case may be, of the amended description and drawings;

(e) where the requester has appointed a representative, particulars as provided in Rule 41, paragraph 2(d).

Rule 93

Precedence of opposition proceedings

(1) The request for limitation or revocation shall be deemed not to have been filed if opposition proceedings in respect of the patent are pending at the time of filing the request.

(2) If, at the time of filing an opposition to a European patent, limitation proceedings in respect of that patent are pending, the Examining Division shall terminate the limitation proceedings and order the reimbursement of the limitation fee. The reimbursement shall also be ordered in respect of the fee referred to in Rule 95, paragraph 3, first sentence, if the requester has already paid this fee.

Rule 94

Rejection of the request as inadmissible

If the Examining Division finds that the request for limitation or revocation fails to comply with the requirements of Rule 92, it shall invite the requester to correct the deficiencies noted, within a period to be specified. If the deficiencies are not corrected in due time, the Examining Division shall reject the request as inadmissible.

Rule 95

Decision on the request

(1) If a request for revocation is admissible, the Examining Division shall revoke the patent and communicate this to the requester.

(2) If a request for limitation is admissible, the Examining Division shall examine whether the amended claims constitute a limitation vis-à-vis the claims as granted or amended in opposition or limitation proceedings and comply with Article 84 and Article 123, paragraphs 2 and 3. If the request does not comply with these requirements, the Examining Division shall give the requester one opportunity to correct any deficiencies noted, and to amend the claims and, where appropriate, the description and drawings, within a period to be specified.

(3) If a request for limitation is allowable under paragraph 2, the Examining Division shall communicate this to the requester and invite him to pay the prescribed fee and to file a translation of the amended claims in the official languages of the European Patent Office other than the language of the proceedings, within a period of three months; Rule 82, paragraph 3, first sentence, shall apply *mutatis mutandis*. If the requester performs these acts in due time, the Examining Division shall limit the patent.

(4) If the requester does not respond in due time to the communication issued under paragraph 2, or if the request for limitation is not allowable, or if the requester fails to perform the acts required under paragraph 3 in due time, the Examining Division shall reject the request.

Rule 96

Content and form of the amended European patent specification

The amended European patent specification shall include the description, claims and drawings as amended. Rule 73, paragraphs 2 and 3, and Rule 74 shall apply.

PART VI. IMPLEMENTING REGULATIONS TO PART VI OF THE CONVENTION

Chapter I. Appeals procedure

Rule 97

Appeal against apportionment and fixing of costs

(1) The apportionment of costs of opposition proceedings cannot be the sole subject of an appeal.

(2) A decision fixing the amount of costs of opposition proceedings cannot be appealed unless the amount exceeds that of the fee for appeal.

Rule 98

Surrender or lapse of the patent

The decision of an Opposition Division may be appealed even if the European patent has been surrendered in all the designated Contracting States or has lapsed in all those States.

Rule 99

Content of the notice of appeal and the statement of grounds

(1) The notice of appeal shall contain:

(a) the name and the address of the appellant as provided in Rule 41, paragraph 2(c);

(b) an indication of the decision impugned; and

(c) a request defining the subject of the appeal.

(2) In the statement of grounds of appeal the appellant shall indicate the reasons for setting aside the decision impugned, or the extent to which it is to be amended, and the facts and evidence on which the appeal is based.

(3) Part III of the Implementing Regulations shall apply *mutatis mutandis* to the notice of appeal, the statement of grounds and the documents filed in appeal proceedings.

Rule 100

Examination of appeals

(1) Unless otherwise provided, the provisions relating to proceedings before the department which has taken the decision impugned shall apply to appeal proceedings.

(2) In the examination of the appeal, the Board of Appeal shall invite the parties, as often as necessary, to file observations, within a period to be specified, on communications issued by itself or observations submitted by another party.

(3) If the applicant fails to reply in due time to an invitation under paragraph 2, the European patent application shall be deemed to be withdrawn, unless the decision impugned was taken by the Legal Division.

Rule 101

Rejection of the appeal as inadmissible

(1) If the appeal does not comply with Articles 106 to 108, Rule 97 or Rule 99, paragraph 1(b) or (c) or paragraph 2, the Board of Appeal shall reject it as inadmissible, unless any deficiency has been remedied before the relevant period under Article 108 has expired.

(2) If the Board of Appeal notes that the appeal does not comply with Rule 99, paragraph 1(a), it shall communicate this to the appellant and shall invite him to remedy the deficiencies noted within a period to be specified. If the deficiencies are not remedied in due time, the Board of Appeal shall reject the appeal as inadmissible.

Rule 102

Form of decision of the Board of Appeal

The decision shall be authenticated by the Chairman of the Board of Appeal and by the competent employee of the registry of the Board of Appeal, either by their signature or by any other appropriate means. The decision shall contain:

- (a) a statement that it was delivered by the Board of Appeal;
- (b) the date when the decision was taken;
- (c) the names of the Chairman and of the other members of the Board of Appeal taking part;
- (d) the names of the parties and their representatives;
- (e) the requests of the parties;
- (f) a summary of the facts;
- (g) the reasons;
- (h) the order of the Board of Appeal, including, where appropriate, a decision on costs.

Rule 103

Reimbursement of appeal fees

(1) The appeal fee shall be reimbursed in full

(a) in the event of interlocutory revision or where the Board of Appeal deems an appeal to be allowable, if such reimbursement is equitable by reason of a substantial procedural violation, or

(b) if the appeal is withdrawn before the filing of the statement of grounds of appeal and before the period for filing that statement has expired.

(2) The appeal fee shall be reimbursed at 50% if the appeal is withdrawn after expiry of the period under paragraph 1(b), provided withdrawal occurs:

(a) if a date for oral proceedings has been set, at least four weeks before that date;

(b) if no date for oral proceedings has been set, and the Board of Appeal has issued a communication inviting the appellant to file observations, before expiry of the period set by the Board for filing observations;

(c) in all other cases, before the decision is issued.

(3) The department whose decision is impugned shall order the reimbursement if it revises its decision and considers reimbursement equitable by reason of a substantial procedural violation. In all other cases, matters of reimbursement shall be decided by the Board of Appeal.

Chapter II. Petitions for review by the Enlarged Board of Appeal

Rule 104

Further fundamental procedural defects

A fundamental procedural defect under Article 112a, paragraph 2(d), may have occurred where the Board of Appeal,

(a) contrary to Article 116, failed to arrange for the holding of oral proceedings requested by the petitioner, or

(b) decided on the appeal without deciding on a request relevant to that decision.

Rule 105

Criminal acts

A petition for review may be based on Article 112a, paragraph 2(e), if a competent court or authority has finally established that the criminal act occurred; a conviction is not necessary.

Rule 106

Obligation to raise objections

A petition under Article 112a, paragraph 2(a) to (d), is only admissible where an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by the Board of

PART II. INDUSTRIAL PROPERTY RIGHTS

Appeal, except where such objection could not be raised during the appeal proceedings.

Rule 107

Contents of the petition for review

(1) The petition shall contain:

(a) the name and the address of the petitioner as provided in Rule 41, paragraph 2(c);

(b) an indication of the decision to be reviewed.

(2) The petition shall indicate the reasons for setting aside the decision of the Board of Appeal, and the facts and evidence on which the petition is based.

(3) Part III of the Implementing Regulations shall apply mutatis mutandis to the petition for review and the documents filed in the proceedings.

Rule 108

Examination of the petition

(1) If the petition does not comply with Article 112a, paragraphs 1, 2 or 4, Rule 106 or Rule 107, paragraph 1(b) or 2, the Enlarged Board of Appeal shall reject it as inadmissible, unless any defect has been remedied before the relevant period under Article 112a, paragraph 4, expires.

(2) If the Enlarged Board of Appeal notes that the petition does not comply with Rule 107, paragraph 1(a), it shall communicate this to the petitioner and shall invite him to remedy the deficiencies noted within a period to be specified. If the deficiencies are not remedied in due time, the Enlarged Board of Appeal shall reject the petition as inadmissible.

(3) If the petition is allowable, the Enlarged Board of Appeal shall set aside the decision of the Board of Appeal and order the re-opening of the proceedings before the Board of Appeal responsible under Rule 12b, paragraph 4. The Enlarged Board of Appeal may order that members of the Board of Appeal who participated in taking the decision set aside shall be replaced.

Rule 109

Procedure in dealing with petitions for review

(1) In proceedings under Article 112a, the provisions relating to proceedings before the Boards of Appeal shall apply, unless otherwise

provided. Rule 115, paragraph 1, second sentence, Rule 118, paragraph 2, first sentence, and Rule 132, paragraph 2, shall not apply. The Enlarged Board of Appeal may specify a period deviating from Rule 4, paragraph 1, first sentence.

(2) The Enlarged Board of Appeal

(a) consisting of two legally qualified members and one technically qualified member shall examine all petitions for review and shall reject those which are clearly inadmissible or unallowable; such decision shall require unanimity;

(b) consisting of four legally qualified members and one technically qualified member shall decide on any petition not rejected under subparagraph (a).

(3) The Enlarged Board of Appeal composed according to paragraph 2(a) shall decide without the involvement of other parties and on the basis of the petition.

Rule 110

Reimbursement of the fee for petitions for review

The Enlarged Board of Appeal shall order the reimbursement of the fee for a petition for review if the proceedings before the Boards of Appeal are reopened.

PART VII. IMPLEMENTING REGULATIONS TO PART VII OF THE CONVENTION

Chapter I. Decisions and communications of the European Patent Office

Rule 111

Form of decisions

(1) Where oral proceedings are held before the European Patent Office, the decision may be given orally. The decision shall subsequently be put in writing and notified to the parties.

(2) Decisions of the European Patent Office which are open to appeal shall be reasoned and shall be accompanied by a communication pointing out the possibility of appeal and drawing the attention of the parties to Articles 106 to 108, the text of which shall be attached. The parties may not invoke the omission of the communication.

Rule 112

Noting of loss of rights

(1) If the European Patent Office notes that a loss of rights has occurred, without any decision concerning the refusal of the European patent application or the grant, revocation or maintenance of the European patent, or the taking of evidence, it shall communicate this to the party concerned.

(2) If the party concerned considers that the finding of the European Patent Office is inaccurate, it may, within two months of the communication under paragraph 1, apply for a decision on the matter. The European Patent Office shall take such decision only if it does not share the opinion of the party requesting it; otherwise, it shall inform that party.

Rule 113

Signature, name, seal

(1) Any decisions, summonses, notices and communications from the European Patent Office shall be signed by, and state the name of, the employee responsible.

(2) Where a document referred to in paragraph 1 is produced by the employee responsible using a computer, a seal may replace the signature. Where the document is produced automatically by a computer, the employee's name may also be dispensed with. The same shall apply to pre-printed notices and communications.

Chapter II. Observations by third parties

Rule 114

Observations by third parties

(1) Any observations by a third party shall be filed in writing in an official language of the European Patent Office and state the grounds on which they are based. Rule 3, paragraph 3, shall apply.

(2) Any such observations shall be communicated to the applicant for or proprietor of the patent, who may comment on them.

Chapter III. Oral proceedings and taking of evidence

Rule 115

Summons to oral proceedings

(1) The parties shall be summoned to oral proceedings under Article 116, drawing their attention to paragraph 2 of this Rule. At least two months' notice of the summons shall be given, unless the parties agree to a shorter period.

(2) If a party duly summoned to oral proceedings before the European Patent Office does not appear as summoned, the proceedings may continue without that party.

Rule 116

Preparation of oral proceedings

(1) When issuing the summons, the European Patent Office shall draw attention to the points which in its opinion need to be discussed for the purposes of the decision to be taken. At the same time a final date for making written submissions in preparation for the oral proceedings shall be fixed. Rule 132 shall not apply. New facts and evidence presented after that date need not be considered, unless admitted on the grounds that the subject of the proceedings has changed.

(2) If the applicant or patent proprietor has been notified of the grounds prejudicing the grant or maintenance of the patent, he may be invited to submit, by the date specified in paragraph 1, second sentence, documents which meet the requirements of the Convention. Paragraph 1, third and fourth sentences, shall apply *mutatis mutandis*.

Rule 117

Decision on taking of evidence

Where the European Patent Office considers it necessary to hear a party, witness or expert, or to carry out an inspection, it shall take a decision to this end, setting out the investigation which it intends to carry out, relevant facts to be proved and the date, time and place of the investigation. If the hearing of a witness or expert is requested by a party, the decision shall specify the period within which the requester must make known the name and address of any witness or expert concerned.

Rule 118

Summons to give evidence before the European Patent Office

(1) A summons to give evidence before the European Patent Office shall be issued to the parties, witnesses or experts concerned.

(2) At least two months' notice of a summons issued to a party, witness or expert to testify shall be given, unless they agree to a shorter period. The summons shall contain:

(a) an extract from the decision under Rule 117, indicating the date, time and place of the investigation ordered and stating the facts in respect of which parties, witnesses or experts are to be heard;

(b) the names of the parties and particulars of the rights which the witnesses or experts may invoke under Rule 122, paragraphs 2 to 4;

(c) an indication that the party, witness or expert may request to be heard by a competent court of his country of residence under Rule 120, and an invitation to inform the European Patent Office, within a period to be specified, whether he is prepared to appear before it.

Rule 119

Examination of evidence before the European Patent Office

(1) The Examining Division, Opposition Division or Board of Appeal may commission one of its members to examine the evidence adduced.

(2) Before a party, witness or expert may be heard, he shall be informed that the European Patent Office may request the competent court in the country of residence of the person concerned to re-examine his testimony under oath or in an equally binding form.

(3) The parties may attend an investigation and may put relevant questions to the testifying party, witness or expert.

Rule 120

Hearing by a competent national court

(1) A party, witness or expert who is summoned before the European Patent Office may request the latter to allow him to be heard by a competent court in his country of residence. If this is requested, or if no reply is received within the period specified in the summons, the European Patent Office may, in accordance with Article 131, paragraph 2, request the competent court to hear the person concerned.

(2) If a party, witness or expert has been heard by the European Patent Office, the latter may, if it considers it advisable for the testimony to be given under oath or in an equally binding form, issue a request

under Article 131, paragraph 2, to the competent court in the country of residence of the person concerned to re-examine his testimony under such conditions.

(3) When the European Patent Office requests a competent court to take evidence, it may request the court to take the evidence under oath or in an equally binding form and to permit a member of the department concerned to attend the hearing and question the party, witness or expert, either through the intermediary of the court or directly.

Rule 121

Commissioning of experts

(1) The European Patent Office shall decide in what form the opinion of an expert whom it appoints shall be submitted.

(2) The terms of reference of the expert shall include:

(a) a precise description of his task;

(b) the period specified for the submission of his opinion;

(c) the names of the parties to the proceedings;

(d) particulars of the rights which he may invoke under Rule 122, paragraphs 2 to 4.

(3) A copy of any written opinion shall be submitted to the parties.

(4) The parties may object to an expert. The department of the European Patent Office concerned shall decide on the objection.

Rule 122

Costs of taking of evidence

(1) The taking of evidence by the European Patent Office may be made conditional upon deposit with it, by the party requesting the evidence to be taken, of an amount to be fixed by reference to an estimate of the costs.

(2) Witnesses or experts who are summoned by and appear before the European Patent Office shall be entitled to appropriate reimbursement of expenses for travel and subsistence. An advance for these expenses may be granted to them. This shall also apply to persons who appear before the European Patent Office without being summoned by it and are heard as witnesses or experts.

(3) Witnesses entitled to reimbursement under paragraph 2 shall also be entitled to appropriate compensation for loss of earnings, and

experts to fees for their work. These payments shall be made to the witnesses and experts after they have fulfilled their duties or tasks.

(4) The Administrative Council shall lay down the details implementing paragraphs 2 and 3. Any amounts due under these provisions shall be paid by the European Patent Office.

Rule 123

Conservation of evidence

(1) On request, the European Patent Office may, without delay, take measures to conserve evidence of facts liable to affect a decision which it may be called upon to take with regard to a European patent application or a European patent, where there is reason to fear that it might subsequently become more difficult or even impossible to take evidence. The date on which the measures are to be taken shall be communicated to the applicant for or proprietor of the patent in sufficient time to allow him to attend. He may ask relevant questions.

(2) The request shall contain:

(a) particulars of the requester as provided in Rule 41, paragraph 2(c);

(b) sufficient identification of the European patent application or European patent in question;

(c) an indication of the facts in respect of which evidence is to be taken;

(d) particulars of the means of giving or obtaining evidence;

(e) a statement establishing a prima facie case for fearing that it might subsequently become more difficult or impossible to take evidence.

(3) The request shall not be deemed to have been filed until the prescribed fee has been paid.

(4) The decision on the request and any resulting taking of evidence shall be incumbent upon the department of the European Patent Office which would have to take the decision liable to be affected by the facts to be established. The provisions with regard to the taking of evidence in proceedings before the European Patent Office shall apply.

Rule 124

Minutes of oral proceedings and of taking of evidence

(1) Minutes of oral proceedings and of the taking of evidence shall be drawn up, containing the essentials of the oral proceedings or of the

taking of evidence, the relevant statements made by the parties, the testimony of the parties, witnesses or experts and the result of any inspection.

(2) The minutes of the testimony of a witness, expert or party shall be read out, submitted to him, so that he may examine them or, where they are recorded by technical means, played back to him, unless he waives this right. It shall be noted in the minutes that this formality has been carried out and that the person who gave the testimony approved the minutes. If his approval is not given, his objections shall be noted. It is not necessary to play back the minutes or to obtain approval of them if the testimony has been recorded verbatim and directly using technical means.

(3) The minutes shall be authenticated by the employee responsible for drawing them up and by the employee who conducted the oral proceedings or taking of evidence, either by their signature or by any other appropriate means.

(4) The parties shall be provided with a copy of the minutes.

Chapter IV. Notifications

Rule 125

General provisions

(1) The European Patent Office shall, as a matter of course, notify those concerned of decisions and summonses, and of any notice or other communication from which a time limit is reckoned, or of which those concerned must be notified under the Convention, or of which notification has been ordered by the President of the European Patent Office. Any notification to be made shall take the form of the original document, a copy thereof certified by or bearing the seal of the European Patent Office, a computer print-out bearing such seal or an electronic document containing such seal or otherwise certified. Copies of documents emanating from the parties themselves shall not require such certification.

(2) Notification shall be made:

(a) by postal services in accordance with Rule 126;

(b) by means of electronic communication in accordance with Rule 127;

(c) by delivery on the premises of the European Patent Office in accordance with Rule 128; or

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(d) by public notice in accordance with Rule 129.

(3) Notification through the central industrial property office of a Contracting State shall be made in accordance with the law applicable to that office in national proceedings.

(4) Where a document has reached the addressee, if the European Patent Office is unable to prove that it has been duly notified, or if provisions relating to its notification have not been observed, the document shall be deemed to have been notified on the date established by the European Patent Office as the date of receipt.

Rule 126

Notification by postal services

(1) Decisions incurring a period for appeal or a petition for review, summonses and other such documents as determined by the President of the European Patent Office shall be notified by registered letter with advice of delivery or equivalent. All other notifications by postal services shall be by registered letter.

(2) Where notification is effected in accordance with paragraph 1, the letter shall be deemed to be delivered to the addressee on the tenth day following its handover to the postal service provider, unless it has failed to reach the addressee or has reached him at a later date; in the event of any dispute, it shall be incumbent on the European Patent Office to establish that the letter has reached its destination or to establish the date on which the letter was delivered to the addressee, as the case may be.

(3) Notification in accordance with paragraph 1 shall be deemed to have been effected even if acceptance of the letter has been refused.

(4) To the extent that notification by postal services is not covered by paragraphs 1 to 3, the law of the State in which the notification is made shall apply.

Rule 127

Notification by means of electronic communication

(1) Notification may be effected by means of electronic communication as determined by the President of the European Patent Office and under the conditions laid down by him.

(2) Where notification is effected by means of electronic communication, the electronic document shall be deemed to be delivered

to the addressee on the tenth day following its transmission, unless it has failed to reach its destination or has reached its destination at a later date; in the event of any dispute, it shall be incumbent on the European Patent Office to establish that the electronic document has reached its destination or to establish the date on which it reached its destination, as the case may be.

Rule 128

Notification by delivery by hand

Notification may be effected on the premises of the European Patent Office by delivery by hand of the document to the addressee, who shall on delivery acknowledge its receipt. Notification shall be deemed to have been effected even if the addressee refuses to accept the document or to acknowledge receipt thereof.

Rule 129

Public notification

(1) If the address of the addressee cannot be established, or if notification in accordance with Rule 126, paragraph 1, has proved to be impossible even after a second attempt, notification shall be effected by public notice.

(2) The President of the European Patent Office shall determine how the public notice is to be given and the beginning of the period of one month on expiry of which the document shall be deemed to have been notified.

Rule 130

Notification to representatives

(1) If a representative has been appointed, notifications shall be addressed to him.

(2) If several representatives have been appointed for a single party, notification to any one of them shall be sufficient.

(3) If several parties have a common representative, notification to the common representative shall be sufficient.

Chapter V. Time limits

Rule 131

Calculation of periods

(1) Periods shall be laid down in terms of full years, months, weeks or days.

(2) Computation shall start on the day following the day on which the relevant event occurred, the event being either a procedural step or the expiry of another period. Where the procedural step is a notification, the relevant event shall be the receipt of the document notified, unless otherwise provided.

(3) When a period is expressed as one year or a certain number of years, it shall expire in the relevant subsequent year in the month having the same name and on the day having the same number as the month and the day on which the said event occurred; if the relevant subsequent month has no day with the same number, the period shall expire on the last day of that month.

(4) When a period is expressed as one month or a certain number of months, it shall expire in the relevant subsequent month on the day which has the same number as the day on which the said event occurred; if the relevant subsequent month has no day with the same number, the period shall expire on the last day of that month.

(5) When a period is expressed as one week or a certain number of weeks, it shall expire in the relevant subsequent week on the day having the same name as the day on which the said event occurred.

Rule 132

Periods specified by the European Patent Office

(1) Where the Convention or these Implementing Regulations refer to "a period to be specified", this period shall be specified by the European Patent Office.

(2) Unless otherwise provided, a period specified by the European Patent Office shall be neither less than two months nor more than four months; in certain circumstances it may be up to six months. In special cases, the period may be extended upon request, presented before the expiry of such period.

Rule 133

Late receipt of documents

(1) A document received late at the European Patent Office shall be deemed to have been received in due time if it was delivered to a recognised postal service provider in due time before expiry of the period in accordance with the conditions laid down by the President of the European Patent Office, unless the document was received later than three months after expiry of the period.

(2) Paragraph 1 shall apply *mutatis mutandis* to any period where transactions are carried out with the competent authority in accordance with Article 75, paragraphs 1(b) or 2(b).

Rule 134

Extension of periods

(1) If a period expires on a day on which one of the filing offices of the European Patent Office under Rule 35, paragraph 1, is not open for receipt of documents or on which, for reasons other than those referred to in paragraph 2, mail is not delivered there, the period shall extend to the first day thereafter on which all the filing offices are open for receipt of documents and on which mail is delivered. The first sentence shall apply *mutatis mutandis* if documents filed by one of the means of electronic communication permitted by the President of the European Patent Office under Rule 2, paragraph 1, cannot be received.

(2) If a period expires on a day on which there is a general dislocation in the delivery or transmission of mail in a Contracting State, the period shall extend to the first day following the end of the interval of dislocation for parties which are resident in the State concerned or have appointed representatives with a place of business in that State. Where the State concerned is the State in which the European Patent Office is located, this provision shall apply to all parties and their representatives. This paragraph shall apply *mutatis mutandis* to the period referred to in Rule 37, paragraph 2.

(3) Paragraphs 1 and 2 shall apply *mutatis mutandis* where acts are performed with the competent authority in accordance with Article 75, paragraphs 1(b) or 2(b).

(4) The date of commencement and the end of any dislocation under paragraph 2 shall be published by the European Patent Office.

(5) Without prejudice to paragraphs 1 to 4, a party concerned may produce evidence that on any of the ten days preceding the day of expiry of a period the delivery or transmission of mail was dislocated due to an exceptional occurrence such as a natural disaster, war, civil disorder, a general breakdown in any of the means of electronic communication permitted by the President of the European Patent Office under Rule 2, paragraph 1, or other like reasons affecting the locality where the party or his representative resides or has his place of business. If the evidence produced satisfies the European Patent Office, a document received late shall be deemed to have been received in due time, provided that the mailing or the transmission was effected at the latest on the fifth day after the end of the dislocation.

Rule 135

Further processing

(1) Further processing under Article 121, paragraph 1, shall be requested by payment of the prescribed fee within two months of the communication concerning either the failure to observe a time limit or a loss of rights. The omitted act shall be completed within the period for making the request.

(2) Further processing shall be ruled out in respect of the periods referred to in Article 121, paragraph 4, and of the periods under Rule 6, paragraph 1, Rule 16, paragraph 1(a), Rule 31, paragraph 2, Rule 36, paragraph 2, Rule 40, paragraph 3, Rule 51, paragraphs 2 to 5, Rule 52, paragraphs 2 and 3, Rules 55, 56, 58, 59, 62a, 63, 64, Rule 112, paragraph 2, and Rule 164, paragraphs 1 and 2.

(3) The department competent to decide on the omitted act shall decide on the request for further processing.

Rule 136

Re-establishment of rights

(1) Any request for re-establishment of rights under Article 122, paragraph 1, shall be filed in writing within two months of the removal of the cause of non-compliance with the period, but at the latest within one year of expiry of the unobserved time limit. However, a request for re-establishment of rights in respect of any of the periods specified in Article 87, paragraph 1, and in Article 112a, paragraph 4, shall be filed within two months of expiry of that period. The request for re-

establishment of rights shall not be deemed to have been filed until the prescribed fee has been paid.

(2) The request shall state the grounds on which it is based and shall set out the facts on which it relies. The omitted act shall be completed within the relevant period for filing the request according to paragraph 1.

(3) Re-establishment of rights shall be ruled out in respect of any period for which further processing under Article 121 is available and in respect of the period for requesting re-establishment of rights.

(4) The department competent to decide on the omitted act shall decide on the request for re-establishment of rights.

Chapter VI. Amendments and corrections

Rule 137

Amendment of the European patent application

(1) Before receiving the European search report, the applicant may not amend the description, claims or drawings of a European patent application unless otherwise provided.

(2) Together with any comments, corrections or amendments made in response to communications by the European Patent Office under Rule 70a, paragraph 1 or 2, or Rule 161, paragraph 1, the applicant may amend the description, claims and drawings of his own volition.

(3) No further amendment may be made without the consent of the Examining Division.

(4) When filing any amendments referred to in paragraphs 1 to 3, the applicant shall identify them and indicate the basis for them in the application as filed. If the Examining Division notes a failure to meet either requirement, it may request the correction of this deficiency within a period of one month.

(5) Amended claims may not relate to unsearched subject-matter which does not combine with the originally claimed invention or group of inventions to form a single general inventive concept. Nor may they relate to subject-matter not searched in accordance with Rule 62a or Rule 63.

Rule 138

Different claims, description and drawings for different States

If the European Patent Office is informed of the existence of a prior right under Article 139, paragraph 2, the European patent application or European patent may, for such State or States, contain claims and, where appropriate, a description and drawings which are different from those for the other designated States.

Rule 139

Correction of errors in documents filed with the European Patent Office

Linguistic errors, errors of transcription and mistakes in any document filed with the European Patent Office may be corrected on request. However, if the request for such correction concerns the description, claims or drawings, the correction must be obvious in the sense that it is immediately evident that nothing else would have been intended than what is offered as the correction.

Rule 140

Correction of errors in decisions

In decisions of the European Patent Office, only linguistic errors, errors of transcription and obvious mistakes may be corrected.

Chapter VII. Information on prior art

Rule 141

Information on prior art

(1) An applicant claiming priority within the meaning of Article 87 shall file a copy of the results of any search carried out by the authority with which the previous application was filed together with the European patent application, in the case of a Euro-PCT application on entry into the European phase, or without delay after such results have been made available to him.

(2) The copy referred to in paragraph 1 shall be deemed to be duly filed if it is available to the European Patent Office and to be included in the file of the European patent application under the conditions determined by the President of the European Patent Office.

(3) Without prejudice to paragraphs 1 and 2, the European Patent Office may invite the applicant to provide, within a period of two months, information on prior art within the meaning of Article 124, paragraph 1.

Chapter VIII. Interruption of proceedings

Rule 142

Interruption of proceedings

(1) Proceedings before the European Patent Office shall be interrupted:

(a) in the event of the death or legal incapacity of the applicant for or proprietor of a European patent or of the person authorised by national law to act on his behalf. To the extent that the above events do not affect the authorisation of a representative appointed under Article 134, proceedings shall be interrupted only on application by such representative;

(b) in the event of the applicant for or proprietor of a patent, as a result of some action taken against his property, being prevented by legal reasons from continuing the proceedings;

(c) in the event of the death or legal incapacity of the representative of an applicant for or proprietor of a patent, or of his being prevented for legal reasons resulting from action taken against his property from continuing the proceedings.

(2) When, in the cases referred to in paragraph 1(a) or (b), the European Patent Office has been informed of the identity of the person authorised to continue the proceedings, it shall notify such person and, where applicable, any third party, that the proceedings will be resumed as from a specified date.

(3) In the case referred to in paragraph 1(c), the proceedings shall be resumed when the European Patent Office has been informed of the appointment of a new representative of the applicant or when the Office has informed the other parties of the appointment of a new representative of the proprietor of the patent. If, three months after the beginning of the interruption of the proceedings, the European Patent Office has not been informed of the appointment of a new representative, it shall communicate to the applicant for or proprietor of the patent:

(a) where Article 133, paragraph 2, is applicable, that the European patent application will be deemed to be withdrawn or the European

patent will be revoked if the information is not submitted within two months of this communication; or

(b) otherwise, that the proceedings will be resumed with the applicant for or proprietor of the patent as from the notification of this communication.

(4) Any periods, other than those for requesting examination and paying renewal fees, in force at the date of interruption of the proceedings, shall begin again as from the day on which the proceedings are resumed. If such date is less than two months before the end of the period within which the request for examination must be filed, such a request may be filed within two months of such date.

Chapter IX. Information to the public

Rule 143

Entries in the European Patent Register

(1) The European Patent Register shall contain the following entries:

- (a) number of the European patent application;
- (b) date of filing of the application;
- (c) title of the invention;
- (d) classification symbols assigned to the application;
- (e) the Contracting States designated;
- (f) particulars of the applicant for or proprietor of the patent as provided in Rule 41, paragraph 2(c);
- (g) family name, given names and address of the inventor designated by the applicant for or proprietor of the patent, unless he has waived his right to be mentioned under Rule 20, paragraph 1;
- (h) particulars of the representative of the applicant for or proprietor of the patent as provided in Rule 41, paragraph 2(d); in the case of several representatives only the particulars of the representative first named, followed by the words "and others" and, in the case of an association referred to in Rule 152, paragraph 11, only the name and address of the association;
- (i) priority data (date, State and file number of the previous application);
- (j) in the event of a division of the application, the numbers of all the divisional applications;

(k) in the case of a divisional application or a new application under Article 61, paragraph 1(b), the information referred to in sub-paragraphs (a), (b) and (i) with regard to the earlier application;

(l) date of publication of the application and, where appropriate, date of the separate publication of the European search report;

(m) date of filing of the request for examination;

(n) date on which the application is refused, withdrawn or deemed to be withdrawn;

(o) date of publication of the mention of the grant of the European patent;

(p) date of lapse of the European patent in a Contracting State during the opposition period and, where appropriate, pending a final decision on opposition;

(q) date of filing opposition;

(r) date and purport of the decision on opposition;

(s) dates of stay and resumption of proceedings in the cases referred to in Rules 14 and 78;

(t) dates of interruption and resumption of proceedings in the case referred to in Rule 142;

(u) date of re-establishment of rights where an entry has been made under sub-paragraphs (n) or (r);

(v) the filing of a request for conversion under Article 135, paragraph 3;

(w) rights and transfer of such rights relating to an application or a European patent where these Implementing Regulations provide that they shall be recorded.

(x) date and purport of the decision on the request for limitation or revocation of the European patent;

(y) date and purport of the decision of the Enlarged Board of Appeal on the petition for review.

(2) The President of the European Patent Office may decide that entries other than those referred to in paragraph 1 shall be made in the European Patent Register.

Rule 144

Parts of the file excluded from inspection

The parts of the file excluded from inspection under Article 128, paragraph 4, shall be:

(a) the documents relating to the exclusion of or objections to members of the Boards of Appeal or of the Enlarged Board of Appeal;

(b) draft decisions and notices, and all other documents, used for the preparation of decisions and notices, which are not communicated to the parties;

(c) the designation of the inventor, if he has waived his right to be mentioned under Rule 20, paragraph 1;

(d) any other document excluded from inspection by the President of the European Patent Office on the ground that such inspection would not serve the purpose of informing the public about the European patent application or the European patent.

Rule 145

Procedures for the inspection of files

(1) Inspection of the files of European patent applications and patents shall either be of the original document, or of copies thereof, or of technical means of storage if the files are stored in this way.

(2) The President of the European Patent Office shall determine all file-inspection arrangements, including the circumstances in which an administrative fee is payable.

Rule 146

Communication of information contained in the files

Subject to the restrictions laid down in Article 128, paragraphs 1 to 4, and in Rule 144, the European Patent Office may, upon request, communicate information concerning any file relating to a European patent application or European patent, subject to the payment of an administrative fee. However, the European Patent Office may refer to the option of file inspection where it deems this to be appropriate in view of the quantity of information to be supplied.

Rule 147

Constitution, maintenance and preservation of files

(1) The European Patent Office shall constitute, maintain and preserve files relating to all European patent applications and patents in electronic form.

(2) The President of the European Patent Office shall determine all necessary technical and administrative arrangements relating to the management of electronic files according to paragraph 1.

(3) Documents incorporated in an electronic file shall be considered to be originals. The initial paper version of such documents shall only be destroyed after expiry of at least five years. This preservation period starts at the end of the year in which the document was incorporated in the electronic file.

(4) Any files shall be preserved for at least five years from the end of the year in which:

(a) the application is refused or withdrawn or is deemed to be withdrawn;

(b) the patent is revoked by the European Patent Office; or

(c) the patent or the corresponding protection under Article 63, paragraph 2, lapses in the last of the designated States.

(5) Without prejudice to paragraph 4, files relating to applications which have given rise to divisional applications under Article 76 or new applications under Article 61, paragraph 1(b), shall be preserved for at least the same period as the files relating to any one of these last applications. The same shall apply to files relating to any resulting European patents.

Chapter X. Legal and administrative co-operation

Rule 148

Communications between the European Patent Office and the authorities of the Contracting States

(1) Communications between the European Patent Office and the central industrial property offices of the Contracting States which arise out of the application of this Convention shall be effected directly between these authorities. Communications between the European Patent Office and the courts or other authorities of the Contracting States may be effected through the intermediary of the said central industrial property offices.

(2) Expenditure in respect of communications under paragraph 1 shall be borne by the authority making the communications, which shall be exempt from fees.

Rule 149

Inspection of files by or via courts or authorities of the Contracting States

(1) Inspection of the files of European patent applications or of European patents by courts or authorities of the Contracting States shall be of the original documents or of copies thereof; Rule 145 shall not apply.

(2) Courts or Public Prosecutors' offices of the Contracting States may, in the course of their proceedings, communicate to third parties files or copies thereof transmitted to them by the European Patent Office. Such communications shall be effected in accordance with Article 128 and shall not be subject to any fee.

(3) The European Patent Office shall, when transmitting the files, draw attention to the restrictions which may, under Article 128, paragraphs 1 and 4, apply to file inspection by third parties.

Rule 150

Procedure for letters rogatory

(1) Each Contracting State shall designate a central authority to receive letters rogatory issued by the European Patent Office and to transmit them to the court or authority competent to execute them.

(2) The European Patent Office shall draw up letters rogatory in the language of the competent court or authority or shall attach to such letters rogatory a translation into that language.

(3) Subject to paragraphs 5 and 6, the competent court or authority shall apply national law as to the procedures to be followed in executing such requests and, in particular, as to the appropriate measures of compulsion.

(4) If the court or authority to which the letters rogatory are transmitted is not competent to execute them, the letters rogatory shall be sent forthwith to the central authority referred to in paragraph 1. That authority shall transmit the letters rogatory either to the competent court or authority in that State, or to the European Patent Office where no court or authority is competent in that State.

(5) The European Patent Office shall be informed of the time when, and the place where, the enquiry or other legal measure is to take place and shall inform the parties, witnesses and experts concerned.

(6) If so requested by the European Patent Office, the competent court or authority shall permit the attendance of members of the

department concerned and allow them to question any person giving evidence either directly or through the competent court or authority.

(7) The execution of letters rogatory shall not give rise to any reimbursement of fees or costs of any nature. Nevertheless, the State in which letters rogatory are executed has the right to require the Organisation to reimburse any fees paid to experts or interpreters and the costs arising from the procedure under paragraph 6.

(8) If the law applied by the competent court or authority obliges the parties to secure evidence and the competent court or authority is not able itself to execute the letters rogatory, that court or authority may, with the consent of the European Patent Office, appoint a suitable person to do so. When seeking such consent, the competent court or authority shall indicate the approximate costs which would result from this procedure. If the European Patent Office gives its consent, the Organisation shall reimburse any costs incurred; otherwise, the Organisation shall not be liable for such costs.

Chapter XI. Representation

Rule 151

Appointment of a common representative

(1) If there is more than one applicant and the request for grant of a European patent does not name a common representative, the applicant first named in the request shall be deemed to be the common representative. However, if one of the applicants is obliged to appoint a professional representative, this representative shall be deemed to be the common representative, unless the applicant first named has appointed a professional representative. The same shall apply to third parties acting in common in filing a notice of opposition or intervention and to joint proprietors of a European patent.

(2) If the European patent application is transferred to more than one person, and such persons have not appointed a common representative, paragraph 1 shall apply *mutatis mutandis*. If such application is not possible, the European Patent Office shall invite such persons to appoint a common representative within a period to be specified. If this invitation is not complied with, the European Patent Office shall appoint the common representative.

Rule 152

Authorisations

(1) The President of the European Patent Office shall determine the cases in which a signed authorisation shall be filed by representatives acting before the European Patent Office.

(2) Where a representative fails to file such an authorisation, the European Patent Office shall invite him to do so within a period to be specified. The authorisation may cover one or more European patent applications or European patents and shall be filed in the corresponding number of copies.

(3) Where the requirements of Article 133, paragraph 2, have not been satisfied, the same period shall be specified for the appointment of a representative and the filing of the authorisation.

(4) A general authorisation may be filed enabling a representative to act in respect of all the patent transactions of a party. A single copy shall suffice.

(5) The President of the European Patent Office may determine the form and content of:

(a) an authorisation relating to the representation of persons under Article 133, paragraph 2;

(b) a general authorisation.

(6) If a required authorisation is not filed in due time, any procedural steps taken by the representative, other than the filing of a European patent application, shall be deemed not to have been taken, without prejudice to any other legal consequences provided for by this Convention.

(7) Paragraphs 2 and 4 shall apply to the withdrawal of an authorisation.

(8) A representative shall be deemed to be authorised until the termination of his authorisation has been communicated to the European Patent Office.

(9) Unless it expressly provides otherwise, an authorisation shall not terminate vis-à-vis the European Patent Office upon the death of the person who gave it.

(10) If a party appoints several representatives, they may act either jointly or singly, notwithstanding any provisions to the contrary in the communication of their appointment or in the authorisation.

(11) The authorisation of an association of representatives shall be deemed to be an authorisation of any representative who can provide evidence that he practises within that association

Rule 153

Attorney-client evidentiary privilege

(1) Where advice is sought from a professional representative in his capacity as such, all communications between the professional representative and his client or any other person, relating to that purpose and falling under Article 2 of the Regulation on discipline for professional representatives, are permanently privileged from disclosure in proceedings before the European Patent Office, unless such privilege is expressly waived by the client.

(2) Such privilege from disclosure shall apply, in particular, to any communication or document relating to:

- (a) the assessment of the patentability of an invention;
- (b) the preparation or prosecution of a European patent application;
- (c) any opinion relating to the validity, scope of protection or infringement of a European patent or a European patent application.

Rule 154

Amendment of the list of professional representatives

(1) The entry of a professional representative shall be deleted from the list of professional representatives if he so requests or if, despite a reminder, he fails to pay the applicable annual subscription to the Institute within five months from either:

- (a) 1 January for members on the list at that date; or
- (b) the date of entry for members entered on the list after 1 January of the year for which the subscription is due.

(2) Without prejudice to any disciplinary measures taken under Article 134a, paragraph 1(c), the entry of a professional representative may be deleted ex officio only:

- (a) in the event of his death or legal incapacity;
- (b) where he is no longer a national of one of the Contracting States, unless he was granted an exemption under Article 134, paragraph 7(a);
- (c) where he no longer has his place of business or employment within one of the Contracting States.

(3) Any person entered on the list of professional representatives under Article 134, paragraphs (2) or (3), whose entry has been deleted shall, upon request, be re-entered on that list if the conditions for deletion no longer exist.

**PART VIII. IMPLEMENTING REGULATIONS TO PART VIII OF
THE CONVENTION**

Rule 155

Filing and transmission of the request for conversion

(1) The request for conversion referred to in Article 135, paragraph 1(a) or (b), shall be filed within three months of the withdrawal of the European patent application, or of the communication that the application is deemed to be withdrawn, or of the decision refusing the application or revoking the European patent. The effect of the European patent application under Article 66 shall lapse if the request is not filed in due time.

(2) When transmitting the request for conversion to the central industrial property offices of the Contracting States specified in the request, the central industrial property office concerned or the European Patent Office shall attach to the request a copy of the file relating to the European patent application or European patent.

(3) Article 135, paragraph 4, shall apply if the request for conversion referred to in Article 135, paragraphs 1(a) and (2), is not transmitted before the expiry of a period of twenty months from the date of filing or, if priority has been claimed, the date of priority.

Rule 156

Information to the public in the event of conversion

(1) The documents accompanying the request for conversion under Rule 155, paragraph 2, shall be made available to the public by the central industrial property office under the same conditions and to the same extent as documents relating to national proceedings.

(2) The printed specification of the national patent resulting from the conversion of a European patent application shall mention that application.

**PART IX. IMPLEMENTING REGULATIONS TO PART X OF
THE CONVENTION**

Rule 157

The European Patent Office as a receiving Office

(1) The European Patent Office shall be competent to act as a receiving Office within the meaning of the PCT if the applicant is a resident or national of a Contracting State to this Convention and to the PCT. Without prejudice to paragraph 3, if the applicant chooses the European Patent Office as a receiving Office, the international application shall be filed directly with the European Patent Office. Article 75, paragraph 2, shall apply mutatis mutandis.

(2) Where the European Patent Office acts as a receiving Office under the PCT, the international application shall be filed in English, French or German. The President of the European Patent Office may determine that the international application and any related item shall be filed in more than one copy.

(3) If an international application is filed with an authority of a Contracting State for transmittal to the European Patent Office as the receiving Office, the Contracting State shall ensure that the application reaches the European Patent Office not later than two weeks before the end of the thirteenth month from filing or, if priority is claimed, from the date of priority.

(4) The transmittal fee for the international application shall be paid within one month of filing the application.

Rule 158

**The European Patent Office as an International Searching
Authority or International Preliminary Examining Authority**

(1) In the case of Article 17, paragraph 3(a) PCT, an additional international search fee shall be paid for each further invention for which an international search is to be carried out.

(2) In the case of Article 34, paragraph 3(a) PCT, an additional fee for international preliminary examination shall be paid for each further invention for which the international preliminary examination is to be carried out.

(3) Where an additional fee has been paid under protest, the European Patent Office shall examine the protest in accordance with Rule 40.2(c) to (e) or Rule 68.3(c) to (e) PCT, subject to payment of the

prescribed protest fee. Further details concerning the procedure shall be determined by the President of the European Patent Office.

Rule 159

The European Patent Office as a designated or elected Office –Requirements for entry into the European phase

(1) In respect of an international application under Article 153, the applicant shall perform the following acts within thirty-one months from the date of filing of the application or, if priority has been claimed, from the priority date:

(a) supply, where applicable, the translation of the international application required under Article 153, paragraph 4;

(b) specify the application documents, as originally filed or as amended, on which the European grant procedure is to be based;

(c) pay the filing fee provided for in Article 78, paragraph 2;

(d) pay the designation fee if the period under Rule 39 has expired earlier;

(e) pay the search fee, where a supplementary European search report has to be drawn up;

(f) file the request for examination provided for in Article 94, if the period under Rule 70, paragraph 1, has expired earlier;

(g) pay the renewal fee in respect of the third year provided for in Article 86, paragraph 1, if the fee has fallen due earlier under Rule 51, paragraph 1;

(h) file, where applicable, the certificate of exhibition referred to in Article 55, paragraph 2, and Rule 25.

(2) The Examining Division shall be competent to take decisions of the European Patent Office under Article 25, paragraph 2(a) PCT.

Rule 160

Consequences of non-fulfilment of certain requirements

(1) If either the translation of the international application or the request for examination is not filed in due time, or if the filing fee, the search fee or the designation fee is not paid in due time, the European patent application shall be deemed to be withdrawn.

(2) If the European Patent Office notes that the application is deemed to be withdrawn under paragraph 1, it shall communicate this to the applicant. Rule 112, paragraph 2, shall apply *mutatis mutandis*.

Rule 161

Amendment of the application

(1) If the European Patent Office has acted as the International Searching Authority and, where a demand under Article 31 PCT was filed, also as the International Preliminary Examining Authority for a Euro-PCT application, it shall give the applicant the opportunity to comment on the written opinion of the International Searching Authority or the International Preliminary Examination Report and, where appropriate, invite him to correct any deficiencies noted in the written opinion or in the International Preliminary Examination Report and to amend the description, claims and drawings within a period of six months from the respective communication. If the European Patent Office has drawn up a supplementary international search report, an invitation in accordance with the first sentence shall be issued in respect of the explanations given in accordance with Rule 45*bis*.7(e) PCT. If the applicant does not comply with or comment on an invitation in accordance with the first or second sentence, the application shall be deemed to be withdrawn.

(2) Where the European Patent Office draws up a supplementary European search report on a Euro-PCT application, the application may be amended once within a period of six months from a communication informing the applicant accordingly. The application as amended shall serve as the basis for the supplementary European search.

Rule 162

Claims incurring fees

(1) If the application documents on which the European grant procedure is to be based comprise more than fifteen claims, claims fees shall be paid for the sixteenth and each subsequent claim as laid down in the Rules relating to Fees within the period under Rule 159, paragraph 1.

(2) If the claims fees are not paid in due time, they may still be paid within the period under Rule 161, paragraph 1 or paragraph 2, as the case may be. If within this period amended claims are filed, the claims fees due shall be computed on the basis of such amended claims and shall be paid within this period.

(3) Any claims fees paid within the period under paragraph 1 and in excess of those due under paragraph 2, second sentence, shall be refunded.

(4) Where a claims fee is not paid in due time, the claim concerned shall be deemed to be abandoned.

Rule 163

**Examination of certain formal requirements by the
European Patent Office**

(1) Where the designation of the inventor under Rule 19, paragraph 1, has not yet been made within the period under Rule 159, paragraph 1, the European Patent Office shall invite the applicant to make the designation within two months.

(2) Where the priority of an earlier application is claimed and the file number of the previous application or the copy thereof provided for in Rule 52, paragraph 1, and Rule 53 have not yet been submitted within the period under Rule 159, paragraph 1, the European Patent Office shall invite the applicant to furnish that number or copy within two months. Rule 53, paragraph 2, shall apply.

(3) Where, at the expiry of the period under Rule 159, paragraph 1, a sequence listing complying with the standard provided for in the Administrative Instructions under the PCT is not available to the European Patent Office, the applicant shall be invited to file a sequence listing complying with the rules laid down by the President of the European Patent Office within two months. Rule 30, paragraphs 2 and 3, shall apply *mutatis mutandis*.

(4) Where, at the expiry of the period under Rule 159, paragraph 1, the address, the nationality or the State in which his residence or principal place of business is located is missing in respect of any applicant, the European Patent Office shall invite the applicant to furnish these indications within two months.

(5) Where, at the expiry of the period under Rule 159, paragraph 1, the requirements of Article 133, paragraph 2, have not been satisfied, the European Patent Office shall invite the applicant to appoint a professional representative within two months.

(6) If the deficiencies noted under paragraphs 1, 4 or 5 are not corrected in due time, the European patent application shall be refused.

If the deficiency noted under paragraph 2 is not corrected in due time, the right of priority shall be lost for the application.

Rule 164

Unity of invention and further searches

(1) If the European Patent Office considers that the application documents which are to serve as the basis for the supplementary European search do not comply with the requirement of unity of invention, it shall:

(a) draw up a partial supplementary search report on those parts of the application which relate to the invention, or the group of inventions within the meaning of Article 82, first mentioned in the claims;

(b) inform the applicant that, for the supplementary European search report to cover the other inventions, a further search fee must be paid, in respect of each invention involved, within a period of two months; and

(c) draw up the supplementary European search report for the parts of the application relating to inventions in respect of which search fees have been paid.

(2) If the supplementary European search report is dispensed with and the Examining Division considers that in the application documents which are to serve as the basis for examination an invention, or a group of inventions within the meaning of Article 82, is claimed which was not searched by the European Patent Office in its capacity as International Searching Authority or Authority specified for supplementary international search, the Examining Division shall:

(a) inform the applicant that a search will be performed in respect of any such invention for which a search fee is paid within a period of two months;

(b) issue the results of any search performed in accordance with paragraph (a) together with:

- a communication under Article 94, paragraph 3, and Rule 71, paragraphs 1 and 2, in which it shall give the applicant the opportunity to comment on these results and to amend the description, claims and drawings, or

- a communication under Rule 71, paragraph 3,
and

(c) where appropriate, in the communication issued under paragraph (b), invite the applicant to limit the application to one invention, or group of inventions within the meaning of Article 82, for which a search report was drawn up by the European Patent Office in its capacity either as International Searching Authority or as Authority specified for supplementary international search, or for which a search was performed in accordance with the procedure under paragraph (a).

(3) In the procedure under paragraph 2(a), Rules 62a and 63 shall apply *mutatis mutandis*.

(4) Rule 62 and Rule 70, paragraph 2, shall not apply to the results of any search performed in accordance with paragraph 2.

(5) Any fee paid under paragraphs 1 or 2 shall be refunded if the applicant requests a refund and the Examining Division finds that the communication under paragraphs 1(b) or 2(a) was not justified.

Rule 165

The Euro-PCT application as conflicting application under Article 54, paragraph 3

A Euro-PCT application shall be considered as comprised in the state of the art under Article 54, paragraph 3, if in addition to the conditions laid down in Article 153, paragraph 3 or 4, the filing fee under Rule 159, paragraph 1(c) has been paid.

**RULES OF PROCEDURE OF THE ENLARGED BOARD OF
APPEAL**

version applicable as from 1 April 2015

Decision of the Administrative Council of 25 March 2015 approving amendments to the Rules of Procedure of the Enlarged Board of Appeal of the European Patent Office

The Administrative Council of the European Patent Organisation,
Having regard to the European Patent Convention, and in particular Article 23, paragraph 4, thereof,

Having regard to the amendments to the Rules of Procedure of the Enlarged Board of Appeal, adopted on 19 March 2015 under Rule 13, paragraph 2, of the Implementing Regulations to the European Patent Convention,

HAS DECIDED AS FOLLOWS:

**ANNEX
DECISION**

Amendments to the Rules of Procedure of the Enlarged Board of Appeal, OJ EPO 1983, 3, as amended in OJ EPO 1989, 362, OJ EPO 1994, 443, OJ EPO 2003, 58, and OJ EPO 2007, 303

In accordance with Rule 13 of the Implementing Regulations to the Convention on the Grant of European Patents, the Enlarged Board of Appeal amends its Rules of Procedure. These amended Rules of Procedure read as follows:

Article 1

Field of application

These Rules of Procedure shall apply in proceedings before the Enlarged Board of Appeal under Article 23, paragraph 1, first sentence, EPC, Article 112 EPC, and Article 112a EPC.

Article 2

Business distribution and composition

(1) Before the beginning of each working year the members of the Enlarged Board of Appeal appointed under Article 11, paragraph 3, EPC shall draw up a business distribution scheme. This scheme shall designate the regular members and their alternates in proceedings under

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Article 23, paragraph 1, first sentence, EPC, Article 112 EPC and Article 112a EPC initiated during the year. The scheme may be amended during the working year.

(2) The Chairman of the Enlarged Board of Appeal shall determine the composition of the Board for each particular case in accordance with the business distribution scheme. In proceedings under Article 23, paragraph 1, first sentence, EPC, in accordance with paragraph 5 the composition of the Board shall be determined by the alternate of the Chairman of the Enlarged Board of Appeal.

(3) For the examination of a petition under Article 112a EPC conducted in the composition under Rule 109, paragraph 2(b), EPC, two legally qualified members shall supplement the composition specified in Rule 109, paragraph 2(a), EPC.

(4) In proceedings before the Enlarged Board of Appeal under Article 112, paragraph 1(a), EPC at least four of the members shall not have taken part in the proceedings before the Board of Appeal referring the point of law.

(5) In proceedings under Article 23, paragraph 1, first sentence, EPC the Enlarged Board of Appeal shall be composed according to the provisions of Article 22, paragraph 2, first sentence, EPC, the Chairman being replaced by his alternate, and two of the legally qualified members being external members of the Enlarged Board of Appeal.

(6) Article 24 EPC shall apply to proceedings under Article 112a EPC. The Chairman, appointed under Article 11, paragraph 3, EPC, of the Board against whose decision the petition for review has been filed may not take part in the review proceedings.

(7) The parties shall be informed of the Board's composition as soon as it has been determined or changed.

Article 3

Replacement of members

(1) Members shall be replaced by alternates if they are prevented from participating, particularly as a result of sickness, excessive workload, and commitments which cannot be avoided.

(2) Any member who wishes to be replaced by an alternate shall inform the Chairman of the Board of his unavailability without delay.

(3) The Chairman of the Enlarged Board of Appeal may, in accordance with the business distribution scheme, designate another regular legally qualified member of the Board to act as Chairman in his stead.

Article 4

Exclusion and objection

(1) If the Board has knowledge of a possible reason for exclusion or objection which does not originate from a member himself or from any party to the proceedings, then the procedure of Article 24, paragraph 4, EPC shall be applied.

(2) The member concerned shall be invited to present his comments as to whether there is a reason for exclusion.

(3) Before a decision is taken on the exclusion of the member, there shall be no further proceedings in the case.

Article 5

Rapporteurs

(1) The Chairman of the Board shall for each case designate a member of the Board, or himself, as rapporteur. The Chairman may appoint an additional rapporteur. The rapporteur of the Board as composed under Rule 109, paragraph 2(a), EPC shall generally go on to be the rapporteur for proceedings conducted in the composition under Rule 109, paragraph 2(b), EPC.

(2) If an additional rapporteur is appointed, the steps referred to in paragraphs 3 to 5 shall be taken by the rapporteur and additional rapporteur jointly unless the Chairman directs otherwise.

(3) The rapporteur shall carry out a preliminary study of the case and may prepare communications to the eligible parties subject to the direction of the Chairman of the Board. Communications shall be signed by the rapporteur on behalf of the Board.

(4) The rapporteur shall make the preparations for meetings of the Board and for oral proceedings.

(5) The rapporteur shall draft decisions or opinions.

(6) If a rapporteur or additional rapporteur considers that his knowledge of the language of the proceedings is insufficient for drafting communications or decisions or opinions, he may draft these in one of the other official languages. His drafts shall be translated by the European

Patent Office into the language of the proceedings and the translations shall be checked by the rapporteur or by another member of the Board.

Article 6

Registry

(1) A Registry shall be established for the Enlarged Board of Appeal. The Senior Registrar of the Boards of Appeal or the registrars assigned to him for this purpose shall be responsible for the discharge of its functions.

(2) The members of the Enlarged Board of Appeal appointed under Article 11, paragraph 3, EPC may entrust to the Registry tasks which involve no technical or legal difficulties, in particular in relation to arranging for inspection of files, issuing summonses to oral proceedings and notifications and granting requests for further processing of applications.

(3) Minutes of oral proceedings and of the taking of evidence shall be drawn up by the Senior Registrar, a registrar assigned to him for this purpose or such other employee of the Office as the Chairman may designate.

Article 7

Change in the composition of the Board

(1) If the composition of the Board is changed after oral proceedings, the parties eligible to take part in the proceedings shall be informed that, at the request of any party, fresh oral proceedings shall be held before the Board in its new composition. Fresh oral proceedings shall also be held if so requested by the new member and if the other members of the Board have given their agreement.

(2) Paragraph 1 shall not apply to a change in composition under Article 2, paragraph 3. In this event, a request for oral proceedings shall continue to apply even where oral proceedings have already taken place.

(3) Each new member shall be bound to the same extent as the other members by an interim decision which has already been taken.

(4) If, when the Board has already reached a final decision, a member is unable to act, he shall not be replaced by an alternate. If the Chairman is unable to act, the legally qualified member of the Board having the longest service on the Board or, in the case where members

have the same length of service, the eldest member shall sign the decision on behalf of the Chairman.

Article 8

Consolidation of proceedings

If two or more points of law with the same or similar subject-matter have been submitted, or two or more petitions to review the same appeal decision, the Board may consider them in consolidated proceedings.

Article 9

EPO President's right to comment

In proceedings under Article 112 EPC the Board may, on its own initiative or at the written, reasoned request of the President of the European Patent Office, invite him to comment in writing or orally on questions of general interest which arise in the course of proceedings pending before it. The parties shall be entitled to submit their observations on the President's comments.

Article 10

Statements by third parties

(1) In the course of proceedings under Article 112 EPC, any written statement concerning the points of law raised in such proceedings which is sent to the Board by a third party may be dealt with as the Board thinks fit.

(2) The Board may announce further provisions concerning such statements in the Official Journal of the European Patent Office if it seems appropriate.

Article 11

Special communications to parties in proceedings under Article 112a EPC

Notwithstanding notifications or communications required under other provisions,

(a) the other parties shall be informed of the receipt of a petition for review and shall receive a copy of the petition, reference being made to Rule 109, paragraph 3, EPC;

(b) the parties shall be informed that a clearly inadmissible or unallowable petition for review has been rejected in oral proceedings;

(c) the parties shall be informed that a petition for review has been forwarded to the Board as composed under Rule 109, paragraph 2(b), EPC.

Article 12

New submissions filed after expiry of the time limit in proceedings under Article 112a EPC

(1) Notwithstanding Rule 109, paragraph 3, EPC the Board may consider new submissions made by the petitioner after expiry of the time limit for filing petitions for review, if this is justified for special reasons.

(2) The same shall apply in proceedings conducted in the composition under Rule 109, paragraph 2(b), EPC to new submissions from the other parties filed subsequently to their reply.

Article 12a

Proceedings under Article 23, paragraph 1, first sentence, EPC

(1) A request that the Enlarged Board of Appeal make a proposal for the removal from office of a member under Article 23, paragraph 1, first sentence, EPC may be made to the Enlarged Board either by the Administrative Council of the European Patent Organisation or by the Vice-President of the European Patent Office in charge of the Boards of Appeal.

(2) In the case of such a request being made by the Administrative Council, the Administrative Council shall be represented in the proceedings. The Vice-President of the European Patent Office in charge of the Boards of Appeal shall also be entitled to be heard in such proceedings.

(3) In the case of such a request being made by the Vice-President in charge of the Boards of Appeal, he shall be a party to the proceedings.

(4) The member who is the subject of a request to make a proposal for their removal from office under Article 23, paragraph 1, first sentence, EPC shall be a party to the proceedings as respondent.

(5) The request referred to in paragraph 1 shall set out all the facts, arguments and evidence relied on. All documents referred to shall be attached.

(6) The proceedings shall be conducted in writing, where necessary or requested supplemented by oral proceedings according to Article 14, and may not be concluded without the respondent being informed of the

facts, arguments and evidence underlying the request and having had the opportunity to be heard on them. The respondent may appoint a person to advise or represent him.

(7) Article 117, paragraph 1, EPC shall be applicable.

(8) The proceedings shall be conducted independently of any disciplinary or national proceedings.

(9) Unless and to the extent that the Enlarged Board decides otherwise, the proceedings shall not be public and shall be confidential.

(10) The Enlarged Board of Appeal may on request propose the reimbursement of some or all costs incurred in the proceedings by the respondent if the request to make a proposal for their removal from office has been rejected.

Article 13

Non-binding communications from the Board

If the Board deems it expedient to communicate with the eligible parties regarding a possible appreciation of substantive or legal matters, such communication shall be made in such a way as not to imply that the Board is in any way bound by it.

Article 14

Oral proceedings

(1) If oral proceedings are to take place, the Board shall endeavour to ensure that the eligible parties have provided all relevant information and documents before the hearing.

(2) The Board's communication under Article 13 may draw attention to matters which seem to be of special significance, or to the fact that questions appear no longer to be contentious, or may contain other observations that may help concentration on essentials during the oral proceedings.

(3) A change of date for oral proceedings may exceptionally be allowed in the Board's discretion following receipt of a written and reasoned request made as far in advance of the appointed date as possible.

(4) The Board shall not be obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned who may then be treated as relying only on its written case.

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(5) The Chairman presides over the oral proceedings and ensures their fair, orderly and efficient conduct.

(6) When a case is ready for decision during oral proceedings, the Chairman shall state the final requests of the eligible parties and declare the debate closed. No submissions may be made by the parties after the closure of the debate unless the Board decides to re-open the debate.

(7) The Board shall ensure that each case is ready for decision at the conclusion of the oral proceedings, unless there are special reasons to the contrary. Before the oral proceedings are closed, the Board's decision or opinion may be announced orally by the Chairman.

Article 15

Attendance of interpreters

If required, the Chairman of the Board shall make arrangements for interpreting during oral proceedings, the taking of evidence or the deliberations of the Board.

Article 16

Deliberation and voting

(1) Only members of the Board shall participate in deliberations; the Chairman may, however, authorise other officers to attend. Deliberations shall be secret.

(2) During the deliberations between members of the Board, the opinion of the rapporteur shall be heard first, followed by that of the additional rapporteur if one has been appointed and, if the rapporteur is not the Chairman, the Chairman's last.

(3) If voting is necessary, votes shall be taken in the same sequence; even if the Chairman is the rapporteur, he shall vote last. Abstentions shall not be permitted.

Article 17

Submission of case by the Board as composed under Rule 109, paragraph 2(a), EPC to the Board as composed under Rule 109, paragraph 2(b), EPC

If, in proceedings under Article 112a EPC, the Board as composed under Rule 109, paragraph 2(a), EPC fails after deliberation to reach the unanimous conclusion that the petition for review should be rejected as clearly inadmissible or unallowable, it shall submit the petition without

delay and without comment as to its merit to the Board as composed under Rule 109, paragraph 2(b), EPC for decision.

Article 18

Reasons for the decision or opinion

(1) Subject to Rule 109, paragraph 2(a), EPC the decision or opinion of the Board shall be in accordance with the votes of the majority of its members.

(2) In proceedings under Article 23, paragraph 1, first sentence, EPC or Article 112 EPC, the reasons for such decision or opinion may also indicate the opinions held by a minority of the members if a majority of the members of the Board agrees. Neither the names of the members forming any such minority nor the size of such minority may be indicated.

(3) The final decision of the Enlarged Board of Appeal in proceedings under Article 23, paragraph 1, first sentence, EPC may be published, due regard being taken of the confidentiality of the proceedings.

Article 19

Binding nature of the Rules of Procedure

These Rules of Procedure shall be binding upon the Enlarged Board of Appeal, provided that they do not lead to a situation which would be incompatible with the spirit and purpose of the Convention.

Article 20

Entry into force

These Rules of Procedure shall enter into force on 1 April 2015.

Done at Munich, 19 March 2015

**PROTOCOL ON THE INTERPRETATION OF ARTICLE 69 EPC
of 5 October 1973
as revised by the Act revising the EPC of 29 November 2000**

Article 1

General principles

Article 69 should not be interpreted as meaning that the extent of the protection conferred by a European patent is to be understood as that defined by the strict, literal meaning of the wording used in the claims, the description and drawings being employed only for the purpose of resolving an ambiguity found in the claims. Nor should it be taken to mean that the claims serve only as a guideline and that the actual protection conferred may extend to what, from a consideration of the description and drawings by a person skilled in the art, the patent proprietor has contemplated. On the contrary, it is to be interpreted as defining a position between these extremes which combines a fair protection for the patent proprietor with a reasonable degree of legal certainty for third parties.

Article 2

Equivalents

For the purpose of determining the extent of protection conferred by a European patent, due account shall be taken of any element which is equivalent to an element specified in the claims.

**PROTOCOL ON THE CENTRALISATION OF THE EUROPEAN
PATENT SYSTEM AND ON ITS INTRODUCTION
(PROTOCOL ON CENTRALISATION)**

of 5 October 1973

as revised by the Act revising the EPC of 29 November 2000

Section I

(1)(a) Upon entry into force of the Convention, States parties thereto which are also members of the International Patent Institute set up by the Hague Agreement of 6 June 1947 shall take all necessary steps to ensure the transfer to the European Patent Office no later than the date referred to in *Article 162, paragraph 1*, of the Convention of all assets and liabilities and all staff members of the International Patent Institute. Such transfer shall be effected by an agreement between the International Patent Institute and the European Patent Organisation. The above States and the other States parties to the Convention shall take all necessary steps to ensure that that agreement shall be implemented no later than the date referred to in *Article 162, paragraph 1*, of the Convention. Upon implementation of the agreement, those Member States of the International Patent Institute which are also parties to the Convention further undertake to terminate their participation in the Hague Agreement.

(b) The States parties to the Convention shall take all necessary steps to ensure that all the assets and liabilities and all the staff members of the International Patent Institute are taken into the European Patent Office in accordance with the agreement referred to in sub-paragraph (a). After the implementation of that agreement the tasks incumbent upon the International Patent Institute at the date on which the Convention is opened for signature, and in particular those carried out vis-à-vis its Member States, whether or not they become parties to the Convention, and such tasks as it has undertaken at the time of the entry into force of the Convention to carry out vis-à-vis States which, at that date, are both members of the International Patent Institute and parties to the Convention, shall be assumed by the European Patent Office. In addition, the Administrative Council of the European Patent Organisation may allocate further duties in the field of searching to the European Patent Office.

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(c) The above obligations shall also apply mutatis mutandis to the sub-office set up under the Hague Agreement under the conditions set out in the agreement between the International Patent Institute and the Government of the Contracting State concerned. This Government hereby undertakes to make a new agreement with the European Patent Organisation in place of the one already made with the International Patent Institute to harmonise the clauses concerning the organisation, operation and financing of the sub-office with the provisions of this Protocol.

(2) Subject to the provisions of Section III, the States parties to the Convention shall, on behalf of their central industrial property offices, renounce in favour of the European Patent Office any activities as International Searching Authorities under the Patent Cooperation Treaty as from the date referred to in *Article 162, paragraph 1*, of the Convention.

(3)(a) A sub-office of the European Patent Office shall be set up in Berlin as from the date referred to in *Article 162, paragraph 1*, of the Convention. It shall operate under the direction of the branch at The Hague.

(b) The Administrative Council shall determine the duties to be allocated to the sub-office in Berlin in the light of general considerations and of the requirements of the European Patent Office.

(c) At least at the beginning of the period following the progressive expansion of the field of activity of the European Patent Office, the amount of work assigned to that sub-office shall be sufficient to enable the examining staff of the Berlin Annex of the German Patent Office, as it stands at the date on which the Convention is opened for signature, to be fully employed.

(d) The Federal Republic of Germany shall bear any additional costs incurred by the European Patent Organisation in setting up and maintaining the sub-office in Berlin.

Section II

Subject to the provisions of Sections III and IV, the States parties to the Convention shall, on behalf of their central industrial property offices, renounce in favour of the European Patent Office any activities as International Preliminary Examining Authorities under the Patent Cooperation Treaty. This obligation shall apply only to the extent to

which the European Patent Office may examine European patent applications in accordance with *Article 162, paragraph 2*, of the Convention and shall not apply until two years after the date on which the European Patent Office has begun examining activities in the areas of technology concerned, on the basis of a five-year plan which shall progressively extend the activities of the European Patent Office to all areas of technology and which may be amended only by decision of the Administrative Council. The procedures for implementing this obligation shall be determined by decision of the Administrative Council.

Section III

(1) The central industrial property office of any State party to the Convention in which the official language is not one of the official languages of the European Patent Office, shall be authorised to act as an International Searching Authority and as an International Preliminary Examining Authority under the Patent Cooperation Treaty. Such authorisation shall be subject to an undertaking by the State concerned to restrict such activities to international applications filed by nationals or residents of such State and by nationals or residents of States parties to the Convention which are adjacent to that State. The Administrative Council may decide to authorise the central industrial property office of any State party to the Convention to extend such activities to cover such international applications as may be filed by nationals or residents of any non-Contracting State having the same official language as the Contracting State in question and drawn up in that language.

(2) For the purpose of harmonising search activities under the Patent Cooperation Treaty within the framework of the European system for the grant of patents, co-operation shall be established between the European Patent Office and any central industrial property office authorised under this Section. Such cooperation shall be based on a special agreement which may cover e.g. search procedures and methods, qualifications required for the recruitment and training of examiners, guidelines for the exchange of search and other services between the offices as well as other measures needed to establish the required control and supervision.

Section IV

(1)(a) For the purpose of facilitating the adaptation of the national patent offices of the States parties to the Convention to the European patent system, the Administrative Council may, if it considers it desirable, and subject to the conditions set out below, entrust the central industrial property offices of such of those States in which it is possible to conduct the proceedings in one of the official languages of the European Patent Office with tasks concerning the examination of European patent applications drawn up in that language which, pursuant to Article 18, paragraph 2, of the Convention, shall, as a general rule, be entrusted to a member of the Examining Division. Such tasks shall be carried out within the framework of the proceedings for grant laid down in the Convention; decisions on such applications shall be taken by the Examining Division composed in accordance with Article 18, paragraph 2.

(b) Tasks entrusted under sub-paragraph (a) shall not be in respect of more than 40% of the total number of European patent applications filed; tasks entrusted to any one State shall not be in respect of more than one-third of the total number of European patent applications filed. These tasks shall be entrusted for a period of 15 years from the opening of the European Patent Office and shall be reduced progressively (in principle by 20% a year) to zero during the last 5 years of the period.

(c) The Administrative Council shall decide, while taking into account the provisions of sub-paragraph (b), upon the nature, origin and number of the European patent applications in respect of which examining tasks may be entrusted to the central industrial property office of each of the Contracting States mentioned above.

(d) The above implementing procedures shall be set out in a special agreement between the central industrial property office of the Contracting State concerned and the European Patent Organisation.

(e) An office with which such a special agreement has been concluded may act as an International Preliminary Examining Authority under the Patent Cooperation Treaty, until the expiry of the period of 15 years.

(2)(a) If the Administrative Council considers that it is compatible with the proper functioning of the European Patent Office, and in order to alleviate the difficulties which may arise for certain Contracting States from the application of Section I, paragraph 2, it may entrust

searching in respect of European patent applications to the central industrial property offices of those States in which the official language is one of the official languages of the European Patent Office, provided that these offices possess the necessary qualifications for appointment as an International Searching Authority in accordance with the conditions laid down in the Patent Cooperation Treaty.

(b) In carrying out such work, undertaken under the responsibility of the European Patent Office, the central industrial property offices concerned shall adhere to the guidelines applicable to the drawing up of the European search report.

(c) The provisions of paragraph 1(b), second sentence, and subparagraph (d) of this Section shall apply to this paragraph.

Section V

(1) The sub-office referred to in Section I, paragraph 1(c), shall be authorised to carry out searches, among the documentation which is at its disposal and which is in the official language of the State in which the sub-office is located, in respect of European patent applications filed by nationals and residents of that State. This authorisation shall be on the understanding that the procedure for the grant of European patents will not be delayed and that additional costs will not be incurred for the European Patent Organisation.

(2) The sub-office referred to in paragraph 1 shall be authorised to carry out, at the option of an applicant for a European patent and at his expense, a search on his patent application among the documentation referred to in paragraph 1. This authorisation shall be effective until the search provided for in Article 92 of the Convention has been extended, in accordance with Section VI, to cover such documentation and shall be on the understanding that the procedure for the grant of European patents will not be delayed.

(3) The Administrative Council may also extend the authorisations provided for in paragraphs 1 and 2, under the conditions of those paragraphs, to the central industrial property office of a Contracting State which does not have as an official language one of the official languages of the European Patent Office.

Section VI

The search provided for in Article 92 of the Convention shall, in principle, be extended, in respect of all European patent applications, to published patents, published patent applications and other relevant documents of Contracting States not included in the search documentation of the European Patent Office on the date referred to in *Article 162, paragraph 1*, of the Convention. The extent, conditions and timing of any such extension shall be determined by the Administrative Council on the basis of a study concerning particularly the technical and financial aspects.

Section VII

The provisions of this Protocol shall prevail over any contradictory provisions of the Convention.

Section VIII

The decisions of the Administrative Council provided for in this Protocol shall require a three-quarters majority (Article 35, paragraph 2, of the Convention). The provisions governing the weighting of votes (Article 36 of the Convention) shall apply.

**PROTOCOL ON JURISDICTION AND THE RECOGNITION OF
DECISIONS IN RESPECT OF THE RIGHT TO THE GRANT OF
A EUROPEAN PATENT
(PROTOCOL ON RECOGNITION)**

of 5 October 1973

Section I. Jurisdiction

Article 1

(1) The courts of the Contracting States shall, in accordance with Articles 2 to 6, have jurisdiction to decide claims, against the applicant, to the right to the grant of a European patent in respect of one or more of the Contracting States designated in the European patent application.

(2) For the purposes of this Protocol, the term "courts" shall include authorities which, under the national law of a Contracting State, have jurisdiction to decide the claims referred to in paragraph 1. Any Contracting State shall notify the European Patent Office of the identity of any authority on which such a jurisdiction is conferred, and the European Patent Office shall inform the other Contracting States accordingly.

(3) For the purposes of this Protocol, the term "Contracting State" refers to a Contracting State which has not excluded application of this Protocol pursuant to *Article 167 of the Convention*.

Article 2

Subject to Articles 4 and 5, if an applicant for a European patent has his residence or principal place of business within one of the Contracting States, proceedings shall be brought against him in the courts of that Contracting State.

Article 3

Subject to Articles 4 and 5, if an applicant for a European patent has his residence or principal place of business outside the Contracting States, and if the party claiming the right to the grant of the European patent has his residence or principal place of business within one of the Contracting States, the courts of the latter State shall have exclusive jurisdiction.

Article 4

Subject to Article 5, if the subject-matter of a European patent application is the invention of an employee, the courts of the Contracting State, if any, whose law determines the right to the European patent pursuant to Article 60, paragraph 1, second sentence, of the Convention, shall have exclusive jurisdiction over proceedings between the employee and the employer.

Article 5

(1) If the parties to a dispute concerning the right to the grant of a European patent have concluded an agreement, either in writing or verbally with written confirmation, to the effect that a court or the courts of a particular Contracting State shall decide on such a dispute, the court or courts of that State shall have exclusive jurisdiction.

(2) However, if the parties are an employee and his employer, paragraph 1 shall only apply in so far as the national law governing the contract of employment allows the agreement in question.

Article 6

In cases where neither Articles 2 to 4 nor Article 5, paragraph 1, apply, the courts of the Federal Republic of Germany shall have exclusive jurisdiction.

Article 7

The courts of Contracting States before which claims referred to in Article 1 are brought shall of their own motion decide whether or not they have jurisdiction pursuant to Articles 2 to 6.

Article 8

(1) In the event of proceedings based on the same claim and between the same parties being brought before courts of different Contracting States, the court to which a later application is made shall of its own motion decline jurisdiction in favour of the court to which an earlier application was made.

(2) In the event of the jurisdiction of the court to which an earlier application is made being challenged, the court to which a later application is made shall stay the proceedings until the other court takes a final decision.

Section II. Recognition

Article 9

(1) Subject to the provisions of Article 11, paragraph 2, final decisions given in any Contracting State on the right to the grant of a European patent in respect of one or more of the Contracting States designated in the European patent application shall be recognised without requiring a special procedure in the other Contracting States.

(2) The jurisdiction of the court whose decision is to be recognised and the validity of such decision may not be reviewed.

Article 10

Article 9, paragraph 1, shall not be applicable where:

(a) an applicant for a European patent who has not contested a claim proves that the document initiating the proceedings was not notified to him regularly and sufficiently early for him to defend himself; or

(b) an applicant proves that the decision is incompatible with another decision given in a Contracting State in proceedings between the same parties which were started before those in which the decision to be recognised was given.

Article 11

(1) In relations between any Contracting States the provisions of this Protocol shall prevail over any conflicting provisions of other agreements on jurisdiction or the recognition of judgments.

(2) This Protocol shall not affect the implementation of any agreement between a Contracting State and a State which is not bound by the Protocol.

**PROTOCOL ON PRIVILEGES AND IMMUNITIES OF THE
EUROPEAN PATENT ORGANISATION
(PROTOCOL ON PRIVILEGES AND IMMUNITIES)
of 5 October 1973**

Article 1

(1) The premises of the Organisation shall be inviolable.

(2) The authorities of the States in which the Organisation has its premises shall not enter those premises, except with the consent of the President of the European Patent Office. Such consent shall be assumed in case of fire or other disaster requiring prompt protective action.

(3) Service of process at the premises of the Organisation and of any other procedural instruments relating to a cause of action against the Organisation shall not constitute breach of inviolability.

Article 2

The archives of the Organisation and any documents belonging to or held by it shall be inviolable.

Article 3

(1) Within the scope of its official activities the Organisation shall have immunity from jurisdiction and execution, except

(a) to the extent that the Organisation shall have expressly waived such immunity in a particular case;

(b) in the case of a civil action brought by a third party for damage resulting from an accident caused by a motor vehicle belonging to, or operated on behalf of, the Organisation, or in respect of a motor traffic offence involving such a vehicle;

(c) in respect of the enforcement of an arbitration award made under Article 23.

(2) The property and assets of the Organisation, wherever situated, shall be immune from any form of requisition, confiscation, expropriation and sequestration.

(3) The property and assets of the Organisation shall also be immune from any form of administrative or provisional judicial constraint, except in so far as may be temporarily necessary in connection with the prevention of, and investigation into, accidents

involving motor vehicles belonging to or operated on behalf of the Organisation.

(4) The official activities of the Organisation shall, for the purposes of this Protocol, be such as are strictly necessary for its administrative and technical operation, as set out in the Convention.

Article 4

(1) Within the scope of its official activities the Organisation and its property and income shall be exempt from all direct taxes.

(2) Where substantial purchases for the exercise of its official activities, and in the price of which taxes or duties are included, are made by the Organisation, appropriate measures shall, whenever possible, be taken by the Contracting States to remit or reimburse to the Organisation the amount of such taxes or duties.

(3) No exemption shall be accorded in respect of duties and taxes which are no more than charges for public utility services.

Article 5

Goods imported or exported by the Organisation for the exercise of its official activities shall be exempt from duties and charges on import or export other than fees or taxes representing services rendered, and from all prohibitions and restrictions on import or export.

Article 6

No exemption shall be granted under Articles 4 and 5 in respect of goods purchased or imported for the personal benefit of the employees of the European Patent Office.

Article 7

(1) Goods belonging to the Organisation which have been acquired or imported under Article 4 or Article 5 shall not be sold or given away except in accordance with conditions laid down by the Contracting States which have granted the exemptions.

(2) The transfer of goods and provision of services between the various buildings of the Organisation shall be exempt from charges or restrictions of any kind; where appropriate, the Contracting States shall take all the necessary measures to remit or reimburse the amount of such charges or to lift such restrictions.

Article 8

The transmission of publications and other information material by or to the Organisation shall not be restricted in any way.

Article 9

The Contracting States shall accord the Organisation the currency exemptions which are necessary for the exercise of its official activities.

Article 10

(1) With regard to its official communications and the transfer of all its documents, the Organisation shall in each Contracting State enjoy the most favourable treatment accorded by that State to any other international organisation.

(2) No censorship shall be applied to official communications of the Organisation by whatever means of communication.

Article 11

The Contracting States shall take all appropriate measures to facilitate the entry, stay and departure of the employees of the European Patent Office.

Article 12

(1) Representatives of Contracting States, alternate Representatives and their advisers or experts, if any, shall enjoy, while attending meetings of the Administrative Council and of any body established by it, and in the course of their journeys to and from the place of meeting, the following privileges and immunities:

(a) immunity from arrest or detention and from seizure of their personal luggage, except when found committing, attempting to commit, or just having committed an offence;

(b) immunity from jurisdiction, even after the termination of their mission, in respect of acts, including words written and spoken, done by them in the exercise of their functions; this immunity shall not apply, however, in the case of a motor traffic offence committed by one of the persons referred to above, nor in the case of damage caused by a motor vehicle belonging to or driven by such a person;

(c) inviolability for all their official papers and documents;

(d) the right to use codes and to receive documents or correspondence by special courier or sealed bag;

(e) exemption for themselves and their spouses from all measures restricting entry and from aliens' registration formalities;

(f) the same facilities in the matter of currency and exchange control as are accorded to the representatives of foreign Governments on temporary official missions.

(2) Privileges and immunities are accorded to the persons referred to in paragraph 1, not for their personal advantage but in order to ensure complete independence in the exercise of their functions in connection with the Organisation. Consequently, a Contracting State has the duty to waive the immunity in all cases where, in the opinion of that State, such immunity would impede the course of justice and where it can be waived without prejudicing the purposes for which it was accorded.

Article 13

(1) Subject to the provisions of Article 6, the President of the European Patent Office shall enjoy the privileges and immunities accorded to diplomatic agents under the Vienna Convention on Diplomatic Relations of 18 April 1961.

(2) However, immunity from jurisdiction shall not apply in the case of a motor traffic offence committed by the President of the European Patent Office or damage caused by a motor vehicle belonging to or driven by him.

Article 14

The employees of the European Patent Office:

(a) shall, even after their service has terminated, have immunity from jurisdiction in respect of acts, including words written and spoken, done in the exercise of their functions; this immunity shall not apply, however, in the case of a motor traffic offence committed by an employee of the European Patent Office, nor in the case of damage caused by a motor vehicle belonging to or driven by an employee;

(b) shall be exempt from all obligations in respect of military service;

(c) shall enjoy inviolability for all their official papers and documents;

(d) shall enjoy the same facilities as regards exemption from all measures restricting immigration and governing aliens' registration as

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are normally accorded to staff members of international organisations, as shall members of their families forming part of their household;

(e) shall enjoy the same privileges in respect of exchange regulations as are normally accorded to the staff members of international organisations;

(f) shall enjoy the same facilities as to repatriation as diplomatic agents in time of international crises, as shall the members of their families forming part of their household;

(g) shall have the right to import duty-free their furniture and personal effects at the time of first taking up their post in the State concerned and the right on the termination of their functions in that State to export free of duty their furniture and personal effects, subject to the conditions considered necessary by the Government of the State in whose territory the right is exercised and with the exception of property acquired in that State which is subject to an export prohibition therein.

Article 15

Experts performing functions on behalf of, or carrying out missions for, the Organisation shall enjoy the following privileges and immunities, to the extent that they are necessary for the carrying out of their functions, including during journeys made in carrying out their functions and in the course of such missions:

(a) immunity from jurisdiction in respect of acts done by them in the exercise of their functions, including words written or spoken, except in the case of a motor traffic offence committed by an expert or in the case of damage caused by a motor vehicle belonging to or driven by him; experts shall continue to enjoy this immunity after they have ceased to be employed by the Organisation;

(b) inviolability for all their official papers and documents;

(c) the exchange facilities necessary for the transfer of their remuneration.

Article 16

(1) The persons referred to in Articles 13 and 14 shall be subject to a tax for the benefit of the Organisation on salaries and emoluments paid by the Organisation, subject to the conditions and rules laid down by the Administrative Council within a period of one year from the date of the entry into force of the Convention. From the date on which this tax is

applied, such salaries and emoluments shall be exempt from national income tax. The Contracting States may, however, take into account the salaries and emoluments thus exempt when assessing the amount of tax to be applied to income from other sources.

(2) Paragraph 1 shall not apply to pensions and annuities paid by the Organisation to the former employees of the European Patent Office.

Article 17

The Administrative Council shall decide the categories of employees to whom the provisions of Article 14, in whole or in part, and Article 16 shall apply and the categories of experts to whom the provisions of Article 15 shall apply. The names, titles and addresses of the employees and experts included in such categories shall be communicated from time to time to the Contracting States.

Article 18

In the event of the Organisation establishing its own social security scheme, the Organisation and the employees of the European Patent Office shall be exempt from all compulsory contributions to national social security schemes, subject to the agreements made with the Contracting States in accordance with the provisions of Article 25.

Article 19

(1) The privileges and immunities provided for in this Protocol are not designed to give to employees of the European Patent Office or experts performing functions for or on behalf of the Organisation personal advantage. They are provided solely to ensure, in all circumstances, the unimpeded functioning of the Organisation and the complete independence of the persons to whom they are accorded.

(2) The President of the European Patent Office has the duty to waive immunity where he considers that such immunity prevents the normal course of justice and that it is possible to dispense with such immunity without prejudicing the interests of the Organisation. The Administrative Council may waive immunity of the President for the same reasons.

Article 20

(1) The Organisation shall co-operate at all times with the competent authorities of the Contracting States in order to facilitate the proper administration of justice, to ensure the observance of police regulations and regulations concerning public health, labour inspection or other similar national legislation, and to prevent any abuse of the privileges, immunities and facilities provided for in this Protocol.

(2) The procedure of co-operation mentioned in paragraph 1 may be laid down in the complementary agreements referred to in Article 25.

Article 21

Each Contracting State retains the right to take all precautions necessary in the interests of its security.

Article 22

No Contracting State is obliged to extend the privileges and immunities referred to in Article 12, Article 13, Article 14, sub-paragraphs (b), (e) and (g), and Article 15, sub-paragraph (c), to:

(a) its own nationals;

(b) any person who at the time of taking up his functions with the Organisation has his permanent residence in that State and is not an employee of any other inter-governmental organisation whose staff is incorporated into the Organisation.

Article 23

(1) Any Contracting State may submit to an international arbitration tribunal any dispute concerning the Organisation or an employee of the European Patent Office or an expert performing functions for or on its behalf, in so far as the Organisation or the employees and experts have claimed a privilege or an immunity under this Protocol in circumstances where that immunity has not been waived.

(2) If a Contracting State intends to submit a dispute to arbitration, it shall notify the Chairman of the Administrative Council, who shall forthwith inform each Contracting State of such notification.

(3) The procedure laid down in paragraph 1 of this Article shall not apply to disputes between the Organisation and the employees or experts in respect of the Service Regulations or conditions of employment or, with regard to the employees, the Pension Scheme Regulations.

(4) No appeal shall lie against the award of the arbitration tribunal, which shall be final; it shall be binding on the parties. In case of dispute concerning the import or scope of the award, it shall be incumbent upon the arbitration tribunal to interpret it on request by either party.

Article 24

(1) The arbitration tribunal referred to in Article 23 shall consist of three members, one arbitrator nominated by the State or States party to the arbitration, one arbitrator nominated by the Administrative Council and a third arbitrator, who shall be the chairman, nominated by the said two arbitrators.

(2) The arbitrators shall be nominated from a panel comprising no more than six arbitrators appointed by each Contracting State and six arbitrators appointed by the Administrative Council. This panel shall be established as soon as possible after the Protocol enters into force and shall be revised each time this proves necessary.

(3) If, within three months from the date of the notification referred to in Article 23, paragraph 2, either party fails to make the nomination referred to in paragraph 1 above, the choice of the arbitrator shall, on request of the other party, be made by the President of the International Court of Justice from the persons included in the said panel. This shall also apply, when so requested by either party, if within one month from the date of appointment of the second arbitrator, the first two arbitrators are unable to agree on the nomination of the third arbitrator. However, if, in these two cases, the President of the International Court of Justice is prevented from making the choice, or if he is a national of one of the States parties to the dispute, the Vice-President of the International Court of Justice shall make the aforementioned appointments, provided that he himself is not a national of one of the States parties to the dispute; if such is the case, the member of the International Court of Justice who is not a national of one of the States parties to the dispute and who has been chosen by the President or Vice-President shall make the appointments. A national of the State applying for arbitration may not be chosen to fill the post of the arbitrator whose appointment devolves on the Administrative Council nor may a person included in the panel and appointed by the Administrative Council be chosen to fill the post of an arbitrator whose appointment devolves on the State which is

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the claimant. Nor may a person of either of these categories be chosen as chairman of the Tribunal.

(4) The arbitration tribunal shall draw up its own rules of procedure.

Article 25

The Organisation may, on a decision of the Administrative Council, conclude with one or more Contracting States complementary agreements to give effect to the provisions of this Protocol as regards such State or States, and other arrangements to ensure the efficient functioning of the Organisation and the safeguarding of its interests.

**PROTOCOL ON THE STAFF COMPLEMENT OF THE
EUROPEAN PATENT OFFICE AT THE HAGUE
(PROTOCOL ON STAFF COMPLEMENT)
of 29 November 2000**

The European Patent Organisation shall ensure that the proportion of European Patent Office posts assigned to the duty station at The Hague as defined under the 2000 establishment plan and table of posts remains substantially unchanged. Any change in the number of posts assigned to the duty station at The Hague resulting in a deviation of more than ten per cent of that proportion, which proves necessary for the proper functioning of the European Patent Office, shall be subject to a decision by the Administrative Council of the Organisation on a proposal from the President of the European Patent Office after consultation with the Governments of the Federal Republic of Germany and the Kingdom of the Netherlands.

**DIRECTIVE (EU) 2016/943 OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL**

of 8 June 2016

**on the protection of undisclosed know-how and business
information (trade secrets) against their unlawful acquisition,
use and disclosure**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE
EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European
Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national
parliaments,

Having regard to the opinion of the European Economic and Social
Committee (1),

Acting in accordance with the ordinary legislative procedure (2),

Whereas:

(1) Businesses and non-commercial research institutions invest in acquiring, developing and applying know-how and information which is the currency of the knowledge economy and provides a competitive advantage. This investment in generating and applying intellectual capital is a determining factor as regards their competitiveness and innovation-related performance in the market and therefore their returns on investment, which is the underlying motivation for business research and development. Businesses have recourse to different means to appropriate the results of their innovation-related activities when openness does not allow for the full exploitation of their investment in research and innovation. Use of intellectual property rights, such as patents, design rights or copyright, is one such means. Another means of appropriating the results of innovation is to protect access to, and exploit, knowledge that is valuable to the entity and not widely known. Such valuable know-how and business information, that is undisclosed and intended to remain confidential, is referred to as a trade secret.

(2) Businesses, irrespective of their size, value trade secrets as much as patents and other forms of intellectual property right. They use confidentiality as a business competitiveness and research innovation management tool, and in relation to a diverse range of information that

extends beyond technological knowledge to commercial data such as information on customers and suppliers, business plans, and market research and strategies. Small and medium-sized enterprises (SMEs) value and rely on trade secrets even more. By protecting such a wide range of know-how and business information, whether as a complement or as an alternative to intellectual property rights, trade secrets allow creators and innovators to derive profit from their creation or innovation and, therefore, are particularly important for business competitiveness as well as for research and development, and innovation-related performance.

(3) Open innovation is a catalyst for new ideas which meet the needs of consumers and tackle societal challenges, and allows those ideas to find their way to the market. Such innovation is an important lever for the creation of new knowledge, and underpins the emergence of new and innovative business models based on the use of co-created knowledge. Collaborative research, including cross-border cooperation, is particularly important in increasing the levels of business research and development within the internal market. The dissemination of knowledge and information should be considered as being essential for the purpose of ensuring dynamic, positive and equal business development opportunities, in particular for SMEs. In an internal market in which barriers to cross-border collaboration are minimised and cooperation is not distorted, intellectual creation and innovation should encourage investment in innovative processes, services and products. Such an environment conducive to intellectual creation and innovation, and in which employment mobility is not hindered, is also important for employment growth and for improving the competitiveness of the Union economy. Trade secrets have an important role in protecting the exchange of knowledge between businesses, including in particular SMEs, and research institutions both within and across the borders of the internal market, in the context of research and development, and innovation. Trade secrets are one of the most commonly used forms of protection of intellectual creation and innovative know-how by businesses, yet at the same time they are the least protected by the existing Union legal framework against their unlawful acquisition, use or disclosure by other parties.

(4) Innovative businesses are increasingly exposed to dishonest practices aimed at misappropriating trade secrets, such as theft,

unauthorised copying, economic espionage or the breach of confidentiality requirements, whether from within or from outside of the Union. Recent developments, such as globalisation, increased outsourcing, longer supply chains, and the increased use of information and communication technology contribute to increasing the risk of those practices. The unlawful acquisition, use or disclosure of a trade secret compromises legitimate trade secret holders' ability to obtain first-mover returns from their innovation-related efforts. Without effective and comparable legal means for protecting trade secrets across the Union, incentives to engage in innovation-related cross-border activity within the internal market are undermined, and trade secrets are unable to fulfil their potential as drivers of economic growth and jobs. Thus, innovation and creativity are discouraged and investment diminishes, thereby affecting the smooth functioning of the internal market and undermining its growth-enhancing potential.

(5) International efforts made in the framework of the World Trade Organisation to address this problem led to the conclusion of the Agreement on Trade-related Aspects of Intellectual Property Rights (the TRIPS Agreement). The TRIPS Agreement contains, *inter alia*, provisions on the protection of trade secrets against their unlawful acquisition, use or disclosure by third parties, which are common international standards. All Member States, as well as the Union itself, are bound by this Agreement which was approved by Council Decision 94/800/EC (3).

(6) Notwithstanding the TRIPS Agreement, there are important differences in the Member States' legislation as regards the protection of trade secrets against their unlawful acquisition, use or disclosure by other persons. For example, not all Member States have adopted national definitions of a trade secret or the unlawful acquisition, use or disclosure of a trade secret, therefore knowledge on the scope of protection is not readily accessible and that scope differs across the Member States. Furthermore, there is no consistency as regards the civil law remedies available in the event of unlawful acquisition, use or disclosure of trade secrets, as cease and desist orders are not always available in all Member States against third parties who are not competitors of the legitimate trade secret holder. Divergences also exist across the Member States with respect to the treatment of a third party who has acquired the trade secret in good faith but subsequently learns, at the time of use, that the

acquisition derived from a previous unlawful acquisition by another party.

(7) National rules also differ as to whether legitimate trade secret holders are allowed to seek the destruction of goods produced by third parties who use trade secrets unlawfully, or the return or destruction of any documents, files or materials containing or embodying the unlawfully acquired or used trade secret. Furthermore, applicable national rules on the calculation of damages do not always take account of the intangible nature of trade secrets, which makes it difficult to demonstrate the actual profits lost or the unjust enrichment of the infringer where no market value can be established for the information in question. Only a few Member States allow for the application of abstract rules on the calculation of damages based on the reasonable royalty or fee which could have been due had a licence for the use of the trade secret existed. Additionally, many national rules do not provide for appropriate protection of the confidentiality of a trade secret where the trade secret holder introduces a claim for alleged unlawful acquisition, use or disclosure of the trade secret by a third party, thereby reducing the attractiveness of the existing measures and remedies and weakening the protection offered.

(8) The differences in the legal protection of trade secrets provided for by the Member States imply that trade secrets do not enjoy an equivalent level of protection throughout the Union, thus leading to fragmentation of the internal market in this area and a weakening of the overall deterrent effect of the relevant rules. The internal market is affected in so far as such differences lower the incentives for businesses to undertake innovation-related cross-border economic activity, including research cooperation or production cooperation with partners, outsourcing or investment in other Member States, which depends on the use of information that enjoys protection as trade secrets. Cross-border network research and development, as well as innovation-related activities, including related production and subsequent cross-border trade, are rendered less attractive and more difficult within the Union, thus also resulting in Union-wide innovation-related inefficiencies.

(9) In addition, there is a higher risk for businesses in Member States with comparatively lower levels of protection, due to the fact that trade secrets may be stolen or otherwise unlawfully acquired more easily. This leads to inefficient allocation of capital to growth-enhancing

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innovation within the internal market because of the higher expenditure on protective measures to compensate for the insufficient legal protection in some Member States. It also favours the activity of unfair competitors who, subsequent to the unlawful acquisition of trade secrets, could spread goods resulting from such acquisition across the internal market. Differences in legislative regimes also facilitate the importation of goods from third countries into the Union through entry points with weaker protection, when the design, production or marketing of those goods rely on stolen or otherwise unlawfully acquired trade secrets. On the whole, such differences hinder the proper functioning of the internal market.

(10) It is appropriate to provide for rules at Union level to approximate the laws of the Member States so as to ensure that there is a sufficient and consistent level of civil redress in the internal market in the event of unlawful acquisition, use or disclosure of a trade secret. Those rules should be without prejudice to the possibility for Member States of providing for more far-reaching protection against the unlawful acquisition, use or disclosure of trade secrets, as long as the safeguards explicitly provided for in this Directive for protecting the interests of other parties are respected.

(11) This Directive should not affect the application of Union or national rules that require the disclosure of information, including trade secrets, to the public or to public authorities. Nor should it affect the application of rules that allow public authorities to collect information for the performance of their duties, or rules that allow or require any subsequent disclosure by those public authorities of relevant information to the public. Such rules include, in particular, rules on the disclosure by the Union's institutions and bodies or national public authorities of business-related information they hold pursuant to Regulation (EC) No 1049/2001 of the European Parliament and of the Council (4), Regulation (EC) No 1367/2006 of the European Parliament and of the Council (5) and Directive 2003/4/EC of the European Parliament and of the Council (6), or pursuant to other rules on public access to documents or on the transparency obligations of national public authorities.

(12) This Directive should not affect the right of social partners to enter into collective agreements, where provided for under labour law, as regards any obligation not to disclose a trade secret or to limit its use, and the consequences of a breach of such an obligation by the party subject to it. This should be on the condition that any such collective

agreement does not restrict the exceptions laid down in this Directive when an application for measures, procedures or remedies provided for in this Directive for alleged acquisition, use or disclosure of a trade secret is to be dismissed.

(13) This Directive should not be understood as restricting the freedom of establishment, the free movement of workers or the mobility of workers as provided for in Union law. Nor is it intended to affect the possibility of concluding non-competition agreements between employers and employees, in accordance with applicable law.

(14) It is important to establish a homogenous definition of a trade secret without restricting the subject matter to be protected against misappropriation. Such definition should therefore be constructed so as to cover know-how, business information and technological information where there is both a legitimate interest in keeping them confidential and a legitimate expectation that such confidentiality will be preserved. Furthermore, such know-how or information should have a commercial value, whether actual or potential. Such know-how or information should be considered to have a commercial value, for example, where its unlawful acquisition, use or disclosure is likely to harm the interests of the person lawfully controlling it, in that it undermines that person's scientific and technical potential, business or financial interests, strategic positions or ability to compete. The definition of trade secret excludes trivial information and the experience and skills gained by employees in the normal course of their employment, and also excludes information which is generally known among, or is readily accessible to, persons within the circles that normally deal with the kind of information in question.

(15) It is also important to identify the circumstances in which legal protection of trade secrets is justified. For this reason, it is necessary to establish the conduct and practices which are to be regarded as unlawful acquisition, use or disclosure of a trade secret.

(16) In the interest of innovation and to foster competition, the provisions of this Directive should not create any exclusive right to know-how or information protected as trade secrets. Thus, the independent discovery of the same know-how or information should remain possible. Reverse engineering of a lawfully acquired product should be considered as a lawful means of acquiring information, except when otherwise

contractually agreed. The freedom to enter into such contractual arrangements can, however, be limited by law.

(17) In some industry sectors, where creators and innovators cannot benefit from exclusive rights and where innovation has traditionally relied upon trade secrets, products can nowadays be easily reverse-engineered once in the market. In such cases, those creators and innovators can be victims of practices such as parasitic copying or slavish imitations that free-ride on their reputation and innovation efforts. Some national laws dealing with unfair competition address those practices. While this Directive does not aim to reform or harmonise the law on unfair competition in general, it would be appropriate that the Commission carefully examine the need for Union action in that area.

(18) Furthermore, the acquisition, use or disclosure of trade secrets, whenever imposed or permitted by law, should be treated as lawful for the purposes of this Directive. This concerns, in particular, the acquisition and disclosure of trade secrets in the context of the exercise of the rights of workers' representatives to information, consultation and participation in accordance with Union law and national laws and practices, and the collective defence of the interests of workers and employers, including co-determination, as well as the acquisition or disclosure of a trade secret in the context of statutory audits performed in accordance with Union or national law. However, such treatment of the acquisition of a trade secret as lawful should be without prejudice to any obligation of confidentiality as regards the trade secret or any limitation as to its use that Union or national law imposes on the recipient or acquirer of the information. In particular, this Directive should not release public authorities from the confidentiality obligations to which they are subject in respect of information passed on by trade secret holders, irrespective of whether those obligations are laid down in Union or national law. Such confidentiality obligations include, *inter alia*, the obligations in respect of information forwarded to contracting authorities in the context of procurement procedures, as laid down, for example, in Directive 2014/23/EU of the European Parliament and of the Council (7), Directive 2014/24/EU of the European Parliament and of the Council (8) and Directive 2014/25/EU of the European Parliament and of the Council (9).

(19) While this Directive provides for measures and remedies which can consist of preventing the disclosure of information in order to protect

the confidentiality of trade secrets, it is essential that the exercise of the right to freedom of expression and information which encompasses media freedom and pluralism, as reflected in Article 11 of the Charter of Fundamental Rights of the European Union ('the Charter'), not be restricted, in particular with regard to investigative journalism and the protection of journalistic sources.

(20) The measures, procedures and remedies provided for in this Directive should not restrict whistleblowing activity. Therefore, the protection of trade secrets should not extend to cases in which disclosure of a trade secret serves the public interest, insofar as directly relevant misconduct, wrongdoing or illegal activity is revealed. This should not be seen as preventing the competent judicial authorities from allowing an exception to the application of measures, procedures and remedies in a case where the respondent had every reason to believe in good faith that his or her conduct satisfied the appropriate criteria set out in this Directive.

(21) In line with the principle of proportionality, measures, procedures and remedies intended to protect trade secrets should be tailored to meet the objective of a smooth-functioning internal market for research and innovation, in particular by deterring the unlawful acquisition, use and disclosure of a trade secret. Such tailoring of measures, procedures and remedies should not jeopardise or undermine fundamental rights and freedoms or the public interest, such as public safety, consumer protection, public health and environmental protection, and should be without prejudice to the mobility of workers. In this respect, the measures, procedures and remedies provided for in this Directive are aimed at ensuring that competent judicial authorities take into account factors such as the value of a trade secret, the seriousness of the conduct resulting in the unlawful acquisition, use or disclosure of the trade secret and the impact of such conduct. It should also be ensured that the competent judicial authorities have the discretion to weigh up the interests of the parties to the legal proceedings, as well as the interests of third parties including, where appropriate, consumers.

(22) The smooth-functioning of the internal market would be undermined if the measures, procedures and remedies provided for were used to pursue illegitimate intents incompatible with the objectives of this Directive. Therefore, it is important to empower judicial authorities to adopt appropriate measures with regard to applicants who act

abusively or in bad faith and submit manifestly unfounded applications with, for example, the aim of unfairly delaying or restricting the respondent's access to the market or otherwise intimidating or harassing the respondent.

(23) In the interest of legal certainty, and considering that legitimate trade secret holders are expected to exercise a duty of care as regards the preservation of the confidentiality of their valuable trade secrets and the monitoring of their use, it is appropriate to restrict substantive claims or the possibility of initiating actions for the protection of trade secrets to a limited period. National law should also specify, in a clear and unambiguous manner, from when that period is to begin to run and under what circumstances that period is to be interrupted or suspended.

(24) The prospect of losing the confidentiality of a trade secret in the course of legal proceedings often deters legitimate trade secret holders from instituting legal proceedings to defend their trade secrets, thus jeopardising the effectiveness of the measures, procedures and remedies provided for. For this reason, it is necessary to establish, subject to appropriate safeguards ensuring the right to an effective remedy and to a fair trial, specific requirements aimed at protecting the confidentiality of the litigated trade secret in the course of legal proceedings instituted for its defence. Such protection should remain in force after the legal proceedings have ended and for as long as the information constituting the trade secret is not in the public domain.

(25) Such requirements should include, as a minimum, the possibility of restricting the circle of persons entitled to have access to evidence or hearings, bearing in mind that all such persons should be subject to the confidentiality requirements set out in this Directive, and of publishing only the non-confidential elements of judicial decisions. In this context, considering that assessing the nature of the information which is the subject of a dispute is one of the main purposes of legal proceedings, it is particularly important to ensure both the effective protection of the confidentiality of trade secrets and respect for the right of the parties to those proceedings to an effective remedy and to a fair trial. The restricted circle of persons should therefore consist of at least one natural person from each of the parties as well as the respective lawyers of the parties and, where applicable, other representatives appropriately qualified in accordance with national law in order to

defend, represent or serve the interests of a party in legal proceedings covered by this Directive, who should all have full access to such evidence or hearings. In the event that one of the parties is a legal person, that party should be able to propose a natural person or natural persons who ought to form part of that circle of persons so as to ensure proper representation of that legal person, subject to appropriate judicial control to prevent the objective of the restriction of access to evidence and hearings from being undermined. Such safeguards should not be understood as requiring the parties to be represented by a lawyer or another representative in the course of legal proceedings where such representation is not required by national law. Nor should they be understood as restricting the competence of the courts to decide, in conformity with the applicable rules and practices of the Member State concerned, whether and to what extent relevant court officials should also have full access to evidence and hearings for the exercise of their duties.

(26) The unlawful acquisition, use or disclosure of a trade secret by a third party could have devastating effects on the legitimate trade secret holder, as once publicly disclosed, it would be impossible for that holder to revert to the situation prior to the loss of the trade secret. As a result, it is essential to provide for fast, effective and accessible provisional measures for the immediate termination of the unlawful acquisition, use or disclosure of a trade secret, including where it is used for the provision of services. It is essential that such relief be available without having to await a decision on the merits of the case, while having due respect for the right of defence and the principle of proportionality, and having regard to the characteristics of the case. In certain instances, it should be possible to permit the alleged infringer, subject to the lodging of one or more guarantees, to continue to use the trade secret, in particular where there is little risk that it will enter the public domain. It should also be possible to require guarantees of a level sufficient to cover the costs and the injury caused to the respondent by an unjustified application, particularly where any delay would cause irreparable harm to the legitimate trade secret holder.

(27) For the same reasons, it is also important to provide for definitive measures to prevent unlawful use or disclosure of a trade secret, including where it is used for the provision of services. For such measures to be effective and proportionate, their duration, when

circumstances require a limitation in time, should be sufficient to eliminate any commercial advantage which the third party could have derived from the unlawful acquisition, use or disclosure of the trade secret. In any event, no measure of this type should be enforceable if the information originally covered by the trade secret is in the public domain for reasons that cannot be attributed to the respondent.

(28) It is possible that a trade secret could be used unlawfully to design, produce or market goods, or components thereof, which could be spread across the internal market, thus affecting the commercial interests of the trade secret holder and the functioning of the internal market. In such cases, and when the trade secret in question has a significant impact on the quality, value or price of the goods resulting from that unlawful use or on reducing the cost of, facilitating or speeding up their production or marketing processes, it is important to empower judicial authorities to order effective and appropriate measures with a view to ensuring that those goods are not put on the market or are withdrawn from it. Considering the global nature of trade, it is also necessary that such measures include the prohibition of the importation of those goods into the Union or their storage for the purposes of offering or placing them on the market. Having regard to the principle of proportionality, corrective measures should not necessarily entail the destruction of the goods if other viable options are present, such as depriving the good of its infringing quality or the disposal of the goods outside the market, for example, by means of donations to charitable organisations.

(29) A person could have originally acquired a trade secret in good faith, but only become aware at a later stage, including upon notice served by the original trade secret holder, that that person's knowledge of the trade secret in question derived from sources using or disclosing the relevant trade secret in an unlawful manner. In order to avoid, under those circumstances, the corrective measures or injunctions provided for causing disproportionate harm to that person, Member States should provide for the possibility, in appropriate cases, of pecuniary compensation being awarded to the injured party as an alternative measure. Such compensation should not, however, exceed the amount of royalties or fees which would have been due had that person obtained authorisation to use the trade secret in question, for the period of time for which use of the trade secret could have been prevented by the

original trade secret holder. Nevertheless, where the unlawful use of the trade secret would constitute an infringement of law other than that provided for in this Directive or would be likely to harm consumers, such unlawful use should not be allowed.

(30) In order to avoid a person who knowingly, or with reasonable grounds for knowing, unlawfully acquires, uses or discloses a trade secret being able to benefit from such conduct, and to ensure that the injured trade secret holder, to the extent possible, is placed in the position in which he, she or it would have been had that conduct not taken place, it is necessary to provide for adequate compensation for the prejudice suffered as a result of that unlawful conduct. The amount of damages awarded to the injured trade secret holder should take account of all appropriate factors, such as loss of earnings incurred by the trade secret holder or unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the trade secret holder. As an alternative, for example where, considering the intangible nature of trade secrets, it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as the royalties or fees which would have been due had the infringer requested authorisation to use the trade secret in question. The aim of that alternative method is not to introduce an obligation to provide for punitive damages, but to ensure compensation based on an objective criterion while taking account of the expenses incurred by the trade secret holder, such as the costs of identification and research. This Directive should not prevent Member States from providing in their national law that the liability for damages of employees is restricted in cases where they have acted without intent.

(31) As a supplementary deterrent to future infringers and to contribute to the awareness of the public at large, it is useful to publicise decisions, including, where appropriate, through prominent advertising, in cases concerning the unlawful acquisition, use or disclosure of trade secrets, on the condition that such publication does not result in the disclosure of the trade secret or disproportionately affect the privacy and reputation of a natural person.

(32) The effectiveness of the measures, procedures and remedies available to trade secret holders could be undermined in the event of non-compliance with the relevant decisions adopted by the competent judicial

authorities. For this reason, it is necessary to ensure that those authorities enjoy the appropriate powers of sanction.

(33) In order to facilitate the uniform application of the measures, procedures and remedies provided for in this Directive, it is appropriate to provide for systems of cooperation and the exchange of information as between Member States on the one hand, and between the Member States and the Commission on the other, in particular by creating a network of correspondents designated by Member States. In addition, in order to review whether those measures fulfil their intended objective, the Commission, assisted, as appropriate, by the European Union Intellectual Property Office, should examine the application of this Directive and the effectiveness of the national measures taken.

(34) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter, notably the right to respect for private and family life, the right to protection of personal data, the freedom of expression and information, the freedom to choose an occupation and right to engage in work, the freedom to conduct a business, the right to property, the right to good administration, and in particular the access to files, while respecting business secrecy, the right to an effective remedy and to a fair trial and the right of defence.

(35) It is important that the rights to respect for private and family life and to protection of personal data of any person whose personal data may be processed by the trade secret holder when taking steps to protect a trade secret, or of any person involved in legal proceedings concerning the unlawful acquisition, use or disclosure of trade secrets under this Directive, and whose personal data are processed, be respected. Directive 95/46/EC of the European Parliament and of the Council (10) governs the processing of personal data carried out in the Member States in the context of this Directive and under the supervision of the Member States' competent authorities, in particular the public independent authorities designated by the Member States. Thus, this Directive should not affect the rights and obligations laid down in Directive 95/46/EC, in particular the rights of the data subject to access his or her personal data being processed and to obtain the rectification, erasure or blocking of the data where it is incomplete or inaccurate and, where appropriate, the obligation to process sensitive data in accordance with Article 8(5) of Directive 95/46/EC.

(36) Since the objective of this Directive, namely to achieve a smooth-functioning internal market by means of the establishment of a sufficient and comparable level of redress across the internal market in the event of the unlawful acquisition, use or disclosure of a trade secret, cannot be sufficiently achieved by Member States but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(37) This Directive does not aim to establish harmonised rules for judicial cooperation, jurisdiction, the recognition and enforcement of judgments in civil and commercial matters, or deal with applicable law. Other Union instruments which govern such matters in general terms should, in principle, remain equally applicable to the field covered by this Directive.

(38) This Directive should not affect the application of competition law rules, in particular Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”). The measures, procedures and remedies provided for in this Directive should not be used to restrict unduly competition in a manner contrary to the TFEU.

(39) This Directive should not affect the application of any other relevant law in other areas, including intellectual property rights and the law of contract. However, where the scope of application of Directive 2004/48/EC of the European Parliament and of the Council and the scope of this Directive overlap, this Directive takes precedence as *lex specialis*.

(40) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 of the European Parliament and of the Council and delivered an opinion on 12 March 2014,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I. SUBJECT MATTER AND SCOPE

Article 1

Subject matter and scope

1. This Directive lays down rules on the protection against the unlawful acquisition, use and disclosure of trade secrets.

PART II. INDUSTRIAL PROPERTY RIGHTS

Member States may, in compliance with the provisions of the TFEU, provide for more far-reaching protection against the unlawful acquisition, use or disclosure of trade secrets than that required by this Directive, provided that compliance with Articles 3, 5, 6, Article 7(1), Article 8, the second subparagraph of Article 9(1), Article 9(3) and (4), Article 10(2), Articles 11, 13 and Article 15(3) is ensured.

2. This Directive shall not affect:

(a) the exercise of the right to freedom of expression and information as set out in the Charter, including respect for the freedom and pluralism of the media;

(b) the application of Union or national rules requiring trade secret holders to disclose, for reasons of public interest, information, including trade secrets, to the public or to administrative or judicial authorities for the performance of the duties of those authorities;

(c) the application of Union or national rules requiring or allowing Union institutions and bodies or national public authorities to disclose information submitted by businesses which those institutions, bodies or authorities hold pursuant to, and in compliance with, the obligations and prerogatives set out in Union or national law;

(d) the autonomy of social partners and their right to enter into collective agreements, in accordance with Union law and national laws and practices.

3. Nothing in this Directive shall be understood to offer any ground for restricting the mobility of employees. In particular, in relation to the exercise of such mobility, this Directive shall not offer any ground for:

limiting employees' use of information that does not constitute a trade secret as defined in

(a) point (1) of Article 2;

(b) limiting employees' use of experience and skills honestly acquired in the normal course of their employment;

(c) imposing any additional restrictions on employees in their employment contracts other than restrictions imposed in accordance with Union or national law.

Article 2

Definitions

For the purposes of this Directive, the following definitions apply:

(1) 'trade secret' means information which meets all of the following requirements:

(a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) it has commercial value because it is secret;

(c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret;

(2) 'trade secret holder' means any natural or legal person lawfully controlling a trade secret;

(3) 'infringer' means any natural or legal person who has unlawfully acquired, used or disclosed a trade secret;

(4) 'infringing goods' means goods, the design, characteristics, functioning, production process or marketing of which significantly benefits from trade secrets unlawfully acquired, used or disclosed.

CHAPTER II. ACQUISITION, USE AND DISCLOSURE OF TRADE SECRETS

Article 3

Lawful acquisition, use and disclosure of trade secrets

1. The acquisition of a trade secret shall be considered lawful when the trade secret is obtained by any of the following means:

(a) independent discovery or creation;

(b) observation, study, disassembly or testing of a product or object that has been made available to the public or that is lawfully in the possession of the acquirer of the information who is free from any legally valid duty to limit the acquisition of the trade secret;

(c) exercise of the right of workers or workers' representatives to information and consultation in accordance with Union law and national laws and practices;

(d) any other practice which, under the circumstances, is in conformity with honest commercial practices.

2. The acquisition, use or disclosure of a trade secret shall be considered lawful to the extent that such acquisition, use or disclosure is required or allowed by Union or national law.

Article 4

Unlawful acquisition, use and disclosure of trade secrets

1. Member States shall ensure that trade secret holders are entitled to apply for the measures, procedures and remedies provided for in this Directive in order to prevent, or obtain redress for, the unlawful acquisition, use or disclosure of their trade secret.

2. The acquisition of a trade secret without the consent of the trade secret holder shall be considered unlawful, whenever carried out by:

(a) unauthorised access to, appropriation of, or copying of any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced;

(b) any other conduct which, under the circumstances, is considered contrary to honest commercial practices.

3. The use or disclosure of a trade secret shall be considered unlawful whenever carried out, without the consent of the trade secret holder, by a person who is found to meet any of the following conditions:

(a) having acquired the trade secret unlawfully;

(b) being in breach of a confidentiality agreement or any other duty not to disclose the trade secret;

(c) being in breach of a contractual or any other duty to limit the use of the trade secret.

4. The acquisition, use or disclosure of a trade secret shall also be considered unlawful whenever a person, at the time of the acquisition, use or disclosure, knew or ought, under the circumstances, to have known that the trade secret had been obtained directly or indirectly from another person who was using or disclosing the trade secret unlawfully within the meaning of paragraph 3.

5. The production, offering or placing on the market of infringing goods, or the importation, export or storage of infringing goods for those purposes, shall also be considered an unlawful use of a trade secret where the person carrying out such activities knew, or ought, under the circumstances, to have known that the trade secret was used unlawfully within the meaning of paragraph 3.

Article 5
Exceptions

Member States shall ensure that an application for the measures, procedures and remedies provided for in this Directive is dismissed where the alleged acquisition, use or disclosure of the trade secret was carried out in any of the following cases:

(a) for exercising the right to freedom of expression and information as set out in the Charter, including respect for the freedom and pluralism of the media;

(b) for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest;

(c) disclosure by workers to their representatives as part of the legitimate exercise by those representatives of their functions in accordance with Union or national law, provided that such disclosure was necessary for that exercise;

(d) for the purpose of protecting a legitimate interest recognised by Union or national law.

CHAPTER III. MEASURES, PROCEDURES AND REMEDIES

Section 1. General provisions

Article 6

General obligation

1. Member States shall provide for the measures, procedures and remedies necessary to ensure the availability of civil redress against the unlawful acquisition, use and disclosure of trade secrets.

2. The measures, procedures and remedies referred to in paragraph 1 shall:

(a) be fair and equitable;

(b) not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays; and

(c) be effective and dissuasive.

Article 7

Proportionality and abuse of process

1. The measures, procedures and remedies provided for in this Directive shall be applied in a manner that:

- (a) is proportionate;
- (b) avoids the creation of barriers to legitimate trade in the internal market; and
- (c) provides for safeguards against their abuse.

2. Member States shall ensure that competent judicial authorities may, upon the request of the respondent, apply appropriate measures as provided for in national law, where an application concerning the unlawful acquisition, use or disclosure of a trade secret is manifestly unfounded and the applicant is found to have initiated the legal proceedings abusively or in bad faith. Such measures may, as appropriate, include awarding damages to the respondent, imposing sanctions on the applicant or ordering the dissemination of information concerning a decision as referred to in Article 15.

Member States may provide that measures as referred to in the first subparagraph are dealt with in separate legal proceedings.

Article 8

Limitation period

1. Member States shall, in accordance with this Article, lay down rules on the limitation periods applicable to substantive claims and actions for the application of the measures, procedures and remedies provided for in this Directive.

The rules referred to in the first subparagraph shall determine when the limitation period begins to run, the duration of the limitation period and the circumstances under which the limitation period is interrupted or suspended.

- 2. The duration of the limitation period shall not exceed 6 years.

Article 9

Preservation of confidentiality of trade secrets in the course of legal proceedings

1. Member States shall ensure that the parties, their lawyers or other representatives, court officials, witnesses, experts and any other person participating in legal proceedings relating to the unlawful

acquisition, use or disclosure of a trade secret, or who has access to documents which form part of those legal proceedings, are not permitted to use or disclose any trade secret or alleged trade secret which the competent judicial authorities have, in response to a duly reasoned application by an interested party, identified as confidential and of which they have become aware as a result of such participation or access. In that regard, Member States may also allow competent judicial authorities to act on their own initiative.

The obligation referred to in the first subparagraph shall remain in force after the legal proceedings have ended. However, such obligation shall cease to exist in any of the following circumstances:

(a) where the alleged trade secret is found, by a final decision, not to meet the requirements set out in point (1) of Article 2; or

(b) where over time, the information in question becomes generally known among or readily accessible to persons within the circles that normally deal with that kind of information.

2. Member States shall also ensure that the competent judicial authorities may, on a duly reasoned application by a party, take specific measures necessary to preserve the confidentiality of any trade secret or alleged trade secret used or referred to in the course of legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret. Member States may also allow competent judicial authorities to take such measures on their own initiative.

The measures referred to in the first subparagraph shall at least include the possibility:

(a) of restricting access to any document containing trade secrets or alleged trade secrets submitted by the parties or third parties, in whole or in part, to a limited number of persons;

(b) of restricting access to hearings, when trade secrets or alleged trade secrets may be disclosed, and the corresponding record or transcript of those hearings to a limited number of persons;

(c) of making available to any person other than those comprised in the limited number of persons referred to in points (a) and (b) a non-confidential version of any judicial decision, in which the passages containing trade secrets have been removed or redacted.

The number of persons referred to in points (a) and (b) of the second subparagraph shall be no greater than necessary in order to ensure compliance with the right of the parties to the legal proceedings to an

effective remedy and to a fair trial, and shall include, at least, one natural person from each party and the respective lawyers or other representatives of those parties to the legal proceedings.

3. When deciding on the measures referred to in paragraph 2 and assessing their proportionality, the competent judicial authorities shall take into account the need to ensure the right to an effective remedy and to a fair trial, the legitimate interests of the parties and, where appropriate, of third parties, and any potential harm for either of the parties, and, where appropriate, for third parties, resulting from the granting or rejection of such measures.

4. Any processing of personal data pursuant to paragraphs 1, 2 or 3 shall be carried out in accordance with Directive 95/46/EC.

Section 2. Provisional and precautionary measures

Article 10

Provisional and precautionary measures

1. Member States shall ensure that the competent judicial authorities may, at the request of the trade secret holder, order any of the following provisional and precautionary measures against the alleged infringer:

(a) the cessation of or, as the case may be, the prohibition of the use or disclosure of the trade secret on a provisional basis;

(b) the prohibition of the production, offering, placing on the market or use of infringing goods, or the importation, export or storage of infringing goods for those purposes;

(c) the seizure or delivery up of the suspected infringing goods, including imported goods, so as to prevent their entry into, or circulation on, the market.

2. Member States shall ensure that the judicial authorities may, as an alternative to the measures referred to in paragraph 1, make the continuation of the alleged unlawful use of a trade secret subject to the lodging of guarantees intended to ensure the compensation of the trade secret holder. Disclosure of a trade secret in return for the lodging of guarantees shall not be allowed.

Article 11

Conditions of application and safeguards

1. Member States shall ensure that the competent judicial authorities have, in respect of the measures referred to in Article 10, the authority to require the applicant to provide evidence that may reasonably be considered available in order to satisfy themselves with a sufficient degree of certainty that:

- (a) a trade secret exists;
- (b) the applicant is the trade secret holder; and
- (c) the trade secret has been acquired unlawfully, is being unlawfully used or disclosed, or unlawful acquisition, use or disclosure of the trade secret is imminent.

2. Member States shall ensure that in deciding on the granting or rejection of the application and assessing its proportionality, the competent judicial authorities shall be required to take into account the specific circumstances of the case, including, where appropriate:

- (a) the value and other specific features of the trade secret;
- (b) the measures taken to protect the trade secret;
- (c) the conduct of the respondent in acquiring, using or disclosing the trade secret;
- (d) the impact of the unlawful use or disclosure of the trade secret;
- (e) the legitimate interests of the parties and the impact which the granting or rejection of the measures could have on the parties;
- (f) the legitimate interests of third parties;
- (g) the public interest; and
- (h) the safeguard of fundamental rights.

3. Member States shall ensure that the measures referred to in Article 10 are revoked or otherwise cease to have effect, upon the request of the respondent, if:

(a) the applicant does not institute legal proceedings leading to a decision on the merits of the case before the competent judicial authority, within a reasonable period determined by the judicial authority ordering the measures where the law of a Member State so permits or, in the absence of such determination, within a period not exceeding 20 working days or 31 calendar days, whichever is the longer; or

(b) the information in question no longer meets the requirements of point (1) of Article 2, for reasons that cannot be attributed to the respondent.

PART II. INDUSTRIAL PROPERTY RIGHTS

4. Member States shall ensure that the competent judicial authorities may make the measures referred to in Article 10 subject to the lodging by the applicant of adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the respondent and, where appropriate, by any other person affected by the measures.

5. Where the measures referred to in Article 10 are revoked on the basis of point (a) of paragraph 3 of this Article, where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no unlawful acquisition, use or disclosure of the trade secret or threat of such conduct, the competent judicial authorities shall have the authority to order the applicant, upon the request of the respondent or of an injured third party, to provide the respondent, or the injured third party, appropriate compensation for any injury caused by those measures.

Member States may provide that the request for compensation referred to in the first subparagraph is dealt with in separate legal proceedings.

Section 3. Measures resulting from a decision on the merits of the case

Article 12

Injunctions and corrective measures

1. Member States shall ensure that, where a judicial decision taken on the merits of the case finds that there has been unlawful acquisition, use or disclosure of a trade secret, the competent judicial authorities may, at the request of the applicant, order one or more of the following measures against the infringer:

(a) the cessation of or, as the case may be, the prohibition of the use or disclosure of the trade secret;

(b) the prohibition of the production, offering, placing on the market or use of infringing goods, or the importation, export or storage of infringing goods for those purposes;

(c) the adoption of the appropriate corrective measures with regard to the infringing goods;

(d) the destruction of all or part of any document, object, material, substance or electronic file containing or embodying the trade secret or,

where appropriate, the delivery up to the applicant of all or part of those documents, objects, materials, substances or electronic files.

2. The corrective measures referred to in point (c) of paragraph 1 shall include:

- (a) recall of the infringing goods from the market;
- (b) depriving the infringing goods of their infringing quality;
- (c) destruction of the infringing goods or, where appropriate, their withdrawal from the market, provided that the withdrawal does not undermine the protection of the trade secret in question.

3. Member States may provide that, when ordering the withdrawal of the infringing goods from the market, their competent judicial authorities may order, at the request of the trade secret holder, that the goods be delivered up to the holder or to charitable organisations.

4. The competent judicial authorities shall order that the measures referred to in points (c) and (d) of paragraph 1 be carried out at the expense of the infringer, unless there are particular reasons for not doing so. Those measures shall be without prejudice to any damages that may be due to the trade secret holder by reason of the unlawful acquisition, use or disclosure of the trade secret.

Article 13

Conditions of application, safeguards and alternative measures

1. Member States shall ensure that, in considering an application for the adoption of the injunctions and corrective measures provided for in Article 12 and assessing their proportionality, the competent judicial authorities shall be required to take into account the specific circumstances of the case, including, where appropriate:

- (a) the value or other specific features of the trade secret;
- (b) the measures taken to protect the trade secret;
- (c) the conduct of the infringer in acquiring, using or disclosing the trade secret;
- (d) the impact of the unlawful use or disclosure of the trade secret;
- (e) the legitimate interests of the parties and the impact which the granting or rejection of the measures could have on the parties;
- (f) the legitimate interests of third parties;
- (g) the public interest; and
- (h) the safeguard of fundamental rights.

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Where the competent judicial authorities limit the duration of the measures referred to in points (a) and (b) of Article 12(1), such duration shall be sufficient to eliminate any commercial or economic advantage that the infringer could have derived from the unlawful acquisition, use or disclosure of the trade secret.

2. Member States shall ensure that the measures referred to in points (a) and (b) of Article 12(1) are revoked or otherwise cease to have effect, upon the request of the respondent, if the information in question no longer meets the requirements of point (1) of Article 2 for reasons that cannot be attributed directly or indirectly to the respondent.

3. Member States shall provide that, at the request of the person liable to be subject to the measures provided for in Article 12, the competent judicial authority may order pecuniary compensation to be paid to the injured party instead of applying those measures if all the following conditions are met:

(a) the person concerned at the time of use or disclosure neither knew nor ought, under the circumstances, to have known that the trade secret was obtained from another person who was using or disclosing the trade secret unlawfully;

(b) execution of the measures in question would cause that person disproportionate harm; and

(c) pecuniary compensation to the injured party appears reasonably satisfactory.

Where pecuniary compensation is ordered instead of the measures referred to in points (a) and (b) of Article 12(1), it shall not exceed the amount of royalties or fees which would have been due, had that person requested authorisation to use the trade secret in question, for the period of time for which use of the trade secret could have been prohibited.

Article 14 Damages

1. Member States shall ensure that the competent judicial authorities, upon the request of the injured party, order an infringer who knew or ought to have known that he, she or it was engaging in unlawful acquisition, use or disclosure of a trade secret, to pay the trade secret holder damages appropriate to the actual prejudice suffered as a result of the unlawful acquisition, use or disclosure of the trade secret.

Member States may limit the liability for damages of employees towards their employers for the unlawful acquisition, use or disclosure of a trade secret of the employer where they act without intent.

2. When setting the damages referred to in paragraph 1, the competent judicial authorities shall take into account all appropriate factors, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the trade secret holder by the unlawful acquisition, use or disclosure of the trade secret.

Alternatively, the competent judicial authorities may, in appropriate cases, set the damages as a lump sum on the basis of elements such as, at a minimum, the amount of royalties or fees which would have been due had the infringer requested authorisation to use the trade secret in question.

Article 15

Publication of judicial decisions

1. Member States shall ensure that, in legal proceedings instituted for the unlawful acquisition, use or disclosure of a trade secret, the competent judicial authorities may order, at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including publishing it in full or in part.

2. Any measure referred to in paragraph 1 of this Article shall preserve the confidentiality of trade secrets as provided for in Article 9.

3. In deciding whether to order a measure referred to in paragraph 1 and when assessing its proportionality, the competent judicial authorities shall take into account, where appropriate, the value of the trade secret, the conduct of the infringer in acquiring, using or disclosing the trade secret, the impact of the unlawful use or disclosure of the trade secret, and the likelihood of further unlawful use or disclosure of the trade secret by the infringer.

The competent judicial authorities shall also take into account whether the information on the infringer would be such as to allow a natural person to be identified and, if so, whether publication of that information would be justified, in particular in the light of the possible

harm that such measure may cause to the privacy and reputation of the infringer.

CHAPTER IV. SANCTIONS, REPORTING AND FINAL PROVISIONS

Article 16

Sanctions for non-compliance with this Directive

Member States shall ensure that the competent judicial authorities may impose sanctions on any person who fails or refuses to comply with any measure adopted pursuant to Articles 9, 10 and 12.

The sanctions provided for shall include the possibility of imposing recurring penalty payments in the event of non-compliance with a measure adopted pursuant to Articles 10 and 12.

The sanctions provided for shall be effective, proportionate and dissuasive.

Article 17

Exchange of information and correspondents

For the purpose of promoting cooperation, including the exchange of information, among Member States and between Member States and the Commission, each Member State shall designate one or more national correspondents for any question relating to the implementation of the measures provided for by this Directive. It shall communicate the details of the national correspondent or correspondents to the other Member States and the Commission.

Article 18

Reports

1. By 9 June 2021, the European Union Intellectual Property Office, in the context of the activities of the European Observatory on Infringements of Intellectual Property Rights, shall prepare an initial report on the litigation trends regarding the unlawful acquisition, use or disclosure of trade secrets pursuant to the application of this Directive.

2. By 9 June 2022, the Commission shall draw up an intermediate report on the application of this Directive, and shall submit it to the European Parliament and to the Council. That report shall take due account of the report referred to in paragraph 1.

The intermediate report shall examine, in particular, the possible effects of the application of this Directive on research and innovation, the mobility of employees and on the exercise of the right to freedom of expression and information.

3. By 9 June 2026, the Commission shall carry out an evaluation of the impact of this Directive and submit a report to the European Parliament and to the Council.

Article 19

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 9 June 2018. They shall immediately communicate the text of those measures to the Commission.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 20

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 21

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 8 June 2016.

**DIRECTIVE (EU) 2015/2436 OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL
of 16 December 2015
to approximate the laws of the Member States
relating to trade marks**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee,

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) A number of amendments should be made to Directive 2008/95/EC of the European Parliament and of the Council. In the interests of clarity, that Directive should be recast.

(2) Directive 2008/95/EC has harmonised central provisions of substantive trade mark law which at the time of adoption were considered as most directly affecting the functioning of the internal market by impeding the free movement of goods and the freedom to provide services in the Union.

(3) Trade mark protection in the Member States coexists with protection available at Union level through European Union trade marks ('EU trade marks') which are unitary in character and valid throughout the Union as laid down in Council Regulation (EC) No 207/2009. The coexistence and balance of trade mark systems at national and Union level in fact constitutes a cornerstone of the Union's approach to intellectual property protection.

(4) Further to the Commission's communication of 16 July 2008 on an industrial property rights strategy for Europe, the Commission carried out a comprehensive evaluation of the overall functioning of the trade mark system in Europe as a whole, covering Union and national levels and the interrelation between the two.

(5) In its conclusions of 25 May 2010 on the future revision of the trade mark system in the European Union, the Council called on the Commission to present proposals for the revision of Regulation (EC) No 207/2009 and Directive 2008/95/EC. The revision of that Directive should include measures to make it more consistent with Regulation (EC) No 207/2009, which would thus reduce the areas of divergence within the trade mark system in Europe as a whole, while maintaining national trade mark protection as an attractive option for applicants. In this context, the complementary relationship between the EU trade mark system and national trade mark systems should be ensured.

(6) The Commission concluded in its communication of 24 May 2011 entitled 'A single market for intellectual property rights' that in order to meet increased demands from stakeholders for faster, higher quality, more streamlined trade mark registration systems, which are also more consistent, user friendly, publicly accessible and technologically up to date, there is a necessity to modernise the trade mark system in the Union as a whole and adapt it to the internet era.

(7) Consultation and evaluation for the purpose of this Directive has revealed that, in spite of the previous partial harmonisation of national laws, there remain areas where further harmonisation could have a positive impact on competitiveness and growth.

(8) In order to serve the objective of fostering and creating a well-functioning internal market and to facilitate acquiring and protecting trade marks in the Union, to the benefit of the growth and the competitiveness of European businesses, in particular small and medium-sized enterprises, it is necessary to go beyond the limited scope of approximation achieved by Directive 2008/95/EC and extend approximation to other aspects of substantive trade mark law governing trade marks protected through registration pursuant to Regulation (EC) No 207/2009.

(9) For the purpose of making trade mark registrations throughout the Union easier to obtain and administer, it is essential to approximate not only provisions of substantive law but also procedural rules. Therefore, the principal procedural rules in the area of trade mark registration in the Member States and in the EU trade mark system should be aligned. As regards procedures under national law, it is sufficient to lay down general principles, leaving the Member States free to establish more specific rules.

PART II. INDUSTRIAL PROPERTY RIGHTS

(10) It is essential to ensure that registered trade marks enjoy the same protection under the legal systems of all the Member States. In line with the extensive protection granted to EU trade marks which have a reputation in the Union, extensive protection should also be granted at national level to all registered trade marks which have a reputation in the Member State concerned.

(11) This Directive should not deprive the Member States of the right to continue to protect trade marks acquired through use but should take them into account only with regard to their relationship with trade marks acquired by registration.

(12) Attainment of the objectives of this approximation of laws requires that the conditions for obtaining and continuing to hold a registered trade mark be, in general, identical in all Member States.

(13) To this end, it is necessary to list examples of signs which are capable of constituting a trade mark, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings. In order to fulfil the objectives of the registration system for trade marks, namely to ensure legal certainty and sound administration, it is also essential to require that the sign is capable of being represented in a manner which is clear, precise, self-contained, easily accessible, intelligible, durable and objective. A sign should therefore be permitted to be represented in any appropriate form using generally available technology, and thus not necessarily by graphic means, as long as the representation offers satisfactory guarantees to that effect.

(14) Furthermore, the grounds for refusal or invalidity concerning the trade mark itself, including the absence of any distinctive character, or concerning conflicts between the trade mark and earlier rights, should be listed in an exhaustive manner, even if some of those grounds are listed as an option for the Member States which should therefore be able to maintain or introduce them in their legislation.

(15) In order to ensure that the levels of protection afforded to geographical indications by Union legislation and national law are applied in a uniform and exhaustive manner in the examination of absolute and relative grounds for refusal throughout the Union, this Directive should include the same provisions in relation to geographical indications as contained in Regulation (EC) No 207/2009. Furthermore, it is appropriate to ensure that the scope of absolute grounds is extended

to also cover protected traditional terms for wine and traditional specialties guaranteed.

(16) The protection afforded by the registered trade mark, the function of which is in particular to guarantee the trade mark as an indication of origin, should be absolute in the event of there being identity between the mark and the corresponding sign and the goods or services. The protection should apply also in the case of similarity between the mark and the sign and the goods or services. It is indispensable to give an interpretation of the concept of similarity in relation to the likelihood of confusion. The likelihood of confusion, the appreciation of which depends on numerous elements and, in particular, on the recognition of the trade mark on the market, the association which can be made with the used or registered sign, the degree of similarity between the trade mark and the sign and between the goods or services identified, should constitute the specific condition for such protection. The ways in which a likelihood of confusion can be established, and in particular the onus of proof in that regard, should be a matter for national procedural rules which should not be prejudiced by this Directive.

(17) In order to ensure legal certainty and full consistency with the principle of priority, under which a registered earlier trade mark takes precedence over later registered trade marks, it is necessary to provide that the enforcement of rights which are conferred by a trade mark should be without prejudice to the rights of proprietors acquired prior to the filing or priority date of the trade mark. Such an approach is in conformity with Article 16(1) of the Agreement on trade-related aspects of intellectual property rights of 15 April 1994 ('TRIPS Agreement').

(18) It is appropriate to provide that an infringement of a trade mark can only be established if there is a finding that the infringing mark or sign is used in the course of trade for the purposes of distinguishing goods or services. Use of the sign for purposes other than for distinguishing goods or services should be subject to the provisions of national law.

(19) The concept of infringement of a trade mark should also comprise the use of the sign as a trade name or similar designation, as long as such use is made for the purposes of distinguishing goods or services.

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(20) In order to ensure legal certainty and full consistency with specific Union legislation, it is appropriate to provide that the proprietor of a trade mark should be entitled to prohibit a third party from using a sign in comparative advertising where such comparative advertising is contrary to Directive 2006/114/EC of the European Parliament and of the Council (5).

(21) In order to strengthen trade mark protection and combat counterfeiting more effectively, and in line with international obligations of the Member States under the World Trade Organisation (WTO) framework, in particular Article V of the General Agreement on Tariffs and Trade on freedom of transit and, as regards generic medicines, the 'Declaration on the TRIPS Agreement and public health' adopted by the Doha WTO Ministerial Conference on 14 November 2001, the proprietor of a trade mark should be entitled to prevent third parties from bringing goods, in the course of trade, into the Member State where the trade mark is registered without being released for free circulation there, where such goods come from third countries and bear without authorisation a trade mark which is identical or essentially identical with the trade mark registered in respect of such goods.

(22) To this effect, it should be permissible for trade mark proprietors to prevent the entry of infringing goods and their placement in all customs situations, including, in particular transit, transshipment, warehousing, free zones, temporary storage, inward processing or temporary admission, also when such goods are not intended to be placed on the market of the Member State concerned. In performing customs controls, the customs authorities should make use of the powers and procedures laid down in Regulation (EU) No 608/2013 of the European Parliament and of the Council (6), also at the request of the right holders. In particular, the customs authorities should carry out the relevant controls on the basis of risk analysis criteria.

(23) In order to reconcile the need to ensure the effective enforcement of trade mark rights with the necessity to avoid hampering the free flow of trade in legitimate goods, the entitlement of the proprietor of the trade mark should lapse where, during the subsequent proceedings initiated before the judicial or other authority competent to take a substantive decision on whether the registered trade mark has been infringed, the declarant or the holder of the goods is able to prove

that the proprietor of the registered trade mark is not entitled to prohibit the placing of the goods on the market in the country of final destination.

(24) Article 28 of Regulation (EU) No 608/2013 provides that a right holder is to be liable for damages towards the holder of the goods where, inter alia, the goods in question are subsequently found not to infringe an intellectual property right.

(25) Appropriate measures should be taken with a view to ensuring the smooth transit of generic medicines. With respect to international non-proprietary names (INN) as globally recognised generic names for active substances in pharmaceutical preparations, it is vital to take due account of the existing limitations on the effect of trade mark rights. Consequently, the proprietor of a trade mark should not have the right to prevent a third party from bringing goods into a Member State where the trade mark is registered without being released for free circulation there based upon similarities between the INN for the active ingredient in the medicines and the trade mark.

(26) In order to enable proprietors of registered trade marks to combat counterfeiting more effectively, they should be entitled to prohibit the affixing of an infringing trade mark to goods, and certain preparatory acts carried out prior to such affixing.

(27) The exclusive rights conferred by a trade mark should not entitle the proprietor to prohibit the use of signs or indications by third parties which are used fairly and thus in accordance with honest practices in industrial and commercial matters. In order to create equal conditions for trade names and trade marks against the background that trade names are regularly granted unrestricted protection against later trade marks, such use should only be considered to include the use of the personal name of the third party. Such use should further permit the use of descriptive or non-distinctive signs or indications in general. Furthermore, the proprietor should not be entitled to prevent the fair and honest use of the mark for the purpose of identifying or referring to the goods or services as those of the proprietor. Use of a trade mark by third parties to draw the consumer's attention to the resale of genuine goods that were originally sold by, or with the consent of, the proprietor of the trade mark in the Union should be considered as being fair as long as it is at the same time in accordance with honest practices in industrial and commercial matters. Use of a trade mark by third parties for the purpose of artistic expression should be considered as being fair as long

as it is at the same time in accordance with honest practices in industrial and commercial matters. Furthermore, this Directive should be applied in a way that ensures full respect for fundamental rights and freedoms, and in particular the freedom of expression.

(28) It follows from the principle of free movement of goods that the proprietor of a trade mark should not be entitled to prohibit its use by a third party in relation to goods which have been put into circulation in the Union, under the trade mark, by him or with his consent, unless the proprietor has legitimate reasons to oppose further commercialisation of the goods.

(29) It is important, for reasons of legal certainty to provide that, without prejudice to his interests as a proprietor of an earlier trade mark, the latter may no longer request a declaration of invalidity or oppose the use of a trade mark subsequent to his own trade mark, of which he has knowingly tolerated the use for a substantial length of time, unless the application for the subsequent trade mark was made in bad faith.

(30) In order to ensure legal certainty and safeguard legitimately acquired trade mark rights, it is appropriate and necessary to provide that, without prejudice to the principle that the later trade mark cannot be enforced against the earlier trade mark, proprietors of earlier trade marks should not be entitled to obtain refusal or invalidation or to oppose the use of a later trade mark if the later trade mark was acquired at a time when the earlier trade mark was liable to be declared invalid or revoked, for example because it had not yet acquired distinctiveness through use, or if the earlier trade mark could not be enforced against the later trade mark because the necessary conditions were not applicable, for example when the earlier mark had not yet obtained a reputation.

(31) Trade marks fulfil their purpose of distinguishing goods or services and allowing consumers to make informed choices only when they are actually used on the market. A requirement of use is also necessary in order to reduce the total number of trade marks registered and protected in the Union and, consequently, the number of conflicts which arise between them. It is therefore essential to require that registered trade marks actually be used in connection with the goods or services for which they are registered, or, if not used in that connection within five years of the date of the completion of the registration procedure, be liable to be revoked.

(32) Consequently, a registered trade mark should only be protected in so far as it is actually used and a registered earlier trade mark should not enable its proprietor to oppose or invalidate a later trade mark if that proprietor has not put his trade mark to genuine use. Furthermore, Member States should provide that a trade mark may not be successfully invoked in infringement proceedings if it is established, as a result of a plea, that the trade mark could be revoked or, when the action is brought against a later right, could have been revoked at the time when the later right was acquired.

(33) It is appropriate to provide that, where the seniority of a national mark or a trade mark registered under international arrangements having effect in the Member State has been claimed for an EU trade mark and the mark providing the basis for the seniority claim has thereafter been surrendered or allowed to lapse, the validity of that mark can still be challenged. Such a challenge should be limited to situations where the mark could have been declared invalid or revoked at the time it was removed from the register.

(34) For reasons of coherence and in order to facilitate the commercial exploitation of trade marks in the Union, the rules applicable to trade marks as objects of property should be aligned to the extent appropriate with those already in place for EU trade marks, and should include rules on assignment and transfer, licensing, rights *in rem* and levy of execution.

(35) Collective trade marks have proven a useful instrument for promoting goods or services with specific common properties. It is therefore appropriate to subject national collective trade marks to rules similar to the rules applicable to European Union collective marks.

(36) In order to improve and facilitate access to trade mark protection and to increase legal certainty and predictability, the procedure for the registration of trade marks in the Member States should be efficient and transparent and should follow rules similar to those applicable to EU trade marks.

(37) In order to ensure legal certainty with regard to the scope of trade mark rights and to facilitate access to trade mark protection, the designation and classification of goods and services covered by a trade mark application should follow the same rules in all Member States and should be aligned to those applicable to EU trade marks. In order to enable the competent authorities and economic operators to determine

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the extent of the trade mark protection sought on the basis of the application alone, the designation of goods and services should be sufficiently clear and precise. The use of general terms should be interpreted as including only goods and services clearly covered by the literal meaning of a term. In the interest of clarity and legal certainty, the Member States' central industrial property offices and the Benelux Office for Intellectual Property should, in cooperation with each other, endeavour to compile a list reflecting their respective administrative practices with regard to the classification of goods and services.

(38) For the purpose of ensuring effective trade mark protection, Member States should make available an efficient administrative opposition procedure, allowing at least the proprietor of earlier trade mark rights and any person authorised under the relevant law to exercise the rights arising from a protected designation of origin or a geographical indication to oppose the registration of a trade mark application. Furthermore, in order to offer efficient means of revoking trademarks or declaring them invalid, Member States should provide for an administrative procedure for revocation or declaration of invalidity within the longer transposition period of seven years, after the entry into force of this Directive.

(39) It is desirable that Member States' central industrial property offices and the Benelux Office for Intellectual Property cooperate with each other and with the European Union Intellectual Property Office in all fields of trade mark registration and administration in order to promote convergence of practices and tools, such as the creation and updating of common or connected databases and portals for consultation and search purposes. The Member States should further ensure that their offices cooperate with each other and with the European Union Intellectual Property Office in all other areas of their activities which are relevant for the protection of trade marks in the Union.

(40) This Directive should not exclude the application to trade marks of provisions of law of the Member States other than trade mark law, such as provisions relating to unfair competition, civil liability or consumer protection.

(41) Member States are bound by the Paris Convention for the Protection of Industrial Property ('the Paris Convention') and the TRIPS Agreement. It is necessary that this Directive be entirely consistent with that Convention and that Agreement. The obligations of the Member

States resulting from that Convention and that Agreement should not be affected by this Directive. Where appropriate, the second paragraph of Article 351 of the Treaty on the Functioning of the European Union should apply.

(42) Since the objectives of this Directive, namely to foster and create a well-functioning internal market and to facilitate the registration, administration and protection of trade marks in the Union to the benefit of growth and competitiveness, cannot be sufficiently achieved by the Member States but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(43) Directive 95/46/EC of the European Parliament and of the Council (7) governs the processing of personal data carried out in the Member States in the context of this Directive.

(44) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 of the European Parliament and of the Council (8) and delivered an opinion on 11 July 2013.

(45) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive amendment as compared with the earlier Directive. The obligation to transpose the provisions which are unchanged arises under the earlier Directive.

(46) This Directive should be without prejudice to the obligations of the Member States under Directive 2008/95/EC relating to the time limit for transposition of Council Directive 89/104/EEC (9) into national law as set out in Part B of Annex I to Directive 2008/95/EC,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER 1. GENERAL PROVISIONS

Article 1

Scope

This Directive applies to every trade mark in respect of goods or services which is the subject of registration or of an application for registration in a Member State as an individual trade mark, a guarantee

or certification mark or a collective mark, or which is the subject of a registration or an application for registration in the Benelux Office for Intellectual Property or of an international registration having effect in a Member State.

Article 2

Definitions

For the purpose of this Directive, the following definitions apply:

- (a) 'office' means the central industrial property office of the Member State or the Benelux Office for Intellectual Property, entrusted with the registration of trade marks;
- (b) 'register' means the register of trade marks kept by an office.

CHAPTER 2. SUBSTANTIVE LAW ON TRADE MARKS

SECTION 1. Signs of which a trade mark may consist

Article 3

Signs of which a trade mark may consist

A trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of:

- (a) distinguishing the goods or services of one undertaking from those of other undertakings; and
- (b) being represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.

SECTION 2. Grounds for refusal or invalidity

Article 4

Absolute grounds for refusal or invalidity

1. The following shall not be registered or, if registered, shall be liable to be declared invalid:

- (a) signs which cannot constitute a trade mark;
- (b) trade marks which are devoid of any distinctive character;
- (c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of

the goods or of rendering of the service, or other characteristics of the goods or services;

(d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade;

(e) signs which consist exclusively of:

(i) the shape, or another characteristic, which results from the nature of the goods themselves;

(ii) the shape, or another characteristic, of goods which is necessary to obtain a technical result;

(iii) the shape, or another characteristic, which gives substantial value to the goods;

(f) trade marks which are contrary to public policy or to accepted principles of morality;

(g) trade marks which are of such a nature as to deceive the public, for instance, as to the nature, quality or geographical origin of the goods or service;

(h) trade marks which have not been authorised by the competent authorities and are to be refused or invalidated pursuant to Article 6ter of the Paris Convention;

(i) trade marks which are excluded from registration pursuant to Union legislation or the national law of the Member State concerned, or to international agreements to which the Union or the Member State concerned is party, providing for protection of designations of origin and geographical indications;

(j) trade marks which are excluded from registration pursuant to Union legislation or international agreements to which the Union is party, providing for protection of traditional terms for wine;

(k) trade marks which are excluded from registration pursuant to Union legislation or international agreements to which the Union is party, providing for protection of traditional specialities guaranteed;

(l) trade marks which consist of, or reproduce in their essential elements, an earlier plant variety denomination registered in accordance with Union legislation or the national law of the Member State concerned, or international agreements to which the Union or the Member State concerned is party, providing protection for plant variety rights, and which are in respect of plant varieties of the same or closely related species.

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2. A trade mark shall be liable to be declared invalid where the application for registration of the trade mark was made in bad faith by the applicant. Any Member State may also provide that such a trade mark is not to be registered.

3. Any Member State may provide that a trade mark is not to be registered or, if registered, is liable to be declared invalid where and to the extent that:

(a) the use of that trade mark may be prohibited pursuant to provisions of law other than trade mark law of the Member State concerned or of the Union;

(b) the trade mark includes a sign of high symbolic value, in particular a religious symbol;

(c) the trade mark includes badges, emblems and escutcheons other than those covered by Article 6ter of the Paris Convention and which are of public interest, unless the consent of the competent authority to their registration has been given in conformity with the law of the Member State.

4. A trade mark shall not be refused registration in accordance with paragraph 1(b), (c) or (d) if, before the date of application for registration, following the use which has been made of it, it has acquired a distinctive character. A trade mark shall not be declared invalid for the same reasons if, before the date of application for a declaration of invalidity, following the use which has been made of it, it has acquired a distinctive character.

5. Any Member State may provide that paragraph 4 is also to apply where the distinctive character was acquired after the date of application for registration but before the date of registration.

Article 5

Relative grounds for refusal or invalidity

1. A trade mark shall not be registered or, if registered, shall be liable to be declared invalid where:

(a) it is identical with an earlier trade mark, and the goods or services for which the trade mark is applied for or is registered are identical with the goods or services for which the earlier trade mark is protected;

(b) because of its identity with, or similarity to, the earlier trade mark and the identity or similarity of the goods or services covered by

the trade marks, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association with the earlier trade mark.

2. 'Earlier trade marks' within the meaning of paragraph 1 means:

(a) trade marks of the following kinds with a date of application for registration which is earlier than the date of application for registration of the trade mark, taking account, where appropriate, of the priorities claimed in respect of those trade marks:

(i) EU trade marks;

(ii) trade marks registered in the Member State concerned or, in the case of Belgium, Luxembourg or the Netherlands, at the Benelux Office for Intellectual Property;

(iii) trade marks registered under international arrangements which have effect in the Member State concerned;

(b) EU trade marks which validly claim seniority, in accordance with Regulation (EC) No 207/2009, of a trade mark referred to in points (a)(ii) and (iii), even when the latter trade mark has been surrendered or allowed to lapse;

(c) applications for the trade marks referred to in points (a) and (b), subject to their registration;

(d) trade marks which, on the date of application for registration of the trade mark, or, where appropriate, of the priority claimed in respect of the application for registration of the trade mark, are well known in the Member State concerned, in the sense in which the words 'well-known' are used in Article 6bis of the Paris Convention.

3. Furthermore, a trade mark shall not be registered or, if registered, shall be liable to be declared invalid where:

(a) it is identical with, or similar to, an earlier trade mark irrespective of whether the goods or services for which it is applied or registered are identical with, similar to or not similar to those for which the earlier trade mark is registered, where the earlier trade mark has a reputation in the Member State in respect of which registration is applied for or in which the trade mark is registered or, in the case of an EU trade mark, has a reputation in the Union and the use of the later trade mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark;

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(b) an agent or representative of the proprietor of the trade mark applies for registration thereof in his own name without the proprietor's authorisation, unless the agent or representative justifies his action;

(c) and to the extent that, pursuant to Union legislation or the law of the Member State concerned providing for protection of designations of origin and geographical indications:

(i) an application for a designation of origin or a geographical indication had already been submitted in accordance with Union legislation or the law of the Member State concerned prior to the date of application for registration of the trade mark or the date of the priority claimed for the application, subject to its subsequent registration;

(ii) that designation of origin or geographical indication confers on the person authorised under the relevant law to exercise the rights arising therefrom the right to prohibit the use of a subsequent trade mark.

4. Any Member State may provide that a trade mark is not to be registered or, if registered, is liable to be declared invalid where, and to the extent that:

(a) rights to a non-registered trade mark or to another sign used in the course of trade were acquired prior to the date of application for registration of the subsequent trade mark, or the date of the priority claimed for the application for registration of the subsequent trade mark, and that non-registered trade mark or other sign confers on its proprietor the right to prohibit the use of a subsequent trade mark;

(b) the use of the trade mark may be prohibited by virtue of an earlier right, other than the rights referred to in paragraph 2 and point (a) of this paragraph, and in particular:

- (i) a right to a name;
- (ii) a right of personal portrayal;
- (iii) a copyright;
- (iv) an industrial property right;

(c) the trade mark is liable to be confused with an earlier trade mark protected abroad, provided that, at the date of the application, the applicant was acting in bad faith.

5. The Member States shall ensure that in appropriate circumstances there is no obligation to refuse registration or to declare a trade mark invalid where the proprietor of the earlier trade mark or other earlier right consents to the registration of the later trade mark.

6. Any Member State may provide that, by way of derogation from paragraphs 1 to 5, the grounds for refusal of registration or invalidity in force in that Member State prior to the date of the entry into force of the provisions necessary to comply with Directive 89/104/EEC are to apply to trade marks for which an application has been made prior to that date.

Article 6

Establishment a posteriori of invalidity or revocation of a trade mark

Where the seniority of a national trade mark or of a trade mark registered under international arrangements having effect in the Member State, which has been surrendered or allowed to lapse, is claimed for an EU trade mark, the invalidity or revocation of the trade mark providing the basis for the seniority claim may be established *a posteriori*, provided that the invalidity or revocation could have been declared at the time the mark was surrendered or allowed to lapse. In such a case, the seniority shall cease to produce its effects.

Article 7

Grounds for refusal or invalidity relating to only some of the goods or services

Where grounds for refusal of registration or for invalidity of a trade mark exist in respect of only some of the goods or services for which that trade mark has been applied or registered, refusal of registration or invalidity shall cover those goods or services only.

Article 8

Lack of distinctive character or of reputation of an earlier trade mark precluding a declaration of invalidity of a registered trade mark

An application for a declaration of invalidity on the basis of an earlier trade mark shall not succeed at the date of application for invalidation if it would not have been successful at the filing date or the priority date of the later trade mark for any of the following reasons:

(a) the earlier trade mark, liable to be declared invalid pursuant to Article 4(1)(b), (c) or (d), had not yet acquired a distinctive character as referred to in Article 4(4);

(b) the application for a declaration of invalidity is based on Article 5(1)(b) and the earlier trade mark had not yet become sufficiently distinctive to support a finding of likelihood of confusion within the meaning of Article 5(1)(b);

(c) the application for a declaration of invalidity is based on Article 5(3)(a) and the earlier trade mark had not yet acquired a reputation within the meaning of Article 5(3)(a).

Article 9

Preclusion of a declaration of invalidity due to acquiescence

1. Where, in a Member State, the proprietor of an earlier trade mark as referred to in Article 5(2) or Article 5(3)(a) has acquiesced, for a period of five successive years, in the use of a later trade mark registered in that Member State while being aware of such use, that proprietor shall no longer be entitled on the basis of the earlier trade mark to apply for a declaration that the later trade mark is invalid in respect of the goods or services for which the later trade mark has been used, unless registration of the later trade mark was applied for in bad faith.

2. Member States may provide that paragraph 1 of this Article is to apply to the proprietor of any other earlier right referred to in Article 5(4)(a) or (b).

3. In the cases referred to in paragraphs 1 and 2, the proprietor of a later registered trade mark shall not be entitled to oppose the use of the earlier right, even though that right may no longer be invoked against the later trade mark.

SECTION 3. Rights conferred and limitations

Article 10

Rights conferred by a trade mark

1. The registration of a trade mark shall confer on the proprietor exclusive rights therein.

2. Without prejudice to the rights of proprietors acquired before the filing date or the priority date of the registered trade mark, the proprietor of that registered trade mark shall be entitled to prevent all third parties not having his consent from using in the course of trade, in relation to goods or services, any sign where:

(a) the sign is identical with the trade mark and is used in relation to goods or services which are identical with those for which the trade mark is registered;

(b) the sign is identical with, or similar to, the trade mark and is used in relation to goods or services which are identical with, or similar to, the goods or services for which the trade mark is registered, if there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark;

(c) the sign is identical with, or similar to, the trade mark irrespective of whether it is used in relation to goods or services which are identical with, similar to, or not similar to, those for which the trade mark is registered, where the latter has a reputation in the Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.

3. The following, in particular, may be prohibited under paragraph 2:

(a) affixing the sign to the goods or to the packaging thereof;

(b) offering the goods or putting them on the market, or stocking them for those purposes, under the sign, or offering or supplying services thereunder;

(c) importing or exporting the goods under the sign;

(d) using the sign as a trade or company name or part of a trade or company name;

(e) using the sign on business papers and in advertising;

(f) using the sign in comparative advertising in a manner that is contrary to Directive 2006/114/EC.

4. Without prejudice to the rights of proprietors acquired before the filing date or the priority date of the registered trade mark, the proprietor of that registered trade mark shall also be entitled to prevent all third parties from bringing goods, in the course of trade, into the Member State where the trade mark is registered, without being released for free circulation there, where such goods, including the packaging thereof, come from third countries and bear without authorisation a trade mark which is identical with the trade mark registered in respect of such goods, or which cannot be distinguished in its essential aspects from that trade mark.

The entitlement of the trade mark proprietor pursuant to the first subparagraph shall lapse if, during the proceedings to determine whether the registered trade mark has been infringed, initiated in accordance with Regulation (EU) No 608/2013, evidence is provided by the declarant or the holder of the goods that the proprietor of the registered trade mark is not entitled to prohibit the placing of the goods on the market in the country of final destination.

5. Where, under the law of a Member State, the use of a sign under the conditions referred to in paragraph 2 (b) or (c) could not be prohibited before the date of entry into force of the provisions necessary to comply with Directive 89/104/EEC in the Member State concerned, the rights conferred by the trade mark may not be relied on to prevent the continued use of the sign.

6. Paragraphs 1, 2, 3 and 5 shall not affect provisions in any Member State relating to the protection against the use of a sign other than use for the purposes of distinguishing goods or services, where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.

Article 11

The right to prohibit preparatory acts in relation to the use of packaging or other means

Where the risk exists that the packaging, labels, tags, security or authenticity features or devices, or any other means to which the trade mark is affixed, could be used in relation to goods or services and that use would constitute an infringement of the rights of the proprietor of a trade mark under Article 10(2) and (3), the proprietor of that trade mark shall have the right to prohibit the following acts if carried out in the course of trade:

(a) affixing a sign identical with, or similar to, the trade mark on packaging, labels, tags, security or authenticity features or devices, or any other means to which the mark may be affixed;

(b) offering or placing on the market, or stocking for those purposes, or importing or exporting, packaging, labels, tags, security or authenticity features or devices, or any other means to which the mark is affixed.

Article 12

Reproduction of trade marks in dictionaries

If the reproduction of a trade mark in a dictionary, encyclopaedia or similar reference work, in print or electronic form, gives the impression that it constitutes the generic name of the goods or services for which the trade mark is registered, the publisher of the work shall, at the request of the proprietor of the trade mark, ensure that the reproduction of the trade mark is, without delay, and in the case of works in printed form at the latest in the next edition of the publication, accompanied by an indication that it is a registered trade mark.

Article 13

Prohibition of the use of a trade mark registered in the name of an agent or representative

1. Where a trade mark is registered in the name of the agent or representative of a person who is the proprietor of that trade mark, without the proprietor's consent, the latter shall be entitled to do either or both of the following:

- (a) oppose the use of the trade mark by his agent or representative;
- (b) demand the assignment of the trade mark in his favour.

2. Paragraph 1 shall not apply where the agent or representative justifies his action.

Article 14

Limitation of the effects of a trade mark

1. A trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade:

(a) the name or address of the third party, where that third party is a natural person;

(b) signs or indications which are not distinctive or which concern the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of the service, or other characteristics of goods or services;

(c) the trade mark for the purpose of identifying or referring to goods or services as those of the proprietor of that trade mark, in particular, where the use of the trade mark is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts.

2. Paragraph 1 shall only apply where the use made by the third party is in accordance with honest practices in industrial or commercial matters.

3. A trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade, an earlier right which only applies in a particular locality, if that right is recognised by the law of the Member State in question and the use of that right is within the limits of the territory in which it is recognised.

Article 15

Exhaustion of the rights conferred by a trade mark

1. A trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Union under that trade mark by the proprietor or with the proprietor's consent.

2. Paragraph 1 shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialisation of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market.

Article 16

Use of trade marks

1. If, within a period of five years following the date of the completion of the registration procedure, the proprietor has not put the trade mark to genuine use in the Member State in connection with the goods or services in respect of which it is registered, or if such use has been suspended during a continuous five-year period, the trade mark shall be subject to the limits and sanctions provided for in Article 17, Article 19(1), Article 44(1) and (2), and Article 46(3) and (4), unless there are proper reasons for non-use.

2. Where a Member State provides for opposition proceedings following registration, the five-year period referred to in paragraph 1 shall be calculated from the date when the mark can no longer be opposed or, in the event that an opposition has been lodged, from the date when a decision terminating the opposition proceedings became final or the opposition was withdrawn.

3. With regard to trade marks registered under international arrangements and having effect in the Member State, the five-year period referred to in paragraph 1 shall be calculated from the date when

the mark can no longer be rejected or opposed. Where an opposition has been lodged or when an objection on absolute or relative grounds has been notified, the period shall be calculated from the date when a decision terminating the opposition proceedings or a ruling on absolute or relative grounds for refusal became final or the opposition was withdrawn.

4. The date of commencement of the five-year period, as referred to in paragraphs 1 and 2, shall be entered in the register.

5. The following shall also constitute use within the meaning of paragraph 1:

(a) use of the trade mark in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, regardless of whether or not the trade mark in the form as used is also registered in the name of the proprietor;

(b) affixing of the trade mark to goods or to the packaging thereof in the Member State concerned solely for export purposes.

6. Use of the trade mark with the consent of the proprietor shall be deemed to constitute use by the proprietor.

Article 17

Non-use as defence in infringement proceedings

The proprietor of a trade mark shall be entitled to prohibit the use of a sign only to the extent that the proprietor's rights are not liable to be revoked pursuant to Article 19 at the time the infringement action is brought. If the defendant so requests, the proprietor of the trade mark shall furnish proof that, during the five-year period preceding the date of bringing the action, the trade mark has been put to genuine use as provided in Article 16 in connection with the goods or services in respect of which it is registered and which are cited as justification for the action, or that there are proper reasons for non-use, provided that the registration procedure of the trade mark has at the date of bringing the action been completed for not less than five years.

Article 18

Intervening right of the proprietor of a later registered trade mark as defence in infringement proceedings

1. In infringement proceedings, the proprietor of a trade mark shall not be entitled to prohibit the use of a later registered mark where that

later trade mark would not be declared invalid pursuant to Article 8, Article 9(1) or (2) or Article 46(3).

2. In infringement proceedings, the proprietor of a trade mark shall not be entitled to prohibit the use of a later registered EU trade mark where that later trade mark would not be declared invalid pursuant to Article 53(1), (3) or (4), 54(1) or (2) or 57(2) of Regulation (EC) No 207/2009.

3. Where the proprietor of a trade mark is not entitled to prohibit the use of a later registered trade mark pursuant to paragraph 1 or 2, the proprietor of that later registered trade mark shall not be entitled to prohibit the use of the earlier trade mark in infringement proceedings, even though that earlier right may no longer be invoked against the later trade mark.

SECTION 4. Revocation of trade mark rights

Article 19

Absence of genuine use as ground for revocation

1. A trade mark shall be liable to revocation if, within a continuous five-year period, it has not been put to genuine use in the Member State in connection with the goods or services in respect of which it is registered, and there are no proper reasons for non-use.

2. No person may claim that the proprietor's rights in a trade mark should be revoked where, during the interval between expiry of the five-year period and filing of the application for revocation, genuine use of the trade mark has been started or resumed.

3. The commencement or resumption of use within the three-month period preceding the filing of the application for revocation which began at the earliest on expiry of the continuous five-year period of non-use shall be disregarded where preparations for the commencement or resumption occur only after the proprietor becomes aware that the application for revocation may be filed.

Article 20

Trade mark having become generic or misleading indication as grounds for revocation

A trade mark shall be liable to revocation if, after the date on which it was registered:

(a) as a result of acts or inactivity of the proprietor, it has become the common name in the trade for a product or service in respect of which it is registered;

(b) as a result of the use made of it by the proprietor of the trade mark or with the proprietor's consent in respect of the goods or services for which it is registered, it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services.

Article 21

Revocation relating to only some of the goods or services

Where grounds for revocation of a trade mark exist in respect of only some of the goods or services for which that trade mark has been registered, revocation shall cover those goods or services only.

SECTION 5. Trade marks as objects of property

Article 22

Transfer of registered trade marks

1. A trade mark may be transferred, separately from any transfer of the undertaking, in respect of some or all of the goods or services for which it is registered.

2. A transfer of the whole of the undertaking shall include the transfer of the trade mark except where there is agreement to the contrary or circumstances clearly dictate otherwise. This provision shall apply to the contractual obligation to transfer the undertaking.

3. Member States shall have procedures in place to allow for the recordal of transfers in their registers.

Article 23

Rights in rem

1. A trade mark may, independently of the undertaking, be given as security or be the subject of rights *in rem*.

2. Member States shall have procedures in place to allow for the recordal of rights *in rem* in their registers.

Article 24

Levy of execution

1. A trade mark may be levied in execution.

PART II. INDUSTRIAL PROPERTY RIGHTS

2. Member States shall have procedures in place to allow for the recordal of levy of execution in their registers.

Article 25

Licensing

1. A trade mark may be licensed for some or all of the goods or services for which it is registered and for the whole or part of the Member State concerned. A licence may be exclusive or non-exclusive.

2. The proprietor of a trade mark may invoke the rights conferred by that trade mark against a licensee who contravenes any provision in his licensing contract with regard to:

- (a) its duration;
- (b) the form covered by the registration in which the trade mark may be used;
- (c) the scope of the goods or services for which the licence is granted;
- (d) the territory in which the trade mark may be affixed; or
- (e) the quality of the goods manufactured or of the services provided by the licensee.

3. Without prejudice to the provisions of the licensing contract, the licensee may bring proceedings for infringement of a trade mark only if its proprietor consents thereto. However, the holder of an exclusive licence may bring such proceedings if the proprietor of the trade mark, after formal notice, does not himself bring infringement proceedings within an appropriate period.

4. A licensee shall, for the purpose of obtaining compensation for damage suffered by him, be entitled to intervene in infringement proceedings brought by the proprietor of the trade mark.

5. Member States shall have procedures in place to allow for the recordal of licences in their registers.

Article 26

Applications for a trade mark as an object of property

Articles 22 to 25 shall apply to applications for trade marks.

**SECTION 6. Guarantee or certification marks
and collective marks**

Article 27

Definitions

For the purposes of this Directive, the following definitions apply:

(a) ‘guarantee or certification mark’ means a trade mark which is described as such when the mark is applied for and is capable of distinguishing goods or services which are certified by the proprietor of the mark in respect of material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics, from goods and services which are not so certified;

(b) ‘collective mark’ means a trade mark which is described as such when the mark is applied for and is capable of distinguishing the goods or services of the members of an association which is the proprietor of the mark from the goods or services of other undertakings.

Article 28

Guarantee or certification marks

1. Member States may provide for the registration of guarantee or certification marks.

2. Any natural or legal person, including institutions, authorities and bodies governed by public law, may apply for guarantee or certification marks provided that such person does not carry on a business involving the supply of goods or services of the kind certified.

Member States may provide that a guarantee or certification mark is not to be registered unless the applicant is competent to certify the goods or services for which the mark is to be registered.

3. Member States may provide that guarantee or certification marks are not to be registered, or are to be revoked or declared invalid, on grounds other than those specified in Articles 4, 19 and 20, where the function of those marks so requires.

4. By way of derogation from Article 4(1)(c), Member States may provide that signs or indications which may serve, in trade, to designate the geographical origin of the goods or services may constitute guarantee or certification marks. Such a guarantee or certification mark shall not entitle the proprietor to prohibit a third party from using in the course of trade such signs or indications, provided that third party uses them in accordance with honest practices in industrial or commercial matters. In

particular, such a mark may not be invoked against a third party who is entitled to use a geographical name.

5. The requirements laid down in Article 16 shall be satisfied where genuine use of a guarantee or certification mark in accordance with Article 16 is made by any person who has the authority to use it.

Article 29

Collective marks

1. Member States shall provide for the registration of collective marks.

2. Associations of manufacturers, producers, suppliers of services or traders, which, under the terms of the law governing them, have the capacity in their own name to have rights and obligations, to make contracts or accomplish other legal acts, and to sue and be sued, as well as legal persons governed by public law, may apply for collective marks.

3. By way of derogation from Article 4(1)(c), Member States may provide that signs or indications which may serve, in trade, to designate the geographical origin of the goods or services may constitute collective marks. Such a collective mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade, such signs or indications, provided that third party uses them in accordance with honest practices in industrial or commercial matters. In particular, such a mark may not be invoked against a third party who is entitled to use a geographical name.

Article 30

Regulations governing use of a collective mark

1. An applicant for a collective mark shall submit the regulations governing its use to the office.

2. The regulations governing use shall specify at least the persons authorised to use the mark, the conditions of membership of the association and the conditions of use of the mark, including sanctions. The regulations governing use of a mark referred to in Article 29(3) shall authorise any person whose goods or services originate in the geographical area concerned to become a member of the association which is the proprietor of the mark, provided that the person fulfils all the other conditions of the regulations.

Article 31

Refusal of an application

1. In addition to the grounds for refusal of a trade mark application provided for in Article 4, where appropriate with the exception of Article 4(1)(c) concerning signs or indications which may serve, in trade, to designate the geographical origin of the goods or services, and Article 5, and without prejudice to the right of an office not to undertake examination *ex officio* of relative grounds, an application for a collective mark shall be refused where the provisions of point (b) of Article 27, Article 29 or Article 30 are not satisfied, or where the regulations governing use of that collective mark are contrary to public policy or to accepted principles of morality.

2. An application for a collective mark shall also be refused if the public is liable to be misled as regards the character or the significance of the mark, in particular if it is likely to be taken to be something other than a collective mark.

3. An application shall not be refused if the applicant, as a result of amendment of the regulations governing use of the collective mark, meets the requirements referred to in paragraphs 1 and 2.

Article 32

Use of collective marks

The requirements of Article 16 shall be satisfied where genuine use of a collective mark in accordance with that Article is made by any person who has authority to use it.

Article 33

Amendments to the regulations governing use of a collective mark

1. The proprietor of a collective mark shall submit to the office any amended regulations governing use.

2. Amendments to the regulations governing use shall be mentioned in the register unless the amended regulations do not satisfy the requirements of Article 30 or involve one of the grounds for refusal referred to in Article 31.

3. For the purposes of this Directive, amendments to the regulations governing use shall take effect only from the date of entry of the mention of those amendments in the register.

Article 34

Persons entitled to bring an action for infringement

1. Article 25(3) and (4) shall apply to every person who has the authority to use a collective mark.

2. The proprietor of a collective mark shall be entitled to claim compensation on behalf of persons who have authority to use the mark where those persons have sustained damage as a result of unauthorised use of the mark.

Article 35

Additional grounds for revocation

In addition to the grounds for revocation provided for in Articles 19 and 20, the rights of the proprietor of a collective mark shall be revoked on the following grounds:

(a) the proprietor does not take reasonable steps to prevent the mark being used in a manner that is incompatible with the conditions of use laid down in the regulations governing use, including any amendments thereto mentioned in the register;

(b) the manner in which the mark has been used by authorised persons has caused it to become liable to mislead the public in the manner referred to in Article 31(2);

(c) an amendment to the regulations governing use of the mark has been mentioned in the register in breach of Article 33(2), unless the proprietor of the mark, by further amending the regulations governing use, complies with the requirements of that Article.

Article 36

Additional grounds for invalidity

In addition to the grounds for invalidity provided for in Article 4, where appropriate with the exception of Article 4(1)(c) concerning signs or indications which may serve, in trade, to designate the geographical origin of the goods or services, and Article 5, a collective mark which is registered in breach of Article 31 shall be declared invalid unless the proprietor of the mark, by amending the regulations governing use, complies with the requirements of Article 31.

CHAPTER 3. PROCEDURES

SECTION 1. Application and registration

Article 37

Application requirements

1. An application for registration of a trade mark shall contain at least all of the following:

- (a) a request for registration;
- (b) information identifying the applicant;
- (c) a list of the goods or services in respect of which the registration is requested;
- (d) a representation of the trade mark, which satisfies the requirements set out in point (b) of Article 3.

2. The application for a trade mark shall be subject to the payment of a fee determined by the Member State concerned.

Article 38

Date of filing

1. The date of filing of a trade mark application shall be the date on which the documents containing the information specified in Article 37(1) are filed with the office by the applicant.

2. Member States may, in addition, provide that the accordance of the date of filing is to be subject to the payment of a fee as referred to in Article 37(2).

Article 39

Designation and classification of goods and services

1. The goods and services in respect of which trade mark registration is applied for shall be classified in conformity with the system of classification established by the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957 ('the Nice Classification').

2. The goods and services for which protection is sought shall be identified by the applicant with sufficient clarity and precision to enable the competent authorities and economic operators, on that sole basis, to determine the extent of the protection sought.

3. For the purposes of paragraph 2, the general indications included in the class headings of the Nice Classification or other general terms

may be used, provided that they comply with the requisite standards of clarity and precision set out in this Article.

4. The office shall reject an application in respect of indications or terms which are unclear or imprecise, where the applicant does not suggest an acceptable wording within a period set by the office to that effect.

5. The use of general terms, including the general indications of the class headings of the Nice Classification, shall be interpreted as including all the goods or services clearly covered by the literal meaning of the indication or term. The use of such terms or indications shall not be interpreted as comprising a claim to goods or services which cannot be so understood.

6. Where the applicant requests registration for more than one class, the applicant shall group the goods and services according to the classes of the Nice Classification, each group being preceded by the number of the class to which that group of goods or services belongs, and shall present them in the order of the classes.

7. Goods and services shall not be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification. Goods and services shall not be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

Article 40

Observations by third parties

1. Member States may provide that prior to registration of a trade mark, any natural or legal person and any group or body representing manufacturers, producers, suppliers of services, traders or consumers may submit to the office written observations, explaining on which grounds the trade mark should not be registered *ex officio*.

Persons and groups or bodies, as referred to in the first subparagraph, shall not be parties to the proceedings before the office.

2. In addition to the grounds referred to in paragraph 1 of this Article, any natural or legal person and any group or body representing manufacturers, producers, suppliers of services, traders or consumers may submit to the office written observations based on the particular grounds on which the application for a collective mark should be refused

under Article 31(1) and (2). This provision may be extended to cover certification and guarantee marks where regulated in Member States.

Article 41

Division of applications and registrations

The applicant or proprietor may divide a national trade mark application or registration into two or more separate applications or registrations by sending a declaration to the office and indicating for each divisional application or registration the goods or services covered by the original application or registration which are to be covered by the divisional applications or registrations.

Article 42

Class fees

Member States may provide that the application and renewal of a trade mark is to be subject to an additional fee for each class of goods and services beyond the first class.

**SECTION 2. Procedures for opposition,
revocation and invalidity**

Article 43

Opposition procedure

1. Member States shall provide for an efficient and expeditious administrative procedure before their offices for opposing the registration of a trade mark application on the grounds provided for in Article 5.

2. The administrative procedure referred to in paragraph 1 of this Article shall at least provide that the proprietor of an earlier trade mark as referred to in Article 5(2) and Article 5(3)(a), and the person authorised under the relevant law to exercise the rights arising from a protected designation of origin or geographical indication as referred to in Article 5(3)(c) shall be entitled to file a notice of opposition. A notice of opposition may be filed on the basis of one or more earlier rights, provided that they all belong to the same proprietor, and on the basis of part or the totality of the goods or services in respect of which the earlier right is protected or applied for, and may be directed against part or the totality of the goods or services in respect of which the contested mark is applied for.

3. The parties shall be granted, at their joint request, a minimum of two months in the opposition proceedings in order to allow for the possibility of a friendly settlement between the opposing party and the applicant.

Article 44

Non-use as defence in opposition proceedings

1. In opposition proceedings pursuant to Article 43, where at the filing date or date of priority of the later trade mark, the five-year period within which the earlier trade mark must have been put to genuine use as provided for in Article 16 had expired, at the request of the applicant, the proprietor of the earlier trade mark who has given notice of opposition shall furnish proof that the earlier trade mark has been put to genuine use as provided for in Article 16 during the five-year period preceding the filing date or date of priority of the later trade mark, or that proper reasons for non-use existed. In the absence of proof to this effect, the opposition shall be rejected.

2. If the earlier trade mark has been used in relation to only part of the goods or services for which it is registered, it shall, for the purpose of the examination of the opposition as provided for in paragraph 1, be deemed to be registered in respect of that part of the goods or services only.

3. Paragraphs 1 and 2 of this Article shall also apply where the earlier trade mark is an EU trade mark. In such a case, the genuine use of the EU trade mark shall be determined in accordance with Article 15 of Regulation (EC) No 207/2009.

Article 45

Procedure for revocation or declaration of invalidity

1. Without prejudice to the right of the parties to appeal to the courts, Member States shall provide for an efficient and expeditious administrative procedure before their offices for the revocation or declaration of invalidity of a trade mark.

2. The administrative procedure for revocation shall provide that the trade mark is to be revoked on the grounds provided for in Articles 19 and 20.

3. The administrative procedure for invalidity shall provide that the trade mark is to be declared invalid at least on the following grounds:

(a) the trade mark should not have been registered because it does not comply with the requirements provided for in Article 4;

(b) the trade mark should not have been registered because of the existence of an earlier right within the meaning of Article 5(1) to (3).

4. The administrative procedure shall provide that at least the following are to be entitled to file an application for revocation or for a declaration of invalidity:

(a) in the case of paragraph 2 and paragraph 3(a), any natural or legal person and any group or body set up for the purpose of representing the interests of manufacturers, producers, suppliers of services, traders or consumers, and which, under the terms of the law governing it, has the capacity to sue in its own name and to be sued;

(b) in the case of paragraph 3(b) of this Article, the proprietor of an earlier trade mark as referred to in Article 5(2) and Article 5(3)(a), and the person authorised under the relevant law to exercise the rights arising from a protected designation of origin or geographical indication as referred to in Article 5(3)(c).

5. An application for revocation or for a declaration of invalidity may be directed against a part or the totality of the goods or services in respect of which the contested mark is registered.

6. An application for a declaration of invalidity may be filed on the basis of one or more earlier rights, provided they all belong to the same proprietor.

Article 46

Non-use as a defence in proceedings seeking a declaration of invalidity

1. In proceedings for a declaration of invalidity based on a registered trade mark with an earlier filing date or priority date, if the proprietor of the later trade mark so requests, the proprietor of the earlier trade mark shall furnish proof that, during the five-year period preceding the date of the application for a declaration of invalidity, the earlier trade mark has been put to genuine use, as provided for in Article 16, in connection with the goods or services in respect of which it is registered and which are cited as justification for the application, or that there are proper reasons for non-use, provided that the registration process of the earlier trade mark has at the date of the application for a declaration of invalidity been completed for not less than five years.

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2. Where, at the filing date or date of priority of the later trade mark, the five-year period within which the earlier trade mark was to have been put to genuine use, as provided for in Article 16, had expired, the proprietor of the earlier trade mark shall, in addition to the proof required under paragraph 1 of this Article, furnish proof that the trade mark was put to genuine use during the five-year period preceding the filing date or date of priority, or that proper reasons for non-use existed.

3. In the absence of the proof referred to in paragraphs 1 and 2, an application for a declaration of invalidity on the basis of an earlier trade mark shall be rejected.

4. If the earlier trade mark has been used in accordance with Article 16 in relation to only part of the goods or services for which it is registered, it shall, for the purpose of the examination of the application for a declaration of invalidity, be deemed to be registered in respect of that part of the goods or services only.

5. Paragraphs 1 to 4 of this Article shall also apply where the earlier trade mark is an EU trade mark. In such a case, genuine use of the EU trade mark shall be determined in accordance with Article 15 of Regulation (EC) No 207/2009.

Article 47

Consequences of revocation and invalidity

1. A registered trade mark shall be deemed not to have had, as from the date of the application for revocation, the effects specified in this Directive, to the extent that the rights of the proprietor have been revoked. An earlier date, on which one of the grounds for revocation occurred, may be fixed in the decision on the application for revocation, at the request of one of the parties.

2. A registered trade mark shall be deemed not to have had, as from the outset, the effects specified in this Directive, to the extent that the trade mark has been declared invalid.

SECTION 3. Duration and renewal of registration

Article 48

Duration of registration

1. Trade marks shall be registered for a period of 10 years from the date of filing of the application.

2. Registration may be renewed in accordance with Article 49 for further 10-year periods.

Article 49

Renewal

1. Registration of a trade mark shall be renewed at the request of the proprietor of the trade mark or any person authorised to do so by law or by contract, provided that the renewal fees have been paid. Member States may provide that receipt of payment of the renewal fees is to be deemed to constitute such a request.

2. The office shall inform the proprietor of the trade mark of the expiry of the registration at least six months before the said expiry. The office shall not be held liable if it fails to give such information.

3. The request for renewal shall be submitted and the renewal fees shall be paid within a period of at least six months immediately preceding the expiry of the registration. Failing that, the request may be submitted within a further period of six months immediately following the expiry of the registration or of the subsequent renewal thereof. The renewal fees and an additional fee shall be paid within that further period.

4. Where the request is submitted or the fees paid in respect of only some of the goods or services for which the trade mark is registered, registration shall be renewed for those goods or services only.

5. Renewal shall take effect from the day following the date on which the existing registration expires. The renewal shall be recorded in the register.

SECTION 4. Communication with the office

Article 50

Communication with the office

Parties to the proceedings or, where appointed, their representatives, shall designate an official address for all official communication with the office. Member States shall have the right to require that such an official address be situated in the European Economic Area.

CHAPTER 4. ADMINISTRATIVE COOPERATION

Article 51

Cooperation in the area of trade mark registration and administration

The offices shall be free to cooperate effectively with each other and with the European Union Intellectual Property Office in order to promote convergence of practices and tools in relation to the examination and registration of trade marks.

Article 52

Cooperation in other areas

The offices shall be free to cooperate effectively with each other and with the European Union Intellectual Property Office in all areas of their activities other than those referred to in Article 51 which are of relevance for the protection of trade marks in the Union.

CHAPTER 5. FINAL PROVISIONS

Article 53

Data protection

The processing of any personal data carried out in the Member States in the framework of this Directive shall be subject to national law implementing Directive 95/46/EC.

Article 54

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 3 to 6, Articles 8 to 14, Articles 16, 17 and 18, Articles 22 to 39, Article 41, Articles 43 to 50 by 14 January 2019. Member States shall bring into force the laws, regulations and administrative provisions to comply with Article 45 by 14 January 2023. They shall immediately communicate the text of those measures to the Commission.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative

provisions to the Directive repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 55

Repeal

Directive 2008/95/EC is repealed with effect from 15 January 2019, without prejudice to the obligations of the Member States relating to the time limit for the transposition into national law of Directive 89/104/EEC set out in Part B of Annex I to Directive 2008/95/EC.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in the Annex.

Article 56

Entry into Force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Articles 1, 7, 15, 19, 20, 21 and 54 to 57 shall apply from 15 January 2019.

Article 57

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 16 December 2015.

**REGULATION (EC) No 816/2006 OF THE EUROPEAN
PARLIAMENT AND
OF THE COUNCIL
of 17 May 2006**

**on compulsory licensing of patents relating to the manufacture
of pharmaceutical products for export to countries with public
health problems**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE
EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,
and in particular Articles 95 and 133 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social
Committee (1),

Acting in accordance with the procedure laid down in Article 251 of
the Treaty (2),

Whereas:

(1) On 14 November 2001 the Fourth Ministerial Conference of the
World Trade Organisation (WTO) adopted the Doha Declaration on the
Agreement on Trade-Related Aspects of Intellectual Property Rights
(TRIPS Agreement) and Public Health. The Declaration recognises that
each WTO Member has the right to grant compulsory licences and the
freedom to determine the grounds upon which such licences are granted.
It also recognises that WTO Members with insufficient or no
manufacturing capacity in the pharmaceutical sector could face
difficulties in making effective use of compulsory licensing.

(2) On 30 August 2003 the WTO General Council, in the light of the
statement read out by its Chairman, adopted the Decision on the
implementation of paragraph 6 of the Doha Declaration on the TRIPS
Agreement and Public Health (the Decision). Subject to certain
conditions, the Decision waives certain obligations concerning the issue
of compulsory licences set out in the TRIPS Agreement in order to
address the needs of WTO Members with insufficient manufacturing
capacity.

(3) Given the Community's active role in the adoption of the
Decision, its commitment made to the WTO to fully contribute to the
implementation of the Decision and its appeal to all WTO Members to

ensure that the conditions are put in place which will allow the system set up by the Decision to operate efficiently, it is important for the Community to implement the Decision in its legal order.

(4) Uniform implementation of the Decision is needed to ensure that the conditions for the granting of compulsory licences for the manufacture and sale of pharmaceutical products, when such products are intended for export, are the same in all Member States and to avoid distortion of competition for operators in the single market. Uniform rules should also be applied to prevent re-importation into the territory of the Community of pharmaceutical products manufactured pursuant to the Decision.

(5) This Regulation is intended to be part of wider European and international action to address public health problems faced by least developed countries and other developing countries, and in particular to improve access to affordable medicines which are safe and effective, including fixed-dose combinations, and whose quality is guaranteed. In that connection, the procedures laid down in Community pharmaceutical legislation guaranteeing the scientific quality of such products will be available, in particular that provided for in Article 58 of Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (3)

(6) As the compulsory licensing system set up by this Regulation is intended to address public health problems, it should be used in good faith. This system should not be used by countries to pursue industrial or commercial policy objectives. This Regulation is designed to create a secure legal framework and to discourage litigation.

(7) As this Regulation is part of wider action to address the issue of access to affordable medicines for developing countries, complementary actions are set out in the Commission Programme for Action: Accelerated action on HIV/AIDS, malaria and tuberculosis in the context of poverty reduction and in the Commission Communication on a Coherent European Policy Framework for External Action to Confront HIV/AIDS, malaria and tuberculosis. Continued urgent progress is necessary, including actions to support research to combat these diseases and to enhance capacity in developing countries.

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(8) It is imperative that products manufactured pursuant to this Regulation reach only those who need them and are not diverted from those for whom they were intended. The issuing of compulsory licences under this Regulation must therefore impose clear conditions upon the licensee as regards the acts covered by the licence, the identification of the pharmaceutical products manufactured under the licence and the countries to which the products will be exported.

(9) Provision should be made for customs action at external borders to deal with products manufactured and sold for export under a compulsory licence which a person attempts to reimport into the territory of the Community.

(10) Where pharmaceutical products produced under a compulsory licence have been seized under this Regulation, the competent authority may, in accordance with national legislation and with a view to ensuring that the intended use is made of the seized pharmaceutical products, decide to send the products to the relevant importing country according to the compulsory licence which has been granted.

(11) To avoid facilitating overproduction and possible diversion of products, the competent authorities should take into account existing compulsory licences for the same products and countries, as well as parallel applications indicated by the applicant.

(12) Since the objectives of this Regulation, in particular the establishment of harmonised procedures for the granting of compulsory licences which contribute to the effective implementation of the system set up by the Decision, cannot be sufficiently achieved by the Member States because of the options available to exporting countries under the Decision and can therefore, by reason of the potential effects on operators in the internal market, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(13) The Community recognises the utmost desirability of promoting the transfer of technology and capacity-building to countries with insufficient or no manufacturing capacity in the pharmaceutical sector, in order to facilitate and increase the production of pharmaceutical products by those countries.

(14) In order to ensure the efficient processing of applications for compulsory licences under this Regulation, Member States should have the ability to prescribe purely formal or administrative requirements, such as rules on the language of the application, the form to be used, the identification of the patent(s) and/or supplementary protection certificate(s) in respect of which a compulsory licence is sought, and rules on applications made in electronic form.

(15) The simple formula for setting remuneration is intended to accelerate the process of granting a compulsory licence in cases of national emergency or other circumstances of extreme urgency or in cases of public non-commercial use under Article 31(b) of the TRIPS Agreement. The figure of 4 % could be used as a reference point for deliberations on adequate remuneration in circumstances other than those listed above,

HAVE ADOPTED THIS REGULATION:

Article 1

Scope

This Regulation establishes a procedure for the grant of compulsory licences in relation to patents and supplementary protection certificates concerning the manufacture and sale of pharmaceutical products, when such products are intended for export to eligible importing countries in need of such products in order to address public health problems.

Member States shall grant a compulsory licence to any person making an application in accordance with Article 6 and subject to the conditions set out in Articles 6 to 10.

Article 2

Definitions

For the purposes of this Regulation, the following definitions shall apply:

(1) 'pharmaceutical product' means any product of the pharmaceutical sector, including medicinal products as defined in Article 1(2) of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (4), active ingredients and diagnostic kits *ex vivo*;

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(2) ‘rights-holder’ means the holder of any patent or supplementary protection certificate in relation to which a compulsory licence has been applied for under this Regulation;

(3) ‘importing country’ means the country to which the pharmaceutical product is to be exported;

(4) ‘competent authority’ for the purposes of Articles 1 to 11, 16 and 17 means any national authority having competence to grant compulsory licences under this Regulation in a given Member State.

Article 3

Competent authority

The competent authority as defined in Article 2(4) shall be that which has competence for the granting of compulsory licences under national patent law, unless the Member State determines otherwise.

Member States shall notify the Commission of the designated competent authority as defined in Article 2(4).

Notifications shall be published in the *Official Journal of the European Union*.

Article 4

Eligible importing countries

The following are eligible importing countries:

(a) any least-developed country appearing as such in the United Nations list;

(b) any member of the WTO, other than the least-developed country members referred to in point (a), that has made a notification to the Council for TRIPs of its intention to use the system as an importer, including whether it will use the system in whole or in a limited way;

(c) any country that is not a member of the WTO, but is listed in the OECD Development Assistance Committee's list of low-income countries with a gross national product per capita of less than USD 745, and has made a notification to the Commission of its intention to use the system as an importer, including whether it will use the system in whole or in a limited way.

However, any WTO member that has made a declaration to the WTO that it will not use the system as an importing WTO member is not an eligible importing country.

Article 5

**Extension to least-developed and developing countries
which are not members of the WTO**

The following provisions shall apply to importing countries eligible under Article 4 which are not WTO members:

(a) the importing country shall make the notification referred to in Article 8(1) directly to the Commission;

(b) the importing country shall, in the notification referred to in Article 8(1), state that it will use the system to address public health problems and not as an instrument to pursue industrial or commercial policy objectives and that it will adopt the measures referred to in paragraph 4 of the Decision;

(c) the competent authority may, at the request of the rights-holder, or on its own initiative if national law allows the competent authority to act on its own initiative, terminate a compulsory licence granted pursuant to this Article if the importing country has failed to honour its obligations referred to in point (b). Before terminating a compulsory licence, the competent authority shall take into account any views expressed by the bodies referred to in Article 6(3)(f).

Article 6

Application for a compulsory licence

1. Any person may submit an application for a compulsory licence under this Regulation to a competent authority in the Member State or States where patents or supplementary protection certificates have effect and cover his intended activities of manufacture and sale for export.

2. If the person applying for a compulsory licence is submitting applications to authorities in more than one country for the same product, he shall indicate that fact in each application, together with details of the quantities and importing countries concerned.

3. The application pursuant to paragraph 1 shall set out the following:

(a) the name and contact details of the applicant and of any agent or representative whom the applicant has appointed to act for him before the competent authority;

(b) the non-proprietary name of the pharmaceutical product or products which the applicant intends to manufacture and sell for export under the compulsory licence;

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(c) the amount of pharmaceutical product which the applicant seeks to produce under the compulsory licence;

(d) the importing country or countries;

(e) where applicable, evidence of prior negotiation with the rights-holder pursuant to Article 9;

(f) evidence of a specific request from:

(i) authorised representatives of the importing country or countries;

or

(ii) a non-governmental organisation acting with the formal authorisation of one or more importing countries; or

(iii) UN bodies or other international health organisations acting with the formal authorisation of one or more importing countries,

(f) indicating the quantity of product required.

4. Purely formal or administrative requirements necessary for the efficient processing of the application may be prescribed under national law. Such requirements shall not add unnecessarily to the costs or burdens placed upon the applicant and, in any event, shall not render the procedure for granting compulsory licences under this Regulation more burdensome than the procedure for the granting of other compulsory licences under national law.

Article 7

Rights of the rights-holder

The competent authority shall notify the rights-holder without delay of the application for a compulsory licence. Before the grant of the compulsory licence, the competent authority shall give the rights-holder an opportunity to comment on the application and to provide the competent authority with any relevant information regarding the application.

Article 8

Verification

1. The competent authority shall verify that:

(a) each importing country cited in the application which is a WTO member has made a notification to the WTO pursuant to the Decision, or

(b) each importing country cited in the application which is not a WTO member has made a notification to the Commission pursuant to

this Regulation in respect of each of the products covered by the application that:

(i) specifies the names and expected quantities of the product(s) needed;

(ii) unless the importing country is a least-developed country, confirms that the country has established that it had insufficient or no manufacturing capacity in the pharmaceutical sector in relation to a particular product or products in one of the ways set out in the Annex to the Decision;

(iii) confirms that where a pharmaceutical product is patented in the territory of the importing country, that importing country has granted or intends to grant a compulsory licence for import of the product concerned in accordance with Article 31 of the TRIPS Agreement and the provisions of the Decision.

This paragraph is without prejudice to the flexibility that least-developed countries have under the Decision of the Council for TRIPS of 27 June 2002.

2. The competent authority shall verify that the quantity of product cited in the application does not exceed that notified to the WTO by an importing country which is a WTO member, or to the Commission by an importing country which is not a WTO member, and that, taking into account other compulsory licences granted elsewhere, the total amount of product authorised to be produced for any importing country does not significantly exceed the amount notified by that country to the WTO, in the case of importing countries which are WTO members, or to the Commission, in the case of importing countries which are not WTO members.

Article 9

Prior negotiation

1. The applicant shall provide evidence to satisfy the competent authority that he has made efforts to obtain authorisation from the rights-holder and that such efforts have not been successful within a period of thirty days before submitting the application.

2. The requirement in paragraph 1 shall not apply in situations of national emergency or other circumstances of extreme urgency or in cases of public non-commercial use under Article 31(b) of the TRIPS Agreement.

Article 10

Compulsory licence conditions

1. The licence granted shall be non-assignable, except with that part of the enterprise or goodwill which enjoys the licence, and non-exclusive. It shall contain the specific conditions set out in paragraphs 2 to 9 to be fulfilled by the licensee.

2. The amount of product(s) manufactured under the licence shall not exceed what is necessary to meet the needs of the importing country or countries cited in the application, taking into account the amount of product(s) manufactured under other compulsory licences granted elsewhere.

3. The duration of the licence shall be indicated.

4. The licence shall be strictly limited to all acts necessary for the purpose of manufacturing the product in question for export and distribution in the country or countries cited in the application. No product made or imported under the compulsory licence shall be offered for sale or put on the market in any country other than that cited in the application, except where an importing country avails itself of the possibilities under subparagraph 6(i) of the Decision to export to fellow members of a regional trade agreement that share the health problem in question.

5. Products made under the licence shall be clearly identified, through specific labelling or marking, as being produced pursuant to this Regulation. The products shall be distinguished from those made by the rights-holder through special packaging and/or special colouring/shaping, provided that such distinction is feasible and does not have a significant impact on price. The packaging and any associated literature shall bear an indication that the product is subject to a compulsory licence under this Regulation, giving the name of the competent authority and any identifying reference number, and specifying clearly that the product is exclusively for export to and distribution in the importing country or countries concerned. Details of the product characteristics shall be made available to the customs authorities of the Member States.

6. Before shipment to the importing country or countries cited in the application, the licensee shall post on a website the following information:

(a) the quantities being supplied under the licence and the importing countries to which they are supplied;

(b) the distinguishing features of the product or products concerned.

The website address shall be communicated to the competent authority.

7. If the product(s) covered by the compulsory licence are patented in the importing countries cited in the application, the product(s) shall only be exported if those countries have issued a compulsory licence for the import, sale and/or distribution of the products.

8. The competent authority may at the request of the rights-holder or on its own initiative, if national law allows the competent authority to act on its own initiative, request access to books and records kept by the licensee, for the sole purpose of checking whether the terms of the licence, and in particular those relating to the final destination of the products, have been met. The books and records shall include proof of exportation of the product, through a declaration of exportation certified by the customs authority concerned, and proof of importation from one of the bodies referred to in Article 6(3)(f).

9. The licensee shall be responsible for the payment of adequate remuneration to the rights-holder as determined by the competent authority as follows:

(a) in the cases referred to in Article 9(2), the remuneration shall be a maximum of 4 % of the total price to be paid by the importing country or on its behalf;

(b) in all other cases, the remuneration shall be determined taking into account the economic value of the use authorised under the licence to the importing country or countries concerned, as well as humanitarian or non-commercial circumstances relating to the issue of the licence.

10. The licence conditions are without prejudice to the method of distribution in the importing country.

Distribution may be carried out for example by any of the bodies listed in Article 6(3)(f) and on commercial or non-commercial terms including completely without charge.

Article 11

Refusal of the application

The competent authority shall refuse an application if any of the conditions set out in Articles 6 to 9 are not met, or if the application does

not contain the elements necessary to allow the competent authority to grant the licence in accordance with Article 10. Before refusing an application, the competent authority shall give the applicant an opportunity to rectify the situation and to be heard.

Article 12
Notification

When a compulsory licence has been granted, the Member State shall notify the Council for TRIPS through the intermediary of the Commission of the grant of the licence, and of the specific conditions attached to it.

The information provided shall include the following details of the licence:

- (a) the name and address of the licensee;
- (b) the product or products concerned;
- (c) the quantity to be supplied;
- (d) the country or countries to which the product or products are to be exported;
- (e) the duration of the licence;
- (f) the address of the website referred to in Article 10(6).

Article 13
Prohibition of importation

1. The import into the Community of products manufactured under a compulsory licence granted pursuant to the Decision and/or this Regulation for the purposes of release for free circulation, re-export, placing under suspensive procedures or placing in a free zone or free warehouse shall be prohibited.

2. Paragraph 1 shall not apply in the case of re-export to the importing country cited in the application and identified in the packaging and documentation associated with the product, or placing under a transit or customs warehouse procedure or in a free zone or free warehouse for the purpose of re-export to that importing country.

Article 14
Action by customs authorities

1. If there are sufficient grounds for suspecting that products manufactured under a compulsory licence granted pursuant to the

Decision and/or this Regulation are being imported into the Community contrary to Article 13(1), customs authorities shall suspend the release of, or detain, the products concerned for the time necessary to obtain a decision of the competent authority on the character of the merchandise. Member States shall ensure that a body has the authority to review whether such importation is taking place. The period of suspension or detention shall not exceed 10 working days unless special circumstances apply, in which case the period may be extended by a maximum of 10 working days. Upon expiry of that period, the products shall be released, provided that all customs formalities have been complied with.

2. The competent authority, the rights-holder and the manufacturer or exporter of the products concerned shall be informed without delay of the suspended release or detention of the products and shall be given all information available with respect to the products concerned. Due account shall be taken of national provisions on the protection of personal data and commercial and industrial secrecy and professional and administrative confidentiality.

The importer, and where appropriate, the exporter shall be given ample opportunity to supply the competent authority with the information which it deems appropriate regarding the products.

3. If it is confirmed that products suspended for release or detained by customs authorities were intended for import into the Community contrary to the prohibition in Article 13(1), the competent authority shall ensure that the products are seized and disposed of in accordance with national legislation.

4. The procedure of suspension or detention or seizure of the goods shall be carried out at the expense of the importer. If it is not possible to recover those expenses from the importer, they may, in accordance with national legislation, be recovered from any other person responsible for the attempted illicit importation.

5. If the products suspended for release or detained by customs authorities are subsequently found not to violate the prohibition in Article 13(1), the customs authorities shall release the products to the consignee, provided that all customs formalities have been complied with.

6. The competent authority shall inform the Commission of any decisions on seizure or destruction adopted pursuant to this Regulation.

Article 15

Personal luggage exception

Articles 13 and 14 shall not apply to goods of a non-commercial nature contained in travellers' personal luggage for personal use within the limits laid down in respect of relief from customs duty.

Article 16

Termination or review of the licence

1. Subject to adequate protection of the legitimate interests of the licensee, a compulsory licence granted pursuant to this Regulation may be terminated by a decision of the competent authority or by one of the bodies referred to in Article 17 if the licence conditions are not respected by the licensee.

The competent authority shall have the authority to review, upon reasoned request by the rights-holder or the licensee, whether the licence conditions have been respected. This review shall be based on the assessment made in the importing country where appropriate.

2. Termination of a licence granted under this Regulation shall be notified to the Council for TRIPS through the intermediary of the Commission.

3. Following termination of the licence, the competent authority, or any other body appointed by the Member State, shall be entitled to establish a reasonable period of time within which the licensee shall arrange for any product in his possession, custody, power or control to be redirected at his expense to countries in need as referred to in Article 4 or otherwise disposed of as prescribed by the competent authority, or by another body appointed by the Member State, in consultation with the rights-holder.

4. When notified by the importing country that the amount of pharmaceutical product has become insufficient to meet its needs, the competent authority may, following an application by the licensee, modify the conditions of the licence permitting the manufacture and export of additional quantities of the product to the extent necessary to meet the needs of the importing country concerned. In such cases the licensee's application shall be processed in accordance with a simplified and accelerated procedure, whereby the information set out in Article 6(3), points (a) and (b), shall not be required provided that the original compulsory licence is identified by the licensee. In situations where

Article 9(1) applies but the derogation set out in Article 9(2) does not apply, no further evidence of negotiation with the rights-holder will be required, provided that the additional amount requested does not exceed 25 % of the amount granted under the original licence.

In situations where Article 9(2) applies, no evidence of negotiation with the rights-holder will be required.

Article 17

Appeals

1. Appeals against any decision of the competent authority, and disputes concerning compliance with the conditions of the licence, shall be heard by the appropriate body responsible under national law.

2. Member States shall ensure that the competent authority and/or the body referred to in paragraph 1 have the power to rule that an appeal against a decision granting a compulsory licence shall have suspensory effect.

Article 18

Safety and efficacy of medicinal products

1. Where the application for a compulsory licence concerns a medicinal product, the applicant may avail himself of:

(a) the scientific opinion procedure as provided for under Article 58 of Regulation (EC) No 726/2004, or

(b) any similar procedures under national law, such as scientific opinions or export certificates intended exclusively for markets outside the Community.

2. If a request for any of the above procedures concerns a product which is a generic of a reference medicinal product which is or has been authorised under Article 6 of Directive 2001/83/EC, the protection periods set out in Article 14(11) of Regulation (EC) No 726/2004 and in Articles 10(1) and 10(5) of Directive 2001/83/EC shall not apply.

Article 19

Review

Three years after the entry into force of this Regulation, and every three years thereafter, the Commission shall present a report to the European Parliament, the Council, and the European Economic and

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Social Committee on the operation of this Regulation including any appropriate plans for amendments. The report shall cover, in particular:

(a) the application of Article 10(9) on determining the remuneration of the rights-holder;

(b) the application of the simplified and accelerated procedure referred to in Article 16(4);

(c) the sufficiency of the requirements under Article 10(5) to prevent trade diversion, and

(d) the contribution this Regulation has made to the implementation of the system established by the Decision.

Article 20

Entry into force

This Regulation shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 17 May 2006.

**DIRECTIVE 98/71/EC OF THE EUROPEAN PARLIAMENT AND
OF THE COUNCIL
of 13 October 1998
on the legal protection of designs**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community and in particular Article 100a thereof,

Having regard to the proposal by the Commission (1),

Having regard to the opinion of the Economic and Social Committee (2),

Acting in accordance with the procedure laid down in Article 189b of the Treaty (3), in the light of the joint text approved by the Conciliation Committee on 29 July 1998,

(1) Whereas the objectives of the Community, as laid down in the Treaty, include laying the foundations of an ever closer union among the peoples of Europe, fostering closer relations between Member States of the Community, and ensuring the economic and social progress of the Community countries by common action to eliminate the barriers which divide Europe; whereas to that end the Treaty provides for the establishment of an internal market characterised by the abolition of obstacles to the free movement of goods and also for the institution of a system ensuring that competition in the internal market is not distorted; whereas an approximation of the laws of the Member States on the legal protection of designs would further those objectives;

(2) Whereas the differences in the legal protection of designs offered by the legislation of the Member States directly affect the establishment and functioning of the internal market as regards goods embodying designs; whereas such differences can distort competition within the internal market;

(3) Whereas it is therefore necessary for the smooth functioning of the internal market to approximate the design protection laws of the Member States;

(4) Whereas, in doing so, it is important to take into consideration the solutions and the advantages with which the Community design system will provide undertakings wishing to acquire design rights;

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(5) Whereas it is unnecessary to undertake a full-scale approximation of the design laws of the Member States, and it will be sufficient if approximation is limited to those national provisions of law which most directly affect the functioning of the internal market; whereas provisions on sanctions, remedies and enforcement should be left to national law; whereas the objectives of this limited approximation cannot be sufficiently achieved by the Member States acting alone;

(6) Whereas Member States should accordingly remain free to fix the procedural provisions concerning registration, renewal and invalidation of design rights and provisions concerning the effects of such invalidity;

(7) Whereas this Directive does not exclude the application to designs of national or Community legislation providing for protection other than that conferred by registration or publication as design, such as legislation relating to unregistered design rights, trade marks, patents and utility models, unfair competition or civil liability;

(8) Whereas, in the absence of harmonisation of copyright law, it is important to establish the principle of cumulation of protection under specific registered design protection law and under copyright law, whilst leaving Member States free to establish the extent of copyright protection and the conditions under which such protection is conferred;

(9) Whereas the attainment of the objectives of the internal market requires that the conditions for obtaining a registered design right be identical in all the Member States; whereas to that end it is necessary to give a unitary definition of the notion of design and of the requirements as to novelty and individual character with which registered design rights must comply;

(10) Whereas it is essential, in order to facilitate the free movement of goods, to ensure in principle that registered design rights confer upon the right holder equivalent protection in all Member States;

(11) Whereas protection is conferred by way of registration upon the right holder for those design features of a product, in whole or in part, which are shown visibly in an application and made available to the public by way of publication or consultation of the relevant file;

(12) Whereas protection should not be extended to those component parts which are not visible during normal use of a product, or to those features of such part which are not visible when the part is mounted, or which would not, in themselves, fulfil the requirements as to novelty and

individual character; whereas features of design which are excluded from protection for these reasons should not be taken into consideration for the purpose of assessing whether other features of the design fulfil the requirements for protection;

(13) Whereas the assessment as to whether a design has individual character should be based on whether the overall impression produced on an informed user viewing the design clearly differs from that produced on him by the existing design corpus, taking into consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs and the degree of freedom of the designer in developing the design;

(14) Whereas technological innovation should not be hampered by granting design protection to features dictated solely by a technical function; whereas it is understood that this does not entail that a design must have an aesthetic quality; whereas, likewise, the interoperability of products of different makes should not be hindered by extending protection to the design of mechanical fittings; whereas features of a design which are excluded from protection for these reasons should not be taken into consideration for the purpose of assessing whether other features of the design fulfil the requirements for protection;

(15) Whereas the mechanical fittings of modular products may nevertheless constitute an important element of the innovative characteristics of modular products and present a major marketing asset and therefore should be eligible for protection;

(16) Whereas a design right shall not subsist in a design which is contrary to public policy or to accepted principles of morality; whereas this Directive does not constitute a harmonisation of national concepts of public policy or accepted principles of morality;

(17) Whereas it is fundamental for the smooth functioning of the internal market to unify the term of protection afforded by registered design rights;

(18) Whereas the provisions of this Directive are without prejudice to the application of the competition rules under Articles 85 and 86 of the Treaty;

(19) Whereas the rapid adoption of this Directive has become a matter of urgency for a number of industrial sectors; whereas full-scale approximation of the laws of the Member States on the use of protected designs for the purpose of permitting the repair of a complex product so

as to restore its original appearance, where the product incorporating the design or to which the design is applied constitutes a component part of a complex product upon whose appearance the protected design is dependent, cannot be introduced at the present stage; whereas the lack of full-scale approximation of the laws of the Member States on the use of protected designs for such repair of a complex product should not constitute an obstacle to the approximation of those other national provisions of design law which most directly affect the functioning of the internal market; whereas for this reason Member States should in the meantime maintain in force any provisions in conformity with the Treaty relating to the use of the design of a component part used for the purpose of the repair of a complex product so as to restore its original appearance, or, if they introduce any new provisions relating to such use, the purpose of these provisions should be only to liberalise the market in such parts; whereas those Member States which, on the date of entry into force of this Directive, do not provide for protection for designs of component parts are not required to introduce registration of designs for such parts; whereas three years after the implementation date the Commission should submit an analysis of the consequences of the provisions of this Directive for Community industry, for consumers, for competition and for the functioning of the internal market; whereas, in respect of component parts of complex products, the analysis should, in particular, consider harmonisation on the basis of possible options, including a remuneration system and a limited term of exclusivity; whereas, at the latest one year after the submission of its analysis, the Commission should, after consultation with the parties most affected, propose to the European Parliament and the Council any changes to this Directive needed to complete the internal market in respect of component parts of complex products, and any other changes which it considers necessary;

(20) Whereas the transitional provision in Article 14 concerning the design of a component part used for the purpose of the repair of a complex product so as to restore its original appearance is in no case to be construed as constituting an obstacle to the free movement of a product which constitutes such a component part;

(21) Whereas the substantive grounds for refusal of registration in those Member States which provide for substantive examination of applications prior to registration, and the substantive grounds for the

invalidation of registered design rights in all the Member States, must be exhaustively enumerated,

HAVE ADOPTED THIS DIRECTIVE:

Article 1
Definitions

For the purpose of this Directive:

(a) ‘design’ means the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation;

(b) ‘product’ means any industrial or handicraft item, including *inter alia* parts intended to be assembled into a complex product, packaging, get-up, graphic symbols and typographic typefaces, but excluding computer programs;

(c) ‘complex product’ means a product which is composed of multiple components which can be replaced permitting disassembly and reassembly of the product.

Article 2
Scope of application

1. This Directive shall apply to:

(a) design rights registered with the central industrial property offices of the Member States;

(b) design rights registered at the Benelux Design Office;

(c) design rights registered under international arrangements which have effect in a Member State;

(d) applications for design rights referred to under (a), (b) and (c).

2. For the purpose of this Directive, design registration shall also comprise the publication following filing of the design with the industrial property office of a Member State in which such publication has the effect of bringing a design right into existence.

Article 3
Protection requirements

1. Member States shall protect designs by registration, and shall confer exclusive rights upon their holders in accordance with the provisions of this Directive.

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2. A design shall be protected by a design right to the extent that it is new and has individual character.

3. A design applied to or incorporated in a product which constitutes a component part of a complex product shall only be considered to be new and to have individual character:

(a) if the component part, once it has been incorporated into the complex product, remains visible during normal use of the latter, and

(b) to the extent that those visible features of the component part fulfil in themselves the requirements as to novelty and individual character.

4. 'Normal use' within the meaning of paragraph (3)(a) shall mean use by the end user, excluding maintenance, servicing or repair work.

Article 4

Novelty

A design shall be considered new if no identical design has been made available to the public before the date of filing of the application for registration or, if priority is claimed, the date of priority. Designs shall be deemed to be identical if their features differ only in immaterial details.

Article 5

Individual character

1. A design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public before the date of filing of the application for registration or, if priority is claimed, the date of priority.

2. In assessing individual character, the degree of freedom of the designer in developing the design shall be taken into consideration.

Article 6

Disclosure

1. For the purpose of applying Articles 4 and 5, a design shall be deemed to have been made available to the public if it has been published following registration or otherwise, or exhibited, used in trade or otherwise disclosed, except where these events could not reasonably have become known in the normal course of business to the circles specialised

in the sector concerned, operating within the Community, before the date of filing of the application for registration or, if priority is claimed, the date of priority. The design shall not, however, be deemed to have been made available to the public for the sole reason that it has been disclosed to a third person under explicit or implicit conditions of confidentiality.

2. A disclosure shall not be taken into consideration for the purpose of applying Articles 4 and 5 if a design for which protection is claimed under a registered design right of a Member State has been made available to the public:

(a) by the designer, his successor in title, or a third person as a result of information provided or action taken by the designer, or his successor in title; and

(b) during the 12-month period preceding the date of filing of the application or, if priority is claimed, the date of priority.

3. Paragraph 2 shall also apply if the design has been made available to the public as a consequence of an abuse in relation to the designer or his successor in title.

Article 7

Designs dictated by their technical function and designs of interconnections

1. A design right shall not subsist in features of appearance of a product which are solely dictated by its technical function.

2. A design right shall not subsist in features of appearance of a product which must necessarily be reproduced in their exact form and dimensions in order to permit the product in which the design is incorporated or to which it is applied to be mechanically connected to or placed in, around or against another product so that either product may perform its function.

3. Notwithstanding paragraph 2, a design right shall, under the conditions set out in Articles 4 and 5, subsist in a design serving the purpose of allowing multiple assembly or connection of mutually interchangeable products within a modular system.

Article 8

Designs contrary to public policy or morality

A design right shall not subsist in a design which is contrary to public policy or to accepted principles of morality.

Article 9

Scope of protection

1. The scope of the protection conferred by a design right shall include any design which does not produce on the informed user a different overall impression.

2. In assessing the scope of protection, the degree of freedom of the designer in developing his design shall be taken into consideration.

Article 10

Term of protection

Upon registration, a design which meets the requirements of Article 3(2) shall be protected by a design right for one or more periods of five years from the date of filing of the application. The right holder may have the term of protection renewed for one or more periods of five years each, up to a total term of 25 years from the date of filing.

Article 11

Invalidity or refusal of registration

1. A design shall be refused registration, or, if the design has been registered, the design right shall be declared invalid:

(a) if the design is not a design within the meaning of Article 1(a); or

(b) if it does not fulfil the requirements of Articles 3 to 8; or

(c) if the applicant for or the holder of the design right is not entitled to it under the law of the Member State concerned; or

(d) if the design is in conflict with a prior design which has been made available to the public after the date of filing of the application or, if priority is claimed, the date of priority, and which is protected from a date prior to the said date by a registered Community design or an application for a registered Community design or by a design right of the Member State concerned, or by an application for such a right.

2. Any Member State may provide that a design shall be refused registration, or, if the design has been registered, that the design right shall be declared invalid:

(a) if a distinctive sign is used in a subsequent design, and Community law or the law of the Member State concerned governing that sign confers on the right holder of the sign the right to prohibit such use;
or

(b) if the design constitutes an unauthorised use of a work protected under the copyright law of the Member State concerned; or

(c) if the design constitutes an improper use of any of the items listed in Article 6b of the Paris Convention for the Protection of Industrial Property, or of badges, emblems and escutcheons other than those covered by Article 6b of the said Convention which are of particular public interest in the Member State concerned.

3. The ground provided for in paragraph 1(c) may be invoked solely by the person who is entitled to the design right under the law of the Member State concerned.

4. The grounds provided for in paragraph 1(d) and in paragraph 2(a) and (b) may be invoked solely by the applicant for or the holder of the conflicting right.

5. The ground provided for in paragraph 2(c) may be invoked solely by the person or entity concerned by the use.

6. Paragraphs 4 and 5 shall be without prejudice to the freedom of Member States to provide that the grounds provided for in paragraphs 1(d) and 2(c) may also be invoked by the appropriate authority of the Member State in question on its own initiative.

7. When a design has been refused registration or a design right has been declared invalid pursuant to paragraph 1(b) or to paragraph 2, the design may be registered or the design right maintained in an amended form, if in that form it complies with the requirements for protection and the identity of the design is retained. Registration or maintenance in an amended form may include registration accompanied by a partial disclaimer by the holder of the design right or entry in the design Register of a court decision declaring the partial invalidity of the design right.

8. Any Member State may provide that, by way of derogation from paragraphs 1 to 7, the grounds for refusal of registration or for invalidation in force in that State prior to the date on which the provisions necessary to comply with this Directive enter into force shall apply to design applications which have been made prior to that date and to resulting registrations.

9. A design right may be declared invalid even after it has lapsed or has been surrendered.

Article 12

Rights conferred by the design right

1. The registration of a design shall confer on its holder the exclusive right to use it and to prevent any third party not having his consent from using it. The aforementioned use shall cover, in particular, the making, offering, putting on the market, importing, exporting or using of a product in which the design is incorporated or to which it is applied, or stocking such a product for those purposes.

2. Where, under the law of a Member State, acts referred to in paragraph 1 could not be prevented before the date on which the provisions necessary to comply with this Directive entered into force, the rights conferred by the design right may not be invoked to prevent continuation of such acts by any person who had begun such acts prior to that date.

Article 13

Limitation of the rights conferred by the design right

1. The rights conferred by a design right upon registration shall not be exercised in respect of:

- (a) acts done privately and for non-commercial purposes;
- (b) acts done for experimental purposes;
- (c) acts of reproduction for the purposes of making citations or of teaching, provided that such acts are compatible with fair trade practice and do not unduly prejudice the normal exploitation of the design, and that mention is made of the source.

2. In addition, the rights conferred by a design right upon registration shall not be exercised in respect of:

- (a) the equipment on ships and aircraft registered in another country when these temporarily enter the territory of the Member State concerned;
- (b) the importation in the Member State concerned of spare parts and accessories for the purpose of repairing such craft;
- (c) the execution of repairs on such craft.

Article 14

Transitional provision

Until such time as amendments to this Directive are adopted on a proposal from the Commission in accordance with the provisions of

Article 18, Member States shall maintain in force their existing legal provisions relating to the use of the design of a component part used for the purpose of the repair of a complex product so as to restore its original appearance and shall introduce changes to those provisions only if the purpose is to liberalise the market for such parts.

Article 15

Exhaustion of rights

The rights conferred by a design right upon registration shall not extend to acts relating to a product in which a design included within the scope of protection of the design right is incorporated or to which it is applied, when the product has been put on the market in the Community by the holder of the design right or with his consent.

Article 16

Relationship to other forms of protection

The provisions of this Directive shall be without prejudice to any provisions of Community law or of the law of the Member State concerned relating to unregistered design rights, trade marks or other distinctive signs, patents and utility models, typefaces, civil liability or unfair competition.

Article 17

Relationship to copyright

A design protected by a design right registered in or in respect of a Member State in accordance with this Directive shall also be eligible for protection under the law of copyright of that State as from the date on which the design was created or fixed in any form. The extent to which, and the conditions under which, such a protection is conferred, including the level of originality required, shall be determined by each Member State.

Article 18

Revision

Three years after the implementation date specified in Article 19, the Commission shall submit an analysis of the consequences of the provisions of this Directive for Community industry, in particular the industrial sectors which are most affected, particularly manufacturers of complex products and component parts, for consumers, for competition

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and for the functioning of the internal market. At the latest one year later the Commission shall propose to the European Parliament and the Council any changes to this Directive needed to complete the internal market in respect of component parts of complex products and any other changes which it considers necessary in light of its consultations with the parties most affected.

Article 19

Implementation

1. Member States shall bring into force the laws, regulations or administrative provisions necessary to comply with this Directive not later than 28 October 2001.

When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field governed by this Directive.

Article 20

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Communities*.

Article 21

Addressees

This Directive is addressed to the Member States.

Done at Luxembourg, 13 October 1998.

**DIRECTIVE 98/44/EC OF THE EUROPEAN PARLIAMENT AND
OF THE COUNCIL
of 6 July 1998
on the legal protection of biotechnological inventions**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE
EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,
and in particular Article 100a thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the Economic and Social Committee,

Acting in accordance with the procedure laid down in Article 189b
of the Treaty,

(1) Whereas biotechnology and genetic engineering are playing an increasingly important role in a broad range of industries and the protection of biotechnological inventions will certainly be of fundamental importance for the Community's industrial development;

(2) Whereas, in particular in the field of genetic engineering, research and development require a considerable amount of high-risk investment and therefore only adequate legal protection can make them profitable;

(3) Whereas effective and harmonised protection throughout the Member States is essential in order to maintain and encourage investment in the field of biotechnology;

(4) Whereas following the European Parliament's rejection of the joint text, approved by the Conciliation Committee, for a European Parliament and Council Directive on the legal protection of biotechnological inventions (4), the European Parliament and the Council have determined that the legal protection of biotechnological inventions requires clarification;

(5) Whereas differences exist in the legal protection of biotechnological inventions offered by the laws and practices of the different Member States; whereas such differences could create barriers to trade and hence impede the proper functioning of the internal market;

(6) Whereas such differences could well become greater as Member States adopt new and different legislation and administrative practices, or whereas national case-law interpreting such legislation develops differently;

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(7) Whereas uncoordinated development of national laws on the legal protection of biotechnological inventions in the Community could lead to further disincentives to trade, to the detriment of the industrial development of such inventions and of the smooth operation of the internal market;

(8) Whereas legal protection of biotechnological inventions does not necessitate the creation of a separate body of law in place of the rules of national patent law; whereas the rules of national patent law remain the essential basis for the legal protection of biotechnological inventions given that they must be adapted or added to in certain specific respects in order to take adequate account of technological developments involving biological material which also fulfil the requirements for patentability;

(9) Whereas in certain cases, such as the exclusion from patentability of plant and animal varieties and of essentially biological processes for the production of plants and animals, certain concepts in national laws based upon international patent and plant variety conventions have created uncertainty regarding the protection of biotechnological and certain microbiological inventions; whereas harmonisation is necessary to clarify the said uncertainty;

(10) Whereas regard should be had to the potential of the development of biotechnology for the environment and in particular the utility of this technology for the development of methods of cultivation which are less polluting and more economical in their use of ground; whereas the patent system should be used to encourage research into, and the application of, such processes;

(11) Whereas the development of biotechnology is important to developing countries, both in the field of health and combating major epidemics and endemic diseases and in that of combating hunger in the world; whereas the patent system should likewise be used to encourage research in these fields; whereas international procedures for the dissemination of such technology in the Third World and to the benefit of the population groups concerned should be promoted;

(12) Whereas the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) (5) signed by the European Community and the Member States, has entered into force and provides that patent protection must be guaranteed for products and processes in all areas of technology;

(13) Whereas the Community's legal framework for the protection of biotechnological inventions can be limited to laying down certain principles as they apply to the patentability of biological material as such, such principles being intended in particular to determine the difference between inventions and discoveries with regard to the patentability of certain elements of human origin, to the scope of protection conferred by a patent on a biotechnological invention, to the right to use a deposit mechanism in addition to written descriptions and lastly to the option of obtaining non-exclusive compulsory licences in respect of interdependence between plant varieties and inventions, and conversely;

(14) Whereas a patent for invention does not authorise the holder to implement that invention, but merely entitles him to prohibit third parties from exploiting it for industrial and commercial purposes; whereas, consequently, substantive patent law cannot serve to replace or render superfluous national, European or international law which may impose restrictions or prohibitions or which concerns the monitoring of research and of the use or commercialisation of its results, notably from the point of view of the requirements of public health, safety, environmental protection, animal welfare, the preservation of genetic diversity and compliance with certain ethical standards;

(15) Whereas no prohibition or exclusion exists in national or European patent law (Munich Convention) which precludes *a priori* the patentability of biological matter;

(16) Whereas patent law must be applied so as to respect the fundamental principles safeguarding the dignity and integrity of the person; whereas it is important to assert the principle that the human body, at any stage in its formation or development, including germ cells, and the simple discovery of one of its elements or one of its products, including the sequence or partial sequence of a human gene, cannot be patented; whereas these principles are in line with the criteria of patentability proper to patent law, whereby a mere discovery cannot be patented;

(17) Whereas significant progress in the treatment of diseases has already been made thanks to the existence of medicinal products derived from elements isolated from the human body and/or otherwise produced, such medicinal products resulting from technical processes aimed at obtaining elements similar in structure to those existing naturally in the human body and whereas, consequently, research aimed at obtaining

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and isolating such elements valuable to medicinal production should be encouraged by means of the patent system;

(18) Whereas, since the patent system provides insufficient incentive for encouraging research into and production of biotechnological medicines which are needed to combat rare or 'orphan' diseases, the Community and the Member States have a duty to respond adequately to this problem;

(19) Whereas account has been taken of Opinion No 8 of the Group of Advisers on the Ethical Implications of Biotechnology to the European Commission;

(20) Whereas, therefore, it should be made clear that an invention based on an element isolated from the human body or otherwise produced by means of a technical process, which is susceptible of industrial application, is not excluded from patentability, even where the structure of that element is identical to that of a natural element, given that the rights conferred by the patent do not extend to the human body and its elements in their natural environment;

(21) Whereas such an element isolated from the human body or otherwise produced is not excluded from patentability since it is, for example, the result of technical processes used to identify, purify and classify it and to reproduce it outside the human body, techniques which human beings alone are capable of putting into practice and which nature is incapable of accomplishing by itself;

(22) Whereas the discussion on the patentability of sequences or partial sequences of genes is controversial; whereas, according to this Directive, the granting of a patent for inventions which concern such sequences or partial sequences should be subject to the same criteria of patentability as in all other areas of technology: novelty, inventive step and industrial application; whereas the industrial application of a sequence or partial sequence must be disclosed in the patent application as filed;

(23) Whereas a mere DNA sequence without indication of a function does not contain any technical information and is therefore not a patentable invention;

(24) Whereas, in order to comply with the industrial application criterion it is necessary in cases where a sequence or partial sequence of a gene is used to produce a protein or part of a protein, to specify which protein or part of a protein is produced or what function it performs;

(25) Whereas, for the purposes of interpreting rights conferred by a patent, when sequences overlap only in parts which are not essential to the invention, each sequence will be considered as an independent sequence in patent law terms;

(26) Whereas if an invention is based on biological material of human origin or if it uses such material, where a patent application is filed, the person from whose body the material is taken must have had an opportunity of expressing free and informed consent thereto, in accordance with national law;

(27) Whereas if an invention is based on biological material of plant or animal origin or if it uses such material, the patent application should, where appropriate, include information on the geographical origin of such material, if known; whereas this is without prejudice to the processing of patent applications or the validity of rights arising from granted patents;

(28) Whereas this Directive does not in any way affect the basis of current patent law, according to which a patent may be granted for any new application of a patented product;

(29) Whereas this Directive is without prejudice to the exclusion of plant and animal varieties from patentability; whereas on the other hand inventions which concern plants or animals are patentable provided that the application of the invention is not technically confined to a single plant or animal variety;

(30) Whereas the concept 'plant variety' is defined by the legislation protecting new varieties, pursuant to which a variety is defined by its whole genome and therefore possesses individuality and is clearly distinguishable from other varieties;

(31) Whereas a plant grouping which is characterised by a particular gene (and not its whole genome) is not covered by the protection of new varieties and is therefore not excluded from patentability even if it comprises new varieties of plants;

(32) Whereas, however, if an invention consists only in genetically modifying a particular plant variety, and if a new plant variety is bred, it will still be excluded from patentability even if the genetic modification is the result not of an essentially biological process but of a biotechnological process;

(33) Whereas it is necessary to define for the purposes of this Directive when a process for the breeding of plants and animals is essentially biological;

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(34) Whereas this Directive shall be without prejudice to concepts of invention and discovery, as developed by national, European or international patent law;

(35) Whereas this Directive shall be without prejudice to the provisions of national patent law whereby processes for treatment of the human or animal body by surgery or therapy and diagnostic methods practised on the human or animal body are excluded from patentability;

(36) Whereas the TRIPs Agreement provides for the possibility that members of the World Trade Organisation may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law;

(37) Whereas the principle whereby inventions must be excluded from patentability where their commercial exploitation offends against *ordre public* or morality must also be stressed in this Directive;

(38) Whereas the operative part of this Directive should also include an illustrative list of inventions excluded from patentability so as to provide national courts and patent offices with a general guide to interpreting the reference to *ordre public* and morality; whereas this list obviously cannot presume to be exhaustive; whereas processes, the use of which offend against human dignity, such as processes to produce chimeras from germ cells or totipotent cells of humans and animals, are obviously also excluded from patentability;

(39) Whereas *ordre public* and morality correspond in particular to ethical or moral principles recognised in a Member State, respect for which is particularly important in the field of biotechnology in view of the potential scope of inventions in this field and their inherent relationship to living matter; whereas such ethical or moral principles supplement the standard legal examinations under patent law regardless of the technical field of the invention;

(40) Whereas there is a consensus within the Community that interventions in the human germ line and the cloning of human beings offends against *ordre public* and morality; whereas it is therefore important to exclude unequivocally from patentability processes for modifying the germ line genetic identity of human beings and processes for cloning human beings;

(41) Whereas a process for cloning human beings may be defined as any process, including techniques of embryo splitting, designed to create a human being with the same nuclear genetic information as another living or deceased human being;

(42) Whereas, moreover, uses of human embryos for industrial or commercial purposes must also be excluded from patentability; whereas in any case such exclusion does not affect inventions for therapeutic or diagnostic purposes which are applied to the human embryo and are useful to it;

(43) Whereas pursuant to Article F(2) of the Treaty on European Union, the Union is to respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law;

(44) Whereas the Commission's European Group on Ethics in Science and New Technologies evaluates all ethical aspects of biotechnology; whereas it should be pointed out in this connection that that Group may be consulted only where biotechnology is to be evaluated at the level of basic ethical principles, including where it is consulted on patent law;

(45) Whereas processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit in terms of research, prevention, diagnosis or therapy to man or animal, and also animals resulting from such processes, must be excluded from patentability;

(46) Whereas, in view of the fact that the function of a patent is to reward the inventor for his creative efforts by granting an exclusive but time-bound right, and thereby encourage inventive activities, the holder of the patent should be entitled to prohibit the use of patented self-reproducing material in situations analogous to those where it would be permitted to prohibit the use of patented, non-self-reproducing products, that is to say the production of the patented product itself;

(47) Whereas it is necessary to provide for a first derogation from the rights of the holder of the patent when the propagating material incorporating the protected invention is sold to a farmer for farming purposes by the holder of the patent or with his consent; whereas that initial derogation must authorise the farmer to use the product of his harvest for further multiplication or propagation on his own farm;

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whereas the extent and the conditions of that derogation must be limited in accordance with the extent and conditions set out in Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (6);

(48) Whereas only the fee envisaged under Community law relating to plant variety rights as a condition for applying the derogation from Community plant variety rights can be required of the farmer;

(49) Whereas, however, the holder of the patent may defend his rights against a farmer abusing the derogation or against a breeder who has developed a plant variety incorporating the protected invention if the latter fails to adhere to his commitments;

(50) Whereas a second derogation from the rights of the holder of the patent must authorise the farmer to use protected livestock for agricultural purposes;

(51) Whereas the extent and the conditions of that second derogation must be determined by national laws, regulations and practices, since there is no Community legislation on animal variety rights;

(52) Whereas, in the field of exploitation of new plant characteristics resulting from genetic engineering, guaranteed access must, on payment of a fee, be granted in the form of a compulsory licence where, in relation to the genus or species concerned, the plant variety represents significant technical progress of considerable economic interest compared to the invention claimed in the patent;

(53) Whereas, in the field of the use of new plant characteristics resulting from new plant varieties in genetic engineering, guaranteed access must, on payment of a fee, be granted in the form of a compulsory licence where the invention represents significant technical progress of considerable economic interest;

(54) Whereas Article 34 of the TRIPs Agreement contains detailed provisions on the burden of proof which is binding on all Member States; whereas, therefore, a provision in this Directive is not necessary;

(55) Whereas following Decision 93/626/EEC (7) the Community is party to the Convention on Biological Diversity of 5 June 1992; whereas, in this regard, Member States must give particular weight to Article 3 and Article 8(j), the second sentence of Article 16(2) and Article 16(5) of the Convention when bringing into force the laws, regulations and administrative provisions necessary to comply with this Directive;

(56) Whereas the Third Conference of the Parties to the Biodiversity Convention, which took place in November 1996, noted in Decision III/17

that ‘further work is required to help develop a common appreciation of the relationship between intellectual property rights and the relevant provisions of the TRIPs Agreement and the Convention on Biological Diversity, in particular on issues relating to technology transfer and conservation and sustainable use of biological diversity and the fair and equitable sharing of benefits arising out of the use of genetic resources, including the protection of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity’,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I. Patentability

Article 1

1. Member States shall protect biotechnological inventions under national patent law. They shall, if necessary, adjust their national patent law to take account of the provisions of this Directive.

2. This Directive shall be without prejudice to the obligations of the Member States pursuant to international agreements, and in particular the TRIPs Agreement and the Convention on Biological Diversity.

Article 2

1. For the purposes of this Directive,

(a) ‘biological material’ means any material containing genetic information and capable of reproducing itself or being reproduced in a biological system;

(b) ‘microbiological process’ means any process involving or performed upon or resulting in microbiological material.

2. A process for the production of plants or animals is essentially biological if it consists entirely of natural phenomena such as crossing or selection.

3. The concept of ‘plant variety’ is defined by Article 5 of Regulation (EC) No 2100/94.

Article 3

1. For the purposes of this Directive, inventions which are new, which involve an inventive step and which are susceptible of industrial application shall be patentable even if they concern a product consisting

of or containing biological material or a process by means of which biological material is produced, processed or used.

2. Biological material which is isolated from its natural environment or produced by means of a technical process may be the subject of an invention even if it previously occurred in nature.

Article 4

1. The following shall not be patentable:

(a) plant and animal varieties;

(b) essentially biological processes for the production of plants or animals.

2. Inventions which concern plants or animals shall be patentable if the technical feasibility of the invention is not confined to a particular plant or animal variety.

3. Paragraph 1(b) shall be without prejudice to the patentability of inventions which concern a microbiological or other technical process or a product obtained by means of such a process.

Article 5

1. The human body, at the various stages of its formation and development, and the simple discovery of one of its elements, including the sequence or partial sequence of a gene, cannot constitute patentable inventions.

2. An element isolated from the human body or otherwise produced by means of a technical process, including the sequence or partial sequence of a gene, may constitute a patentable invention, even if the structure of that element is identical to that of a natural element.

3. The industrial application of a sequence or a partial sequence of a gene must be disclosed in the patent application.

Article 6

1. Inventions shall be considered unpatentable where their commercial exploitation would be contrary to *ordre public* or morality; however, exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation.

2. On the basis of paragraph 1, the following, in particular, shall be considered unpatentable:

(a) processes for cloning human beings;

- (b) processes for modifying the germ line genetic identity of human beings;
- (c) uses of human embryos for industrial or commercial purposes;
- (d) processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit to man or animal, and also animals resulting from such processes.

Article 7

The Commission's European Group on Ethics in Science and New Technologies evaluates all ethical aspects of biotechnology.

CHAPTER II. Scope of protection

Article 8

1. The protection conferred by a patent on a biological material possessing specific characteristics as a result of the invention shall extend to any biological material derived from that biological material through propagation or multiplication in an identical or divergent form and possessing those same characteristics.

2. The protection conferred by a patent on a process that enables a biological material to be produced possessing specific characteristics as a result of the invention shall extend to biological material directly obtained through that process and to any other biological material derived from the directly obtained biological material through propagation or multiplication in an identical or divergent form and possessing those same characteristics.

Article 9

The protection conferred by a patent on a product containing or consisting of genetic information shall extend to all material, save as provided in Article 5(1), in which the product is incorporated and in which the genetic information is contained and performs its function.

Article 10

The protection referred to in Articles 8 and 9 shall not extend to biological material obtained from the propagation or multiplication of biological material placed on the market in the territory of a Member State by the holder of the patent or with his consent, where the multiplication or propagation necessarily results from the application for

which the biological material was marketed, provided that the material obtained is not subsequently used for other propagation or multiplication.

Article 11

1. By way of derogation from Articles 8 and 9, the sale or other form of commercialisation of plant propagating material to a farmer by the holder of the patent or with his consent for agricultural use implies authorisation for the farmer to use the product of his harvest for propagation or multiplication by him on his own farm, the extent and conditions of this derogation corresponding to those under Article 14 of Regulation (EC) No 2100/94.

2. By way of derogation from Articles 8 and 9, the sale or any other form of commercialisation of breeding stock or other animal reproductive material to a farmer by the holder of the patent or with his consent implies authorisation for the farmer to use the protected livestock for an agricultural purpose. This includes making the animal or other animal reproductive material available for the purposes of pursuing his agricultural activity but not sale within the framework or for the purpose of a commercial reproduction activity.

3. The extent and the conditions of the derogation provided for in paragraph 2 shall be determined by national laws, regulations and practices.

CHAPTER III. Compulsory cross-licensing

Article 12

1. Where a breeder cannot acquire or exploit a plant variety right without infringing a prior patent, he may apply for a compulsory licence for non-exclusive use of the invention protected by the patent inasmuch as the licence is necessary for the exploitation of the plant variety to be protected, subject to payment of an appropriate royalty. Member States shall provide that, where such a licence is granted, the holder of the patent will be entitled to a cross-licence on reasonable terms to use the protected variety.

2. Where the holder of a patent concerning a biotechnological invention cannot exploit it without infringing a prior plant variety right, he may apply for a compulsory licence for non-exclusive use of the plant variety protected by that right, subject to payment of an appropriate

royalty. Member States shall provide that, where such a licence is granted, the holder of the variety right will be entitled to a cross-licence on reasonable terms to use the protected invention.

3. Applicants for the licences referred to in paragraphs 1 and 2 must demonstrate that:

(a) they have applied unsuccessfully to the holder of the patent or of the plant variety right to obtain a contractual licence;

(b) the plant variety or the invention constitutes significant technical progress of considerable economic interest compared with the invention claimed in the patent or the protected plant variety.

4. Each Member State shall designate the authority or authorities responsible for granting the licence. Where a licence for a plant variety can be granted only by the Community Plant Variety Office, Article 29 of Regulation (EC) No 2100/94 shall apply.

CHAPTER IV. Deposit, access and re-deposit of a biological material

Article 13

1. Where an invention involves the use of or concerns biological material which is not available to the public and which cannot be described in a patent application in such a manner as to enable the invention to be reproduced by a person skilled in the art, the description shall be considered inadequate for the purposes of patent law unless:

(a) the biological material has been deposited no later than the date on which the patent application was filed with a recognised depository institution. At least the international depository authorities which acquired this status by virtue of Article 7 of the Budapest Treaty of 28 April 1977 on the international recognition of the deposit of micro-organisms for the purposes of patent procedure, hereinafter referred to as the 'Budapest Treaty', shall be recognised;

(b) the application as filed contains such relevant information as is available to the applicant on the characteristics of the biological material deposited;

(c) the patent application states the name of the depository institution and the accession number.

2. Access to the deposited biological material shall be provided through the supply of a sample:

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(a) up to the first publication of the patent application, only to those persons who are authorised under national patent law;

(b) between the first publication of the application and the granting of the patent, to anyone requesting it or, if the applicant so requests, only to an independent expert;

(c) after the patent has been granted, and notwithstanding revocation or cancellation of the patent, to anyone requesting it.

3. The sample shall be supplied only if the person requesting it undertakes, for the term during which the patent is in force:

(a) not to make it or any material derived from it available to third parties; and

(b) not to use it or any material derived from it except for experimental purposes, unless the applicant for or proprietor of the patent, as applicable, expressly waives such an undertaking.

4. At the applicant's request, where an application is refused or withdrawn, access to the deposited material shall be limited to an independent expert for 20 years from the date on which the patent application was filed. In that case, paragraph 3 shall apply.

5. The applicant's requests referred to in point (b) of paragraph 2 and in paragraph 4 may only be made up to the date on which the technical preparations for publishing the patent application are deemed to have been completed.

Article 14

1. If the biological material deposited in accordance with Article 13 ceases to be available from the recognised depositary institution, a new deposit of the material shall be permitted on the same terms as those laid down in the Budapest Treaty.

2. Any new deposit shall be accompanied by a statement signed by the depositor certifying that the newly deposited biological material is the same as that originally deposited.

CHAPTER V. Final provisions

Article 15

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 30 July 2000. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 16

The Commission shall send the European Parliament and the Council:

(a) every five years as from the date specified in Article 15(1) a report on any problems encountered with regard to the relationship between this Directive and international agreements on the protection of human rights to which the Member States have acceded;

(b) within two years of entry into force of this Directive, a report assessing the implications for basic genetic engineering research of failure to publish, or late publication of, papers on subjects which could be patentable;

(c) annually as from the date specified in Article 15(1), a report on the development and implications of patent law in the field of biotechnology and genetic engineering.

Article 17

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 18

This Directive is addressed to the Member States.

Done at Brussels, 6 July 1998.

**Cherniak Olena,
Stefanchuk Mykola**

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