View of Belgian Compulsory Licensing

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Insight into effects of new Belgian patent law, relationship to other laws

The Patent law of 1854 has been replaced by the law of March 28, 1984, which became effective in its entirety on January 1, 1987.

The change of law had two main purposes:

1. To adapt the Belgian legislation to the provisions of international treaties, ratified by the Belgian Parliament by the law of July 8, 1977.
   - — The Convention concerning the uniformity of certain principles of patent law, at Straatsburg on June 19, 1970.
   - — The Patent Cooperation Treaty, at Washington on June 19, 1970.
   - — The Convention on the Grant of European Patents, at Munich on October 5, 1973, (the "European Patent Convention").
   - — The Convention concerning European Patents for the Common Market, at Luxembourg on December 15, 1975 (the "Community Patent Convention").
2. To modernize the old law of 1854 in order to give the patent holder more effective protection. As a result, both material and formal patentability conditions have become detailed.

PATENTABILITY CONDITIONS

Under the conditions and within the limits set out below, a patent can be granted for the exploitation of any *invention* that is *new*, that involves an *inventive step* and that is *capable of industrial application.*

Invention

There is no positive definition of the term "invention" in the Patent Law, but it can be defined as the creation of something that did not exist before. Nevertheless, the law provides a negative definition, stating that the following in particular shall not be regarded as inventions:

- — Discoveries (i.e. the perception of a natural phenomenon existing before the first perception thereof), scientific theories and mathematical methods.
- — Aesthetic creations.
- — Schemes, rules and methods for performing intellectual work, games or management, and computer programs.
- — Data presentation.

Article 3

Patentability of the subject matter or activities referred to above is excluded only to the extent to which a patent application or a patent relates to such subject matter or activities.

Also excluded from the protection granted by the Patent Law are:

- — New plant varieties of species or varieties covered under the Law of May 20, 1975, for the protection of new plant varieties.
- — Animal varieties.
- — Essentially biological processes for the protection of plants or animals.

Article 4

However, the exclusion does not apply to microbiological processes or to the products obtained thereby.

Patents shall not be granted for inventions the publication or application of which would be contrary to public policy or morality, provided that the application shall not be deemed so merely because it is prohibited by law or regulation.

New

An invention shall be considered to be new if it does not form part of the state-of-art *(stand van de techniek)*. The state-of-the art shall be held to comprise everything made available to the public by means of a written or oral description, by use, or in any other way, before the date of filing the patent application. Additionally, the content of Belgian patent applications and of European or international patent applications (i) that indicate Belgium as a country in which protection is sought, (ii) which were filed prior to the date of filing your patent application, and (iii) which were published on or after that date, shall be considered to be part of the state-of-art.

It should be noted that a disclosure of the invention shall not disqualify the novelty if the disclosure did not occur earlier than six months preceding the filing of the patent application and if the disclosure was due to, or in consequence of (a) an evident abuse to the detriment of the applicant or his legal predecessor or (b) the fact that the applicant or his legal predecessor has displayed the invention at an official or officially recognized international exhibition falling within the terms of the convention on International Exhibitions (signed at Paris on November 22, 1928). In these circumstances, the applicant must state at the time of filing the patent application that the invention has been so displayed. He should also file a supporting certificate within the period and under the conditions to be laid down by the King.

Inventive Step

As it is not that difficult to develop-

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something new, since the requirements for novelty are rather broad and would cover more inventions than intended the involvement of an inventive step or of a certain originality *(Erfindungshohe)* is also required.

An invention shall be considered as involving an inventive step if, having regard to the state-of-the-art, it is not obvious to a person skilled in the art (Article 6). It follows that this condition gives a substantial discretionary power to the judge.

Capable of Industrial Application

An invention shall be considered to be susceptible to industrial application if it can be made or used by any type of industry, including agriculture.

Methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practised on the human or animal body shall not be regarded as inventions which are susceptible to industrial application. But this provision shall not apply to products, in particular substances or compounds, for use in any of those methods (Article 7).

FORMAL CONDITIONS

Who Can File the Application and Where Should the Application Be Filed? (Articles 8 through 12)

The right to a patent shall belong to the inventor or his successor. If two or more persons have made an invention independently of each other, the right to the patent shall belong to the person whose patent application has the earliest date of filing.

The inventor should file the application with the Industrial Property Office of the Ministry of Economic Affairs (hereinafter "the Office"). This Office considers that the applicant is entitled to the exercise of the patent right without further examining the application.

Contents of the Application (Articles 15 through 20)

Anyone wishing to obtain a patent shall be required to file an application. Patent applications shall contain:

1. A request for the grant of a patent addressed to the Minister.
2. A description of the invention that is sufficiently clear and complete to be carried out by a person skilled in the art, failing which the judge can revoke the patent.
3. The extent of the matters for which protection is sought (such determination(s) of the extent are called "claim(s)"); this is very important because the limits of the protection conferred by a patent shall be determined by the terms of the claims.
4. Any drawings referred to in the description or the claims if they are necessary to the understanding of the invention.
5. An abstract merely for the purpose of technical information.

Each patent application shall be subject to payment of the filing fee which at present amounts to BF 2,000 (Royal Decree of December 18, 1986).

Control

Contrary to the legal systems of most other countries, the old Belgian Patent law only controlled the formal conditions. The control of material conditions was made by the judge, afterwards, if there was litigation. Unfortunately, the new law has not modified this method as it stipulates that patents shall be granted without prior examination of the patentability of the inventions, without guarantee of the value of the inventions or of the exactness of their description, at the applicant's own risk (Article 22 paragraph 3).

However, a search report relative to the new character of the invention may be drafted by the European Patent Office, created by the Convention of Munich. Such report shall be drafted on the basis of the claims, taking into account the description and any drawings. It shall cite those elements of the prior state of the art that may be taken into consideration in deciding whether the invention is new and whether it involves an inventive step. The Office shall communicate the search report to the applicant who may file a new draft of its claims and of the abstract. However, the new draft may not go beyond the scope of the patent application.

If it appears from the search report that the invention is not new and does not involve an inventive step, the Belgian Office cannot refuse the granting of a patent on this ground but the applicant can withdraw the patent application. Only the courts are entitled to control the validity of the patent, in particular on the basis of the search report.

The applicant has to pay a search fee amounting to about BF 40,000. if this fee is not paid within a month after the filing of the application the protection of the patent will be reduced to 6 years instead of 20 years.

When a search report drafted by the European Patent office (or another foreign authority with respect to an invention that is identical with one for which a patent application has been filed in Belgium) has been produced under the granting procedure for a foreign patent, such search report may be used in the Belgian patent granting procedure without paying the search fee again.

Granting of the Patent

The completion of the formalities laid down for granting a patent must be confirmed by a ministerial decision. Such decision shall constitute the patent. The decision shall be issued as soon as possible following the expiration of a period of 18 months from the filing date of the patent application.

On the date of the granting of a patent, the patent file shall be made available to the public at the Office. The patent is also published in the Patent Collection. The exclusive right shall take effect as of the day on which the patent is made available to the public. (Articles 22 through 25)

THE RIGHTS AND OBLIGATIONS DERIVING FROM PATENTS

Rights

The rights are more or less the same as conferred by the Convention of Luxembourg and by the Convention of Munich. The patent shall confer on its owner the right

to prevent all third parties not having his consent (Article 27):

— From making, offering, putting on the market or using a product that is the subject matter of the patent or a product obtained directly by a process which is the subject matter of the patent, or

— From using a process that is the subject matter of the patent.

The rights conferred by the patent shall not, *inter alia,* extend to acts done privately and for non-commercial purposes or to acts performed for experimental purposes relating to the subject matter of the patented invention, nor to acts concerning a product covered by that patent that are performed on Belgian territory after that product has been put on the market in Belgium by the owner of the patent or with his express consent (Article 28).

Obligations

In order to keep the patent valid, *renewal fees* must be paid for any patent application or patent as of the third year after the filing date of the application. Failing payment by its due date or within the six months thereafter, the owner of the patent shall automatically lose his rights. He may, however, request that his rights be re-established if he can provide a legitimate reason for his failure to pay the renewal fee (which ranges from BF 1,200 for the third year to BF 9,000 for the twentieth year) (Articles 40 through 41).

The new law requires that the patent holder *uses the patent,* failing which he can be compelled by the Department of Economic Affairs to grant a license to an interested third party (Articles 31 through 38). The Minister of Economic Affairs may grant such compulsory license to use an invention covered by the patent.

1. When a period of four years from the date of filing of the patent application or three years from the date of granting the patent (whichever period expires last) has elapsed without the patented invention having been used by means of an effective and continuous exploitation in Belgium and without a reasonable justification from the owner of the patent for his inaction.

A compulsory license may not, however, be granted if the product covered by the Belgian patent is manufactured in a state that belongs to the same economic community as Belgium and is put on the market in Belgian territory in sufficient quantities to satisfy national demands.

2. When an invention is covered by a patent (in practise it is most often an improvement invention) owned by a third party interested in obtaining a compulsory license of the main patent, and cannot be exploited without infringing the rights derived from the main patent granted on an earlier filing, insofar as the improvement patent is of particular technical importance.

The third party interested in a compulsory license must prove that one of the two abovementioned conditions applies to the owner of the patent and that he has applied in vain to the owner to obtain a voluntary license. In addition, when the license is claimed under item (1.) above, he must prove that he possesses (should a license be granted to him) the necessary means to undertake effective and continuous manufacturing of the patented invention in Belgium.

Once a compulsory license has been granted, the relationship between the legal patent owner and the licensee shall be assimilated (except as otherwise provided in the decision to grant) to that existing between a contractual licensor and licensee.

A patent shall expire at the end of the 20th year after the filing date of the application, subject to payment of the renewal fees referred to below. However, the patent shall expire at the end of the sixth year after the filing date of the application if the applicant does not pay the search fee or if he has not supplied the search report to the Office.

Any violation of the rights of the owner, even if in good faith, shall constitute an infringement involving the infringer's liability, which entitles the owner, the usufructuary or, as the case may be, the holder of the compulsory license to institute infringement proceedings before the Court of First Instance for five years as of the day on which the infringement was committed (Articles 52 through 54).

The court shall order any infringer, at the request of the injured party, to cease the infringement and to pay the plaintiff compensation for the damage caused by the infringement. In the event of bad faith, the court shall order the confiscation, to the benefit of the plaintiff, of the articles manufactured in infringement of the patent and of the instruments or means specifically intended for their manufacture. Where appropriate, the court shall award an amount equal to the price of the articles already sold.

International Patent Law

As mentioned above, the new Belgian law was adapted to the international Conventions ratified by Belgium. According to this adaptation, the patentability conditions and the rights and obligations of the patent holder set forth in these Conventions are more or less the same as under Belgian law.

Therefore, your attention is drawn only to some specific points in these Conventions and to their practical consequences.

THE EUROPEAN PATENT CONVENTION OF MUNICH

This Convention, which is an initiative of the EC, does not take the place of national patent law. The main purpose of the Convention is to facilitate patent application in all member states by requiring that only one patent application to be made at the European Patent Office. Moreover, the handling of the patent application, with a preliminary search, and the granting of a patent by this Office takes place in accordance with the patentability conditions as set forth in Articles 52 through 57 of the Convention.

A European patent application may be filed:

— At the European Patent Office at Munich or at its branch at The Hague, or

— If the law of a Contracting State so permits, at the Central Industrial Property Office or other competent authority of that state. In Belgium, the Industrial Property Office of the Ministry of Economic

Affairs is the competent authority for European patents (Article 3 of the law of July 8, 1977). An application for a European patent filed at this office shall have the same effect as if it had been filed on the same date at the European Patent Office.

The Search Division of the European Patent Office shall draft a European search report concerning the new character of the invention. A European patent shall be published as soon as possible after the expiration of a period of 18 months from the date of filing. Upon written request, the European Patent Office shall examine whether a European patent application and the invention to which it relates meet the requirements of the Convention. It is important to note that this request may be filed by the applicant until the end of six months after the date on which the European Patent Bulletin mentions the publication of the European search report, failing which the application shall be deemed to be withdrawn (Article 94).

The Convention leads to a certain extent of uniformity with respect to patentability conditions and duration of the patents (i.e. 20 years). The patents granted shall confer upon their owner, in each Contracting State in respect of which it is granted, the same rights as would be conferred by a national patent granted in that State (Article 64).

THE PATENT COOPERATION TREATY OF WASHINGTON

The Belgian Patent Office receives the international patent applications (under the Patent Cooperation Treaty) from Belgian residents. Through this international patent application, the granting procedure to obtain a national patent commences in all the Contracting States designated in the application. This international patent application results in an international search concerning the new character of the invention. The application and the search report are sent to the designated countries and are published by the World Intellectual Property Organization after a period of 18 months.

The Patent Cooperation Treaty also organizes a procedure to issue an "international provisional appreciation" of the international application. This "appreciation" is to be executed by the Institute for International Provisional Appreciation and results in a report on the question of whether the invention meets the patentability conditions under the Patent Cooperation Treaty. This procedure takes place only at the request of the applicant. The report is communicated to the Contracting States in which the applicant wishes to use the results of the provisional appreciation.

Contrary to the European Patent Convention, this treaty does not organize a central granting procedure, but only facilitates the granting of a patent in several countries. The Contracting States are free to follow the abovementioned search report in making their decision on the granting of a national patent. The Royal Decree of August 21, 1981, concerning the filing of an international patent application in Belgium, appointed the European Patent Office as the competent organization to make the international search and the international provisional appreciation with regard to the international patent application emanating from Belgium. If Belgium is indicated in an international patent application as a country in which protection is sought, this indication is considered to be an application for a European Patent according to the European Patent Convention (Article 2 § 3 of the law of July 8, 1977). It follows that an international patent application under the Patent Cooperation Treaty cannot result in a Belgian patent.

THE COMMUNITY PATENT CONVENTION OF LUXEMBOURG

Community patents shall have a *unitary* character and they shall have equal effect throughout the territories to which this Convention applies. They may only be granted, transferred, revoked or allowed to lapse with respect to the whole of such territories. Community patents shall also have an *autonomous* character. They shall be subject only to the provisions of this Convention and to those provisions of the European Patent Convention that are binding upon every European patent and that shall as a result be deemed to form part of this Convention.

This Convention, which involves a substantial degree of uniformity, has not yet come into effect. It will most probably not come into effect prior to 1992.

If this Convention comes into effect, the applicants for patents which are valid in Belgium will have three possibilities:

1. They can still apply for a *national patent* with the national patent authorities.

2. They can apply for a *European patent* in one or more of the Contracting States of the European Patent Convention, which will confer in each Contracting State the same rights as would be conferred by a national patent granted in that state. A European patent results from a European patent application or from an international patent application.

3. They can apply for *a Community patent,* which shall have equal effect throughout the territories to which the Community Patent Convention applies.