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German Government Plans Possibilities to Limit Patents In View of Corona Pandemic

Thomas Musmann (Rospatt Osten Pross) · Tuesday, March 24th, 2020

by Dr. Simon Klopschinski

In the wake of the evolving Corona pandemic the German government intends enacting amendments to the German Act on the Prevention and Control of Infectious Diseases in Humans (Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen - Infektionsschutzgesetz - IfSG), which could also have an impact on patents. The bill of 23 March 2020 is available [here](#).

The bill foresees that the Federal Government would have the competence to determine that there is a so-called 'epidemic situation of national significance' (epidemische Lage). Such 'epidemic situation' would require the following:

'An epidemic situation of national significance exists if the Federal Government has identified a serious threat to public health in the entire Federal Republic of Germany because

- 1. the World Health Organisation has declared a health emergency of international scope and there is a threat of introduction of a threatening communicable disease into the Federal Republic of Germany or*
- 2. there is a threat of dynamic spread of a threatening communicable disease across several states in the Federal Republic of Germany.'*

According to news reports dated 24 March 2020 the bill has been amended in the meantime so that it would be up to the German parliament, the Federal Diet, to find that there is an 'epidemic situation'. It is apparently planned that the Federal Diet will declare an 'epidemic situation' on 25 March 2020 (see [here](#)).

If pursuant to the bill an 'epidemic situation' was found, the Federal Ministry of Health would gain additional competences in the fields of prevention and control of infectious diseases.

For instance the Federal Ministry of Health would be authorised to order by way of statutory instruments various measures for ensuring the supply of medicines, narcotics, active substances, starting and auxiliary materials, medical devices, laboratory diagnostics, aids, items of personal protective equipment and products for

disinfection.

In addition the intended changes stipulate with regard to patents that in an ‘epidemic situation’ the Federal Ministry for Health would be authorized to order pursuant to section 13 (1) of the Patent Act that an invention relating to one of the above mentioned products shall be used in the interest of public welfare or in the interest of the security of the Federal Republic of Germany. The bill provides the following explanations for this provision:

‘In order to ensure supply of products in the event of a crisis, the effect of a patent can also be restricted in accordance with § 13 Patent Act, for example, in order to be able to produce vital active ingredients or medicines.’

Section 13(1) of the Patent Act is a provision which has apparently never been used after 1945 and which in its current form reads as follows:

‘(1) The patent shall have no effect in a case where the Federal Government orders that the invention is to be used in the interest of public welfare. Further, it shall not extend to a use of the invention which is ordered in the interest of the security of the Federal Republic of Germany by the competent highest federal authority or by a subordinate authority acting on its instructions.’

(2) The Federal Administrative Court shall be competent to hear an appeal from an order made pursuant to subsection (1) if the order was made by the Federal Government or by the competent highest federal authority.

(3) In the cases referred to in subsection (1), the proprietor of the patent shall be entitled to equitable remuneration from the Federal Republic of Germany. In the event of dispute as to its amount, recourse may be taken to the ordinary courts. A Federal Government order pursuant to subsection (1), first sentence, shall be communicated to the person entered in the Register as the proprietor of the patent (section 30 (1)) before the invention is used. Where the highest federal authority which issued an order or instruction in accordance with subsection (1), second sentence, obtains knowledge of a remuneration claim in accordance with the first sentence, this authority shall communicate this to the person registered as the proprietor of the patent.’

According to legal scholarship the term ‘public welfare’ pursuant to section 13(1) Patent Act is narrower compared to the concept of ‘public interest’ under section 24(1) Patent Act, which provides for compulsory licenses. ‘Public welfare’ covers for instance pandemics. Under section 13(3) Patent Act the patentee is entitled to an ‘equitable remuneration’ vis-à-vis the German government, e.g. in form of a reasonable royalty.

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