

## **Some remarks about invalidity as a defence in European patent infringement proceedings.**

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As regards this subject matter, there is an important difference between Germany and Austria on the one hand and the other European countries on the other hand.

In Germany and Austria there are different courts that are competent for invalidity proceedings and for infringement proceedings.

In Germany infringement is dealt with by the civil courts of the states (Germany is a federal republic), while invalidity claims are decided by a federal court, the Federal Patent Court (Bundespatentgericht).

In all other European countries infringement- and invalidity proceedings are dealt with by the (same) civil courts.

If in Germany or Austria in infringement proceedings the defence of invalidity of the patent is raised, the infringement court can stay its decision about the infringement until the validity issue has been decided upon by the competent court. However, in practice this is seldom done; only when the infringement judge feels that there is a strong case for invalidity will he stay proceedings.

In the other countries the court will deal itself with the defence of invalidity, which will often be accompanied by a counterclaim for revocation of the patent.

The way this is done may differ from country to country. Differences are mainly notable in the way the courts (composed of lawyers) provide themselves with the necessary technical information.

The judges in the UK will use evidence brought by (cross-examined) party experts.

Judges in e.g. the Netherlands on the other hand will appoint court-experts (after consultation with the parties) and/or request a technical opinion from the national patent office or from the European Patent Office (on the basis of art. 25 EPC).

A stay of the proceedings is not necessary if the judge himself deals with the validity issue. This is only different where the decision about the validity is the exclusive jurisdiction of a foreign judge because the infringed patent is a foreign patent. In such a case a stay of the infringement proceedings is probable. This can happen because of the jurisdiction rules in Europe, that give exclusive jurisdiction about validity to the courts of the state where the patent is registered but who give jurisdiction for infringement issues to, among others, the court of the domicile of the defendant (not necessarily being in the state where the patent is registered).