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Subject : Draft Agreement on the European and Community¹ Patents Court and Draft Statute
- Working paper from the Commission Services on the draft Rules of Procedure for a Unified Patent Litigation System

Delegations will find enclosed a working paper on the draft Rules of Procedure for a Unified Patent Litigation System.

This paper has been drawn up by the services of the Commission (DG MARKT) to serve as a basis for discussion in the Council's Intellectual Property (Patents) Working Party and should not be regarded as a proposal from the Commission.

¹ The terminology of the present draft has not yet been adapted to the terminology of the Lisbon Treaty.

Working paper from the Commission Services
on the draft Rules of Procedure for a Unified Patent Litigation System

In reply to repeated requests by users of the patent system as expressed, for example, at the Conference on Industrial Property Rights organised in October last year in Strasbourg, the Internal Market and Services Directorate-General has launched preparatory work on the Rules of Procedure for a Unified Patent Litigation System.

Users have stressed that work on the Rules of Procedure should be started at an early stage before the text of the Draft Agreement creating the new Litigation System itself is finalised. They point to the importance of seeing the interplay between the Draft Agreement, the Statute of the Court and the Rules of Procedure before the overall court system can be fully assessed. They also think that beginning to prepare the Rules of Procedure is essential for the creation of trust and confidence in such a future Litigation System, giving all stakeholders a better understanding of how the new Litigation System would work in practice. Finally, users stress that working on the Rules of Procedure will be vital to achieve the right balance between on the one hand the more general provisions on organisation and procedure of the Court in the Draft Agreement and on the other hand the more detailed rules in the Rules of Procedure.

Article 22(2) of the draft Agreement provides that the Rules of Procedure "shall be adopted by the Mixed Committee on a proposal from the Commission. The Commission shall draw up the proposal on the basis of broad consultations with the stakeholders and after having received an opinion of the Court".

It will be a tremendous task to prepare comprehensive, uniform and detailed Rules of Procedure to provide for the most efficient and fair procedural practices, and thus guarantee that the new litigation system becomes the attractive forum for resolving patent disputes that European businesses need. The Commission's eventual proposal for Rules of Procedure will have to be the result of a long, very thorough and collaborative process, involving judges, lawyers, patent attorneys, experts from industry and other interested circles as well as Member States, over the coming months and years. Even after the Unified Patent Litigation System comes into operation, the Rules of Procedure will have to be regularly adjusted, in accordance with Article 22(2) of the Draft Agreement.

On the basis of expert advice from judges, lawyers, patent attorneys and industry representatives experienced with patent litigation, the Internal Market and Services Directorate-General is in the process of drawing up a preliminary set of procedural rules for a Unified Patent Litigation System as a foundation for future work and discussion which should feed into the eventual proposal.

The first part of this preliminary set of rules which is enclosed in the Annex concerns the procedure before the Court of First Instance. In this part, it is particularly important to find the right balance between oral and written procedure, ensure efficient case management, and at the same time provide the possibility for the parties to best present and defend their case in proceedings.

Preliminary set of provisions for PART 1, CHAPTER 1 of the Rules of procedure of the European and Community Patents Court

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PREAMBLE

The Court shall conduct proceedings in accordance with these Rules of Procedure which shall be applied and interpreted on the basis of the principles of proportionality, fairness and equity.

Proportionality shall be ensured by giving due consideration to the nature and complexity of each case, its economic value and its importance to the parties.

Fairness shall be ensured by giving due consideration to the legitimate interests and expectations of the parties, including predictability of proceedings and the possibility to best present and defend their case.

Equity shall be ensured by giving due consideration to the necessary balance of interests of all parties including the prevention of abuse of procedure by one of the parties, as well as unnecessary costs and delays.

In accordance with these principles the Court shall apply and interpret the Rules of Procedure in a way which will ensure efficiency and cost-effectiveness of proceedings and decisions of the highest quality.

In accordance with these principles proceedings shall be conducted in a way which will normally allow deciding or otherwise concluding cases at first instance within one year. Case management shall be organised in accordance with this objective. Parties shall cooperate and set out their full case as early as possible in the proceedings.

The Court shall endeavour to ensure consistent application and interpretation of these Rules of Procedure by all first instance divisions and the Court of Appeal. Due consideration will be given to this objective in any decision concerning leave to appeal against procedural orders.

Practice Directions shall lay down further details of the proceedings before the Court. They may not contradict or alter the provisions of the Agreement, the Statute or these Rules of Procedure.

PART 1 – PROCEDURE BEFORE THE COURT OF FIRST INSTANCE

Rule 1 - Stages of the proceedings

1. Proceedings before the Court of First Instance shall consist of one or more of the following stages:
 - (a) the written procedure,
 - (b) the interim procedure, which may include an interim conference,
 - (c) the oral procedure.

Relation with draft Agreement: Article 32(1)

Rule 2 - Powers of the Court

1. The Court may, at any stage of the proceedings, of its own motion or on reasoned request by a party, order a party to answer any question or provide any clarification or evidence, within periods to be specified.
2. The Court may disregard any fact, evidence or argument which a party, without reasonable grounds, has not submitted in due time.

CHAPTER 1 – Infringement action

SECTION 1 – Written procedure

Rule 3 - Exchange of pleadings

1. The written procedure shall consist of the lodging of the Statement of claim (by the plaintiff) and the lodging of the Statement of defence (by the defendant). The Statement of defence may include a Counterclaim for revocation.
2. If a Counterclaim for revocation is lodged, the plaintiff may lodge a Reply to the counterclaim for revocation. The Reply may include a Proposal to amend the claims.
3. If a Proposal to amend the claims is lodged, the defendant may lodge a Rejoinder to the Proposal to amend the claims.
4. The judge-rapporteur may allow the exchange of further pleadings, within periods to be specified.

Rule 4 - Use of electronic means of communication

All pleadings shall be lodged at the Registry in electronic form, in accordance with the Practice Directions. Parties shall make use of the Forms available on-line.

Relation with draft Agreement: Article 25 draft Agreement

STATEMENT OF CLAIM

Rule 5 - Contents of Statement of claim

The Statement of claim shall contain:

- (a) the name of the plaintiff and of the plaintiff's representative;
- (b) the name of the party against whom the Statement of claim is made (the defendant);
- (c) postal and electronic addresses for service on the defendant and on the plaintiff and the names of the persons authorised to accept service;
- (d) an indication of the plaintiff's choice of a division, in accordance with Article 15a(1) of the Agreement;
- (e) the subject-matter of the proceedings, in particular the number of the patent concerned and, where applicable, information about any pending proceedings relating to that patent before the European Patent Office or before any national authority;
- (f) the nature of the claim, the order or the remedy sought by the plaintiff;
- (g) the facts relied on, in particular
 - one or more examples of alleged infringements specifying the date and place of each,
 - the identification of the patent claims alleged to be infringed;
- (h) all written evidence relied on, including any affidavits, and where necessary an indication of the nature of any further evidence which will be offered in support, including offers to produce witnesses and experts; and
- (i) the arguments of law, which may include an explanation of the proposed claim interpretation.

Rule 6 - Language of Statement of claim

1. The Statement of claim shall be drawn up

(a) in the language of the regional division or local division which the plaintiff has indicated in the Statement of claim that he has chosen pursuant to Rule 5(d) or

(b) in the language in which the patent was granted, when the parties have agreed in accordance with Article 29, paragraph 3 of the Agreement, together with an appropriate evidence of such an agreement or

(c) in the language in which the patent was granted, when the plaintiff has indicated in the Statement of claim that he has chosen the Central Division pursuant to Rule 5(d).

2. The plaintiff may lodge together with the Statement of claim a translation of the Statement of claim in one of the official languages of the EPO.

Relation with draft Agreement: Article 29

Rule 7 - Fee for the infringement action

1. The plaintiff shall pay the fee for the infringement action. Proof of payment of the fee shall be provided together with the Statement of claim.

2. Without prejudice to a decision on an application for legal aid under Article 44 of the Agreement, the Statement of claim shall not be deemed to have been lodged until the fee has been paid.

Relation with draft Agreement: Articles 43, 44

Rule 8 - Examination as to formal requirements of the Statement of claim

1. The Registrar shall, within 5 days, examine whether the requirements of Rules 5(a), (b), (c) and (d), 6(1) and 7(1) have been complied with.

2. If the plaintiff has not complied with the requirements referred to in paragraph 1, the Registrar shall inform the President of the Court of First Instance who shall reject the infringement action as inadmissible. He may hear the plaintiff.

3. A decision to reject the infringement action as inadmissible shall be notified to the plaintiff.

Rule 9 - Recording in the Register (Court of First Instance)

1. If the requirements referred to in Rule 8(1) have been complied with, the Registrar shall immediately, in accordance with the Instructions to the Registrar,
 - (a) attribute a date of receipt to the Statement of claim and a case-number to the file,
 - (b) record the file in the Register,
 - (c) notify the plaintiff of the case number and the date of receipt and
 - (d) inform the division chosen by the plaintiff pursuant to Rule 5(d) that a Statement of claim has been lodged.

2. The action shall be regarded as pending before the Court as from the date of receipt attributed to the Statement of claim.

Relation with draft Agreement: Articles 8 and 15a

Rule 10 - Assignment of the case to a panel

[The President of] the Court of First Instance shall assign the case to a panel in accordance with the business distribution scheme published annually in accordance with the Practice Directions, designating one judge as judge-rapporteur.

Rule 11 - Service of the Statement of claim on the defendant²

1. Immediately after the date of receipt has been attributed to the Statement of claim, the Registrar shall serve the Statement of claim on the defendant by means of electronic communication in accordance with the Practice Directions. The defendant shall be informed about the possibility to lodge an Initial objection and a Statement of defence including a Counterclaim for revocation.
2. Where service by means of electronic communication cannot be effected, the Registry shall serve the Statement of claim on the defendant by:
 - (a) registered letter with advice of delivery, in accordance with the Practice Directions;
 - (b) fax, in accordance with the Practice Directions; or
 - (c) any method authorised by the Court under Rule <on Service of the Statement of claim by an alternative method or at an alternative place>.
3. Service under paragraph 2(a) shall be effected at the following place:
 - (a) where the defendant is a company or other legal person: at its statutory seat, central administration, principal place of business or at any place within the Contracting States where the company or other legal person carries on its activities and which has a real connection with the claim;
 - (b) where the defendant is an individual: at his usual or last known residence.

² A general rule on service has been included in order to illustrate how service could be effected in the most straightforward cases. More detailed rules on service will be included in a later draft.

PROCEDURE WHEN THE DEFENDANT RAISES AN INITIAL OBJECTION

Rule 12 - Initial objection

1. At the latest together with the Statement of defence, the defendant may lodge an Initial objection regarding
 - (a) the contents of the Statement of claim;
 - (b) the language of the Statement of claim;
 - (c) the plaintiff's choice of a division pursuant to Rule 5(d); or
 - (d) the lack of jurisdiction of the Court.
2. An Initial objection shall be lodged in a separate written pleading setting out
 - (a) the grounds upon which it is based,
 - (b) where appropriate, the facts and evidence on which it is based and
 - (c) the order sought by the defendant.
3. The Registrar shall
 - (a) serve the Initial objection on the plaintiff,
 - (b) invite him to comment within four weeks and
 - (c) inform the judge-rapporteur designated under Rule 10.
4. The period for lodging the Statement of defence under Rule 15(1) shall not be affected by the lodging of an Initial objection, unless the judge-rapporteur decides otherwise.

Rule 13 - Decision on Initial objection

1. For the purposes of deciding as soon as possible on the Initial objection, the judge-rapporteur designated under Rule 10 may
 - (a) hear the parties;
 - (b) where appropriate, invite the plaintiff to correct, within a time period to be specified, any deficiency noted;
 - (c) convene an early hearing.
2. The judge-rapporteur shall present a report on the Initial objection to the panel to which the case has been assigned, as soon as possible after the expiry of the period of four weeks referred to in Rule 12(3)(b).
3. The panel shall decide on the Initial objection in accordance with Rule <on Decision in written proceedings>. The decision shall include instructions to the parties and to the Registrar concerning the next step in the proceedings.

Rule 14 - Appeal against decision on Initial objection

1. An appeal against a decision on Initial objection may only be lodged together with an appeal against the final decision of the Court of First Instance, unless the Court of Appeal grants leave to appeal.
2. If an appeal against a decision on Initial objection is lodged, proceedings at first instance may be stayed by the Court of Appeal on a reasoned request by a party.

STATEMENT OF DEFENCE

Rule 15 - Lodging of Statement of defence

1. The defendant shall lodge a Statement of defence within four months after service of the Statement of claim. The period may be extended by the judge-rapporteur on a reasoned request by the defendant.
2. The Statement of defence shall be lodged in the language of proceedings. Rule 6(2) shall apply *mutatis mutandis*.

Rule 16 - Contents of Statement of defence

1. The Statement of defence shall contain:
 - (a) the name of the defendant and of the defendant's representative;
 - (b) postal and electronic addresses for service on the defendant and the names of the persons authorised to accept service, where different from the addresses and persons indicated by the plaintiff under Rule 5(c);
 - (c) the case-number;
 - (d) an indication whether the defendant has lodged an Initial objection under Rule 12;
 - (e) the facts relied on, including any challenge to the facts relied on by the plaintiff;
 - (f) all written evidence relied on, including any affidavits, and where necessary an indication of the nature of any further evidence which will be offered in support, including offers to produce witnesses and experts; and
 - (g) the arguments of law, including
 - the grounds why the infringement action should fail and,
 - where appropriate, any challenge to the plaintiff's proposed claim interpretation.
2. The Statement of defence may include a Counterclaim for revocation of the patent alleged to be infringed. The Counterclaim for revocation shall contain:
 - (a) the form of order sought by the defendant (revocation, partial revocation);
 - (b) one or more grounds for revocation;
 - (c) submissions in accordance with paragraph 1(e), (f) and (g).

Rule 17 - Fee for the Counterclaim for revocation

1. The defendant shall pay the fee for the Counterclaim for revocation. Proof of payment of the fee shall be provided together with the Statement of defence.
2. Without prejudice to a decision on an application for legal aid under Article 44 of the Agreement, the Counterclaim for revocation shall not be deemed to have been lodged until the fee has been paid.

Rule 18 - Service of the Statement of defence on the plaintiff

1. The Registrar shall serve the Statement of defence on the plaintiff.
2. Where the Statement of defence includes a Counterclaim for revocation, the Registrar shall inform the plaintiff about the possibility to lodge a Reply to the Counterclaim for revocation including a Proposal to amend the claims.

Rule 19 - Further schedule

1. At the latest two weeks after service of the Statement of defence, the judge-rapporteur shall, after consulting the parties and in accordance with the Practice Directions, set
 - (a) a date, time and place for an interim conference and
 - (b) a provisional date for the oral hearing.
2. On request by the parties, the judge-rapporteur may convene an early hearing, in accordance with the Practice Directions.

REPLY TO THE COUNTERCLAIM FOR REVOCATION AND PROPOSAL TO AMEND THE CLAIMS

Rule 20 - Lodging of Reply to the counterclaim for revocation

1. Within two months after the service of a Statement of defence which includes a Counterclaim for revocation, the plaintiff may lodge a Reply to the counterclaim for revocation setting out the arguments and evidence why the defendant's allegations shall fail. The period may be extended by the judge-rapporteur on a reasoned request by the plaintiff.
2. The Reply to the counterclaim for revocation may include a Proposal to amend the claims in which the plaintiff's shall
 - (a) set out proposals for amending the claims of the patent in dispute;
 - (b) set out the grounds upon which the amendments are sought;
 - (c) indicate whether the proposals are definite or conditional; the amendments proposed, if conditional, must be reasonable in number in the circumstances of the case.
3. Any subsequent request for amendment of the claims may only be submitted with the leave of the Court.

Rule 21 - Service of the Reply to the counterclaim for revocation on the defendant

The Registrar shall serve the Reply to the Counterclaim for revocation as well as any Proposal to amend the claims on the defendant. Where the Reply to the Counterclaim for revocation includes a Proposal to amend the claims, the defendant shall be informed about the possibility to lodge a Rejoinder to the proposal to amend the claims.

REJOINDER TO THE PROPOSAL TO AMEND THE CLAIMS

Rule 22 - Lodging of Rejoinder to the proposal to amend the claims

1. Within two months of the service of a Proposal to amend the claims, the defendant may lodge a Rejoinder to the proposal to amend the claims. The period may be extended by the judge-rapporteur on a reasoned request by the defendant.
2. The Rejoinder to the proposal to amend the claims shall set out the grounds upon which the defendant believes all or some of the amendments proposed are not allowable or the grounds upon which the claims as amended remain invalid.

Rule 23 - Service of the Rejoinder to Proposal to amend the claims on the plaintiff

The Registrar shall serve the Rejoinder to the proposal to amend the claims on the plaintiff.

SECTION 2 – Interim procedure

Rule 24 - Stages of the interim procedure

The interim procedure may consist of

- an interim conference of the parties,
- other exchanges of pleadings that the judge-rapporteur deems necessary and
- the preparation for the oral hearing.

Relation with draft Agreement: Article 32(2)

Rule 25 - Role of judge-rapporteur (Case management)

During the interim procedure, the judge-rapporteur shall

- (a) have all authority to ensure fair, orderly and efficient proceedings;
- (b) conduct the interim conference;
- (c) make all necessary preparations for the oral hearing.

Relation with draft Agreement: Article 24

Rule 26 - Referral to panel

1. The judge-rapporteur may refer any matter to the panel for decision.
2. Any party may request that a decision or order of the judge-rapporteur be referred to the panel for an early review. Pending review, the decision or order of the judge-rapporteur shall be effective.

INTERIM CONFERENCE

Rule 27 - Aim of interim conference

The interim conference shall enable the judge-rapporteur to

- (a) identify main issues and determine which relevant facts are in dispute,
- (b) where necessary, clarify the position of the parties as regards those issues and facts,
- (c) establish a schedule for the further progress of the proceedings,
- (d) explore with the parties the possibilities to settle the dispute or to make use of the facilities of the Patent Mediation and Arbitration Centre,
- (e) where necessary, issue orders regarding experiments, inspections or production of documents or appoint experts,
- (f) where appropriate, hold preparatory discussions with witnesses and experts with a view to properly prepare for the oral hearing,
- (g) make any other decision or order as he deems necessary for the preparation of the oral hearing.

Relation with draft Agreement: Articles 17(3) and 32(2)

Rule 28 - Preparation for interim conference

Before the interim conference, the judge-rapporteur may order the parties to

- (a) provide further clarification on specific points,
- (b) produce evidence,
- (c) answer specific questions or
- (d) lodge specific documents.

Rule 29 - Telephone conference and video conference

1. The interim conference shall be held by telephone conference or by video conference.
2. On request by a party and subject to the approval of the judge-rapporteur, the interim conference may be held in Court.

Rule 30 - Recording of the interim conference

1. The interim conference shall be [audio / video] recorded, in accordance with the Practice Directions. The recording shall be made publicly available after the hearing, subject to paragraph 3.
2. An audience sheet shall be drawn up by the Registrar following instructions from the judge-rapporteur. It shall contain particulars of the persons attending the interim conference.
3. After hearing the parties, the judge-rapporteur may order that the recording or parts thereof be kept confidential in the interest of
 - the parties or other affected persons,
 - public security,
 - justice or public order.

Relation with draft Agreement: Articles 25, 26

Rule 31 - Settlement

1. If the judge-rapporteur is of the opinion that the dispute is suitable for a settlement, he may [without compromising his judicial position] propose that the parties make use of the facilities of the Patent Mediation and Arbitration centre in order to settle the dispute.
2. No opinion expressed, suggestion made, proposal put forward, concession made or document drawn up for the purposes of settlement may be relied on as evidence by the Court or the parties in proceedings before the Court.

Relation with draft Agreement: Articles 17(3) and 52

Rule 32 - Date for the oral hearing

The judge-rapporteur shall, after consulting the panel and the parties, confirm the date for the oral hearing provisionally set under Rule 19.

PREPARATION FOR THE ORAL HEARING

Rule 33 - Further instruction

1. After the interim conference, the judge-rapporteur shall examine whether the state of preparation of the file is adequate, including where appropriate ensure that
 - (a) the parties have provided all necessary documents and complied with orders made and
 - (b) the evidence offered is as complete as necessary for the efficient conduct of the oral hearing.
2. The judge-rapporteur shall set the dates and periods for any further procedural steps as soon as possible, including where appropriate set a date within which the parties may lodge final written submissions in preparation for the oral hearing.

Rule 34 - Summons to the oral hearing

The judge-rapporteur shall summon the parties to the oral hearing, in accordance with the Practice Directions. At least one month's notice of the summons shall be given, unless the parties agree to a shorter period.

Rule 35 - Closure of the interim procedure in view of the oral hearing

1. As soon as the judge-rapporteur decides that the interim procedure is completed, he shall inform the presiding judge and the parties that the debate is declared closed in view of the oral hearing.
2. The presiding judge shall take over the management of the case.

SECTION 3 – Oral procedure

Rule 36 - Role of presiding judge (Case management)

During the oral procedure, the presiding judge shall

- (a) have all authority to ensure fair, orderly and efficient proceedings;
- (b) ensure that the case is ready for decision at the end of the oral hearing.

Rule 37 - Conduct of the oral hearing

1. The oral hearing shall be held before the panel and shall be opened, directed and closed by the presiding judge.
2. The presiding judge and each of the judges may in the course of the oral hearing put questions to the parties, to the parties' representatives and to any witness or expert.
3. The oral hearing shall consist of
 - (a) the hearing of the submissions of the parties' representatives,
 - (b) if necessary and under the control of the presiding judge, the hearing of witnesses and experts, including questioning of the other party's witnesses and experts.

Relation with draft Agreement: Article 33(1)(a)

Rule 38 - Duration of the oral hearing

1. Without prejudice to the principle of proportionality, the presiding judge shall endeavour to complete the oral hearing within one day. The presiding judge may set time limits for argument in advance of the oral hearing in accordance with the Practice Directions.
2. Oral testimony at the oral hearing shall be limited to issues identified by the judge-rapporteur or the presiding judge as having to be decided by oral evidence.
3. The presiding judge may, after consulting the panel, limit the oral submission of a representative if the panel is sufficiently informed.

Rule 39 - Adjournment where the Court considers that further evidence is required

In exceptional cases, the Court may, after hearing the oral argument of the parties, decide to adjourn proceedings and call for further evidence.

Rule 40 - Recording of the oral hearing

1. The oral hearing shall be recorded, in accordance with the Practice Directions.
2. Rule 30 shall apply *mutatis mutandis*.

Relation with draft Agreement: Article 26

Rule 41 - Absence of a party from the oral hearing

1. Any party which does not wish to be present at the oral hearing shall inform the Registry in good time. Where both parties have informed the Registry that they do not wish to be present at the hearing, the presiding judge may decide to close the case in accordance with Rule <on Decision in written proceedings>.
2. The Court shall not be obliged to delay any step in the procedure, including its decision, by reason only of the absence of a party from the oral hearing.
3. A party absent from the oral hearing shall be treated as relying only on its written case and not wishing to contradict any new statements of fact that the other party may be allowed to make at the oral hearing.
4. If due to an exceptional occurrence a party is prevented from attending the oral hearing, it shall immediately inform the Registry. The Court shall decide whether adjournment of the oral hearing is justified.

Rule 42 - Decision

The decision of the Court shall be given in writing as soon as possible after the closure of the oral hearing. The Court shall endeavour to give its decision in writing within six weeks of the oral hearing.

Relation with draft Agreement: Article 50

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