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Court sheds light on damages caused by preliminary injunctions

Miquel Montaña (Clifford Chance) · Friday, May 17th, 2013

When a preliminary injunction is lifted, the debate arises regarding the amount of damages that the company affected by the preliminary injunction may claim against the applicant. A recent judgment of 6 May 2013 from Commercial Court number 6 of Barcelona has shed some light on this topic. The background of the case can be summarized as follows:

On 26 June 2009, Commercial Court number 6 of Barcelona ordered an “ex parte” preliminary injunction preventing a Spanish company from marketing generics of a patented medicament. After hearing the defendant, the preliminary injunction was then lifted on 29 January 2010. After the preliminary injunction was lifted, the defendant filed a complaint claiming 3,700,000 Euros against the applicant for the damages suffered. This amount was calculated taking into account the period while the preliminary injunction was in force, plus a projection of the *lucrum cessans* that the defendant would allegedly have suffered until 2014 as a result of not having been able to benefit from the advantages allegedly derived from being the first company to launch the generic.

After considering the evidence filed by both parties, which included two expert opinions from two accountants, the Court reached the conclusion that the period to be compensated was limited to 1 November 2009 – 30 April 2010. This is because according to the Court the defendant would not have been able to launch until 1 November 2009 and although the preliminary injunction was lifted on 29 January 2010, the defendant could not have launched immediately thereafter, as it needed time to order product and supply the product to the distribution chain (hence the 30 April 2010 “end” date). As regards the damages claimed for the loss of profit allegedly suffered until 2014, the Court found that these damages had not been proved. In particular, the Court noted that the cause-effect relationship between the preliminary injunction ordered and the damage alleged could not be established, as other companies that had launched generics of the same product at a later stage had higher sales than those that had launched first. In the end, the compensation to be paid to the defendant was reduced to approximately 473,000 Euros.

All in all, this decision made a small contribution to an area in which case law is still relatively scarce in Spain.

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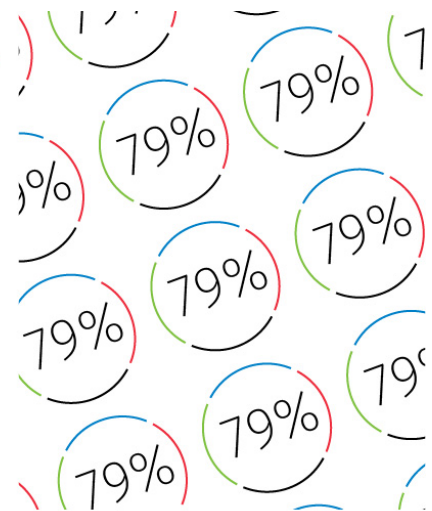
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