BILAGA 50

JUDGEMENT

(office translation)

Court of Mid-Netherlands

Department Civil Law

Place of court session Lelystad

Judgement in P.I. of 30 December 2015 (early)

In the case between

1. Glaxo Group Limited
2. GlaxoSmithKline

claimants,

lawyers, Mrs. A.M.E. Verschuur, Mr. J.M. Boelens and Mr. A.H. Stoffels, Amsterdam, against

1. Sandoz B.V.
2. Sandoz N.V.

defendants,

lawyers, Mr. O.F.A.W. van Haperen, Mrs Th.Y Adam – van Straaten and Mrs. H.A.J. Pors, Rotterdam.

Claimants shall be jointly referred to as "GSK" and defendants jointly as "Sandoz".

1. The procedure

1.1. The course of the procedure follows from:
- The writ of summons dated 20 November 2015 with 69 exhibits;
- The statement in reply with 44 exhibits;
- The deed of deposit dated 7 December 2015 of Sandoz;
- The deed of deposit dated 9 December 2015 of GSK;
- The court hearing;
- The pleading notes of GSK;
- The pleading notes of Sandoz.

1.2. Judgement was rendered accordingly.

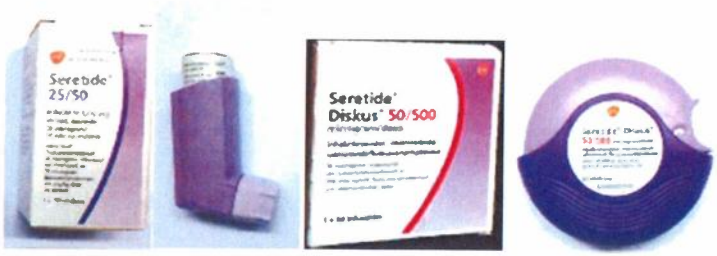
2. The facts

2.1 The GSK group is a worldwide pharmaceutical company as a result of a merger between Glaxo Wellcome and SmithKline Beecam in 2001. The GSK group develops, produces and sells prescription drugs, vaccines and OTC medicines. Glaxo Netherlands is the holder of several market authorizations for the distribution of prescription medicines and is the licensor in the Netherlands of the trademarks owned by Glaxo Group.

2.2 Sandoz Netherlands and Sandoz Belgium belong to the Novartis Group. Sandoz mainly focusses on the trade in generic medicines.

2.3 Both GSK and Sandoz are active in the field of breathing medication, more specifically in the field of asthma and COPD. The medicines within this market are divided, more or less in "relievers" and "preventers". Relievers are destined to quickly relief acute breathing difficulties and are active for a limited period. They are only used in the event a patient has immediate breathing difficulties. Preventers are used daily and for a longer period in time used to control the symptoms relating to asthma and COPD and to avoid immediate attacks.

2.4 GSK has applied for a patent on 7 September 1990 for medicines which contain the (combination) Salmeterol and Fluticason. The patent is registered on 13 October 1994 and publicized on 4 January 1995. Since 1999 GSK markets the Seretide-inhalers. Seretide falls within the category preventers and contains a combination of an anti-inflammatory agent (fluticasonpropionaat) and a long-acting ß2-agonist (salmeterol). The inhaler, the packaging as well as the promotion material contain the color purple .



On the Belgium market the medicine is offered in the following package.

2.5 The patent owned by GSK for this medicine (Seretide) is, after the obtained ABC-certificate (lapsed on 8 September 2013). Once a patent is lapsed, the previously patented medicine (hereafter: branded medicine), may also be marketed by third parties (generic medicine).

2.6 Sandoz has, after the lapse of the patent of GSK, developed the generic medicine Airflusal, which is offered in an inhaler named Forspiro. Sandoz Belgium has obtained a market authorization for this medicine for the Belgium market on 16 October 2014. The medicine has not been marketed on the Belgium market yet. On 14 Augustus 2015 Sandoz Netherlands has obtained a market authorization for the Dutch market.

2.7 Airflusal Forspiro is marketed by Sandoz Nederland since 1 October 2015. This medicine is presented as follows:

The color purple which Sandoz uses on the Airflusal Forspiro and (partly) on the package and promotional / information material contains the color Pantone 2573 C:

2.8 Both Seretide as well as Airflusal are prescription medicine.

2.9 GSK has applied for an accelerated trademark application on 30 June 2015 for the following color mark with the BOIP (Benelux Trademark Office):

The trademark is registered on 2 July 2015 under number 0977861 for pharmaceutical preparations and inhalers for asthma and or COPD in class 5 and 10 and contains the description CFE.29.1.5 (violet) and the PMS-code Violet 2587 C (hereafter the color mark).

2.10 GSK is also the owner of a community trademark registration (CTM) under number 3890126, which trademark was applied for on 16 June 2004 and has been registered on 19 December 2008 for inhalers in class 10. It concerns a combination color mark, consisting of two tones, with a description: "The trade mark consists of the colour dark purple (Pantone code 2587C) applied to a significant proportion of an inhaler, and the colour light purple (Pantone code 2567C) applied to the remainder of the inhaler".

2.11 The product Airflusal Forspiro in the color purple has been subject of various legal proceedings in Germany, Denmark, Norway, Ireland, Portugal and Korea between the GSK Group and the Novartis Group.

2.12 In Norway GSK has obtained an interim injunction proceedings and has started a proceedings on the merits against Sandoz based on slavish imitation and unfair practices. Both the P.I. judge as well as the judge on the merits have refused to award GSK its claims. In Germany GSK has won in first instance in the P.I. proceedings but Sandoz has filed appeal against these proceedings after which GSK has finally decided to revoke these proceedings. In Canada the filed color mark of GSK (which is similar to the community trademark) has been revoked after several parties, including Sandoz, had filed a revocation proceeding relating thereto.

2.13 In Denmark and Ireland GSK has summoned based on (presumed) infringement of the CTM by Sandoz (see point 2.10 above). Both the Danish court as well as the Irish court (in interim injunction proceedings) have denied the claims of GSK. At this moment in time proceedings on the merits are pending in Ireland between these parties, but no judgement has been rendered yet. In Canada, the registered color mark of GSK (similar to the CTM) has been declared void after parties, including Sandoz, filed revocation proceedings relating thereto.

2.14 On the color mark which is described above under point 2.9, which is subject of these proceedings, no judgement has been rendered yet. However, Sandoz has started several proceedings on the merits in order to obtain a revocation for the registered trademark, among which the currently pending proceedings before the court of The Hague and Brussels.

3. The conflict

3.1. GSK has demanded by judgement:

1. to order Sandoz BV and Sandoz NV with immediately affect after serving the judgement in the Benelux, to cease and desist from infringement on the trademark rights of Glaxo Group Limited, more especially but expressly not limited to cease and desist from every use as outlined in this writ of summons (particularly in paragraph 66) as well as the corresponding exhibits, as well as the use as specified in art. 2:20 paragraph 2 BTIP;
2. to order Sandoz BV with immediate effect after serving this judgement to cease and desist from (other) unlawful acts against Glaxo Group Limited and GlaxoSmithKline B.V., more especially but expressly not limited to cease and desist from every use as outlined in this writ of summons (particularly in no. 66) and the corresponding exhibits;
3. to order Sandoz BV and Sandoz NV within six weeks after serving this writ to provide to Mr. Dr. AME Verschuur, attorney from Glaxo Group Limited and GlaxoSmithKline BV, a written statement containing all information that is known to Sandoz BV and Sandoz NV with respect to the origin and distribution channels of the AirFluSal Products, (including, but expressly not limited to, the names and addresses of the relevant (legal) entity's), as well as the net profit (being the revenue from which exclusively the taxes

and direct variable costs are deducted) made in the Benelux as well as the exact manner how this met profit has been calculated as well as the total amount of AirFluSal Products that are still in stock with Sandoz B.V. and Sandoz NV, specified for the type of product; which statement must be provided by means of an audit report from an accountant, which is made taking into account COS 4400 (Control and Other Standards) by an independent chartered accountant chosen by Sandoz BV and Sandoz N.V. KPMG, PwC, EY or Deloitte, and must be accompanied with documentation from which the precision and completeness of those information appears;

4. to order Sandoz BV and Sandoz NV within two weeks after serving these judgment to send a signed letter on its own letterhead by register mail, without any (oral or written) accompanying text, to all its purchasers of the AirFluSal products in the Benelux, with exclusively the following text:

   "The preliminary injunction Judge of the Court of The Hague has recently sentenced us to inform you about the following.

   Recently we have offered and sold AirFluSal products which are infringing the purple trademark of GlaxoSmithKline. The preliminary injunction Judge has ordered that the products offered and delivered by us infringe the trademark rights of GlaxoSmithKline, as well as are otherwise unlawful towards GlaxoSmithKline.

   By order of the preliminary injunction Judge we have taken the particular products immediately from our range of products and will no longer supply these in the future.

   We request you to kindly but urgently immediately return to us the AirFluSal products that have been delivered to you. Of course we will reimburse you for the full purchasing amount as well as any transparent costs.

   A copy of the judgment is enclosed to this letter.

   Yours sincerely,

   Sandoz"

   Each letter always needs to be accompanied of an attachment which is a copy of the full text of the judgement,

   Copy of each letter being send simultaneously, as well as proof that these letters have been sent, to Mr. Dr. AME Verschuur, attorney of Glaxo Group Limited and GlaxoSmithKline BV;

5. To allow the claimed under 1 t/m 4 on paying of an immediately and forceable penalty, to be paid by the relevant plaintiff(s), of
   (i) EUR 10,000 (in words: ten thousand euros) for each time that the plaintiff(s) does not (fully and/or timely) comply/complies with one or more of the convictions to which it is sentenced, in this respect that this penalty is owed as much time as need if (subject of) the convictions are not (fully and/or timely) complied with, and, cumulative, per day at a relevant non-compliance persists, whereby each part of a day is counted as a full day;

   or to choice of Glaxo Group Limited and GlaxoSmithKline B.V. and whether or not in combination,

(ii) EUR 500 (in words: five hundred euro) for each product with which the relevant plaintiff(s) does not (fully and or timely) comply/complies with one or more of the convictions against her, in this respect that the penalty will be owed as much time as if (subjects of) the relevant convictions are not (fully and timely complied) with;

6. to order the plaintiffs individually, or at least in equal parts,

(a) in so far the currents claim relates to the infringement of intellectual property rights, to reimburse to Glaxo Group Limited and GlaxoSmithKline BV the reasonable and proportional litigation costs as well as other costs with respect to the current litigation based on art. 1019h DCCP;

(b) in so far the current dispute relates to otherwise unlawful acts, to reimburse to Glaxo Group Limited and Glaxo Smith Kline BV because fixed based on the liquidation rate; and

(c) in the usual subsequent costs;

7. to set the reasonable term to initiate a claim on the merit, as outlined in art. 1019i CCP, on six months after this judgement has been served;

3.2. To substantiate its claim GSK has broad forward the following arguments. GSK has marketed the medicine Seretide since 1999 on the Benelux market in the color purple and also on the packaging and the marketing- and information material the color purple is frequently used. The color purple was not used up until that moment in time on the market for inhalers and was therefore unique. The color purple used by GSK has distinctive character ab initio but has at least obtained distinctive character by its use. For that reason the BOIP has agreed to register the color mark. Sandoz infringes this trademark acc. to article 2.20 paragraph 1 sub a) to d) BTIP with the medicine Airflusal Forspiro. This medicine contains the same combination of active ingredients as Seretide and is also offered on the market by Sandoz in the color purple (pantone 2573 C). Sandoz ALSO acts unlawful against GSK. There is unnecessary confusion due to the similarities (6:162 Civil Code). Also the use of the color purple by Sandoz constitutes a misleading statement (6:194 Civil Code) and Sandoz hereby acts unfairly in the course of trade (6:193b Civil Code).

3.3. Sandoz puts forward its defense arguments. Primarily Sandoz argues that the color mark of GSK is void because it lacks any distinctive character and the color mark consists solely of a sign that can serve to indicate the characteristics of the goods and is also a sign which has become customary in the bona fide course of trade. Sandoz has, based on these arguments, filed revocation proceedings both in the Netherlands and Belgium. Further, Sandoz argues that the registration of the color Pantone 2587C as a color mark constitutes an act of unfair competition because GSK is a dominant player on the market and does not obtain any efficiency advantage by the registration of the color mark. Further, Sandoz claims that GSK has obtained the registration for the color mark by misleading the BOIP. Sandoz also argues that the registration of the color mark infringes the fundamental rights of Sandoz. Finally, Sandoz denies to infringe rights to the color mark registration of GSK, or that she acts unlawful against GSK, or is acting unfairly in the course of trade. Unless and insofar the claims of GSK are allowed, Sandoz requests to do so under the condition that GSK sets up a considerable security.

3.4. Insofar relevant the statements of parties will be discussed hereunder.

4. The assessment

Competence

4.1. Insofar the claims of GSK are based on the Benelux trademark law the following is relevant. In a judgement of the Appeal Court of The Hague (ref. to document number) it is ruled that the rules of jurisdiction of the EEX regulation 44/2001 (hereafter: EEX I-Reg.), insofar the regulation is applicable in material, formal and temporal regards, prevails over article 4.6 BTIP. There is no reason to assume that

such is differently with the applicability of the EEX treaty 1215/2012 (hereafter: EEX II-Reg.). Based upon the aforementioned judgement of the Court of Appeal, the PI judge is entitled to consider these claims in interim injunction proceedings on the basis of article 4 para. 1 EEX II-Reg. in conjunction with (jo.) article 8 paragraph 1 EEX II-Reg. jo. article 99 Civil Proceeding Code now that one of the defendants, Sandoz Netherlands, is located in the Netherlands and the claims against Sandoz Netherlands and Sandoz Belgium are so closely related that it is against a fair administration of justice to not rule on these simultaneously. Insofar the claims of GSK against Sandoz Netherlands are based on unfair practices/ unlawful acts, it is law that the PI judge is competent on the basis of article 4 paragraph 1 EEX II-Reg. jo. article 99 civil procedures code.

4.2. It can be left aside if the jurisdiction needs to be established on the basis of national or Benelux law now that, on the basis of article 99 Civil Proceedings Code as well as on the basis of article 4.6 para. 1 BTIP, the PI judge is relative competent because Sandoz Netherlands has its seat in the district of Mid-Netherlands (thus: Lelystad).

4.3. The competence of the court is also not argued by Sandoz.

Trademark infringement

4.4. According to GSK, Sandoz is (by the use of its color purple) infringing the color mark of GSK which GSK uses on its medicine Seretide, with its medicine Airflusal Forspiro, the package and the marketing material.

4.5. The most far stretching defense of Sandoz concerns the argument that the registration of the color mark is void. Sandoz has already filed revocation proceedings against this color mark registration in the Netherlands with the Court of The Hague and in Belgium with the Court of Brussels. In relation thereto Sandoz invokes, among others, the grounds for revocation as included in article 2.28 para. 1 sub b, c and d BTIP. According to Sandoz, the color mark Pantone 2587C lacks any distinctive character, can serve as a characteristic/indication of the goods and the sign has become customary in the bona fide course of trade.

4.6. As Sandoz has filed proceedings concerning the revocation of the color mark with the Court of The Hague and Brussels, the PI judge shall first and foremost have to asses if there is a serious, real chance that the judge on the merits will award the revocation claim.

4.7. On the grounds of article 2.28 paragraph 1 sub b to d BVIE, anyone with an interest may invoke the revocation of a trademark in case the trademark lacks any distinctive character (b), consists solely of a sign that can serve in the course of trade as an indication of the sort, capacity, amount, destination, value, place of origin of the goods or the time of production of the goods (c), or have become customary in the normal language or in the bona fide course of trade (d). These grounds for revocation can however not succeed in the event it can be established that a trademark has obtained distinctive character due to the use thereof (article 2.28 para. 2 BTIP).

4.8. The PI judge concludes as follows. According to established case law the distinctive character of a trademark entails that a trademark for which the registration is obtained can identify the goods and services as originating from a specific company and thus that these goods or services are distinguished from other companies.

4.9. This distinctive character - either intrinsic (ab initio) or by use - must be judged for the goods and services for which it is registered based upon the probable perception of the relevant public, which is the normally informed and reasonably circumspect and attentive average consumer for the relevant category of goods and services. In the issue at hand, it concerns medicines for asthma/COPD, which can only be

obtained by (doctors) recipe. The relevant public for prescription medicines consist both of end users as well as professionals within the healthcare sector, which are the doctors prescribing the medicines and the pharmacists selling the prescription medicines (*reference made*: Travistan judgement ECJ).

4.10. For the assessment of the distinctive character of a specific color as a trademark the general Interest should be taken into account which means the availability of colors cannot be unjustifiably limited for other market parties which offer the same goods or services as those for which the registration was sought. The bigger the numbers of goods and services of the type for which a color trademark is applied, the sooner this comes into conflict with the system of unfair competition. In that respect it should also be taken into account that the consumer is not used to perceive colors as an indication of origin (*reference made*: Oberbank judgement ECJ). Only in case a color mark – before it was used –significantly differs from the norm which is customary in the relevant sector and therefore can fulfill the essential function of indication of origin, it can have distinctive character.

4.11. That the color mark of GSK has distinctive character ab initio, as argued by GSK, has, to the assessment of the PI judge, become insufficiently likely. Parties do not disagree that in the market of medicines for asthma/COPD, colors are often used by pharmaceutical companies on (the inhalers of) its medicines. The use of different colors is therefore a customary practice in the market. Although it is a fact that the color purple, at the moment of the market introduction of Seretide by GSK, was not used, it has been insufficiently motivated/claimed by GSK that the color purple was so characteristic in a market in which the use of colors became more and more customary, that it therefore could fulfill its essential function of indication of origin. Also in the letter of GSK to the BOIP of 29 June 2014 in which it requests to register the color mark, GSK hardly argues why the color mark applied for has obtained ab initio distinctive character (exhibit 25, writ of summons).

4.12. Further, Sandoz has argued that the use of color in the relevant market can serve to indicate the purpose of the good. GSK has denied this and states that in the relevant market no formal color coding system is applicable to indicate the purpose of the goods. However, with this GSK does not acknowledge, according to the PI judge, that on the basis of article 2.28 para. 1 sub c) BTIP, it is not necessary that the color purple of the color mark of GSK is [actually] used on the basis of a formal color code system. Even more so, it is not necessary to establish that the color mark is, at this moment in time, already used to indicated the purpose and the characteristics of the medicine. The word 'can' indicates that for this article to be applicable it is not necessary that the color mark refers to the purpose of the good at the time of the application of the trademark but that it is sufficient that the color mark can serve to indicate the purpose/characteristic of the goods. In the assessment of the PI judge the latter is sufficiently likely.

4.13. The PI judge assesses in relation thereto that the color blue is often used for reliever medication (in short: bronchodilators). For example this has become evident from the overview submitted by GSK (exhibit 12, writ of summons), in which GSK has included an overview per medicine in which color it is brought on the market. GSK has also acknowledged that for her product Relvar, a combination product falling into the category preventers, which was initially brought on the market in the color blue, it was changed to yellow after requests thereto from the market. In her information leaflet, GSK indicates that the change to the color yellow was done to prevent confusion with reliever medication. With that GSK endorses that reliever medication are featured in the color blue. Further, Sandoz has filed information leaflets from various hospitals in which reference is made to the "blue puff" to indicate reliever medicines (exhibit 16 – 18, statement in reply) and to the "red/brown puff" to indicate anti-inflammatory agents. From that it can be concluded that colors can serve to indicate the type of medicine.

4.14. Also GSK uses various colors to indicate the difference in type of medication and/or dose. For example, she has acknowledged during the oral hearing that the various tones of purple, from light to

dark, for its aerosol medicines of Seretide are available and relate to differences in dose. The higher the dose, the darker the color purple.

This means that GSK uses different tones of color to indicate the characteristics of the goods, namely the dose. Apart from that, GSK offers its Diskus-inhalers in various colors which indicates per color which medicine the Diskus contains (blue for short acting bronchodilators; orange for anti-inflammatory agents; green for long working bronchodilators; purple for the combination medicine).

The colors blue, orange, green and purple are thus used by GSK to indicate the purpose (type) of its medicine and to distinguish these medicines from one another.

4.15. The PI judge, as indicated above, concludes that it has become sufficiently apparent that the color purple of the color mark can serve in the course of trade to indicate the purpose of the medicine or the dose thereof, and the color purple of the color mark does not have distinctive character ab initio, which leads to the assessment of the question whether the color purple (Pantone 2587 C) of GSK has obtained distinctive character by use. Sandoz has argued against this with a motivation. The PI judge concludes as follows. In order to establish if a trademark has obtained distinctive character by use, all factors should be taken into account from which the conclusion can be drawn that the trademark is suitable to distinguish the relevant goods from a specific company and thus to distinguish these from other companies (*reference made*: Chiemsee judgement ECJ). Facts that can be taken into account are the period of time the trademark was used, the market share of the trademark, the intensity and geographical use of the trademark, the amounts of advertising/marketing costs of the company for the trademark and the percentage of the relevant users that can identify the goods as coming from a specific company on the basis of that trademark. It has to be established that the relevant consumer or at least a significant part thereof, identifies the goods as originating of a specific company on the basis of the use of that sign and therefore in relation to the nature and effect of the sign by which the relevant goods can be distinguished from other companies (*reference made*: Philips/Remington judgement ECJ). A market research can substantiate this.

4.16. As argued above under point 4.9, the relevant consumer in relation to prescription medicine consists from both the end user as well as professionals in the healthcare sector, doctors who prescribe the medicines and pharmacists who sell the medicines.

4.17. GSK has, in order to substantiate its claim that the color mark has acquired distinctiveness by use within the relevant public, referred to the extensive length of use of the color purple on its Seretide products, its market share of the Seretide products and (the intensity of) its marketing of the Seretide product. The PI judge however concludes that the color mark has always been used in combination with

the trademark Seretide and the name of GSK as the producer. Also the color mark on the Seretide Diskus has always been used in combination with another tone of purple. The aerosol Seretide furthermore is marketed in three different colors of purple (light purple, purple and dark purple; for each dose a color) in combination with a lighter color of purple for the mouthpiece. Also on the package of the Seretide Diskus and the aerosol various tones of purple are used (from light purple to dark purple). Therefore GSK presents its Seretide product in different shades of purple, among which the color Pantone 2587 C. Although a sign (the color purple Pantone 2587 C) does not necessarily has to be used individually to acquire distinctiveness as a trademark, as unrightfully claimed by Sandoz, these circumstances do raise the question if the relevant public has perceived the color purple (Pantone 2587 C) as a trademark and also in what extent the marketing and the market share of the Seretide products, which contain various tones of purple, substantiate the claimed acquired distinctiveness by use of the color purple (Pantone 2587 C) by GSK. GSK has insufficiently explained and made this clear due to which within the scope of these PI proceedings no correct and concrete judgement can be made of the influence of the indicated circumstances in relation to the claimed acquired distinctiveness by use of the color purple (Pantone 2587 C). Further, GSK refers for the substantiation of her claim that the color mark has acquired distinctiveness by use amongst the relevant public, to a market survey conducted in 2015. From this, according to GSK, it appears that a very high percentage of pharmacists and doctors recognize the color purple as an indication of origin. According to Sandoz this acquired distinctiveness of the color mark cannot be concluded from the market survey because it was not carried out amongst the entire relevant public (solely general practitioners and pharmacists, not specialists and patients) and also no survey was conducted in the entire Benelux area (Luxembourg was not included). Also the line of questioning in the market survey does not meet the requirement of the so-called 'three step test' as established in relevant case law and also there was no correction relating to the market leader effect of GSK which was the case given the fact that, as the owner of the patent, GSK was the only company entitled to market these specific medicines. Both parties have submitted experts opinion to substantiate their standpoints which, depending on the party by whom they were instructed, have indicated that the market survey was performed inadequately or correctly. In the scope of this PI it goes too far to discuss the market survey and the various criticisms and asses the market survey in full. Further, the PI judge thinks it likely that the judge on the merits, concerning the complications which arise with the assessment of the question if a color mark has acquired distinctive character by use, shall order its (own) expert opinion. For that, the scope of a PI is too limited.

4.18 Based on the above, and also in view of the observation under points 4.11 until 4.14 that the use of colors is standard practice with asthma and COPD medication, that the color blue is often used for reliever medication and that GSK itself also uses other colors to distinguish the function of its medication, in the assessment of the PI judge it seems for the time being not plausible that the color mark has acquired distinctive character.

4.19 Furthermore, the PI judge has assessed that the trademark registration by the BOIP has taken place on the basis of the information of GSK exclusively (exhibit 25, writ of summons). As Sandoz has rightfully noted, GSK did not consider the various legal procedures, which have taken place in Europe already about the use of the color purple. GSK has also not informed the BOIP about the use of colors by itself and by other medicine manufacturers as distinction of the type of medicine. Also, it is sufficiently likely that the BOIP in allowing the color mark registration, considering the explanation of the Belgium attorney of Sandoz during the oral hearing, has not taken into account the third party observations that where filed by Sandoz. The conclusion is therefore justified that with the application of the trademark, the BOIP has not been able to make an assessment based on all the specific circumstances of the case.

4.20 Based on this position, the PI judge is of the opinion that there is a serious, not to be neglected chance that the judge on the merits will allow the claim for invalidity of the trademark. This means that the claims of GSK in so far based on trademark infringement will be dismissed.

Slavish imitation

4.21 GSK is of the opinion that the product Airflusal Forspiro is a slavish imitation of the color purple (Pantone 2587 C) as used on its product Seretide and that Sandoz Nederland therefore acts unlawfully against it. Sandoz contests this with reasoning.

4.22 The Supreme Court has ruled that imitation of a product that is not (longer) protected by an absolute right of intellectual property is in principal free, unless confusion with the public can be expected because of the imitation and the imitating competitor fails to do anything reasonably possible and necessarily to prevent that by the similarity of both products the risk of confusion arises, without doing detriment to the validity or usability of its product. A need to standardization with the purchasers of the products may under circumstances be a justification for the imitation of a product that is confusing (HR 20 November 2009, ECLI:NL:HR:2009:B19666, Lego). For a successful appeal on slavish imitation it is necessary that the imitated product has a certain distinctive character, or in other words, has its own place on the market (HR 21 December 1956, NJ1960/414, drukasbakken). For the assessment of the risk of confusion, the basic principle is to take into account the overall impression that is decisive for each product as well as the consideration thereof by a barely attentive purchasing public that usually does not see both products side by side. The situation on the Dutch market is decisive for the claim (HR 7 June 1991, NJ 1992/392, Rummikub).

4.23 With its statement that the risk of confusion of the product Airflusal Forspiro should be assessed compared to the color purple (Pantone 2587 C), GSK fails to recognize that the risk of confusion must be assessed based on the total impression of both products at stake. In the assessment of the PI judge the total impression is, amongst others, decided by the shape of both products. The Diskus of GSK is characterized by its round shape, whilst the Airflusal Forspiro is more egg-shaped. Also the color combination is different; the Diskus consists of two colors purple (points 2.4 and 2.10 above), of which the color mark is predominant. The Forspiro consists of one tone of purple (Pantone 2573 C) in combination with white. Besides, both products have a sticker that deviates in shape and on which in clear letters the name of the product and the name of the manufacturer is indicated. Also the name of the products differ, as well as the way in which both inhalers function. It has not become evident that Sandoz has tried to imitate the Diskus of GSK. For example, Sandoz has been granted an award for the innovative character of the product Forspiro. Finally, also the packages in which both products are sold, distinguish from each other as regards to the shape (points.2.4 and 2.7 above). With the Seretide product, the color change of the color purple (from dark to light) is from the right to the left and is surrounded by an edge in a different color (red, green or purple depending on the dosage), which color comes back in the indication of the dosage on the package. Besides the dosage, the rest of the text on the package is in black. With Airflusal the color purple goes (from dark to light) from the top to the bottom and the name of the product, as well as the dosage, is mentioned in purple (from light to dark). The corresponding aspects, the use of a purple color and the fact that both products are indicated for asthma and/or COPD medication do not compensate the differences between the products. In the assessment of the PI judge, Sandoz has complied with its obligation to do anything reasonably possible and needed to prevent that the risk of confusion may arise. It is likely that the public, even though less attentive, will notify these differences. Also when it is assumed that Seretide has gained its own place on the market, which is disputed by Sandoz, the claim of GSK must be dismissed, because for the moment it is not likely that Sandoz has slavishly imitated GSK's product.

Misleading information

4.24 According to GSK the use of Sandoz Nederland of the color purple is misleading information within the meaning of article 6:194 DCC, because this unlawfully suggests a commercial connection with GSK and besides, it is unlawfully suggested that Airflusal Forspiro is equivalent to Seretide as regards to quality, indication and function.

4.25 One of the questions that must be answered in this regard, is whether the use of a color is covered by the concept of "information" within the meaning of article 6:194 DCC. According to Sandoz this is not the case and the PI judge agrees to that. Through the sole use of a color, in fact no information of any fact is being undertaken.[1] No misleading information in the sense of the before mentioned article has taken place.

4.26. Finally, GSK argues that Sandoz commits unfair commercial practices within the meaning of articles 6:193b and 6:193c DCC. According to GSK Sandoz Nederland uses an important character of the product of a competitor within the meaning of article 6:193c, para. 1 sub b DCC, as a consequence of which the average consumer is misled of may be misled. Furthermore, according to GSK confusion is caused with regard to the products, trademarks and distinguishing characters of a competitor, within the meaning of article 6:193c, para. 2 sub a DCC.

4.27. Sandoz has argued that GSK is not entitled to invoke these articles because, on the one hand the activities of Sandoz are not directly aimed at consumers because of the prohibition on public advertising included in article 85 Medicines Act and on the other hand because the consumer does not take the purchasing decision. According to Sandoz, the prescribing doctor is the one that takes the purchasing decision for the patient, as the doctor is the one that prescribes a certain medicine, after which it is the pharmacist who orders the medicine with Sandoz and to whom Sandoz delivers the medicine.

4.28. The PI judge concludes as follows. Articles 6:193a-j DCC exclusively pertain to business-to-consumer (hereinafter: B2C) communication. Besides, in Dutch law there is no explicit possibility that competitors may invoke the concerning articles towards each other. The foregoing articles, however, implement Directive 2005/29/EC (hereinafter: Directive) and in that Directive it is explicitly indicated that (also) competitors must be protected against unfair B2C commercial practices. Since it has not appeared from the legislative history that the national legislator has made an explicit choice to deviate from the Directive on this point, an explanation in accordance with the Directive is the starting point (reference HR 17 January 2014, IEPT20140117 (Ryanair/PR Aviation)). Considering what is included in the Directive, according to the PI judge it must be accepted that GSK can invoke the articles 6:193a-j DCC.

4.29. Based on the foregoing, a merchant acts unlawfully towards a consumer if he performs an act that is unfair, as result whereof the average consumer takes or can take a decision about a purchase which he otherwise would not have taken. In the current situation the medicines can only be obtained with a recipe and for which public advertising is forbidden based on article 85 Medicines Act. Whilst there is no direct advertising aimed at the consumer, it can be admitted to GSK that the patient, being the consumer, is ultimately the one using the product and the one receiving the package and potentially also information leaflets. The fact that advertising aimed directly at the consumer is not allowed, therefore does not mean that the aforementioned articles cannot be applied. Also through packaging and information leaflets, information is given to the consumer and also that information can potentially be misleading.

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[1] Compare to: Court 's-Hertogenbosch 8 September 1997, NJ1998/431(Shampony)

4.30. However, in this case there is the particular situation that with prescription only medicines it is not the patient/consumer that takes the ultimate decision about the product, but it is the doctor and/or pharmacist. Although the patient can indicate its preference to the doctor and/or pharmacist, also in that even it is the doctor and/or pharmacist who decides which product will be provided to the patient and it is not the patient himself. The doctor and/or pharmacist are however not considered a consumer in the meaning of the forgoing articles, as a consequence whereof the claims of GSK fail. Besides, based on the arguments as described in point 4.23 above, there can be no question of misleading or confusion.

4.31. The claims of GSK will therefore be dismissed.

Costs of the proceedings

4.32. GSK will be ordered to pay the costs of the proceedings, being the party which is ruled against. Sandoz requests compensation by GSK of € 120.000,00 as costs of the proceedings further to article 1019h Civil Proceedings Code. With regard to the amount of the costs of the proceedings, parties have reached an agreement. The PI judge does not see any reason to deviate from that. The court fees are considered to be included in this amount.

4.33. The PI judge furthermore estimates, as also indicated by the parties, that the claims with a foundation in intellectual property, are 72,5% of the procedure. Therefore, 72,5% of the requested costs will be allowed, being € 87.000,00.

4.34. The claims, that do not have any foundation in intellectual property, are 27,5% of the legal proceedings. Normally, these costs would amount to € 816,00 on the basis of the regular court-approved costs. As the claims without any foundation in intellectual property are 27,5% of the legal proceedings, also 27,5% of these costs, therefore € 224,40, will be imposed on GSK.

4.35. The costs on the part of Sandoz are therefore in total estimated at € 87.224,40 for counsel's fixed fee.

5. The decision of the judgement

The PI judge

5.1. dismisses the claims,

5.2. orders GSK to pay the costs of the proceedings, until today estimated at € 87.224,40 on the part of Sandoz,

5.3. declares the judgement provisionally and forcible with regard to the order to pay costs.

This judgement is rendered by Mr. J.A. Schuman and was announced in public on 30 December 2015.