

VAN BAEL & BELLIS

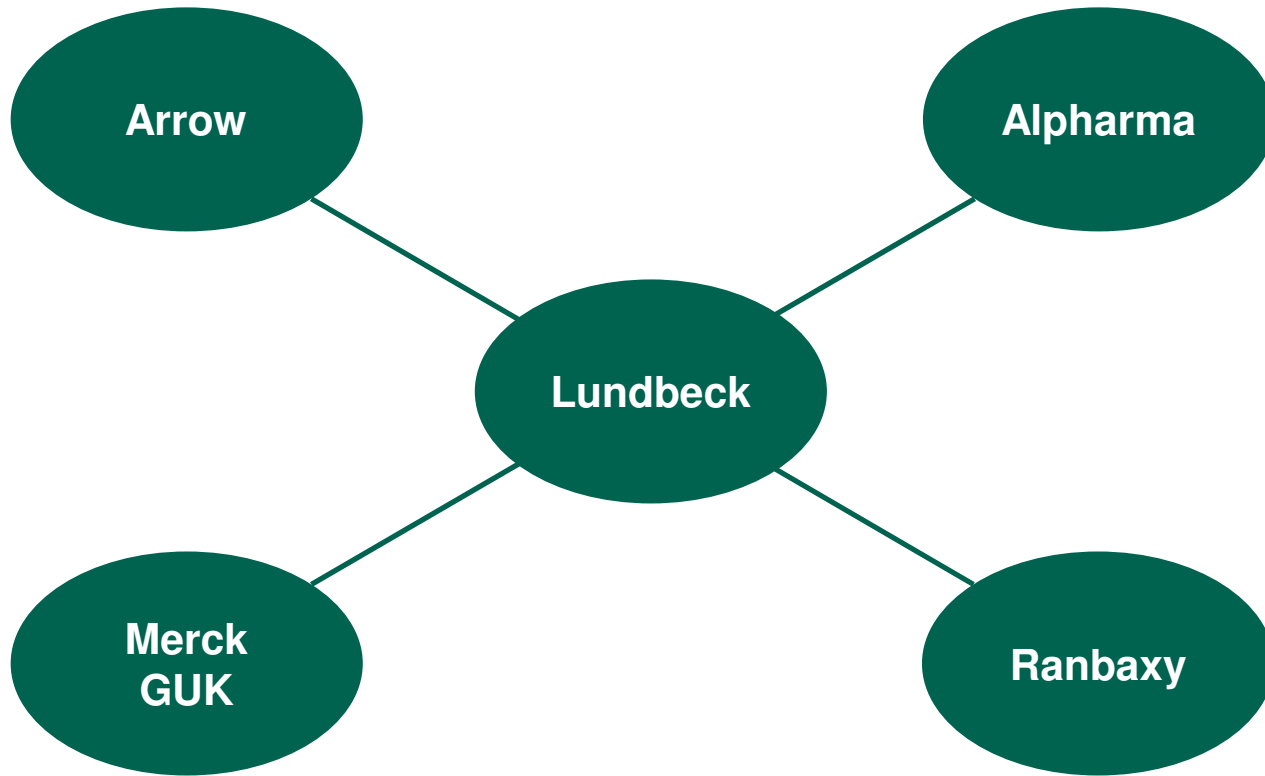
**General Court's Judgment in *Lundbeck*:
A Critical Review**

Brussels School of Competition Morning Briefing

David W. Hull

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The Agreements



Facts

Facts relating to Alparma settlement:

- Lundbeck manufactures citalopram, a blockbuster antidepressant
- Alparma preparing to enter the market upon expiry of the compound patent and had purchased product from supplier
- Just before expiration of compound patent, Lundbeck granted patent on process
- Lundbeck sued Alparma in UK and threatened to sue elsewhere for infringement of process patents
- Parties settled: Lundbeck paid Alparma and Alparma agreed not to enter for 18 months.

Potential Competition

Lundbeck and generics were potential competitors as generics had “real concrete possibilities” to enter the market

- Generics had obtained or taken steps to obtain marketing authorizations
- Some generics concluded supply contracts in anticipation of entry

Existence of process patent did not block entry

- 50 to 60% chance of invalidity
- generic could launch “at risk”
- possible to obtain non-infringing product
- presumption of validity of patent not the same as presumption of illegality of generic products
- Patent did not prevent generics from entering

“By Object” Infringement

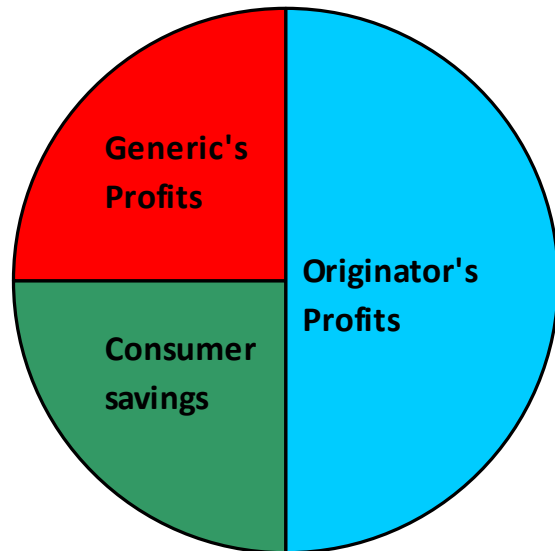
- Payment not linked to strength of the patent, but the expected profits of generic entering market
- Akin to a straight-forward market-sharing agreement exchanging uncertainty of patent litigation for certainty of no generic entry in return for a payment.

What's Wrong With This Picture ?

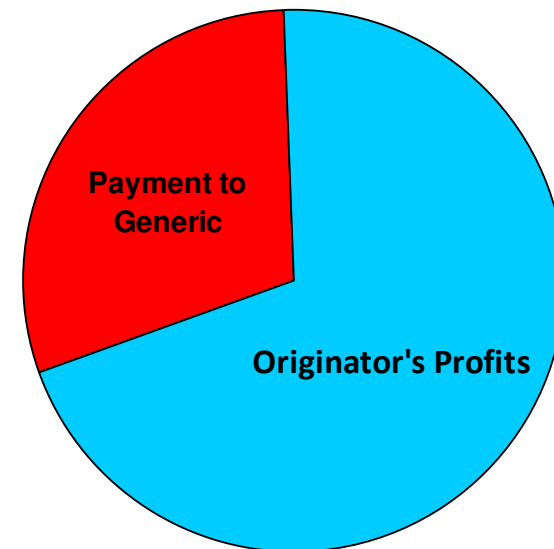
Monopoly



No Reverse Payment Settlement
(Commission's Counter-Factual)

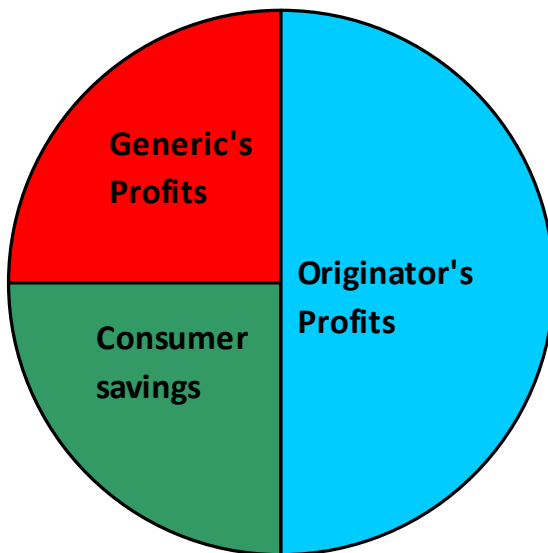


Reverse Payment Settlement



No Settlement: 2 Possible Outcomes

Generic Wins

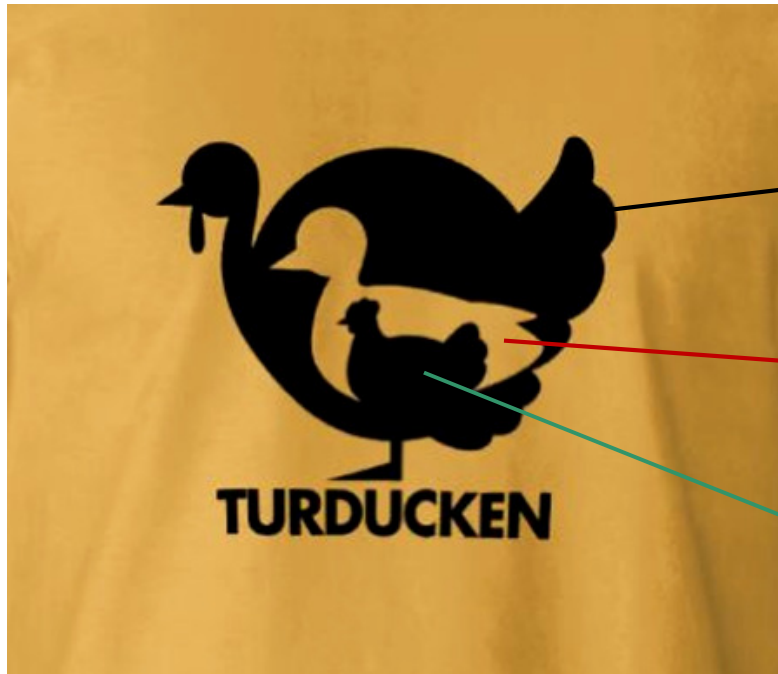


Originator Wins



Criticisms of Counter-Factual

- It assumes that Generic is more likely than not to win in litigation, which is an incorrect assumption.
- Subtext of Commission decision and General Court's judgment is the notion that Lundbeck's process patent not very strong – but Commission ill-equipped to judge likely validity of patent



Settlement of patent case

Competition law case about settlement of patent case

Patent case

A Better Approach

- Assume that patent is valid and infringed unless compelling evidence that Originator would lose in patent litigation.
- Assumption that patent is valid is more consistent with patent system than an assumption that it is invalid.

Relevance of Reverse Payment

Is the direction of the payment relevant?

- Commission/General Court: 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.