

# Kluwer Patent Blog

## The Swiss Federal Patent Court's jurisdiction to assess claims directed against the Swiss Federal Confederation based on alleged patent infringement

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In a recent decision (case no. [4A\\_443/2012](#)) the Swiss Federal Supreme Court had to deal with a dispute between the German Robert Bosch GmbH, which filed suit against the Swiss Federal Confederation based on the Swiss portion of EP 0 741 373. The decision exclusively focuses on the question whether the Swiss Federal Patent Court has jurisdiction to decide Robert Bosch's injunction and damages claims. The Swiss Federal Supreme Court confirmed that the new Swiss Federal Patent Court is exclusively competent to decide Robert Bosch's permanent injunction against the Swiss Federal Confederation. However, the Federal Supreme Court stated that the Federal Patent Court is not competent to decide on Robert Bosch's damage claim since the allegedly patent infringing activities concern a public function, namely the operation of the system of the [Heavy Goods Vehicle Tax](#). In an obiter dictum, the Supreme Court finally held that the Swiss Federal Patent Court would be exclusively competent to hear a claim filed by the Swiss Federal Confederation requesting a compulsory license to use EP 0 741 373 in the public interest. This would be the first proceeding concerning a compulsory license based on a public interest in Switzerland.

### Background of the case

The facts of the case can be summarized as follows: In May 2011, Robert Bosch GmbH brought an action against the Swiss Confederation for infringing its patent EP 0 741 373 before the commercial court of the Canton of Zurich. The patentee asked for an injunction for future patent infringements and a financial compensation of CHF 62 million. The patentee accused the defendant of infringing his patent rights by means of operating the registration system for the Heavy Goods Vehicle Tax. The plaintiff argued that the patented invention covers a toll collection system such as the one presently operated in Switzerland. The commercial court referred the action to the new Federal Patent Court, which took up work in January 2012.

The defendant contested the jurisdiction of the Federal Patent Court. However, the Federal Patent Court declared itself competent to hear the case in June 2012. The defendant appealed this interim decision to the Swiss Federal Supreme Court.

### Legal aspects

The Swiss Federal Supreme Court found that "an action for injunction based on patent law against

the Swiss Confederation is a matter of civil law and thus to be judged by the Federal Patent Court.” It held that the exclusive rights conferred by the patent are the result of the provisions of the patent law, which are part of the civil law. Given that public corporations may also be proprietors of patents, they are in return obliged to respect the boundaries resulting from patent law; like private persons, they are not permitted to violate the property rights of third parties. This implies that a public entity even if it acts in the public interest is not entitled to use a patented invention without the patentee’s approval.

However, jurisdiction is different with regard to Robert Bosch’s damage claim. The Federal Supreme Court held that the jurisdiction with regard to the financial liability of the Confederation for alleged patent infringement depends on the nature of the activity that allegedly causes the liability: if it concerns a public interest (in this case the operation of the registration system for the Heavy Goods Vehicle Tax), the financial liability is to be determined according to the Federal Act on the Liability of the Confederation. The Federal Patent Court is not competent to apply this law. Only if the Federal Confederation’s activities would be commercial in nature, the financial liability of the Confederation would be subject to the civil law provisions of the Patent Act and the Code of Obligations, respectively.

The Federal Supreme Court held that the determining factor with regard to the relevant liability regime was to be determined from the nature of the activity allegedly causing the liability of the public entity. The Court confirmed the Federal Patent Court’s finding that the registration system for the Heavy Goods Vehicle Tax serves public purposes exclusively. It thus denied that the operation of the registration system is a commercial activity, which is in principle related to the realization of a profit according to the Court.

Finally, the Federal Supreme Court deemed in an obiter dictum that “public corporations are not barred from filing a lawsuit for the grant of a licence in the public interest according to the Swiss Patent Act.” The Federal Supreme Court held that efforts by the Plaintiff to obtain a contractual license on appropriate market terms were not required in cases of public non-commercial use.

It is rather exceptional that the Federal Confederation is accused to have infringed patent rights and it is to be expected that this will not be the last time the Federal Supreme Court will have to deal with this case.

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