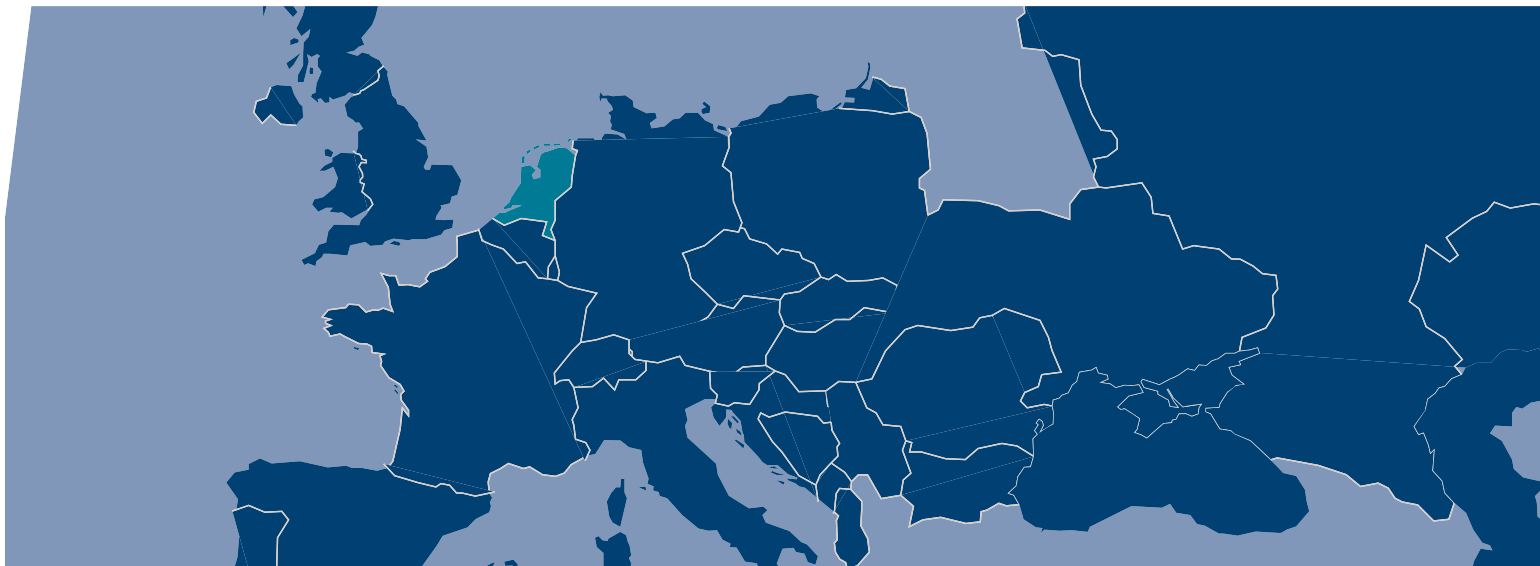




Compensation law in the Netherlands

Rogier de Vrey, Associate in our Dutch patent team, provides a brief summary of Dutch law in this area.

Salary or equitable reward schemes

According to Section 12(1) of the Patent Act 1995 (Rijksoctrooiwet 1995), an employee who has made an invention is entitled to the patent *'unless the nature of the service entails the use of the employee's special knowledge for the purposes of making inventions of the same kind as that to which the patent application relates'*, in which case the employer is entitled to the patent. In other words, if the nature of the employee's job is to make inventions of the type embodied in the patent application, the employer is entitled to the patent. This provision is mandatory and it is not possible to contract out of it.

In the event that the employer is entitled to the patent and the inventor is not deemed to have been sufficiently compensated, the employer will be obliged to grant equitable remuneration to the inventor depending on the pecuniary importance of the invention and the circumstances under which it was made (Section 12(6) Patent Act 1995). The inventor's right to claim compensation lapses three years after the date of the grant of the patent.

According to Dutch case-law, as a general principle – particularly in respect of large, sophisticated companies – the salary agreed in the inventor's employment contract is deemed to include compensation for patents not granted to the inventor. This is particularly the case if the inventor was specifically hired for R&D purposes (even if, as seems to be the typical case, the salaries of Dutch employees engaged in R&D are not especially larger than those of other employees). The Dutch courts are reluctant to award additional compensation and only do so in exceptional circumstances. In determining whether to award additional compensation, the Dutch courts consider the following factors:

- The employee's position and function within the employer's organisation
- The employee's remuneration and other terms of employment
- The nature and the financial significance of the invention
- The extent of the employee's contribution to the invention
- The role played by other employees in making the invention.

- The extent to which the employer has:
 - provided the necessary facilities and research opportunities and
 - assisted with the exploitation of the invention.

Calculation of equitable remuneration

In the Netherlands, there are no schemes, policy rules or guidelines for employers to use to calculate the salary or remuneration for inventors, although the two leading cases from the Supreme Court provide for some guidelines in this respect. According to these cases, the right to equitable remuneration does not imply that the compensation for the lost patent has to be based on the benefit to the company resulting from the exploitation of the patent. According to the Supreme Court the equitable remuneration should not be calculated solely on the basis of the commercial value of the invention or a (hypothetical) royalty fee, which the employer would have had to pay if the employer had concluded a licence agreement with an independent inventor. Nonetheless, such factors may play a role in the calculation.

Currently, the leading principle in the Netherlands (which is reflected in the case law of the lower Dutch courts), is that remuneration will be calculated in a similar manner to awarding a bonus. However, the Explanatory Memorandum of the Dutch Patent Act of 1910 (which is still relevant despite introduction of the Patent Act 1995) states that if the commercial profit gained by the employer from the exploitation of the patent is excessive, the inventor may be entitled to receive a share of the profits. This statement is invoked by Dutch academics to argue that the calculation of the remuneration may still be based on the commercial success of the invention, but this approach has not been followed in practice by the courts.

Timing and method of payment

There are no general guidelines/rules governing the conditions of payment where an inventor is entitled to equitable remuneration.