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Can a generic that cannot be marketed be taken into account to include the "reference medicament" in the price reference system?

Miquel Montaña (Clifford Chance) · Tuesday, December 21st, 2010

On 3 August 2007 and 5 December 2007, Commercial Court Number 1 of Barcelona ordered a preliminary injunction preventing the launch of all the generics of a well-known medicament used to treat schizophrenia. Also, for the purpose of maintaining the status quo, the Court ordered for the judgment be notified to the Ministry of Health so that the latter was aware that the generics subject to the preliminary injunction could not be taken into account for the purpose of the "Price Reference System". The preliminary injunction was then upheld by the Barcelona Court of Appeal. Against this background, on 29 November 2010, the Ministry of Health published a list that included the medicament of reference in the "Price Reference System". On 3 December 2010, Commercial Court Number 1 of Barcelona handed down a decision reiterating to the Ministry of Health that the generics affected by the preliminary injunction may not be taken into account for the purpose of the "Price Reference System".

This case is highly illustrative of the tension that sometimes arises between Commercial Courts, which are committed to the long-term objective of protecting patent rights, and the more narrow view of the Ministry of Health, which is focused on short-term measures aimed at reducing public spending in medicaments.

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