

24 July 2015

EPI position paper on Court fees and recoverable costs

1. The epi welcomes the consultation of the Preparatory Committee on the Rules on Court fees and recoverable costs and appreciates the progress made so far.

2. The epi would like to make the following comments.

3. The epi noted that the fees for low-value cases appear to be higher than a comparable German case, while the high-value cases appear relatively less expensive. This however fails to take into account the proposed fee reductions for SME's or good conduct. The epi is of the opinion that the high-value cases could reasonably be expected to bear a greater burden.

4. Concerning Rule 370, it is proposed either Alternative 1 or Alternative 2. The epi believes that one should not exclude the other.

5. A construction along the lines of Alternative 1 is essential in order to adequately encourage settlement. In particular, in the case of the fee for revocation, failure to include some form of reduction for early settlement would prejudice the patent proprietor who immediately surrendered his patent on being challenged. Without some form of fee reduction, the proprietor would apparently be liable for the full burden of both the other party's costs and the court fee of €20 000.

6. Contrary to the commentary to the consultation document, the epi doubts that Alternative 1 would be especially preferred by SME's. The alternative is believed to be beneficial to all users of the court and to the court itself, in particular for lower value cases where the fixed fee is a major component of the overall fee.

7. Alternative 2, gives clear benefits for SMEs and other eligible parties once the value of the action exceeds €500k. Some scheme of this nature would be essential to ensure access to justice for SME's once the value of the action has passed this threshold, which would not be achieved by Alternative 1.

8. Consequently, the epi suggests to merge partially Alternative 1 with Alternative 2.

More precisely, the epi suggests to keep § 6 of Alternative 1 unchanged and to add thereafter § 6 of Alternative 2.

§7 which is common to both alternatives would remain unchanged.

9. Concerning the proposed ceilings for recoverable costs, the epi considers that the upper values are excessive. Given that these will be open to review in future, the epi feels that a € 1.5 million maximum limit would be more than adequate and should be imposed to discourage escalation, except in particular circumstances, at the discretion of the court and in conformity with the provisions of Rule 152-1 which calls for "reasonable and proportionate costs".

10. In addition, the epi observes that the proposal for recoverable costs in case of multiple parties in a single action appears presently unclear, especially since it refers to the recoverable costs of the successful party. Art 69 of the Agreement seems clear in that it states that the unsuccessful party shall bear costs up to a ceiling but the proposed wording for Rule 370 is ambiguous. It could be interpreted to mean that if costs were awarded against a plaintiff in favour of multiple successful defendants, then a multiplication of the ceiling would apply, which could be catastrophic to the plaintiff.

11. The epi considers that, if a case is decided in favour of a plaintiff, each defendant should only share a portion of the plaintiff's costs (which would be limited by the ceiling). The wording of Rule 370 should therefore be clarified to emphasise that the ceiling is applicable to the unsuccessful party i.e. no (unsuccessful) party can be subject to costs exceeding the ceiling.

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