

## IP Right Enforcement in the EU: CJEU Reduces Claimant's Liability Risk when Seeking Preliminary Injunctions

**The Court of Justice of the EU (CJEU) recently dealt with "appropriate compensation" due in cases where a preliminary injunction based on IP rights was lifted or not rectified in subsequent main proceedings.**

### **Compensation for unjustified preliminary measures under EU law**

Case C-688/17, Bayer Pharma, concerned questions for a preliminary ruling brought by a Hungarian court in patent infringement proceedings. In these proceedings the court issued preliminary injunctions, which were finally revoked due to the invalidity of the patent. The successful defendants therefore subsequently claimed compensation for losses incurred due to the apparently unjustified preliminary injunction.

In its decision, the CJEU states that "appropriate" (a term used in Article 9(7) of the EU Enforcement Directive aimed at facilitating enforcement of IP rights) as a concept of EU law must be given an independent and uniform interpretation in all EU Member States and that an assessment of whether damages are "appropriate" must take into account the overall circumstances of each case. The courts are therefore not automatically and not in every case obliged to grant compensation for damages if a preliminary injunction is subsequently not rectified, but "only in the case of an unjustified application". The CJEU links the answer to the question of whether an application was "unjustified" not only to the objective circumstance that the preliminary injunction could not be rectified in the subsequent main proceedings. It even requires on the subjective side that the application was filed "abusively". Otherwise, the IP right holders could be deterred from applying for preliminary measures at all, which would contradict the Enforcement Directive's objective of ensuring a high, equivalent and homogeneous level of protection for intellectual property (including industrial property rights).

### **Impact on national laws**

The result of the decision, however, raises the question of whether national laws comply with the requirements of the Enforcement Directive as interpreted by the CJEU in the Bayer Pharma decision.

For example, the national legislation in Hungary (as enshrined by the decision of the CJEU) permits the court to take due account of the negligence or fault of both the party applying for the preliminary injunction and the defendant. Although the provisions of the old Civil Code (Act IV of 1959) assessed by the CJEU have been replaced in the meantime by the new Civil Code (Act V of 2013), the substance of the new rules remains unchanged. The injured party is obliged to act as would generally be expected in the circumstances in question to avoid or to mitigate the loss. The injured party will not be compensated for loss resulting from its failure to comply with this obligation. These provisions are a double-edged sword resulting in the conduct of both parties being assessed on a case-by-case basis, i.e. whether the applicant applied for the preliminary injunction abusively, and whether the party suffering loss from such an injunction indeed did what was expected to avoid the loss (e.g. by not marketing the product before the conclusion of the patent invalidity proceedings). In the CJEU's view this national legislation should be in line with the objectives of the Enforcement Directive.

On the other hand, Section 394 of the Austrian Enforcement Act (Exekutionsordnung) foresees strict liability for damages caused by unrectified preliminary injunctions regardless of negligence or fault, which no longer seems to be in line with the findings of the CJEU.

The CJEU thus brought some clarity to the EU-wide interpretation of the Enforcement Directive, certainly decreasing the risk for IP owners to enforce their rights via preliminary measures in the EU. However, important

questions still need to be resolved by the national courts (or even the CJEU in subsequent proceedings). Particularly which circumstances would qualify as "abusive" pursuant to the CJEU but also the applicability in proceedings other than those directly dealing with the enforcement of registered IP rights (i.e. unfair competition claims, trade secret protection, etc.) seems to provide some room for future discussion.