



## European patents – Late filing of a translation in Belgium – Special restoration procedure with retrospective effect

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The Belgian rules on invention patents underwent certain changes in 2011, one of which was the introduction of a restoration procedure.<sup>1</sup> This restoration procedure, which came into effect on 13 March 2014, allows applicants for or holders of patents that missed a deadline in procedures before the Belgian Office for Intellectual Property (OPRI), to commence proceedings before it aimed at restoring the rights lost owing to the failure. The main cases in contemplation are failure to meet the deadline for paying the annual taxes or that for filing a translation of a European patent (which, for some time now, has only concerned European patents issued in English).

Restoration is subject to strict conditions, which include an obligation, for it to be admissible, to file the application for restoration within the earlier of two months from the date on which the reason for failure to observe the deadline in question ceased and twelve months from the expiry of that period.<sup>2</sup>

The other conditions that must be complied with are:

- the act in respect of which here has been a failure must fall within the same period as laid down for filing the restoration application itself;
- the application has to set out the reasons why the deadline laid down was not met; and
- the OPRI must find that failure to observe the deadline occurred “despite the relevant requisite diligence having been exercised.”

<sup>1</sup> Section 70bis of the Invention Patents Act of 28 March 1984, introduced by section 42 of the Act of 10 January 2011 implementing the Treaty on the law of invention patents and the Act amending the Convention on the issuance of European patents and amending various provisions relating to invention patents. See also sections 48 and 50 of the Act of 10 January 2011.

<sup>2</sup> Section 25 of the Royal Decree of 9 March 2014 amending various royal decrees with a view, in particular, to amending the Act of 10 January 2011 implementing the Treaty on the law of invention patents and the Act amending the Convention on the issuance of European patents and amending various provisions relating to invention patents.

When the Invention Patents Act of 28 March 1984 was incorporated into the Economic Law Code,<sup>3</sup> this procedure was retained, subject to certain clarifications.<sup>4</sup> It was added, first, that, if the restoration application is accepted, the legal consequences of failure to observe the relevant deadline are deemed never to have occurred and, second, that the annual taxes falling due between forfeiture of the right and registration of the restoration decision have to be paid within four months of such registration.

In the codification, parliament added a special procedure to this standard restoration procedure, under which the holder of a European patent that has forfeited his rights owing to late filing of a translation of the patent into a national language can be restored to his right even if the period for filing a standard restoration application has expired.<sup>5</sup> In other words, this procedure has the potential effect of retrospectively “reviving” European patents whose rights have been forfeited in Belgium prior to the coming into force of the standard restoration procedure, which can date back several years.

The origin of this special restoration procedure lies in a 16 January 2014 decision by the Constitutional Court, under which the provision providing that a European patent was deemed of no effect in Belgium *ab initio* in the event of late filing of the translation was ruled unconstitutional, constituting as it did an unjustified incursion on the property right of the patent holder.<sup>6</sup>

It should be noted from the outset that this procedure will only be available for a one-off period of six months starting as of 22 September 2014. **A restoration application filed in accordance with this special procedure therefore has to be submitted before 22 March 2015.**

Moreover, the special procedure is only available under the quite specific conditions set down in the act, which are inspired by the aforementioned Constitutional Court judgment. As will be seen below, we nonetheless think that it should be possible to successfully file such a restoration application in a number of situations that would, at first sight, seem to be ruled out.

The conditions laid down in the Economic Law Code (section XI.83) to be able to take advantage of the special restoration procedure are as follows:

- the European patent is not written in a national language (which therefore only covers European patents issued in English);
- the European patent is maintained as modified or limited;
- the European patent is ineffective in Belgium owing to a translation having been sent to the OPRI after expiry of the three-month period set down for submission of the translation and before 22 September 2014 (this therefore rules out cases where no translation had been filed by 22 September 2014);

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<sup>3</sup> See the Act of 19 April 2014 incorporating Book XI “Intellectual Property” into the Economic Law Code and incorporating the definitions individual to Book XI into Books I, XV and XVII of that Code (Official Gazette, 12 June 2014, p. 44,352) and the Act of 10 April 2014 incorporating the provisions governing matters covered by article 77 of the Constitution into Book XI “Intellectual Property” of the Economic Law Code, incorporating a specific provision in Book XI into Book XVII of the Code, and amending the Judicial Code regarding the courts organisation relative to actions involving intellectual property rights and the transparency of copyright and related rights (Official Gazette, 12 June 2014, p. 44,348, corrigendum Official Gazette, 27 June 2014, p. 48,237).

<sup>4</sup> See especially sections XI.77 and XI.83 of the Economic Law Code.

<sup>5</sup> Section XI.83(2/3) of the Economic Law Code and section 5(4) of the Act of 8 July 1977 approving various international acts.

<sup>6</sup> Constitutional Court, 16 January 2014, judgment no. 3/2014.

- the standard restoration procedure is inapplicable to the patent as at 22 September 2014 owing to expiry of the period set down for filing a standard restoration application; and
- the restoration application is filed with the OPRI within six months after 22 September 2014 (i.e. by 22 March 2015).

The first, third and fifth conditions do not call for any particular comment. This is not so for the second and fourth conditions.

The effect and avowed aim of the second condition is to exclude from this retrospective restoration procedure those European patents that have not been subject to modification (opposition procedure) or limitation (central limitation procedure) by the patent holder. The aim of the amendment that gave rise to this wording was to place the procedure at the sole disposal of patent holders who are in a situation identical to that on which the Constitutional Court ruled.

One might wonder as to the ambit of this special restoration procedure being so limited. The exclusion of European patents that have been issued and not subject to limitation, whether further to opposition or in the context of a voluntary limitation procedure, might be viewed as a form of discrimination that the Constitutional Court could judge contrary to the equality rule, combined with the respect due to the right of property.

The fourth condition closes the door to the special restoration procedure on European patents that, as of 22 September 2014, were able to comply with the deadlines under the standard restoration procedure. One might wonder as to whether it would be possible to apply the special restoration procedure where the holder of a European patent could have claimed the standard procedure in force since 13 March 2014 but did not do so before 22 September 2014.

## CONCLUSION

Parliament offers a unique opportunity to holders of European patents that were late in filing the translation of their patents in Belgium and thereby forfeited their rights, of being restored in their rights provided they comply with the conditions explained above. It is important to point out that it is essential that applications seeking such remedies be filed before 22 March 2015. Although the law only refers to European patents “maintained as modified or limited”, we believe that it should also be possible to file a special restoration application for patents issued without opposition or limitation. If the OPRI were to refuse to grant restoration and that decision were appealed against, it can doubtlessly be expected that a reference would be made to the Constitutional Court for a preliminary ruling.

It should also be borne in mind that, in the case of restoration, any third party that used the invention covered by the patent in Belgium and in good faith between the time the rights were forfeited and the time of their restoration is granted a statutory right to continue using the invention for the purposes of their own business, although the right cannot be assigned except together with the business to which it attaches. Even if not stated explicitly by the law, this third-party right ought also to apply in the case of restoration obtained as the outcome of the special restoration procedure.

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