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Subject : EU Patent Jurisdiction - Main features of the Court system (first part); Remedies, procedures and other measures (second part)

Delegations will find in Annex a revised Presidency working document, which takes into account comments made at the meeting of the Working Party on 15 February 2008. Changes compared to document 5954/08 are marked.

Delegations are kindly requested to submit any comments or suggested changes to this document in writing to the Council's General Secretariat (intellectual-property@consilium.europa.eu) by Monday 10 March 2008 close of business at the latest.

PART I: MAIN FEATURES OF THE EU PATENT JURISDICTION

1. Introductory remark

The present working document aims at setting out in more technical detail the possible features of a future unified and integrated patent litigation system which, it is hoped, could find the support of Member States (MS) and users. It is based on the results of the deliberations of the Council Working Group following the Commission's Communication dated 3 April 2007 and previous work carried out by MS and users, in particular in the context of work on the European Patent Litigation Agreement (EPLA). Moreover it reflects the reactions of MS and stakeholders during informal consultations carried out throughout the period September 2007 to February 2008.

2. General features of the EU patent jurisdiction

- The envisaged patent jurisdiction must be designed in a way which guarantees trust and confidence by users while ensuring proximity, an efficient use of existing structures and a spreading of experience with patent litigation throughout Europe. It should make good use of modern technology.
- In order to ensure efficiency and coherence of patent litigation the EU patent jurisdiction should be an **exclusive jurisdiction** dealing with validity, infringement and inter-related proceedings arising under patent law concerning European patents and future Community patents.
- It should be a **Community jurisdiction specialised in patent litigation**.
- Since it would be a Community jurisdiction national constitutional requirements or MS legislation concerning the organisation of their judiciary would not apply.
- It should be an **integrated system** effective in all MS.

- It should comprise a **first instance** with local and regional divisions as well as one central division, a **second instance** and a **Registry**.
- All divisions would form an integral part of a **unified Community jurisdiction** with **uniform procedures**.
- All divisions would be specialised and distinct bodies. The ECJ would, however, be able to ensure the uniformity of the Community legal order. For this reason a reference on points of law (cassation) to the ECJ should be foreseen. In order to avoid that parties systematically refer appeals to the ECJ, extending the length of the procedure unnecessarily, the ECJ should be entitled to grant the leave to appeal (certiorari).

3. First instance

- In order to guarantee a high degree of specialisation and expertise as well as proximity to the users, the first instance should comprise one **central division** and **divisions located in MS**.
- All divisions should provide for a high level of expertise and deliver expeditious and high quality judgments. Towards this end the Community would establish a specific training framework for patent judges (see below, under 19) and create a pool of experienced judges that could reinforce local and regional divisions where necessary (see below, under 10).
- **First instance divisions** could be located in MS who wish to have such a division in their territory. MS would designate the seat of such divisions. The divisions concerned could use existing national infrastructures and existing courts could form the basis of local divisions of the Community jurisdiction.
- More than one first instance division could be located in a MS if more than one hundred cases concerning European or Community patents per calendar year have been recorded in the respective MS during three successive years prior to the coming into operation of the Court system or thereafter. The maximum number of divisions per MS would be three.

- In the case a MS would not have a first instance division located in its territory or would not participate in a joint regional division (see below), the central division would be competent for cases related to its territory (for allocation of cases see below, under 5).
- All local and regional divisions as well as the central division should have, in principle, a multinational composition.
- MS would be encouraged to share **joint regional divisions**. The Community could provide financial assistance for this purpose.
Such regional divisions could be composed of judges from a **regional list of judges** and could sit at **multiple locations**, e.g. rotate between seats in the MS who share a regional division and hear cases at different seats as appropriate.
- The first instance divisions would have **exclusive civil jurisdiction** in respect of:
 - actions for actual or threatened infringement or for a declaration of non-infringement;
 - direct actions or counterclaims for invalidity;
 - actions or claims for damages, other related issues and legal costs;
 - injunctions and provisional measures.

4. Relationship between first instance divisions at MS or regional level and the central division

- The first instance divisions located at MS/regional level should have jurisdiction over infringement cases unless the **parties agree** to refer the case to the central division (for allocation of cases see below).
- The central division should be hearing **direct actions concerning the revocation of patents**, actions for declaration of non-infringement and cases referred by divisions located at MS/regional level

- In the case of counter-claims for invalidity the first instance division located at MS or regional level concerned should rapidly assess whether the counterclaim is manifestly unfounded, or whether there is a likelihood that the counterclaim could be founded and that the patent could be revoked.
- If the division considers that the counterclaim is manifestly unfounded, it goes ahead with the case. By contrast, if the division considers that the patent could be revoked either totally or partially it should, after having heard the parties, either involve a technical judge qualified in the field of technology concerned from the European pool of patent judges (see below, under 10) or stay proceedings and refer the case for a decision concerning the claim interpretation and validity to the central division or refer the entire case to the central division.

5. Allocation of cases

- The allocation of infringement cases should reflect the **basic principles of the Brussels I Regulation**. Consequently plaintiffs should be entitled to choose either the division of the MS (or regional division):
 - of the place where the infringement took place, or
 - of the place where the defendant is domiciled.
- In the absence of a local or regional division with territorial competence for the MS where the plaintiff could bring an action the case could be brought before the central division.
- The same allocation should also apply to applications for injunctions which could be brought either at the place of infringement or the place of domicile of the defendant.
- In the case of infringements of the same patent(s) through related acts (such as manufacturing, importing or selling of the same product), but with different parties involved, it should be possible to sue all infringers concerned before one forum in order to avoid the risk of diverging judgments.
- Parties should be entitled to agree to litigate before a division (at MS or regional level) of their choice or the central division.
- For actions concerning invalidity see above.

6. Language of proceedings at first instance

- In cases before a **division at MS/regional level** the language of proceedings would be the official language(s) of the MS in question or the language(s) designated by MS who have set up a joint regional division.
- **On grounds of convenience and fairness**, at the request of one of the parties and after having heard the other party, the division concerned may choose a different language of proceedings. Moreover, the division concerned would be entitled, to the extent deemed appropriate, to dispense with translation requirements for the patent and supporting documentation.
- Parties should be entitled to **agree on the use of the language in which the patent has been granted**, subject to approval by the competent division. If the division does not approve the choice of the parties the case should be allocated to the central division.
- In all cases before the **central division** the language of proceedings would be the language in which the patent has been granted.
- The parties should, before all divisions and at their request, be provided by the division concerned with interpretation to assist them in presenting and defending their case to the extent necessary. The creation of a European list of specialised patent interpreters and of a separate training framework financed by the Community (see below, under 18) could be explored.

7. Second instance

- A **second instance Court** would be created which would deal exclusively with appeals of judgements of the first instance divisions. It would be composed by judges with a high level of expertise in patent litigation (for qualifications and appointment of judges see below, under 11 and 12).
- It could be created at the Court of First Instance with one or more specialized chambers or alternatively as a new distinct entity.

- Appeals might be based on points of law and matters of fact; new facts and new evidence might only be introduced if their submission by the party concerned could not reasonably have been expected during proceedings at first instance.
- An appeal shall have suspensive effect unless the first instance division or the second instance court decides otherwise.
- The **language of proceedings** at second instance would be the language of proceedings used at first instance. However, in exceptional cases and to the extent deemed necessary, the Court, subject to agreement by the parties, may choose a different language for the whole or part of the proceedings. Parties should be entitled to agree on the use of the language in which the patent has been granted as language of proceedings. At their request they should also be provided with interpretation at oral hearings in order to assist them in presenting or defending their case.

8. Further review

In order to ensure the uniformity of the Community legal order decisions of the second instance Court could be reviewed by the ECJ. For this reason a reference on points of law (cassation) to the ECJ should be foreseen. In order to avoid that parties systematically refer appeals to the ECJ, extending the length of the procedure unnecessarily, the ECJ should be entitled to grant the leave to appeal (certiorari). Review procedures should not have a suspensive effect.

9. Composition of the divisions

- Experience in patent litigation is a *conditio sine qua non* for high quality judgments and for the building of trust of users in the system. Experience cannot be acquired by training alone but has to be obtained "on the job". For this reason it is imperative that the composition of the divisions is balanced, and that less experienced judges work alongside more experienced colleagues.
- The panels of local first instance divisions should normally consist of three judges, two from the MS concerned and one from the European pool of patent judges. The two national judges would serve as **permanent members** of the local division.

- Regional divisions should be composed of panels consisting of three two judges chosen from a regional list of judges and one from the European pool of patent judges.
- The central division should be composed of panels consisting of three judges. An additional chamber of the central division would be set up each time when, during a period of three successive years, more than seventy first instance cases concerning European or Community patents per calendar year have been recorded at the central level.
- The involvement at first instance of judges from the European pool of patent judges should make good use of modern communication technologies such as video conferencing.

10. European pool of patent judges

- A **pool of patent judges** would be created at Community level. The purpose of the pool would be to provide reinforcements for local and regional divisions and to spread knowledge and experience throughout the Community.
- This pool should consist of legally and technically qualified judges. Technically qualified judges should be appointed for each **field of technology**.
- The pool should include permanent judges from the local, regional and central divisions.

11. Specialisation and technical expertise of judges

- It is of utmost importance that the judges of all divisions shall have a proven knowledge and experience in patent litigation. Where necessary training should be provided under the **EU training framework** (see below, under 19). Internships of less experienced judges and judges in training should be stimulated as much as possible, in particular during the transitional period. The panels of the central division of the first instance and the second instance should be composed of mixed chambers of **legally and technically qualified judges** (two legally and one technically qualified judges for the central division, three legally and two technically qualified judges for the second instance).
- **Technically qualified judges** would have university diplomas in scientific or technical disciplines and appropriate knowledge in patent law and litigation. Where necessary, training could be provided under the EU training framework (see below, under 19). In each chamber legally qualified judges should be in majority (i.e. two out of three or three out of five).

12. Judicial independence, impartiality and appointment procedure for judges

- Judges could be recruited amongst members of the EPO or national offices' Boards of Appeal, patent judges, European patent attorneys, etc.
- The judges would have to guarantee **judicial independence** and **impartiality**. In particular, members of the Boards of Appeal of the EPO should not be eligible to serve in parallel to their functions as members of the Boards of Appeal as a judge of the EU patent jurisdiction.
- The exercise of the office of a Community judge would however not exclude the exercise of **other judicial functions at the national level**.

- All judges of the EU patent jurisdiction would be **appointed** by the Council, acting unanimously, following consultation of an advisory committee which shall be set up for this purpose.
- The **advisory committee**, chosen from among the most experienced patent practitioners of recognised competence and appointed by the Council, should prepare lists of suitable candidates for appointment as judges of the EU patent jurisdiction.
- Only candidates with proven experience in patent law could be considered as suitable for appointment.

13. List of experts

- A **list of technical experts** would be created at Community level. Such experts would provide the judges and the parties with complementary expertise in all fields of technology. The technical experts would have to guarantee independence and impartiality. They could be university researchers, experts from IP offices or other experienced practitioners.
- If the first instance divisions and the second instance decide to make use of experts, they should normally refer to the Community list of experts. The litigants would however remain free to involve other experts.
- The list of the experts concerned should be established by the advisory committee (see above, under 12).

14. Registry

- For reasons of efficiency and transparency, all cases – at first and second instance – should be recorded by a Community registry, attached to the central division.
- All divisions would immediately have to notify each case to the registry.
- At the request of a local or regional division the registry would **allocate judges from the pool** of European patent judges to the division concerned on the basis of their technical expertise, linguistic skills and proven experience.

15. Rules of procedure

- Since the suggested system would constitute a fully fledged Community jurisdiction (however with some degree of decentralisation and local presence in MS) it is suggested to provide for uniform rules of procedure.
- The rules of procedure should take account of the **Enforcement Directive** and should also reflect the work carried out in the context of the preparation of EPLA, such as the **Second Venice Resolution**, dated 4 November 2006, of the European Patent Judges Association relating to the rules of procedure of a European Patent Court.
- Such rules should ensure expeditious and high quality judgments. Moreover they should provide for cost effectiveness of procedures and thus facilitate access to justice, in particular for SMEs.

16. Patent arbitration and mediation centre

In order to promote the idea of a time and cost effective alternative to traditional litigation and considering the need of increasing specialisation in dispute resolution concerning patents the possibility for setting up a new mechanism for arbitration and mediation of patent disputes at Community level should be explored. This mechanism would involve a list of Community mediators and arbitrators, as well as a European code of conduct for patent mediators and arbitrators, and would not deal with invalidity cases.

The establishment of such a mechanism (in addition to those existing outside the Community framework) could ensure proximity and better accessibility for SMEs. A patent arbitration and mediation centre could deal in particular with disputes concerning patent licence fees. It goes without saying that any arbitration and mediation system shall be voluntary and not mandatory for the parties. If the parties agree to arbitration, the legal effect of the Arbitration Centre between the parties would be similar to decisions of the first instance divisions. Financial contributions by the Community to the funding of such a centre could be considered. The utilization of state of the art electronic tools should be guaranteed.

17. Decisions with EU-wide effect

In order to take full account of the European or Community dimension of an integrated patent litigation system, the competent jurisdiction (MS/regional or central divisions) should in particular be entitled, with effect for the entire territory of the EU (for Community patents) or with effect for the territories which have been designated in a patent application and for which patent protection is in place (for European patents):

- to grant preliminary injunctions;
- to award damages;
- to revoke a patent.

18. Budgetary and cost issues

- **Operational costs of divisions at MS level** should be borne by MS. However, initial costs required for the establishment of such divisions, costs incurred as a result of participation of judges from the pool of patent judges and costs related to the introduction of state of the art electronic tools facilitating participation of such judges should be borne by the Community budget.
- **Costs incurred at the central division** (first instance) should be borne by the Community budget as should be the operational costs at second instance level.
- The Community would contribute to the operational costs of **regional first instance divisions** set up jointly by two or more MS, which operate at a cross-border level.
- The Community would contribute to the **additional expenditure** (interpretation services, travel expenses, accommodation, daily allowances) incurred by the participation of members of the Community patent judges pool on the bench of first instance divisions set up at MS/regional level.

- The Community could also contribute to the costs of providing simultaneous interpretation in order to assist the parties at oral hearings.
- A **specific budgetary line** would be created in order to cover the intervention by the Community in the financing of the operational costs of the EU patent jurisdiction.
- Appropriate **court fees** would be charged for the proceedings. The amount of such fees would be fixed at a level ensuring a right balance between the principle of fair access to justice and an adequate contribution of the parties for the services rendered by the courts. Fees should be set at Community level.

19. Training framework

- A **training framework** for patent judges should be set up at Community level in order to improve and increase available patent litigation expertise and to ensure a broad geographic distribution of such specific knowledge and experience.
- In addition regular meetings of patent judges should be organised with a view to providing for a forum for the exchange of views and debate on issues of patent law. The objective of such meetings would be to promote coherence and consistency of case law.
- The Community would provide a budget line for funding such a **training framework**.
- The training framework would reflect best practices in MS and focus on gaining practical experience. Towards this end it would involve **internships** in the patent judiciary of other MS already having substantial levels of patent litigation activity.
- The training framework should be set up well **before the coming into operation** of the EU patent jurisdiction in order to guarantee that once the EU patent jurisdiction becomes operational, all divisions dispose of specific knowledge and expertise.

20. Jurisdiction of national courts during a transitional period

- **During the first three calendar years** after the EU patent jurisdiction has become operational proceedings for infringement or revocation of European patents might still be initiated before national tribunals or other competent MS authorities having jurisdiction under national law.

- Any proceedings pending before a national tribunal at the end of the transitional period should continue to be subject to the transitional regime.
 - The transitional period as such should be kept short for reasons relating to the efficiency of the system which relies on a critical mass of cases being processed. However, it could be explored whether patentees should be given, for European patents granted prior to the date the EU patent jurisdiction has become operational, the possibility to opt out of the system. Such derogation from the exclusive nature of the jurisdiction would require that opt-outs are notified to and published by the Registry before expiry of a cut-off date.
 - It could be also explored whether during the transitional period local divisions in those MS having hitherto little experience in patent litigation should in all cases involving parties from more than one MS or affecting the territories of more than one MS be composed of one national judge and two judges from the European pool of patent judges (one technically and one legally qualified). This would further increase trust of the users, encourage them to bring cases before local divisions and help to enhance spreading of experience with patent litigation across Europe.
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PART II: REMEDIES, PROCEDURES AND OTHER MEASURES

Introduction

The proposed EU-Patent Jurisdiction ("the Court"¹) would constitute a Community jurisdiction with uniform remedies and procedures. This document presents an outline of the remedies, procedures and other measures that the first and second instances of the Court could apply.

The rules should be tailor-made for patents and ensure expeditious and high quality decisions, striking a fair balance between the interests of right holders and other parties. Moreover, they should provide for cost-effectiveness of procedures and thus facilitate access to justice, in particular for SMEs.

The future rules should to a great extent be based on Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2.6.2004, L 195/16) and on the work carried out in the context of EPLA, in particular the draft European Patent Litigation Agreement (EPLA, version 7.12.2005); the draft Statute of the European Patent Court (version 9.9.2005) and the Second Venice Resolution of the European Patent Judges Association relating the rules of procedure of a European Patent Court (4 November 2006).

This working document does not contain an exhaustive list of issues but addresses basic features which are relevant for patent litigation and require an early discussion. The main principles of the remedies and procedural rules should be set out in the legal instrument creating the EU Patent Jurisdiction. However, more detailed rules of procedure and the practical organization of proceedings (including case management) will have to be laid down at a later stage in separate rules of the Court pursuant to the procedure provided in the legal instrument..

¹ General term "the Court" is used without prejudice to the outcome of this discussion on the first part of this paper.

1. General

The divisions of the Court should deliver high standard work in all phases of the proceedings. The rules should be appropriate for the speciality of patent litigation. The Court must deal with cases in ways which are proportionate to their importance and complexity. To this end the judges need to dispose of a variety of necessary instruments adapted to the specificities of patent litigation and containing an appropriate level of flexibility.

A basic feature should be that the Court must be able to work rapidly and within certain deadlines. This requires that the panels and individual judges respect strict internal working methods. But parties also have a responsibility. They should put their best case forward as soon as possible, and the Court should not grant extensions of time limits without good cause. Therefore, clear rules should be developed about active case management. While respecting the autonomy of the parties, these rules should increase litigation efficiency and should avoid that parties unnecessarily delay the procedure.

The rules should strike a fair balance between the interests of patent holders and other parties. They should be effective and dissuasive but also fair and equitable and not be unnecessarily costly, and take account of the need to facilitate access to the Court for SMEs. In order to take away fears that the creation of an EU-wide court would increase unfair litigation, the rules should be designed and applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for sound safeguards against their abuse. The Court must guarantee that these rules are not used in an unfair way and in particular not distort competition.

The proceedings need to be open to the public unless the Court decides to make them confidential in the interest of the parties or in the general interest of justice or public order.

2. Remedies

2.1 Evidence

Obtaining evidence about the other party's product or process is often crucial, especially when the right holder tries to prove infringement. It needs to be reflected what the approach of the Court should be on particular means of evidence.

In proceedings before the Court it is for a party to present and for the Court to order and to conduct the taking of evidence. The means of giving or obtaining evidence should in particular include the following:

- hearing the parties
- requests for information
- production of documents
- hearing witnesses
- opinions by experts
- inspection
- comparative tests or experiments
- sworn statements in writing (affidavits).

The main rule should be that any party must offer proof for the facts stated, if these facts are disputed. The parties are dominus litis of the procedure; however, the Court has an active role in conducting the procedures. The Court should be free to disregard any statement of fact for which no proof is offered.

The Court should be able, if necessary, to order a party to offer a proof. In infringement cases, the evidence is usually to be found under the control of the infringer (manufacturer or distributor). The main rule should therefore be that the Court may order the production of specified evidence which lies in the control of the alleged infringer. Such orders should not result in an obligation of self-incrimination. Under certain conditions it should even be possible for the Court to order a third party to produce specified and relevant evidence. When there are good reasons to expect that evidence would be destroyed, the Court should be able to order the preservation of evidence.

But the interests of the defendant need to be adequately protected. "Fishing expeditions" must be avoided and the production of evidence should, for example, be subject to the protection of confidential information. If the orders would affect third parties, their interest should be taken into account and they should, for instance, be given the opportunity to submit observations.

The Court could be given the authority to order the inspection of commercial premises to permit the search for goods, materials, devices, etc. These inspections should be carried out by a person appointed by the Court who is qualified for such tasks under national law, such as a "huissier" in France or a "Gerichtsvollzieher" in Germany. MS would have to notify to the registry which persons should be qualified to carry out these inspections in their respective territory. In this context, the Court could accept that a detailed description or a sample of the "evidence" may be considered sufficient proof for the whole. However, adequate safeguards must ensure the protection of confidential information such as business secrets. The requesting party should not be present but only represented by an independent professional practitioner, such as lawyer, at the inspection of the premises of his opponent. The name of such representative of the requesting party have to be specified in the Court's order. This procedure, known in patent law as *saisie-contrefaçon*, is an example of good practice which already exists in certain MS. It would enable proof of infringement to be brought very efficiently and at a moderate cost.

Witnesses should where necessary be heard by the Court in person but statements could in appropriate cases be provided by means of affidavit. It is for the Court to appreciate whether such affidavit provides sufficient proof. Witnesses could at the request of one of the parties and to the extent deemed necessary by the Court be put to cross-examination. The Court would decide whether or not a certain question is allowed and has to be answered.

The Court should at any time be entitled to appoint experts in order to provide expertise for specified technical aspects of the case.

2.2 Injunctions

The possibility to take quick action against alleged patent infringements is extremely important for the right holder. It should be possible to obtain injunctions very rapidly and the Court should be authorized to grant injunctions with legal effect in the whole EU. However, in order to strike a fair balance the applications for these measures should be subject to safeguards to protect the alleged infringer.

Interlocutory injunctions should stop any impending infringement, or forbid the continuation of the alleged infringement. The Court could also order the seizure of the goods suspected of infringing a patent right so as to prevent their distribution within the channels of commerce. When the recovery of damages is likely to become difficult or impossible, the Court could be authorized to order the seizure of property of the alleged infringer. If strictly necessary, this could include the blocking of his bank accounts. Another essential tool for the proprietor would be that the Court orders a party to refrain from removing assets beyond the jurisdiction of the Court so as to frustrate a judgment (*freezing order*, or *Mareva injunction*).

An important safeguard should be that injunctions may only be granted if the right holder provides adequate evidence to substantiate his claim. The party who seeks the injunction should in principle make full and frank disclosure of the case given the risks for the defendants. The injunction may also be subject to the lodging of adequate guarantees (including financial guarantees) by the applicant to ensure any compensation of the prejudice suffered by the defendant if in proceedings on the merits the claims are subsequently judged to be unfounded. The applicant needs to institute proceedings leading to a decision on the merits of the case within a reasonable interval. Special safeguards should be built in when the Court issues an order without the other party having been heard (*inaudita altera parte*). In such situations, for example, the defendant should have the right to request a review of the order, including the right to be heard.

Injunctions should be based on the principle of equity and judges should have discretion to weight the interests of all the parties and avoid possibilities of abuse. Judges should for example be able to take into account the prejudice of the defendant if the products in question are removed from the market as well as the fact that the applicant does not manufacture or commercialize competing products, but is only looking for royalties.

2.3 Damages, legal costs and periodic penalty payments

Once the Court confirms that a patent right has been infringed, the right holder would be entitled to receive damages as a compensation for the prejudice actually suffered.

The Court should have two ways of setting the specific level of damages. Firstly, it could take into account all appropriate aspects for the compensation of the prejudice, such as unfair profits made by the infringer and/or lost profits if the patentee can show that he lost sales as a result of the defendant's infringing sales. It could also take into account elements other than economic factors, such as the moral prejudice caused to the right holder. Secondly, the Court could set the damages as a *lump sum* on the basis of certain elements. A *lump sum* should, in order to be dissuasive, be at least the amount of the royalties or fees which would have been due if the infringer had requested authorization to use the patented invention in question. The infringer should not benefit from the infringement.

These methods do not contain a specified upper limit. It should however not be the aim to introduce an obligation to provide for punitive damages. This is in conformity with common practice in EU patent litigation.

The legal costs and other expenses incurred by the successful party such as costs for expertise or research should, as a general rule, be borne by the unsuccessful party. The Court should have the flexibility to order that costs be apportioned equitably or that the parties bear their own costs. In any event, a party should bear unnecessary costs it has caused in the proceedings. In cases, where a party such as independent inventor or SME would be unable to meet the costs of the proceedings, the possibility of legal aid borne by the Community could be considered.

If a party does not comply with the terms of an order of the Court, then this could be sanctioned with a periodic penalty payment payable to the Court. The individual fine should be proportionate to the importance of the order to be enforced. The periodic penalty payment should be ordered without prejudice to the party's right to claim damages.

3. Procedures

3.1 The parties and their representatives

The group of persons entitled to have access to the Court in order to seek application of the procedures and remedies should naturally include patent owners. However, other persons authorized to use the patent right, especially licensees, could also have access to the Court. The holder of an exclusive licence under a Community patent or a European patent should be able to initiate litigation before the Court in the same way as the proprietor, and provided that the patent holder is given prior notice, unless the licensing agreement provides otherwise. In cases initiated by the licence holders, the patent holder should also have the right to participate in the procedure. The holders of other licences should be entitled to initiate litigation before the Court in so far as expressly permitted by the license agreement.

The parties should be represented by lawyers authorized to practice before a court of a MS. In patent litigation, questions of technology play an important part in order to reach a legally sound decision. The lawyers should therefore have the possibility to involve and to act together with a European Patent Attorney who is a national of a MS and entered on the list maintained by the EPO. Any European Patent Attorney with EU certificate should be allowed to solely represent a party. Specific training for European Patent Attorneys and lawyers could be envisaged in order to promote efficient and sound litigation proceedings.

It goes without saying that all representatives should enjoy the rights and immunities necessary to the independent exercise of the duties.

3.2 The written and oral procedure

The written and oral procedures should be organized in a proportionate, flexible and balanced manner. They must contribute to high quality decisions which may only be based on arguments or evidence on which the parties have had an opportunity to present their comments.

It may be useful that after the written procedure and under the responsibility of one of the judges an interim hearing is convened in order to explore the possibility of an early settlement.

An oral procedure can be necessary to give parties the opportunity to explain properly the merits of their arguments. The Court may however, after having heard the parties and only with their approval, dispense with the oral procedure.

To the appropriate extent the procedures should be conducted in electronic form or otherwise making good use of modern communication technologies such as video conferencing. The hearing of witnesses by video or by other electronic means could, for example, become a common feature. The costs for making use of these technologies should normally be borne by the Court.

3.3 Reversal of the burden of proof

The onus of proof of facts should in principle be on the party relying on those facts.

The owner of a patent who institutes proceedings before the Court against an alleged infringer must provide proof of this infringement. However, when the alleged infringement concerns a patented process for obtaining a product, it may be very difficult for the patent owner to prove that the claimed process was used in the manufacture of the product. This is for example the case if there is a strong probability that the identical product was made using the patented process but the patent owner has been unable to determine the process actually used despite reasonable efforts.

In such situations specific rules on the reversal of the burden of proof could be considered. The Court could then order the defendant to prove that the process of obtaining the identical product is different from the patented process. The legitimate interests of the defendant in protecting his manufacturing and business secrets should be taken into account.

4. **Decisions**

The Court should decide in accordance with the requests submitted by the parties. Apart from well-known facts, decisions on the merits may only be based on the grounds, facts and evidence put forward by the parties or introduced into the procedure by order of the Court. The judgement should be given in writing, preferably within three months of the end of the oral/written procedure. The Court may order to publicize the decision in full or in part. In certain circumstances dissenting or concurring opinions should be allowed.

Given the length of opposition procedures it should be explored whether, despite pending opposition procedures, it should nevertheless be possible to file an invalidity action with the central division of the Court. The parties can request the EPO to apply the accelerated procedure. The Court could stay proceedings when the EPO would apply the accelerated procedure and a rapid decision could be expected.

Decisions of the Court should be enforceable if they are no longer subject to appeal or where the Court declares a decision enforceable while, if necessary, subject enforcement to the provision of security. The Court itself should be able to append the order of enforcement to its decision which a party could then directly enforce according to the national civil procedure law concerned.

Special arrangements should be explored for the enforcement of decisions initiated by licence holders without participation of the proprietor of the patent.