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Recent news in the Italian Pfizer antitrust case

Daniela Ampollini (Trevisan & Cuonzo) · Monday, July 22nd, 2013

In my earlier posts (here and here) I reported and commented on the first two phases of the Italian Pfizer antitrust case, in which the Italian Antitrust Authority (IAA) accused Pfizer of having abused of a dominant position by judicially enforcing patent rights against generic latanoprost in the Italian Courts. A small but potentially meaningful development now has to be reported while the case is being heard in the last instance by the Supreme Administrative Court, after appeal by the IAA against the decision of the Regional Administrative Court.

The story commenced in October 2010 and concerned the fact that Pfizer had obtained an SPC over latanoprost on the basis of the grant in 2009 of a divisional patent, deriving from a parent patent already granted in 1994, on the basis of which no such SPC protection had however been sought. The SPC was eventually granted by the Italian Patent Office and Pfizer started to enforce it against a number of generics launching latanoprost based products. Further to a complaint by a number of generic companies, the IAA opened investigations alleging that Pfizer's overall behaviour was abusive from a competition law perspective, as in summary resulting in the artificial extension of the deadline to seek SPC protection. In January 2012, Pfizer was in fact found guilty by the IAA and ordered to pay an administrative sanction of Euro 10.6 million to the Italian State. This decision was however reversed in full upon appeal by the Regional Administrative Court, in September 2012. In this phase, the administrative judge, after having noted that the divisional patent in question was eventually found valid in the last instance of EPO opposition proceedings, concluded that Pfizer had only exercised its rights under patent law, both at an administrative level (by requesting the divisional patent and later the SPC) and at a judicial level (by requesting injunctions against generics based on the granted SPC), and that no "quid pluris" (such as the wilful provision of elusive or erroneous information to a patent office as in AstraZeneca) had been identified which could support the finding of an unlawful exclusionary behaviour. The decision of the administrative court was welcome by many as a sort of reconciliation between antitrust and patent law. Many thought that the administrative judge had been able to cure the several deficiencies of the IAA reasoning, which had inter alia stated – an absolute nonsense in the eyes of the IP lawyers community – that Pfizer's unlawful behaviour was evidenced by the fact that no new product had been developed or launched based on the divisional patent, as opposed to the invention claimed in the parent patent.

I am now a bit worried of where the Supreme Administrative Court is heading to in the third and last phase of proceedings. Whilst no ruling is expected before the beginning of 2014, at the earliest, last May an interlocutory order was issued whereby the Court requested the parties to submit *"detailed and documented clarifications aimed at specifying if divisional patent EP '168 (...) was or was not applied and exploited in practice with the production or commercialisation of new medicinal products or in the improvement of existing ones, or in any alternative activity which is proper of the nature of a pharmaceutical patent and intrinsic of its content according to the Munich Convention, distinct from the activity deriving from the ownership of EP '417 relating to the same active principle and which expired in Italy and Spain on 6 September 2009, later extended until 17 January 2011"*.

The supreme administrative judge is therefore again questioning on the purpose of the divisional patent in the framework of the development of a new product. My first comment is of course that this question is not pertinent at all, from a patent law perspective. The point is whether the Supreme Administrative Court will be capable of producing a sound reasoning according to which such a question is a pertinent one from a competition law perspective. I think I can say that the IAA failed in the first round, but I seriously fear that this round the Supreme Administrative Court may come up with some more solid reasoning and that innovators may not like it. Let's see.

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