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The Administrative Court reverses the decision of the Italian Antitrust Authority in Pfizer.

Daniela Ampollini (Trevisan & Cuonzo) · Wednesday, October 17th, 2012

On 3 September 2012, the Adminstrative Court decision in the Italian antitrust case involving Pfizer was published. This decision completely reversed the ruling of the Italian Antitrust Authority which had initially found Pfizer guilty of abuse of dominant position and applied a 10.6 million euro fine (see my earlier post here).
In substance, the Administrative Court noted that the Antitrust Authority found for the existence of an abuse of dominant position in the combination of a number of conducts by which Pfizer had enforced its rights and legitimate interests, either in court or at the EPO and national patent office. However, said the Administrative Court, the Authority was unable to identify a "quid pluris" as opposed to the mere summation of such lawful behaviours (such as the willful provision of elusive or erroneous information to a patent office as in Astra Zeneca), which only would have allowed a finding of existence of an exclusionary conduct. This resulted in the misapplication of community case law as well as in the violation of the principle of legal certainty. As regards Pfizer's behaviour in terms of the judicial strategy, the Administrative Court also pointed out that the first instance decision seemed to be in contrast with community case law in Itt-Promedia, considering that the majority of the judicial proceedings involving the Xalatan SPC had, in fact, been initiated by the generics and not by Pfizer.
The above reasoning, I think, is not difficult to share and would have been enough to close the case. However the Administrative Court brought the reasoning further and noted that the actual motivation behind the findings of the Antitrust Authority seemed to be the fact that the patent which Pfizer had enforced against the generics had already been revoked upon opposition in the first instance. And instead of concluding that, in any event, this revocation could not *per se* provide the *quid pluris* necessary for a finding of abuse, the Administrative Court stated that, if the validity of EP '168 mattered (as it seemed it did for the Antitrust Authority), the Antitrust Authority should have considered that the first instance decision of revocation had already been appealed and that such appeal had automatically stayed the first instance revocation, with the further conclusion that the Antitrust Authority should have then considered to stay the proceedings until the conclusion of the appeal phase at the EPO. Well, this part of the reasoning of the decision of the Administrative Court is definitely less convincing, and cannot but suggesting that the Administrative Court was in turn influenced by the fact that the patent in question had meanwhile been maintained by

the EPO Board of Appeal. A clarification on this point would be welcome, should this case proceed to the next instance before the Supreme Administrative Court…

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