

Intellectual Asset Management



International Report

***Olanzapin* decision further strengthens patent enforcement practice**

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On 16th December 2008 the Federal Supreme Court confirmed the validity of the German part of a European patent protecting Olanzapin, an atypical anti-psychotic drug. The decision followed the revocation of the patent by the Federal Patent Court at first instance.

Although Olanzapin generates revenues of several hundred million euros a year, this development is not surprising in itself. The key issue is that through this decision the Federal Supreme Court has confirmed a groundbreaking ruling of the Dusseldorf High Court, the leading German patent infringement court of appeal.

Following the decision of the Federal Patent Court to revoke the patent, Eli Lilly took a risk in filing a request for a preliminary injunction with the Dusseldorf District Court on the grounds that that the patent was valid despite the Federal Patent Court decision. Infringement was not an issue in the case. In line with the expectations of learned observers, the district court rejected the request on the reasoning that, under German law, the Federal Patent Court was responsible for deciding on the validity of the patent.

However, on appeal the Dusseldorf High Court concluded that the decision of the Federal Patent Court was flawed and was not final, as an appeal had been filed with the Federal Supreme Court; it granted a preliminary injunction in favour of Eli Lilly. Thereby, in this unique case a preliminary injunction was granted based on a patent revoked by the Federal Patent Court at first instance.

By confirming the validity of the Olanzapin patent in its decision, the Federal Supreme Court further strengthened the reputation of the Dusseldorf High Court for handling appeals against decisions of the busiest patent court in Europe, and perhaps worldwide. It also indirectly confirmed the criticism aimed at the decision of the Federal Patent Court too

far. The Supreme Court decision is another brick in the wall of German patent enforcement precedent for adopting the fair and reasonable patentability standards set by the European Patent Convention.

Thus, Germany remains an attractive venue for patent litigation in view of the quick, reliable and fair proceedings for reasonable equitable costs. The German attorney general has stayed abreast of these developments by introducing new procedural guidelines for Federal Patent Court proceedings to improve the reliability and speed of validity proceedings. The guidelines are expected to be implemented into national law in mid-2009. Finally, a second senate to deal with patent matters will be established soon at the Federal Supreme Court, meaning that there will be up to 10 patent judges at Germany's highest court to deal with the cases that have built up thanks to the success of German patent enforcement practice.

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