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Pfizer found guilty in the final round of the latanoprost saga

Daniela Ampollini (Trevisan & Cuonzo) · Tuesday, February 18th, 2014

In the last instance, the Consiglio di Stato (the Italian supreme administrative court) established that Pfizer did commit abuse of a dominant position while it obtained and enforced in Italy its SPC protection over latanoprost. While the news was spread a few weeks ago already (the decision is dated 14 January 2014), the reasons of the decision have just been made available (they bear the date of 12 February 2014).

The story, which commenced in 2010, is already a rather famous one, so I will not dwell again on the facts here. Details can be found in my previous posts here, here and here.

It is sufficient to recall that in September 2012, the Regional Administrative Court – in reversing the findings of the Italian Antitrust Authority (IAA) according to which Pfizer committed abuse – established that Pfizer had done nothing else than engaging in the mere exercise of rights deriving from patent law: applying for divisional patent EP '168 based on parent patent EP '417 (which divisional patent had eventually been found valid in the last instance of opposition proceedings by the EPO BoA), obtaining SPC protection based on EP '168, extending SPC protection via so-called paediatric extension, and enforcing the relevant exclusive rights in court against generics. Against this background, according to the Regional Court, the IAA had not been able to identify any *"quid pluris"* to support the finding of an unlawful exclusionary behaviour (such as the wilful provision of elusive or erroneous information to a patent office as in *AstraZeneca*).

The Consiglio di Stato has now reinstated the original IAA finding, and the reasons can be summarised by the following paragraphs.

"Whether the divisional patent and the relative supplementary protection certificate have been applied for lawfully or not is irrelevant here (…) as the scope of the law concerning the protection of inventions by the grant of patents differs from that of competition law. (…) This case does not concern the lawfulness or not of a conduct under patent law, but the anti-competition effects of a series of acts that are per-se lawful. In fact, the abuse of a dominant position of which Pfizer is accused is nothing but the specification of the more general concept of abuse of right. This concept presupposes the existence of a right which is however used artificially, for a goal which is incoherent with that for which such a right is granted: in this case, the exclusion of competitors from the market.

(…)

In summary, although, and in fact as, taken separately they result in the exercise of rights

abstractly contemplated by the law, even special law, the acts carried out by Pfizer resulted in a complex and articulated conduct that was correctly defined by the IAA as an abuse of right and, in particular, an anti-competitive one. This conclusion is confirmed by the circumstance, ascertained by the Authority (…), that the divisional patent did not lead to the introduction into the market of a product different from the one that was already present in the market, which circumstance, as already stated, confirms the exclusionary intent found by the Authority in the overall assessment.

With this decision the Consiglio di Stato seems to indicate that there is no need of a *"quid pluris"* for a conduct consisting in the exercise of rights to be unlawful from a competition law perspective. What counts is whether the aim of the conduct is different from that for which the rights are granted in the first place, as the abuse of dominant position in question would be nothing else than a particular type of abuse of rights. This said, the court clearly misses the next step, i.e. it fails to explain in what the goal pursued by Pfizer would have differed from that for which the rights were granted in the first place. By no means can it be accepted that enforcing patent rights is abusive when the aim is the exclusion of competitors… In any event, this is the end of the saga, and although I am aware the industry is looking with concern at this case, fearing it may become a leading one, I believe that it will not be easily applied generally. Firstly, the facts at stake are so peculiar that generalisation is a very difficult exercise *per se*. Second, and more important, the line of reasoning is, to say the least, unsatisfactory, besides failing to discuss and distinguish from the applicable European case law.

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