



More room for the bypassing of patent rights by the Russian Government in the wake of the pandemic health emergency

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On 31 December 2020, the Russian Government issued order no. 3718-p of 31 December 2020 (the Order) exercising for the first time its right to grant the right to use a patent without the consent of the holder, as provided by article 1360 of the Russian Civil Code, which permits it in the interest of defense and security, and is applicable to inventions, industrial models and industrial designs.

It is not easy to find a correlation of defense and security in strict sense with the patents used to make medicines for the treatment of COVID-19, which were the object of the Order. Be it as it may, the Russian government referred to that provision to allow the Russian company Pharmasintez to use of Gilead's patents in the country Pharmasintez.

Gilead, a US company and the owner of the patents concerned challenged the Order before the Russian courts, and the hearing is scheduled for 27 May 2021. Meanwhile, an amendment to article 1360 of the Civil Code proceeded before Parliament via fast track procedure, was adopted in April 2021, and is effective as from 11 May 2021.

The new version of article 1360 of the Civil Code says that, in case of absolute necessity/emergency related to State defense and security or protection of citizens' life and health, the Russian Government may take a decision on the use of a patented invention, utility model or industrial design without the authorization of the rightholder.



The amendment expressly adds life and health protection as grounds for the Government use of the patent without the proprietor's consent. There is also a second part of the new version of article 1360 of the Civil Code, which empowers the Government to approve the method of compensation of the proprietor, its calculation and the payment procedure.

Besides, the new text of the article replaces the provision whereby the Russian Government "... *may grant the right to use the invention...*" with that whereby the Russian government "... *may take a decision on the use of the invention...*". As a matter of interpretation, it is unclear if this part of the amendment means that after 11 May

2021 the invention, utility model or industrial design may be used in emergency cases only by the Russian Government itself, and the grant of the right to use IP rights to third parties is no longer permitted under article 1360 of the Russian Civil Code.

Whilst the consequences of the legislative amendment on the ongoing litigation between Gilead and the Russian Government (and Pharmasintez) remain to be unveiled, it is undeniable that the concept of health protection is very broad. Administrative and political discretion seems to have been broadened accordingly, unfortunately at the cost of legal certainty.



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