DLA PIPER

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CLIENT ALERT

THE COMMISSION FINES SERVIER AND FIVE GENERIC COMPANIES FOR CURBING ENTRY OF CHEAPER VERSIONS OF CARDIOVASCULAR MEDICINE

The European Commission has imposed fines totalling €427.7 million on the French pharmaceutical company Servier and five producers of generic medicines – namely, Niche/Unichem, Matrix (now part of Mylan), Teva, Krka and Lupin – for concluding a series of deals all aimed at protecting Servier's bestselling blood pressure medicine, perindopril, from price competition by generics in the EU. Through a technology acquisition and a series of patent settlements with generic rivals, Servier implemented a strategy to exclude competitors and delay the entry of cheaper generic medicines to the detriment of public budgets and patients in breach of EU antitrust rules.

Perindopril is a blockbuster blood pressure control medicine and used to be Servier's best-selling product. Servier's patent for the perindopril molecule expired, for the most part, in 2003. The Commission found that in 2004 Servier acquired a protected technology just to stop the generic producers that were preparing their market entry. Servier never used the acquired technology.

The Commission also found that Servier settled the challenges brought by the generic producers against its patents. The Commission held that the settlements were not ordinary transactions where two parties decide to settle a patent claim outside of court to save time and costs. On the contrary, the generic companies agreed to abstain from competing in exchange for a share of Servier's rent.

According to Commission the Servier misused such legitimate tools by shutting out a competing technology and buying out a number of competitors that had developed cheaper medicines, to avoid competing on their own merits. This amounted to both an infringement Article 102 of the Treaty on the Functioning of the European Union – TFEU that prohibits the abuse of a dominant market position and an infringement of Article 101 TFEU that prohibits anti-competitive agreement. Each of the settlements between Servier and its generic competitors was considered an anti-competitive agreement.

Servier was fined by the Commission €331 million for both the infringements while the generic manufacturers were imposed lower fines only for the infringement of Article 101.

COMMENT

For various years the Commission has been monitoring patent settlements in order to identify settlements which could be potentially problematic from an antitrust perspective – namely those that limit generic entry against a value transfer from an originator to a generic company.

The case at hand was the third case where the Commission sanctioned pharmaceutical companies over delaying the release of cheaper drugs.

The first case came in June last year, when the regulator levied fines of €93.8 million on Danish pharmaceutical company Lundbeck. It also imposed penalties totalling €52.2 million on four generic drugmakers.

In December 2013, it also fined the Dutch subsidiaries of Johnson and Johnson €10.8 million and the Switzerland's Novartis €5.5 million, for colluding with generic drugmakers to delay the sale of a cheaper version of painkiller fentanyl.

In a fourth case, the Commission is investigating settlement between pharmaceutical companies Cephalon and Teva, whereby the latter undertook to delay marketing its generic version of the branded drug of Cephalon.

In the UK the health authorities have already sued Servier. They claim that the pharmaceutical company blocked the sale of cheaper generic versions of its cardiovascular drug and thus must compensate them.

WHAT TO DO

More broadly speaking the Commission is constantly monitoring the pharmaceutical sectors. According to rumours quickly spread throughout the market, the Commission has initiated the praxis to request pharmaceutical companies to submit all the settlements signed over the past 12 months with other players of the market. The Commission deems the settlements as suspect where the deal involves money changing hands.

If you are a company intending to enter into settlement agreements you should carefully asses the antitrust risk. Settlements in the pharmaceutical sector, especially those regarding alleged patent infringements, are constantly under the scrutiny of the Commission. It also worth reviewing those already signed.

Should you have any queries or need further information please feel free to contact us.

Francesca Sutti
Partner
francesca.sutti@dlapiper.com