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Update

Intellectual Property

December 2023

Amgen vs Sanofi: At UPC, Every Minute Counts

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On 1 June 2023, the day the Unified Patent Court ("UPC") entered functions, and before the UPC's electronic Case Management System ("CMS") was up and running, a curious incident took place that put the UPC's rules of procedure to the test, showing that every minute counts when filing patent infringement and revocation actions before the Court, against the same patent.

The two pharmaceutical multinationals, Sanofi and Amgen, already share a long history of legal disputes over Amgen's European Patent EP 3 666 797 ("EP 797"), which protects the active substance *evolocumab*. As Amgen had decided not to opt out when the UPC was established, this patent became a **European Patent with Unitary Effect**. On the first day the UPC's entered functions, Amgen decided to file an action for infringement of the patent at hand against Sanofi and, likewise, Sanofi had the opposite idea: to file a revocation action of EP 797 on the same day, at almost the same time.

Since the CMS was not yet effectively operational, and Rule 4 no. 2 of the Rules of Procedure of the UPC¹ states that a party may file a paper document at the Registry or a sub-registry if the electronic system ceases to function, Sanofi filed a hard copy of the revocation action with the Registry in Luxembourg, the receipt of which was recorded at 11:26 (CET), an action brought before the Munich Central Division. At the same time, Amgen, the defendant in the invalidity action, delivered a hard copy of the patent infringement action to the Munich Local Division sub-registry, which receipt was recorded at 11:54 (CET).

Article 33(4) of the Unified Patent Court Agreement ("UPCA") provides that a revocation action must be filed before the Central Division, unless a previous infringement action concerning the same patent, between the same parties, has already been filed before a local or regional division. In this case, the

subsequent revocation action must be filed before the same division in which the infringement action was filed.

Later, when the documentation of the actions was filed within the CMS, the date of that filing was recorded as earlier for Amgen's action and later for Sanofi's action. For this reason, Amgen claimed that Sanofi's revocation action was inadmissible, arguing that, because it was filed after the patent infringement action, and in harmony with Article 33(4) of the UPCA, it should be filed before the same division as the earlier action, the Munich Local Division. Amgen also argued that Sanofi had not deposited the hard copy of their action in the right place but should have done so at the Secretariat of the Munich Central Division, where the case was to be heard, in accordance with the UPCA's rules on competence.

The judge, using the principles of certainty, predictability and promptness that should guide European law and, consequently, the rules of the Unified Patent Court, decided that the **determining factor for assessing the priority of the actions is the exact time when both were filed, *ab initio***. In other words, the date on which the documents were registered within the CMS and other subjective factors are not relevant, but rather the exact time when both parties filed their actions, which differs by only 28 minutes. Furthermore, in view of Rule 4 no. 2 of the TUP Rules of Procedure, the judge considered that the documents relating to the filing of that action could be delivered to any Registry.

Therefore, since Sanofi filed the hard copy of its action earlier, even if by a tiny time fraction, the judge rejected Amgen's claim of inadmissibility and proceeded with Sanofi's action in the Munich Central Division. Therefore, the action for revocation will take place in the Munich Central Division and the action for infringement of the same patent in the Munich Local Division, with the UPC following a bifurcated approach to the competence to decide on these actions. There is the possibility that the Munich Local Division will refer the patent infringement action to the full jurisdiction of the Central Division, with the latter judging both actions, in accordance with Article 33(3)(c) of the UPCA, but that option requires the agreement of both parties, which does not seem a likely scenario.

¹ Rule 4 no. 2 of the TUP's Rules of Procedure: "Where it is not possible to lodge a document electronically for the reason that the electronic case management system of the Court has ceased to function a party may lodge a document in hard-copy form at the Registry or a sub-registry. An electronic copy of the document shall be lodged as soon as practicable thereafter".