

ARTICLE

SAVING STRICT LIABILITY

Patent Law | 12/01/24 | François Pochart Pierre-Olivier Ally



On 11 January 2024, the Court of Justice rendered a judgment in Case C-473/22 between Mylan and Gilead.

As a reminder, Gilead had requested and obtained interim injunctive relief in Finland against Mylan. These provisional measures were later overturned, and Mylan sought damages to be compensated. In its opinion of 21 September 2023, the Advocate General argued that Article 9(7) of Directive 2004/48/EC (the “**Directive**”) should be construed as incompatible with Member States’ regulations providing for strict liability regimes[1].

However, the Court adopted a contrary solution.

In its analysis to determine whether the Finnish strict liability regime is in compliance with the Directive, specifically Article 3, the Court examined three essential criteria. The Court ruled that:

A strict liability regime is proportionate and equitable, as it strikes a balance between the protection of intellectual property rights and the rights of the defendant.

A system of provisional measures incorporating such a strict liability regime is compatible with the principle of the absence of any barrier to legitimate trade. The Court believes that as the intellectual property rights which served as a basis for claiming provisional measures are revoked with retroactive effect, the acts of the defendant which have been prevented by these unjustified measures ought to be considered as being fully part of legitimate trade.

Such a strict liability regime should not, in any case, call into question the dissuasive nature of the provisional measures system as the defendant’s right to compensation is limited to damages triggered by the unjustified provisional measures, excluding the portion of damages resulting from the defendant’s behaviour (“*whether the defendant played a part in the occurrence of the injury*”) that could have exacerbated the initial harm caused by said provisional measures.

We can only laud the clarifications provided by the Court of Justice in contrast to the *Bayer*[2] ruling. However, it remains to be seen how national courts will interpret the circumstances of the case, including “*whether the defendant played a part in the occurrence of the injury*”, to adjust the amount of damages sought.

[1] Will the Court of Justice Spell the End of the French Strict Liability Regime?

[2] *Bayer v. Richter*, Judgment of 12 September 2019 of the Court of Justice of the European Union, No C-688/17.
