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Covid-19 “Patent Waiver”: revolution or tempest in a glass of water?

Matthieu Dhenne (Ipsilon) · Wednesday, June 22nd, 2022

On June 17, 2022, WTO members adopted a waiver to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) allowing suspension of patent related to the Covid-19 pandemic, which is the result of a year and a half of intense debate. Already there is a lot of alarm in the industry about this measure, but what does it really mean? The “Patent Waiver” revolution or tempest in a glass of water?

A fast-track procedure for obtaining compulsory licenses

The adopted waiver differs from the initial proposal by South Africa and India in October 2020. The latter proposal envisaged a more comprehensive waiver, more akin to expropriation, of TRIPS obligations for the production and availability of Covid-19 treatments. However, the waiver finally adopted is based on the European Union’s counter-proposal of October 2021, which focuses on the use of the existing TRIPS flexibility of compulsory licenses. As a reminder, compulsory licenses limit the use of intellectual property rights, but guarantee royalties to their holders, which is not the case with expropriation.

In fact, the waiver allows a WTO member to exploit a patent, which relates to a technique linked to a Covid-19 vaccine, without the consent of the right holder via a compulsory license that will be obtained through an accelerated procedure: any national legal mechanism, such as a decree for example. In sum, the idea is to facilitate the obtaining of compulsory licenses for certain patents, which requires that member countries already have such a mechanism in their national laws.

Regarding remuneration of rights holders, reference is made to the humanitarian and non-profit nature of the provision of vaccines, which allows for flexibility in determining the level of royalties to be paid. Reference is made to WHO/United Nations Development Programme (UNDP) guidelines on remuneration for this purpose.

Scope of the measure

It is specified that patents on products as well as on processes are concerned. However, only vaccines are currently concerned. Other technologies are still excluded from this decision, but Members have committed themselves in paragraph 8 to decide within the next six months whether to extend its scope to include the production and supply of therapeutic and diagnostic products.

However, the measure seems to be limited to developing countries. It is stated that while developing countries are eligible, countries with “existing” production capacity are encouraged to make a “binding commitment not to avail themselves of this decision. Yet it is precisely these countries that would be most likely to implement the waiver. On the other hand, the states waive the application of Article 31(f) of TRIPS, according to which production under the decision must be primarily for the domestic market, although re-export of products is discouraged.

As for its duration, the mechanism can be applied for the next 5 years. This duration will be reviewed and may be revised annually by the General Council.

Finally, if the “Patent Waiver” does not constitute a revolution, we can nevertheless neglect the important source of restrictions that it could constitute in the future for right holders. However, as it stands, it is more like a sign of political goodwill towards developing countries, intended to facilitate their access to the production of “Covid-19” vaccines, although the success of the initiative will probably rest, in the end, more on the willingness of the rights holders to transfer their know-how.

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