

# Patent Settlements under EU Competition Law

Competition Law  
in the Pharma Sector

David Hull

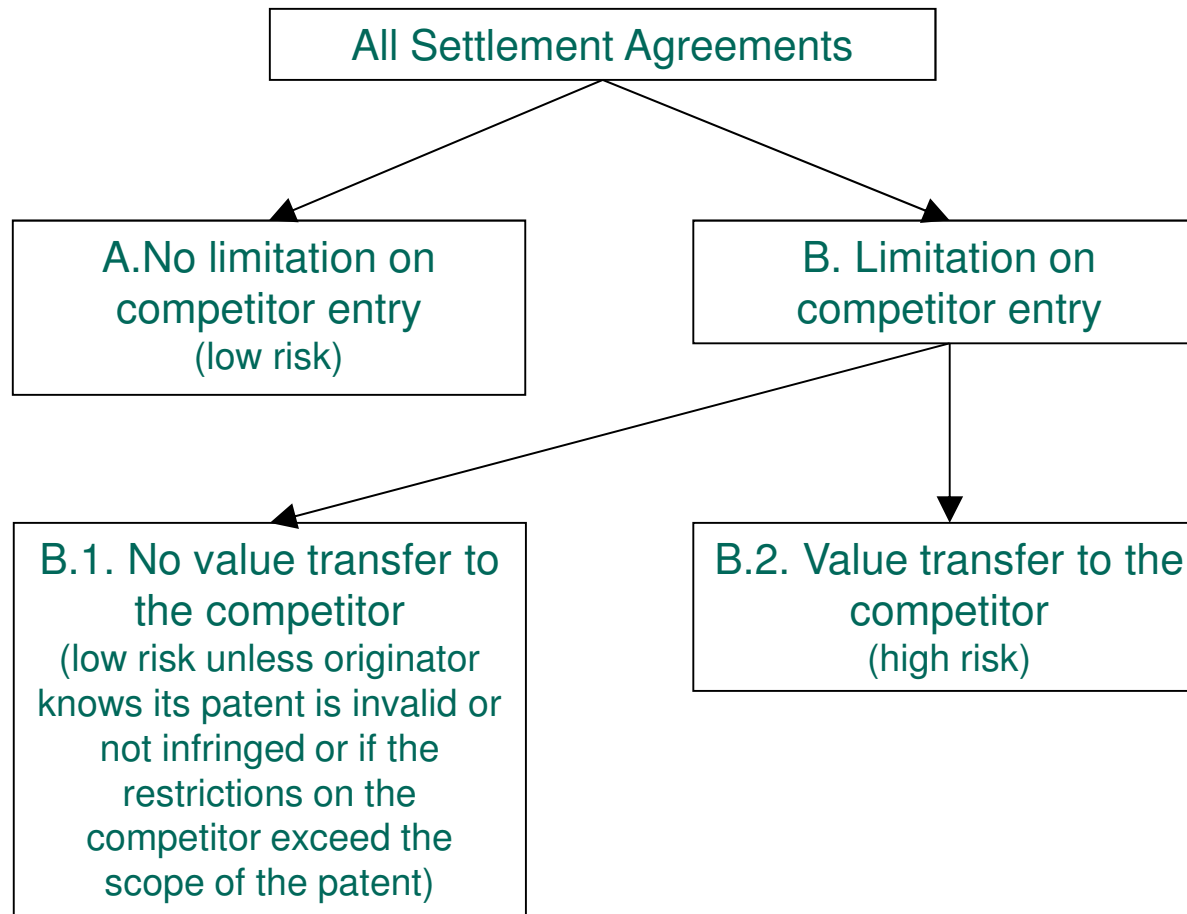
**VAN BAELE & BELLIS**

6 December 2016

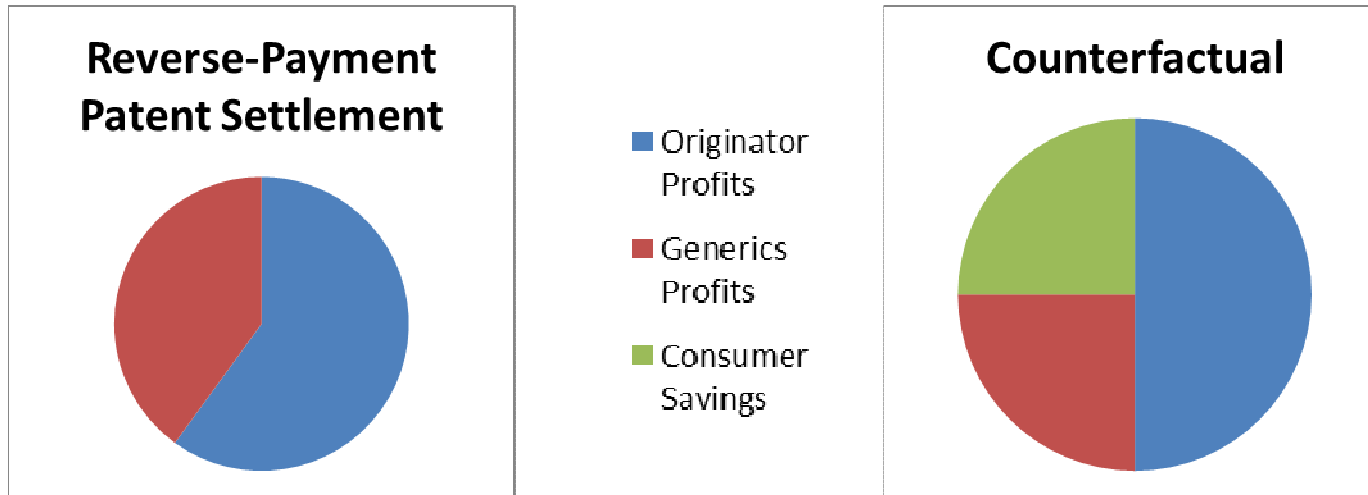
## Patent Settlement Cases

Year	Companies	Investigated Practice	Country	Fines
2016	GSK & Generics	Illegal patent settlement agreements	UK	£45 million
2014	Servier & Generics	Illegal patent settlement agreements and illegal acquisition of a competing technology	EU	€427.7 million
2013	Lundbeck & Generics	Illegal patent settlement agreements	EU	€146 million

## Commission's Analytical Framework



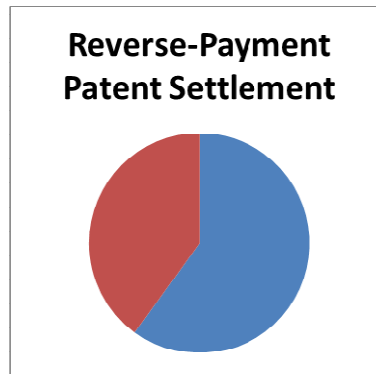
## The Commission's Simplistic Analysis



Question 1: What is the counterfactual? Generic enters and wins in litigation? Less restrictive settlement?

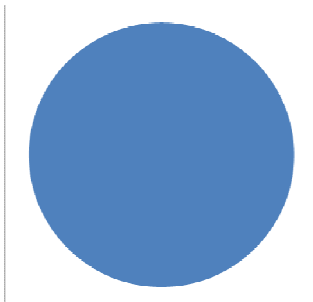
Question 2: Has the Commission proven that its counterfactual is likely (or – in a by object case – so likely that a detailed assessment is redundant)?

## Many Counterfactuals Are Possible

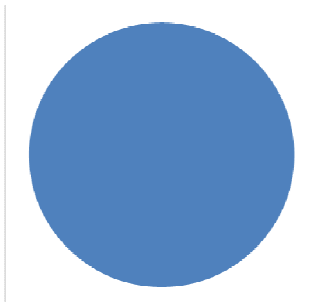


- Originator Profits
- Generics Profits
- Consumer Savings

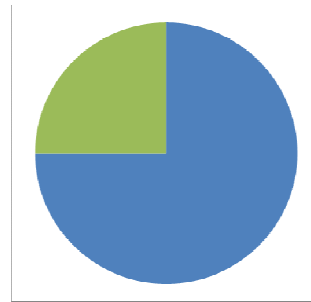
**Originator Wins  
Injunction and on  
the Merits**



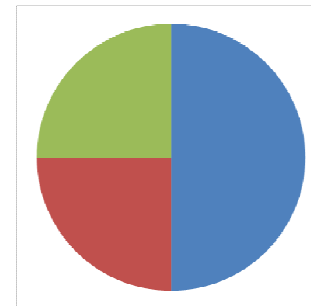
**Generic Decides  
Not to Enter Due  
to Patent Risks**



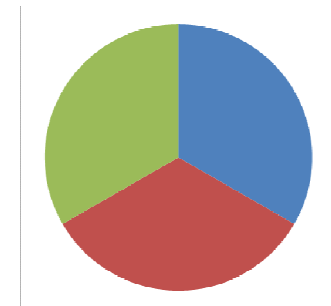
**Generic Enters At  
Risk and Loses in  
Litigation**



**Split the Time  
Deal**



**Generic Enters  
and Wins  
Litigation**



## **Relevance of Reverse Payment**

- **Is the direction of the payment relevant?**
  - Commission: reverse payment is anti-competitive because it suggests that Originator must think that it is likely to lose in litigation, so it must make a payment to keep Generic off the market
  - But direction of payment is a red herring – it is a function of the parties' relative bargaining positions and does not necessarily reflect the strength of the parties' claims.

## Relevance of Reverse Payment

- **Asymmetry of risk:**

Reverse payment by Originator to Generic simply reflects asymmetry of risk – even if Originator very likely to win, this asymmetry means that it may not want to take a chance of losing.



## Relevance of Reverse Payment

- **Key factors creating asymmetry of risk:**
  - Originator may face mandatory price reductions in jurisdiction of the litigation.
  - Originator may face cascading price reductions in other jurisdictions due to reference pricing.
  - Originator may incur significant damages due to length of litigation that it may have difficulty recovering.