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2015/AR/927
17th chamber, civil cases
9 June 2015

JUDGMENT COURT OF APPEAL BRUSSELS

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1. NOVARTIS AG, choosing domicile at the office of its counsel, Mr. RONSE Christophe, lawyer, at 1000 Brussels, Havenlaan 86C PB 414.

2. NOVARTIS PHARMA N.V., choosing domicile at the office of its counsel, Mr. RONSE Christophe, lawyer, at 1000 Brussels, Havenlaan 86C PB 414, registered with the Crossroads Bank of Enterprises under the number 0459.093.476.

Both represented by Mr. RONSE Christophe, lawyer, at 1000 Brussels, Havenlaan 86C B.414;
Claimants of the recusal,

of

SWALENS Natalie, judge at the Dutch-speaking Commercial Court of Brussels,

Other parties summoned under Article 838, para 2 Judicial Code:

1. APOTEX NV, with registered offices at 1090 BRUSSELS, Burgemeester Etienne Demunterlaan 5, and registered with the Crossroads Bank of Enterprises under the number 0893.034.557,

2. MYLAN BVBA, with registered offices at 1560 Hoeilaart, Terhulpsesteenweg 6A, and registered with the Crossroads Bank of Enterprises under the number 0885.805.780,

Both represented by Mr. ROOX Kristof and Mr. DEKONINCK Christian, lawyers, having their offices at 1000 Brussels, Joseph Stevensstraat 7;

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1. Judicial procedure:

1.1.

On 7 January 2015, NOVARTIS AG (company under the Laws of Switzerland) and NOVARTIS PHARMA NV (hereafter the "claimants") filed a request for recusal at the registry of the Dutch-speaking Commercial Court of Brussels to recuse Ms. Natalie SWALENS, judge in the Dutch-speaking Commercial Court of Brussels.

The request contains the legal grounds and has been signed by an attorney who has been registered at the Dutch speaking bar of Brussels for over 10 years.

The request was handed over to Ms. Natalie SWALENS on 7 January 2015. On 8 January 2015, Ms. SWALENS formulated a declaration, as provided for by Article 836, para 2 Jud. Code, in which she refuses to refrain from the case.

The Advocate-General has written an opinion in which he demands that the claim be declared admissible, though unfounded.

The request for recusal, the opinion of the judge for which the recusal is claimed and the opinion of the Advocate-General, were filed by the Advocate-General at the Court's registry on 11 May 2015, together with the list of the persons to be summoned.

1.2.

By letter of 20 May 2015 the persons and companies indicated by the Advocate-General were summoned to be heard at the hearing of the 17th Chamber of the Court on 2 June 2015; its lawyers were notified of the hearing by letter of the same date.

1.3.

During the Court's hearing of 2 June 2015, Mr. Alex VERHEGGE, honorary Advocate-General, explained the written Opinion of the Public Prosecutor; the claimants were heard. The claimants filed a trial brief and a dossier. The remarks of the other parties were heard. MYLAN BVBA filed written remarks and a dossier.

The claimants were given the opportunity to reply.

1.4.

Article 838, second paragraph Jud. Code stipulates that the recusal needs to be judged in last instance by the competent Court, in response to the written opinion of the Public Prosecutor, within eight days of the parties being properly summoned to hear their remarks.

Considering the entire provisions laid down in Articles 833, 835, 836, §1, and 838 Jud. Code, and the subsequent prescribed term to submit the recusal for a judge, it follows that the term of eight days in which a decision needs to be rendered starts from the date of the hearing on which the case is settled for consideration, after the parties are summoned appropriately[1] and not from the date of deposition of the request for recusal at the registry.

The law does not stipulate a term in which the request for recusal needs to be fixed by the Court for evaluation.

[1] Supreme Court 17 September 2002, *Arr.Cass.* 2002, 1859, concl. DUINSLAEGER, http://www.cass.be sorted on date, decision numbers P.02.0386.N, P.02.0602.N, P.02.0662.N, concl. DUINSLAEGER; *Pas.* 2002, I, 1658, concl. DUINSLAEGER.

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2. Precedents:

By its request, NOVARTIS AG and NOVARTIS NV asked Judge Natalie SWALENS, president of the 10th Chamber of the Dutch-speaking Commercial Court of Brussels, to recuse herself with reference to the hearing on the merits of 7 January 2015 (A.R. A/13/06945), and, for that purpose, to make an acquiescing statement in accordance with Articles 828 and 836 Judicial Code.

The said judge did not want to recuse herself from this case.

As the legal basis for the request for recusal of Judge SWALENS, the claimants invoke – in their request for recusal - Article 828, 9° Jud. Code, which provides that: "*Every judge can be recused for the following reasons:* […] *9° if the judge has counselled, pleaded or written about the dispute; if he has previously considered the matter as a judge or as a referee, except when in the same instance he:*
1. cooperated to the making of a provisional decision;
2. rules on the case after having issued a default judgment;
3. later takes the same case into account in joined chambers after having ruled on an interim order"

According to the claimants, this ground for recusal corresponds to Article 6, §1 ECHR, which provides that "*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".*

In her written response, dated 8 January 2015, which was signed for receipt by the registry on 8 January 2015 at 09.05am, Judge SWALENS has refuted the grounds for recusal of the aforementioned request, as follows:

> *"The provisions concerning recusal must be interpreted strictly, in order to prevent them being used by parties to choose their judge. Article 828, 9°, 1 Jud.C. on which the claimant relies, is not applicable. The judgment in summary proceedings which I pronounced between the parties necessarily concerns a different dispute than the dispute on the merits in accordance with that provision, given that this judgment only provisionally determines the situation of the parties. The motivation of the decision in summary proceedings moreover relies on a prima facie assessment. The claimant mistakenly asserts that the considerations which it cites (incompletely) in its request are not prompted by a prima facie assessment; they are part of a subsection which has been explicitly entitled as such ("5.2. prima facie infringement"). Finally, the decision in summary proceedings in no way binds the judge who rules upon the merits; naturally this also applies if that judge is the same person. Hence, I am of the opinion that I cannot consent to the recusal request."*

3. The admissibility:

3.1.

The request is signed by an attorney who has been registered at the Dutch-speaking bar of Brussels for over 10 years. The request is thus formally admissible.

3.2.

The request for recusal was submitted on time. The request for recusal is admissible.

3.3.

The claimants expanded their legal grounds with the filed "*remarks in application of Article 838 Judicial Code*" – which are in fact trial briefs – during the hearing of 2 June 2015. They no longer claim the recusal exclusively on the basis of Article 828, 9° Jud. Code, but added a new ground for recusal, that is Article 828, 1° Jud. Code (legitimate suspicion).

The request for recusal must be based on one of the grounds for recusal which are enumerated, in limited measure, in the Law[2].

The judge deciding on the recusal may only rule on the basis of the grounds that has been included in the request for recusal and that has been submitted for objection to the recused judge; additional grounds for recusal, invoked in trial briefs that were filed during the hearing, are not admissible. (Articles 835, 836 and 838, §2 Jud. Code)[3].

To the extent the recusal is founded on Article 828, 1° Jud. Code, it is inadmissible.

4. The soundness of the recusal based on Article 828, 9° Jud. Code

4.1.

The claim in summary proceedings (preliminary measure) and the dispute on the merits have a different subject-matter (and both claims are at least partially invoked between other parties).

The aim of the summary proceedings was to take non-irreversible measures in order to settle the situation of the parties temporarily, but not to prejudice the case itself. The resulting case law in summary proceedings does not bind the judge on the merits.

By writs of summons notified on 6 and 13 December 2014, NOVARTIS AG initiated summary proceedings against MYLAN, as well as against ACINO AG, a company operating under the laws of Germany. In these proceedings, Judge SWALENS pronounced an interim decision on 9 December 2014, declaring the claims of NOVARTIS AG admissible but unfounded.

Already on 13 September 2013, NOVARTIS AG and NOVARTIS NV summoned APOTEX on the merits before the 10th Chamber of the Dutch-speaking Commercial Court of Brussels, A.R. A/13/06945. MYLAN voluntarily intervened in these proceedings.

[2] Cass., 7 November 1969, *Arr. Cass.*, 1970, 247; *Pas*., 1970, I, 221; Cass., 20 August 1975, *Arr. Cass*., 1975, 1186; *Pas*., 1975, I, 1075.
[3] Cass. 21 April 2011, http://www.cass.be on date, decision number C.11.0054.F; *JT* 2011, 447; *JLMB* 2013, 1623; *Pas.* 2011, I, 1142.

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NOVARTIS AG and NOVARTIS NV state their concern that the judge on the merits, given the court's composition, and especially considering that Judge SWALENS (as president) is part of this composition, would not be able to judge in a sufficiently independent and impartial way on their claims on the merits. According to the claimants for recusal, Judge SWALENS, would have formed an opinion on the merits of the case, during her *prima facie* assessment of the case in summary proceedings, as a result of which she would have already judged on the merits with regard to the facts that are at the basis of the dispute before the judge on the merits, *i.a.* with regard to the infringement on, as well as the validity of the European patent EP 2 292 219, granted to NOVARTIS AG.

According to the claimants for recusal, the decision in summary proceedings would moreover contain considerations which go beyond a *prima facie* assessment. In particular, the claimants refer to paragraphs 46, 50, 51 and 52 of this decision, and they allege that the considerations of that decision would manifestly contradict the infringement claim on the merits.
The claimants submit that a different decision in the proceedings on the merits would, at the very least, require that these findings be set aside by the judge on the merits.

In summary proceedings, NOVARTIS AG requested that urgent and preliminary measures be imposed on MYLAN and ACINO to prevent infringements of the European patent with n° EP 2 292 219, pending a decision in the proceedings on the merits which NOVARTIS AG would initiate before the Commercial Court.

In the proceedings on the merits initiated by NOVARTIS AG, and joined by NOVARTIS NV, before the 10th Chamber of the Dutch-speaking Commercial Court of Brussels, A.R. A/13/06945, the claimants requested that APOTEX be prohibited from manufacturing, selling and distributing medicinal products, and that the products that are infringing the aforementioned European patent with n° EP 2 292 219 be recalled. In this dispute on the merits, the claimants also asked for damages in respect of the infringements, and requested information regarding the distribution of the alleged infringing medicinal products.

The aforementioned claim on the merits is – contrary to the summary proceedings – not directed against MYLAN, nor against ACINO, but only against APOTEX.
MYLAN voluntarily intervened in this dispute on 23 January 2014.

With regard to the requested urgent and preliminary measures, Judge SWALENS submits that she, as a judge in summary proceedings, made a "*prima facie*" assessment of the merits of the claimants' case, according to the considerations set out in her decision under the following paragraphs:

- 53.: *"In casu, the interim judge concludes that there is no prima facie infringement of EP '219."* (p. 26 of the decision), as well as
- 57.: *"superfluously: prima facie there is a significant chance that the patent EP '219 will be annulled in the future…*" (p. 27 of the decision).

The at first sight less nuanced considerations, such as:

- 46.: "*according to the judge in summary proceedings, the specific composition of both layers is at least one of the essential features of the patent without which there can be no infringement.*" (p. 22 of the decision), as well as
- 50.: "*As demonstrated above, the cited differences in excipients between the product of Mylan and EP '219 exclude any patent infringement, …* " (p. 25 of the decision),

must be read in the context of all the considerations of the elaborately motivated decision in summary proceedings.

In this regard, the "dispute" presented to the judge in summary proceedings and the case on the merits have a different subject matter (at least partially). Moreover, both disputes do not affect the "*same parties*".

There are no indications in this case that Judge SWALENS would no longer be able to pronounce an independent and impartial judgment on the merits of the case, after having ruled (whether or not) on the merits of the claimed preliminary measures, which have another subject matter and were (partially) brought against other parties.

Decisions of the interim judge – that concern the merits of the dispute – are deemed to be allowed and are in no way binding on the judge on the merits[4].

4.2.

Article 828, 9°, 1 Judicial Code states as an exception to the grounds for recusal that the cooperation to the making of a provisional decision cannot be considered as a judge's previous knowledge of the dispute, as specified in Article 828, 9° Jud. Code.

The Court acquires the reasoning of the Supreme Court as stated in its decision of 28 February 2003[5], and which take into consideration:

> "*Considering that from the sole fact that a judge ordered a preliminary measure before settling a dispute, it does not follow that he would no longer be objectively impartial when settling the dispute definitely;*
>
> *And thus, that the judge who renders a decision – pending a decision on the divorce against the husband who has already obtained the divorce in his favor – on a provisional allowance awaiting the adjourned decision in the divorce claim, is not objectively partial when he determines afterwards, by refusing the adjourned divorce claim, the final allowance after the divorce;*
>
> *That the same goes for a case in which the judge refers to the grounds of the decision on the provisional allowance in his decision on the final allowance;*
>
> *That the argument which assumes that such a judge is not objectively impartial, fails."*

This means that, in the hypothesis that the judicial procedure both on the merits and in summary proceedings were to relate to the same dispute (with the same subject matter and between the same

[4] Jean Laenens, Karen Broeckx, Dirk Scheers and Pierre Thiriar, Handboek voor gerechtelijk recht, Intersentia, Antwerpen – Oxford 2008, nr. 528, p. 272 and footnote 6.
[5] Cass. 28 February 2003, *Arr.Cass*. 2003, 530; *E.J.* 2004, 117, note VAN ORSHOVEN, P; http://www.cass.be on date, decision number C.01.0221.N; *J.dr.jeun.* 2004, 38; *Pas.* 2003, I, 438; *RABG* 2004, 145, note VAN LERSBERGHE, P; *Rev.trim.dr.fam.* 2004, 1155; *RW* 2003-04, 954.

parties – quod non –), and that judge SWALENS were to have considered in the same instance, in collaboration with a provisional decision, this would fall under the exceptions to the grounds for recusal, as provided by Article 828, 9°, 1 Judicial Code.

Either way, there is no single objective element from which it appears that the judge, of whom the recusal is requested, would have expressed any prejudice with regard to the claim on the merits which is presented to the Commercial Court[6].

Therefore, there is no single tangible element that supports the alleged fear of the claimants. The claimants also do not provide elements which could confirm the assumption that the judge of whom the recusal is requested would not be able to rule on the case on the merits in an objective and independent manner.

That judge SWALENS has taken a certain position in regard to the soundness of the claim in summary proceedings while explicitly mentioning that it concerned a *prima facie* assessment, does not imply – and the claimants have not proved the opposite – that the judge would have given her opinion with regard to the claims in the proceedings on the merits (partially between other parties and with another subject-matter)[7].

Hence, the request for recusal is ill-founded.

[6] See Cass., 23 February 2005, *Arr. Cass.* 2005, 453; http://www.cass.be on date, nr. P.04.1685.F; *Pas.* 2005, I, 444 – Brussels 9 March 2009, *R.W.* 2009-10, 1090.
[7] See explicitly in this regard the cited decision of the Supreme Court of 23 February 2005 (note 5).

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FOR THESE REASONS

THE COURT,

Considering the Act of 15 June 1935 on the use of languages in court cases,

Heard in public hearing of 2 June 2015, Mr. A. VERHEGGE, honorary Advocate-General at the Brussels Court of Appeal, who explained his written opinion;

- Declares the request for recusal, initiated by NOVARTIS AG (company operating under the laws of Switzerland) and NOVARTIS PHARMA NV, inadmissible to the extent it is based on Article 828, 1° Jud. Code and ill-founded to the extent it is based on Article 828, 9° Jud. Code;

- Orders NOVARTIS AG (company under the laws of Switzerland) and NOVARTIS PHARMA NV to pay the costs of the proceedings, to date settled as zero EURO;

As pronounced in the public hearing of the 17th Chamber of the Brussels Court of Appeal, on **9 June 2015**.

Present were:

Ms. Bettens, Judge, dd. President
Mr. Bosmans and Ms. Degreef , Judges
Ms. Heymans, clerk

[SIGNATURES]