Case C-179/16 *F. Hoffmann-La Roche and Novartis* – ECJ finds concerted efforts to restrict off-label use of medicinal products likely to breach competition rules

1. INTRODUCTION

On 23 January 2018 the Court of Justice of the European Union (the ***ECJ***) handed down its judgment in Case C-179/16 *F. Hoffmann-La Roche and Novartis*. The case concerned the Italian subsidiaries of F. Hoffmann-La Roche Ltd (***Roche***) and Novartis AG (***Novartis***). Largely following the Opinion of Advocate General Saugmandsgaard Øe (the ***AG***), the ECJ held (i) that the content of a marketing authorisation does not determine the scope of the relevant product market so long as other conditions are fulfilled; (ii) that a licensing agreement between non-competitors may fall within EU competition rules; and (iii) that the coordinated dissemination of misleading safety claims may constitute a serious violation of competition rules.

2. FACTS

Through its US subsidiary Genentech, Roche developed two medicines from related active substances. The first, Avastin® (bevacizumab), was granted a marketing authorisation (***MA***) for an oncological indication. The second, Lucentis® (ranibizumab), was developed later and was granted an MA specifically for the treatment of ophthalmological conditions such as macular degeneration and glaucoma. A practice developed whereby doctors prescribed Avastin® for the treatment of eye conditions. The Italian health authority permitted, and later encouraged, this 'off-label' use, even after Lucentis® had received its own MA and obtained reimbursement for that indication.

Novartis licensed Lucentis® from Genentech, and moreover owns a 33% share in Roche itself.

In 2014, the Italian competition authority found that Roche and Novartis had colluded to discourage the off-label use of Avastin® and had a common interest in generating a higher volume of sales of the more expensive Lucentis®. This was considered an unlawful market-sharing agreement and therefore a serious restriction of competition by object, contrary to Article 101 TFEU. As a result, the companies were fined approximately €90 million each.

Both companies appealed to the Italian courts and the Italian Council of State, which asked the ECJ for guidance in relation to three points:

1. How to define the relevant product market, and whether the content of an MA is decisive in this regard;

2. The extent to which licensing agreements may infringe EU competition law, even when between two companies which are not competitors; and

3. Whether colluding to emphasise the relative safety of one medicine over another can be considered a restriction of competition if there is no unequivocal scientific evidence for this sort of claim.

3. JUDGMENT

3.1 Scope of the relevant market

The ECJ first recalled that medicinal products that may be used for the same therapeutic indications belong, in principle, to the same product market. In assessing whether one product is actually substitutable for another, however, the ECJ emphasised the regulatory structure which governs the sale and manufacture of medicines. If a product were unlawfully manufactured or sold, for example, it could not be substitutable or interchangeable for a lawful product.

EU rules on pharmaceutical products, notably Directive 2001/83, do not prohibit the off-label use of products or the repackaging of products for off-label use per se. They do, however, require that such repurposing is done in accordance with certain conditions. In this regard, the ECJ noted that the repackaging of Avastin® for intravitreal injection would generally require authorisation, and that the off-label prescription of products may be exempted from the usual authorisation requirements only when a doctor considers that the patient's condition requires the administration of a product for which there is no authorised equivalent available on the market. These conditions, according to the ECJ, are for the national courts rather than the national competition authority (***NCA***) to assess.

In the case at hand, the ECJ observed that there is a specific relationship of substitutability between (on-label) Avastin® and (off-label) Lucentis®. It held that if the national court has not examined whether the conditions for the off-label use of a product are lawful, the NCA may consider the two products as competing on the same market. Insofar as the national courts have examined whether those conditions are lawful, then the NCA must take account of that outcome. This suggests that the content of an MA is persuasive rather than decisive in defining a relevant market.

3.2 Licensing agreement and ancillary restraints

On the nature of the licensing agreement, the ECJ does not directly answer the referring court's question. Instead, it focuses on the interaction between the licensing agreement and the apparent agreement to disseminate jointly information which

discouraged the use of Avastin®. The ECJ held that this "arrangement" to disseminate information was not designed to restrict the commercial autonomy of either party to the licence agreement, but rather to influence the conduct of third parties such as regulatory authorities and medical practitioners in order to limit the use of Avastin® in favour of Lucentis®. Thus, the agreement to disseminate information which is unfavourable to the non-licensed product could not be considered to be ancillary to the licensing agreement and objectively necessary for its implementation. It therefore falls within the scope of EU competition rules as a separate agreement to the (otherwise apparently lawful) licensing agreement.

3.3 Safety claims as a restriction of competition by object

Finally, the ECJ followed the AG's opinion that the joint efforts of Novartis and Roche to communicate that the off-label use of a product is less safe than the on-label use of another product can be considered a restriction of competition "by object". It was particularly concerned that companies may seek to reduce competitive pressure on a product by disseminating information which exaggerates the likelihood of adverse reactions arising from the off-label use of another product.

The ECJ also emphasised that the responsibility for reporting risks associated with the off-label use of a product lies solely with the MA holder. The involvement of another party is likely to be problematic. In particular, the ECJ held that the fact that two companies which market competing products disseminate information relating to a product marketed by only one of them may constitute evidence that the information is not being circulated for legitimate pharmacovigilance purposes. If that is the case, and if the information is sufficiently misleading, the arrangement will amount to a violation 'by object' of the competition rules, regardless of its effects.

It is for the national court to decide whether such information is misleading. The ECJ listed two conditions in this regard: that the information was designed to confuse the regulators (*i.e.*., the European Medicines Agency and the European Commission), and that the information also intended to heighten public perception of the risks associated with the off-label use of a product. The ECJ also confirmed that such coordinated dissemination could not be regarded as "indispensable" and therefore could not benefit from an exemption from the competition rules under Article 101(3) TFEU.

24 January 2018