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Restoration of priority rights under scrutiny

Christopher Dumont (Crowell) · Wednesday, May 18th, 2022

1. Introduction

In an important decision of February 8, 2022 the Brussels Dutch Court of Enterprises (hereafter the “**Court of Enterprises**”) declared null and void a patent on an “*apparatus, system and method for filling containers with fluids*” (hereafter the “**patent in suit**”).

The decision is interesting for multiple reasons, but this article will only deal with the part on the restoration of the priority rights. Decisions on priority rights are scarce in Belgium and therefore deserve a moment of consideration.

In the case at hand, the patentee had failed to file a patent application in Belgium within the foreseen period of 12 months after the filing of three patents of which the priority was invoked. A request for restoration of the priority rights was filed and granted by the Department of Intellectual Property (in Dutch “Dienst Intellectuele Eigendom”, hereafter “**DIP**”). The decision of the DIP was limited to one single sentence stating that the statutory conditions for restoration were met (hereafter the “**restoration decision**”).

In nullity proceedings against the patent in suit in front of the Court of Enterprises, the claimant in the proceedings challenged the restoration decision of the DIP for a lack of motivation and requested to have it set aside in the examination of the novelty. The patentee raised multiple objections against this challenge.

Faced with these objections, the Court of Enterprises had two crucial decisions to make, namely:

- whether it was competent to rule on the challenge of the restoration decision; and
- if it was competent, whether the DIP violated its formal and substantive obligation to motivate.

2. Highlights from the decision

Competence

The Court of Enterprises did not follow the patentee’s reasoning that the challenge

would be a concealed appeal for annulment of the restoration decision for which only the Council of State (in Dutch “Raad van State”) would be competent.

The Court of Enterprises established it was competent because it is in general competent to hear all claims relating to patents and there is no provision that assigns the claim to set aside the restoration decision to another court.

Formal and substantive obligation to motivate

Not in discussion was that the DIP, who is an administrative body, is obligated by law to adequately motivate its decisions.

The Court of Enterprises follows the claimant that the restoration decision contains no motivation whatsoever and for that reason alone considers said decision unlawful. In the absence of factual and legal considerations in the decision, it is not possible to ascertain whether the decision is adequately motivated. This violates the formal obligation to motivate.

Superfluously, the Court of Enterprises also establishes that the substantive obligation to motivate was violated. The Court of Enterprises stated multiple reasons such as the use of a stylistic formula.

Although the Court of Enterprises did not make a decision thereon, it explicitly acknowledged the guidance of the case law of the Boards of Appeal of the European Patent Office for the interpretation of the concept “due care” which is necessary condition for the restoration of priority rights.

Setting aside of the restoration decision

The violation by the DIP of its obligation to adequately motivate its decisions made the restoration decision unlawful. The Court of Enterprises therefore set it aside for the determination of the relevant date of the prior art to be taken into consideration.

The foregoing opened the patent up for novelty attacks on the basis of publications the patentee had published in the period between the patent applications.

3. Take-away

It was already known that the patent file is a rich source of information. It is common practice to look at the patent file for the interpretation of the patent claims. A patentee that reduced the scope of its patent during prosecution is estopped from suddenly taking a wider position after the grant.

With the decision of February 8, 2022, the Court of Enterprises recognizes that (restoration) decisions from the DIP can also be challenged during patent nullity proceedings. This makes the patent file more important than ever.

The Court of Enterprises also established that the DIP cannot merely state that the statutory conditions are met. The decision needs to have factual and legal considerations in relation to the statutory conditions. The bar has been raised for the

DIP to motivate its decisions.

The author represented one of the parties in the case.

A banner with a blue background and a white horizontal line at the top. The text "White Paper: Preparing for the Unitary Patent" is written in white. On the left is the Wolters Kluwer logo, and on the right is a white button with the text "Download now →".

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