

## **"PAY-FOR-DELAY" AGREEMENT RESULTS IN A RECORD FINE FOR BREACH OF COMPETITION RULES**

The European Commission has imposed a record fine on Denmark's second largest pharmaceutical company Lundbeck for breaching the competition rules. The fine is the largest ever imposed on a Danish company for having breached the competition rules. Besides Lundbeck which was fined EUR 93 mill., the European Commission also imposed fines on a number of other manufacturers of generic pharmaceuticals totalling EUR 52.5 mill.

According to the Commission, Lundbeck entered into an agreement in 2002 concerning the anti-depressant Citalopram with four generic competitors. According to Lundbeck, the purpose of the agreements was to protect Lundbeck's patents, but apparently they entailed Lundbeck paying the participating pharmaceutical companies to delay the market entry of a cheaper generic version of Lundbeck's anti-depressant Cipramil.

The Commission opened a case against Lundbeck in 2010 for the purpose of uncovering possible breaches of the competition rules in the form of restrictive business practices and the abuse of a dominant position, including whether Lundbeck had contributed to the delay of the introduction of the generic and cheaper citalopram into the European Market through the agreements with the generic competitors.

Lundbeck has maintained throughout the case that the purpose of the agreements was to protect the company's patents.

However, the Commission found that Lundbeck paid large sums, bought the stocks of the generic product manufacturers, destroyed the products, and offered a guaranteed profit through a distribution agreement. The Commission also refers to Lundbeck's in-house documents describing a "club" in which money was to be shared amongst the participants. Due to these circumstances, the Commission found that a serious breach of the competition rules had occurred.

When fixing the fines, the Commission took into consideration the duration of each of the breaches along with their severity. In connection with the publication of the decision, the Commission accentuated that agreements of this type are unacceptable and that they cause direct harm to the patients and the national health services which are already working on severely tight budgets. The Commission will not allow this type of anti-competitive practice, and it was on this background that the record fines were imposed on the participating companies.

Lundbeck has announced that they do not agree with the decision and expect to appeal it.

### **Our Assessment**

During the past few years, pay-for-delay agreements have received increased attention. A pay-for-

delay arrangement is characterized by a constellation where a manufacturer of generic products is being paid to stay away from a certain market.

In their pure form, such agreements constitute anti-competitive agreements in contravention of TEU, Article 81, and are considered very serious as the arrangement leads to consumers paying an extraordinary high price for the pharmaceutical product.

Just a few days earlier, the U.S. Supreme Court made a decision in a similar case concerning a pay-for-delay arrangement in the pharmaceutical industry stating that such arrangements must be thoroughly scrutinized and persecuted. Moreover, the U.S. Supreme Court rejected the notion that such arrangements are legal because of the patent rights of the pharmaceutical company.

*The U.S. Supreme Court's decision: U.S. Supreme Court, FTC v. Actavis, Inc., No. 12-416, decided June 17 2013*

*Lundbeck's decision: European-Commission IP/13/563, press release 19 June 2013*

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