

## **Reaction of IP2Innovate to the internet consultation on the revision of the Dutch Patent Act, March 2025.**

### **1. About IP2Innovate**

IP2Innovate is a coalition of both small and large companies<sup>1</sup> that collectively hold over 484,000 patents and published applications worldwide, with over 75,000 patents and applications in Europe. For our members – who produce and invest in Europe and operate in high-technology areas that are driving Europe’s digital transformation and the growth of the European economy – a properly functioning European patent system is essential. IP2I welcomes the opportunity to respond to the consultation on the proposed revision of the Dutch Patent Act. On the basis that (a) the proportionality requirement contained in the EU’s Intellectual Property Rights Enforcement Directive (IPRED) has not been explicitly transposed into Dutch law and (b) an analysis of Dutch patent law decisions shows that proportionality is not being effectively applied by Dutch courts, IP2I suggests that the revision of the Dutch Patent Act is the right opportunity to codify proportionality.

### **2. Introduction and review**

IP2I believes the revision of the Patent Act is the perfect moment to ensure it is fit for purpose, aligns with European legislation and enables and stimulates businesses in the Netherlands to innovate without being hindered by legislation.

As the Beleidskompas ROW rightly points out, a balance must always be struck in the patent system between the interests of the patentee and of third parties, and patent protection cannot be unlimited or unconditional. The proposed revisions to the Patent Act, bringing about an end to unexamined patents and offering an administrative path for reviewing a patent after it has been granted, are positive steps toward achieving this balance. These changes will help to bring about more certainty in the value of a patent, ensuring that a patent’s scope is better understood and is limited to what was actually invented.

While revising the Patent Act to bring about more certainty in patent scope is important, it is equally important to ensure that patent remedies are commensurate with that scope. Currently, due to Dutch courts effectively granting injunctions automatically without effective application of the proportionality requirement, that is not the case. This shortcoming is detrimental to the competitiveness of the Dutch economy, and it should be fixed in tandem with the proposed patent examination changes.

IP2Innovate recommends transposing the proportionality requirement of the IPRED into the Dutch Patent Act. Doing so will ensure the patent system is fit for purpose.

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<sup>1</sup> Our members are: Adidas, Amazon, Apple, ASML, BMW, Bull (Atos), Dell, Deutsche Telekom, Freebox, Google, IMEC, Intel, Microsoft, Nvidia, Proximus, SAP, Spotify, Xiaomi, Zeiss.

### 3. Solution: codification of proportionality (IPRED 2004)

Article 3 (2) of the IPRED requires that remedies for infringement of a patent be “proportionate,” meaning that the remedies must strike the right balance by taking into account the specific characteristics of the case at hand. Even though Article 3(2) of the IPRED has not been transposed into Dutch law, Dutch courts are still required to comply with the proportionality requirement set out in EU law.

However, despite proportionality being a legal requirement because of the IPRED, an analysis of Dutch court rulings in patent cases for the period of 1 January 2015 to 31 December 2020 by Darts-ip (the largest database in the world of court rulings in patent cases) indicated that Dutch courts do not seem to effectively apply proportionality. In the period prior to 2015 following the IPRED’s enactment, IP2I is not aware of any cases evaluating proportionality, and since 2020, IP2I is only aware of one. In the 2025 [Edwards Lifesciences v Meril Life Science](#) case, which related to medical devices, the court considered the third party and public interest implications of removing the medical device at issue from the market, ultimately deciding in favour of an injunction. While proportionality was evaluated in the case, the analysis lacked the depth and predictability for the court and the parties that a clear, flexible assessment enumerated in the Patent Act would provide for. And as just a single case in twenty years, it does not indicate a greater likelihood for courts to consider proportionality, particularly in the high-tech complex product cases that raise proportionality concerns outside of third party and public interest issues.

The result of this system of effectively automatic injunctions is that a manufacturer faces the risk of an entire product range being removed from the market even if the manufacturer has inadvertently infringed a patent on a minor feature. For complex products like smartphones, automobiles or semiconductor manufacturing equipment, which contain thousands of patented components, the risk of automatic injunctions and entire product ranges being removed is untenable. As a result, manufacturers are prepared to pay excessively high settlements to patent owners who allege that they have infringed their patent – settlement values that go far beyond what the actual value of the patented innovation is.

This situation makes the Netherlands a less attractive place for innovative technology companies to invest and do business in. At best, they run the risk of paying excessive settlements, taking resources away from R&D; at worst they run the risk of product ranges being removed from the market. This is detrimental to companies, consumers and the competitiveness of the Netherlands.

Modernisation of the Dutch Patent Act provides a good opportunity to ensure that proportionality is applied in an effective and meaningful way as is required by EU law. Codification of proportionality in the Dutch Patent Act would provide courts with clarity on when and how to apply proportionality and would also provide innovative companies with a line of defence that they know they can use.

**The members of IP2Innovate are therefore of the view that codification of proportionality in the upcoming revision of the Dutch Patent Act is necessary and urgent to ensure innovative Dutch companies are not exposed to disproportionate penalties and to preserve the competitiveness of the Netherlands.**

#### 4. Policy considerations and process

All stakeholders, including the Dutch Government and the University of Maastricht<sup>2</sup>, agree that Dutch courts must apply proportionality when deciding what remedy to grant for patent infringement as a result of the IPRED. The Minister of Economic Affairs, in a letter to the Dutch Parliament, explained that judges should “take proportionality into account” and pointed to the evaluation of complex products and processes such as cars and manufacturing, noting that “finding a good balance between protection and availability of innovations is therefore also very important for our economy.” There is however a divergence of opinion on whether proportionality is currently being applied by Dutch courts and how to ensure proportionality is effectively applied.

Although Dutch law does not explicitly provide a basis for courts to apply proportionality, the Government and the University of Maastricht are of the view that courts have the power to apply proportionality because of the direct effect of the IPRED, and that they are currently applying it. On this basis, they argue that the further codification of proportionality in Dutch law is not necessary and that courts must be given more time to further develop the law.

Despite the direct effect of the IPRED, IP2Innovate, however, is only aware of a single case in which Dutch courts have applied proportionality in final remedies for patent infringement, likely because proportionality is not being brought as a defence or because there is not sufficient clarity on when and how to apply proportionality. Given the lack of legislative clarity in Dutch law around proportionality, parties are less likely to plead proportionality as a defence, courts are (therefore) unlikely to apply it, and the case law is unlikely to evolve without codification of proportionality in the Dutch Patent Act. IP2Innovate believes this is now an urgent issue for Dutch competitiveness, and does not see why giving more time for Dutch case law to evolve will result in proportionality actually being applied when this has only happened once since the IPRED was adopted in 2004. A number of leading academic experts<sup>3,4</sup> on proportionality are also of the view that proportionality should be codified in Dutch law.

#### 5. Political considerations

IP2Innovate believes that the effective application of proportionality is essential in ensuring innovation and competitiveness for Dutch companies. In the current situation, because of the lack of application of proportionality, injunctions are imposed automatically in the event of an infringement. Patent holders can therefore exploit the threat of automatic injunctions to extract excessively high settlement fees from manufacturers. These fees are often based not on the actual value of the patent but on the threat of having to immediately withdraw an entire product line from the market, therefore stifling innovation and hindering start-ups and scale-ups in their growth.

The consequence of injunctions being issued automatically is that even an accidental infringement by a manufacturer of a patent that relates to a minor feature of a complex product can result in the entire existing product range being immediately removed from the market. Companies often settle claims to avoid that, which gives patent owners excessive leverage to demand settlements

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<sup>2</sup> Research University of Maastricht - Proportionaliteit in het octrooirecht & Letter from Minister Adriaansens: [Link](#).

<sup>3</sup> Leon Dijkman, *The Proportionality Test in European Patent Law: Patent Injunctions Before EU Courts and the UPC*. Hart Publishing, 2023.

<sup>4</sup> van Dongen, L. (2023). Proportionality and flexibilities in final injunctive relief. In A. Strowel, F. de Visscher, V. Cassiers, & L. Desaunettes-Barbero (Eds.), *The unitary patent package & unified patent court: Problems, possible improvements and alternatives* (1st ed., pp. 357-387). Ledizioni.

far surpassing the patented technology's value<sup>5</sup>. The situation is even more egregious when the defendant is an SME and the recalled product provides their only source of revenue.

Proportionality in patent legislation serves as one of the answers to the government's ambition to ensure the Netherlands is in the top 5 countries worldwide in terms of competitiveness. By ensuring that remedies for patent infringement are proportionate, the business environment in the Netherlands will be more competitive and more supportive of innovation. The Dutch Government has indeed recognized that a balanced approach is very important to the economy. Such a measure would also be beneficial for SMEs, allowing them to innovate and grow without the fear of disproportionate legal consequences, thus directly supporting the government's focus on fostering entrepreneurship and improving the Netherlands' position as an attractive country for talent and investment.

Ultimately, the codification of proportionality in patent legislation would help create a more robust, innovative, and competitive Dutch economy, aligning with the government's vision for the Netherlands' economic future.

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<sup>5</sup> According to a brief by Copenhagen Economics - Economic implications of automatic injunctions in German patent litigation – in the Broadcom-Audi case the estimated settlement payment exceeds the value of the invention by more than ten thousand.