Appeal brought on 18 November 2016 by H. Lundbeck A/S, Lundbeck Ltd against the judgment of the General Court (Ninth Chamber) delivered on 8 September 2016 in Case T-472/13: H. Lundbeck A/S, Lundbeck Ltd v European Commission

(Case C-591/16 P)

(2017/C 030/30)

Language of the case: English

Parties

Appellants: H. Lundbeck A/S, Lundbeck Ltd (represented by: R. Subiotto QC, Barrister, T. Kuhn, Rechtsanwalt)

Other parties to the proceedings: European Commission, European Federation of Pharmaceutical Industries and Associations (EFPIA)

Form of order sought

The appellants claim that the Court should:

— Set aside the Judgment, in whole or in part

— Annul the Decision in so far as it applies to the Appellants or, in the alternative, annul the fines imposed on the Appellants pursuant to the Decision or, in the further alternative, substantially reduce the fines imposed on the Appellants pursuant to the Decision;

— Order the Commission to pay the Appellants' legal and other costs of these proceedings and of the proceedings before the General Court ('GC');

— If necessary, remand the case to the GC for reconsideration in accordance with the Court's judgment;

— Take any other measures that this Court considers appropriate;

Pleas in law and main arguments

By their first plea, the Appellants submit that the GC erred in law in upholding the Commission's conclusion that the Agreements had the object of restricting competition. The GC erred in law in finding that an Agreement restricts competition by object even if it falls within the scope of Lundbeck's patents. Such agreement cannot be considered by its very nature harmful to competition, as it contains restrictions comparable to those that the patent holder could have obtained through court rulings enforcing its patents. A mere payment cannot turn an otherwise legitimate and unproblematic agreement, such as an in-scope patent settlement agreement, into a restriction of competition by object. As a result, the GUK UK Agreement, which the GC found to fall within the scope of Lundbeck's patents, should not have been held to restrict competition by object. The same conclusion applies to the other five Agreements, because the GC erred in law in qualifying them as exceeding the scope of Lundbeck's patents.

By their second plea, the Appellants submit that the GC erred in law in failing to apply the correct legal test to assess whether five of the six Agreements contained restrictions that exceeded the scope of Lundbeck's patents. The GC should have assessed whether there was a 'meeting of minds' within the meaning of Article 101 TFEU between Lundbeck and each of the Generics that the relevant Agreement(s), with the exception of the GUK UK Agreement, imposed restrictions that exceeded the scope of Lundbeck's patents. Applying this test leads to the inevitable legal conclusion that the Agreements fell within the subject-matter of Lundbeck's patents.

By their third plea, the Appellants submit that even if the GC's legal qualification that five, or less, of the six Agreements fell outside the scope of Lundbeck's patents was correct, the GC erred in law in concluding that the out-of-scope Agreements restricted competition by object. In their economic and legal context, the Agreements were not by their very nature harmful to competition and are not comparable to market sharing agreements, and the GC erred in law as it failed to assess the counterfactual.

By their fourth plea, the Appellants submit that the GC erred in law, committed a manifest error of assessment of the evidence, and gave contradictory reasons in upholding the Commission's conclusion that Lundbeck and the Generics were actual or potential competitors at the time of the Agreements, regardless of whether the Generics' products violated Lundbeck's patents. First, the GC erred in law as it disregarded the existence of legal barriers, namely Lundbeck's patents, that prevented the Generics' entry with infringing citalopram products. Second, the GC's conclusion that Lundbeck doubted the validity of its patents is vitiated by an error in law, a manifest error in the assessment of the evidence and contradictory reasoning. Third, the GC erred in law by holding that evidence dated from after the conclusion of the Agreements, but which still in many cases pre-dated the expiry of the Agreements, cannot be decisive in assessing whether the Generics were potential competitors to Lundbeck. These documents include scientific evidence that the Generics or their API producers infringed Lundbeck's patents, national courts' orders granting preliminary injunctions or other forms of relief to Lundbeck against citalopram products based on the API that some of the Generics used, and the European Patent Office ('EPO')'s confirmation of the validity of Lundbeck's Crystallization Patent on all relevant aspects, whose strength the Commission questioned. Lastly, the GC erred in law and failed to state reasons by finding that each of the Generics had real and concrete possibilities of entering the market without properly assessing whether they could do so with non-infringing citalopram.

By their fifth plea, the Appellants submit that the GC erred in law in upholding the Commission's imposition of fines on Lundbeck. First, the GC erred in law by misapplying the standard for culpability. Second, the GC erred in law in upholding the Commission's conclusion that Lundbeck could not be unaware of the anticompetitive nature of its conduct. Third, the GC violated the principle of legal certainty and non-retroactivity by upholding the imposition of more than a symbolic fine.

By their sixth plea, the Appellants submit, in the alternative, that the GC erred in law and failed to provide adequate reasoning in upholding the Commission's calculation of the fines imposed on the Appellants. The value of sales on which the fines are based includes Lundbeck's sales in certain EEA Member States in which the Generics were effectively barred from entering because they did not obtain a marketing authorization ('MA') until after the expiry of the Agreements or, with respect to Austria, because Lundbeck's citalopram compound patent was still in force during a significant part of the term of the Agreements. In addition, this case warrants the application of a lower gravity percentage, in particular since the Agreements are not comparable to cartels and their effective geographic scope was much more limited that their literal geographic scope.

Appeal brought on 23 November 2016 by Viktor Fedorovych Yanukovych against the judgment of the General Court (Ninth Chamber, Extended Composition) delivered on 15 September 2016 in Case T-346/14: Yanukovych v Council

(Case C-598/16 P)

(2017/C 030/31)

Language of the case: English

Parties

Appellant: Viktor Fedorovych Yanukovych (represented by: T. Beazley QC)

Other parties to the proceedings: Council of the European Union, European Commission, Republic of Poland

Form of order sought

The appellant claims that the Court should:

— set aside the Judgment of the General Court (Ninth Chamber, extended composition) of 15 September 2016 in Case T-346/14 to the extent particularised in the Appeal, namely paragraphs 2 and 4 of the operative part of that Judgment;

— grant the relief sought by the Appellant in the proceedings before the General Court to the extent particularised below namely:

  — to annul Council Decision (CFSP) 2015/143 of 29 January 2015 amending Decision 2014/119/CFSP ([1]) ('the Second Amending Decision');