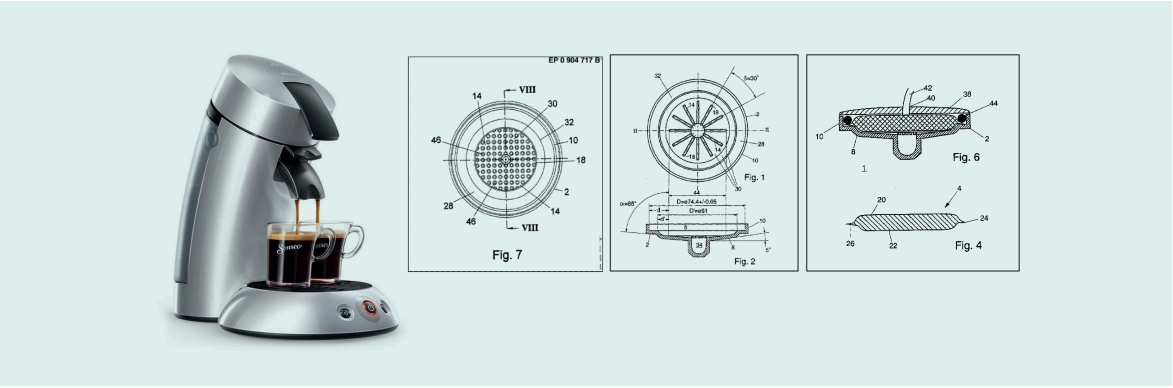
INTELLECTUAL
PROPERTY RIGHTS
IN A NUTSHELL

Patents

01. What do patents protect?

Patents protect **inventions**. An invention must be understood as a **technical solution** to a **technical problem**.



The following examples do **not** constitute **inventions** and are therefore **not patentable**

- Discoveries (i.e. when something is found that already exists in nature)
- Natural science theories and mathematical methods
- Aesthetic creations
- Systems and methods for doing mental work or business

There are also examples of creations which could be qualified as an invention but for which **patent protection** was **not considered desirable**, namely:

- plant or animal varieties or essentially biological processes for the production of plants or animals
- methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practised on the human or animal body

However, when these elements are integrated into a product, process or result that provides a technical solution to a technical problem, patent protection is available.

In principle, there are **two types of patents**, namely product patents and process patents:

- A **product** must be understood as a material object that in itself has a value *(see e.g. pictured on the next page EP2218655A1 – Aerosol container)*.
- A **process** is a method for manufacturing, preparing, constructing or obtaining a certain product or achieving a certain product or result *(see e.g. pictured on the next page EP2520159A1 – A method of transporting compost)*. The patent protection will apply specifically to the method of creating the product or result and not to the product or result itself. The patent holder will thus not be able to prevent third parties from achieving the same product or result through the application of a different process.

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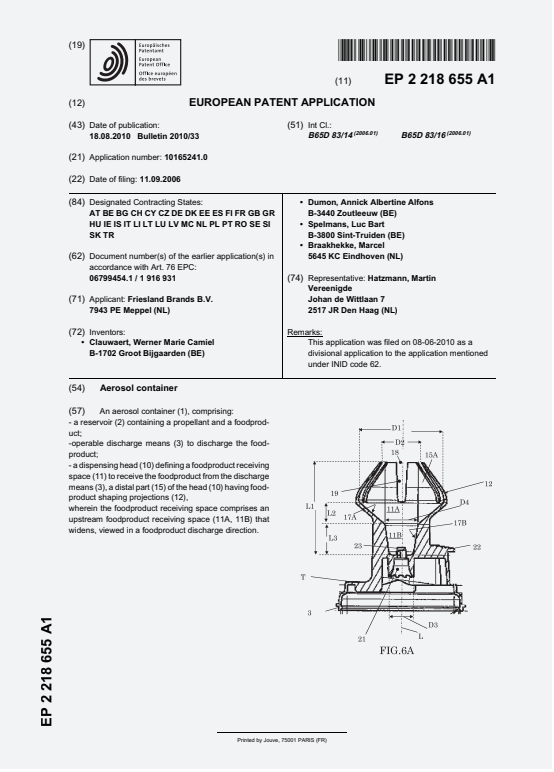

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Remarks:
This application was filed on 08-06-2010 as a divisional application to the application mentioned under INID code 62.

(54) **Aerosol container**

(57) An aerosol container (1), comprising:
- a reservoir (2) containing a propellant and a foodproduct;
-operable discharge means (3) to discharge the foodproduct;
- a dispensing head (10) defining a foodproduct receiving space (11) to receive the foodproduct from the discharge means (3), a distal part (15) of the head (10) having foodproduct shaping projections (12),
wherein the foodproduct receiving space comprises an upstream foodproduct receiving space (11A, 11B) that widens, viewed in a foodproduct discharge direction.

FIG.6A

EP 2 218 655 A1

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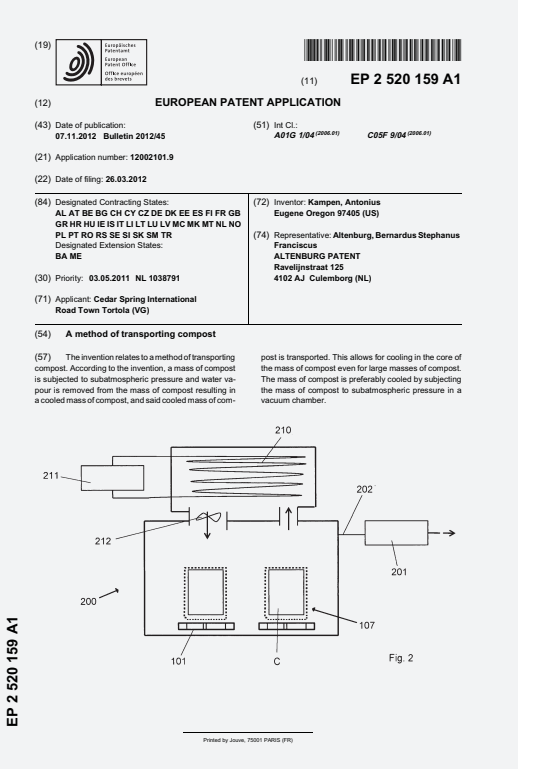

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(54) **A method of transporting compost**

(57) The invention relates to a method of transporting compost. According to the invention, a mass of compost is subjected to subatmospheric pressure and water vapour is removed from the mass of compost resulting in a cooled mass of compost, and said cooled mass of compost is transported. This allows for cooling in the core of the mass of compost even for large masses of compost. The mass of compost is preferably cooled by subjecting the mass of compost to subatmospheric pressure in a vacuum chamber.

Fig. 2

EP 2 520 159 A1

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02. What are the requirements for patent protection?

Several conditions need to be fulfilled in order to obtain valid patent protection. The invention must more specifically be:

- new
- inventive, and
- industrially applicable

a. The invention must be new

The first requirement is that the invention must be **new**. This means that it may not yet form part of the ***state of the art*** at the time of filing of the patent application.

The **state of the art** comprises everything disclosed to the public anywhere in the world by means of a written or oral description, by use, or in any other way, before the date of filing.[28] All forms of disclosure are taken into account, such as written descriptions in magazines, in dissertations and on the Internet, but also oral descriptions during conferences and during a company visit, etc. The concept of "public" is not quantified, so that it may be sufficient that one person has had access to the invention to be considered a disclosure.

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Novelty is however only precluded by something which is clearly disclosed to a skilled person in **a single source of prior art** (e.g. in a patent application).

> **Tip:** In light of the novelty requirement, it is extremely important that the invention is kept secret and confidential before the patent application is filed. Otherwise the invention will not be "new" and patent protection will no longer be available. To this end, confidentiality clauses with everyone who comes into contact with the invention are of the utmost importance.

b. The invention must be inventive

The second requirement is that the invention must be **inventive/entail inventive step** and may not be obvious to the so-called "person skilled in the art". This requirement is intended to prevent exclusive rights from forming barriers to normal and routine development.

The **person skilled in the art** can be described as a fictitious person or group of persons with a distinct expertise. It is a skilled practitioner in the relevant field of technology with average knowledge and ability.[29]

Inventive step is usually evaluated on the basis of the "**problem/solution" approach**, which entails three main stages:

- determining the "closest prior art",
- establishing the "objective technical problem" to be solved, and
- considering whether or not the claimed invention, starting from the closest prior art and the objective technical problem, would have been obvious to the skilled person.[30]

As opposed to novelty, in assessing inventive step **multiple sources of prior art may be applied.**

It is **not required** that the invention is **inventive in all respects**. It is possible for an invention to be inventive through the bringing together of non-inventive elements precisely because the way in which these elements are brought together is inventive.

c. The invention must be industrially applicable

The final requirement is the **industrial applicability**. This means that the invention must be able to be used in trade, industry or agriculture. This requirement causes the least problems in practice since it is extremely rare that an invention cannot be used industrially.

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03. How can you obtain patent protection?

Patent protection can only be obtained through **the filing of a patent application** with the competent authority. The assistance of a licensed patent attorney is not mandatory, but highly recommended.

The right to a patent belongs to the "**inventor or his assignee**". However, neither the Belgian Intellectual Property Office nor the European Patent Office examine whether the person filing a patent application is indeed the inventor or his assignee. The applicant does not have to prove this, but is presumed to be entitled to apply for the patent. However, this presumption is rebuttable and if the patent applicant is not the rightful owner, a revendication action or nullity request may be submitted.

The patent systems are governed by the **first-to-file principle**, which means that the first applicant for a patent will be the patent holder, even if the applicant is not the first to have invented the invention in question. The **date of filing of the application** is therefore extremely important. Also because it is the **reference date** for assessing the novelty and inventive step of the invention and thus for judging the validity of the patent.

> **Tip:** The applicant can also invoke a **right of priority** from an earlier application. The right of priority more specifically entails a 12-month period during which the person who has duly filed an application for a patent or his assignee is allowed to territorially expand the patent protection to other territories. When priority is claimed, the new application will factiously be considered to have been filed on the filing date of the priority application.

To maintain the patent application or patent, an **annual fee** must be paid starting from the third anniversary of the filing date.

Subject to the payment of these annual fees, a patent may be maintained for a period of maximum **20 years**. After these 20 years, the patent will expire and the holder will no longer be able to enjoy his exclusive rights of exploitation.

Three avenues are currently available for the **filing of a patent application**:

1. The national route (Belgium, Germany, …)
2. The European route (European)
3. The PCT-route

Although the patent application or patent is named differently in the respective routes – "the European patent application", "the international patent application" and "the Belgian/German/… patent application", – each patent application will ultimately lead to a patent that is legally valid in a national country, in other words to a right that can be enforced before the national courts of that country.

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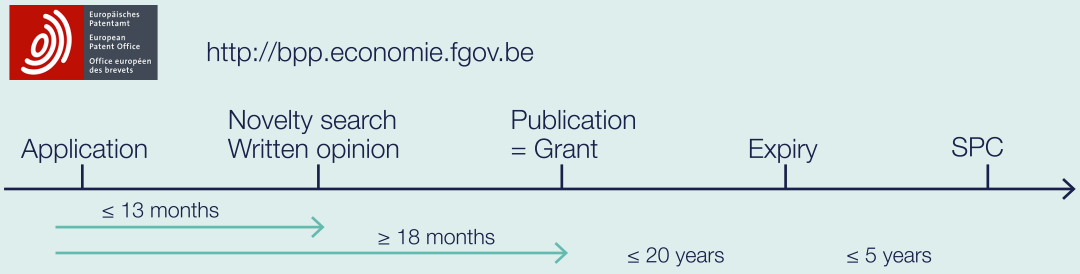
a. Belgian application and granting procedure

You can opt for the Belgian application and granting procedure when you only seek protection in Belgium or as “a first filing” in order to then enjoy the right of priority.[31]



A **written application** in Dutch, French or German must be **submitted** to the Belgian Intellectual Property Office in person, by letter or online via the Benelux Patent Platform[32].

This **application must** a.o. **contain**:

- a description of the invention:
  - > The invention must be described in a sufficiently clear and complete manner so that a specialist in the same technical field can carry out the invention.
- one or more claims:
  - > The claims describe the subject matter for which protection is sought. Although the description and optional drawings may help to interpret the claims, the claims will in principle determine the scope of protection.

Tip: The formulation of the claims is crucial. If the claims of a patent application are formulated too restrictively, the scope of protection of the patent will be limited. This cannot be remedied subsequently. A poorly drafted claim can, therefore, lead to a very limited patent. Conversely, a well drafted claim can significantly expand a patent’s scope of protection, which will also typically lead to a more commercially valuable invention. The assistance of a good patent attorney in drafting a patent application is thus highly recommended!

The Belgian prosecution procedure has **no (mandatory) investigation on the merits**, reason why this procedure is **rather simple and inexpensive**.

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Only a **novelty search** will be conducted to identify publications which constitute prior art with respect to the invention for which the patent is sought. The results of this search will be included in a **report** with an accompanying written opinion. The search report and written opinion are not decisive for the grant of a Belgian patent. Even if a patent is found not to be new, a Belgian patent will be granted.

Conversely, the novelty search does not provide a definitive guarantee as to the validity of the patent. Accordingly, a Belgian judge is not bound by this document. Nonetheless, the search report and the written opinion have a useful informative role and allow the patent applicant to withdraw or amend his application accordingly.

The patent application will in principle be **published** 18 months after the filing or priority date.

Once all formalities are fulfilled, the patent will be **granted**. After the grant, the patent will also be published, allowing the applicant to officially enjoy the exclusive right of exploitation granted by the patent.

b. European application and granting procedure

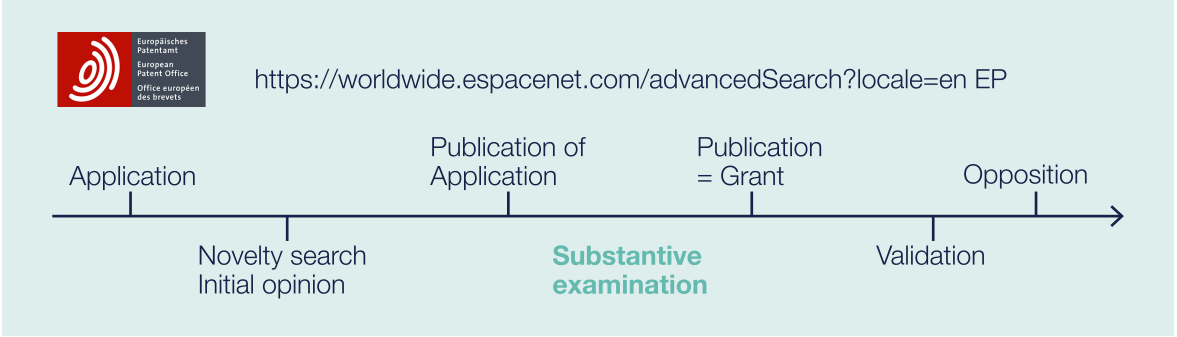
If you want to protect your invention in multiple European countries, we definitely recommend you to request a European patent. Through **one application** and one **procedure** you can obtain patent protection in all or several countries of the currently 38 member states of the European Patent Convention. You are able to opt for a "European patent" either immediately or before the expiry of the right of priority following an earlier national application.

The European patent is in fact a **bundle of national applications** and will provide the applicant with a bundle of national patents. Therefore, once the patent is granted, it will be **subjected to the national rules of each designated country regarding e.g.**:

- scope of protection;
- transfer and license;
- implementation of rights, etc.

All European patent applications have to be filed with the **European Patent Office ("EPO[33]")**. This can also be done online (www.epoline.org). However, there is one exception. When your invention may be relevant to de defence of Belgian territory or Belgian State security, you will have to file your application with the Belgian Intellectual Property Office.

You can file your patent application in the **language** of your home country (e.g. Dutch). However, within two months after filing you will have to provide a translation of your application in one of the official languages of the EPO (i.e. English, French or German). The chosen language will be used during the entire procedure.



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As with Belgian patent applications, the EPO will carry out a **novelty search** and draft a **search report**.

The patent application and the search report will be **published** in the European Patent Bulletin[34] as soon as possible after the expiry of a period of 18 months after the date of filing.

However, contrary as to Belgian patents, the EPO will also investigate the other material validity requirements (e.g. inventive step and industrial applicability). This is the reason why a European patent is considered to be '**stronger**' and why the grant procedure of a European patent is **longer** than the one for a Belgian patent.

Based on this investigation the EPO will decide either to grant or reject the patent application.

The decision to grant the patent becomes official on the day the patent is officially **published** in the European Patent Bulletin[35]. Only from that date on the patent is valid.

Within 9 months after the publication of the patent, it is possible for third parties to file an **opposition** to oppose the granted patent (e.g. if the patent does not meet the patentability conditions or if the invention has not been described clear and entirely).

The EPO opposition division will examine the opposition and will decide to:

- revoke,
- maintain, or
- modify the patent

All decisions made by the filing, research or opposition divisions of the EPO are **subject to appeal** before the EPO Boards of Appeal within two months of their publication.

c. Unitary patent

There is a reform ongoing on the European patent level, i.e. the creation of a **Unitary patent**.[36] This Unitary patent will differ from the "European patent" as it will grant uniform protection in Europe instead of various different national patents.

In addition, a new court will be established – **the Unified Patent Court** – with in principle exclusive competence in respect of all European patents and Unitary patents.

The application procedure for this Unitary patent will be exactly the same as the application procedure for a European patent. It is only when the patent is granted that the proprietor will be able to choose between a European patent and a Unitary patent.

It is expected that this new Unitary patent will come into force in march 2023.

d. PCT-procedure

The PCT-procedure enables patent applicants to simultaneously seek protection for an invention in several or all countries in the world that are members[37] of the Patent Cooperation Treaty[38] by filing **one international patent application**. The PCT-procedure does not lead to an international patent, but provides the applicant, as it were, with a **bundle of national patent applications**. The PCT-procedure has advantages mainly in terms of costs, which are lower than if one were to start a registration procedure in each country individually.

International patent applications must be filed either with the **International Bureau of WIPO**[39] or the **EPO**[40].

A **novelty search** will be carried out, as well as – upon request – an international preliminary assessment of whether the invention meets the substantive patentability requirements. The search report as well as the application will be **published** on the website of WIPO.

After this, the applicant is to proceed with the **national phase** in the various designated countries. The granting procedure then continues before the competent national (or regional) authorities according to the national rules of each designated country. In these countries, a simplified procedure will be followed, as a novelty search and examination on the merits will already have been carried out.

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04. What rights do you have as a patent holder?

The **patent holder** is the person who filed the patent application with the competent authority. He may be the inventor himself (i.e. the person who created the invention) or may have acquired the economic rights of exploitation associated with the invention (e.g. by transfer).

A patent grants **the holder** an **exclusive temporary right to exploit the invention**. Only the holder of a granted patent can:

- manufacture, offer for sale, place on the market, use, import, and/or store the patented product.
- apply the patented process or offer to apply the patented process (except under certain conditions).
- offer for sale, use, place on the market, import and/or store a product obtained directly by the application of the patented process.

Since these acts are reserved for the patent holder, it is forbidden for third parties to perform such acts without the patent holder's permission and the patent holder may thus **prevent any third party** from doing so (i.e. **patent infringement**).

There are two categories of patent infringements: direct infringements and indirect infringements.

The category of **direct infringement** in turn consists of the two subcategories literal infringement and infringement by equivalence.

- A so-called "literal infringement" occurs when a product or process contains all characteristics of at least one claim of the granted patent.
- An "infringement by equivalence" occurs when a product or process uses technical features which are different from the characteristics described in the patent, but which are equivalent as they perform substantially the same function in substantially the same way and achieve substantially the same result (the "function-way-result test").

Indirect patent infringement on the other hand relates to the situation in which a third party knowingly offers or provides means relating to an essential element of the invention for the purpose of implementing or exploiting the patented invention.

Note that this **exclusive protection only arises from the moment the patent is granted** and not from the moment of the patent application. Between the patent application and the date of the actual grant of the patent, the patent applicant cannot prohibit third parties from exploiting the invention. At best and provided certain conditions are met, he can obtain a reasonable compensation.

In addition, the ***inventor*** himself has a **moral right of paternity**, i.e. the right to be mentioned on the patent as the person who created the invention. This right is inalienable and cannot be transferred. This moral right is quite important for academics. Recently, the EPO decided that an inventor must be a natural person.[41]

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