

The First of its Kind: Compensation for Damages Caused by Unfair Preliminary Injunction Decisions in the Pharmaceutical Industry

One must have deep knowledge and experience in many different disciplines to play a role in the solution of complex and multi-layered patent law disputes. One of the most important examples of this situation are compensation actions filed following the abolition of preliminary injunctions in patent disputes related to the pharmaceutical industry. As a matter of fact, the decisions of the courts of first instance and the Court of Appeal in these types of cases give direction to deep debates both in sectoral, commercial and legal terms, and it is observed that these discussions gain more importance with each new decision.

In 2018, the first known decision of a court of first instance on a compensation action for the damages arising from unfair preliminary injunction in the pharmaceutical sector, and upon the appeal of this decision, the first district court decision was also given in 2022, establishing the first precedents of different degrees in this field.

The events giving rise to the action can be summarised as follows: The patent owner companies requested a preliminary injunction decision to be granted due to the imminent danger of infringement of the patent by a local pharmaceutical company's generic product (the Gx product). The court granted the preliminary injunction and decided to suspend the manufacture of the Gx products depending on the outcome of a court appointed expert panel's report. The patent owner then filed the infringement action on merits and the preliminary injunction was maintained throughout the proceedings. Finally, the infringement action on merits was rejected and the decision became final following the appeal process. The Gx Company then filed an action claiming compensation for damages, alleging that it incurred a loss of profit for not being able to manufacture the Gx products due to the unfair preliminary injunction.

The court of first instance, firstly, ruled that in order to be held liable for compensation of damages incurred due to the preliminary injunction decision, it is sufficient that the main action (infringement case in this example) is rejected and that there is no need to investigate whether the patent owner is faulty as per the related article of the Turkish Civil Procedural Law. Secondly, while calculating the loss of the Gx company, the court decided that the Gx product, which was the first Gx to enter into the market and was blocked by the preliminary injunction decision, would have had a market share of 16%, taking into account the market conditions at the date of the preliminary injunction decision, the legal regulations on the market at that time, the reputation and reliability of the Gx company and the pharmaceutical era in which the product would have entered the market for the first time.

