

Unclassified

DAF/COMP/WD(2014)80

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

17-Jun-2014

English - Or. French

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

DAF/COMP/WD(2014)80
Unclassified

GENERIC PHARMACEUTICALS

-- Note by France--

18-19 June 2014

This document reproduces a written contribution from France submitted for Item VI of the 121st meeting of OECD Competition Committee on 18-19 June 2014.

More documents related to this discussion can be found at <http://www.oecd.org/daf/competition/generic-pharmaceuticals-competition.htm>.

JT03359471

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

English - Or. French

Introduction

1. The Autorité de la concurrence¹ (hereinafter the “Autorité”) has litigation and consultation experience in the health sector. This experience was summarized by the Conseil de la concurrence, which the Autorité succeeded in 2009, in a study published in its 2008 annual report. Since then, several important decisions and opinions have been issued by the Autorité on the healthcare sector, particularly with regard to generic drugs.

2. The role played by generic drugs in the competitive dynamics of the market for medicines for human use relates not only to the regulatory environment which governs their prescription and delivery but also to the attitude of the players in this sector to these products. It would appear that generic drugs are perceived, in France, with a certain distrust by patients and some health professionals – prescribing doctors, dispensing chemists... Thus in France in 2012 the market share of generic drugs did not exceed a quarter (by volume) of the total quantity of reimbursable drugs, whereas this figure was about two-thirds in Germany and the United Kingdom and three-quarters in the USA².

3. It is against this background and in light of these specific facts that the litigation and consultation experience of the Autorité has developed in recent times. The main developments are discussed below and concern first of all the sectoral opinion³ on competition in the distribution of medicines issued in December 2013 (1.), and two recent cases involving the denigration of generic drugs⁴ (2.).

1. Sector inquiry into medicines

4. For some years the health sector has been subject to change, particularly as regards the development of generic and bio-similar drugs, budgetary constraints on the State Health Insurance Fund as well as new challenges for dispensing chemists.

5. These changes, along with the impact of health expenditure on the national economy⁵ and the questions raised by ongoing disputes and the development of the regulatory framework led the Autorité to begin an ex-officio investigation on 25 February 2013 into the sector of distribution of prescription drugs for human use. A public consultation was held from July to September 2013, inviting players in this sector to give their views on the Autorité’s interim findings, and the Autorité’s final opinion was published on 19 December 2013.

¹ The Autorité de la concurrence is an independent authority and the opinions expressed in this contribution are purely its own.

² Inspection générale des affaires sociales (IGAS), « *Évaluation de la politique française des médicaments génériques* », Report, September 2012

³ Opinion No 13-A-24 of 19 December 2013 on competition in the distribution of prescription drugs for human use (<http://www.autoritedelaconcurrence.fr/pdf/avis/13a24.pdf>)

⁴ Decision No 13-D-11 of 14 May 2013 concerning practices prevalent in the pharmaceutical sector (<http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=13-D-11>); decision No 13-D-21 of 18 December 2013 concerning practices in the French market for high dose buprenorphine available from community pharmacies (<http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=13-D-21>)

⁵ Current health expenditure in 2012 stood at EUR 243 billion, i.e. 12% of GDP. Drug consumption per person stood at EUR 525 in 2012 and prescription drug reimbursements by the State Health Insurance Fund totaled EUR 22.66 billion during the same period.

6. This focussed principally on competition issues related to generic medicines. The Autorité underlined the importance of innovation in the pharmaceutical sector, which strengthens the competition between companies and constitutes a source of employment in the sector. It also stressed the role that generics can play in encouraging originator companies to maintain ongoing research and development. Finally, it stated that generics allow the State Health Insurance Fund to make savings and, as a result, to be able to offer higher payments or reimbursements for innovative drugs.

7. Taking into account the current economic backdrop against which pharmaceutical laboratories are operating, the Autorité identified possible areas in which competitive regulation could be exercised in the generic drug sector.

1.1 Prices of generic drugs and reimbursement:

8. In its opinion, the Autorité denounced the way in which generic laboratories systematically exceeded the maximum discounts permitted by law.

9. This phenomenon can be explained by the high level of competition between the many generic laboratories operating in France. Dispensing chemists hold low levels of stock and generally offer one or two ranges of generics, so that the laboratories that offer the most attractive discounts have more chance of being chosen.

10. A report by the *Inspection générale des affaires sociales*⁶ revealed that these discounts can also be disguised. They can take the form of payments to dispensing chemists in exchange for commercial services that do not correspond in reality to the amounts paid but which serve to remunerate the pharmacist for his purchases of generics over and above the maximum legally permissible discount.

11. These high discounts may indicate that the prices of generic drugs are too high and could therefore be renegotiated downwards by the *Comité Economique des Produits de Santé* ("CEPS")⁷. The Autorité therefore expressed its support for legalisation of these additional discounts as well as transparency in this area. The legislative response to the Autorité's concerns was to amend the social security code by introducing an obligation on generic laboratories to declare to CEPS the level of discounts offered to dispensing chemists and to allow an increase by law in the legal level of these discounts, up to a maximum of 50%⁸. Monitoring these measures should make it possible to establish their real impact on the prices of generics.

12. Furthermore, the Autorité stated its reservations concerning any setting of an identical reimbursement amount for an originator and its generics. This practice certainly has an immediate positive effect on the State Health Insurance Fund budget and decisions can be taken when the level of market penetration by generics appears to be too low. However, it also carries a risk of excluding generics from the market. In fact, it is the much lower prices of generics that constitute their main attraction from the point of view of consumers. In a situation of identical reimbursement, however, it has been found that the prices of originators and generics tend to align and, in these circumstances, consumers favour the originator, particularly because of the reputation of the brand.

⁶ IGAS, « *Évaluation de la politique française des médicaments génériques* », Report, September 2012

⁷ CEPS is an inter-ministerial body under the joint leadership of ministers responsible for health, social security and the economy whose primary responsibility under the law is to set the prices of medicines and medical devices for personal use that are covered by compulsory sickness insurance.

⁸ Law No 2013-1203 of 23 December 2013 concerning social security financing for 2014.

13. It could therefore happen, if this practice became general, that the originator's market share may increase, to the detriment of generics, whose manufacturers could renounce entering certain markets. The originator would then have a monopoly, which would allow them to force higher prices on CEPS and, as a consequence, on the end consumer.

1.2 Lists of generic and bio-similar drugs:

14. For a pharmacist to be able to substitute an original medicine with a generic, the latter must be registered in the list of generics kept by the *Agence nationale de sécurité du médicament* (ANSM). The Autorité found that this list was still relatively small, with the generics' share of reimbursable drugs being much lower in France than, for example, in Germany or the United Kingdom. In addition, the Autorité found that no groups of generics had been created for certain proprietary drugs, including paracetamol and acetylsalicylic acid (better known as aspirin).

15. Since prescriptions in France are issued largely on the basis of brand names, the absence of a group of generics means that a prescription specifying a brand of paracetamol does not allow substitution by a generic, even though this would be cheaper. This is not an insignificant issue given that one of the brands of paracetamol prescribed in France (Doliprane®) is the drug with the fifth highest rate of reimbursement by the State Health Insurance Fund.

16. Although, during the extension to the public consultation held by the Autorité, ANSM took the initiative at the beginning of 2014 of announcing the creation of a group of dry oral forms of paracetamol in the list of generics, this has not yet happened and is for now being examined by the *Conseil stratégique de la dépense publique* (Strategic Committee for Public Spending) – a committee to the President of the Republic.

17. As regards biosimilar drugs, their substitution within a list and at the start of treatment has recently been introduced in law⁹. The Autorité has noted this initiative and has called on players to avoid any anticompetitive behaviour similar to the practices seen in the past in the case of generics (in particular the use of denigration tactics).

1.3 The protection of intellectual property

18. The Autorité has highlighted the importance of innovation in the pharmaceutical sector, which goes hand in hand with adequate protection of the patents held by the pharmaceutical laboratories. Tools such as infringement proceedings thus ensure that a laboratory maintains its exclusivity throughout the term of the patent.

19. However, the practice of European and American competition authorities reveals that some behaviour aimed in principle at protecting patents are in reality akin to an anticompetitive strategy aimed at preventing or delaying the entry of competitors (generics or others) onto a given market. There are, for example, "pay-for-delay" tactics – agreements under which originator and generic laboratories agree to delay the entry of generics onto a given market, in exchange for payment¹⁰. Likewise worth mentioning are

⁹ *Ibid.*

¹⁰ See on this subject the European Commission judgements in the cases Lundbeck (http://europa.eu/rapid/press-release_IP-13-563_fr.htm?locale=FR) and Johnson & Johnson (http://europa.eu/rapid/press-release_IP-13-1233_en.htm?locale=FR). See also the order of the Supreme Court of the US: 570 U.S. FTC v. ACTAVIS, INC. (2013).

the practices by which a laboratory issues erroneous information to a patent office, with a view to preventing or delaying the entry of generics onto the market¹¹.

20. Finally, some studies indicate that laboratories in France attempt to bring multiple proceedings for patent infringement solely with a view to creating a dissuasive cost of entry for the generic laboratories in question. Legal action has already been taken against such manoeuvres in the United States¹². The Autorité could likewise declare that it is competent to take action against such behaviour.

1.4 Risk of denigration of generic drugs:

21. In France, the public and certain healthcare professionals approach generics with a degree of distrust which is sometimes reinforced by both institutions and private players. This distrust can constitute a basis for a pharmaceutical laboratory to implement a strategy of denigration against a generic drug that is about to compete with an originator whose patent is due to expire.

22. Such a strategy can fall foul of competition law, as can be seen in two cases of abuse of a dominant position that were condemned by the Autorité in 2013 (cf. II, *infra*).

23. The Autorité subsequently issued a number of recommendations as part of its sectoral opinion aimed at reducing the negative perception surrounding generics and thus preventing denigration strategies.

24. In this context, it has been noted that the use of the concept of ‘auto-generic’ – which the law does not distinguish from ‘generic’ – could create a fictitious distinction within a single class of medicines and reinforce the image of the originator laboratory.

25. The reluctance to use generics may be due in part to ignorance of the pharmacopoeia by certain players within the health system, requiring intervention from public authorities and accountability of companies in the sector. Some measures have already been put in place but their effectiveness is limited: special payments to pharmacists for replacing original medicines with generics only apply when the level of substitution exceeds 85% and there are no sanctions for a substitution level below 60%; the proportion of prescriptions issued by doctors using international nonproprietary names only stood at 13.6% by the end of 2012; and finally, an increase was noted in the number of occurrences of the words ‘not to be substituted’¹³.

26. As a result, the Autorité recommended the introduction of new measures: regular information campaigns on the effectiveness of generics; additional training for doctors on the pharmacopoeia; additional support for the performance payment system in order to encourage doctors to issue more prescriptions for international nonproprietary named products; better use of the medical examination form; and the adoption of good practice by pharmaceutical laboratories (especially via their competition law compliance programmes) in order to prevent the use of strategies of denigration by their sales teams.

2. Litigation: Recent cases of denigration

27. In 2013 the Autorité issued two successive decisions imposing sanctions on pharmaceutical laboratories for abuse of their dominant positions by directing strategies of denigration against generic

¹¹ Case T-321/05, *AstraZeneca v/ Commission*, judgement of 1 July 2010 and Case C-457/10, *AstraZeneca AB and AstraZeneca v/ Commission*, order of 6 December 2012.

¹² Case Bristol-Myers Squibb Company, 135 F.T.C. 444 (2003).

¹³ IGAS, *Évaluation de la politique française des médicaments génériques*, Report, September 2012

versions of their own originators. This type of practice illustrates the need for preventive measures of the type described above as these strategies have only been able to operate because of the lack of trust in generic medicines that exists in France.

28. Such a situation is rarely seen outside of France. Markets where generic drugs are present in much greater volumes and where they are also better accepted both by consumers and by stakeholders in the healthcare system have instead seen the emergence of practices – which have already been subject to sanctions imposed by the competition authorities – such as the so-called ‘pay-for-delay’ agreements or deliberately misleading statements aimed at obtaining unlawful extensions to patent protection.

2.1 The case of Plavix®

29. On 14 May 2013, the Autorité published its decision 13-D-11, under which it fined Sanofi-Aventis for having abused its dominant position by putting into place a strategy of denigration of the generics of Plavix®, one of its flagship products. This decision, which was brought against the fourth biggest pharmaceutical group in the world, and the sector’s leader on the French market, censured the practice of denigration of generic medicines for the first time.

30. An appeal has been filed with the Paris Court of Appeals.

2.1.1 The generification of Plavix: a major challenge for the medicines sector in France

31. The practices condemned by the Autorité concern Plavix®, a pharmaceutical industry “blockbuster”. It is the fourth most sold medicine in the world and in 2008 represented more than 550 million euros of turnover on French territory alone. Plavix®, whose main active ingredient is clopidogrel, is used for the prevention of relapses of serious cardiovascular illnesses.

32. The regulatory protection of Plavix®’s pharmaceutical data came to end in Europe on 15 July 2008, and the first generic competitors were sold from October 2009 onwards. Due to the importance of this product, its generification constituted a major financial event for the medicines sector in France and particularly for social security accounts. Indeed in 2008 Plavix® was the item most reimbursed by the State Health Insurance Fund, amounting to 625 million dollars. A saving of 200 million euros was forecast for 2010.

2.1.2 A strategy of structured denigration rolled out across the whole territory of France

33. The Autorité found that just before the Plavix® generics were set to come out, Sanofi-Aventis implemented a communication strategy towards the public and healthcare professionals, aimed at limiting the entry of generics competing with its product Plavix® and its own generic, Clopidogrel Winthrop®.

34. The discourse used by Sanofi-Aventis was based on negatively highlighting the differences between its own products and the competing generics. In fact, while all clopidogrel generics are bioequivalent to Plavix® and can be substituted by the pharmacist in all cases, there are two differences between the latter and the originators: the use of a salt – to fix the active ingredient – different from the one contained in Plavix®, and the absence of any therapeutic indication on acute coronary syndrome, in combination with aspirin.

35. However these purely formal distinctions, having to do with the existence of intellectual property rights, were in no way linked to the therapeutic properties of the generics and had no impact on the possibility of substituting Plavix® with a generic.

36. However, Sanofi-Aventis stressed these differences in order to instil doubt about clopidogrel generics. The raising of these matters took place right at the heart of considerations related to the sensitive nature of the pathologies concerned and the risks incurred by patients. The discourse concluded with clear incitements: for doctors, to hinder substitution by using the comment “not to be substituted” and for pharmacists, to order Clopidogrel Winthrop®, which was presented by Sanofi-Aventis as the “authorised copy” of the originator.

37. Furthermore, on the basis of an in-depth field investigation, the Autorité obtained numerous direct witness statements from pharmacists and doctors, as well as extensive feedback from the network of representatives of the National Health Insurance Fund. This corroborating evidence demonstrates that Sanofi-Aventis medical visitors and pharmaceutical sales representatives had directly stated to healthcare professionals that the generics constituted a risk to patients’ health.

2.1.3 The specific context of the health sector

38. In order to better appreciate the effect of Sanofi-Aventis’s practices, the Autorité also carried out an analysis of the specific nature of the health sector. It was predominantly a matter of ascertaining precise details of the level of professionals’ knowledge, as well as the manner in which they receive information.

39. It became apparent that healthcare professionals only had a vague knowledge of matters related to medicine law, that doctors do not always have full and precise knowledge of pharmacopoeia and that visits by medical sales staff constitute a major source of information for them.

40. Thus the discourse designed by Sanofi-Aventis took place in a context where it undoubtedly had the effect of generating doubts, and indeed concern, on the part of professionals as regards Plavix® generics. This concern was confirmed by the evidence gathered, which demonstrated a strong feeling of suspicion with regard to these products across the whole French territory.

2.1.4 The very atypical clopidogrel market

41. The impact of Sanofi’s practices is particularly noticeable on the clopidogrel market. Indeed, despite very high turnover and volumes and a large number of laboratories producing generics on the market, the substitution rate of Plavix®, after an initial sharp increase when the generics were first introduced, then suffered a continuous fall over many months.

42. In its 2010 report, the State Health Insurance Fund highlighted that the “rate of effective penetration of clopidogrel at the end of December 2010 [was] 10 points lower than the target (64.6% against 75%)”. For the period January 2010-August 2011, the State Health Insurance Fund put losses related to unrealised savings at 38 million euros.

43. The practice in question also allowed Sanofi-Aventis’s own generic, Clopidogrel Winthrop®, to enjoy a market share of more than 34% in the clopidogrel generics segment, namely a position four times greater than that normally held by the brand on the French generics market.

2.1.5 A fine in proportion to the seriousness of the loss

44. The Autorité therefore considered that Sanofi-Aventis had abused its dominant position on the French market for clopidogrel prescribed in private practice, in violation of Article L.420-2 of the commercial code as well as Article 102 on the Treaty on the Functioning of the European Union, and imposed a fine of 40.62 million euros.

2.2 *The case of Subutex®*

45. On 18 December 2013, in its decision 13-D-21, the Autorité fined the laboratory Schering Plough 15.3 million euros for having abusively hindered the entry of generics competing with its product Subutex®, by awarding dispensing chemists' commercial advantages entailing brand loyalty and by denigrating the generics.

46. The Autorité also imposed a fine for an agreement between Schering-Plough and its supplier, Reckitt Benckiser, aimed at putting this eviction strategy into place. The fines imposed were respectively 414,000 euros (on the Schering-Plough parent company, Merck & Co) and 318,000 euros (for Reckitt Benckiser) for implementing the agreement.

2.2.1 *Proceedings commenced by Arrow Laboratory*

47. The case originated in a complaint by a generics manufacturer, Arrow Laboratory, which was accompanied by an application for the imposition of protective measures. In a decision dated 11 December 2007, the Conseil de la Concurrence upheld this application and ordered Schering-Plough to publish an announcement in the specialist press, reminding doctors and pharmacists of the strict bio-equivalence of Subutex® with competing generics and the absence of risks to the health of patients from generic substitution¹⁴.

48. Subutex® (a molecule of buprenorphine), prescribed in the treatment of patients with an opiate dependency particularly heroin, was first marketed France in 1997 by Schering-Plough (which became MSD France in 2011). The previous year it had reached an exclusive agreement with Reckitt Benckiser (the manufacturer of Subutex®) for distribution of the product in France. In exchange, Schering-Plough paid Reckitt Benckiser royalties which were a percentage of the turnover achieved.

49. In March 2006, as the Schering-Plough patent expired, Arrow launched its equivalent generic. In view of the difficulties encountered in penetrating the market, Arrow referred the matter to the Conseil de la concurrence, claiming that Schering-Plough was abusing its dominant position to drive it out of the market.

2.2.2 *The comprehensive plan conceived by Schering-Plough and Reckitt Benckiser to counter the arrival of the Subutex® generics*

50. Between October and December 2005, Schering-Plough and Reckitt Benckiser, anticipating the 2006 arrival of Subutex® generics, adopted a plan ("French plan against generics") aimed at "Delaying/Discouraging the entry of generics".

51. This plan firstly envisaged setting up a system of direct sales to pharmacists, three months before the arrival of the generic, accompanied by client loyalty programmes, based in particular on discounts. The two undertakings concerned also upheld the need for communication instilling "fear" in the minds of doctors and pharmacists with regard to a change in treatment and in relation to the patient's "psychiatric instability", the risk of wrongful use and indeed the increase of "trafficking" with the Subutex® generic.

¹⁴ See press release and decision 07-MC-06.

2.2.3 *The implementation of the plan by Schering-Plough*

52. A global, structured denigration campaign was thus implemented against Arrow's generic. From mid-February to May 2006, Schering-Plough organised seminars and telephone meetings, as well as rolling out arguments in the form of questions/answers distributed to its medical sales teams and pharmaceutical representatives so that they could propagate alarmist discourse among doctors and pharmacists on the risks of prescribing or issuing Arrow's generic, even though no specific medical studies could have justified its arguments.

53. Schering-Plough completed its plan by offering pharmacists major reductions from January to August 2006, without any objective counterpart, with the sole aim of filling the pharmacies' shelves with boxes of Subutex® only.

54. Payment facilities (extended payment terms and discounts) were also granted to the pharmacists, beyond those generally offered.

2.2.4 *Major effects on the rate of substitution and the public accounts*

55. According to the managers of Schering-Plough themselves, these practices proved very effective.

56. By influencing both doctors and pharmacists, Schering-Plough placed an obstacle in the path of competition at the two key stages of substitution, namely at the prescription stage, by significantly increasing the number of "not to be substituted" specifications (67% of orders were marked thus) at the dispensing stage, by persuading pharmacists not to substitute Subutex® even in the absence of such a specification.

57. In order to assess the loss to the economy, the Autorité sought to measure the difference between the observed rate of substitution of Subutex® by its generic and the rate that would have normally been recorded. It used as a reference the rate of substitution observed for one of three dosages of Subutex® (0.4 mg) given that the practices were mainly linked to the other dosages (2 mg and 8 mg). The Autorité also made use of the studies undertaken by Schering Plough itself that had analysed the substitution rates of products known as "sensitive" that could be compared to Subutex®, particularly Prozac®. Finally, it took as counterfactual the rate of penetration of 11-molecule generics in class-N to which Subutex® belongs.

58. The Autorité thus estimated that the savings that the State Health Insurance Fund could have made would have been between 2 and 5 million euros per year.

2.2.5 *Schering-Plough's decision not to challenge the objections and the commitments by Financière MSD and its parent company Merck & Co*

59. Schering-Plough, as well as Financière MSD which succeeded it and its parent company Merck & Co, did not challenge the objections brought by the Autorité and offered commitments to comply with competition law in order to prevent such practices in the future. They particularly undertook to monitor planned commercial strategy prior to the arrival of generics and to provide training for their sales teams on the prohibitive nature of denigration. These major commitments are being made at a time when many of Schering Plough's molecules are due to come into the public domain. The fines were reduced on this basis.