

CLIENT ALERT

Belgian Supreme Court Raises the Bar for *Prima Facie* Validity of EPs in Favor of More Harmonized European Patent Jurisprudence

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On September 12, 2013, the Belgian Supreme Court (Cour de Cassation / Hof van Cassatie) issued a decision that fundamentally changes patent enforcement in Belgium. The Supreme Court ruled that a patent judge ruling (as) in summary proceedings on the *prima facie* (in)validity of the Belgian national part of a European patent cannot simply ignore foreign rulings on the (in)validity of the same patent. The Court also decided that a patent invalidation in first instance cannot be ignored by only relying on the suspending effect of the appeal lodged against the first instance decision.

The case at hand was brought before the Belgium Supreme Court by Syral Belgium, a producer of complex sugars. Syral Belgium had been the subject of a counterfeit search and seizure (*saisie contrefaçon*) by its competitor Roquette Frères. The latter had thereto invoked its French national patent FR 9 712 035 and the Belgian national part of its European Patent EP 0 905 138, both relating to "*Crystals of maltitol of a particular form, crystalline compositions containing them and processes for their preparation.*" Syral Belgium initiated third party opposition proceedings against the ruling authorizing the seizure. During these proceedings the French patent was nullified in first instance proceedings on the merits (appeal is still pending) as was the English national part of the European patent in first instance and in appeal. After a heavily fought debate between parties, the case ended up before the Court of Appeal of Antwerp. In its ruling of February 1, 2013, this court decided among others that irrespective of the nullifications in France and the UK, Roquette still had a *prima facie* valid French patent because the appeal had a suspending effect. Moreover, the Belgian national part of the European patent of Roquette was not affected by the nullity in the UK because of the limited territorial effect thereof. In short, the nullity in France and the UK left the *prima facie* validity of the Belgian national part unaffected according to the Court of Appeal of Antwerp.

Syral Belgium initiated proceedings before the Belgian Supreme Court, specifically targeting these findings of the Court of Appeal of Antwerp. In the opinion of June 6, 2014, advocate-general Van Ingelem shared Syral Belgium's criticism. According to the advocate-general, the traditional Belgian view that a (European) patent is deemed *prima facie* valid in spite of a nullification in first instance or abroad might be too formalistic and ignoring the reality created by a European title. A European patent might be a bundle of national patents, but they all stem from the same patent. Moreover, according to the advocate-general, a correct evaluation of the apparent (in)validity of a patent might require more than simply establishing that the invalidity ruling is appealed and therefore not final. In that respect, the advocate-general recalls that the validity of a patent that has been provisionally declared null and void is a presumption *iuris tantum*. The judge that has to evaluate the *prima facie* validity in such circumstances can therefore conclude that this presumption is affected by the evidence, facts, and arguments brought forward by the parties.

With respect to the case at hand, the advocate-general concluded that the nullity of the English national part of Roquette's European patent qualifies as a serious presumption of the invalidity of the Belgian national part of the same European patent. The Court of Appeal of Antwerp should have considered this as sufficiently relevant to conclude to the *prima facie* invalidity of the Belgian national part. The advocate-general opined that one cannot ignore foreign decisions and make a strict application

of the territoriality principle that a patent is only enforceable in the country where it is registered. By doing so, the Court of Appeal of Antwerp ignored a clear trend supported by recent case law of the highest specialized courts in Europe as well as by legal doctrine, according to the advocate-general.

In its ruling of September 12, 2014, the Belgian Supreme Court agreed with the opinion of the advocate-general. The Supreme Court found that "*when evaluating the prima facie validity of the patent, all facts and circumstances invoked by the parties relating to the validity of the patent should be taken into account*" and "*although the nullification of a European patent, granted for a certain State, only has an effect on the territory of that State and therefore generates no legal consequences in another State, this nullification and the reasons on which it is based, can be relevant when assessing the prima facie validity of the patent in another state for which it was granted.*" The Supreme Court also finally made clear that if a patent has been invalidated in first instance proceedings, "*one cannot consider the title to be prima facie valid by merely referring to the suspending effect of the appeal that was lodged against the decision nullifying the patent.*"

With this ruling, the Supreme Court has joined the ranks among others of the English High Court of Justice (Patents Court) (*Actavis – Medis v. Eli Lilly*) and of the Court of Appeal of England and Wales (*Grimme v Scott*), that already stated that an 'island mentality' such as the one of the Court of Appeal of Antwerp undermines the attempts of leading European patent judges to obtain a more consistent and more harmonized European patent jurisprudence.

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