



International report - First damages claim decision in pharma sector for unjust preliminary injunction

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The Istanbul IP Court has recently decided on a generic company's damages claim based on an unjust preliminary injunction, in what appears to be the first decision of its kind by Turkish IP courts within the pharmaceutical sector. The parties can appeal the decision before the district court, as well as the court of appeal, after the proceedings.

Facts

The dispute between an originator firm and a generic firm derived from an infringement claim. The court had issued a preliminary injunction, which it lifted after 13 months based on an expert report which found that there had been no infringement. The generic company then filed a compensation action for damages due to the fact that it had not been able to launch the generic product during the 13-month preliminary injunction term. However, as the generic product was never released to the market – even after the dismissal – it was difficult for the court-appointed experts to calculate the amount of compensation due. The plaintiff asserted that, had the product entered the market as the first generic during the injunction period, it would have acquired 85% of the market from the original product; it therefore asked the court to calculate profit loss as such. As an alternative, the generic company alleged that the generic drug would have had a market



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share of at least 37.5%, considering the market share of another company which had subsequently entered the market as the first generic of the original product.

The defendant argued that in order to calculate the hypothetical market share of the generic company, the court should compare other products in the same or similar markets during the same period; it submitted the in-market sales data for two example products, which had a 6.7% and 16% market share as the first generics. It also challenged the generic company's calculation of a 37.5% market share, suggesting that any company used as a model should be of a similar size and reputation in the market, and that the sales should have taken place during the same period.

Decision

After reviewing the evidence, the experts calculated the market share based on a comparison of in-market sales data for similar product markets. They also tested different hypothetical scenarios in which the generic firm would have had, for example, a 6.7%, 16%, 37.5% or 50% market share. The experts concluded that the generic firm would most likely have had 16% market share. Therefore, the court awarded damages based on this figure.

Comment

A 'one size fits all' approach for the calculation of damages is not appropriate for this kind of action as certain case-specific parameters must be considered. These include:

- the conditions for pricing and sales of the products within the relevant period;
- the therapeutic area of the drug;
- the size and sales potential of the pharmaceutical company;
- brand loyalty; and
- the substitutability of the generic with the original product.

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