

Norway

Legal basis

Sections 45 to 50a of the Patents Act (Act No. 9 of December 15, 1967) (as amended) (hereinafter PA).

Art. 31bis of TRIPS is implemented in the Patent Regulation Sections 97 to 99. The Patents Act and Regulation were amended before Art 31bis was inserted into TRIPS to accommodate the new rules.

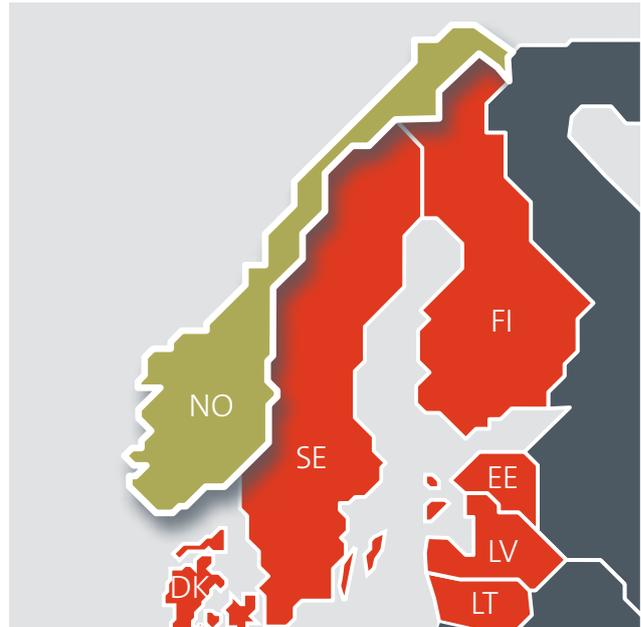
Norway, as an EEA member, has also implemented the Biotech Directive (including Art. 12).

Grounds for applying for a licence

There are different grounds for obtaining a compulsory licence, with different requirements to be considered by the competent authority.

Pursuant to Section 45 PA, a compulsory licence may be obtained on the grounds that three years have passed since the patent was granted and four years since the patent application was filed, without the invention being used “to a reasonable extent” in Norway. It is sufficient that the patent has been used by voluntary licensees. Use of the invention in WTO member states or EEA member states is equivalent to use in Norway as long as patent rights do not impede import to Norway. If the law’s requirement regarding non-use is met, anyone who wants to use the invention may obtain a compulsory licence as long as there are not “reasonable grounds” for its non-use. Importation alone does not in itself qualify as “use” or working of the invention for the purpose of Section 45 PA. Nevertheless, if the patent holder imports to Norway and thereby serves the Norwegian market, the patent holder may be deemed to have “reasonable grounds” for not using or working the invention in Norway, which would bar an application for a compulsory licence.

Pursuant to Section 46 PA, a patent holder of a patent for which the use is dependent on another patent may obtain a compulsory licence to use the other patent when the first patent constitutes an important technical advance of significant economic importance in relation to the other patent. The patent holder of the patent for which a compulsory licence is granted also has a right to obtain a compulsory licence “on reasonable terms” for the first patent.



NO

Pursuant to Section 46a PA, a plant variety owner who may not obtain or use a plant breeder right without infringing an older patent, may, against a reasonable fee, obtain a compulsory licence to use the invention protected by the patent if the licence is necessary to use the plant variety. A compulsory licence is granted only if the plant variety owner demonstrates that the variety represents an important technical advance of significant economic importance in relation to the invention. Moreover, if the patent holder has been granted a compulsory licence to use the protected plant species, the variety owner has a right to a compulsory licence to the patent on reasonable terms.

Pursuant to Section 47 PA, a person who wants to use an invention that someone else holds a patent to, for commercial or operational activities, may obtain a compulsory licence when it is deemed necessary with regard to important public interests or if the patent rights are used in a way that may limit the competition significantly. The latter requirement is assumed to be met only when a dominant market position is being abused.

Pursuant to Section 48 PA, a person who used an invention for commercial or operational activities in Norway at the point in time that the patent application was made publicly available, and the patent application led to a patent, may be granted a compulsory licence to use when special reasons for such a licence are present, and the person did not know of the patent application and could not have obtained knowledge of it through reasonable means. The same applies for persons who, under the same circumstances, have made significant preparations to use the invention in

Norway for commercial or operational activities. The compulsory licence may also cover the time before the patent was granted.

Pursuant to Section 49 PA, a compulsory licence may be granted to a person who has attempted to obtain a licence on reasonable commercial terms by agreement without succeeding within a reasonable amount of time, and who may be deemed capable of exploiting the invention in a reasonable way that is in accordance with the licence.

A compulsory licence does not impede the patent holder from using the patent or granting licences. A compulsory licence may be transferred only together with the company that holds the compulsory licence.

For semiconductor technology, compulsory licences may be granted for public non-commercial use only, or because the patent rights are used in a way that may significantly limit competition.

General procedure

Both the Oslo District Court (as the court of first instance) and the Norwegian Competition Authority are competent to grant compulsory licences (Sections 50 and 50a PA).

The applicant may choose whether to apply for a compulsory licence from the Oslo District Court and/or from the Norwegian Competition Authority.

If the applicant chooses the Oslo District Court, he must send a notice to the Norwegian Intellectual Property Office and to the patent holder, informing them of the initiation of proceedings at the same time as the writ of summons is sent to the Oslo District Court (Section 64 PA). If the applicant does not do this even after the court has given the applicant a deadline for sending such notice, the case will be dismissed by the Oslo District Court.

In general, the procedure is the same as for any other cases before the Oslo District Court; there are no specific rules for processing a compulsory licence case other than what is stated explicitly in this document.

The Oslo District Court may order that the compulsory licence holder may begin using the licence prior to the court's judgment being final and binding, however such that if the compulsory licence is later cancelled or limited in scope, the licence holder is liable to the extent that damages for the use are reasonable. The court may order the licence holder to provide a guarantee for such liability (Section 50(3) PA).

The court may decide the scope of the licence, the fee and the other terms. The requirement of the law regarding the fee is that it should be suited to the circumstances of the specific case, so it is at the discretion of the court to determine what is reasonable in the specific case. There is little case law in Norway to shed light on the interpretation of the term.

If the applicant petitions the Norwegian Competition Authority, the application must include the reasons for a compulsory licence, including the considerations mentioned in Section 49 PA. These considerations are that the applicant has attempted to obtain a licence on reasonable commercial terms by agreement without succeeding within a reasonable amount of time, and that the applicant may be deemed capable of exploiting the invention in a reasonable way that is in accordance with the licence. The petition must include the scope of the licence, and what compensation and other terms the applicant considers reasonable. The Norwegian Competition Authority may call for an oral hearing if it considers it useful. The provision regarding the licence holder's opportunity to start using the licence prior to the decision being legal and binding (Section 50(3) PA) also applies to the procedure by the Norwegian Competition Authority, however so that the Norwegian Competition Authority may not cancel or amend a compulsory licence granted or reviewed by the Oslo District Court.

A compulsory licence should generally be granted with a view to supplying the domestic market.

As to the calculation of the fee, it is thought that the fee should be based on the hypothetical condition that the patent holder himself, or through others, would have used the invention in Norway to a reasonable extent. The assessment of how the patent holder would have acted must necessarily be specific and based on hypotheses. The fee should be equivalent to the revenue the patent holder is losing as a result of the compulsory licence holder's production.

It is not possible to obtain a compulsory licence by way of preliminary relief in Norway.

Appeal/review

A judgment by the Oslo District Court may be appealed to the Borgarting Court of Appeal. The only specific restriction resulting from Section 50(4) PA, last sentence, is that if the District Court grants the applicant a right to use the licence prior to the judgment being final and binding, and the judgment is appealed, the Court of Appeal may reverse the decision regarding the right to use the licence prior to the

judgment being final and binding, and may also change the District Court's decision regarding the applicant providing a guarantee for potential damages. In that case, the Court of Appeal's decision on these specific issues may be appealed only in connection with an appeal of the judgment regarding the merits of the case. In Norway, the Supreme Court selects which cases it will hear, so most cases are only appealed to the Court of Appeal.

A decision by the Norwegian Competition Authority may be appealed to the Competition Complaints Board, *Konkurransklagenemnda*, or be challenged in court. A lawsuit to challenge a grant of a compulsory licence is directed at the licence holder, not the Norwegian state. It is not possible to bring a lawsuit against a decision to reject a petition for a compulsory licence. In that scenario, the applicant should launch an action before the Oslo District Court in accordance with Section 50 PA.

Statistics and jurisprudence

The only case reported in the last 30 years was decided by the Norwegian Competition Authority and the Ministry of Modernisation and Administration (2010). The basis for the application for a compulsory licence was necessary out of regard for important public interests, which was denied at both instances.

