

## **T-321/05 AstraZeneca v Commission, judgment of 1 July 2010**

**Facts:** The case concerned the anti-ulcer drug Losec, which was produced by the Swedish subsidiary of AstraZeneca plc, AstraZeneca AB. The Commission fined both the British parent company and the Swedish subsidiary for having made misleading representations before the patent offices which were of an anticompetitive nature in order to induce them to provide the company with a provisional protection certificate which should not have been issued to it. Moreover, the company was subject to deregistration sanctions of the marketing authorisations in several Member States. Overall then, the finding was that the companies had abused their dominant positions in the market.

The applicants had argued that there were a number of specific features of competition in the pharmaceutical sector which made the conditions of competition irregular, and so could not be analogised to normal conditions of competition: in particular, the pharmaceutical industry was subject to a high degree of public regulation, including, in particular, rules constraining pricing and reimbursement, which restrain prices. As such, the Commission had relied excessively on factors relating to prices and market shares, given that pharmaceutical companies could not exercise market power in respect of price, even if they had high market shares.

The General Court had held that the Commission was correct in issuing its decision, except that it considered the finding that AstraZeneca had not only sought to further its advantage, but in doing so had prevented parallel imports to be imported, was unfounded, and so it reduced the fine.

**Held:** The Court rejected the argument that there were a number of specific features of competition in the pharmaceutical sector which made the conditions of competition irregular, and so could not be analogised to normal conditions of competition. The Court reasoned that prices do not, in themselves, constitute a reliable or essential element allowing the existence of market power to be assessed: in view of the bargaining position of the companies with respect to the pricing or other reimbursement levels, these large pharmaceutical companies had first-mover status and substantial market power. As such, they were able to maintain prices at a high level whilst retaining far larger market shares than those of their competitors.

Furthermore, to prove an abuse of dominant position, it would not be necessary that the behaviour had a direct effect on competition. What needed to be shown was that the practises were capable of restricting competition in light of the economic or regulatory context in which

the practises are initiated. Moreover, the concept is objective and would not require that an intention to cause harm to be established.

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