Teva/Barr
(Commission of the European Communities, Case No COMP/M.5295, December 2008)

Prepared by UNCTAD's Intellectual Property Unit

Summary

This case concerned a concentration involving two generic producers. The Commission of the European Communities (hereinafter "the Commission")[1] approved the proposed acquisition of Barr Pharmaceuticals, Inc. (hereinafter "Barr"), by Teva Pharmaceutical Industries Limited (hereinafter "Teva"), subject to conditions. In its decision, the Commission recognized that the third level of the anatomical therapeutic chemical (ATC) classification system, known by the abbreviation ATC3, is not always the most appropriate level for the purposes of market definition. It adopted *inter alia* a narrower market definition, i.e. the molecule level, for the competitive analysis of oncology products.

The facts

In November 2008, the Commission received a notification of a proposed concentration involving two generic producers.[2] The concentration related to the acquisition of Barr, a global pharmaceutical company specialized in generic pharmaceuticals, by Teva, the largest generic pharmaceutical company in the world. The Commission had to decide whether to oppose the notified operation or, on the contrary, to declare it compatible with the European Union (EU) internal market and authorize it.

The legal issues

In its analysis of the effect of the concentration on competition, the Commission first defined the relevant product markets. While the Commission normally relies on the ATC3[3], it also took into account the ATC4 level[4] and the molecule level in its analysis. The Commission considered that these two narrower market definitions would be more appropriate in genericized markets – especially for drugs aimed at serious illnesses and purchased by hospitals – since generic competition is mainly based on molecules.[5] From a geographic perspective, the relevant markets were defined on a national scope.

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[1] The Commission of the European Communities is known today as the European Commission.
[2] A notification of a concentration pursuant Art. 4 of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("EU Merger Regulation").
[3] The Commission uses the ATC classification devised by the European Pharmaceutical Marketing Research Association ("EphMRA") and maintained by EphMRA and Intercontinental Medical Statistics ("IMS"). ATC3 covers pharmaceuticals that are grouped in terms of their specific therapeutic indications (i.e. their intended use).
[4] ATC4 is the most detailed level. It consists of products that are grouped according to therapeutic or more frequently pharmacological criteria such as molecule class, formulation or mode of action.
[5] See paragraphs 17-18 of the decision.

The Commission's examination of the proposed transaction mainly focused on Teva's and Barr's overlaps in the field of oncology. The Commission's market investigation confirmed the molecule level approach for the competitive analysis of the parties' products for the treatment of cancer.

The Commission's investigation revealed that the proposed transaction would give rise to serious competition concerns in 17 markets in Central and Eastern Europe. The Commission identified 15 markets in the oncology field and two for vitamin products. In these cases, there was a risk that the transaction would reduce the number of competitors and that the lack of competition would lead to higher prices for hospitals and patients.[6]

In order to address the Commission's concerns, Teva offered a number of commitments, i.e. to divest its business in the affected countries. The divestment businesses included, *inter alia*, all tangible and intangible assets, including intellectual property rights and all licenses permits and authorizations.

The Commission considered that the remedies submitted by Teva were sufficient to eliminate all serious doubts raised by the concentration. The Commission therefore decided to clear the proposed transaction, declaring it compatible with the EU internal market.

Points of significance

- The *Teva/Barr* case illustrates the Commission's approach to product market definition in a pharmaceutical merger case involving two generic producers. The Commission assessed horizontal overlaps at molecule level, which is the narrowest level.
- In *Teva/Barr* and *Sanofi-Aventis/Zentiva* (see the summary available in this database), the Commission considered that structural remedies, i.e. divestiture measures, were sufficient to eliminate the serious doubts resulting from the proposed transaction. Intellectual property rights may play a role in the determination of market power. A commitment to divest intellectual property rights may make mergers more acceptable for the competition authority.

Key words: Competition, EU merger control, merger and acquisition, market definition, commitments.

Available at:
http://ec.europa.eu/competition/mergers/cases/decisions/m5295_20081219_20212_en.pdf

[6] European Commission, Press Release IP/08/2043, 19 December 2008, Brussels, "Mergers: Commission clears Teva's proposed acquisition of Barr subject to conditions". Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_08_2043.