

## The Netherlands

### Administrative procedure

#### Opposition

No formal opposition procedure is available.

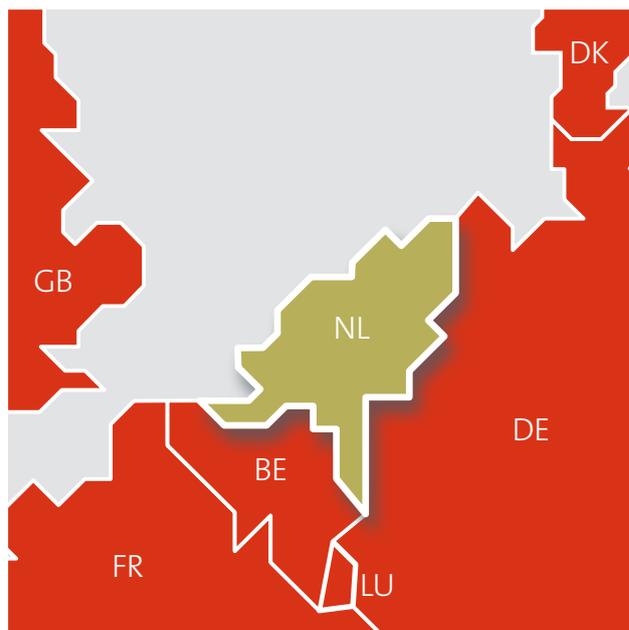
#### Advice procedure

The Dutch patent system is a registration-only system. The claims of a patent application are not examined by the Netherlands Patent Office (hereinafter the “Patent Office”) and a patent based on the patent application is granted eighteen months after the date of filing or after the first date of priority, whichever date comes first. However, a search into the state of the art is obligatory and is provided with a written opinion by the Patent Office. Due to the lack of substantive examination, such a system however, creates legal uncertainty among third parties about the validity of the patent claims. Therefore, for national patents, an “advice procedure” (Art. 84-86 PA) is available.

Any person (not including the patentee) may file a written statement to the Patent Office providing reasons why the claims of a national patent are invalid. The patentee may file a response to the petitioner’s objections within a time limit set by the Patent Office. The case will be orally presented before a committee of the Patent Office (one lawyer, two technicians and a secretary). After the hearing, the written advisory report is issued within two months. The advisory report consists of a reasoned evaluation of the objections stated in the request. Where the invalidity case is continued in court, the judges will generally follow the advice of the Patent Office, although such advice is not legally binding.

#### Re-establishment of rights

A lapsed patent may be re-established when a term was missed in spite of all due care taken (Art. 23 PA) The (written) request should be submitted within a period of two months after express knowledge of the lapse and ultimately within one year after the missed term. A legal advisor of the Patent Office will examine the request and determine if all due care was taken. If the request is granted, the legal consequences of the failure to observe the time limit will be deemed not to have ensued. If the request is denied, the decision on restoration may be appealed (*bezwaar*) within six weeks after receipt of the decision. The appeal (*bezwaar*) will be



reviewed by a legal appeal committee consisting of three legal advisors of the Patent Office. The final decision of the Patent Office, may be appealed by filing a further appeal (*beroep*) within six weeks at the District Court of The Hague (Administrative Chamber). The decision of the District Court may be further appealed at the Council of State (*Raad van State*). The Council has a special department for administrative procedures and is the highest court for administrative disputes.

### Supplementary Protection Certificates

The Patent Office takes the decision in first instance and in appeal (*bezwaar*) regarding requests for supplementary protection certificates (SPCs) based on Regulations (EC) No. 469/2009 and Regulation (EC) No. 1610/96. These decisions may be further appealed at the District Court of The Hague and at final instance at the Council of State (*Raad van State*).

### Civil procedure

Patent cases at first instance are heard by a specific specialised chamber of the District Court of The Hague (*Rechtbank Den Haag*) which has exclusive jurisdiction over cases involving (amongst others) infringement and validity of Dutch and European patents designated for the Netherlands (Art. 80 PA). The (legally qualified) judges of first instance are specialised in IP matters (some also have a science degree).

On appeal, cases are heard by The Hague Court of Appeal (*Gerechtshof Den Haag*), which will fully review the case. Decisions from the Court of Appeal may be further appealed at the Supreme Court (*Hoge Raad*). The grounds for such an appeal can only be based on points of law.

Proceedings at first instance are commenced by service of a writ of summons on the defendant, followed by a statement of defence submitted by the defendant. The Code of Civil Procedure has two main procedures for contentious disputes: proceedings on the merits (which are largely conducted in writing) and preliminary relief proceedings (*Kort Geding*).

With regard to the proceedings on the merits, there are two streams of patent proceedings: ordinary and accelerated (VRO). Ordinary and accelerated proceedings are, in general, decided by a panel of three judges. The claimant may decide which type of proceeding he wants to initiate. The advantage of accelerated proceedings is that, at the commencement of the proceedings, the court provides a compulsory schedule for proceedings, with the result that the procedure is quicker than ordinary proceedings.

Preliminary relief proceedings are decided by a single judge. The claimant is required to establish that it has an urgent interest in obtaining the preliminary measures which is claimed. The required urgent interest is generally assumed to be present in cases of imminent or ongoing patent infringement. If the injunction is granted the judge determines a reasonable period within the claimant should commence proceedings on the merits. If the claimant fails to do so, the preliminary measure may be revoked.

## Infringement

The statutory provisions on infringement can be found in Art. 53 PA (direct infringement) and Art. 73 PA (indirect infringement). Infringement proceedings may be brought only after grant of the patent by the patentee. A claim is subject to private law (certain special provisions for patent disputes are found in Art. 1019-1019i of the Code of Civil Procedure – implemented on the basis of the Enforcement Directive 2004/48/EC).

Infringement claims for damages and surrender of profits may be initiated by the patentee (on behalf of himself and licensees or pledgees) or by licensees or pledgees only provided they have been authorised by the proprietor (Art. 70(6) PA). Only the patentee may sue for the suspension of infringing acts (Art. 70(1) PA).

As a general rule there is no bifurcation; infringement and validity arguments are heard together. If at first instance infringement is claimed, patent invalidity may be claimed by the defendant either as a defence (as an estoppel – the infringement claim will be dismissed if the court considers the patent to be invalid) or as a patent invalidity counterclaim for nullity to the infringement filing.

Where it appears to the court that a decision on infringement may be affected by invalidity proceedings which have been or may be instituted, the court may stay the infringement proceedings, with or without setting a time limit. It may also do so where a decision on infringement may be affected by proceedings instituted on different grounds, as well as when opposition is pending before the EPO (Art. 83 PA). The judge may declare the patent wholly or partially invalid outside of the infringement proceedings.

A search report on prior art relating to the subject-matter of the patent, as published by the Patent Office or the EPO, is obligatory when pursuing infringement proceedings (Art. 70(2) PA). Furthermore, the Patent Office is obliged to provide the court with all information and technical advice that it may require for a decision in legal proceedings (Art. 87 PA).

## Nullity/counterclaim for revocation

A nullity request has to be made to the District Court (Civil Chamber) of The Hague (Art. 80, 75 PA). In the case of national patents an advisory report from the Patent Office on the validity of national patents is required (Art. 76, 84-86 PA). Any party can institute nullity proceedings at any time against a patent that is in force (Art. 75 – subject to exceptions).

Nullification has retroactive effect, but this will not influence decisions given in infringement proceedings relating to the nullified patent, where such decisions have become final and have been executed prior to nullification. Partial nullification is available (Art. 75(5), (6) PA). The writ initiating nullification proceedings must be recorded in the Patent Register within eight days (Art. 75(4) PA). During the proceedings it is possible to amend claims in accordance with Article 138(3) EPC, provided that such an amendment is not in violation of due process. It frequently happens that auxiliary requests are brought into the proceedings by the patent proprietor. Furthermore, partial surrender in relation to Art. 63 PA is not possible without the consent of the plaintiff if the plaintiff has registered his writ initiating nullification in the National Patent Register according to Art. 75(4) PA.

See also “Infringement” above.

## Remedies

According to Articles 70, 71 PA and Articles 1019-1019i of the Code of Civil Procedure (implemented on the basis of the Enforcement Directive 2004/48/EC) the following forms of relief are available to the patentee in an enforcement action:

- a) Injunctions;
- b) Recall orders;
- c) Patentee can claim the ownership of infringing products;
- d) Order for surrendering and or destruction of infringing goods;
- e) Orders for providing information concerning suppliers and/or customers;
- f) Orders to pay damages or to surrender the profits made through the infringement;
- g) Orders for accounting for profits made through the infringement;
- h) An order forcing the infringing party to publish the court's decision; and
- i) Order to pay (all) legal costs of the litigation,

## Appeal

Civil appeal is possible at The Hague Court of Appeal (Civil Chamber) within three months from the taking of the decision. Further appeal only on points of law is possible at the Supreme Court, based in The Hague.

## Parallel proceedings

The Court may suspend the proceedings with or without time limits in the event of opposition proceedings at the EPO (Art. 83(4) PA).

There are few cases where suspension is applied while awaiting the outcome of opposition proceedings.

See also "Infringement" above.

## Arbitration/mediation

There is no provision for arbitration or mediation in patent litigation proceedings.

## Enforcement

During and after proceedings a bailiff is responsible for enforcing an order.

## Compulsory licence

A compulsory licence may be granted in the following circumstances:

- a) if it is in the general interest (Art. 57(1) PA);
- b) if a patent is not genuinely used (Art. 57(2) PA);
- c) if a patent is dependent on an older patent (Art. 57(4) PA);
- d) if the patent relates to plant variety rights (Art. 57(5) and (6) PA);
- e) if the patent relates to semiconductor technology (Art. 57a PA);
- f) if it is necessary for the defence of the Kingdom of the Netherlands (Art. 59);
- g) if it is based on Article 20 or 21 of the Euratom Treaty (Art. 60 PA).

Compulsory licences may be granted in civil or administrative procedure depending on the situation in which a licence is unsuccessfully requested.

## Administrative procedure

The procedure for obtaining a compulsory licence in the general interest is governed by administrative law. The Minister of Economic Affairs and Climate (hereinafter: Minister) will first investigate whether the patentee is willing to grant a licence voluntarily under reasonable conditions. If the patentee is not willing to voluntarily grant a licence the Minister will inform the patentee of the intention to grant a compulsory licence and providing him an opportunity to respond. Consequently the Minister will issue a decision in which it is explained whether the compulsory licence is granted or not.

An administrative appeal may be made against this decision. First there is an objection (*bezwaar*) to the Minister, then an administrative appeal (*beroep*) against the Minister's decision to the District Court of The Hague (Administrative Chamber). Further appeal (*hoger beroep*) may be made to the Council of State (*Raad van State*).

requesting the grant of a compulsory licence (Art. 58(1) PA). If the parties cannot agree on the amount of compensation for the compulsory licence, the interested party may request the judge to determine the amount (Art. 58(6) PA). The decision may be appealed before The Hague Court of Appeal (Civil Chamber) and subsequently before the Supreme Court (Civil Chamber). The final decision by which a compulsory licence is granted shall be registered at the Patent Office.

### Compulsory licence

If the patentee is not willing to voluntarily grant a licence for non-genuine use, in case of dependency or in relation to plant variety rights, the interested party may start a civil procedure at the District Court of the Hague (Civil Chamber)

### Relevant national law

Patents Act 1995 (Rijsoctrooiwet 1995) [cited as: PA]

### Competent authorities or courts

