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Brussels Court of Appeal refuses to recuse a judge deciding on the merits, who had previously decided on a PI request

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The Brussels Court of Appeal has clarified in a recent decision that a judge, who has previously ruled on a preliminary injunction in a patent case, may be part of the court deciding on the merits relating to the same patent. The Court of Appeal held that there is no reason to assume that this judge would not be able to rule on the merits in an objective, impartial and independent manner.

This decision is part of the rivastigmine litigation in Belgium relating to Novartis' patent EP 2 292 219 (EP '219). Novartis initiated PI proceedings against several generic companies that wanted to commercialize a generic version of the Exelon® patch. In this context, Novartis initiated PI proceedings against Mylan (among others). By decision of 9 December 2014, the President of the Brussels Commercial Court refused to grant a preliminary injunction, considering that *prima facie* Mylan's product did not infringe EP '219 and, moreover, that the validity of EP '219 seemed *prima facie* doubtful.

One year before, in September 2013, Novartis had initiated proceedings on the merits against Apotex. Mylan voluntarily intervened in these proceedings on the merits. This case was scheduled to be heard on 7 January 2015 before the Brussels Commercial Court. As the President who had previously decided on the PI request brought against Mylan was part of the panel of this court, Novartis stated their concern that the court would not be able to judge in a sufficiently independent and impartial way on their claims on the merits. Indeed, it argued that the President would already have formed an opinion on the merits of the case during her *prima facie* assessment of the case in the PI proceedings, and, as a result, that she would have already (pre)judged on the merits with regard to the relevant facts before the court. (These facts include the alleged infringement to, and the validity of, EP '219.) Novartis therefore filed a request for recusal of the judge that had decided on the PI request. The case on the merits was then suspended until the Court of Appeal had decided on this request for recusal.

In its decision of 9 June 2015 the Brussels Court of Appeal has refused to grant this request.

Firstly, the Court found that the PI proceedings and the proceedings on the merits had different subject matter. The aim of PI proceedings was to temporarily settle the situation between the parties based on a *prima facie* assessment of the case, without prejudice to the case itself. The *prima facie* assessment of Novartis' claims in the PI proceedings, therefore, did not mean that the same judge would no longer be able to decide in an independent and impartial manner in the proceedings on the merits, as the proceedings related to different claims. The Court also noted that not only did the proceedings have a different subject matter, the

parties involved in the proceedings were different: Mylan was the only party involved in the PI proceedings, whereas Mylan and Apotex are involved in the proceedings on the merits.

The Court of Appeal then argued that, even if both proceedings related to the same case (with the same subject matter and between the same parties), the Belgian Judicial Code explicitly provides that a judge cannot be recused for the simple reason that s/he has already decided on provisional measures relating to the same case.

In any event, the Court held that there was no single objective element from which it appeared that the judge, of whom the recusal was requested, would have expressed any prejudice with regard to Novartis' claims on the merits. Thus, it held, even if some considerations in the PI decision seem less nuanced at first sight, they should be read in the context of all the considerations of the elaborately motivated decision on the *prima facie* assessment of Novartis' claims for a PI.

The Court of Appeal therefore concluded that there was no reason to recuse the judge. Deciding otherwise would have complicated patent litigation in Belgium. Since 1 January 2015, the Brussels courts have exclusive competence to settle all patent cases in Belgium. As there is only a limited number of specialized judges, it is therefore inevitable that a judge who has decided on a PI request based on a certain patent will later have to decide in a case on the merits relating to that same patent.

Please click here to see the English translation of the judgement of 9 June 2015 of the Brussels Court of Appeal.

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