



Update on court cases that affect the industry

1. Belgium

- Problem: *prima facie* assessment of patent/SPC rights: assumption that a European patent/SPC is *prima facie* valid. Invalidation defenses raised by the alleged infringer are very unlikely to succeed.

- Escitalopram
 - » First instance judgment (10/2011) invalidated SPC, followed by appeal

 - » Launch pending appeal
 - PI proceedings
 - Patent/SPC is *prima facie* valid until it is revoked in a final decision which can no longer be appealed (suspensive effect of appeal with court of appeal and Supreme Court)
 - Virtually impossible to launch generic products (unless there are non-technical arguments)
 - Appeal with the Supreme Court is pending

1. *Belgium*

- Co-irbesartan
 - » Confirms the need for a UPC: even a regulation leads to diverging decisions in FR, UK, NL, DE, IT and BE
 - » Seizure proceedings (Pres. Comm. Brussels)
 - Ex parteseizure
 - Opposition proceedings (judgment 18/12/2012): confirmation of seizure:
 - * Presumption of validity even of a SPC, refusal to examine and apply the case law of the CJEU
 - * Seizure also applies to future stock (indirect PI)

1. *Belgium*

- Co-irbesartan (continued)
 - » Accelerated proceedings on the merits with request for PI (Pres. Comm. Brussels)
 - Judgment of one day later (19/12/2012)
 - Stay of proceedings (permanent injunction) in light of UK-reference to the CJEU
 - Request for PI :
 - * Presumption of validity does not apply to SPCs
 - * Refused since the SPC is prima facie invalid in light of the case-law of the CJEU and the facts at hand (HCTZ was not specified in the basic patent, only the broad class “diuretic”)
 - » Contradictory views in one and the same court

1. *Belgium*

- Literal infringement test: Nouvag-judgment Belgian Supreme Court of 3 February 2012 (numerical claims)
 - The patent claimed a liposuction device i.a. with a component with an amplitude between 2mm and 1 mm. The allegedly infringing device had an amplitude of 1,98 mm.
 - Supreme Court: literal infringement
 - * The difference in amplitude does not stand in the way of a finding of literal infringement, despite the numerical values in the claim
 - * There is no need for an identical reproduction of the invention ; secondary or superficial differences do not prevent (literal) infringement.
 - * it is not required to examine whether the allegedly infringing product presenting such differences has an equivalent effect
 - * this also applies to the assessment of the infringement of patent claims with numerical features

1. *Belgium*

- Literal infringement test (continued)
 - Example
 - * Patent requires a purity of more than 90%
 - * Does 88% purity infringes the patent literally?
 - * Infringement if 90% is a crucial threshold?
 - * No, also not by equivalent as 88% cannot be considered as an “essential same way” to obtain “the same result” according to the required function-way-result-test

- Are cross-border injunctions back on the strategic map ?
 - » History: cross-border injunctions, spider in the web, Italian torpedo, *Roche v. Primus* and *Gat v. Luk*
 - » *Solvay v. Honeywell* (CJEU 12/07/2012)
 - Facts
 - * Honeywell companies infringe Solvay's EP in various EU-countries
 - * 3 defendants, two Belgian and one Dutch
 - * Solvay requested the DC The Hague to render a cross-border PI under art. 31 Brussels I-Regulation to stop the infringement in DK, IL, GR, LX, AU, PT, FL, SE, LI and CH (no infringement in NL)
 - * Honeywell only raised an invalidity defense

» *Solvay v. Honeywell* (continued)

- Question:

* can a cross-border PI be granted if an invalidity defense is raised?

* *Gat v. Luk* (art. 22(4) Brussels I): Infringement question has to be handled by the individual national courts if the invalidity of the parallel EPs is invoked

- CJEU

* Art. 22(4) Brussels I-Regulation does not prevent preliminary measures under art. 31 Brussels I-Regulation as the provisional assessment of validity does not prejudice the invalidity decision in the national proceedings on the merits

* Jurisdiction also over Dutch and non-Dutch defendants, provided that each defendant infringes the same national EP

* Is this in line with the *Van Uden*-case law of the CJEU requiring a real connecting factor (not answered in *Solvay*)?

- Are cross-border injunctions back on the strategic map ?
 - » *Boehringer v. Teva* (DC Utrecht, PI, 15/08/2012)
 - Facts
 - * Boehringer is the holder of a Portuguese national patent for a process to manufacture nevirapine and also holds a corresponding SPC
 - * Several Teva-entities are based in NL and TevaNL holds EU MA
 - * Teva Portugal uses EU MA to market nevirapine in Portugal
 - * Alleged infringement on Portuguese SPC
 - * Teva argued that the NL courts do not have jurisdiction, and alternatively that the patent is invalid (in order to be able to invoke *Gat v. Luk*)

» *Boehringer v. Teva* (continued)

- Judgment

- * PI judge has jurisdiction on the basis of art. 31 Brussels I as the defendant is domiciled in NL ; there is a real connecting link with NL (*Van Uden*)
- * No risk of conflicting judgments as there is only a preliminary assessment of invalidity (under Portuguese law) → *Gat v. Luk* does not apply
- * Teva's invalidity defense is unfounded
- * TevaNL's involvement in Portuguese infringement is an act of tort (promotion and facilitation of patent infringement)
- * TevaNL has been ordered to withdraw its consent to Teva Portugal to market nevirapine in Portugal