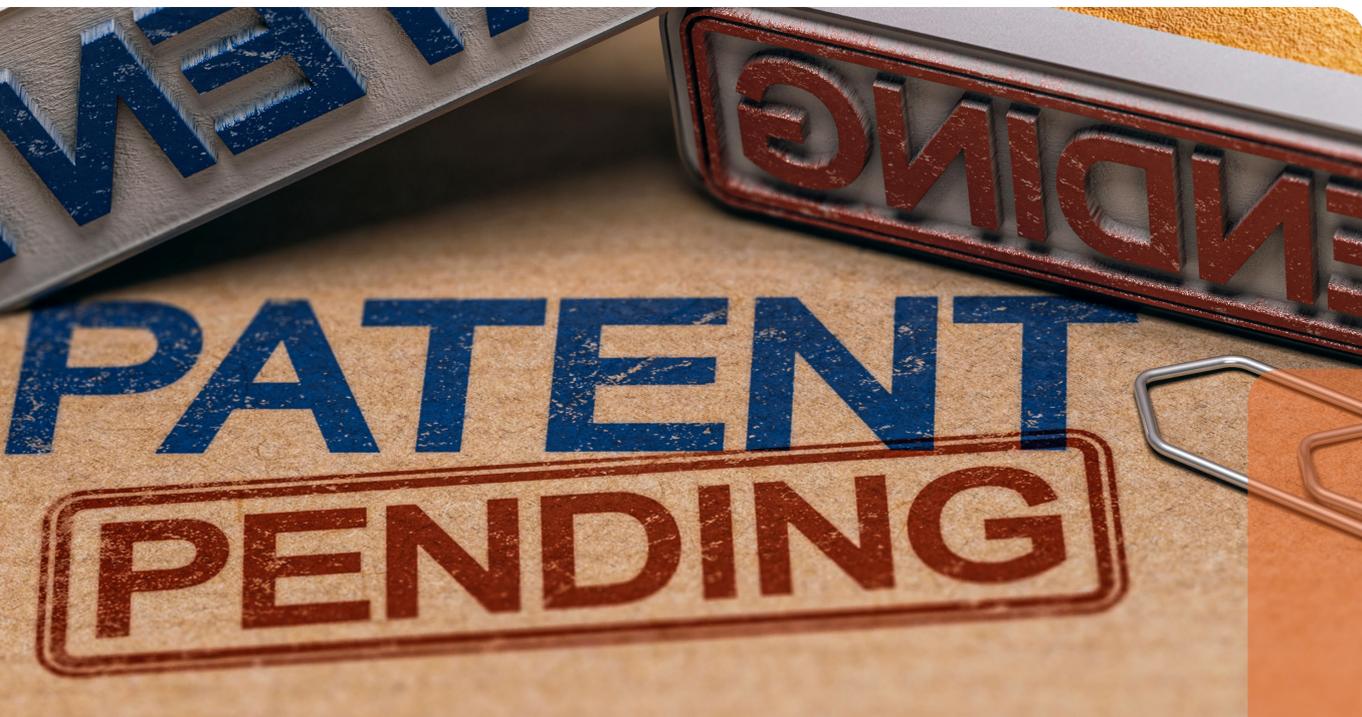


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**Patents**

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# Belgium

Stibbe



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## 1 Patent Enforcement

**1.1 Before what tribunals can a patent be enforced against an infringer? Is there a choice between tribunals and what would influence a claimant's choice?**

The Brussels Enterprise Court has exclusive jurisdiction over all patent disputes in Belgium. However, in certain situations, there is still a choice to be made whether to conduct the proceedings in French or Dutch, which may be useful in the event of a multi-jurisdictional dispute.

If the dispute concerns a European patent that has not been opted-out from the UPC jurisdiction, the claimant also has a choice between national proceedings and UPC proceedings.

The parties may also agree to bring their dispute before an arbitration tribunal.

**1.2 Can the parties be required to undertake mediation before commencing court proceedings? Is mediation or arbitration a commonly used alternative to court proceedings?**

Yes, the parties can be required to undertake mediation before commencing court proceedings, unless all parties disagree. However, mediation or arbitration are not a commonly used alternative to court proceedings in patent disputes.

**1.3 Who is permitted to represent parties to a patent dispute in court?**

Only lawyers have the right to represent parties to a patent dispute in court. Patent attorneys have recently been granted a limited right to intervene at oral hearings, but under the supervision of the lawyers representing the parties.

**1.4 What has to be done to commence proceedings, what court fees have to be paid and how long does it generally take for proceedings to reach trial from commencement?**

The proceedings usually start with a writ of summons served

upon the defendant by a bailiff. Bailiff fees and a very limited court fee must be paid. The time to trial depends on the type of proceedings initiated. Timing issues are covered in questions 1.8 and 1.9.

**1.5 Can a party be compelled to disclose relevant documents or materials to its adversary either before or after commencing proceedings, and if so, how?**

There is no extensive deposit or disclosure obligation as known in other jurisdictions. However, where there are serious and specific indications that a party (or even a third party) is in possession of a particular document containing proof of a fact relevant to the dispute, the judge may order that the document or a certified copy thereof be filed.

In patent disputes, a special evidence-taking procedure is available, called “descriptive seizure”. An *ex parte* request is filed with the court to appoint an expert whose mission is to visit all places on the Belgian territory where evidence of the alleged infringement (including the origin, destination and scale of said infringement) may be found. After said visit, the expert must prepare a report containing his findings and file it with the court. The request is granted if the patentee proves that its patent is *prima facie* valid and provides the court with indications of infringement. The threshold to be met is low and such requests are easily granted.

**1.6 What are the steps each party must take pre-trial? Is any technical evidence produced, and if so, how?**

The proceedings include several rounds of written submissions during which parties must provide evidence in support of their submissions. This evidence might include technical reports. The oral pleadings are scheduled after the exchange of written submissions and are mainly used to present the case in a synthetic manner for the court and answer its questions.

**1.7 How are arguments and evidence presented at the trial? Can a party change its pleaded arguments before and/or at trial?**

A party cannot submit additional arguments or evidence after its

last written submissions. If it does, the court is not obliged to take them into account.

**1.8 How long does the trial generally last and how long is it before a judgment is made available?**

A patent trial usually takes between one and four half-day sessions, which are usually spread over several weeks. The law provides that judgments must be rendered within one month as of the last trial day, but in complex cases, this deadline is not always met, and it sometimes takes two or three months.

**1.9 Is there any alternative shorter, flexible or streamlined procedure available? If so, what are the criteria for eligibility and what is the impact on procedure and overall timing to trial?**

The classic procedure on the merits usually takes between 18 and 24 months from the start of the procedure to a first instance judgment. Next to this classic procedure, there are two main alternative procedures.

First, a summary procedure to obtain a preliminary injunction is available. The request is usually made *inter partes* before the president of the court. The requirements to obtain a preliminary injunction are urgency and a *prima facie* valid and infringed patent. The president also generally balances the interests at stake. It usually takes six to 12 weeks from the start of the proceedings to a first instance judgment. In cases of extreme urgency, the request can even be made *ex parte*. In that case, a first instance judgment can be obtained within a few days.

Second, a fast-track procedure on the merits to obtain a permanent injunction is available. The request is also brought before the president of the court. The condition to obtain a permanent injunction is to demonstrate infringement. No urgency is required. The defendant can file (and usually does file) a counterclaim for revocation of the patent. It usually takes six to 10 months from the start of the proceedings to a first instance judgment. The main downside of this fast-track procedure on the merits is that no damage award can be requested. To obtain such an award, the patentee must file subsequent separate proceedings.

**1.10 Are judgments made available to the public? If not as a matter of course, can third parties request copies of the judgment?**

Judgments are public, but there is no official database for judgments. They are usually published by legal blogs and reviews when they are of interest. If a judgment has not been published by a legal blog or review, third parties can request a copy of it to the court office.

**1.11 Are courts obliged to follow precedents from previous similar cases as a matter of binding or persuasive authority? Are decisions of any other jurisdictions of persuasive authority?**

There is no rule of precedent, but the decisions of the Courts of Appeal and of the Supreme Court have a particular authority. Courts also consider foreign decisions, including those of the European Patent Office, but they do not necessarily follow them. They decide independently.

**1.12 Are there specialist judges or hearing officers, and if so, do they have a technical background?**

Patent cases are handled by specialist judges, but they usually have no technical background.

**1.13 What interest must a party have to bring (i) infringement, (ii) revocation, and (iii) declaratory proceedings?**

Only the patent owner may bring an infringement action. It is only if he fails to do so that the holder of an exclusive licence may act. For actions to obtain damages, any party who suffered damages (notably licensees) have an interest to act.

Since patents are enforceable against anyone, the interest to bring a revocation action is almost automatically present. In practice, revocation actions are always launched by potential infringers, whose interest is obvious.

Declaratory proceedings can be brought by anyone, as long as it is to prevent the violation of a right that is seriously threatened.

**1.14 If declarations are available, can they (i) address non-infringement, and/or (ii) claim coverage over a technical standard or hypothetical activity?**

Actions for declarations of non-infringement are available. Such actions can claim coverage over a technical standard, but not over a hypothetical activity because of the requirement that the action must aim at preventing the violation of a right that is seriously threatened.

**1.15 Can a party be liable for infringement as a secondary (as opposed to primary) infringer? Can a party infringe by supplying part of, but not all of, the infringing product or process?**

Yes, a patent confers the right to prevent any third party from supplying on the Belgian territory, means of implementing the invention on that territory, provided they relate to an essential element of the invention and that the third party knows, or should have known, that those means are suitable and intended for such implementation. It does not apply where said means of implementing the invention are staple consumer products, unless the third party induces the person to whom they are supplied to commit an infringing act.

**1.16 Can a party be liable for infringement of a process patent by importing the product when the process is carried on outside the jurisdiction?**

Yes, a party can.

**1.17 Does the scope of protection of a patent claim extend to non-literal equivalents (a) in the context of challenges to validity, and (b) in relation to infringement?**

Equivalents are considered in relation to infringement, but not in the context of challenges to validity.

**1.18 Can a defence of patent invalidity be raised, and if so, how? Are there restrictions on such a defence e.g. where there is a pending opposition? Are the issues of validity and infringement heard in the same proceedings or are they bifurcated?**

Yes, either by way of a main claim or a counterclaim. There are no restrictions on such a defence. The fact that an opposition is pending does not prevent the defendant from raising that defence. If the defence is filed by way of counterclaim, the issues of validity and infringement are heard in the same proceedings.

**1.19 Is it a defence to infringement by equivalence that the equivalent would have lacked novelty or inventive step over the prior art at the priority date of the patent (the "Formstein defence")?**

Yes, it is.

**1.20 Other than lack of novelty and inventive step, what are the grounds for invalidity of a patent?**

There are five other grounds of invalidity: (i) the subject-matter of the invention is excluded from patentability; (ii) the patent contains added matter; (iii) the scope of protection has been extended; (iv) the invention is not sufficiently disclosed; and (v) the patentee is not entitled to the patent.

**1.21 Are infringement proceedings stayed pending resolution of validity in another court or the Patent Office?**

No. The suspension can be granted but it is not automatic. Unless all parties agree on the suspension, it is rarely granted by the courts.

**1.22 What other grounds of defence can be raised in addition to non-infringement or invalidity?**

There is no exhaustive list of defences. A few examples include statute of limitation (the action is time-barred), abuse of rights, compulsory licensing, abuse of a dominant position or abuse of economic dependence.

**1.23 (a) Are preliminary injunctions available on (i) an *ex parte* basis, or (ii) an *inter partes* basis? In each case, what is the basis on which they are granted and is there a requirement for a bond? Is it possible to file protective letters with the court to protect against *ex parte* injunctions? (b) Are final injunctions available? (c) Is a public interest defence available to prevent the grant of injunctions where the infringed patent is for a life-saving drug or medical device?**

- (a) Yes, preliminary injunctions are available both on an *inter partes* and on an *ex parte* basis. If requested *inter partes*, urgency, as well as *prima facie* validity and infringement, must be established. If requested *ex parte*, extreme urgency must be established in addition to *prima facie* validity and infringement. A bond is not automatically required, but the judge may request one.

Protective letters can be filed to protect against *ex parte* injunctions, but this practice has no legal basis. Therefore, there is no obligation for the courts to take such protective letters into account.

- (b) Yes, final injunctions are available.  
(c) Compulsory licences are provided for as explained under question 3.2.

A broader public interest defence based on fundamental rights is available, but there is little precedent.

**1.24 Are damages or an account of profits assessed with the issues of infringement/validity or separately? On what basis are damages or an account of profits assessed? Are punitive/flagrancy damages available?**

If the claim is filed within the classic procedure on the merits, they can be assessed with the issues of infringement and validity.

If the claim is filed within a fast-track procedure on the merits, new proceedings must be started afterwards (see also question 1.9).

The general principle is that of full compensation for the damage suffered. The law does not lay down any rules for quantifying the loss suffered. The assessment of the loss is based on case law, which has established certain guidelines for assessing the loss suffered.

If the patentee exploits the invention, the calculation of the amount of the loss is based on the loss of profits and the losses suffered. If not, the calculation is based on reasonable royalties. If the calculation based on the above is not possible, the courts assess the loss "*ex aequo et bono*".

In case of bad faith, the infringer may be ordered to return profits and the confiscation of counterfeit products can be ordered.

**1.25 How are orders of the court enforced (whether they be for an injunction, an award of damages or for any other relief)?**

When a preliminary or permanent injunction or other relief are granted, they are usually accompanied with penalty payments in case of non-compliance. For the penalty payments to become enforceable, the decision must be served upon the defendant by a bailiff. For an award of damages, interests are due and seizures can be performed in case of nonpayment.

**1.26 What other form of relief can be obtained for patent infringement? Would the tribunal consider granting cross-border relief?**

The judge may notably take "corrective" measures where they are likely to contribute to stopping the infringement. These measures may consist of remedies in kind, such as recall from the channels of commerce, permanent removal from the channels of commerce or destruction of the infringing goods and, in appropriate cases, of the materials and implements that were primarily used in the creation or manufacture of those goods.

Another corrective measure that may be ordered is the publication of the judgment or a summary thereof, for a period determined by the judge, outside and inside the infringer's establishments, and/or online, in newspapers or in any other manner, all at the infringer's expense.

Yes, cross-border relief is possible, but not common.

### 1.27 How common is settlement of infringement proceedings prior to trial?

It happens in a minority of cases.

### 1.28 After what period is a claim for patent infringement time-barred?

Five years from the day on which the infringement was committed (or ended).

### 1.29 Is there a right of appeal from a first instance judgment, and if so, is it a right to contest all aspects of the judgment?

Yes, all aspects of a first instance judgment can be challenged in an appeal.

### 1.30 What effect does an appeal have on the award of: (i) an injunction; (ii) an enquiry as to damages or an account of profits; or (iii) an order that a patent be revoked?

- (i) An appeal has no suspensive effect, but provisional enforcement occurs at the risk of the patentee.
- (ii) Same as (i), but in practice, it is common to wait for the outcome of the appeal.
- (iii) An appeal has suspensive effect in case the first instance judgment revokes the patent.

### 1.31 Is an appeal by way of a review or a rehearing? Can new evidence be adduced on appeal?

It is a full review, new evidence can be filed and new claims can be raised.

### 1.32 How long does it usually take for an appeal to be heard?

If it is an appeal in a fast-track procedure, it takes about eight to 12 months. If it is a classic procedure, four to five years.

### 1.33 How many levels of appeal are there? Is there a right to a second level of appeal? How often in practice is there a second level of appeal in patent cases?

There are two levels of appeal. After the first appeal level, an appeal before the Supreme Court, limited to points of law, is possible. Such an appeal before the Supreme Court is common in patent cases that have already gone through the first appeal level.

### 1.34 What are the typical costs of proceedings to a first instance judgment on: (i) infringement; and (ii) validity? How much of such costs are recoverable from the losing party? What are the typical costs of an appeal and are they recoverable?

- (i) Usually between 75,000 and 200,000 euros, depending on the complexity of the case.
- (ii) Usually between 75,000 and 200,000 euros, depending on the complexity of the case.

The losing party needs to pay a procedural indemnity, which is generally capped at 15,000 euros.

Appeal proceedings are usually slightly cheaper than first instance proceedings. The recoverable costs are the same as in first instance (usually capped at 15,000 euros).

### 1.35 For jurisdictions within the European Union: What is the status in your jurisdiction on ratifying the Unified Patent Court Agreement and preparing for the unitary patent package? For jurisdictions outside of the European Union: Are there any mutual recognition of judgments arrangements relating to patents, whether formal or informal, that apply in your jurisdiction?

Belgium ratified the UPC Agreement, which entered into force on 1 June 2023. There is a Belgian local division of the UPC.

## 2 Patent Amendment

### 2.1 Can a patent be amended *ex parte* after grant, and if so, how?

Yes, by a request to the Belgian IP Office.

### 2.2 Can a patent be amended in *inter partes* revocation/invalidity proceedings?

Yes, it can.

### 2.3 Are there any constraints upon the amendments that may be made?

Yes, the amendments made cannot entail that the subject-matter of the patent extends beyond the content of the application as filed or that the scope of protection is extended.

## 3 Licensing

### 3.1 Are there any laws which limit the terms upon which parties may agree a patent licence?

None as to the content of the agreement. However, the patent licence must be in writing and is only enforceable against third parties as from its registration in the patent register. Furthermore, the licence agreement must respect competition law.

### 3.2 Can a patent be the subject of a compulsory licence, and if so, how are the terms settled and how common is this type of licence?

Yes, a patent can be the subject of a compulsory licence, but this has never happened in Belgium. A complex procedure is foreseen by law. In substance, the terms of the licence are settled by a special commission instituted for that specific purpose within the Ministry of Economic Affairs.

## 4 Patent Term Extension

### 4.1 Can the term of a patent be extended, and if so, (i) on what grounds, and (ii) for how long?

Yes, for inventions related to medicinal and plant protection products.

The grounds are set forth in EU Regulations 469/2009 (medicinal products) and 1610/96 (plant protection products). These rules are very complex and Stibbe wrote a detailed publication about it, which is available upon request to the authors.

The extension is normally of a maximum of five years, but an additional extension, known as the “pediatric extension”, may be available under specific circumstances.

## 5 Patent Prosecution and Opposition

### 5.1 Are all types of subject matter patentable, and if not, what types are excluded?

No. Article XI.4 of the Code of economic law states that:

“The following are not considered as inventions within the meaning of Article XI.3:

- 1) discoveries, as well as scientific theories and mathematical methods;
- 2) aesthetic creations;
- 3) plans, principles and methods for carrying out intellectual activities, games or economic activities, as well as computer programs; and
- 4) presentations of information.”

Article XI.5 of the same Code states that:

“§1. The following are not patentable:

- 1) plant varieties and animal breeds;
- 2) essentially biological processes for obtaining plants or animals; and
- 3) plants or animals obtained exclusively by the processes referred to in 2), including parts of such plants or animals constituting reproductive material.

§2. Without prejudice to paragraph 1, inventions relating to plants or animals shall be patentable if the technical feasibility of the invention is not limited to a particular plant variety or animal breed.

§3. Paragraph 1, 2) shall not affect the patentability of inventions having as their subject matter a microbiological process, or other technical processes, or a product obtained by such processes.

§4. Inventions shall not be patentable if their commercial exploitation would be contrary to ordre public or morality, including in order to protect human, animal or plant life or health or to avoid serious prejudice to the environment, and the implementation of an invention shall not be considered as such merely because it is prohibited by a legal or regulatory provision.

§5. Under paragraph 4, the following in particular are not patentable:

- 1) processes for cloning human beings, i.e. any process, including techniques for splitting embryos, the purpose of which is to create a human being having the same nuclear genetic information as another human being, whether living or deceased;
- 2) processes for modifying the germ line genetic identity of a human being;
- 3) the use of human embryos for industrial or commercial purposes; and
- 4) processes for modifying the genetic identity of animals of such a nature as to cause them suffering without any substantial medical benefit for man or animal, as well as animals resulting from such processes.

§6. The human body, at the various stages of its formation and development, and the simple discovery of one of its elements, including the sequence or partial sequence of a gene, shall not constitute patentable inventions.

An element isolated from the human body or otherwise produced by a technical process, including the sequence or partial sequence of a gene, may constitute a patentable invention, even if the structure of that element is identical to that of a natural element.

The industrial application of a sequence or partial sequence of a gene which serves as a basis for an invention must be concretely set out in the patent application.

§7. Patents shall not be granted for methods of surgical or therapeutic treatment of the human or animal body and diagnostic methods applied to the human or animal body. This provision shall not apply to products, in particular substances or compositions, for the implementation of one of these methods.”

### 5.2 Is there a duty to the Patent Office to disclose prejudicial prior disclosures or documents? If so, what are the consequences of failure to comply with the duty?

No, there is no such duty.

### 5.3 May the grant of a patent by the Patent Office be opposed by a third party, and if so, when can this be done?

No, it may not.

### 5.4 Is there a right of appeal from a decision of the Patent Office, and if so, to whom?

Yes, these decisions can be appealed before the Brussels Enterprise Court.

### 5.5 How are disputes over entitlement to priority and ownership of the invention resolved?

Those disputes are brought before the Brussels Enterprise Court by way of the classic procedure on the merits. Alternatively, parties can decide to bring the dispute before an arbitration tribunal.

### 5.6 Is there a “grace period” in your jurisdiction, and if so, how long is it?

“Grace period” can have at least two meanings.

- I. It can refer to the period after the disclosure of an invention during which a patent application can be filed and the disclosure will not be taken into account as prior art. In that sense, a grace period of six months as from disclosure exists when the disclosure directly or indirectly results from:
  - i) a clear abuse with regard to the applicant or the applicant’s predecessor in title; or
  - ii) the fact that the applicant or his predecessor in title has exhibited the invention at official or officially recognised exhibitions within the meaning of the Convention relating to International Exhibitions, signed in Paris on 22 November 1928.
- II. It can refer to the period after the failure to meet the deadline to perform an act where the Patent Office still allows the performance of the act. In that sense also, a grace period exists under Belgian law.

For the deadline to pay the patent yearly fee, the grace period is six months as from the due date.

A procedure of *restitutio ad integrum* exists under certain circumstances under Belgian law. The reasoned request must be filed within the period expiring on the earliest of the following dates:

- either two months, from the date of cessation of the cause of non-compliance with the time limit for performing the act in question; or
- 12 months, from the date of expiry of the time limit for performing the act in question.

It also applies to the failure to pay the patent yearly, in which case the deadline starts running after the grace period of six months.

### 5.7 What is the term of a patent?

The term of a patent is 20 years as from its filing, provided the yearly patent fee is paid. For inventions related to medicinal products and plant protection products, a patent extension can be obtained, see question 4.1.

### 5.8 Is double patenting allowed?

There is no statutory prohibition of double patenting. Some case law decided that such prohibition would exist, but it was criticised by legal authors. However, double protection by a European (or Unitary) patent and a Belgian patent is prohibited by law.

### 5.9 For jurisdictions within the European Union: Once the Unified Patent Court Agreement enters into force, will a Unitary Patent, on grant, take effect in your jurisdiction?

Yes, the UPC Agreement entered into force on 1 June 2023.

## 6 Border Control Measures

### 6.1 Is there any mechanism for seizing or preventing the importation of infringing products, and if so, how quickly are such measures resolved?

Yes, the customs administration can block and seize infringing products at the border. Such measures are effective within a couple of days.

## 7 Antitrust Law and Inequitable Conduct

### 7.1 Can antitrust law be deployed to prevent relief for patent infringement being granted?

Yes, but it is unusual. One case in which Stibbe is instructed involves an antitrust defence to a patent infringement action. More details can be obtained upon request to the authors.

### 7.2 What limitations are put on patent licensing due to antitrust law?

There is no exhaustive list of limitations put on patent licensing due to antitrust law. Discriminatory licensing policy is just one example of a conduct that could infringe antitrust law depending on the facts of the case. Stibbe IP and Competition practices regularly work together to deliver opinions on the limits imposed by antitrust law to patent licensing.

**7.3 In cases involving standard essential patents, are technical trials on patent validity and infringement heard separately from proceedings relating to the assessment of fair reasonable and non-discriminatory (FRAND) licences? Do courts set FRAND terms (or would they do so in principle)? Do courts grant FRAND injunctions, i.e. final injunctions against patent infringement unless and until defendants enter into a FRAND licence?**

FRAND case law is not developed in Belgium. All matters could be handled in the same trial. The court could set FRAND terms and could also grant an injunction pending the conclusion of a FRAND licence. These are general considerations and such complex litigation issues should be assessed on a case-by-case basis.

## 8 Current Developments

### 8.1 What have been the significant developments in relation to patents in the last year?

The entry into force of the UPC is the major development of 2023.

Our courts also rendered several interesting decisions in 2023. Stibbe publishes an annual review of the most important patent case law, which can be obtained upon request to the authors.

### 8.2 Are there any significant developments expected in the next year?

The progress of the UPC system and the first decisions of the Belgian division of the UPC will be important next year and in the years to come.

Stibbe is instructed in several major ongoing patent litigation cases. We await important decisions within the next year that will influence Belgian patent law.

### 8.3 Are there any general practice or enforcement trends that have become apparent in your jurisdiction over the last year or so?

Patent law is in constant evolution and there are several trends. To name just a few, we notice that:

- Belgium remains a preferred forum for enforcing patent rights in Europe, especially in the pharmaceutical sectors. Belgian courts usually deliver consistent and well-reasoned decisions thanks to the specialisation of patent judges.
- The scrutiny to grant preliminary injunctions is becoming more challenging, which highlights the importance of a good preparation.
- Clear-the-way actions are being launched more frequently.
- In situations where the patent was later revoked or found not to be infringed, the threshold for holding a patentee liable for having enforced its rights is high.



**Philippe Campolini** has 15 years of experience in intellectual property with a strong focus on patent and trademark litigation for Belgian and international clients from various sectors, notably the life sciences and medical device industries. He also works in transactional matters. Philippe has also been an associate researcher at the Unit for Economic Law of the *Université libre de Bruxelles* (ULB) since 2013. He is often invited to speak at conferences featuring intellectual property and trade secrets law and has authored many publications on these subjects. He recently contributed to the book *"The Unitary Patent Package & Unified Patent Court. Problems, Possible Improvements and Alternatives"*, in which he discusses the international jurisdiction of the Unified Patent Court and related issues addressed by EU Regulation no. 542/2014. Further, Philippe is the President of the French-speaking section of the Belgian Patent Attorney Accreditation Commission, as well as board member of the European Patent Lawyers Association (EPLAW), the Belgian Copyright Association (BVA-ABA), the Belgian law journal *Revue de droit commercial belge – Tijdschrift voor Belgisch handelsrecht* (RDC-TBH) and the Belgian copyright law journal *Auteurs & Media* (A&M).

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**Clémence Jonckheere** graduated from the ULB in 2021. She then completed an LL.M. in intellectual property and ICT law at the KUL in 2022. In her daily practice, she focuses on advice and litigation in a wide range of intellectual property matters and pharmaceutical law. She is active in the AIPPI, where she participated at various conferences and was a contributor to the Belgian 2023 report on "Responsibility of online marketplaces for online infringement of industrial property rights". Clémence joined the Brussels office of Stibbe in 2022.

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