

CASE COMMENT

BY LÉON DIJKMAN



IP ENFORCEMENT: EU'S TOP COURT APPROVES STRICT LIABILITY FOR PROVISIONAL ENFORCEMENT OF SUBSEQUENTLY-REVOKED PATENT

In a decision of 11 January, [C-473/22 Mylan](#), the Court of Justice of the EU (CJEU) has given an important interpretation of Directive 2004/48/EC (the Enforcement Directive), which lays down minimum standards for the enforcement of intellectual property rights in the EU. The CJEU held that so long as national courts may adjust a damages award in light of the circumstances of the case, adopting strict liability for the provisional enforcement of a patent that is subsequently revoked is compatible with the Enforcement Directive.

The decision follows a reference from the Finnish Market Court which, on 21 December 2017, granted Gilead's application for a provisional injunction against Mylan based on a supplementary protection certificate (SPC). On 11 April 2019, the Finnish Supreme Court revoked the provisional injunction while on 25 September 2019, the Market Court invalidated Gilead's SPC. Mylan sued for damages and under Finnish law, Gilead was strictly liable for damages caused by the wrongful enforcement, though the damages could be reduced in case Mylan failed to take reasonable precautions to mitigate the damage suffered.

The CJEU first examined whether a strict liability regime as provided for by Finnish law is compatible with Article 9(7) Enforcement Directive, which lays down a damages entitlement for the defendant in the case of wrongful enforcement. The CJEU interpreted this provision in light of the TRIPS Agreement and held that it allows Member States "discretion as to the specific implementation of the rules governing the applicant's liability" (at 35).

Secondly, the CJEU recalled that any national rule within the ambit of the Enforcement Directive must comply with the requirements of Article 3 thereof (at 41). The Court considered a liability regime as provided for by Finnish law proportionate and equitable, because it provides a necessary counterweight to the quick availability of provisional relief and respects the balance put in place by the EU legislator (at 45-46). It further held that the regime does not create a barrier to legitimate trade; in fact, it suggested that an injunction based on a patent that is later revoked itself obstructs legitimate trade (at 49). Lastly, the Court held that a strict liability regime is not capable of calling into question the dissuasive nature of provisional measures (at 50).

The decision in *Mylan* thus confirms that a strict liability regime for the enforcement of patents that are subsequently revoked is, in principle, compatible with EU law. That is an important clarification following the CJEU's 2019 decision in [C-688/17 Bayer Pharma](#), which was understood by many commentators to preclude such a regime.