

## Denmark

### Legal basis

The legal basis for compulsory licences under Danish patent law is the Danish Patents Act (hereinafter Patents Act) Chapter VI (Sections 45-50).

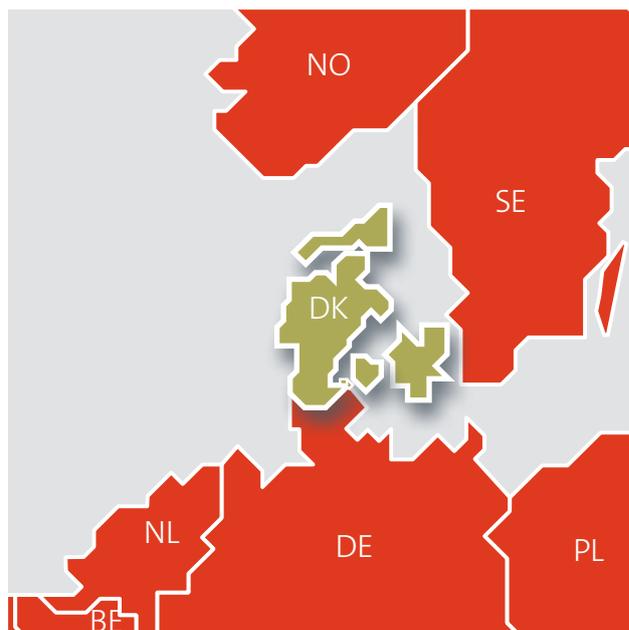
The Patents Act implements the Biotech Directive. EU Regulation 816/2006 is directly applicable under Danish law.

### Grounds for applying for a licence

According to Section 49 Patents Act (the “general criteria”), a compulsory licence may be granted only if (i) it has not been possible to obtain a licence through agreement on reasonable terms and (ii) the licensee is considered capable of exploiting the invention in a proper and reasonable manner and in compliance with the licence.

The specific criteria in Sections 45-48 of the Patents Act provide various scenarios according to which a compulsory licence may be granted:

- Pursuant to Section 45, a compulsory licence may be granted if the patented invention is not exercised in Denmark (or in the EU, EEA or a WTO state) to a reasonable extent within 3 years of the grant of the patent or 4 years from the filing of the patent application, unless legitimate reasons exist. For the purpose of Section 45, import does not amount to work of the invention. However, work of the patented invention within EU or EEA or a state that has ratified the WTO is with respect to the question of compulsory licence equivalent to work of the patent in Denmark. Therefore, the exception regarding import is of very little significance (i.e. in relation to non-WTO states only).
- Pursuant to Section 46, the proprietor of a patented invention, the exploitation of which is dependent on a patent or a registered utility model which belongs to another person, may be granted a compulsory licence to exploit the invention protected by said patent or utility model registration, provided that the former invention constitutes significant technical progress of considerable economic importance.
- According to Section 46a(1) of the Patents Act, a breeder who cannot acquire or exploit a plant variety right without infringing a prior patent may apply for a compulsory licence for the exploitation of the invention, provided that the compulsory licence is necessary for the exploitation of the plant variety to be protected, subject



to the payment of an appropriate royalty. The compulsory licence shall be granted only if the breeder demonstrates that the variety constitutes significant technical progress of considerable economic importance compared with the invention.

- Pursuant to Section 47, a compulsory licence may be granted when essential public interests render it necessary.
- Pursuant to Section 48, a compulsory licence may be granted to a person who, at the time of the filing of a patent application, was already exploiting the invention described in the application. However, this requires very special circumstances in favour of such a grant and it is essential that the person who exploited the invention commercially did not know of the application and could not reasonably have obtained knowledge thereof.

### General procedure

Pursuant to Section 50 of the Patents Act, the grant of a compulsory licence requires court proceedings, the Maritime and Commercial High Court being the sole competent entity for granting compulsory licences.

The court assesses whether the general criteria in Section 49 of the Patents Act and one (or more) of the specific criteria in Sections 45-48 of the Patents Act are met.

It is unclear whether there is the possibility of obtaining a compulsory licence by way of preliminary relief. Arguably, the rules allow the Maritime and Commercial High Court or the

district court to order a compulsory licence as a preliminary measure. On the other hand, it may be argued that the competence to grant compulsory licences lies only with the Maritime and Commercial High Court in cases on the merits, according to Section 50 of the Patents Act. Whether that would prevent the same court from granting a compulsory licence as a preliminary measure is unclear. If a potential compulsory licence can be granted as a preliminary measure, it would probably at least require that the person requesting the compulsory licence had negotiated with the patentee to obtain a licence by agreement first, according to Section 49 of the Patents Act. Further, the person requesting the compulsory licence would have to prove that the requirements for obtaining a compulsory licence were fulfilled.

The terms of the compulsory licence, including the compensation level and the extent of the licence, are determined by the court based on the court's discretion. In general, the extent of a compulsory licence should not be more extensive than necessary considering the circumstances that prompt the grant of the compulsory licence. The court can determine the nature, volume, time frame and geographical extent of the utilisation. As to the nature and volume of the exploitation, this usually covers all commercial use, although there are substantial exceptions hereto. If the court does not specify a time frame for the compulsory licence, the licence is valid as long as the patent is. The geographical scope of the compulsory licence is limited to the state of Denmark.

The compensation level is determined in accordance with the general principles on damages. Thus, the patent owner is to be fully compensated for the loss he incurs due to the grant of a compulsory licence. Due to the difficulties of determining this loss, the courts usually set the damages on a discretionary basis. If the patent owner has previously granted licences or if there are other comparable contracts, these will be taken into account. Otherwise, the compensation will correspond to the value to the exploiter of using the patent or in the absence of such specific value the value will generally be determined as 5% of the sales price of the sold packaged units ex works. This compensation level has its basis in a decision from 1966 (see below).

## Appeal/review

Decisions delivered by the Maritime and Commercial High Court or the district court can be appealed to the Eastern or Western High Court, or the Supreme Court, see the Danish Administration of Justice Act, Sections 368(1) and (4).

According to Section 368(4) of the Danish Administration of Justice Act, a decision delivered by the High Courts or the

Maritime and Commercial High Court may be appealed to the Supreme Court if the outcome of the case is of fundamental legal importance and of general importance to the application and development of the law or has significant societal implications in general, or where there are other special reasons why the case should be heard before the Supreme Court.

## Statistics and jurisprudence

There have been three cases concerning compulsory licences (as reported in *Ugeskrift for Retsvæsen*: U 1972.325H, U 1966.566H, 1943.752/2H).

The leading one is a Supreme Court decision from 17 June 1966 (case No. I 194/1964 (U.1966.566H)). The Danish Patents Commission granted a compulsory licence (today, only the courts have such competence, as described above) to a defendant due to the fact that the patent for a medicinal product (phenylbutazone) had not been sufficiently exploited in Denmark considering the demand for it and without there being any legitimate reasons for it. The decision by the Patent Commission was confirmed by the Maritime and Commercial Court and subsequently by the Supreme Court. The courts did not find that there was any information in the trials which could give reason to change the compensation level awarded by the Patent Commission, which was 5% of the sales price ex works. The compensation level in the decision has since been considered the standard level in this type of case if another compensation level is not substantiated to be more relevant.

In the case reported in U.1972.325H, the Danish Ministry of Defence had imported SAAB Draken fighter planes that had catapult seats. An English company had a patent to a delaying mechanism that was part of the catapult seat. The Danish Ministry of Defence and SAAB were awarded a compulsory licence for said delaying mechanism. The amount awarded was set by the Supreme Court to GBP 100 per seat. The majority of the court stated that, considering the significance of the technology for the catapult seat, the court found that although the compensation should be less than a licence for the entire catapult seat (which had a price of GBP 4,000), the compensation should anyway be reasonable in comparison to the price for the entire seat.

The third decision reported in U.1943.752/2H concerned a compulsory licence for a medicinal product (Isopropylantipyrin), in which the Supreme Court confirmed a compulsory licence for production of a medicine during the Second World War as the product was not exploited in Denmark. The compensation awarded is not considered generally applicable.