

## Hungary

### Legal basis

The Hungarian Patent Act, i.e. Act XXXIII of 1995 on the Protection of Inventions by Patents – consolidated text of 1 March 2015 (hereinafter PA).

Art. 12 Biotech Directive has been implemented partly by the general rules of compulsory licence in Art. 32 PA and the special implementation rule in Art. 114/B PA.

### Grounds for applying for a licence

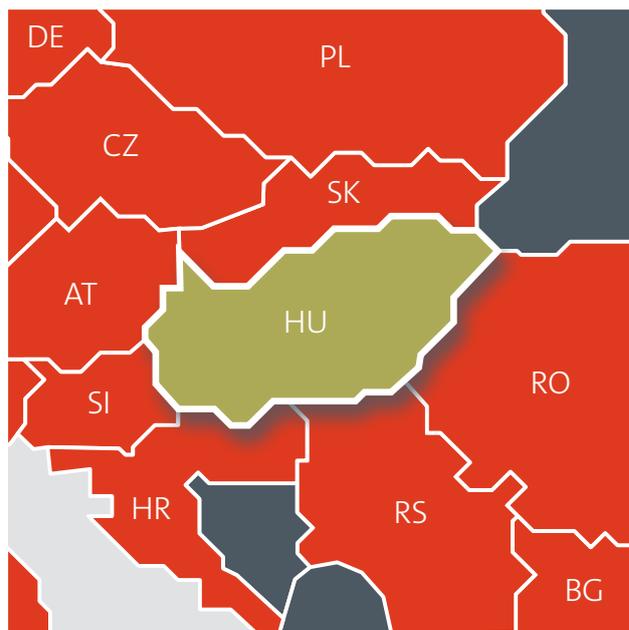
In Hungary, compulsory licences are available on the three grounds:

- non-genuine use of the patent (Art. 31 and 33 PA): Art. 31 of the Patent Act specifies that: “If within four years from the date of filing of the patent application or within three years from the grant of the patent, whichever period expires last, the patentee has not exploited the invention in the territory of the country to satisfy the domestic demand or if he has not undertaken serious preparations or has not granted a licence for such purpose, a compulsory licence shall be granted to the applicant for the licence, unless the patentee justifies the lack of exploitation.”<sup>1</sup>
- dependency of patents (Art. 32 and 33 PA; also extended to plant varieties Art. 114/B PA);
- for the treatment of public health problems (EU Regulation 816/2006, Art. 33/A and 83/A-H PA).

### General procedure

The Metropolitan Court of Budapest (*Fővárosi Törvényszék*) has exclusive jurisdiction at first instance level in compulsory licence matters based on dependency of patents and failure to commence exploitation (non-genuine use of the patent).

The Hungarian Intellectual Property Office (HIPO) is competent to grant compulsory licences based on Art. 33/A PA (for the treatment of public health problems).



### Compulsory licence based on dependency and non-genuine use

In the petition filed with the court, the plaintiff who seeks a compulsory licence for a patent shall indicate the type of compulsory licence it seeks, i.e. either due to non-genuine use or dependency (with specific reference to Art. 31 or 32 PA), and file all necessary evidence to prove that the requirements for a compulsory licence as set out in Arts. 31-33 PA have been complied with.

Furthermore, the plaintiff shall prove that (i) the holder of the patent (the defendant) was not willing to voluntarily license the exploitation of the invention within a reasonable time even though all requirements were satisfied, and that (ii) the plaintiff is capable of exploiting the invention to the extent required.

If a compulsory licence is granted, the patentee shall be entitled to an appropriate licence fee. The fee shall reflect the economic value of the compulsory licence and must be consistent with the amount that would have to be paid by the holder of the compulsory licence with regard to the licensing requirements prevailing in the field to which the invention pertains.

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<sup>1</sup> Article 19 PA determines the acts of exploitation as follows: making, using, putting on the market or offering for sale a product which is the subject matter of the invention, or stocking or importing the product for such purposes; although there is no judicial practice, under Hungarian law importation shall also qualify as use of the patented invention in accordance with TRIPS.

A compulsory licence may be granted only if exploitation is predominantly aimed at domestic supply and if it confers non-exclusive right(s) for exploitation. The extent, scope and time limit of a compulsory licence shall be established by the court at its discretion, taking into account the purpose of the exploitation that was made possible through the compulsory licence. A compulsory licence may be granted with or without restrictions.

Compulsory licences shall be registered in the patent register. The holder of the compulsory licence shall be entitled to the same treatment as the patentee with regard to the renewal of patent protection and the enforcement of the rights arising from the protection.

Unless surrendered or withdrawn, a compulsory licence shall remain in effect until the end of the period established by the court or until the expiry of patent protection.

The question of whether a compulsory licence may be sought by the plaintiff by means of provisional injunction has not yet been dealt with in the Hungarian patent litigation practice.

However, given the principle that a preliminary injunction can be requested in all civil litigation, including the lawsuit for granting a compulsory licence based on dependency and lack of genuine use, seeking provisional relief seems to be theoretically possible (other types of compulsory licence belong to the competence of the HIPO and thus are not civil lawsuits). Special provisions of the PA regarding preliminary injunctions (presumptions, factors to be considered) relate only to infringement disputes, and therefore a provisional injunction sought in the context of a compulsory licence would be governed by the general provisions of the Code of Civil Procedure (Act CXXX of 2016, hereinafter CCP). Seeking a preliminary injunction in the context of a claim for a compulsory licence due to dependency and lack of genuine use may be possible under the general rules (Arts. 103 and 108 CCP); however, there is no court practice relating to the preconditions and its scope.

### Compulsory licences related to public health

In the case of compulsory licences granted for the treatment of public health problems, the procedure set out in Regulation 816/2006 applies (implemented in Art. 83/A-H PA). The decision on the grant of a compulsory licence under this category falls within the competence of the HIPO.

The Hungarian Intellectual Property Office shall:

- notify the European Commission of the grant of a compulsory licence;
- disclose the information specified in Art. 12 EU Regulation 816/2006; and
- send a copy of the resolution to the customs authority and the government body for pharmaceuticals.

The HIPO shall display the information prescribed under Art. 12 EU Regulation 816/2006 on its official website, including information relating to the characteristics intended to distinguish the pharmaceutical products proposed to be manufactured under the compulsory licence from the products manufactured by the holder of the patent or by others under his authorisation.

The HIPO shall regularly inform the customs authority and the government body for pharmaceuticals concerning the information displayed on the website of the WTO concerning compulsory licences granted in other member states, and on any changes therein.

The Regulation does not allow discretion in the procedure in cases of compulsory licences granted for the treatment of public health problems.

### Appeal/review

#### Compulsory licence based on dependency and non-genuine use

The decision of the Metropolitan Court may be appealed before the Metropolitan Court of Appeal, and the decision of the Metropolitan Court of Appeal is subject to judicial review before the Curia (Hungarian Supreme Court).

#### Compulsory licences related to public health

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## Statistics and jurisprudence

Compulsory licences have had very limited practice in Hungary. No compulsory licence has been granted since the Patent Act of 1995 took effect.

Prior to that, there was only one case concerning a compulsory licence, relating to dependency of patents. The defendant was the patentee of an earlier product patent concerning an active ingredient (a pharmaceutical compound reducing blood pressure).

The plaintiff was the owner of a later process patent, which according to claim 1, claimed the process for the preparation of an active ingredient was exactly the same as the one protected by the defendant's earlier patent.

The plaintiff had fulfilled the requirements set out by law: he first made an offer for a cross-licence to the defendant who did not respond. This was understood as the defendant not willing to grant voluntary authorisation for the use of his invention, and the plaintiff launched a court action.

The condition for obtaining a compulsory licence based on the dependency of patents is that the invention of the dependent patent shall constitute significant technical progress of considerable economic interest compared with the invention claimed in the earlier patent.

The specificity of the present case is that a process patent was compared with a product patent.

The plaintiff argued that, pursuant to Art. 32 PA, inventions should be compared without making any distinction or restriction in relation to products and processes. In the plaintiff's interpretation, it is possible to compare his patented invention as a process with the process that was the most advanced at the filing date of plaintiff's patent, and to evaluate the important technical advance of economic interest in this respect.

The court of first instance rejected to grant a compulsory licence and established that the plaintiff had failed to provide an appropriate basis of comparison, since it is not enough to prove that the dependent patent represents an important technical advance of considerable economic significance; it should also be demonstrated that this progress exists in respect of the earlier patent. However, criteria exist against which the subject matters of the patents may be characterised, but these criteria do not apply both in respect of a process patent and a product patent. In addition, the wording of the law refers to the comparison of inventions but in the case of both the earlier and the defendant patent, the Patent Act requires a comparison of

inventions according to the patent. Since in the present case the product prepared by the process according to claim 1 of the plaintiff's patent completely corresponds to the defendant's patent, the comparison is meaningless.

At second instance, the Metropolitan Appeal Court annulled the decision of the Metropolitan Court and ordered the first instance court to reopen the case. The Metropolitan Appeal Court established that in terms of "significant technical progress" a comparison between the product and process patents was also possible. The second instance court argued that the fact that the Patent Act contains a uniform definition and content of patent protection results in that a product (in the given case a pharmaceutical active ingredient) and a process resulting in the same product shall be compared to each other from the perspective of the requirement of significant technical progress.

The decision of the Metropolitan Appeal Court was not challenged by the Curia (Supreme Court) because the basic patent's term had expired. A new (final) decision was not reached by the lower court, so eventually there was no final decision on granting the compulsory licence or not.

