

Court hears *Bayer Pharma* challenge to liability for lifted preliminary injunction

28 June 2021 | Contributed by [Westerberg & Partners Advokatbyrå Ab](#)

Bayer Pharma case

Facts

Decision

Comment

The question of compensation for damages suffered from a subsequently lifted preliminary injunction (PI) has, for the first time in Sweden, been heard in light of the European Court of Justice's (ECJ's) *Bayer Pharma* ruling (ECJ C-688/17). The Swedish court ultimately found that *Bayer Pharma* was irrelevant for the injunction defendant's right to damages.

Bayer Pharma case

Bayer Pharma, referred to the ECJ by a Hungarian court,⁽¹⁾ related to the standard of appropriate compensation for damages suffered from provisional measures which are subsequently lifted under Article 9(7) of the EU Enforcement Directive (2005/48/EC). As in Sweden, Hungary had not implemented Article 9(7) of the EU Enforcement Directive by new legislation but believed that its pre-existing legislation accommodated the directive in that respect. Essentially, the ECJ held that:

- EU member states should uniformly interpret the term 'appropriate compensation' in Article 9(7) of the EU Enforcement Directive;
- appropriate compensation is necessary to cover costs due to unjustified applications;
- where there is risk of irreparable harm to the patent owner, the application is not *prima facie* unjustified; and
- any other conclusion could discourage rights holders from availing themselves of provisional measures, which would contradict the EU Enforcement Directive's objective.

Facts

In the case at hand, the patent owner sought and was granted a PI against a generics company. The injunction was subsequently lifted, since the court found it unlikely that the patent in suit was valid. The generics company brought proceedings for damages against the patent owner. The patent owner argued that its request for a PI had been justified in the sense contemplated by the *Bayer Pharma* ruling. The court was thus called upon to determine what that ruling meant for Swedish law.

Decision

The court began by reiterating the conventional liability standard under Swedish law in this respect, as confirmed by the Supreme Court in the *Multitotal* judgment (NJA 2017, page 9). Under that standard, the injunction claimant's liability is strict and accordingly the injunction defendant need not prove negligence. The court then turned to the question of whether *Bayer Pharma* would affect this law.

In this respect, the court reasoned that the *Bayer Pharma* ruling had to be interpreted bearing in mind that the Hungarian court had referred its questions to the ECJ based on Hungarian legislation. The purpose of Article 9(7) of the EU Enforcement Directive was not, according to the court, to harmonise the applicable standard of liability. The court held that instead, the article aims to ensure that EU member states have legislation which provides a ground for liability so that an applicant, under certain circumstances, is entitled to compensation. The court also held that the EU Enforcement Directive does not prohibit strict liability and that neither did this follow from the *Bayer Pharma* ruling.

The court then noted that the *Bayer Pharma* case contained statements relating to the injured party's contribution to the harm suffered and that the duty to mitigate damages had to be considered when

AUTHORS

[Björn Rundblom Andersson](#)



[Måns Ullman](#)



determining appropriate compensation. However, according to the court, this aligned with previous Swedish case law.

Lastly, the court addressed the term 'unjustified application' and concluded that it related to a situation where, subsequent to the grant of a PI, it appears that the applicant had no justified claim. According to the court, that had hardly anything to do with whether the application was already an unjustified request when the relief was sought and thus the term had nothing to do with whether the defendant had been negligent.

The court thus held that Article 9(7) of the EU Enforcement Directive, as interpreted in the *Bayer Pharma* ruling, did not preclude strict liability. However, the case did clarify that the liability can be adjusted and that all relevant circumstances can be taken into consideration when determining what should constitute appropriate compensation.

The court then turned to the damages claim with which it was seized, ruling, among other things, that the liability period started from the communication of the PI to the injunction defendant. The court detailed the general rules to be considered when establishing quantum, including the duty to mitigate and the possibility of lowering damages, to which the injured party's conduct contributed.

In this context, the court held that the fact that the generics company (the injunction defendant) had launched at risk had no effect whatsoever.

The court also noted that the injunction defendant had been aware that the opposition division of the European Patent Office had considered the patent in suit invalid in a preliminary opinion issued in March 2015. Despite this, the injunction defendant had not commenced Swedish revocation proceedings until late December 2015. The injunction defendant had appealed the PI decision with regard to only one of several enjoined products. However, without going into detail, the court concluded that these circumstances were irrelevant for the issue of mitigation or contribution and the damages were accordingly not adjusted in light thereof.

Comment

This judgment represents the first time that the effects of the *Bayer Pharma* ruling have been considered by a Swedish court. The court confirmed that the *Bayer Pharma* ruling entails that all relevant circumstances (*inter alia* contribution) must be taken into consideration when determining appropriate compensation, albeit that this was already covered by the *Multitotal* judgment. However, it did not explain why the launch at risk did not justify the request for PI in the sense of *Bayer Pharma*, accordingly requiring the Swedish court to take the injunction defendant's conduct into consideration within the scope of the law of contribution and mitigation. The court's silence might be understood as the court implying that the relevance of *Bayer Pharma* does not extend beyond the circumstances of the Hungarian case for which the preliminary ruling was given. It would be interesting to know how the court understood the policy concern that the liability under the EU Enforcement Directive is not made so strict that it dissuades rights holders from availing themselves from provisional measures.

The judgment in question was given by the first-instance court and was not appealed. The judgment will not be binding in other cases and the last word has thus not been said on this topic.

For further information on this topic please contact [Björn Rundblom Andersson](#) or [Måns Ullman](#) at *Westerberg & Partners Advokatbyrå Ab* by telephone (+46 8 5784 03 00) or email (bjorn.rundblom.andersson@westerberg.com or mans.ullman@westerberg.com). The *Westerberg & Partners Advokatbyrå Ab* website can be accessed at www.westerberg.com.

Endnotes

(1) For further information please click [here](#).

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).