2. In finding that there was material 'potential competition' in existence between the Appellants and Lundbeck at the time of the Agreement, the General Court manifestly distorted the evidence in the Court's file. The Commission was required to demonstrate objectively that the Appellants had a real concrete possibility of entering the market in an economically viable manner. The evidence demonstrated that (a) such entry was not a real or concrete possibility, either objectively or in terms of economic viability, prior to the expiry of the Agreement; and (b) in the negotiations leading to the Agreement, the Appellants had no incentive to be truthful regarding their readiness to enter the market and tricked Lundbeck into agreeing both to supply its own product to the Appellants at a discounted price and making a payment to the Appellants. This in fact allowed the Appellants to enter the market immediately which crucially they could not otherwise have done. The General Court failed to take account of the key distinction between the Appellants and the other generic manufacturers who entered into agreements with Lundbeck, which is the Appellants had no realistic and concrete possibility of obtaining an marketing authorization within the timeframe of the Agreement.

3. In any event, no penalty should have been imposed on the Appellants. At the time of the Agreement, the Commission's Guidelines did not treat such an agreement as constituting an infringement 'by object'. It was a novel case in which Lundbeck had prima facie protection from competition in the form of its patents and regulatory barriers where the Appellants in fact improved their ability to compete with Lundbeck on the relevant market, by obtaining discounted supplies of Lundbeck's product which the Appellants could label as their own. The Appellants' penalty ignored the novelty of the infringement and the Commission's unreasonable delay: notice of the investigation could easily have been provided to the Appellants more than five years prior to the actual notice.

Appeal brought on 18 November 2016 by Generics (UK) Ltd against the judgment of the General Court (Ninth Chamber) delivered on 8 September 2016 in Case T-469/13: Generics (UK) v Commission

(Case C-588/16 P)

(2017/C 030/28)

Language of the case: English

Parties

Appellant: Generics (UK) Ltd (represented by: I. Vandenborre, advocaat, T. Goetz, Rechtsanwalt)

Other party to the proceedings: European Commission

Form of order sought

The appellant claims that the Court should:

— annul the judgment or take such other action as justice may require.

Pleas in law and main arguments

1. **First plea-in-law**. The Court has failed to demonstrate that the Settlement Agreements constitute infringements 'by object', within the meaning of the Cartes Bancaires judgment. In particular, the Court does not explain how the Settlement Agreements reveal in themselves a sufficient degree of harm to competition without the need to assess their actual and potential effects. Instead, the Court expresses doubt and uncertainty in relation to critical points of the analysis of the Settlement Agreements.

2. **Second plea-in-law**. The evidence supporting the Court's findings does not meet the requirement of accurate, reliable, consistent and comprehensive evidence, which this Court has identified as necessary to meet the burden of proving a 'by object' infringement.

3. **Third plea-in-law**. The Court reverses the burden of proof when it imposes a requirement on Generics (UK) to demonstrate that litigation certainly would have ensued in case of a launch at risk, and that Generics (UK) would certainly have lost in litigation, to support the legality of the Settlement Agreements.

4. **Fourth plea-in-law**. The Court failed to exercise a full review of the rejection of the applicability of Article 101(3) TFEU by the Commission.

5. **Fifth plea-in-law**. The Court erred in law by applying its powers of judicial review ultra vires in establishing a new infringement of Article 101(1) TFEU that was not formulated in the Decision and substituting its own findings for those of the Commission.

6. **Sixth plea-in-law**. The Court failed to identify clear, precise and consistent evidence to support a finding that Generics (UK) committed the alleged infringement intentionally or negligently as required pursuant to Article 23(2) of Council Regulation (EC) No 1/2003 ([1]) of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

([1]) OJ 2003, L 1, p. 1.

Action brought on 21 November 2016 — European Commission v Hellenic Republic

(Case C-590/16)

(2017/C 030/29)

Language of the case: Greek

Parties

Applicant: European Commission (represented by: Flavia Tomat and Aikaterini Kyratsou, acting as Agents)

Defendant: Hellenic Republic

Form of order sought

— declare that, as provided for in Article 258 of the Treaty on the Functioning of the European Union, by enacting and retaining in force legislation which permits petroleum products to be made available without excise duty being charged by the filling stations of the company Katastimata Aforologiton Eidon A.E. at the border posts located at Kipoi in Evros, at Kakavia and at Evzonoi, all of which are in areas bordering on third countries, specifically Turkey, Albania and the Former Yugoslav Republic of Macedonia respectively, the Hellenic Republic has failed to fulfil its obligations under Article 7(1) of Directive 2008/118/EC; ([1])

— order the Hellenic Republic to pay the costs.

Pleas in law and main arguments

1. According to the reasoned opinion of 1 September 2014 which the Commission sent to the Greek authorities, by its approval of the fact that the filling stations held by the company Katastimata Aforologiton Eidon A.E. at the border posts located at Kipoi in Evros, at Kakavia and at Evzonoi make petroleum products available on which excise duty is not charged, Greece has failed to fulfil its obligations under Directive 2008/118 concerning the general arrangements for excise duty, as Greece does not consider that making those products available constitutes actual release for consumption. The direct supply of vehicles with fuel at those filling stations constitutes release for consumption and is subject to excise duty.

2. The deviations from the basic rule that duty is due in the Member State where consumption occurs are expressly laid down by the EU legislature. The application, when petroleum products subject to excise duty are made available, of simplified procedures for export to a third country is contrary to Directive 2008/118, since it does not fall within the scope of any of the relevant provisions of the directive.

([1]) OJ 2009 L 9, p. 12.