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The CJEU clarifies the effects of skinny labelling
– What uncertainties remain from a Swedish perspective?

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Case Note

INTRODUCTION

Where to draw the line between the protection of new innovations within the pharmaceutical area, on the one hand, and the generic companies' right to enter the market on the other, has been subject to discussion in patent law for a long time. The innovative pharmaceutical companies' right to exclusively capitalise on their innovative research stands against the generic pharmaceutical companies' right to compete in the EU market, which will likely result in lower prices and thereby in advantages from a social economic point of view.

1. THE CONCEPT OF SKINNY LABELLING

The main rule when the national authority is assessing a generic medicine[1] for marketing approval is that the information in the package leaflets, and in the summaries of product characteristics (SmPC), must be the same as for the original medicine of reference. However, the rule is not without exceptions. A generic applicant is permitted to "carve-out" from the SmPC of the reference medicinal product any indications protected by patents; this is commonly referred to as "skinny labelling" and is regulated in the second sentence of Article 11 of Directive 2001/83.[2] The aim of the article is to facilitate the placement of generic medicinal products on the market even if individual indications or dosage forms of the reference medicinal product are patented. This exemption is a result of the allowance of so-called second medical use patents, i.e. claims protecting secondary and later uses of known and safe substances (secondary medicinal indications). The concept of skinny labelling is used to avoid the infringement of a valid second medical use patent. However, it has not been clear in which cases skinny labelling can result in a patent infringing act, due to the fact that courts across Europe have put forward different reasonings in this respect.[3] Moreover, there are no precedential Swedish cases.

2. THE CJEU PRELIMINARY RULING

Recently, the Court of Justice of the European Union (CJEU) delivered a preliminary ruling[4] clarifying the effects of performing skinny labelling in the context of the marketing authorisation procedure. The court establishes that the applicant's or holder's communication of the omittance of certain indications covered by patent from the product information must be interpreted as a request to actually limit the marketing authorisation to indications not covered by patent. The judgment must be viewed as good news to pharmaceutical companies seeking effective protection for their second medical use patents. However, considering the national context and the specific characteristics of the Swedish regulatory system, the practival results, if any, can be questioned. However, at the very least the judgment may bring us one step closer to the answer on how to assess skinny labelling issues under Swedish law.

2.1 The dispute in the national proceedings

The main question in the national proceedings concerned the practice of the Dutch authority to publish in full on its website the package leaflets and the SmPC of generic medicinal products, instead of the carved-out version. Warner-Lambert Company (WLC), a pharmaceutical company within the Pfizer group, was marketing the

[1] The term 'generic medicinal product' is defined in Article 10.2 (b) of Directive 2001/83 as "medicinal products which have the same qualitative and quantitative composition in active substances and the same pharmaceutical form as the reference medicinal product, and whose bioequivalence with the reference medicinal product has been demonstrated by appropriate bioavailability studies".

[2] Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use. Article 11 has been implemented in Chapter 3, Section 5 of the MPA's provisions on approval of medicinal products for sale etc. (LVFS 2006:11).

[3] Regarding so-called Swiss type claims, UK courts and Dutch courts have come to different conclusions: See the UK decision in Warner-Lambert Company LLC v Generics (UK) Ltd (t/a Mylan) & Anor [2018] UKSC 56, where four of the five judges, albeit for different reasons, held that WLC's second medical use claims, if they would have been deemed valid, would not have been infringed by the sale of a skinny labelled product. See the Dutch decision in Merck Sharp & Dohme Corp. v. Teva Pharma B.V. and Pharmachemie B.V ECLI:NL:HR:2017:2807, where the Dutch Supreme Court held that a manufacturer or seller of a generic medicine infringes a Swiss type claim if it is reasonably foreseeable that the generic product will be used intentionally for treatment covered by the second medical indication patent.

[4] Judgment of the CJEU on 14 February 2019, Warner-Lambert Company, C-423/17 (ECLI:EU:C:2019:125).

medicinal product Lyrica, containing the active ingredient pregabalin. The only relevant patent still in force was covering the use of pregabalin for use of treatment of neuropathic pain. Several producers of generic medicinal products obtained marketing authorisation for pregabalin. Before placing its product on the market, one of the producers, Aurobindo, informed the authority that it did not intend to include the information relating to the treatment of neuropathic pain in the product information. Aurobindo asked if only relevant parts of the package leaflet and the SmPC could be published, but the authority refused.

WLC brought an action against the authority, claiming that their practice of publishing the full product information for e.g. Aurobindo's product constituted a direct infringement, as it offered pregabalin for sale for a patented indication, as well as an indirect infringement in that it encourages third parties to engage in infringements. WLC also claimed that the policy was contrary to Article 11 of Directive 2001/83.

The first instance court found that the full publication of product information does not constitute an infringement of the patent but is incompatible with the authority's duty of care. The judgment was appealed to the Regional Court of Appeal in The Hague, which considered that there were grounds to request that the CJEU considered the question of how Article 11 of Directive 2001/83 must be interpreted.

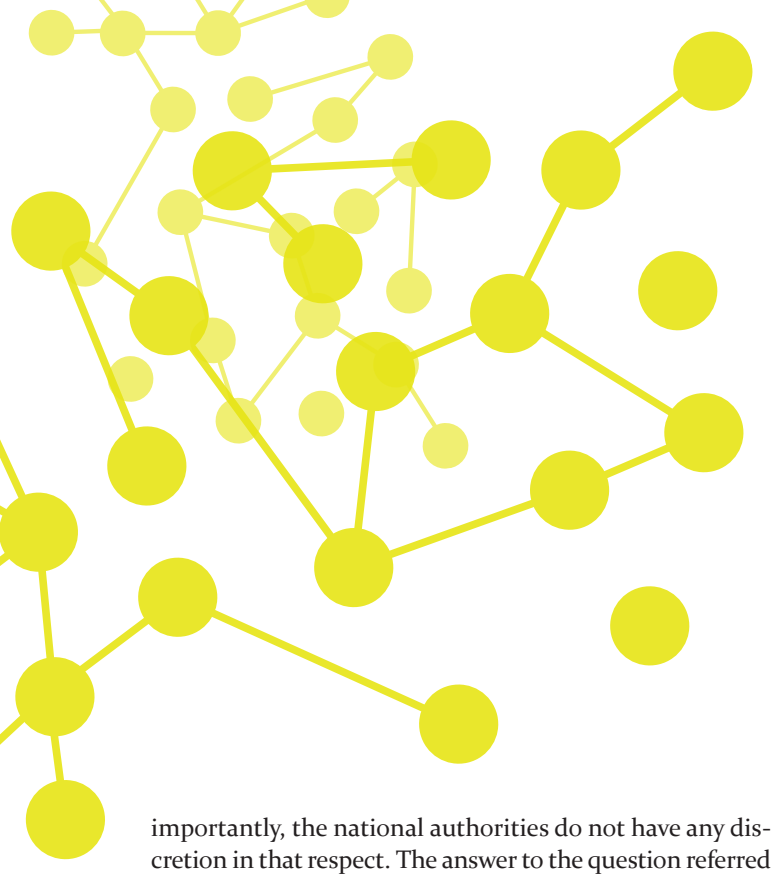
2.2 The CJEU's considerations of the questions referred

The parties before the CJEU, WLC and the Netherlands, both agreed that Article 11 permits an applicant for marketing authorisation, in respect of generic medicinal products, to leave out the indications still covered by patent from the product information. However, the parties had different views on how the relevant authority should treat a declaration from the applicant which indicates that it intends to opt for publication of an edited version.

At the outset, the CJEU noted the aim of Directive 2001/83, i.e. safeguarding public health, and the mandatory marketing authorisation for all medicinal products. The Court also highlighted the SmPC requirement, which allows for verification of whether a medicinal product meets the information needs of patients and health professionals, together with the provision stating that 'the competent authorities shall take all necessary measures to ensure that the information given in the summary is in conformity with that accepted when the marketing authorisation is issued or subsequently'. On the basis of these provisions, the CJEU stated first that the package leaflet and the SmPC form part of the marketing authorisation; second, that the medicinal product placed on the market must fulfil the conditions of the marketing authorisation, which must be reflected in the SmPC; and third, that the marketing authorisation holder may not amend the package leaflet or the SmPC without notifying the competent authority in order to obtain its approval.

The CJEU then turned to the exemption contained in Article 11 and stated that the provision confers on the applicant for a marketing authorisation of a generic medicinal product the option of derogating from the principle that the marketing authorisation of a generic medicinal product and that of a reference product must tally by reducing the scope of its application to indications or dosage forms which are not covered by patent law. In line with the principle of facilitating the entry of generic medicines to the community market, the CJEU reasoned that such entry should not be delayed until expiry of all patents which may include several indications or dosage forms of the reference medical product. Consequently, if a marketing authorisation applicant or holder for a generic product avails himself or herself of the option provided for in Article 11 of Directive 2001/83, then the marketing authorisation for that product covers only the indications and dosage forms which are not patented.

According to the CJEU, failure to include certain indications or dosage forms in the SmPC of generic medicinal products means that those indications or dosage forms are not covered by the marketing authorisation application. By making use of the above-mentioned option the applicant thus limits the scope of application and most



importantly, the national authorities do not have any discretion in that respect. The answer to the question referred by the national court was, in light of the above that the second paragraph of Article 11 must be interpreted as meaning that, in a marketing authorisation procedure, communication to the authority by the applicant or holder of a marketing authorisation for a generic medicinal product of the package leaflet or a SmPC of that medicinal product – which does not include any reference to indications or dosage forms which were still covered by patent law at the time that medicinal product was placed on the market – constitutes a request to limit the scope of the marketing authorisation of the generic medicinal product in question.

3. CONCLUDING REMARKS

The CJEU judgment clarifies the consequences of when the applicant or the holder of a marketing authorisation uses the option given in Article 11 to carve-out patented protected indications from the product information. The marketing authorisation is thereby limited to non-patented indications only. It is clear from the judgment that the mentioned article affects not only the SmPC but also the scope of the marketing authorisation itself, as they are meant to correspond. To this extent, the effects of the CJEU's preliminary ruling are clear.

However, from a Swedish perspective, a number of questions related to skinny labelling issues arise as a result of the clarifications by the CJEU. How should the judgment be interpreted with regard to the Swedish system? What are the practical results of such request to limit the scope of the marketing authorisation and what bearing, if any, will this have on the assessment of skinny labelling situations under Swedish law? Thanks to the CJEU judgment, innovative pharmaceutical companies may now find some solace in that one of the factors, which previously might have encouraged the distribution of generic medicine for a patent protected indication, i.e. in this case the practice of the Dutch authority, is no longer an issue. However, under Swedish law, a number of similar factors still remain problematic.

3.1 Swedish regulatory aspects

First, it is still unclear whether a request to limit the product information, and thereby the scope of the marketing authorisation, is in fact a guarantee which prevents the medicine from being used for indications still covered by patent protection. When the Swedish Medicinal Products Agency *(Läkemedelsverket, MPA)* approves an application for a marketing authorisation for a medicine, it shall also decide on what pharmaceutical products are substitutable for the medicine in question.[5] The substitutability is determined based on, inter alia, whether the products have the same active substance in the same amount and are otherwise medically equivalent. However, differences regarding indications stated in the product information are usually not considered by the MPA as such differences between two medicinal products would prevent substitution. Consequently, according to the MPA's present practice, a skinny labelled generic medicine may end up as substitutable with the reference medicinal product, which is used for an indication still covered by a patent, on the MPA's list of substitutable medicinal products.

Based on the list of substitutable medicinal products, the Swedish Dental and Pharmaceutical Benefits Agency *(Tandvårds- och Läkemedelsförmånsverket, TLV)* determines whether a pharmaceutical product shall be subsidised by the state, i.e. be covered by the Swedish reimbursement system, and also which product in each package size group has the lowest price to be applied during a specific period (a calendar month), the so-called 'product of the period system'. A consequence of the described system is therefore that a reference medicine could be replaced by a skinny labelled generic medicine by doctors or pharmacists for treating an indication that is patent protected – even if the generic pharmaceutical company has made use of the option under Article 11 to limit the product information, and hence limit the scope of the marketing authorisation to indications and dosage forms that are not covered by patent protection. In addition, even if the generic company would expressly communicate a desire to the relevant authority that the authority should respect the scope of the marketing authorisation, so that such contains only non-patented indications, it is doubtful due to the authorities' regulations whether this would mitigate the described risks. An aggravating factor is that the relevant Swedish authorities are not instructed to take existing patent rights into account in their assessments. On the contrary, the authorities are presumably even legally restricted to do so since their assessments are limited to certain factors given in the authorities' instructions and regulations. Moreover, doctors are always free to prescribe whatever medicine they consider to be most suitable in light of science and proven experience – regardless of which indications are covered by the SmPC or the marketing authorisation.

Second, there is another regulatory aspect which further complicates how the CJEU judgment should be viewed in the Swedish context. According to the MPA's guidelines,

the following wording shall be included in the product leaflet for generic medicinal products:

> *"(Active substance) which is contained in (Product name) may also be authorised to treat other (diseases) (conditions) that are not mentioned in this product information. Ask your doctor, pharmacist or other health care personnel if you have further questions and always follow their instructions."*[6]

This so-called "blue box" text may be problematic from a patent law perspective as it obviously may be seen to open up the possibility for the authorities, the prescribing doctor and pharmacies to consider that the generic medicine may be used outside the scope of the product information and the market authorisation. It is probably safe to say that such a note, similar to the Swedish substitution assessment or the previous Dutch authority practice, may increase the risk that the skinny labelled generic medicine is used for an indication covered by patent.

3.2 Reduced risk of patent infringement?

If Article 11 does not provide sufficient safeguards, what could be done to reduce the risk of patent infringement in the situation of skinny labelling? It is clear from a case decided by the Swedish Supreme Court[7] that an application to the relevant authority regarding pharmaceutical benefits does not amount to an "offering for sale", i.e. is not a form of infringing conduct under the Swedish Patents Act. Except for that, there are, as far as we are aware of, no rulings by Swedish courts that clarify whether actions such as selling, prescribing, stocking or distributing a generic medicine for an indication covered by a patent but not comprised by the approved indication, or the package leaflet or the SmPC, would constitute infringing conduct. This is an unsatisfying degree of uncertainty that affects both generic and innovative pharmaceutical companies alike. Furthermore, it can be questioned whether the Swedish system provides sufficient protection for both the generic companies to ensure that they do not commit patent infringement as well as sufficient safeguards for the patent holder's right to exclusively distribute the medicinal product for the indication covered by a patent. To ensure a fair level of protection for the medicine market as well as for patent holders in the future, perhaps it is time for the patent system and the regulatory system to be more interactive, e.g. to allow for patent rights or medicinal indications to be taken into account by the relevant authorities. In any event, what must be achieved is the effective protection for the patent holder as well as a fair level of foreseeability for the generic company.

[5] The List of Substitutable Medicinal Products is available on the MPA's website (www.lakemedelsverket.se).
[6] Article 13, Section 3 of MPA's provisions (LVFS 2005:11) on labelling and product leaflets and the guidelines to the aforementioned regulation.
[7] NJA 2008 s. 1192 (Pfizer v STADA).

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