

Danish High Court radically changes its course on costs awards

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On 29 August 2019, the Danish High Court (Eastern Division) rendered a decisive new decision regarding legal costs in Danish patent (and IP) litigation, markedly changing the previously conservative tendency in awarding costs in Danish patent cases:

In one among several parallel cases regarding an SPC (Tenofovir), the Maritime and Commercial High Court in April 2018 granted a PI against a generic pharmaceutical (Sandoz Padviram).

The PI was appealed to the High Court, but the scheduled oral hearing never took place as in the meantime, the Sandoz successfully convinced the Maritime and Commercial Court to repeal the PI while the appeal was still pending at the High Court (Eastern Division).

Consequently, the High Court was asked to rule on the issue of costs.

It is generally acknowledged in Denmark that costs awards are relatively low, typically constituting only a fraction of the costs actually incurred. At the High Court (Eastern Division) Sandoz argued that Danish case law in this respect was not in accordance with the Enforcement Directive, article 14, which stipulates that the prevailing party in IP matters must be awarded fair and adequate legal costs as well as other costs, eg. for patent agent assistance.

In that connection, Sandoz argued that it must follow from C-57/15 (United Video Properties) that the award of costs to cover legal assistance must reflect the general rates applicable for external legal counsel in IP matters, and that the assessment must take as its starting point the actual costs incurred in that respect.

Also, it was argued that it follows from the same ECJ decision that costs incurred as a result of other external assistance, including from eg. patent agents (if deemed necessary in the context of the legal action) shall be covered in full as "other expenses".

The High Court held that the ECJ decision in United Video Properties offered sufficient guidelines for the High Court to apply article 14 in the matter at hand.

The High Court agreed with Sandoz that article 14 entails that Sandoz was entitled to legal costs in an amount reflecting those generally applicable in the IP practice area as well as a substantial and suitable amount of the fair costs actually incurred.

Furthermore, the High Court ruled that it follows from the ECJ-decision in United Video Properties that Sandoz was entitled to costs incurred in relation to expert statements as well as costs incurred as a result of (necessary) assistance from a patent agent, the latter being a clear deviation from previous case law which had been established by way of a Supreme Court decision in 2008 whereby costs incurred from patent agent assistance should only be covered under "special circumstances". It should be noted that patents agents are almost always retained by legal counsel in Denmark in order to assist with inter alia questions of a technical nature.

With this decision, the High Court (Eastern Division) explicitly acknowledges the general applicability of article 14 of the Enforcement Directive as adopted by the ECJ in United Video Properties, which means that prevailing parties in patent litigation (and by inference in IP litigation in Denmark) may now expect to receive costs that reflect the actual costs incurred as a result of patent litigation.

Sandoz was represented by Horten.