ruling

COURT OF APPEAL OF THE HAGUE

Civil law
Team Trade

Court case numbers	200.327.532/01 and
Case numbers court	200.328.173/01 C/09/644989 / KG ZA 23-240 C/09/644996 / KG ZA 23-244 C/09/646434 / KG ZA 23-322

Interlocutory judgment of 15 August **2023 (in case of anticipation)**

in the case of

the foreign-law legal entity Bristol-5teyers Squibb Holdings Ireland Limited Company, based in Dublin, Ireland,
appellant,
Advocate: Mr R.M. van der Velden, with offices in Amsterdam,

at

1. Sandoz B.V.,
based in Weesp, the
defendant,
Advocate: Mr O.P. Swens, practising in Amsterdam;

2. Centrafarm B.V.,
3. Centrafarm Services B.V.,
4. Centrafarm Netherlands B.V.,
5. Stada Service Holding B.V.,
all established in Breda,
defendants,
Advocate: Mr D. de Lange.

The court will hereinafter refer to the appellant as BMS, the respondent under 1 as Sandoz, fencers under 2-5 as Stada c.s.

and in the case of

the foreign-law legal entity Bristol-Meyers Squibb Holdings **Ireland Limited** Company,
based in Dublin, Ireland,
appellant,
Advocate: Mr R.M. van der Velden, practising in Amsterdam,

at

1. Teva B.V.,
2. Teva Netherlands B.V.,
3. Pharmachemie B.V.,
all domiciled in Haarlem, the
defendants,
Advocate: Mr J. Krens, practising in Amsterdam;

The court will hereinafter call the appellant BMS and the defendants jointly Teva c.s.

The defendants in both cases will hereafter be collectively referred to as Sandoz et al.

1. The case in brief

1.1 ln the present proceedings, BMS seeks, inter alia, an injunction against Sandoz et al. from marketing generic apixaban. The issues at stake include how the ruling G2/21 dated 23 March 2023 of the Grand Board of Appeal (GKB) of the European Patent Office (EPO) should be interpreted and whether, in light of that, the patent relied on by BMS can be considered inventive.

2. Proceedings on appeal

2.1 The course of the appeal proceedings is evidenced by the following documents:

the urgent appeal summons with grievances dated 22 May 2023, by which BMS appealed the judgment of the judge in preliminary relief proceedings of the District Court of The Hague dated 17 May 2023 in the case against Sandoz with case/role number C/09/644989 / KG ZA 23-240;
- the urgent appeal summons with grievances dated 22 May 2023, by which BMS appealed the judgment of the judge in preliminary relief proceedings of the District Court of The Hague dated 17 May 2023 in the case against Stada c.s. with zaaWrol number C/09/644996 / KG ZA 23-244;
the urgent appeal summons with grievances dated 5 June 2023, by which BMS appealed the judgment of the judge in preliminary relief proceedings of the District Court of The Hague of 31 May 2023 in the case against Teva c.s. with case/role number C/09/646434 / KG ZA 23-322;
- Sandoz's response, with exhibits;
- the memorandum of reply of Stada et al, with exhibits;
- Teva et al's reply with prodiictions;
the productions submitted by BMS on the occasion of the oral proceedings referred to below;
the exhibits submitted by Sandoz on the occasion of the oral proceedings referred to below;
the exhibits submitted by Stada c.s. on the occasion of the oral proceedings referred to below;
the exhibits submitted by Teva et al. at the oral hearing mentioned below.

2.2 An oral hearing was held on 29 June 2023. The lawyers explained the case on the basis of pleadings which they submitted.

3. Factual background

3.1 BMS is part of the BMS concern. This concern is a pharmaceutical group that operates worldwide and focuses on drug development. Since 2007, the BMS concern has entered into a global partnership with Pfizer.

3.2 BMS - in the Netherlands and elsewhere - markets the drug with the brand name EliqiiisK, with apixaban as the active ingredient. Apixaban is a substance that inhibits the work ing of factor Xa. Inhibiting factor Xa helps prevent the formation of blood clots. Eliquisis used in tablet form as an anticoagulant, or blood thinner, in the treatment of thromboembolic disorders.

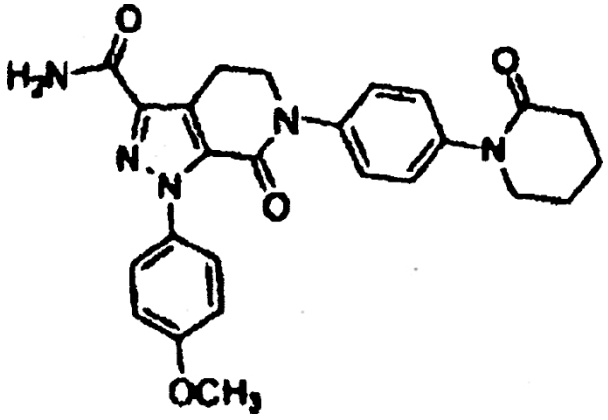
3.3 Bristol-Meijers Squibb Company (USA) filed an intemational PCT application on 17 September 2002 under number WO 03/026652 (hiema: WO 652) entitled *'Lactam-containing compounds and derivatives thereofas factor Xa inhibitors'.* The application invokes priority document US 60/324165 dated 21 September 2001 (hiema: US 165).

3.4 WO 652 was continued as a European patent application and eventually granted on 12 August 2009 under publication number EP 1 427 415 B l (hereinafter EP 415 or the patent) with BMS as patentee. EP 415 was in force, including in the Netherlands, until 16 **September 2022.**

3.5 EP 415 is the basic patent for Supplementary Protection Certificate (NL) 300500 for 'Apixaban optionally in the form of a pharmaceutically acceptable salt' (hereinafter the SPC). The SPC commenced on 17 September 2022 and is effective until 19 May 2026.

3.6 Claims 1-4 of EP 415 relied upon read as follows in the authentic English version:

1. A compound, which is represented by formula (1) [apixaban - court):



or a pharmaceutically acceptable salt thereof.

2. A compound according to claim 1, which is represented by the formula (I).

3. A pharmaceutical composition, comprising: a pharmaceutically acceptable carrier and a therapeutically effective amount of the compound of the formula (1) of claim 1 or a pharmaceutically acceptable salt thereof.

4. A pharmaceutical composition, comprising: the pharmaceutically acceptable carrier and a therapeutically effective amount of the compound of claim 2.

3.7 International patent application WO 00/39131 (hereinafter WO 131) dated 17 December 1999 is the closest prior art for EP 415. WO 131 was published on 6 July 2000 and entitled *'Nitrogen containing heterobicycles asfactor Xa inhibitors'*. The inventors are from the same research group as the inventors of EP 415.

3.8 During the granting procedure, EP 415 was limited to apixaban, following objections by the Examiner of the EPO to what he considered to be too broad a main claim (a Markush formula). At the Examiner's request, during the granting procedure, BMS submitted results of in vitro tests, as evidence of the technical effect claimed by BMS that apixaban is a more potent factor Xa inhibitor than the structurally closest compounds of WO 131.

3.9 By writ of summons dated 2 jtili 202 l, Teva Nederland B.V. brought VRO proceedings against BMS before the District Court of The Hague, seeking the annulment of the Dutch part of EP 415 and of the ABC (hereinafter: the VRO proceedings). These proceedings have been stayed pending the GKB's ruling in case G2/21.

3.10 Sandoz belongs to the Sandoz Group, which is engaged in the development, production and distribution of, among other things, generic medicines. One such medicine is the generic version of Eliquis (hereinafter apixaban Sandoz).

3.11 Sandoz obtained market authorisation for apixaban Sandoz 2.5 mg and 5 mg film-coated tablets on 24 September 2021. Sandoz had apixaban Sandoz included in the May 2022 G standard, published on 12 April 2022. Apixaban Sandoz is

become preferred by several health insurers.

3.12 Following the inclusion in the G-standard of apixaban Sandoz, BMS initiated summary proceedings against Sandoz in April 2022. Judgement was delivered in that case on 10 May 2022. The interim relief judge assumed that there was a reasonable chance that the patent and the SPC would not survive proceedings on the merits due to lack of inventive step and therefore denied an injunction. Briefly, he considered that the improved inhibition of factor Xa claimed by BMS by a Ki value in late nanomolar range could not be deduced from the original application, nor made plausible therein, so that this effect could not be taken into account in the assessment of inventive step.

3.13 Stada c.s. belongs to the Stada group, which is engaged in the development, production and distribution x an vooniaiiiic genei ial drugs. One of those generic medicines is Apixaban CF. Apixaban CF is a generic version of Eliquis .

3.14 Stada et al obtained market authorisations for ApiKaban CF 2.5 and 5 mg on 3 January 2022. Stada c.s. announced on 7 March 2023 that this product would be included in the G standard for May 2023 on 18 April 2023 and that it would enter the market on 1 May 2023.

3.15 Teva c.s. belongs to the Teva group, which is engaged in the development, manufacture and distribution of, among other things, generic medicines. One of those medicines is the generic version of Eliquis (hereinafter apixaban Teva).

3.16 Teva B.V. obtained market authorisations for apixaban Teva on 17 November 2020. By letter dated 18 April 2023, (the lawyer of) Teva c.s. wrote to BMS and informed it that it intends to market its generic product apixaban in the near future. Teva had apixaban Teva had apixaban listed i n the G-standard for June on 16 May 2023.

3.17 On 23 March 2023, the GKB ruled on case G2/21. The GKB had been asked the following questions:

> *1. If for acknowledgement of inventive step the patent proprietor relies on a technical effect and has submitted evidence, such as experimental data, to prove such an effect, this evidence not having been public before the filing date of the patent in suit and having been filed after that date (post-published evidence): 1. Should an exception io the principle of free evaluation of evidence (see e.g. G 3797, Reasons 5, and G 1/12, Reasons 31) be accepted in that* post-published *evidence mast be disregarded on the ground that the proofofihe effect rests exclusively on the post-published evidence?*
>
> *2. If the answer is yes (the post-published evidence ittiist be disregarded fi'the proofofihe effect rests exclusively on this evidence), can the post-published evidence be taken into consideration if, based on the inforntation in the patent application in suit or the common general knowledge, the skilled* person *at the filing date of the patent application in suit would have considered the effect plausible (ab initio plausibility)?*
>
> *3. If the answer to the firsi qtiestion is yes (the postpiiblished evidence must be disregarded if the proofofthe effect rests exclusively on this evidence), can the*

postpiiblished evidence be taken into consideration if, based on the information in the patent application in suit or the common general knowledge, the skilled person at the filing date of the patent application in suit would have seen no reason to consider the effect implausible (at initio fmplausibility)?

3.18 Before answering these questions, the GKB considered, inter alia, the following:

"0. The Enlca-gecl Bo'ii-J t'ikes note ofthc- cla.s.sification done h- he *i-vferi-ing hoor':1 in respect of the case law of the boards of appeal concerning the relevance of post-published evidence to prove an asserted technical ejection for acknowledgement of inventive step (see points 13.4 to 13.6 of the Reasons for the referring decision).*

71 However, when analysing the case law in more detail and irrespective of the conceptual terittinolo,qic-s f'or ii'hat cpiestion,s ? rincl 3 re/ei- t" as tii'o rlistinct f'ltmsihilih' tiyyroacln- , lh'- Enlarged Board understands from the case lmv of the boards ofappeal as common ground that the core issue rests with the question ofwhat the skilled person, with the common general knowledge in mind, understands at the filing date from the application as originally fileJ as the technical teaching ofihe claf'med invention.

72 Applying this understanding to the aforementioned decisions, nOt fit *reviewing them but in an attempt to test the Enlarged Board's understanding, the Enlarged Board is satisfied that the* outcome *in each particular case wuiild nol have been different from the actual finJing of the respective board of a p p e a l. Irrespective of the use of the termf "nological notion of plniisibility, the cited decisions appear to show that the particular board ofappeal focussed on the ffuestf "on whether or not the technical effect relied upon by the patent applicant or proprietor was derivable for the person skilleJ in the art front ltte lechnf "Cal teaching of the application documents.*

87 Notwithstanding the foct that the nforementionc-J ':lecisions were faken on the decisive facts of the case in hand and the particular submissions macle by the parties to those proceedings, the Enlarged Boord recognises o certaf "n degree oJ "comition ground that the courts of the APC Contracting States, when confronted 'flf'rh *the* e.rriniff2iiiion *ofan asserted technical effect in the assessment ofinventive step and with lhe question whether a patent proprietor may rely on post-published evidence to confirm that technical effect, pon':ter on the technical teaching of the claimed subject-matter that the person skilleJ* f'n *the art, with the common general knowledge in min':1, underston':1s from the patent application.*

3.19 The *'concliicling cotisiJerations'* preceding the Order on questions 2 and 3 read:

92. The term "plaiisibilitf-" thcit is found in the cose lms of the boorcls ofappeal end relied upon by the referring board in 'questions 2 and 3 of the referral and the reasons for it, does not amount to a distinctive legal concept or a specific potent lmv requirement under the EPC, in particukir under Article J6 *an':183 EPC'. li rother ':lescribes a generic catchivord sei-ed in the jiirispriiJence of the boards of appeol, by some national courts and by users o]"fhe European patent system.*

93 *The relevant standarJ for the reliance on a purported technical effect when assessing whether or not the claimed subject-matter involves an inventive step concerns the question ofivhat the skilled person, irith the common general knowledge in mind, would understand at the filing date from the opplicotion as originally filed as the technical teaching ofthe claimeJ invention. The technical effect relied upon, even at a later stage, needs to be encompassed by thnt technical teaching ariJ to embody the same irniention, because such an* ejection *does not change the nature of*

the claimed invention.

94 Hence, a parent applicant or proprietor may rely upon a technical effect for izrventive step if the skilled person, having the common general knowledge in mind, and based on the application as originally filed, would consider said effect as being encompassed by the technical teaching and embodied by the same originally disclosed invention.

95 Thu Enl irged BocirJ is asvcii-e oJ'the abstructness ofsowe of flue afoi-eitientioneJ ci-iterio. However, apart from the fact that the Enlarged Board, in ifs/fffC/fñn *assigned to* f/ *under Article I 12(1) EPC, is not calleJ to decide on a spec;fic case, it is the pertinent circumstances ofeach case which provide the basf'S on which a board ofappeal or other deciding body is required to judge, and the actual outcome may well be influenced to some extent by the technical field ofthe claimed invention. Irrespective of the actual circiimstanc'es ofa particular case, the guiding yriiic'iyfei* ref *uat ciboi'u slioiihl 'illuti' they cowyc-teitt bocir'l* o/riyye'i/ or *otltei- Jecicliiig bocl)' to take a decision on whether or not post-published evidence may or may not be relied upon in support ofan asserted technical effect when assessing whether or not the claimed subject-matter involves an inventive step.*

3.20 The GKB then answered the questions submitted as follows in its *Order':*

I Evidence submitted by a patent applicant or proprietor to prove a technical effect relf'ed upon for acknowledgement of inventive step of the claimed subject-matter may not be disregarded solely on the ground that such evidence, on which the effect rests, had not been public before the filing date of the patent in suit and was filed after thai date.

II A patent applicant or proprietor may rely upon a technical effect for inventive step if the skilled person, having the common general knowledge in mind, and based on the application as originally filed. would derive said effect as being encompassed by the technical teaching and embodied by the same originally disclosed invention.

3.21 Several nullity proceedings are pending against foreign parts of EP 415. Sandoz Limited and Teva Pharmaceutical Industries Limited have filed nullity proceedings against BMS in the UK. On 7 April 2022, Meade J of the High Court ruled that the English part of EP 415 was void for lack of plausibility and technical contribution. On 4 May 2023, the England and Wales Court of Appeal (Civil Division) upheld Meade J's decision. Nullity proceedings are also pending in Bulgaria, Denmark, Finland, Hungary, Ireland, Italy, Croatia, Poland, Portugal, Slovakia, Spain, Czech Republic, and Switzerland. ln all these countries, Teva companies are litigants.

3.22 Judgments on the merits have already been delivered in France, Norway and Sweden. In all those proceedings, the Teva companies' inventiveness objections were rejected and the relevant national part of EP 415 was found valid.

3.23 In proceedings in Finland and Ireland, Teva companies were recently granted injunctions as an interim measure.

3.24 In the US, Canada and Korea, BMS successfully defended the validity of the relevant EP '415 equivalent national patents and it was ruledthat generic versions of Eliquis infringe.

4. Court proceedings

4.t **BMS** sued Sandoz et al. - in separate proceedings and, as regards Sandoz: again - and claimed (in summary) an infringement ban, an order to remove generic apixaban from the G-Standard (or have it removed), an injunction against acting unlawfully by inciting infringement, with ancillary claims (abandonment, recall and rectification), all on pain of a penalty payment and provisionally enforceable and with an order that Sandoz et al.s. to pay the full costs of the proceedings pursuant to Section 10 l9h of t h e Code of Civil Procedure.

4.2 In support of its claims, BMS argued - in summary - that Apixaban Sandoz, Apixaban CF and Apixaban Teva each meet the characteristics of claims l to 4 of EP 415 as well as fall under the SPC. For Stada c.s. and Teva c.s., the opiiaion in the G-Standard meant that there was a concrete threat of direct infringement (or of acting unlawfully vis-à-vis BMS), with which BMS was entitled to and had an interest in the interim measures.

4.3 Sandoz et al. put forward a defence seeking dismissal of BMS's claims.

4.4 The interim relief judge dismissed the claims in all proceedings and ordered BMS to pay the costs. In short, the interim relief judge upheld Sandoz et al's defence and held that EP 415 constitutes a selection invention, as it protects a compound already revealed in WO 131 as one of the possibilities of the Markush formulations described therein. In the original application (WO 652), the technical effect of apixaban was not made plausible, let alone a surprising effect compared to the group of compounds disclosed in WO 131. On that ground, the interim relief judge ruled that there was a reasonable chance that the patent and the SPC based on it would not survive invalidity proceedings.

5. Claims on appeal

5.1 BMS appealed because it disagrees with the Judgment. It has raised several grievances against the Judgment. BMS claims the same as before the interim court. In addition, it claimed that, in case the Court of Appeal did not find a provisional enforcement order without further conditions admissible, it should be accompanied by a security deposit pursuant to 233 (3) Rv. More siibsidiously, BMS claimed that if the injunction proceedings were dismissed, the continuation of trading in generic apixaban should be subject to security pursuant to Section 70(11) of the Dutch Patent Act 1995.

5.2 In short, BMS's objections relate to the Interlocutory Court's interpretation of the GKB's G2/21 decision.

5.3 Sandoz et al put forward broadly the same defences against BMS's prohibition claims. Only Teva et al. additionally argued that EP 415 is invalid because the BMS company that invoked the priority right was not the company entitled to do so. According to Teva et al., EP 415 is null and void (also) on that ground, because prior art after the priority date is then

novelty d a m a g e .

6. Assessment on appeal

6.1 At the heart of the present proceedings is the question of what criteria to test i n a s s e s s i n g whether a patent claim is inventive.

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6.2 One method used by the EPO to assess inventive step is the *problent solution approach* (hereafter also referred to as PSA). This involves determining the technical effects of the differences between the features of the patent claim as granted and the closest prior art. Based on those technical effects, the objective technical problem is identified, i.e. the problem that needs to be solved to a c h i e v e the technical effects. It is then assessed whether the average person skilled in the art (m/f), taking into account his general know-how, *would reach* the solution according to the patent (the features of the patent claim) on the priority date without inventive step.

6.3 The formulation of the objective technical problem is thus closely related to the technical effects a c h i e v e d by the invention (relative to the closest prior art). In G2/21, the GKB considered, inter alia:

> *25. The technical problem must be derived from effects directly and caysally related to the technical features of fhe claimed invention. An effect could not be validly used in the formulation of the technical problem if the effect required additional information not at the disposal of the skilled person even afier taking into account ihe content of the application in question (see CLB, 10th edition, I.D.4.1, and* he *decisions therein).*
>
> *26. Step (c)* [in the PSA, namely 'determining the technical effect(s) or result(s) achieved by and linked to the difference(s) between the subject-matter of the claim at issue and the disclosure of the closest prior art - court], *which is the most relevant in the context of the present referral, requires that, in order to determine the objective technical problem, the technical results and effects achieved by the claimed invention as compared with the closest prior arl must be assessed. According to the established case law ' of the boards of appeal (...) if rests ii ith the palenl applicant or proprietor to properly demonstrate that the purported advantages of the claimed invention have siiccessfiilly been achieved.*

6.4 The significance of G2/21 lies (in part) in the fact that the GKB ruled when a patentee may rely on a technical effect achieved thereby in assessing the inventive step of his invention, viz.

> *"if the skilled person, having the common general lmoivledge in niiriJ, aitd based on the appliccition as originally filed, would derive sciid effect as being encompassed by the technical teaching and entbodiecl by the scinie origincilly disclosed invention".*

Explanation of G2/21

6.5 According to Sandoz et al, the test formulated in G2/21 means that in assessing

invention may only be invoked on the basis of a claimed technical effect if the average person skilled in the art already understands from the patent application that the claimed effect is actually achieved by the invention and the problem is actually solved, or at least that this is made plausible. That position is rejected.

6.6 The court agrees with BMS that the only requirement imposed by G2/21 for being allowed to take into account a technical effect - as determined in application of the PSA by comparison of the invention disclosed in the patent with the closest prior art - when formulating the objective problem statement and assessing inventive step based on it, is that it is in*ferable {"derivable")* to the average person skilled in the art, using his general knowledge of the art on the priority date, from the application that the alleged technical effect is due to the technical doctrine
thereof and embodies the same invention revealed therein.

6.7 The court notes that, read in the light of the considerations in the G2/21 decision, the words *'would derive'* in paragraph 11 of the Order, the meaning of which is disputed by the parties, do not, in its preliminary view, mean anything other than *'derivable'*. Cf. in this sense the*'intermediate conclusion'*.
at paras 70-72 of G2/21 (quoted at para 3.18 above).

6.8 It follows from the GKB's considerations in G2/21 that, according to G2/21, the test does not mean that it is always required that the application already includes evidence that the alleged technical effect actually occurs or that this is made plausible in the application, as Sandoz et al argue. In para 74 of G2/21, the GKB pointed out that inventiveness and post-activity, and their assessment, should clearly be treated separately and on their own merits: "*the issues ofst iciency ofdf'Sclosure (Article 83 EPC) and invenfive step (Article 56 EPC) and their assessment are clearly to be treated sepcircitely ciitJ on their own".*

6.9 In this regard, the GKB considered in paragraph 77 of G2/21 that, compared with the assessment of inventive step, the possibility of relying on*'post piiblished evidence'* to show that the claimed effect actually occurs is a lot more limited when assessing post-effectiveness (' eicf 'encJ *ofdisclosure')*. For an invention where the technical effect achieved by it is included in the claim, such as the therapeutic effect in the case of a second medical indication claim, such evidence should only be taken into account if evidence of the claimed effect is already included in the application, in particular if, in the absence of experimental data, it is not credible *{'creclible'j* that the effect was achieved. In the preliminary view, it is incompatible with this consideration to interpret G2/21 in such a way that the assessment of inventive step should be subject to the condition that the alleged effect has always already been made plausible in the application, as advocated by Sandoz et al.

6.10 It also follows that 'technical teaching' is not to be understood as 'that which is taught *to the shirt of information contained in the application* to the average person skilled in the art about how the technical problem *is actually solved* by technical means (as Sandoz et al incorrectly argue, para 63 plea HB). As BMS correctly argues, the technical teaching of a patent should be understood as 'that which is taught to the average person skilled in the art about how

the technical problem can be solved by technical means'[1] .

6.1 Ifthe test of G2/21 is met, the patentee may then present further evidence during patent grant that the claimed effect actually occurs (cf. para 26 of G2/21 last sentence). If such evidence is provided, the effect may then be included in the inventive step assessment.

6.12 Contrary to Sandoz et al's argument, this interpretation of G2/21 by the court of appeal does not lead to a carte blanche for speculative patents. Indeed, granting protection on the basis of a purely speculative patent for an invention that is only subsequently made is prevented by requiring that the technical effect is already encompassed by the technical doctrine of the application and embodies the same invention revealed therein. Moreover, it is well established that EP 415 does not involve a speculative patent. BMS has onbetss ist argued that the inventors had already x prior to the filing of the patent application experimentally established the favourable affinity and selectivity of apixaban.

6.13 The court can leave open whether and to what extent the G2/21 test is a different one from the one used in Dutch case law. While Dutch courts - like courts in other countries party to the European Patent Convention - are not bound by decisions of the GKB, they are largely considered guiding and are generally followed. Indeed, the CPC rulings aim to promote uniform application of the law applicable to the validity of European patents, as laid down in the European Patent Convention and incorporated in the national laws of the contracting states. Compliance with the decisions of the GKB therefore contributes to the desired harmonisation of (the application of) patent law within the contracting states. The court will therefore follow the rulings of the GKB in **G2/21 apply formulated test.**

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6.14 The GKB indicated in para 95 of G2/21 that the 'rather abstract' criteria it laid down in G2/21 must be *fleshed out* in a concrete case based on the specific circumstances of the case. This involves establishing what is necessary for the average practitioner to be able to infer from the application that the alleged technical effect was encompassed by its technical doctrine. That depends on the specific circumstances of the case. It is not inconceivable that in some cases this may require, for example, test results or a scientific doctrine to be revealed in the application. The court points out that then it is not so much a stricter requirement (in the sense of different test) as that, under the circumstances, more is then needed for the average practitioner to meet the test of G2/21. This assessment - the actual interpretation of the G2/21 criteria on the basis of the specific circumstances of the case - is therefore to be distinguished from always requiring (plausible) evidence in the application that the technical effect actually occurs before post-filed evidence can be considered, as Sandoz et al wrongly advocate.

' Cf. G 1 19, para 24, with reference to the 'Basic proposal for the revision of the European Patent Convention, MR/2/00, Munich, 13-10-2000, p. 43': 'technical teaching, ie an instruction addressed to a skilled person as to how to solve a particular technical problem using particular technical means'.

6.15 In this case, what matters in assessing whether the criteria set out by G2/21 are met is that the application expressly and specifically mentions the relevant effect as the primary objective of the patent. The technical effect achieved by the patent on which BMS relies is improved factor Xa inhibition. As Sandoz et al. rightly point out, "improved" should be understood as "improved over the compounds disclosed in WO 131". That effect is stated in the following passage of the application, which describes the purpose of the uiWinding compared to the prior prior art, including WO 131 (WO 652 p.6):

> **Therefore, efficacious and specific inhibitors of factor Xa are needed as potentially valuable therapeutic** agents for the treatment of thromboembolic disorders. It **is thus desirable to discover new factor Xa inhibitors. In addition, it is also desirable to find new compounds with improved pharmacological characteristics compared with known factor Xa inhibitors. Por example, it is preferred** to find new compounds with improved factor Xa inhibitory **activity and selectivity for factor Xa versus other serine proteases (i.e., trypsin). It is also desirable and**

6.16 Unlike in some other cases in which the plausibility of an effect was at issue (e.g. TKB 10 April 2019, T 235/13, Nakao, and Court of Appeal of The Hague 7 November 2017, ECLI:NL:GHDHA:2017:4029, Leo Pharma/Sandoz), there is no need to assess whether the average practitioner would read into the application the alleged effect based on his general professional knowledge.

6.17 In addition, this case differs from cases in which the breadth of the claim raised doubts among the average person skilled in the art as to whether the application teaches that the claimed effect can be realised across the full breadth of the patent's claim (e.g. TKB 12 September 1995, T 0939/92, AgrEvo). Indeed, the claims of EP 415 do not cover large groups of compounds, but only one specific compound, apixaban. Sandoz c.s. also failed to argue that the average person skilled in the art would, on the basis of his general professional knowledge, consider the alleged effect at the claimed joint to be implausible (as was the case, for example, in TKB 28 June 2005, T 1329/04, Johns Hopkins)

6.18 It is also important to note that it is established between the parties that the application discloses a test that allows the average person skilled in the art to easily self-determine the favourable Ki value of apixaban and thus its alleged effect.

6.19 These circumstances, considered in combination, mean, in the preliminary view, that the average practitioner with his general professional knowledge on the priority date will infer from the application a technical doctrine that includes that the claimed effect can be achieved with apixaban, if the average practitioner can infer from the application that apixaban is a promising candidate for it. According to BMS, this is inferable from the application for the following reasons.

6.20 The general professional knowledge of the average craftsman to be considered is uncontested the following.

6.20.1 Factor Xa inhibition is a more effective and safer route than thrombin inhibition. One factor Xa molecule generates thousands of thrombin molecules.

6.20.2 Du Pont was developing factor Xa inhibitors.

6.20.3 Factor Xa inhibitors with Ki values in the nanomolar range had already been identified. These had not yet reached clinical development due to insufficiently advantageous farinacokinetisclie properties.

6.20.4 In one research project, after identification of a factor Xa inhibitor, the next step is in vitro testing for factor Xa inhibition, and other serine proteases for selectivity.

6.20.5 Such in vitro tests are easy to set up (commercial kits were available for factor Xa and other eiizj men in 2001). may ken quickly and are easy to control.

6.20.6 The next step is 'oral bioavailability' testing. This requires an amount of 1 to 50 mg.

6.20.7 For the follow-up step of animal studies, another larger quantity is needed.

6.21 With that general professional knowledge, according to BMS, the average craftsman would then be able to enter the application read:

6.21.1 that the objective is to develop effective factor Xa inhibitors with improved factor Xa inhibition, selectivity and other pharmacological properties (see the passage quoted above (WO 652 p.6));

6.21.2 that with regard to Xa inhibition, compounds with (sub)nanoinolar activity with a Ki value below 0.001 pM, the preferred range mentioned in WO 652, were sought;

6.21.3 That the application reveals an easy-to-perform test to determine the Ki value;

6.21.4 that the uiwinders were looking for improved factor Xa inhibitors and found them in the form of lactam-containing compounds. The average person skilled in the art would infer this from the title of the application: *'Lcictaitt-containing coiitpotinds and derivatives thereofas factor Xa inhibitors',* the *'Siuiintciry ofthe invention'* which is entirely about lactam-containing compounds as being factor Xa inhibitors and the *'Background of the iitvention'.* That section is entirely about factor Xa inhibition and it also explains how factor Xa inhibition works and that it is a more efficient approach than thrombin inhibition:

Activated factor Xa, whose major practical role is the generation of thrombin by the limited proteolysis of prothrombin, holds a central position that links the intrinsic and extrinsic activation mechanisms in the final common pathway of blood coagulation. The generation of thrombin, the final serine protease in the pathway to generate a fibrin clot, from its precursor is amplified by formation of prothrombinase complex (factor Xa, factor V, Ca2t and phospholipid). Since it is calculated that one molecule of factor Xa can generate 138 molecules of thrombin {Elodi, S., Varadi, K.: Optimization of conditions Complex: Probable role of the complex in the amplification of blood coagulation. Thromb. Nes. 1979, *zS*, 617-629), inhibition of factor Xa may be more efficient than inactivation of thrombin in interrupting the blood coagulation system.

6.21.5 that the average person skilled in the art would infer from *"Accordingly" that* the inventors achieved the stated objective by developing lactam-containing compounds. The average person skilled in the art would interpret *"iiseftil°"* in the light of the objective as meeting the stated objective:

SUMMARY OF THE INVENTION

Accordingly, the present invention provides novel lactam-containing compounds and derivatives thereof that are useful as factor Xa inhibitors or pharmaceutically acceptable salts or prodrugs thereof.

6.21.6 That according to WO 652 (p.168, r.15 - p.170, r.20) lactam-containing compounds have been synthesised and tested;

6.21.7 that the average practitioner infers from Example 18 that apixaban has been synthesised on a much larger scale than the other lactam-containing compounds that have been synthesised, in a quantity and purity (after two recrystallisation steps) that is sufficient for animal testing;

6.21.8 That apixaban is specifically claimed in claim 8.

6.22 In its preliminary opinion, BMS rightly argues that from all that, the average person skilled in the art can infer from WO 652 that apixaban is the most promising factor Xa inhibitor. Given what the court considered above in paragraph 6.19, the G2/21 test is thus satisfied.

6.23 This is confirmed by the outcome of ground cases abroad.

6.24 In the French and Norwegian proceedings, the Teva companies broadly

raised the same inventive step objections and defences to BMS's position as set out above as in these proceedings. These objections and defences were rejected and BMS's patent was held valid in both proceedings on the merits. In summary, both the French and Norwegian courts on the merits held that the average person skilled in the art, making use of his general know-how, could, at the priority date, infer from the application that the aim of finding a compound with - compared to the already known factor Xa inhibitors - improved factor Xa inhibition, selectivity and farinacological properties, could be achieved with apixaban and that this could then be, and is uncontested, proven with post-filed evidence.

6.25 The French judgment considered, inter alia, the following in this regard (in an uncontested English translation provided by BMS):

S4. The Coun notes, however. that the initial filing specifically discloses **apixaban (page 76 of the translation of Document** WO'6S2), 'hich is further exemplified (no. IB), admittedly among} 140 cxamples and a dcscription of over 100 product summaries.

SS. I lowe 'er, the Court notes that this Document W O ' 652 reveals tests. **resulting in the determination of the** *"zziasl preferred"* **compounds with ver}' high affinity and in particular Ki fi 0.001 {zM. This Document WO'652 further specifies that the invention relates to a factor Xa inhibitor whose pharmacological and pharmacokinetic properties arc improved. It further describes that 3.07 g of apixaban havc been synthcsized (page 178). This quantity undoubtedly distinguishes api.xaban among all the examples of synthesised compounds, in that it is, by far, the largest quantity synthesized by the description (no other example falls to the gram, with the other largest quantity' synthesized being fixamplc 9I: 0.34 g).**

S6. A person skilled in the art would have necessarily deduced, on thc basis of common general knowledge, that the patentee thought that apixaban was a promising compound, or even the most promising compound

It is also the c"nclt's'on thai Lh¢ English decision rcach0d (iccn s 171 and 172 of the I(igh £"ourt of l'ngland 8nd I\ales judgment of 7 April 2U?2: *"Tire* **3 ppoizsr tz ztor** *cumpleiel* **u'ifAo "r** *eele--anca ( ) ii sets 'iprxahan ap'irl f'rom* **I/ir** *oiher exemplified compounds based on information in '652 itself that I think the skilled reader would notice However ( ) I do* set' ïïti'i' f/le puiiir run jo *und* /urï/u-r *hunt the yutr-tl thuught thut upixuhtin v ice yroiiiis my' j*

57. Of **course,** this conclusion is not formally expressed in the description from the priority date and is further less corroborated by data made public in this document when it 'as filed.

58. 1Iow'ever, such a requirement for disclosure of results does not appear in the EPC, neither in the implementing regulation, nor in French case law' for a patent other than a second therapeutic application (for it to be sufficiently described), whereas in this case, the extent of patent EP'4 lS monopoly corresponds to apixaban (regardless of it' ther apeutic application).

S9. As it has been sccn. the technical efFect uf apixaban is alsu credible front his point of vice of a person skilled in the art when reading the patent specification as filed (it beiitg noted that the protection of I\bird parties is in principle cnsurcd through thc complaint of undue extension). As a rcsulL it docs not appear to be justified here to depri¥'c hMS frum the possibility of pro -iding proof of lhc contribution cfthis compound to the state of the art, on the date of Filing, by tic production of external and contcnporary clcmcnts.

60. In this case, ftMS submits to the proceedings the laboratoq notebooks and reports of its researcher s. prior to the filing of the WO'652 application, which indisputably demonstrate in a manner that has actually not seriously been disputed, that it was in possession of the invention, i.e. a factor Xa inhibitor, useful in treating thrombococmbolic disorders. with impruvcd phatznacological and phannacok inctic properties.

6.26 ln the Norwegian judgment, the following considerations, among others, were made in this regard:

Further reference is made to the r- - application page 170, lines 2 I to 22 (FU page 1779) where it is statecl that: "Coinpoiinds tested in the abox'e assay are considered to be active ii' they exhibit a Ki of'< 10 [tM." Furthermore, more prelened x'alties of K '"re listecl before it is stated that: "Still more preferred coiiipotinds of the present invention have Ki'.s of< 0.001 ttM" in line 26. Thus, it is *>l- icitly stated front the application that the nios rrelñiTC£l compotirtds are potent factor' Xa inhibitors.

The skilleil person o otild undeivstancl that the substances pro'lucecl liacl been tested in the normal way, anil that severil UI'the substances had pit ved tt' be ef'tñctive faclor Xa inhibitors. Furtliennore, the skilled person woiilcl understand that the compound in exa 1'le 18 apixaban had been selectecl ft'r liirtlier study because it had yielclecl proiiiisinp- results in initial tests, as an et'fectis e factor Xa inhibitor.

The skil1e'l per on ii ould nt'le that apixaban is the only coinpointd procliicetl in a lil1'ge amount. Of' all the *cxuuiy ie* in WW 652. quantities front 1 to 424 ing have been produced, " itll the excel,tion ot exaiiiple 18. " hich is apixaban, ix'liere ?-070 nag (3.07 _-iaiiis) is pro'liicetl. The skille'l pei'son ivt'tilcl liai'e ntateil the liii'ge ain"iinl txt'3.07 -pi'ains. Apixaban ix'as not only prodiiced in a larpge anioirnt, brit ii'as siibjectetl to liirtlier purification anal recrystallization steps. These are steps necessary for the preparation ot' a pure inatcri:il for h'ii'tlier pliai'inacokinetic shitlies and preclinicill ales elt'pinent stticlies o1' potential dnigs.

The court notes that the synthesizing process in exaniple 18 consists of six synthesis steps. o i8i an overall loci' yield of l.3°-£. This is a demanding process, o'liere intermediate products o ere produced several times. It is often iiiore deiiianding to produce larger quantities of clieiiiical substances than smaller ones. The skilled person o'ould understand that the manufacture must have been based on a deliberate process, and that example 18 (apixaban) "'as the most promising substance, and that animal experinients were probably planned or carried out in vivo with this substance. Thus, it is plausible to the expert that apixaban had a sufficiently good selectivity to study the antithroinbic effects in via o.

Following this, it is the court's view' that the skilled person would consider apiKaban to be a credibly effective factor Xa inhibitor.

It is then permissible to rely on subsequent ex idence. It is agreed that subsequent evidence confirms the effect.

The objective teclmical probleni can tlius be fonnulated as: to produce an ef1 "ective factor Xa inliibitor tor the treatinent of throniboeinbolic disorders, with iiiiproved properties.

6.27 As recalled in the French judgment (note 3 to recital 56 therefrom), the English court also actually held that the average person skilled in the art would notice the synthesis of apixaban on a gram scale and that he would understand from that that the onion winder considered apixaban to be *'prontising'*. That the outcome in those proceedings was nevertheless different lies in the fact that the English High Court and Court of Appeal are bound by English Supreme Court precedent in the Warner-Lambert v Generics proceedings'. Under that precedent, the application is required to provide a scientific justification, or include measurement results, that demonstrates plausibly that the alleged technical effect occurs. That test was not met, according to the English court: *"I do not see how the poittt can go ciny fUrther than that the patentee thoiight that apixaban was proiiiising. A bare asseriion to their effect in '652 (bare iit the sense oflacking data or reasoning) ivoiild not have been any use in establishing plausibility, as is clear front the second point in [37] in Wariter-Lantbert."* (UK High Court (2022) EWHC 822 (Pat) para 172).

6.28 For the time being, the test applied by the English court - which is also defended by Sandoz et al. in the present proceedings - is a different test from that of paragraph II of the Order in G2/21. The English test was developed by the English Supreme Court in a case that concerned after-effectiveness rather than inventiveness. For after-workability of second medical indication claims, the GKB in para 77 of G2/21 formulated a different test than the one formulated in paragraph II of the order. As already considered above in paragraph 6.9, the court of appeal does not consider it compatible with this consideration to apply the same test when assessing the inventive step of a claim that does not include the technical effect to be achieved, as is the case with the present dust claim.

Warner-Lambert Company LLC (Respondent) v Generics (UK) Ltd t/a Mylan and another (Appellants) [2018] UKSC 56, para 37.

6.29 The test applied by the Swedish court also implies that the invention is derivable must be from the application (judgment p.29, 3rdparagraph):

> The Patent and Market Court initially stntes that the technical el'fcci iiiust be deris'able from the patent application. either directly or through the General knowledge of the skilled person.

The Swedish court also ruled further that it is not required that the application contains evidence that the technical effect actually occurs:

> According to the court. the skillecl person who. with his general knoo'1edge, took part of the patent writing o'ould hold it too probable that apixaban u as an fXa inhibitor and in the absence ot'anything u'hich indicated the opposite x'oiild not find grounds *t "or* doitbt. The mere absence ol'speci1ic biological data x'oiild not hai'e lecl the skilled person to question the function o1' apixaban. nor has the investi-_ation in the case rex'ealed anytliinp- else that woiil'l have p-ii'en the skillecl person reason to doubt the compound's function as an lXa iifliibitor.

6.30 BMS presented evidence - during the granting procedure, therefore only after the application - that apiKaban is indeed an improved Xa inhibitor compared to the structurally c l o s e s t compounds revealed in WW 131. It is not in dispute that this evidence w a s provided. Both the French, Norwegian and Swedish courts have found EP 415 inventive.

6.31 The Dutch judge in interlocutory proceedings is - unlike u n d e r the so-called rule of referral in the case of decisions of the Dutch judge on the merits - not bound by decisions of foreign judges on the merits in disputes concerning parallel patents. However, these decisions do have authority, especially where - as in the present proceedings - substantially the same facts, arguments and legal questions are involved.

6.32 The court of appeal considers the decisions of the French and Norwegian soil courts to be readily followable. This also applies, in particular, to the opinion given therein that - contrary to Sandoz et al.'s argument - it was deducible for the average person skilled in the art using his general professional knowledge on the priority date on the basis of the application (cf. r.o. 6.20 and 6.21 above) was inferable from it that an *improved* factor Xa inhibitor was being sought over the Xa inhibitors already disclosed in WW 131, that the substance individualised in that application apixaban was the most promising candidate for it - thus revealing the application to be more than an *'iitere verbal statement'* of a technical effect -, that there was no reason for the average person skilled in the art to doubt that apixaban could achieve the goal (finding an improved faxor Xa inhibitor) and that there is no requirement that any evidence to that effect be included in the application.

6.33 ln those proceedings, virtually the same arguments were put forward by the parties as in the present proceedings and both judgements are largely based on the same facts and party expert statements. The position of Sandoz et al. that the

average practitioner would be read into WO 131 only that an *alternative* factor Xa inhibitor was sought - or at best the technical effect of enhanced Xa inhibition claimed by BMS was only mentioned verbatim in WO 131 - that it was only *subsequently* revealed that apixaban was an *enhanced* Xa inhibitor, and that the average practitioner would have found this speculative on the priority date, in the absence of any evidence in WO 652 pointing to it - which is the core of Sandoz et al's defence also in these proceedings - was rejected therein.

6.34 Taking into account the interpretation given to G2/21 above, the court of appeal sees no reason in what Sandoz et al. have argued to assume for the time being that the outcome in the French and Norwegian courts deciding on the merits would be incorrect and that the Dutch courts deciding on the merits would reach a different outcome.

6.35 On the basis of all the foregoing, the Court of Appeal is of the opinion that Sandoz c.s.'s claim that there is a good chance that the Dutch courts on the merits will consider EP 415 invalid for lack of inventive step must be dismissed.

6.36 The court thus turns to assess the defences to which the court in preliminary relief proceedings did not accede.

Added ntatery

6.37 Sandoz has argued (CvA first instance, para 251) that "to the extent that EP 415 would teach something technical that WO 652 does not technically teach (by omission and addition of passages, and by limiting the conclusions), there is added matter", thunder further substantiating this.

6.38 In the Court's provisional opinion, there is no added matter. As follows from what has been considered above, in the Court of Appeal's provisional opinion, the Dutch court deciding on the merits will rule, just like the French and Norwegian courts deciding on the merits, that the average person skilled in the art, using his general professional knowledge, could deduce from the application, on the priority date, that the aim of finding a compound with - compared to the already known factor Xa inhibitors - improved factor Xa inhibition, selectivity and pharmacological properties, could be achieved with apixaban. The test to be applied according to G2/21 (in the context of the assessment of inventive step) that the alleged technical effect is covered by the technical teaching of the application and embodies the same invention disclosed in the application is thus satisfied. There is thus no question of a different technical doctrine of EP 415 from that revealed in the application. The substance claimed in EP 415 apixaban is also disclosed in the application in an individualised manner, both in Example 18 and Claim 8.

6.39 The court notes, incidentally, that BMS rightly argued that even if a claim directed to apixaban would have been added only later, in the context of added matter, it is not required that the application plausibly shows or demonstrates that the technical effect achieved by the invention claimed in the new claim is actually achieved. A mere (implicit) disclosure of what is claimed under protection in the new claim is sufficient. This is satisfied, as follows from the above.

Priority

6.40 Teva et al have argued that the BMS company that invoked the priority of US 165 in the WO 652 application did not have the (priority) right to do so. Thereby, prior art after that date becomes novelty harm and EP 415 is null and void.

6.41 Between BM S and Teva et al, the following is established.

6.41.1 The priority document US 165 was filed on 21 September 2001 by Pinto and Quan, who at the time were employed by DuPont Pharmaceuticals Company (hiema: DuPont);

G.4l .2 D iPcnt is ox cigcnonzen duol liet Bi istul-M} cl's Sqtiibb cl\cci n, 'xaal na de i aanl is changed to Bristol-Myers Squibb Pharma Company (hiema also: BMS Pharma);

6.41.3 Pinto and Quan transferred their rights to US 165 to BMS Pharma on 3 November 2001;

6.41.4 Bristol-Myers Squibb Company (hereafter **BMS** Company) filed WO 652 for all signed countries except the US on 1 7 September 2002, naming Pinto and Quan as inventors and invoking priority based on US 165. For the US, WO 652 was filed by Pinto and Quan.

6.42 **BMS** argued, with reference to various submissions, that *beneficial ownership* on the priority right passed from BMS Pharma to BMS Company. Teva c.s. has not disputed that, or at least in the light of BMS' substantiated submissions, has not given sufficient reasons. Nor has Teva c.s. argued that it is not possible under Article 87 EPC for legal ownership and *'beneficial'* ownership of the priority right to be vested in different companies. Teva c.s.'s defence in the present proceedings is based in particular on the fact that for the assessment of the right to invoke priority, it is decisive who holds the legal ownership and that there was no *overJrachi* of the *jwiclical* ownership of the priority right by BMS Pharma to BMS Company prior to the WO 652 application.

6.43 In the court's preliminary view, BMS's defence boils down to the following. After DilPont's oveniaine, the legal title to the priority right remained with BMS Pharma and the *beneficicil oivnership* then passed to BMS Company. Having *beneficil oivnership* (aka: *equftttble title)* is sufficient to exercise priority rights. However, even if this were not the case, the requirements of Article 87 EPC are met in this case anyway. A *beneficial oivnership* gives the owner thereof (BMS Company), under the applicable law of the State of Delaware, the right to also have legal ownership transferred by the legal owner (BMS Pharma) on demand. This can be done on a form-free basis. With the invocation of the priority right by BMS Company, as the *'beneficial'* owner, it implicitly exercised the right to (also) have the legal ownership of the priority rights transferred from BMS Pharma. Thereby, in addition to the *'beneficial'* ownership, the legal ownership of the priority right was also transferred to BMS Company. Therefore, it validly invoked the priority of US 165, the court understands BMS's position.

6.44 This implicit 'appropriation' of (also) the legal ownership of the priority rights is, in the preliminary view, in accordance with the agreements made between BMS Pharma and BMS Company in the framework of the DuPont takeover, namely that BMS Company would file the new patent applications. This makes it sufficiently plausible for the time being that pursuant to agreements made about which of these companies would file patent applications, both the economic and legal ownership of the priority right of BMS Plianiia was transferred to BMS Company prior to the WO 652 application. Thus, in the preliminary view, the requirements set by Article 87 EPC for BMS Company to invoke the priority of US 165 have been met, and the prior art claimed by Teva et al. after that date is thus irrelevant to the novelty of EP 415.

6.45 lii the Swedish and French bodeili proceedings, the Texa companies also invoked a lack **of priority and** the **parties mutually** put forward largely the same **arguments** based on largely the same **expert statements, as in the present proceedings. In both proceedings, the Teva company's defence was rejected.**

6.46 The Swedish proceedings considered the following, among other things, in this regard (pp. 21-27 of the judgment):

> US 165 was submitted by inventors Donald .I. Pinto and Miini L. Qiian. 21 S-i'teinbei 2001. The investigation in the case show's that they transleiTedthe said patent application and certain additional rights associated; it to BMS Pliaiina on 3 November' 2001.BMS Plianna has thus taken the place of' the inventors as I.ar as US 165 is concerned.
>
> Under the Delaii'are legal order, a person can be the beneficial oo'ner t'f property ol' "liich someone else is the legal oo'ner. This also applies to iiii'entions and intellectual l°*'operty rights such as patents. It li'lloo s from the said legal order that it is the beneficial owner "'lio has the ultimate decision-makin-q poo'er over the property. It does not require a special transfer from one ou'ner to another for their i'arioiis interests in the property to arise.

Accor'linp- to the Patent and Market Cotirt. it is through the statements of Marla Matliia.s and Paul Golian. "'liic1i, according to the court. ilJere is no reason to i}iiestion. that there ix'as a policy w ithin the group repartlinp the decision-making of'intellectual property rivhts at the time "'lien WO 652 u as filed and that this policy iiieant that BMS Company had actiial control over the rights. Takin-_ into account the internal guidelines and the f.act that BMS Pharma o'as a ii'1ioIly ou'ned subsidiary - albeit indirectly oo'ned through a subsidiary and a subsidiary - ot' BMS Company, the court finds tltat BMS Company at that time u'as the beneficial ou'ner of US 165.

According t o the Patent and Market Coint, it is also clear that BMS Coiiipany, in tlte presence o1" the benelicial owner of(JS 165, has taken fire place o1 BMS Pharma in the meaning re1'erred to in Article 87 EPC u'lien WO 652 "'as tiled (ct\ Englancl and

Fioiii the 1oregoinp-. it is not sliown that BMS Co'-ị'- y laeked the right to ilis'oke prioiity norii LAS 165 ulien WO fi52 nas filed.

6.47 The French ground judge came to the same conclusion.

> 87. It shall be deducted that BMS Company holds the effective ownership of patent WO'652 as of October 2001 and as such entitled BMS Pharma so that it has validly filed this application, and validly claimed the priority right attached to the application US'I65.

6.48 In view of what has been considered above, the court sees no reason to assume that the Dutch court on the merits will reach a different outcome.

Spoc-deisencl interest

6.49 The Court of Appeal rejects Sandoz et al.'s view that BMS has no (further) urgent interest in its claims. The circumstance that Sandoz has been on the market with generic apixaban for quite some time does not alter the fact that BMS has an urgent interest in its claims. The longer Sandoz continues to offer its generic product at a lower price, the more price erosion will occur. The fact that Sandoz has been on the market with generic api.xaban for a long time cannot be attributed to BMS. It acted expeditiously by instituting interlocutory proceedings. The fact that the court in preliminary relief proceedings did not already uphold the status quo in the first judgment does not mean that BMS no longer has an urgent interest in achieving that situation (that Sandoz is not on the market with an infringing product) as yet.

6.50 On top of this, BMS has argued uncontested that it has an interest in a short-term ban, as it still has to negotiate the price agreement for apixaban with the Ministry of Health for the next two c a l e n d a r s this year. A

Relevant factor here is whether generic apixaban is available.

6.51 BMS also has an urgent interest in its claims against Stada et al. and Teva et al. Stada et al. entered the market after the judgment, Teva et al. has not yet entered the market, but is included in the G-Standard. Market entry by several generics can be expected to generate competition between them and has a reinforcing effect on the negative price spiral already set in motion by Sandoz' market entry. An eeiunally initiated price valiiig is in practice usually irreparable. Moreover, the presence of multiple generic apixaban providers will put the aforementioned price negotiations on a negative trajectory for BMS.
way put further pressure. This will result in significant harm to BMS. It has an urgent interest in preventing them.

6.52 The circumstance that Ter a c.s. was the subject of invalidity proceedings against EP 415 does not mean that BMS would no longer have an urgent interest in the present proceedings, as Teva c.s. argues. In that case, oral argument was set for 12 January
Teva c.s. did not want to cooperate in oral proceedings at the same time as the proceedings brought by Sandoz on 13 October 2023. Teva et al. did argue that BMS would have had procedural options in those proceedings that would have removed BMS's interest in interim relief, but did not specify which ones. Be that as it may, a speedy judgment, in which BMS has an interest, was not to be expected therein. In those circumstances, BMS was free to seek an injunction in interim relief proceedings and to appeal from the dismissing Judgment, even while proceedings on the merits were pending.

Divestment of interest

6.53 Sandoz has argued that the weighing of the parties' interests that has to take place in summary proceedings should be in its favour and therefore an injunction should be dispensed with. To this end, it points out that it has been on the market with generic apixaban since the first judgment and that a judgment on the merits will not be long in coming. Taking into account the also considerable interests of BMS in maintaining its SPC and the irreparable price erosion caused by the presence of a cheaper generic product, the Court of Appeal deems Sandoz's arguments, taking all circumstances into account, insufficient to dismiss BMS's claim for an injunction.

6.54 In the preliminary view, Sandoz infringed a valid BMS patent and is now infringing a valid SPC. Sando2 chose not to file invalidity proceedings against EP 415 before entering the market, apparently in response to the English High Court's judgment on the merits, despite its earlier notice to await the expiry of the SPC. It did so in the knowledge that the GKB would issue a ruling in G2/21, which would potentially affect the Dutch court's assessment of inventive step of EP 415. It then stayed in the market even after the GKB had ruled. By doing so, it took the risk that after the ruling in G2/21 on the inventive step on appeal or in new summary proceedings, it would be ruled differently and it would have to withdraw from the market again with its generic apixaban, with all the adverse consequences it outlined - including not being able to meet contractual obligations to health insurers assumed by Sandoz and the loss

of its 'first mover' fordee1 - of that.

6.55 That risk has materialised, as the Court of Appeal is of the preliminary opinion that Sandoz should not have entered the market. Under the given circumstances, the adverse consequences of a prohibition claim for Sandoz must remain at its own risk, in the sense that they cannot entail that the balancing of interests turns out to BMS's disadvantage. Be that as it may, the circumstance that patients and pharmacists would be disadvantaged if apixaban would have to be changed all the time is a circumstance of which Sandoz (and the health insurers that have designated apixaban Sandoz as preferred) should have been aware before it started offering its generic product even during the term of EP 415. That is not a circumstance that can be held against BMS and does not make the balancing of interests to its detriment.

6.56 The fact that proceedings on the merits are currently pending does not make the weighing of interests any different. The oral proceedings will only take place on 13 October this year and a decision in these proceedings cannot therefore be expected in the short term. As considered above in ground 6.50, BMS has argued without appeal that it has an interest in a short-term ban in connection with upcoming price negotiations for apixaban. In the present opinion, moreover, there is no reasonable chance that the court on the merits will consider EP 415 invalid.

6.57 Stada c.s. entered the market after the Judgment. Teva c.s. was not yet on the market at the time of the oral hearing in these appeal proceedings, but it has announced its intention to enter the market. As for Stada c.s. - and Teva c.s. in so far as it did so prior to the delivery of this judgment - it is true that it thereby knowingly took a risk that the Judgment would not be upheld. There are no reasons why the realisation of that risk and the damage caused by having to exit the market again should not remain at their risk. Nor can it work in favour of Stada et al. and Teva et al. in this weighing-up of interests that Sandoz is already on the market with a generic product. Notwithstanding the fact that the Court of Appeal will impose a ban on Sandoz and that the competition with Sandoz sought by Stada et al. and Teva et al. will therefore not occur, the presence on the market of a competitor with an infringing product cannot provide a licence for others to enter the market with another infringing product. Moreover, that market entry by more generic suppliers would only be at the expense of (the market share of) Sandoz and not BMS is, in the preliminary view, incorrect. Competition between different generic suppliers will lead to an enhanced negative effect on the price, also for BMS.

6.58 The unilateral Letter of Guarantee issued by Stada et al. to cover the damages to be suffered by BMS, as well as Sandoz's willingness to issue a similar guarantee, is insufficient to refrain from imposing an injunction, already in view of the unreasonable restrictions contained therein regarding the amount of the guaranteed amount and its period of validity.

6.59 Teva c.s.'s reliance on Article 16 Charter (freedom to conduct a business) cannot help it. As Teva c.s. recognises, this must be weighed against other rights, such as the rights - protected by Article 17 (2) Charter - that BMS derives from the SPC. In the circumstances, there is no

prohibition to be imposed on Teva et al. to enter the market with its generic apixaban product would be a disproportionate measure. In the preliminary opinion, the ABC can be deemed valid and a ban will also be imposed on Sandoz and Stada et al. There is therefore no unjustified competitive disadvantage of Teva et al. compared to these competitors.

Abuse of procedural law?

6.60 Under the circumstances, Sandoz did not put forward sufficient grounds on the basis of which it can be assumed that BMS would commit an abuse of rights or act contrary to due process by bringing a second preliminary relief action. The outcome of these proceedings confirms that BMS did not do so 'against better **know in' has done.**

6.61 BMS was free to apply again for an order for interim relief after the GKB had ruled in G2/21, ruling on a *point of law of fundanierital iiitportance* at issue here (cf. G2/21, para. 15). The fact that BMS did not appeal against the earlier interlocutory judgment does not prevent it from doing so. After all, a summary judgment has no res judicata. Nor does the fact that Sandoz has been on the market for a long time alter the assessment. After all, BMS acted expeditiously and took action again immediately after the G2/21 judgment, which it could reasonably assume would result in a change of assessment by the court in preliminary relief proceedings.

Conflict not closed system of remedies?

6.62 Sandoz furthermore objected to the grievances formulated by BMS in the second preliminary relief proceedings (paragraphs 5.21-5.26 of the SO) against the considerations of the court in preliminary relief proceedings in (paragraphs 6.12-6.16 of) the judgment of 10 May 2022, which, according to Sandoz et al. are unrelated to the test formulated in G2/21. According to Sandoz, it would be contrary to the closed system of remedies if the Court of Appeal - notwithstanding the fact that BMS did not appeal against that first judgment - were to assess those grievances in the present second interim proceedings. That objection need not be decided. As follows from what has been considered above, the court of appeal reaches a different outcome with regard to the inventive step of the patent on the basis of a different interpretation of G2/21 than that applied by the court in preliminary relief proceedings. The Judgment will be set aside for that reason alone. The grievances to which Sandoz objects are **failed to arrive.**

Conclusion and progress

6.63 The conclusion is that BMS's appeal succeeds. In its preliminary judgment there is no reasonable chance that the court in the proceedings on the merits will rule EP 415 or the SPC invalid, That the generic apixaban products of Sandoz et al. fall within the scope of protection of the SPC is not in dispute. The judgment of the interim relief judge therefore cannot stand and the court of appeal will set aside the Judgment.

6.64 The claimed injunction to cease infringement will be granted, as will the order to remove (or have removed) the generic apixaban from the G-standard. The periodic penalty attached to breach of these orders will be set at £100,000 per day (a

part of a day included) orC 1000,- per product, at BMS's discretion.

6.65 That and why there was wrongful conduct has not been sufficiently substantiated. The claim directed thereon is therefore dismissed.

6.66 The requested statement will be awarded as claimed, with the exception of the requested information relating to the calculation of damages or profit transfer. It has not been substantiated why BMS would have an urgent interest in doing so. The time limit for providing the information to be supplied will be set at two weeks after service of this judgment. The Court sees no reason for a statement by a chartered accountant in these interim proceedings, also considering the urgency requested by BMS. The periodic penalty payment to be imposed on the order is deemed to be already sufficient incentive to lexeteti otT1 fully and correctly comply with the order imposed.

6.67 The claimed recall of infringing products within seven days after service of this judgment is also granted. This may prevent further infringements in which BMS has an urgent interest, in view of the considerations under 6.51 and 6.52. No reasons were given as to why this term would be unreasonably short. The statement and recall obviously only apply to the defendants that entered the market with the generic apixabam.

6.68 The claimed rectification is rejected. BMS has insufficiently substantiated why it has an (urgent) interest in doing so in addition to the orders to cease infringement and remove (or have removed) generic apixaban from the G-standard.

6.69 The Court sees no reason to attach an obligation to provide security to a declaration of enforceability. The fact that Sandoz et al. run a recovery risk if BMS is ultimately ruled against has not been sufficiently substantiated.

Litigation costs

6.70 The court of appeal will order Sandoz et al. as the unsuccessful party to pay the costs of the appeal. These costs will be calculated on the basis of l0l9li Rv. The parties have agreed that these costs amount to £60,000, which the Court understands to be for both proceedings jointly and including disbursements, a specification of which is lacking. Since it has not been specified who will bear what share of these costs, the court of appeal will order Sandoz et al. jointly and severally to reimburse these legal costs of BMS and the court registry fee of £783.

7. Decision

The court:

Sets aside the Judgment and re-adjudicates:

7.1 orders each of the defendants, with immediate effect from service of this judgment, to cease and desist from any infringement of the SPC in the Netherlands, under penalty of

forfeiture of a penalty of £100,000 (in words: one hundred thousand euros) for each day (including any part of a day) that the relevant defendant fails to comply with the order in whole or in part or - at BMS's discretion - of £1,000 (in words: one thousand euros) for each infringing product with which the relevant defendant fails to comply in whole or in part;

7.2 orders each of the defendants, with immediate effect from service of this judgment, to remove, or cause to be removed, its generic api.xabai1 products from the G-standard, on pain of forfeiture of a penalty of £100,000 (in words: one hundred thousand euros) for each day (including any part of a day) that the defendant in question fails to comply with the order in whole or in part;

7.3 orders each of the defendants to report to l et adi'es of the ad' ocatcn ' an BMS within two (2) weeks of service of this judgment in respect of:

7.3.1 the full names and addresses of all domestic and foreign customers to which the relevant defendant has supplied infringing products, or substantial parts thereof, with a specification of the quantity of products or substantial parts thereof supplied, and the date of delivery;

7.3.2 the full names and addresses of all domestic and foreign suppliers from whom the relevant defendant obtained the infringing products or substantial parts thereof, with, for each supplier, a specification of the number of products delivered and the date of delivery;

7.3.3 the number of all infringing products manufactured, distributed and/or stocked by the relevant defendant;

all substantiated by means of all relevant supporting documents;

7.4 orders each of the defendants, within seven (7) days of service of this judgment, to take back from all its customers, other than end-users, all infringing products supplied by the defendant in question, refunding the purchase price paid and reimbursing the transport costs associated with their return;

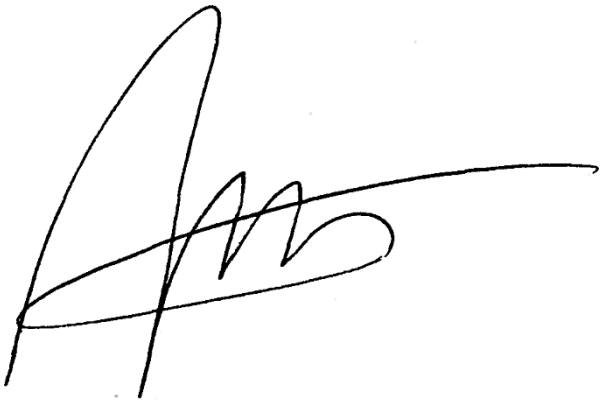
7.5 orders each of the defendants to pay an immediately payable penalty of £100,000 (in words: one hundred thousand euros) for each breach of, or - at BMS's discretion - for each day of breach of, any of the conditions set out in paragraphs 7.3 and 7.4 above. 7.4 Order imposed by relevant defendant;

7.6 orders the defendants jointly and severally to pay the costs of these appeal proceedings on the part of BMS, estimated at E 60,000 and E 783 in court costs, plus any post-court costs, with a stipulation that, if these costs have not been paid within five weeks of notification of this judgment, the defendants shall be liable to pay statutory interest on them without further notice;

7.7 declares this judgment provisionally enforceable;

7.8 Dismisses the more or otherwise claimed.

This judgment was delivered by Mr R. Kalden, chairman, Mr M.Y. Bonneur and P.H. Blok and was signed in public in the absence of the chairman by the senior judge and pronounced on 15 August 2023 in the presence o f the registrar.



for afsc hrift,
The Clerk of h et Ge echtsho
Den Haag,