

Confidentiality of Communication between Clients and their Patent Advisors

Belgium

On 28 June 2018 Belgian parliament adopted a law proposal introducing advanced regulation for the access and exercise of the patent attorney profession in Belgium. The law proposal was published in the Belgian State's Gazette on 19 July 2018 as the Law of 8 July 2018 (hereafter - the Law). This Law includes:

- 1) The creation of an Institute representing the patent attorney profession, which will enforce deontological rules and organise further training;
- 2) The protection of the professional title of patent attorney; and
- 3) The right for patent attorneys to be heard in cases involving patent litigation before the Belgian courts.

As one of the main aspects, the Law also provides for an attorney-client privilege applicable to patent attorneys established in Belgium and to foreign patent attorneys temporarily exercising the profession in Belgium under the freedom to provide services. This is accomplished through the introduction of professional secrecy containing specific additional provisions directed towards the patent attorney profession which have been inspired by the attorney-client privilege contained in Rule 153 of the Implementing Regulations of the European Patent Convention.

The provision containing the attorney-client privilege, which is being introduced into the Belgian Code of Economic Law, reads as follows:

Art. XI.75/13.

§ 1er. Lorsqu'un membre de l'Institut des mandataires en brevets est consulté en sa qualité de mandataire en brevets, nul ne peut divulguer ou être contraint de divulguer les communications échangées ou destinées à être échangées à ce propos entre ce mandataire en brevets et son client, dans le cadre de procédures judiciaires ou administratives, à moins que le client n'ait expressément renoncé à ce droit. L'alinéa 1er s'applique uniquement aux membres de l'Institut, sous réserve des dispositions de traités internationaux.

§ 2. Les communications visées au paragraphe 1er concernent notamment toutes les communications relatives à:

- 1° l'appréciation de la brevetabilité d'une invention ou de l'opportunité de déposer une demande de brevet;
- 2° la préparation d'une demande de brevet belge, ou d'une demande internationale désignant la Belgique, ou la procédure y relative;
- 3° tout avis concernant la validité, l'étendue de la protection ou la contrefaçon de l'objet d'un brevet belge ou d'une demande de brevet belge.

§ 3. L'article 458 du Code pénal s'applique aux membres de l'Institut et à leurs préposés.

Les infractions à l'interdiction visée au paragraphe 1er commises par ces personnes, sont punies de la sanction prévue à l'article 458 du Code pénal.

An equivalent attorney-client privilege applicable to European patent attorneys is also being introduced in Article XI.90/1 of the Belgian Code of Economic Law.

The Belgian attorney-client privilege is thus two-sided:

1. First it gives anyone the right to refuse to make certain communication between the patent attorney and his client public, within the context of judicial or administrative proceedings;
2. Secondly, it forbids anyone to make such communication public without the consent of the client of the patent attorney.

The privilege protects any communication exchanged or destined to be exchanged between a patent attorney and his client in so far as he is consulted in his function of patent attorney.

Infractions of the attorney-client privilege committed by the patent attorney can lead to criminal, civil as well as disciplinary proceedings.

The entry into force of the Law, including the provisions on the attorney-client privilege, is subject to further implementing measures. These, together with the Law, are expected to enter into force in the course of 2019.