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**Datasheet for the interlocutory decision
of 28 March 2014**

Case Number: T 1125/13 - 3.3.04

Application Number: 05740675.3

Publication Number: 1755662

IPC: A61K 39/095, A61K 47/48,
G01N 33/50

Language of the proceedings: EN

Title of invention:
Combined meningococcal conjugates with common carrier protein

Patent Proprietor:
Novartis AG

Opponent:
GlaxoSmithKline Biologicals SA

Headword:
Combined meningococcal/NOVARTIS

Relevant legal provisions:
EPC Art. -

Keyword:
"Acceleration of proceedings (yes)"

Decisions cited:
-

Catchword:
-



Case Number: T 1125/13 - 3.3.04

I N T E R L O C U T O R Y D E C I S I O N
of the Technical Board of Appeal 3.3.04
of 28 March 2014

Appellant:
(Patent Proprietor)

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Respondent:
(Opponent)

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Representative:

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 19 February
2013 revoking European patent No. 1755662
pursuant to Article 101(3) (b) EPC.**

Composition of the Board:

Chairman: C. Rennie-Smith
Members: R. Morawetz
G. Alt

Summary of Facts and Submissions

- I. This interlocutory decision is concerned only with the request of the respondent (opponent) for acceleration of the appeal.
- II. The appellant has appealed against the revocation of its European patent No. 1755662 by the decision of the opposition division of 19 February 2013. It filed its notice of appeal by fax on 1 May 2013 and its statement of grounds of appeal by online filing on 1 July 2013. The respondent filed its reply by online filing on 15 November 2013 under cover of a letter of that date in which it requested acceleration of the appeal.
- III. The respondent's arguments for acceleration can be summarised as follows:

The Patent is so blatantly invalid that it could almost be said that accelerated proceedings are justified for that reason alone. However, in this case, particular circumstances surrounding the patent and the approach taken by the appellant in the vaccine patent field to date make acceleration especially justified.

The respondent's worldwide vaccine R&D and production centre is based in Belgium. When assessing a request for preliminary measures, the Belgian Courts will only look very superficially (if at all) at the validity of a European patent. A first instance decision (whether by the opposition division or a national court) that the patent should be revoked does not as such affect the Belgian Court's decision to grant preliminary measures. Pending the appeal before the board, the

appellant is free to assert the patent in Belgian court proceedings to obtain preliminary measures (including a preliminary injunction or *ex parte* measures).

In relation to this particular appellant, this is a real and serious threat. On a number of occasions the appellant has demonstrated its willingness to take advantage of the limited review by the Belgian courts of patents to obtain preliminary measures, for example the case of *Novartis v. Mylan*, in which the appellant enforced a preliminary injunction pending an appeal against a decision of the opposition division revoking the patent in issue.

Reference was also made to a case between the present parties in which the appellant enforced far-reaching *ex parte* seizure measures, acquiring access to the respondent's confidential manufacturing information, while its appeal against the opposition division's decision to limit the patent was pending. There is uncertainty in Belgian law as to the liability (if any) of a patent holder who enforces preliminary measures on the basis of a patent which later turns out to be invalid or not infringed. The respondent is exposed to commercial risks for which the possible compensation is uncertain, even if the board eventually dismisses the appeal. Acceleration would remove the commercial and legal uncertainty overshadowing a substantial part of its business as soon as possible.

In support of its arguments the respondent provided footnote references to various Belgian court decisions.

IV. The board sent a communication to the parties dated 11 December 2013 in which it summarised the respondent's arguments as set out above, noted that, in the co-pending appeal T 895/13 in which the same parties are also appellant and respondent, the respondent has made the same request, based on exactly the same arguments, and invited the appellant to file its written observations on the respondent's request within two months of the deemed date of receipt of the communication. The board observed that, while the appellant was of course free to make any submissions or none as it wished, it might be significant if the appellant stated that it would not in this case make any such application to the Belgian courts as the respondent had mentioned. If that confirmation were given, then the threat which the respondent perceived would be removed. Equally, if not given, the respondent's position, which was based on surmise arising from past experience, would have a firmer basis related to this case.

V. The appellant replied to the communication in a letter dated and filed online on 21 February 2014. The appellant's submissions can be summarised as follows:

In reply to the board's suggestion that the acceleration request would be unnecessary if the appellant could state that it will not in this case make an application for preliminary measures to the Belgian courts, the appellant confirmed that such proceedings based on this patent have not been brought and are not envisaged.

The present situation would seem to be the opposite of the first scenario for accelerating proceedings given in the Notice from the Vice-President Directorate-General 3 dated 17 March 2008 (most recently published in OJ EPO 1/2014, 63 - "the Notice") which states that it might be justified to deal with an appeal rapidly "where infringement proceedings have been brought or are envisaged". Similarly, none of the other scenarios in the Notice apply to the present case.

The respondent's reasons for acceleration would apply to a great many appeals and therefore do not represent the kind of special circumstances for which acceleration might be appropriate. The respondent suggests that it deserves special treatment because it is based in Belgium which would be contrary to the concept of equal treatment under the EPC.

It may not be surprising that the respondent describes the patent as "blatantly invalid" but the fact that the patent was granted after careful examination and received a completely positive preliminary opinion from the opposition division shows that the issues are not so clear cut.

The respondent's argument that it is at a particular disadvantage because its production centre is based in Belgium suggests that any opponent based in Belgium should be entitled to acceleration. This is clearly nonsensical as it would place Belgian opponents at an advantage to parties based in other contracting states. The respondent goes on to suggest that the reason Belgian opponents should be given this special treatment is because Belgian courts "will only very

superficially (if at all) look at the validity of an asserted European Patent" but no evidence is provided to support this assertion. Even so, the respondent's main concern seems to be that the appellant is "free to assert the Patent in Belgian Court proceedings to obtain preliminary measures", but this argument would of course apply to any patent in opposition-appeal proceedings because of the suspensive effect of an appeal under Article 106(1) EPC. It cannot be a reason for special treatment of this particular case.

Acceleration of appeal proceedings requires genuine and compelling reasons. The respondent has failed to meet this standard in the present case, and none of its reasons come close to those set out in the Notice.

- VI. The respondent filed observations on the appellant's reply in a letter dated 3 March 2014.
- VII. Neither party requested oral proceedings in relation to the respondent's request for acceleration.

Reasons for the Decision

- 1. The appellant has submitted that acceleration of appeal proceedings requires genuine and compelling reasons and that the respondent has failed to meet this standard in the present case. The board disagrees. While trivial reasons would clearly not warrant acceleration, there is no fixed standard of proof, and the appellant has not cited any legal authority for such. Indeed it follows from *inter alia* the Notice from the Vice-President Directorate-General 3 dated 17 March 2008

- (OJ EPO 1/2014, 63), on which the appellant relies, that acceleration is always a matter for the exercise of the board's discretion (see also point 10 below). In such discretionary matters which fall to be decided on an interlocutory basis, the board has to weigh the parties' submissions on the basis that they are *prima facie* correct, at least to the extent that they are relevant to the issue and not so disputed that no conclusion can be drawn.
2. The respondent has advanced two arguments for acceleration. First, it says the patent in suit is so blatantly invalid that acceleration is warranted for that reason alone. The appellant unsurprisingly disputes that assertion. Self-evidently, the board cannot make any assessment at all of the strength or weakness of either party's case at the present stage of the proceedings, and certainly not just on the basis of that assertion and response. Thus the respondent's first argument does not take the matter forward.
 3. The second (but primary) argument of the respondent is based on the combination of two propositions - that on application, possibly *ex parte*, by patentees for preliminary measures the Belgian courts do not consider the validity of patents even in cases where a revocation decision is suspended pending appeal; and that, supported by "similar facts" evidence relating to the appellant's past conduct, the appellant has made such applications in the past. Thus the inference is that the appellant might do so again in this case.
 4. Those arguments together with the material referenced in the footnotes to the respondent's letter of

15 November 2013 make a *prima facie* case which it was open to the appellant to rebut. However the appellant has not rebutted the respondent's argument - it does not deny either that the Belgian courts will grant preliminary measures without considering the validity of patents or that it has itself sought such measures in the past. Instead, it has confined its arguments to two observations.

5. First, it says that the respondent's argument suggests that any opponent based in Belgium should be entitled to acceleration which would give Belgian opponents an advantage over others and be contrary to the principle of equal treatment. However, this overlooks both the fact that the respondent's case is that the approach of the Belgian courts in itself poses a disadvantage to Belgian opponents compared to others, and that in the present case it is the combination of the approach of the Belgian courts together with the appellant's prior conduct on which the respondent relies.
6. Second, the appellant says there is no evidence that the Belgian courts will only look very superficially at the validity of an asserted European patent. This is not correct - the respondent has referred to a note of a Belgian Supreme Court decision in a case brought by the appellant itself which reads:

"The Belgian Supreme Court has confirmed an earlier decision of the Brussels court of appeal whereby Novartis saw its claim for a preliminary injunction against Mylan's intended commercialisation of a generic sustained release formulation of fluvastatin granted. In doing so, the Supreme Court upheld the established

approach applied by the Belgian courts that a granted (European) patent is presumed to be valid for the purpose of obtaining an interim injunction. This prima facie validity is not affected by a decision of the Opposition Division of the EPO against which an appeal has been lodged before the EPO Technical Board of Appeal, even if the patent concerned was revoked in its entirety by the Opposition Division. According to the Court, this directly ensues from the suspensive effect of such an appeal pursuant to Article 106(1) EPC."

That appears to support the respondent's argument both as regards the approach of the Belgian courts and the appellant's prior conduct. It is in fact the appellant who has not advanced any evidence to the contrary.

7. In its communication (see section IV above) the board summarized the respondent's argument that it feared the appellant might make application, possibly *ex parte*, to the Belgian courts for preliminary measures, and observed:

"While the appellant is of course free to make any submissions or none as it wishes, the Board considers that it may be significant if it states that it will not in this case make any such application to the Belgian courts as the respondent mentions. If that confirmation is given, then the threat which the respondent now perceives will be removed. Equally, if not given, the respondent's position, which is currently based on surmise arising from past experience, will have a firmer basis related to this case." (Emphasis added)

8. The appellant has replied to that particular point as follows:

"In section 4 [of the communication] the Board suggests that this request would be unnecessary if the appellant could state that it will not in this case make an application for preliminary measures to the Belgian courts. The appellant duly confirms that such proceedings based on this patent have not been brought and are not envisaged." (Emphasis in the letter)

9. The board notes that the difference between "will not make" and "have not been brought and are not envisaged" is such that the appellant has declined to give a clear and unequivocal statement of intent which would remove the threat perceived by the respondent. Had such an unequivocal statement been given, that would have resolved the matter without more. As it is, the absence of such a statement together with the absence of any rebuttal of the respondent's second (but primary) argument means that there is no direct answer to the respondent's *prima facie* case. Its request for acceleration of the proceedings will therefore be allowed.

10. The appellant has also made a general submission that none of the respondent's reasons come close to any of the scenarios in the Notice. The board disagrees. The scenarios mentioned in the Notice are quite clearly stated as given "by way of example" (see the opening words of the fourth paragraph on page 63). Acceleration is thus not limited to those exemplified situations and is a matter to be decided in the discretion of the board on the particular facts of the case before it.

11. Further, the Notice states (see last paragraph on page 63):

"By way of exception, the board may accelerate the procedure ex officio, for example in view of the disadvantages which could ensue from the suspensive effect of the appeal of the case in question."

It appears that, in the case brought by the appellant referred to above, the Belgian Supreme Court attributed the approach of the Belgian courts relied on by the respondent specifically to the suspensive effect. The respondent has thus demonstrated, by reference to that approach and the appellant's prior conduct, a disadvantage which could ensue from that effect and, if the board could allow acceleration on that basis of its own motion, it may clearly do so on the request of a party.

12. The same conclusion applies in the co-pending appeal T 895/13 in which the same parties are also appellant and respondent, the respondent has made the same request, the board has sent the same previous communication, and the appellant has made the same answer. The board adds that its views relate only to the particular facts of these present cases and are not intended to set any precedent for application beyond those facts.

Order

For these reasons it is decided that:

The appeal proceedings are to be accelerated.

The Registrar:

The Chairman:

P. Cremona

C. Rennie-Smith