

## 2025 – Study Question

### Preliminary Injunctions: Requirements for compensating damage suffered by Defendant

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#### I) Current law and practice

##### a. EXISTENCE OF LIABILITY

1. *Does your law or case law establish that the applicant of a PI will be held liable for the defendant's damages in case the PI is lifted or reversed? Please comment.*

#### EXECUTIVE SUMMARY

YES: Belgian law provides that an applicant of a preliminary injunction (“PI”) may be held liable for the defendant’s damages if the PI is lifted or reversed, but the applicable liability regime depends on the manner of reversal.

If the PI is overturned on appeal, then strict liability applies under Article 1398, §1, JC, meaning the applicant is automatically liable for damages caused by the provisional measures. Conversely, if a subsequent decision on the merits contradicts the PI without formally lifting it, then strict liability does not apply. Instead, liability is assessed under the general fault-based regime of Article 6.5 of the (new) Civil Code (“CC”), as clarified by the Belgian Supreme Court in the *Balta* case.

The transposition of the EU Directive 2004/48 on the enforcement of intellectual property rights (“*Enforcement Directive*”) introduced Articles 1369*bis*/3, §2, and 1369*ter*, §3, JC, which entitle the courts to order compensation when a PI is revoked, ceases to apply, or when no infringement is ultimately found. The Belgian courts have been divided about whether these provisions impose strict liability or require fault (meant here as breach of duty of care or negligence). While some courts (Ghent, Antwerp) have favoured strict liability, the Brussels Court of Appeal has held that fault/negligence must be demonstrated to avoid discouraging IP enforcement.

The ECJ’s *Bayer* judgment confirmed that Article 9(7) of the Enforcement Directive allows Member States to impose fault-based liability, provided courts consider case-specific circumstances. The Belgian courts subsequently leaned towards requiring fault/negligence. However, the ECJ’s *Mylan* judgment later confirmed that strict liability is also compatible with the Directive, provided the courts can adjust compensation based on case circumstances.

This shift may prompt the Belgian courts to reconsider whether strict liability should apply in line with *Mylan*. Some scholars further argue that liability could still be based on fault under the Civil Code, underlining that a fault is not only a negligence but may also consist in the breach of a legal prohibition, in this case the legal prohibition on disrupting economic activity (Article II.2-II.4 CEL). The Belgian Supreme Court or the legislator may need to provide further clarification on the applicable standard.

YES. Belgian law foresees that applicants of a PI can be held liable for the defendant’s damages if the PI is lifted or reversed, but a distinction must be made depending on the type of PI and the way in which it is “lifted or reversed”.

In Belgium, IP rights holders may apply to the President of the Enterprise Court (or, sometimes, the Court of First Instance) for authorisation to carry out a seizure in an infringement matter (“*saisie en matière de contrefaçon*”/“*beslag inzake namaak*”), involving descriptive measures and, provided more solid evidence can be produced, measures of actual seizure of counterfeit goods and counterfeiting tools (Article 1369*bis*/1 et s. of the Belgian Judicial Code, hereafter “*JC*”). They may also apply to the same judge, in summary proceedings, for that judge to order provisional measures (Article 584 JC), including injunctions (subject to a penalty), the seizure of the movable and immovable property of the alleged infringer, and, if deemed necessary, the freezing of that party’s

bank accounts and other assets (Article 584, 5°, JC). Finally, any court hearing an infringement action may order provisional measures before ruling on the merits of the case (Article 19, 3<sup>rd</sup> indent, JC).

The applicable liability regime for the applicant of one of the abovementioned PIs differs depending on whether (i) the order of the President of the court that authorised an infringement seizure or granted interim measures is reversed following an appeal ([third-party] – opposition or appeal) or (ii) whether it is contradicted by a subsequent decision of the judge determining the case on the merits and concluding that there has been no infringement (i.e. because the IP right on which the applicant based the PI has not been infringed or is null and void).

(i) Reversal of PI following an appeal

In case of reversal of the order following an appeal, the strict liability regime provided for in Article 1398, §1, JC applies: “the provisional enforcement of the judgment shall take place only *at the risk and peril of the party pursuing it*” (free translation, emphasis added); which means that the PI applicant will “automatically” be required to compensate the damage caused by the provisional measures granted at first instance, which they decided to enforce.<sup>(1)</sup>

(ii) Contradiction of PI by subsequent decision on merits

In case a PI is contradicted by a subsequent decision on the merits, without the PI being formally lifted or reversed, Article 1398, §1, JC (and the strict liability regime that follows from it) does not apply. In its *Balta* judgment of 11 March 2005, the Court of Cassation ruled that, by deciding that the seizure was unlawful solely because it had been enforced by a party whose copyright was subsequently not recognised by the judge on the merits, the judge did not legally justify his decision.<sup>(2)</sup> In other words, in the circumstances of the case, the mere fact that provisional measures were contradicted by a decision on the merits did not necessarily give rise to liability on the part of the party that requested and enforced those measures. The liability of the IP rights holder was in fact governed by Article 6.5 of the (new) Civil Code (hereafter “CC”) (former Article 1382 – *lex generalis*) and not by Article 1398, §1,

(1) Cass., 7 April 1995, *Pas.*, I, p. 396, *R.J.C.*, 1995-1996, p. 185, obs. K. BROECKX; H. BOULARBAH, *Requête unilatérale et inversion du contentieux*, Brussels, Larcier, 2010, No. 925, and the references cited in note 3505.

(2) Cass., 11 March 2005, *Pas.*, 2005, p. 583, *J.L.M.B.*, 2005, p. 1313, *I.R.D.I.*, 2005, p. 238, *A.M.*, 2005, p. 396, note F. DE VISSCHER; D. DESSARD, “Les abus de la saisie-description”, *Ing.-Cons.*, 2005, pp. 303 et s., spec. p. 304.

JC (*lex specialis*),<sup>(3)</sup> so that it depended on a fault on the part of the IP rights holder.<sup>(4)</sup> The “fault” required here seems to consist in a breach of duty of care or act of negligence by the IP rights holder.

Following the transposition of the EU Directive 2004/48 on the enforcement of intellectual property rights (hereafter “Enforcement Directive”),<sup>(5)</sup> this topic resurfaced again. In particular, Articles 7(4) and 9(7) of the Enforcement Directive sought to strike a balance between the rights of the IP rights holders and defendants who may be subject to unjustified PI measures. Both provisions specify that in case the PI is revoked or lapses or where it is subsequently found that there has been no infringement or threat of infringement of an IP right, then “*the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by those measures*”.

As part of the Enforcement Directive’s transposition, the Belgian legislator inserted into the JC two provisions directly inspired by said Articles 7(4) and 9(7): under Article 1369bis/3, §2, JC, “*in cases where the description or seizure measures are repealed or cease to be applicable because of any act or omission of the applicant, or in cases where it is subsequently found that there has been no infringement or threatened infringement of the intellectual property right in question, the court may order the applicant, on application by the defendant, to pay the latter appropriate compensation for any damage caused by such measures*” (free translation). Article 1369ter, §3, JC provides the same regarding damage caused by interim measures.<sup>(6)</sup>

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(3) It should be noted that Article 1398, §1, JC is also not applicable when an infringement seizure has been carried out in execution of a decision which is then retracted on the basis of Article 1369bis/1, §7, JC (formerly Article 1419, §2, JC), which allows the defendant to request the modification or revocation of the order in the event of a “*change of circumstances*”: cf. Cass., 10 September 2004, *Pas.*, 2004, p. 1294, *J.L.M.B.*, 2005, p. 1308, *A.M.*, 2008, p. 105, note F. DE VISSCHER. This type of situation is treated in the same way as when a judgment is overturned by a subsequent decision on the merits.

(4) To compensate for the non-application of Article 1398, §1, JC, F. de Visscher, noting that it is difficult to qualify the enforcement of a court decision as a breach of the general duty of care, proposes that the seizure, carried out by a party who is ultimately recognised as having no exclusive right, should be considered as a fault for breach of a specific legal provision, namely that which enshrines the freedom of trade and industry (cf. our above-mentioned case under Cass., 11 March 2005; e.g. F. DE VISSCHER and P. BRUWIER, *La saisie-description et sa réforme (jurisprudence 1997-2009), Les dossiers du Journal des tribunaux (Case Law 1997-2009)*, vol. 79, p. 152).

(5) Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, *OJ L* 157, 30 April 2004, p. 45.

(6) “*In cases where interim measures are revoked or cease to apply as a result of any act or omission of the claimant, or in cases where it is subsequently found that there has been no infringement or threatened infringement of the intellectual property right in question, the court may order the claimant, on application by the respondent, to appropriate compensation for any damage caused by these measures*” (free translation).

Legal doctrine was then divided on the question of whether these provisions introduced a new case of strict liability<sup>(7)</sup> or whether they implicitly referred to Article 1382 Old CC.<sup>(8)</sup>

The Ghent Court of Appeal, the Antwerp Enterprise Court and the Antwerp Court of Appeal chose the first option,<sup>(9)</sup> while the Brussels Enterprise Court and the Brussels Court of Appeal were more lenient towards the IP rights holders, by making their liability subject to demonstrating fault (understood as a breach of duty of care or act of negligence).<sup>(10)</sup>

In its judgment of 28 February 2018, the Brussels Court of Appeal considered, amongst other things, that a strict liability regime could constitute an undesirable barrier to the Enforcement Directive's objective, which is to ensure that IP rights holders have the effective means of enforcing their rights, and that Article 1382 Old CC provides the party against whom enforcement is sought with a sufficient guarantee against the use and abuse of the infringement seizure procedure, without this guarantee discouraging the IP rights holder too much from invoking this procedure.<sup>(11)</sup>

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(7) In this sense, see in particular H. BOULARBAH, *op. cit.*, p. 942; K. ONGENA, art. 1369bis/3 Ger.W., in *Gerechtigdijk Wetboek Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer* (B. ALLEMEERSCH, P. DEPUYDT, D. LINDEMANS, S. RAES and B. VAN DEN BERGH (eds.), Alphen-on-the-Rhine, Kluwer, 2009; L. VAN BUNNEN, "Examen de jurisprudence (2004 à 2008) – Brevets d'invention", *R.C.J.B.*, 2009/1, p. 142, No. 23; V. PEDE, "Schadevergoeding bij onterecht beslag inzake namaak: *Quo vadis?*", *I.R.D.I.*, 2010, pp. 274 and 275; Rappr. B. REMICHE and V. CASSIERS, *Droit des brevets d'invention et du savoir-faire*, Brussels, Larcier, 2010, pp. 554 and 555 (who, while considering that the liability of the PI applicant is based on Article 1382 Old CC and therefore requires a fault, consider that this fault results solely from the execution of the provisional measures while it is subsequently held that there was no infringement of the IP right. For a critique of this approach in terms of "implicit fault", see S. CATTOOR and M. VAN MEERBECK, "Compensation to the alleged infringer of an IP right for harm caused by provisional measures in case of a different outcome on appeal or on the merits", in *Handhaving van intellectuele rechten in België – Respect des droits intellectuels en Belgique*, Ghent, Larcier, 2017, pp. 127-146, No. 21.

(8) In this sense, see K. ROOX, "De nieuwe bevoegdheidsregeling in het intellectueel eigendomsrecht (deel II)", *I.R.D.I.*, 2008, p. 16, No. 17; A. DE BOECK and J. LINDEMANS, "Aansprakelijkheid voor beslag inzake namaak", *R.A.B.G.*, 2011, pp. 16-20; S. CATTOOR and M. VAN MEERBECK, *op. cit.*, pp. 127-146, No. 25-26; M. BUYDENS, *Droit des brevets d'invention*, Brussels, Larcier, 2020, No. 1027 and 1045.

(9) See Ghent Court of Appeal, 5 May 2014, *DA-OR*, 2015, p. 108, para. 7.1; Antwerp Court of Appeal, 18 April 2016, 2010/AR/2481, *Helm and Others/Ajinomoto*, available on *Darts-IP*; Antwerp Commercial Court (Prés.), 20 December 2017, *Ing.-Cons.*, 2018, p. 502, para. 7; compare with Ghent Commercial Court (Prés.), 13 December 2012, *Ing.-Cons.*, 2012, p. 851, para. 4.4 (the Court does not refer to strict liability but directly applies Article 1369bis/3, §2, without investigating whether the seizure was wrongful or referring to Article 1382 Old CC).

(10) Brussels Enterprise Court, 3 November 2010, *R.D.C.*, 2011/5, *I.R.D.I.*, 2010, p. 474; Brussels Court of Appeal, 15 December 2009, *R.A.B.G.*, 2011, p. 8, note A. DE BOECK and J.-D. LINDEMANS; Brussels Court of Appeal, 28 February 2018, *DRC*, 2018, p. 480, *I.R.D.I.*, 2018, p. 64, note V. VAN OVERMEIRE.

(11) Brussels Court of Appeal, 28 February 2018, *DRC*, 2018, p. 480, *I.R.D.I.*, 2018, p. 64. For the sake of completeness, it should be noted that in this case, the Court held the holder of the registered design liable, as the case file revealed that they had been aware of a disclosure (likely to invalidate the design)

This *status quo* was once again impacted by the *Bayer*<sup>(12)</sup> and *Mylan*<sup>(13)</sup> judgments of the EU Court of Justice (hereafter “ECJ”).

First, in the *Bayer* case, the ECJ was required to rule on the compatibility of the Hungarian liability regime – based on fault and allowing the conducts of the defendant to be taken into consideration – with the Enforcement Directive. The ECJ ruled that such a liability regime is indeed compatible with the Enforcement Directive, in particular Article 9(7), as it is for the national courts to take into account the “*particular circumstances of the case before them in order to decide whether the applicant should be ordered to pay the defendant ‘appropriate’ compensation*”. In particular, the ECJ stated that while the exercise of the power to award compensation is “*strictly subject to the pre-conditions*” set out in Article 9(7) of the Enforcement Directive (i.e. a repeal of measures or a finding of an absence or a threat of harm), “*the fact that those conditions are met, in a particular case, does not imply that the competent national courts would be automatically and in all cases obliged to order the applicant to pay compensation all the damage incurred by the defendant as a result of the said measures*”.<sup>(14)</sup>

The same decision also mentioned that “*As regards the fact that the provisional measures at issue in the main proceedings have been repealed, although that may ... constitute one of the conditions necessary for the exercise of the authority laid down in Article 9(7) ... by contrast, it cannot be regarded in itself as a decisive factor in proving the unjustified nature of the application which gave rise to the provisional measures which have been set aside*”.<sup>(15)</sup> This statement and its reasons were criticized but they inspired a more lenient case law in favour of the IP rights holder.

Following the *Bayer* judgment, Belgian legal doctrine and case law seemed to swing towards the fault-based liability regime in case of a subsequent decision on the merits. In a judgment of 11 October 2022,<sup>(16)</sup> in particular, the Brussels Court of Appeal, after reproducing the main recitals of the *Bayer* judgment, has considered, on the basis of several articles of legal

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predating the grace period, and yet failed to inform the court from whom they had requested the infringement seizure measure. By concealing this information, the holder committed a fault within the meaning of Article 1382 Old CC.

(12) ECJ, 12 September 2019, *Bayer Pharma AG v. Richter Gedeon Vegyészeti Gyár Nyrt and Exeltis Magyarország Gyógyszerkereskedelmi Kft*, C-688/17, ECLI:EU:2019:722.

(13) ECJ, 11 January 2024, *Mylan AB v. Gilead Sciences Finland Oy and others*, C-473/22, ECLI:EU:C:2024:8.

(14) ECJ, *Bayer*, para. 52, emphasis added.

(15) ECJ, *Bayer*, para. 64, emphasis added.

(16) Brussels Court of appeal, 11 October 2022, *Ing.-Cons.*, 2022, p. 893.

doctrine,<sup>(17)</sup> that these recitals leave no room for strict liability based solely on the withdrawal of the PI measures,<sup>(18)</sup> a fault is required. Moreover, according to the Court of Appeal, the mere fact that interim measures were sought and enforced on the basis of a patent that was subsequently cancelled or revoked is not sufficient to prove fault on the part of the patent holder.<sup>(19)</sup> To invoke the liability of the latter, the defendant must establish that at the time the measures were requested, or at the time they were enforced, the applicant “*knew or ought to have known*” that the patent on which it relied did not meet the material conditions of validity, and that its acts or omissions were unlawful or constituted an abuse of rights. The Ghent Court of Appeal also concurred with this analysis in a copyright case.<sup>(20)</sup>

This view was challenged again when the ECJ rendered its judgment in the *Mylan* case. Here the ECJ was asked to decide whether Finnish law – which provides for the strict liability of PI measures applicants – was compatible with the Enforcement Directive. Much to the surprise of many scholars and contrary to the opinion of Advocate-General Szpunar,<sup>(21)</sup> the ECJ concluded that such a liability regime can meet the requirements of the Enforcement Directive, as long as the national courts can take into account all the relevant circumstances of the case (including the defendant’s possible participation in the occurrence of the damage) when deciding on the level of compensation granted to the defendant of a PI measure that has been subsequently lifted or reversed.<sup>(22)</sup>

It follows from the *Mylan* judgment that the analysis of the *Bayer* case law in Belgian legal doctrine and the precited judgments is erroneous: not only do the Member States have the choice between fault-based liability and strict liability, but a regime of the latter type, provided that it allows the national court to take

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(17) T. DE HAAN, “Conséquences de l’eupéanisation des mesures provisoires et conservatoires en matière de droits intellectuels : la Cour de justice donne l’avantage au titulaire de droits”, *Ing.-Cons.*, 2019, p. 503; V. PEDE, “Het arrest *Bayer* van het Hof van Justitie en het nieuwe Uniebegrip ‘passende schadeloosstelling’ ingeval voorlopige maatregelen achteraf worden ingetrokken”, *I.R.D.I.*, 2019, p. 279; N. SOMERS, “Rechtsplegingen inzake intellectuele rechten”, commentaar Art. 1369ter Ger.W., OHRA, afl. 87 (2020), p. 249; J.-D. LINDEMANS and J. BUSSÉ, “Aansprakelijkheid voor het Aansprakelijkheid voor het uitvoeren van voorlopige maatregelen in het kader van de handhaving van intellectuele rechten na de Bayer- en Snowfall-arresten”, *R.D.C.*, 2020, liv. 3, 356-365, p. 362; C. RONSE and G. FROIDBISE, “Intellectuele rechten: beslag inzake namaak”, in *Bestendig Handboek Deskundigenonderzoek*, Mechelen, Kluwer, 2023, pp. 80-117, spec. p. 116.

(18) “*The considerations of the Court of Justice cited above do not allow for objective liability solely on the basis of the revocation of the interim measures*” (free translation).

(19) Compare the proposal of F. DE VISSCHER referred to in footnote 4 above.

(20) Ghent Court of Appeal, 7 November 2022, *Ann. prat. com.*, 2022, p. 953, note F. REYNAERT.

(21) Av. gen. M. SZPUNAR, concl. prev. ECJ, 21 September 2023, *Mylan AB v. Gilead Sciences Finland Oy and Others*, C-473/22, ECLI:EU:C:2023:699.

(22) ECJ, *Mylan*, para. 44 to 50.

into account all the circumstances of the case, appears proportionate and fair,<sup>(23)</sup> ensures that there are no barriers to legitimate trade<sup>(24)</sup> and is not capable of calling into question the deterrent effect of the system of interim measures.<sup>(25)</sup> Therefore, it is fully in line with the requirements of Article 3 of Enforcement Directive (and Article 41 of the TRIPS Agreement).

According to some authors, the *Mylan* judgment could also lead to a reconsideration of the meaning of Articles 1369bis/3, §2, and 1369ter, §3, JC.<sup>(26)</sup> In the interpretation adopted by the Brussels Court of Appeal, these provisions contribute to conferring on the putative IP rights holder a remarkable, potentially disproportionate, position of strength. However, while IP deserves a high degree of protection, in accordance with Article 17 of the Charter of Fundamental Rights of the European Union, the freedom to conduct a business is also a pillar of the economic order, both at the Belgian (Article II.3 of the Belgian Code of economic law – “CEL”) and the EU level (Article 16 EUTC). Furthermore, another author reminds that a fault, necessary under Article 1382 Old CC (today Article 6.5 CC) does not only consist of negligence/lack of prudence, but also in the infringement of a legal rule imposing or prohibiting a specific behaviour (see Question 19). Now, this author argues, such a legal rule can be found in Articles II.2, II.3 and II.4 CEL that prohibit any enterprise from interfering with the economic activity of another enterprise without the authorisation of the law. Thus, according to this author, the liability of the applicant of a PI may be based on the general, fault-based, legal provisions of the Civil Code without the need to demonstrate a breach of duty of care or act of negligence of the IP rights holder.<sup>(27)</sup>

It seems clear that the final word on the applicable liability regime in Belgium in situations where a PI is contradicted by a subsequent decision of the judge on the merits concluding that there has been no infringement, has not been said. A judgment by the Belgian Supreme Court or clarification by the legislator may be required to resolve the matter definitively. At present, the opening granted by the ECJ's judgment in *Mylan* might give defendants more possibilities in trying to convince the courts that a strict liability regime should apply, which seemed unlikely following the *Bayer* judgment.

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(23) ECJ, *Mylan*, para. 44 to 48.

(24) ECJ, *Mylan*, para. 49.

(25) ECJ, *Mylan*, para. 50.

(26) See D. GLORIEUX and B. VANBRABANT, “Responsabilité du titulaire de droits intellectuels pour des mesures provisoires ou conservatoires injustifiées : le vent tourne !”, *A.M.*, 2024, pp. 36-46. See also note of F. REYNAERT, under Ghent Court of Appeal, 7 November 2022, *Ann. prat. com.*, 2022, pp. 977-988.

(27) F. DE VISSCHER, « La responsabilité en cas de mesures provisoires protégeant un droit intellectuel de contredites ultérieurement au fond : une salutaire mise au point et des perspectives en droit belge », *R.D.C.*, 2015/4, pp. 89 à 114.

2. If YES, does your law or case law provide that the defendant needs to request the court or relevant authority to decide on the liability of the applicant (that is, a court will not automatically issue such a finding upon revocation of the PI)?

A lift or reversal of the PI does not automatically trigger a decision on the applicant's liability. In accordance with Article 9(7) Enforcement Directive, Article 1369ter, §3, JC for example states that the court may "at the request of the defendant" order the applicant to appropriately compensate the defendant for the damage caused by provisional measures that are revoked or lapsed due to any act or omission of the applicant or if it is later established that no (threat of) infringement of the IP right in question existed. Belgian procedural law thus requires the defendant to submit a liability claim before the court can decide on the applicant's liability. Once such a claim has been submitted, the court must decide on the applicant's liability in accordance with the rules set forth under Question 1 above and Question 6 below.

3. Does your law provide for any particular time or moment as to when the defendant is allowed to request compensation?

A distinction must be made between: (i) the *right to compensation* that arises at the moment the provisional measures were revoked or when they lapse due to any act or omission by the applicant, or when it is determined that the provisional measure turned out to be unjustified (i.e. when it was subsequently found that there has been no infringement or threat of infringement of an IP right); and (ii) the actual awarding of damages at a later stage.

There are no legal provisions under Belgian law determining a particular time or moment as to when the defendant is allowed to request compensation. The injured party can file a claim from the moment it has legal grounds to do so. However, it is important to note that the 5-year prescription period under Article 2262bis, §1, 2<sup>nd</sup> indent, CC applies. All claims for compensation of damage based on non-contractual liability expire after five years from the day following the day on which the injured party became aware of the damage or its aggravation and of the identity of the person liable for it. Such claims expire in any case after twenty years from the day following the day on which the event causing the damage occurred.

The particular time or exact moment varies on a case-by-case basis. In general, Belgian case law suggests that it is common practice for the injured

party to request damages not immediately when the PI is ordered, but at a later stage, namely after the provisional measures have been revoked, the invoked IP right has been declared invalid, or the infringement is not recognised.<sup>(28)</sup>

As an example, in a recent case, the defendant counterclaimed damages against the applicant, on the merits, under Article 1369*bis*/3, §2, JC, for the damage it had suffered during the seven-week period in which it was banned from the market as a result of the provisional measures.

During the proceedings on the merits in first instance damages were awarded to the defendant.<sup>(29)</sup> On appeal, this decision was reversed, and no damages were awarded to the defendant because the preliminary measures were deemed to be justified.<sup>(30)</sup>

*4. Does your law or case law provide applicants with an exemption or safe harbour from any liability based on the fact that it holds a valid IP right and is reasonably exercising such lawful right?*

NO.

Statutory law does not provide for an exemption or safe harbour as such. However, when the PI order is not reversed on appeal (whether (third-party-) opposition or appeal), but merely contradicted by a further decision on the merits, liability will only occur, according to the dominant case law, when the IP rights holder exercised its right abusively, or otherwise committed a fault (see Question 1 above). This could be viewed as a safe harbour in the opposite case where the IP rights holder has been exercising in good faith a right that was initially (provisionally) found to be valid.

*5. Are there any differences in assessing the applicant's liability if the dismissal is based on a finding of invalidity or of non-infringement? Please comment.*

NO.

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(28) Brussels Court of Appeal, 11 October 2022, *ICIP-Ing.Cons.*, 2022, p. 893; Brussels Court of Appeal, 28 February 2018, *T.B.H.*, 2018, pp. 480-488; Brussels Court of Appeal, 24 May 2016, *I.R.D.I.*, 2016, p. 253; Ghent Court of Appeal, 5 May 2014, *DA-OR*, 2015, p. 108.

(29) Ghent Enterprise Court (section Ghent), 24 December 2020, *A/19/3788*, *unpublished*.

(30) Ghent Court of Appeal, 7 November 2022, *Jb.Markt.*, 2022, p. 953.

b. NATURE OF LIABILITY AND LIMITS THEREOF

6. *According to your law or case law, what is the nature of the applicant's liability if the PI is lifted, and the applicant's claims are ultimately dismissed?*

Reference is made to the Question 1 response.

The applicable liability regime differs depending on whether (i) the PI is reversed following an appeal ((third-party-)opposition or appeal) or (ii) whether it is contradicted by a subsequent decision of the judge determining the case on the merits concluding that there has been no infringement. In the first case, the strict (risk-based) liability regime provided for in Article 1398, §1, JC applies. In the second case, there is discussion on whether a fault-based liability (negligence or abuse) or a strict liability regime applies, with diverging legal doctrine and judgments.

7. *Does your law or case law provide that a court or relevant authority should also take into account the conducts of the defendant (e.g. if the defendant enabled the injury to occur or failed to take reasonable measures to avoid or mitigate the injury and thereby contributed to its occurrence)? Please comment.*

To the extent that the question concerns the criteria to take into consideration in determining whether liability exists and/or the nature of such liability, the answer to the question is NO.

If, on the other hand, the question seeks to determine whether the conducts of the defendant can be taken into consideration in assessing the extent of the compensation (and therefore damages) to which he or she is entitled when the applicant's liability is engaged, then the answer is YES.

8. *Does your law or case law stipulate that the causal link between the damages being claimed, and the issuance of the PI should be assessed?*

First, the Group notes that this question is somewhat unclear. As formulated, the question seems to concern the granting ("issuance") of a PI only and not its enforcement. However, the question of the applicant's liability and, where applicable, the defendant's compensation, will in principle only arise in the event of the enforcement of a provisional measure, and not simply because it has been obtained. In view of this clarification, the courts called upon to rule on the possible liability of an applicant for PI will necessarily have to assess whether there is a causal link between not only the granting, but above all the enforcement of such a PI and the prejudice claimed by the defendant. In the absence of such

a causal link, the defendant will not be entitled to any compensation from the PI applicant, even if the PI has subsequently been withdrawn or contradicted.

9. *Does your law or case law establish any limits to the damages to be compensated?*

In Belgium, the fundamental principle is that of “full compensation” (“*restitutio in integrum*”), which means that compensation must be equivalent to the *actual* loss suffered by the injured party; no more, no less. Therefore, the aim is to restore the injured party in the state they would have been should the disputed PI not have been enforced which implies that the compensation is supposed to fully offset all aspects of the harm suffered.<sup>(31)</sup>

The damage to be compensated is thus not limited as such, since it must in principle be compensated in its entirety. For the sake of completeness, however, the Group notes that there is a kind of limit, inherent in the principle of full compensation, namely that the compensation may not exceed the level necessary to compensate for the injury *actually* suffered. Beyond this amount, damages lose their compensatory character and have on a “punitive” aspect, which is excluded under Belgian law.<sup>(32)</sup>

Finally, the Group also notes that while the defendant’s legal costs are considered to constitute compensable damage, Belgian law provides for a certain limit. Pursuant to Article 1022 JC, even if the defendant succeeds in having the PI lifted or reversed, they may not recover the entirety of their legal costs from the applicant. Instead, they can only claim a *lump sum* set by the Royal Decree of 26 October 2007 depending on the nature and value of the claims debated between the parties.

10. *Are there any other factors, circumstances or defences the court or relevant authority will take into account when establishing liability and the amount of damages?*

Taking into consideration other factors depends on the legal basis on which the applicant’s liability is sought/established. In the scenario of a reversal of a first instance decision (Article 1398 JC), the liability regime is very strict.

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(31) Cass., 23 June 1981, *Pas.*, 1981, I, p. 12; Cass., 15 March 1985, *J.T.*, 1986, p. 8; Cass., 23 December 1992, *Pas.*, 1992, I, p. 1406; Cass., 13 April 1995, *J.T.*, 1995, p. 649; Cass., 13 October 2008, R.G. No. C.06.0562.F, available on [www.cass.be](http://www.cass.be); Cass., 13 May 2009, *A.M.*, 2009, p. 384; Cass., 5 May 2011, *R.G.D.C.*, 2012, p. 249; Antwerp Commercial Court, 12 December 2014, R.G. No. A/14//02415, p. 8, available on [www.ie-forum.be](http://www.ie-forum.be); Brussels Court of Appeal, 16 June 2016, R.G. No. 2011/AR/3011, p. 14, available on [www.ie-forum.be](http://www.ie-forum.be); Mons Court of Appeal, 18 January 2019, R.G. No. 2016/IC/51, *unpublished*, p. 7.

(32) *Doc. parl.*, Ch. repr., sess. ord. 2006-2007, n° 51-2943/001 et n° 51-2944/001, pp. 28 and 29; Cass., 13 May 2009, *Pas.*, 2009, I, p. 1167.

In the scenario at stake here (see “Scope of this study question” in §11 of Study Guidelines) and under the majority case law (see Question 1 above), the application of the common law of torts based on the limited notion of “fault” as negligence or abuse allows the judge to take all circumstances into consideration. The same applies if the judge would adopt the idea of the fault in its meaning of an illicit act (i.e. the breach of a statutory provision).

This applies not only for assessing whether asking for and/or enforcing the PI was a fault or an abuse, but also for verifying the causal link and the extent of the damage.

Further, the common law of torts provides for some scenarios where there is no liability at all because of a *force majeure*, an insurmountable error, a constraint, a situation of absolute necessity, the order of the authority, etc.

Consideration will also be given to the rules under which the liability can be shared when a third party and/or the defendant is also liable for the damage, or under which the defendant must undertake reasonable steps to mitigate their damage.

11. *Are there any special circumstances in particular cases, such as SEP/FRAND litigation or pharma/biotech disputes? Please comment.*

## **EXECUTIVE SUMMARY**

NO. Belgian law does not provide for specific liability rules in SEP/FRAND or pharma/biotech disputes. However, in the pharmaceutical sector, Articles 35ter, §5, and 35ter/1, §8, of the Act of 14 July 1994 allow postponement of the (bio) reference reimbursement system if a generic’s or biosimilar’s market entry is legally challenged. If a final court decision later authorises the generic’s or biosimilar’s commercialisation, then additional costs incurred by compulsory health insurance due to the postponement must be borne by the innovator company. This provision has not been further implemented by Royal Decree, nor has it been applied in case law.

NO.

In the pharmaceutical context, reference can be made to Articles 35ter, §5, 4<sup>th</sup> section and 35ter/1, §8, 4<sup>th</sup> indent, of the Coordinated Act of 14 July 1994 on compulsory insurance for medical care and benefits (“*Act of 14 July 1994*”), which relate to the application of the so-called (bio) reference reimbursement system.

The (bio) reference reimbursement system entails a combination of pricing-reimbursement decreases for (biological) medicinal products whose main active substance is not or no longer protected by a patent or SPC. This system is in principle applied if, on the first day of the prior month, a generic or biosimilar medicinal product containing the same active substance (or combination of active substances) is included on the List of reimbursable medicines and is effectively available on the Belgian market (Articles 35ter, §1 and 35ter/1, §1 Act of 14 July 1994).

However, the application of the (bio) reference reimbursement system can be postponed if the right to commercialise the generic or biosimilar medicinal product is challenged on the grounds of alleged patent infringement or infringement of the period of data protection, and if proof of this challenge is submitted to the National Institute for Health and Disability Insurance (“NIHDI”) at least 20 days before the entry into force of the new reimbursement basis, by means of a copy of the writ of summons/court claim initiating the preliminary injunction or cease-and-desist action. In such a case, the application will be postponed from receipt of the writ of summons/court claim and until an enforceable court decision has been made that allows for the commercialisation of the concerned generic or biosimilar, or until another generic or biosimilar is included in the List of reimbursable medicines and is effectively available.

In this context, Articles 35ter, §5, 4<sup>th</sup> section and 35ter/1, §8, 4<sup>th</sup> indent, of the Act of 14 July 1994 stipulate that the additional costs for the compulsory insurance for medical care, incurred as a result of an undue postponed application of the (bio) reference reimbursement system, are borne by the company responsible for the innovative medicinal product, if a final court decision ultimately authorises the commercialisation of the concerned generic or biosimilar product. The King is mandated to develop the detailed rules applicable in this regard. To the best of our knowledge, this provision has not been further implemented by Royal Decree, nor are there any precedents applying this provision.

#### c. POSSIBLE BONDS AND GUARANTEES FOR SECURING A PI

12. *Does your law or case law establish any specific standards or requirements for a court relevant authority to request a bond, a security or undertaking to compensate a defendant? Please comment.*

#### **EXECUTIVE SUMMARY**

Belgian law does not establish specific standards or requirements for courts to impose a bond, security, or undertaking to compensate a defendant. However,

different provisions grant the Belgian courts discretionary power to require such measures depending on the circumstances:

- Counterfeiting seizures: Article 1369*bis*/3, §1, JC allows the court to impose a bond when granting a seizure in counterfeiting matters to ensure compensation for potential damages suffered by the defendant.
- Provisional measures in IP cases: Article 1369*ter*, §2, JC provides that courts may require a suitable security when ordering provisional measures related to IP rights.
- Injunctions in summary proceedings: Article 1039 JC permits the courts to condition the granting of an injunction upon the posting of a bond.
- General provisional measures: Article 19, 3<sup>rd</sup> indent, JC does not explicitly mention the possibility of imposing a bond, but legal doctrine considers that the courts retain the discretion to do so.

Additionally, Article 851 JC establishes a *cautio judicatum solvi* requirement, allowing the Belgian courts to demand a financial guarantee from foreign applicants who lack sufficient assets in Belgium, unless an international treaty provides for an exemption (*e.g.*, EU-nationals by virtue of Article 18 TFEU). This provision was interpreted by the Constitutional Court (11 October 2018) and the Court of Cassation (10 March 2023) to apply regardless of nationality, where the applicant does not have adequate assets in Belgium. Unlike the four judicial guarantees mentioned above, this exception applies only upon request and covers not only damages but also legal costs.

Under Belgian law and case law, there are *no specific standards* or requirements for a court relevant authority to require a bond, a security or undertaking to compensate a defendant. Depending on the type of measure ordered by the court, different legal provisions apply, but they establish equivalent rules. According to Article 1369*bis*/3, §1, JC, when granting a request for seizure in counterfeiting matters, the court may require the applicant to lodge an appropriate bond or an equivalent to ensure compensation for any loss suffered by the defendant. The court has sovereign discretion as to whether to impose the bond/guarantee,<sup>(33)</sup> the purpose of which is to enable the defendant to be compensated for any prejudice they may suffer as a result of the seizure order granted. As for the seizure in counterfeiting matters, when ordering provisional measures applied to IP rights, the court may order the applicant to deposit a suitable

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(33) N. SOMERS, *Gerechtigd recht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, 2020, pp. 116 and 117; Gent Commercial Court, 16 February 2009, *I.R.D.I.*, 2009/4, p. 352.

bond or an equivalent to cover any damage suffered by the defendant (see Article 1369<sup>ter</sup>, §2, JC).

Moreover, Article 1039 JC provides that in summary proceedings, a court may make the enforcement of an injunction conditional on the posting of a bond. In contrast to the provisions above, Article 19, 3<sup>rd</sup> indent, JC does not expressly provide that a court may order a bond to be provided when ordering a provisional measure: “*the court may, at any stage of the proceedings, order a preliminary measure either to investigate the claim or to settle an incident relating to such a measure, or to provisionally settle the situation of the parties (...)*”. However, legal doctrine holds that, also in this case, the court may also require a party to provide a bond, until a decision is made on the merits.<sup>(34)</sup>

In all the scenarios explained above, the bond of guarantee may be ordered by the court at its discretion or upon request by one of the parties involved. It is an option, not an obligation and the amount secured will aim solely to compensate the defendant for the damage incurred.

In addition to the above-mentioned provisions that apply to all applicants and defendants, Article 851 JC provides for a dilatory exception. This exception’s purpose is to protect Belgian legal subject against financial losses resulting from an unfounded lawsuit brought by a person not residing in Belgium and who cannot guarantee with assets in Belgium the payment of costs and damages that they would be ordered to pay.

Following the Constitutional Court’s judgment on 11 October 2018, and the Court of Cassation’s judgment on 10 March 2023, Article 851 JC should be interpreted as allowing the exception to be invoked against any applicant, regardless of nationality, who lives or resides abroad and does not have sufficient assets in Belgium to cover the financial consequences of a potential negative court decision, unless an international treaty exempting them from providing a bond applies.

As indicated, this exception does not apply in cases where States have stipulated in conventions that their nationals are exempt from the obligation to provide a bond *judicatum solvi*. This is for instance the case for the contracting States of the Convention on civil procedure of the Hague Conference on Private International Law. Article 17 states that “*No security, bond or deposit of any kind, may be imposed by reason of their foreign nationality, or of lack of domicile or residence in the country, upon nationals of one of the Contracting*

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(34) N. SOMERS, “Afdeling II. Voorlopige maatregelen toepasselijk op intellectuele eigendomsrechten”, in *Gerechtigd recht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, 2020, pp. 147 and 148.

*States, having their domicile in one of these States, who are plaintiffs or parties intervening before the courts of another of those States”.*

The *cautio judicatum solvi* should also be applied in a non-discriminatory manner in accordance with the principles established by EU law and in particular Article 18 of the Treaty on the Functioning of the European Union (hereafter “TFEU”). Indeed, Article 18 TFEU (former Article 12 TEC) prohibits any discrimination on grounds of nationality.

Finally, in contrast to the scenarios described above, this exception, known as the *cautio judicatum solvi*, will only be ordered if requested and will not only cover the damages but also the costs of the legal proceedings. When requested, the court must grant the *cautio*, unless the applicant *against whom the cautio is requested* can demonstrate that they have sufficient immovable property in Belgium or provide a pledge (see Article 852 JC).

13. *According to your law or case law, is the setting of a bond mandatory or discretionary? Please comment.*

As provided under Question 12, the setting of a bond is not in principle mandatory and is left to the court’s discretion. However, the setting of a bond will be mandatory when it is requested by the defendant under the *cautio judicatum solvi* regime *and* the applicant is established in a jurisdiction outside the EU or in a country that has not concluded a reciprocal agreement with Belgium on the enforcement of judgments, unless the applicant can demonstrate having sufficient assets in Belgium to cover any subsequent award of damages.

14. *Does it matter whether a PI is granted in an ex parte or an inter partes proceeding? Please comment.*

NO.

Whether a PI is granted in the context of *ex parte* or *inter partes* proceedings does not affect the rules related to the bond. The difference will be a procedural one: depending on the nature of the measure sought or the degree of urgency, the procedure will be either *ex parte* or *inter partes*.

For example, counterfeit seizure proceedings will start with an *ex parte* application and when the matter is extremely urgent, the summary proceedings will be *ex parte*. On the other hand, if provisional measures are requested based on Article 19, §3, JC, then this will normally occur in an *inter partes* proceedings.

15. Does your law or case law provide for any specific standards for the amount of the bond to be determined, or otherwise establish a pre-set amount? Please comment.

NO.

16. Does your law or case law also assess and balance the degree of harm to a defendant in case a PI is granted?

In Belgian PI litigation, the courts are tasked with balancing interests when deciding whether to grant a preliminary injunction. A PI judge will consider the proportionality of the injunction, weighing the impact on the alleged infringer against the need to protect the IP rights holder. This includes evaluating the economic consequences and potential disruption to the alleged infringer's business. Even the interests of third parties and the public may be taken into account, such as Belgian patients and/or the Belgian social security system in pharmaceutical PI cases. The Belgian courts have significant discretion in balancing these factors, ensuring that the decision to grant or deny a PI is fair and equitable given the circumstances of the case.

17. Does your law or case law allow courts to accept a “counter-guarantee” from the defendant to suspend a PI? If so, in which circumstances? Does it depend on the consent of the applicant? Are there any differences in special cases, such as in SEP/FRAND litigation or pharma/biotech disputes?

Only the Benelux Convention on Intellectual Property (“BCIP”), applicable to Benelux trademarks and designs (as a reminder, there are no “Belgian” trademarks or designs), expressly provides for the possibility of suspending a PI in return for the defendant's payment of a “counter-guarantee”. In this respect, Article 2.22.3.c provides that:

*“Insofar as not provided for by national law and at the request of the proprietor of a trademark, the courts may, under this provision, issue an interlocutory injunction against the alleged infringer or against an intermediary whose services are used by a third party to infringe a trademark right, in order to (...) make continuation of the alleged infringements subject to the lodging of guarantees intended to ensure the compensation of the proprietor of the trademark”.*<sup>(35)</sup>

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(35) Article 3.18.3.c BCIP reproduces the same requirement for Benelux designs.

Other applicable legislation on IP rights does not expressly provide for such a possibility, but it does not appear to be excluded *a priori*.

To our knowledge, whether it is expressly provided for by law, this possibility has never been applied by the courts.

For the sake of completeness, the Group points out that a PI is only granted after a balancing of the interests involved, considering the circumstances of the case. When proceedings are adversarial, it is therefore not out of the question that the defendant's behaviour and, where applicable, some of the undertakings given by the latter during the proceedings, may be taken into account in deciding not to grant or, where applicable, to suspend a PI. However, to our knowledge, the offer of a counter-guarantee has never been used to refuse or suspend a PI.

## **II) Policy considerations and proposals for improvements of your group's current law**

18. *Could your Group's current law or practice relating to the requirements for compensating damage suffered by the defendant and related topics be improved? If yes, please explain.*

YES. See the answers to the questions below.

19. *Could any of the following aspects of your Group's current law relating to the requirements for compensating damage suffered by the defendant be improved? Please explain:*

- a. The existence or not of liability;
- b. The nature of such liability and limits thereof;
- c. The possibility of determining bonds and guarantees for securing a PI, and/or counter-bonds.

## **EXECUTIVE SUMMARY**

While liability for wrongful PIs is not disputed under Belgian law, the applicable liability regime lacks clarity. Three possible legal bases are debated at present:

- General fault-based liability under Article 6.5 CC (formerly Article 1382 Old CC), considering the dual statutory notion of fault. It is reminded that a fault may also consist in an unlawful behaviour. In this case, an IP rights

holder could thus be liable, under Article 6.5 CC for having unlawfully restricted the defendant's economic freedom (Articles II.2-II.4 CEL). This approach aligns with risk-based liability principles, holding right holders accountable for the economic harm caused by an unjustified PI. However, Belgian case law until now often requires the applicant's negligence or abuse (i.e., the other concept of fault) to be demonstrated, making compensation complex in practice.

Article 1398 JC, which establishes strict liability but currently applies only when a PI is reversed on appeal or in third-party opposition proceedings. Some scholars argue that this provision should be extended to cover cases where a PI remains in force but is later contradicted on the merits.

- Articles 1369*bis*/3, §2, and 1369*ter*, §3, JC, which grant the courts a discretion to order compensation when a PI is revoked or ceases to apply. The interpretation of these provisions remains inconsistent, with some courts favouring strict liability and others requiring fault.

The majority position within the Group is that liability should not depend on proving negligence or abuse. Instead, the right holders should bear responsibility for the risk inherent in enforcing a PI, even if they acted prudently. Alternatively, Article 1398 JC could be interpreted more broadly, or specific provisions for IP-related provisional measures should be clarified – either through Supreme Court jurisprudence or legislative intervention.

Furthermore, the use of bonds and counter-bonds should be reconsidered. While bonds remain discretionary, they should be imposed more frequently to ensure a balanced approach to provisional measures. Some members of the Group also advocate for the increased use of counter-bonds in favour of IP rights holders. Finally, the strict liability regime under Article 1398 JC may require reassessment to ensure coherence and fairness in the legal framework governing PI enforcement in general.

YES.

### **Sub-questions a) and b)**

While the principle of some kind of liability of the IP rights holder in the scenario considered here (a PI contradicted on the merits) is generally not under discussion in Belgium, legal certainty about the *applicable liability regime* would benefit our country's current law. A liability regime with sufficient flexibility as required by the ECJ in the *Mylan* judgment is needed.

Which liability regime should apply in Belgium is under discussion in the Group (see the answer in Question 1).

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Currently, three main legal grounds are considered as possible, but there is no unanimity.

*An important preliminary remark:* there is a general agreement that these three grounds are subject to common liability law for the surplus, which means *inter alia* that all exoneration causes can apply and that there can be a sharing of liabilities (notably between the IP rights holder and the defendant). Such flexibility and consideration for all circumstances of the case comply with general requirements under the Enforcement Directive as confirmed by the ECJ in the *Mylan* judgment.

- (i) **The first ground is the broader concept of “fault”** (“faute”/“fout”) that exists under general Belgian liability law. The statutory concept is two-fold: the fault consists of either an objective illegal behaviour or a negligence/abuse. According to an author, followed by part of the Group, the fault consists of having objectively and illegally restricted the defendant’s economic freedom (Articles II.2 to II.4 CEL) (the PI is reversed on the merits) and this should as such be considered as an objective illegal behaviour. Such an illegal restriction appears always present in a situation where a PI (which is provisional by its very nature) was imposed but the infringement of a valid IP right is not confirmed in the proceedings on the merits. This approach is in line with the idea of a liability based on the risk taken by the IP rights holder in having enforced the PI. Another part of the Group criticises this approach as being too severe. Others and the current case law (see the answer to Question 1) consider that the defendant should establish a negligence or abuse, by the IP rights holder in using the PI system and the judicial remedies. A part of the Group criticises this latter approach as being too lenient in favour of the IP rights holder because establishing a negligence or an abuse generally turns out to be very complex in practice, when not impossible most of the time.
- (ii) **The second possible ground is the application of Article 1398, first sentence, JC.** As explained under Question 1, this legal provision currently applies only where a PI has been granted in first instance and enforced by the IP rights holder, but this PI is reversed on appeal ((third-party-)opposition or appeal), and in respect of a PI ordered under Article 19(3) of the JC. Under this risk-based liability regime, the party enforced the PI at its own risk and must repair the damage caused by this enforcement. For a part of the Group, the current restrictive interpretation of this legal provision is unsatisfactory because it creates an unjustified difference of treatment, being not applicable to the situation where the PI is maintained (even on appeal) but the court judging later on the merits determines that there has been no infringement of a valid IP right. In this approach, Article 1398, *first sentence*, JC expresses a more general principle and should receive a broader scope of application.

**(iii) The third possible ground could be found in the statutory provisions** (notably Articles 1369*bis*/3, §2, and 1369*ter*, §3, JC) which are specific to intellectual property litigation. Whether these provisions should entail a risk-based liability regime or not, is again under discussion within the Group (see (i)). A clarification of the meaning of such provisions, and an extension of their scope to cover trade secrets related PIs would be welcome.

The majority of the Group believes that whatever the ground favoured, the liability of the right holder should not be dependent upon the demonstration of negligence; in other words, there should be a place for compensation even when the right holder proved to be prudent, because he or she took the risk of enforcing the PI while knowing that it could be ultimately reversed, lifted or contradicted.

However, a minority of the Group considers that this approach is too severe and approves current dominant case law making liability dependent upon negligence, if not an abuse of its rights, by the IP rights holder.

The majority of the Group considers that the concept of fault under ground (i) should then be understood as the objective illegal restraint of the defendant's economic freedom, also in the absence of imprudence or abuse of the PI system. Alternatively, ground (ii) could be interpreted more extensively to cover all legal proceedings where provisional measures were enforced but the infringement of the IP right is not confirmed by the judge ruling on the merits. Or the existing Articles 1369*bis*/3, §2, and 1369*ter*, §3, JC (ground (iii)) should be clarified, either by the Supreme Court, or by the legislator, to mention that the defendant is entitled to compensation unless his or her prejudice is attributable, totally or in part, to their own behaviour, and subject to other usual non-contractual liability rules.

Given these considerations, the question then arises whether the application of the very strict and full liability general regime of Article 1398 JC in the scenarios considered until now in the case law, namely when the first decision is reversed on appeal (appeal *sensu stricto* or third-opposition), is perhaps too severe (because it can be understood as excluding the moderating rules of the general non-contractual liability) in comparison to the considered scenario here (a PI contradicted on the merits) and the solution submitted above. This illustrates the need to reconsider the whole matter in the general regime of provisional enforcement.

#### **Sub-question c)**

Finally, a part of the Group believes that *bonds and guarantees* prior to enforcement of provisional measures should be imposed more frequently than they

currently are. The Group believes that the imposition of such measures should be done in a flexible manner with consideration of possible damages for both parties. A part of the Group considers that counter-bounds should also be considered more often in favour of the IP rights holders.

20. *According to the opinion of your Group, what is the policy rationale for compensating damages suffered by the defendant in case of a PI?*

The policy rationale for compensating damages suffered by the defendant in case of a PI (later “reversed” on the merits) is to safeguard the defendant’s economic freedom and, at least, to prevent abuse of the PI system. A majority of the Group considers that the IP rights holder’s liability should be based on the risk that the IP rights holder took when enforcing the PI. A minority of the Group considers that only negligent or abusive behaviours should be penalised, and prudent IP rights holders should never have to compensate damages caused by PIs.

21. *Are there any other policy considerations and/or proposals for improvement to your Group’s current law falling within the scope of this Study Question?*

NO.

### **III) Proposals for harmonisation**

22. *Do you believe that there should be harmonisation in relation to the requirements for compensating damage suffered by Defendant and related issues, as well as in connection with the setting of bonds or guarantees?*

YES. See answers to the questions below.

23. *Should the applicant of a PI be held liable for defendant’s damages in case a PI is lifted or reversed? Please comment.*

YES, where the question is to know whether the applicant should be able to be held liable for the damage suffered by the defendant when a PI is lifted or reversed. As to knowing whether the applicant should necessarily and automatically be held responsible for such damage, see our answer to Question 24 below.

24. *Should a defendant need to request the court or relevant authority to decide on the liability of the applicant (that is, a court will not automatically issue such a finding upon revocation of the PI)? Please comment.*

YES. The defendant should expressly request the court or relevant authority to decide on the liability of the applicant. Indeed, it is necessary to limit the finding of liability to cases where the defendant suffered damages as a result of the PI. An automatically issued finding of liability is therefore not desirable.

25. *Should there be any particular time or moment for the defendant to request compensation?*

YES, to ensure that claims for compensation are made at a time when the legal situation is, if not certain, at least clearer (and thus to reduce ambiguity for all parties concerned), the defendant should only be allowed to claim damages after the PI has been lifted, reversed or contradicted by a latter decision. For the sake of completeness and in view of the harmonising purpose of this section, the Group also notes that, although not directly relevant to the question asked, attention should also be paid to the procedural issue concerning the applicable time limit for the defendant's claim. If it is agreed that the defendant must wait until the disputed PI has been lifted, reversed or contradicted by a subsequent decision before being entitled to claim damages, then it is necessary to ensure that the defendant's right to act in this regard will not have been extinguished in the meantime under national statutes of limitations.

26. *Should an applicant benefit from an exemption or safe harbour from any liability based on the fact that it holds a valid IP right and is reasonably exercising such lawful right? Please comment.*

NO.

According to the majority of the Group, establishing such an exemption or "safe harbour" would inherently create a risk of abuse, as it would allow an applicant to evade liability for the wrongful enforcement of an IP right which is inherently at risk of being invalidated and is invalidated actually afterwards. Granting immunity solely because of holding a formally valid IP right and exercising it in a manner deemed "reasonable" would disproportionately favour the IP rights holder at the expense of the defendant's economic freedom and legal certainty.

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Moreover, such a broad exemption would undermine the fundamental balance between the rights of IP holders and those of alleged infringers, as enshrined in the Enforcement Directive and interpreted by the ECJ, particularly in *Mylan*. The ability to claim compensation for wrongful provisional measures is an essential safeguard against strategic litigation tactics and overreach in IP enforcement.

Of course, an applicant should remain entitled to invoke the general principles of liability law, including defences available under the applicable law, such as *force majeure*, the defendant's contributory negligence, or the absence of causal link. However, these exceptions should be assessed on a case-by-case basis rather than through a categorical exemption that would preclude judicial scrutiny of potentially abusive enforcement actions.

27. *Should there be any differences in assessing the applicant's liability if the dismissal of the PI is based on a finding of invalidity or of non-infringement? Please comment.*

NO.

a. NATURE OF LIABILITY AND LIMITS THEREOF

28. *Which should be the nature of the applicant's liability if the PI is lifted, and/or the applicant's claims are ultimately dismissed?*

- (a) Strict liability (that is, the applicant is liable for damages irrespective of proof of negligence, recklessness or intent to harm).
- (b) Liability will depend on proof of negligence, recklessness or intent to harm.
- (c) Liability will depend on proof of intent to harm or recklessness only.
- (d) Liability will depend on proof of intent to harm only.
- (e) Other (Please comment).

The majority of the Group is in favour of solution (a) (strict liability), it being understood that (i) usual causes for exoneration of liability should be taken into account, in particular the "invincible error" (the applicant could absolutely not have known, at the time that they enforced the PI, that the latter was groundless), (ii) the defendant has to prove the causal link between the enforcement of the PI and the harm suffered, and (iii) one should take into account any negligence by the defendant that resulted in the worsening of their harm.

29. *Should a court or relevant authority take into account the conducts of the defendant (e.g. if the defendant enabled the injury to occur or failed to take reasonable measures to avoid or mitigate the injury and thereby contributed to its occurrence) or any other particular factors? Please comment.*

To answer this question, a distinction must first be made between the event giving rise to the applicant's liability and the obligation to pay compensation that may then be incumbent upon them.

The conducts of the defendant should have no impact on the event likely to give rise to the applicant's liability, which, according to the majority of the Group, should exist simply because the applicant takes the risk of executing the PI. Once the event giving rise to liability has been established, the conducts of the defendant should, on the other hand, be taken into consideration in deciding the extent of the applicant's obligation to pay compensation and, correlatively, the compensation (and therefore the damages) to which the defendant is entitled, which may be adjusted in the event of the defendant's shared liability.

The comment above must be read in conjunction with – and subject to – what is set out in Question 30: if the conducts of the defendant are such that they exclude any causal link between (i) the injury that the defendant claims to have suffered and (ii) the enforcement of the PI by the applicant, then the latter should not be held liable to pay compensation.

30. *Should the causal link between the damages being claimed, and the issuance of the PI be assessed? Please comment.*

First, echoing the remark made under Question 8, the Group notes that the question lacks some clarity. As formulated, the question seems to refer only to the granting (“issuance”) of a PI and not strictly speaking to its enforcement. However, the question of the applicant's liability and, where applicable, the defendant's compensation, should in principle only be considered in the event of the enforcement of a granted PI.

Having made this clarification, the Group considers that YES, for the applicant to be required to compensate the damage claimed by the defendant because of a PI's enforcement, there must necessarily be a causal link between the enforcement of the PI in question and the damage claimed. Thus, if the damage, in whole or in part, would have occurred even in the absence of the PI's enforcement, for example due to negligence on the part of the defendant or even a third party, the applicant's obligation to compensate should be adjusted accordingly.

31. *Should there be any limits to the damages to be compensated?*

YES, in the sense that the damages that may be awarded must be strictly limited to the *actual* harm suffered by the defendant as a result of the applicant's enforcement of the contested PI. Therefore, no damages should therefore be awarded beyond this amount.

32. *If YES, please indicate the ones that apply:*

- (a) Damages should be limited to the actual losses of the defendant or lost profit;
- (b) Damages should be limited to by the amount of guarantee or security provided by the applicant;
- (c) Damages should also include legal costs incurred during litigation.
- (d) Other. Please Comment
  - a) NO. As indicated in Question 31, damages must be able to cover the entirety of the real harm suffered by the defendant, including, for example, any non-material damage that would have resulted for him or her from the contested PI's enforcement.
  - b) NO, for the same reasons as those mentioned above: damages must be able to cover the entirety of the real harm suffered by the defendant because of the PI's enforcement.
  - c) YES, provided that these costs are reasonable and proportionate, in particular for avoiding excessive imbalances between parties depending on whether they use legal counsel with higher or lower rates.
  - d) N/A.

33. *Should there be any other factors, circumstances or defences the court or relevant authority should take into account when establishing liability and the amount of damages? Please comment.*

NO.

34. *Should there be any special circumstances in particular cases, such as SEP/FRAND litigation or pharmaceutical/biotech disputes? Please comment.*

YES.

The majority of the Group believes that it would make sense to harmonise liability regimes for harm to healthcare systems following the enforcement of a

PI that is later lifted or reversed (such as through a resulting postponement in the decrease of prices – see response to Question 11 above).

b. POSSIBLE BONDS AND GUARANTEES FOR SECURING A PI

35. *Should there be any specific standards or requirements for a court or relevant authority to request a bond, a security or undertaking to compensate a defendant? Please comment.*

YES, in the Group's opinion, certain parameters could be considered by the court or relevant authority to request a bond or a security. For instance, the court might consider whether the applicant has seizable assets within the court's jurisdiction. If not, the court could then order that a bond or a security be provided. In any case, the court should retain discretionary power in deciding whether to impose a bond or a security.

36. *In your group's opinion, the setting of a bond should be:*

- (a) Mandatory;
- (b) Discretionary;
- (c) Other. Please comment.

(b): The Group is of the opinion that the setting of a bond should be discretionary.

37. *Should it matter whether a PI is granted in an ex parte or an inter partes proceeding? Please comment.*

NO.

38. *Should there be any specific standards for the amount of the bond to be determined, or otherwise should a pre-set amount be established? Please comment.*

If the court considers it necessary to set a bond, then it is advisable for the amount to be determined in such a way as to cover at least the reasonably expected legal costs. Should the judge, in light of the circumstances of the case, consider it necessary to set a bond exceeding the defendant's reasonably expected legal costs alone, then the amount likely to be awarded should in any case be reasonable and proportionate to the *actual* damage likely to be suffered by the defendant.

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39. *Should courts be allowed to accept a “counter-guarantee” from the defendant to suspend a PI? In which circumstances? Please comment.*

YES, in all cases, considering the specific circumstances of the case and after a fair balance of the interests at stake.

40. *Should it depend on the consent of the applicant? Please comment.*

NO. The possibility of a counter-guarantee should only be granted at the court’s discretion if the court considers it reasonable and proportionate given the circumstances of the case.

41. *Please comment on any additional issues concerning any aspect that you consider relevant to this Study Question.*

N/A

42. *Please indicate which industry sector views provided by in-house counsels are included in your Group’s answers to Part III.*

An in-house counsel from a company operating in the food and drink sector has participated in the drafting of this report and generally supports the Group’s position.