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# Kluwer Patent Blog

## Danish court revisits EPO assessment (BioPorto v. Phadia – Maritime and Commercial Court case T0009-07))

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In a recent decision, the Danish specialty court for inter alia patents, the Maritime and Commercial Court, demonstrated its ability to render an in-depth analysis and reasoned decision in a patent case.

The case was between BioPorto Diagnostics A/S (formerly AntiBodyshop A/S) a bio-tech company dealing with research, development, production and marketing of diagnostic tests and kits (especially for human diseases) and Phadia AB (formerly Pharmacia AB) which conducts business in the field of research, production and marketing of diagnostic test systems and kits in the fields of allergy and sicknesses related to the immune defence system.

Phadia obtained European patent no. 0 756 780 on 22 May 2001 and the patent was validated as a DK patent. According to the patent, the invention concerned the use of a protein as a diagnostic marker for human diseases, especially for diagnoses in connection with inflammation with a bacterial background.

BioPorto filed claims regarding invalidity based on lack of novelty and inventive step as well as insufficient disclosure and Phadia claimed that BioPorto's kits 036 037 infringed upon the patent-in-suit.

As is customary in Danish patent cases on the merits, the court appointed its own experts to whom the parties submitted written questions regarding the facts of the case.

### Invalidity

As regards novelty, BioPorto submitted that information in one exhibit 9 together with another exhibit 10, but the court simply found that because exhibit 9 did not directly refer to exhibit 10, additional information stated in exhibit 10 could not be taken into account in the assessment of whether exhibit 9 constituted a novelty destroying citation.

As regards inventive step, the court applied the "problem-and-solution" approach and sided with the patentee that argued – and with the EPO – on the choice of closest prior art. This assessment in fact went against the evidence given by the court-appointed experts who had pointed to another document as closest prior art, but the court found that the evidence of the court-appointed experts on this point must be due to ex post facto assessments and therefore set the experts' finding aside on this point.

The court then went on to set aside the EPO's wording of the technical problem, although still concluding that the invention according to an alternative claim set submitted by the patentee for the court case was non-obvious and therefore inventive.

Finally, as regards the assessment of invalidity, the court, having analysed the patent in some detail on this point also, ruled that the patent description and the data re-reported therein constituted a sufficient disclosure.

In consequence, as regards the patent's validity, the court ruled that for lack of inventive step for claims 1 and 2, the patent-in-suit was partially invalid, but should nevertheless be upheld in an alternative form.

### Infringement

Having thus upheld the patent in a partially amended form, the court considered the patentee's infringement claim. On this issue, the court held that kit 036 was neither marked, destined for nor suitable for diagnosis of inflammation caused by a bacterial infection and that the directions were offered as to how a result is to be construed diagnostically. Consequently, the court ruled that kit 036 would not constitute an infringement of the patent-in-suit as amended by the Maritime and Commercial Court's decision.

As regards kit 037 the court, relying on the court-appointed experts, held that it had not been proven that the increased concentration of the protein that may be measured with the kit in case of acute kidney damage, can be referred to inflammatory response caused by a bacterial infection. Due to the way kit 037 was marked, the court also rejected infringement of the patent-in-suit as amended as regards kit 037.

### Legal costs

The court held that BioPorto in essential aspects won the case and therefore ordered Phadia to pay its costs.

### Comment

This decision confirms that the Maritime and Commercial Court does not shy away from revisiting all relevant aspects of patent litigation, including EPO assessments.

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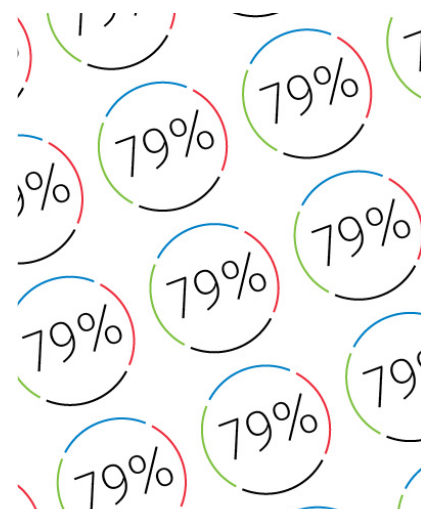
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