

THE EUROPEAN AND EU PATENTS COURT: IS THAT REALLY THE BEST WE CAN COME UP WITH?

The subject of the creation of the EU Patent System can be traced back to 1957¹, with countless faltering on the way. There appears now to be real prospects for its introduction over the course of the next five years. Part of the new system will be the European and EU Patents Court (EEUPC) that already in the latest formulations² resembles an unwieldy and complex compromise. This paper will examine the reasons for a unified EU patent system, the proposed system, the architecture of the EEUPC, provide a critical evaluation of the need for a specialised EU patent court and analyse the prospects for the current architecture succeeding.

The European Union, as it now called uniformly, has been around since 1957. The desire to have an EU wide unitary patent has been around for roughly the same length of time, with the Commission initiating talks in 1959³. The history of failed attempts is well known, with the first proposal for the Community Patent Convention⁴ in 1975, the second proposal for the Convention⁵ in 1989, the third proposal for a Community Patent Regulation⁶ in 2000 and the fourth proposal for a Community Patent Regulation⁷ in 2004. The Commission in its strategy paper of 2007⁸, after considerable consultation in 2005 and 2006, admitted defeat and launched a new approach.

¹ T Jaeger, 'The EU Patent: *Cui Bono et Quo Vadit?*' (2010) 47 CMLRev 63

² See Council Working Documents 7928/09 and 11813/09 on the Draft Agreement on the European and Community Patents Court and Draft Statute. See also TT Jaeger, RM Hilty, J Drexl, H Ullrich, 'Opinion' (2009) 40 IIC 817

³ A Brimelow, 'Not Seeing the Wood for the Trees: Is the Patent System Still Fit for Purpose' 2nd Annual Francis Gurry Lecture, delivered 1 March 2010 accessed 18 March 2010 at <http://www.epo.org/topics/news/2010/20100302a.html> at 34

⁴ Convention 76/76/EEC for the European patent for the common market (Community Patent Convention) OJ 1976 L17/1

⁵ Agreement 89/695EEC relating to Community patents OJ 1989 L401/1

⁶ Commission proposal for a Council Regulation on the Community patent, COM(2000) 412 final OJ 2000 C337E/278

⁷ Council Presidency's proposal for a Council Regulation on the Community patent, Council Document 7119/04

⁸ Commission Communication on enhancing the patent system in Europe, COM(2007) 165 final

Reasons for a Unified EU Patent System

The 2007 Commission Communication⁹ sets out the reasons for the adoption of a Unified System, concentrating particularly on an integrated jurisdictional system.

1. Multiple Patent Litigation

This is a direct consequence of the EPC system of issuing a bundle of national patents rather than a single unified patent. The national patent then becomes subject to national patent rules and procedures. There is thus a risk of multiple patent litigation in a number of contracting States, on the same issue, that can lead to diverse findings and completely different conclusions on the validity of a patent. The point is well made by LJ Jacobs in Leo Pharma v Sandoz¹⁰.

2. Cost

There are significant costs for all sides for multiple litigation. These include national attorneys, that can in some countries involve both solicitors and barristers, expert witnesses and court fees. The Commission suggests¹¹ that this is not a significant problem for big businesses, although there is no doubt such a cost can militate against a European dimension for foreign companies. However, for SMEs this cost can be prohibitive, such that they could choose a number of options: not to patent the invention, keep it as close to a trade secret as possible and simply be first to market; to claim the patent and then license it to a larger market player; or, be forced, after spending considerable amounts of money to develop the invention and then attain a patent, to abandon enforcement of the patent. As the Commission notes this has the effect of emptying the patent of any practical value¹².

⁹ Op. Cit. n.6 at 5

¹⁰ Leo Pharma v Sandoz [2009] EWCA Civ 1188 (CA) (Jacobs LJ) para 77

¹¹ Op. Cit. n.6 at 6

¹² Ibid.

3. Different National Court Systems

The Commission notes the major differences between different national court systems. There can be different courts to hear different elements of a patent dispute in some States (e.g. Germany) whilst in others (e.g. UK) there are unified systems to decide the whole patent issue. Second there can be an adversarial system rather than an inquisitorial system. Finally there can be dissenting opinions in judgments, particularly in multiple judge appeal courts, whereas in other countries the judgment delivered is collegiate.

4. Expertise

The different national court systems can either be specialised patent courts or general courts that also hear patent cases. The consequence of this is that the level of expertise of the judiciary, both in their experience and qualifications, varies depending on the type of court hearing the case. Furthermore the expertise of expert witnesses will vary accordingly, a more inexperienced judge requiring greater explanation taking a longer period of time, thereby increasing the costs.

The Way Forward

The conclusions of the Commission's consultations in 2005-2006 are interesting¹³. The EPO had also recognised the problem with multiple patent litigation and had set up a working party in 1999 that negotiated the Draft Agreement on the establishment of the European Patent Litigation System in 2004¹⁴ (henceforth EPLA) to set up a European Patent System¹⁵, that was revised in 2005¹⁶. Many of the stakeholders and Member States were in favour of the Commission adopting a legislative

¹³ Op. Cit. n.6

¹⁴ Draft Agreement on the establishment of a European patent litigation system 2004, accessed 18 March 2010 at <http://www.epo.org/patents/law/legislative-initiatives/epla.html>

¹⁵ Draft Statute of the European Patent Court 2004, accessed 18 March 2010 at <http://www.epo.org/patents/law/legislative-initiatives/epla.html>

¹⁶ Draft Agreement on the establishment of a European patent litigation system 2005, accessed 18 March 2010 at <http://www.epo.org/patents/law/legislative-initiatives/epla.html>

measure for the implementation of EPLA. However, the required unanimity could not be obtained, principally through the objection of France¹⁷. However, a system similar to EPLA that combined the positive elements of a local/national decentralised patent litigation system with central oversight was popular. Second it was discovered that more than 90% of patent litigation takes place before the tribunals of just four Member States (Germany, France, UK and the Netherlands)¹⁸. Third the Commission proffered an opinion, at the time only supported by circumstantial evidence, that a unified patent litigation system would result in significant savings¹⁹. That was confirmed in a subsequent study for the Commission by Harhoff²⁰, who suggested that private savings of between €148 and €289 million would result in 2013²¹.

The Result

The solution put forward by the Commission was ingenious and, in effect, split up the development of the European Union system into four parts, each of which must be adopted as a legislative measure before the European Union Patent System can come into force. It is suggested that the thinking behind this approach is to move forward incrementally. If Member States see two or three successfully negotiated parts then there will be a strong incentive to complete the process and the political will, lacking in the past, might see things through.

1. The European Union Patent

¹⁷ Op. Cit. n.6 at 10. See also J Pagenberg, 'Another Year of Debates on Patent Jurisdiction in Europe and No End in Sight?' (2007) 38 IIC 805 at 811

¹⁸ Ibid. at 7

¹⁹ Ibid. at 8

²⁰ T Harhoff, 'Economic Cost-Benefit Analysis of a Unified and Integrated European Patent Litigation System', Final Report, 26 February 2009, accessed 11 March 2010 at

http://ec.europa.eu/internal_market/indprop/docs/patent/studies/litigation_system_en.pdf

²¹ Ibid. at 5

This was the least controversial aspect of the process. The starting point for negotiations was the 2004 proposal for a Community patent²² with the latest revised text for a Regulation on 27 November 2009²³.

2. The European and EU Patents Court (EEUPC)

This is likely to be a significant building block for the successful culmination of the process. Although some working papers had been made available to the public, the first document that presented the full draft Regulation and also included the Draft Statute of the Court appeared on 19 March 2008²⁴ that eventually resulted in the text of 8 January 2009²⁵. The positive response to this draft persuaded the Council, in principle, to agree to request an Opinion from the ECJ as to the compatibility of the draft Regulation with the Treaties²⁶ and the Council Legal Service made such a reference on 18 June 2009²⁷. The ECJ's answer in Opinion 1/09 is awaited eagerly. The latest version of the text, now called the Agreement on the EEUPC was issued on 23 March 2009²⁸ and a working paper on the first part of the draft Rules of Procedure for a Unified Patent Litigation System was issued on 9 July 2009²⁹. More direction was provided by the Competitiveness Council's Conclusions of December 2009³⁰.

3. Translation

Little work has yet to appear in public over translation arrangements. Two Council Presidency working papers³¹ were issued in early 2008 and the Competitiveness Council of December 2009³² mentioned the requirement for a Regulation on translation arrangements but did not go any further. The second working paper did

²² Op. Cit. n.5

²³ Council Document 16113/09 Add 1

²⁴ Council Document 7728/08

²⁵ Council Document 5072/09. This is analysed by TT Jaeger, RM Hilty, J Drexl, H Ullrich, 'Comments of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the 2009 Commission Proposal for the Establishment of a Unified European Patent Judiciary' (2009) 40 IIC 817

²⁶ Council of the European Union, Conclusions of the Competitiveness Council of 27-28 May 2009, Council Document 10306/09 at 9

²⁷ Council Document 11183/09

²⁸ Council Document 7928/09. See Op. Cit. n.1

²⁹ Council Document 11813/09

³⁰ Council of the European Union, Conclusions of the Competitiveness Council of 3-4 December 2009, Council Document 10306/09, expanded in Council Document 17229/09

³¹ Council Documents 6985/08 and 8928/08

³² Op. Cit. n.26 at 10

identify three different aspects of translation that would need to be resolved³³: the filing of the application³⁴; the publication of the application and grant of the patent³⁵; and, legal disputes³⁶. In June 2010 the Commission issued a proposal for a Regulation on the translation arrangements³⁷. Article 3 required the publication of the EU patent specification in one of the three official languages of the EPO with the claims translated into the other two. In the case of a dispute the patent proprietor must provide at the request and choice of the alleged infringer a full translation of the patent into the official language of the Member State in which either the alleged infringement took place or in which the alleged infringer is domiciled (Article 4(1)). A court in which the dispute is being litigated can request the patent proprietor to provide a translation of the patent into the language of the proceedings of the court (Article 4(2)). The cost of the translation in both situations is to be borne by the patent proprietor (Article 4(3)).

4. The Enhanced Partnership

Similar to the translation arrangements little has been forthcoming from the EU. The Competitiveness Council in December 2009³⁸ provided some direction though this is predominantly to take place within the EPO³⁹. The aim of Enhanced Partnership is to enhance the capabilities of the EPO during the process of granting a patent through partnership with national patent offices.

The final element in the creation of the European Union Patent System will occur once the other elements have been slotted into place. This will take the form of amendments to the EPC, to enable the EU to accede to the EPC. As the Competitive

³³ Op. Cit. n.28 at 3

³⁴ The suggestion is that the applicant can file in any language with the national patent office translating into one of the languages of the EPO. Costs would be reimbursed by the EU patent system

³⁵ Automated technical translations to be employed

³⁶ Full translation costs to be borne by the patent holder or applicant but should be limited as the machine translation would already be available and so only revision and approval by a translator would be required

³⁷ Commission proposal for a Council Regulation on the translation arrangements for the European Union patent, COM(2010) 350 final

³⁸ Op. Cit. n.26 at 11

³⁹ See EPO Documents CA/120/06, CA/122/06, CA/153/09 and CA/PL 8/09

Council⁴⁰ makes clear this will be merely procedural and will not result in any revision of substantive patent law.

The European and EU Patents Court (EEUPC)

This section will first consider the positives (benefits) and negatives (downsides) of specialised patent courts based on the International Bar Association report of 2006⁴¹ and the analysis of Glazebrook⁴² in 2009. The following section will consider the proposals that have been put forward over the last forty years for different types of European patent courts. Finally the latest proposal for the EEUPC will be critically analysed by through the questions put forward in the IPEC report⁴³.

1. Specialised Patent Courts
 - a. Positives (benefits)

The IPEC report identifies three overarching themes for the benefits of specialised patent courts: expertise; effectiveness; and, efficiency⁴⁴. These then each contain a number of advantages. For expertise it is claimed that judges will produce more reasoned and practical judgments as a result of their experience, legal doctrine will become more consistent, there will be greater dynamism in a fast moving and highly technical area of the law, legal training can be better directed and there will be the creation of a body of specialist IP advocates. Under effectiveness it is considered that there will be a quicker and more-effective decision-making process, greater understanding of IP issues, unique rules and procedures established for IP, reduction of judicial errors and a reduced caseload. Finally with efficiency patent courts are likely to manage the complex cases more efficiently and precisely, expertise would lead to greater cost effectiveness and faster adjudication of cases, international aspects of patents can be considered, proceedings could be shortened

⁴⁰ Op. Cit. n.26 at 13

⁴¹ Intellectual Property and Entertainment Law Committee (IPEC), *International Survey of Specialised Intellectual Property Courts and Tribunals* (International Bar Association, London 2006)

⁴² S Glazebrook, 'A Specialist Patent or Intellectual Property Court for New Zealand?' (2009) 12 *Journal of World Intellectual Property* 524

⁴³ Op. cit. n.41 para 4.4

⁴⁴ *Ibid.* para 4.2

without the need for exhibits and experts, and, if the system allows, appeals could be sent directly to the highest court.

b. Negatives (downsides)

The negatives identified by the IPEC report can again be constrained within three overarching headings: cost; location; and, procedure⁴⁵. For costs this can be the high costs of maintaining patent courts and the training of judges, court personnel, and public prosecutors. Under location there are concerns over the lack of a specialised patent caseload, the centralisation of specialised courts limiting access to justice leading to increased travel of judges or litigants and thus increased costs, and the isolation of patent law from the developments of the general law. Third with procedure repeat litigators will have an advantage over one-time litigants as they will know the peculiarities of the system, court and personnel, informality can develop, there will be a loss of originality and freshness that can come from a generalist overview, and there can be overlap between patent law and general law that may require a general law judge to preside rather than an expert patent judge.

2. Proposals for European patent courts

a. CPC

The original CPC envisaged a patent judicial system with two arms, national courts and the European Patent Convention, overseen by the European Court of Justice. First a single national judgment invalidating a Community patent would invalidate it for the whole of the territory of the EU, having major implications economically and territorially. Second there was a danger that the length of legal proceedings in some national courts, with subsequent appeals, could significantly delay patent protection across the whole of the EU. There was a third, unspoken, ground of concern and that was over national sovereignty. A patent system has always been considered to be territorially defined such that it is designed to encourage and promote domestic innovations and industry. There was disquiet among some Member States that

⁴⁵ Ibid. para 4.3

national courts, possibly with little experience of patents or patent litigation, could invalidate a particularly important patent for another Member State.

b. Community Patent Regulation

The proposals for a Community Patent Regulation shifted the focus of the patent litigation system, seeking to establish a highly centralised jurisdictional system whilst incorporating the EPO's application procedures. This would have entailed the EU becoming a signatory to the European Patent Convention and the EPO's Boards of Appeal dealing with all examination and opposition proceedings prior to the grant of the patent. A single unitary Community intellectual property court would have had exclusive jurisdiction over all infringement and invalidity actions. This would have been set up as a judicial panel, attached to the Court of First Instance (now the General Court after Lisbon), with a right of appeal to the General Court and a final appeal to the ECJ on questions of law. The loss of local, national input to a system was considered to be a major concern.

c. EPLA

A European Patent Judiciary was to be set up (Article 3) comprised of two specific organs: the European Patent Court (itself comprised of the Court of First Instance, the Court of Appeal (Article 11) and a Registry (Article 12)); and, the Administrative Committee. The Court of First Instance was to comprise a Central Division with Regional Divisions being set up or disbanded by the Administrative Committee as required, in accordance with the Statute (Article 10). The Administrative Committee was to be comprised of representatives and alternate representatives, one each from each Contracting State (Article 13). Judges of the European Patent Court had to have good command of at least one of the official languages of the EPO, have sufficient experience of patent law and be or have been a judge in a Contracting State, be or have been a member of a board of appeal of the EPO or a national patent office, or have other equivalent experience (Article 2 Statute (henceforth St)). The Court was to be comprised of legally and technically qualified judges (Article 3 St) that were to sit for a term of 6 years that could be renewed (Article 4 St). If a Contracting State or group of Contracting States request, the Administrative Committee were to set up a Regional Division of the Court of First Instance with at least two legally qualified judges assigned (Article 19 St). If over three years that

Regional Division heard more than 100 cases then a further Regional Division could be set up, up to a maximum of three (Article 20St). The Court of First Instance was to have sat in panels of an odd number of judges at least three in number. They were to contain at least one technically qualified judge and two legally qualified judges of different nationalities (Article 26St). The same arrangements were to have applied to the Court of Appeal (Article 27St). National courts were to retain jurisdiction to order provisional or protective measures as provided for by national law (Article 45).

d. EEUPC

The architecture of the EEUPC closely resembles that of EPLA. Article 1 of the Draft Agreement (Article 1DA) establishes the EEUPC and provides it with legal personality (Article 3aDA). The Court is to comprise a Court of First Instance, a Court of Appeal and a Registry (Article 4DA) with the Court of First Instance having central, local and regional divisions (Article 5(1)DA). A local division is to be set up at the request of a Contracting State in accordance with the Statute with additional divisions added when over 100 patent cases per year have been commenced in that Contracting State during three successive years and up to a maximum of three (Article 5(4)DA). A regional division is to be set up in two or more Contracting States upon their request and in accordance with the Statute (Article 5(5)DA). Any panel of the Court of First Instance is to have a multinational composition and is to sit in a composition of three judges (Article 6(1)DA). For a regional division two of these judges shall be nationals of the Contracting States concerned and one judge from the pool of judges with another nationality (Article 6(4)DA). Local divisions will be made up of two judges of that Contracting State and another judge from the pool of judges assigned on a case by case basis unless more than fifty patent cases per calendar year have been commenced at first instance in that Contracting State for three successive years (Article 6(2)&(3)DA). After having heard the parties in the case a local or regional division can request the allocation of a technically qualified judge from the pool of judges (Article 6(5)DA). Panels of the central division are to sit in panels of two legally and one technically qualified judges allocated from the pool of judges (Article 6(6)). In accordance with the Rules of Procedure, the parties may agree to have their case heard before a single judge (Article 6(7)DA). Article 7(1)DA provides for the Court of Appeal to sit in panels of five, comprised three legally and

two technically qualified judges. Decisions of the panels are to be by majority with dissenting opinion being allowed to be expressed in exceptional circumstances (Article 51DA).

The Court's judges are to be either legally or technically qualified judges with the highest standards of competence and proven experience in the field of patent litigation (Article 10(1)DA). A legally qualified judge must possess the qualifications required for appointment to judicial offices in the Contracting State (Article 10(2)DA) and a technically qualified judge must have a university degree and proven experience in a field of technology (Article 10(3)DA). They are to comprise the pool of judges where the legally qualified are full-time and technically qualified are part-time judiciary (Article 13(2)DA). They are to be appointed for renewable six years periods (Article 3(4)St).

The EEUPC shall have jurisdiction in respect of: patent infringement actions (local division); patent non-infringement declaration actions (local division); provisional, protective measures and injunctions (local division); patent revocation actions (central division); damages actions (local division); patent prior use actions (local division); compulsory licence actions (central division); and, compulsory licence compensation actions (central division) (Article 15DA). Article 15aDA sets out detailed provisions on the jurisdiction of the divisions of the Court of First Instance, with actions being brought in a local division (or regional division) on the basis of place of infringement (Article 15a(1)(a)DA) or domicile of the defendant (Article 15a(1)(b)DA). Actions against defendants domiciled outside the territory of the Contracting States shall be brought before the local or regional division in accordance with Article 15a(1)(a)DA. Article 17DA provides for a Patent Mediation and Arbitration Centre (PMAC) to be established where patent disputes, short of validation proceedings, can be mediated and arbitrated.

According to Article 45(1)DA an appeal against a decision of the Court of First Instance may be brought before the Court of Appeal by any party which has been

unsuccessful, in whole or in part, in its submissions within two months of the notification of a final decision of the Court of First Instance (Article 45(2)DA). The appeal may be based on points of law and matters of fact (Article 45(3)DA).

Article 48DA provides that both the Court of First Instance and the Court of Appeal can make a reference to the Court of Justice of the European Union over a question of interpretation of the TEU and TFEU or the validity and interpretation of acts of the institutions of the EU. The judgment of the ECJ is binding.

3. Critique

The questions advanced by the IPEC report that need to be asked before setting up a specialised patent court are:

Do problems in the particular area disclose a genuine need for a specialised court?
How have the problems been dealt with before the courts?

Multiple patent litigation (MPL) – national courts simply apply national procedures & decide the case IAW national law.

Cost – not dealt with.

Different national court systems (DNCS) – no solution

Expertise – no solution

Is the current court system failing to provide an effective enforcement mechanism for IP rights holders? If so, what are the concerns with the current system?

As above

Has there been any important legislation that has prompted or will prompt an increase in the number of cases being litigated in this area over a period of time?

No but there is an ever increasing number of patent cases, often litigated in a number of different jurisdictions.

Are the general courts experiencing a backlog in regard to this particular area of law?

No evidence of this but possible in the future.

Is the volume or potential volume of work in this area sufficient to justify the creation of a specialised court?

Yes

How will the centralisation of a specialised court affect the practicalities of litigation?

Greater expertise, effectiveness and efficiency with few of the downsides related to cost, location and procedure

How will the creation of a specialised court in this area affect the quality of justice in general courts?

Already a specialist area of the law and so justice from the general courts will not be affected. By removing patent law from the jurisdiction of general courts then expertise will increase as will efficiency and as a consequence effectiveness.

General Problems with EEUPC

1. Over-Flexibility⁴⁶

Many provisions for the Court enable considerable flexibility over the type of litigation (EU patents or European patents), a very wide choice of claims, mediation or arbitration may be utilised, cases can be brought in local divisions or the central division, a technical judge can be used if required, options for languages are very wide etc. It must be questioned whether this flexibility is too great, undermining legal certainty for the Court, practitioners and, in particular, litigants.

2. Decentralisation

⁴⁶ Op. Cit. n.1 at 88

The decentralisation model chosen for the EEUPC increases the effectiveness of the unified litigation system. However, as Jaeger⁴⁷ notes it is essential that in a decentralised system the distribution of jurisdiction among the courts or divisions is clear. Actions for revocation and involving compulsory licences must be brought before the central division whilst actions concerning infringements, preliminary measures including injunctions, damages and prior use can be brought before local divisions. The two parallel principles of jurisdiction that enable an action to be brought in a local division are the domicile of the defendant and the place of infringement. However, there is no jurisdiction for actions against multiple defendants, a problem that should be corrected it is submitted by providing jurisdiction for the central division to collate multiple party actions and hear them together.

3. ECJ Appeal

The latest version of the Draft Agreement has corrected some concerns expressed by previous commentators over the limitation imposed on the ECJ's preliminary reference jurisdiction. However, there still remains a problem with the length of time, in 2009 approximately 17 months but in 2004 this was 24 months⁴⁸, to receive an answer from the ECJ that could have a negative effect on the efficiency and effectiveness of the new system.

4. Quality of Judgments

It could be argued that judges from alternative national systems could create problems with the standard of the judgments delivered. However, considerable thought has been given to ensuring a high standard of decisions including the inclusion of technical judges, dissenting opinions, comprehensive permanent training regimes, multinational panels in local divisions and a sophisticated appointment procedure for the judiciary.

5. Non-EU States before the EEUPC

⁴⁷ Op. Cit. n.1 at 90

⁴⁸ Court of Justice of the European Union, *Annual Report: Synopsis of the Work of the Court of Justice, General Court and the Civil Service Tribunal* (Office for Official Publications of the European Communities, Luxembourg 2009) at 94

The ECJ has held that a complete litigation system under an agreement that includes both EU and non-EU States is compatible with the EU Law⁴⁹. However, where non-EU Member State cases come before the EEUPC they will be decided solely by the EEUPC, whilst EU Member State cases can be referred to the ECJ. Therefore there is a possibility that contradictory case law may develop. This is acceptable so long as there is a process to resolve such contradictions⁵⁰. There are three alternatives: an obligation for the EEUPC to take account of ECJ case law⁵¹; a committee to attempt reconciliation and take a final decision in accordance with ECJ case law⁵²; or, the ECJ being given the competence to provide final adjudication⁵³.

Conclusion

The creation of a Unified European Patent System appears to be seen as an important priority for Member States, with the Commission's new strategy having the prospects of a fair degree of success. The architecture of the EEUPC is a clever compromise that is probably really the best we can come up with, although it is suggested some minor modifications are still required. However, the creation of the EPS has a long way to go and anybody expecting a swift resolution of 51 years of debate is likely to be disappointed. The delivery of Opinion 1/09 is awaited with some anticipation.

⁴⁹ Opinion 1/91 EEA Agreement I [1991] ECR I-6079 para 32

⁵⁰ *Ibid.* para 28

⁵¹ For example EEA Agreement Article 6

⁵² Opinion 1/92 EEA Agreement II [1992] ECR I-2821 paras 20-23 and EEA Agreement Article 105

⁵³ For example EEA Agreement Article 111