ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
19 October 2000 *

In Case T-141/00 R,

Laboratoires pharmaceutiques Trenker SA, established in Brussels (Belgium), represented by X. Leurquin and L. Defalque, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of A. Schmitt, 7 Val Sainte-Croix,

applicant,

v

Commission of the European Communities, represented by H. Støvlbæk, of its Legal Service, acting as Agent, and B. Wägenbaur, of the Brussels Bar, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

APPLICATION for suspension of operation of the Commission's decision of 9 March 2000 concerning the withdrawal of marketing authorisations for medicinal products for human use which contain 'amfepramone' (C(2000) 453),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

Legal context

1 On 26 January 1965 the Council adopted Directive 65/65/EEC on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products (OJ, English Special Edition 1965-1966, p. 20), since amended on several occasions. Article 3 of that directive lays down the principle that no proprietary medicinal product may be placed on the market in a Member State unless an authorisation has first been issued by the competent authority of that Member State in accordance with the directive or an authorisation has been granted in accordance with Council Regulation (EEC) No 2309/93 of 22 July 1993 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products (OJ 1993 L 214, p. 1).

2 Article 4 of Directive 65/65 states that, in order to obtain a marketing authorisation as provided for in Article 3, the person responsible for placing the product on the market is to apply to the competent authority of the Member State. Under Article 5, the authorisation is to be refused if it proves that the proprietary medicinal product is harmful in the normal conditions of use, or that its therapeutic efficacy is lacking or is insufficiently substantiated by the applicant, or that its qualitative and quantitative composition is not as declared, or if the particulars and documents submitted in support of the application do not comply with Article 4. Under Article 10, as amended, the authorisation is to be valid for five years and renewable for five-year periods after consideration by the competent authority of a dossier containing in particular details of the data on pharmacovigilance and other information relevant to the monitoring of the medicinal product.

3 The first paragraph of Article 11 provides that the competent authorities of the Member States are to suspend or revoke an authorisation to place a proprietary medicinal product on the market where that product proves to be harmful in the normal conditions of use, where its therapeutic efficacy is lacking, or where its qualitative and quantitative composition is not as declared. According to that provision, therapeutic efficacy is lacking when it is established that therapeutic results cannot be obtained with the proprietary medicinal product.

4 Under Article 21, an authorisation to market a proprietary medicinal product may not be refused, suspended or revoked except on the grounds set out in Directive 65/65.

5 The Second Council Directive 75/319/EEC of 20 May 1975 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products (OJ 1975 L 147, p. 13), as amended by Council Directive 93/39/EEC of 14 June 1993 amending Directives 65/65/EEC, 75/318/EEC and 75/319/EEC in respect of medicinal products (OJ 1993 L 214, p. 22), provides for a number of arbitration procedures before the Committee for Proprietary Medicinal Products (hereinafter 'the CPMP') of the European Agency for the Evaluation of Medicinal Products. Such a procedure is applied where a

Member State considers that there are grounds for supposing that the authorisation of the medicinal product concerned may present a risk to public health (Article 10 of Directive 75/319 as amended by Directive 93/39), where divergent decisions have been adopted concerning the grant, suspension or withdrawal of national authorisations (Article 11), in specific cases where the interests of the Community are involved (Article 12) and in the case of variations of harmonised authorisations (Articles 15, 15a and 15b). The procedures laid down in Articles 12 and 15a of Directive 75/319 are of particular relevance in the present case.

6 Under Article 12, the Member States among others may, in specific cases where the interests of the Community are involved, refer the matter to the CPMP for application of the procedure laid down in Article 13 before reaching a decision on a request for a marketing authorisation or on the suspension or withdrawal of an authorisation, or on any other variation to the terms of a marketing authorisation which appears necessary, in particular to take account of the information collected in the context of the pharmacovigilance system provided for in Chapter Va of Directive 75/319.

7 Article 15a provides:

'1. Where a Member State considers that the variation of the terms of a marketing authorisation which has been granted in accordance with the provisions of this Chapter or its suspension or withdrawal is necessary for the protection of public health, the Member State concerned shall forthwith refer the matter to the [CPMP] for the application of the [procedures] laid down in Articles 13 and 14.

2. Without prejudice to the provisions of Article 12, in exceptional cases, where urgent action is essential to protect public health, until a definitive decision is adopted a Member State may suspend the marketing and the use of the medicinal

product concerned on its territory. It shall inform the Commission and the other Member States no later than the following working day of the reasons for its action.'

Facts and procedure

8 The applicant is the holder of marketing authorisations, originally issued by the Kingdom of Belgium, for medicinal products containing amfepramone called 'Dietil Retard', 'Regenon' and 'Atractil' respectively.

9 On 17 May 1995 the Federal Republic of Germany made a referral to the CPMP in accordance with Article 12 of Directive 75/319, as amended by Directive 93/39, expressing its fears as regards anorectics, which include medicinal products containing amfepramone, liable to cause serious pulmonary artery hypertension.

10 The procedure initiated by this referral led to the adoption of Commission Decision C(96) 3608 of 9 December 1996, based on Article 14(1) and (2) of Directive 75/319, instructing Member States to vary certain clinical information which had to appear in the national authorisations to place the medicinal products in question on the market.

11 By letter of 7 November 1997 addressed to the chairman of the CPMP, the Belgian Ministry of Social Affairs, Public Health and the Environment expressed *inter alia* its fears that there was a causal link between cardiac valve disorders and

the use of medicinal products containing amfepramone. It therefore requested the CPMP, pursuant to Articles 13 and 15a of Directive 75/319, to issue a reasoned opinion on the medicinal products concerned.

12 On 31 August 1999 the CPMP gave its opinion on medicinal products containing amfepramone. It reached the conclusion that, although the concerns expressed by the Belgian ministry could not altogether be excluded, there was no evidence to substantiate them. However, it concluded that medicinal products containing amfepramone had an unfavourable benefit/risk balance and recommended that the marketing authorisations for those products should be withdrawn.

13 On the basis of that opinion, the Commission prepared a draft decision which was circulated in January 2000. On 9 March 2000 the Commission adopted the decision concerning the withdrawal of marketing authorisations of medicinal products for human use which contain the following substance: 'amfepramone' (C(2000) 453; hereinafter 'the contested decision'). Article 2 of the contested decision refers to the views expressed by the CPMP in the opinion. Article 3 provides that the Member States are to withdraw the marketing authorisations for all the medicinal products mentioned in Annex I to the contested decision within 30 days of its notification.

14 By document lodged at the Registry of the Court of First Instance on 25 May 2000, the applicant brought an action before the Court under the fourth paragraph of Article 230 EC for annulment of the contested decision.

15 By separate document lodged at the Court Registry on 11 September 2000, the applicant made the present application for suspension of operation of the contested decision.

16 The Commission submitted its observations on the application for suspension of operation by a written pleading lodged on 20 September 2000.

17 Having regard to the documents before the Court, the President considers that he possesses all the necessary information in order to rule on the present application for interim relief, without any need to hear the parties' oral submissions first.

Law

18 Under the combined provisions of Articles 242 EC and 243 EC and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), the Court of First Instance may, if it considers that circumstances so require, order that operation of the contested act be suspended or lay down necessary interim measures.

19 Article 104(2) of the Rules of Procedure provides that an application for suspension of operation of a measure must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the relief applied for. These conditions are cumulative, so that an application for suspension of operation must be refused if either of them is not fulfilled (order of the President of the Court of Justice in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30). The court hearing the application will also, where appropriate, balance the competing interests (order of the President of the Court of Justice in Case C-107/99 R *Italy* v *Commission* [1999] ECR I-4011, paragraph 59; orders of the President of the Court of First Instance in Case T-191/98 R *DSR-Senator Lines* v *Commission* [1999] ECR II-2531, paragraph 22, and in Case T-222/99 R *Martinez and de Gaulle* v *Parliament* [1999] ECR II-3397, paragraph 22).

Prima facie case

Arguments of the parties

20 The applicant puts forward several pleas in law to establish a prima facie case for the interim relief sought.

21 First, the applicant submits that the Commission lacked competence to adopt the contested decision. Article 15a of Directive 75/319 does not provide a legal basis for the procedure used in the present case. Article 15a allows a Member State to initiate the procedure provided for in Articles 13 and 14 of the directive only in the case of marketing authorisations which have been granted in accordance with Chapter III of the directive. However, the authorisations in question are national authorisations, not authorisations granted in accordance with that chapter. The fact that they were varied by the decision of 9 December 1996, following a procedure initiated under Article 12 of Directive 75/319, does not affect this conclusion. It follows that only the first paragraph of Article 11 of Directive 65/65, governing the withdrawal of a marketing authorisation, could justify suspension or withdrawal of the marketing authorisations. The applicant adds that the procedure laid down by Article 15a(1) assumes that suspension or withdrawal of medicinal products is necessary for the protection of public health. No new fact has been raised to justify the withdrawal of marketing authorisations, although, in 1996, the Commission, following the opinion of the CPMP, had judged it sufficient for the protection of public health to alter the extract of the summary of the product's characteristics.

22 Secondly, the applicant argues that the conclusions of the Commission on the effectiveness of medicinal products containing amfepramone, taken from the opinion of the CPMP, were based on the fact that old substances such as amfepramone are not clinically tested in accordance with the most recent standards. That testing requirement had not been laid down in 1996 and no new fact has arisen since then. As regards the 'Note for Guidance on Clinical

Investigations of Drugs Used in Weight Control', the applicant argues that the application of those new standards to substances still covered by an authorisation would seriously infringe the principle of non-retroactivity of administrative acts and would also infringe the fundamental principle of legal certainty.

23 Thirdly, the applicant submits that it is contrary to the principle of proportionality for the Commission, by means of the contested decision, to order the withdrawal of marketing authorisations where no new scientific information permits the inference that the measures laid down by the Commission in its decision of 1996 did not make it possible to attain the objective sought. In this respect, the CPMP has not taken into account the fact that it is impossible for the holder of a marketing authorisation for a medicinal product to present the results of clinical tests in conformity with new guidelines, experience showing that such tests necessarily take several years. The applicant adds that the CPMP has made an error of assessment in requiring that the duration of treatment should be at least one year when that requirement cannot be inferred from any of the guidelines.

24 Fourthly, the applicant argues that the contested decision has been adopted in contravention of Council Directive 75/318/EEC of 20 May 1975 on the approximation of the laws of the Member States relating to analytical, pharmacotoxicological and clinical standards and protocols in respect of the testing of medicinal products (OJ 1975 L 147, p. 1) in that the decision states that the benefit/risk balance for amfepramone is not favourable in the light of the new assessment criteria applied by the CPMP.

25 Fifthly, the applicant submits that the legal obligation, set out in Article 253 EC, requiring an act to state the reasons on which it is based has been infringed three times in the contested decision.

26 Sixthly, the applicant states that it was not given the opportunity to be heard by the CPMP on the effectiveness of medicinal products containing amfepramone until it made an appeal. According to the applicant, it follows that the contested decision was taken in contravention of the general legal principle requiring the administration to hear interested parties fully before a decision liable to affect their interests seriously is adopted.

27 Finally, the contested decision has a substantial procedural defect since it is based on an opinion of the CPMP which was requested in contravention of Article 15a of Directive 75/319. Article 15a can be applied only in cases where a marketing authorisation has been granted in accordance with the provisions laid down in Chapter III of that directive and where suspension or withdrawal of the authorisation is necessary for the protection of public health.

28 The Commission, in its observations of 20 September 2000, considers that the President of the Court could base his decision in the present case on the same grounds as those set out in his order of 28 June 2000 in Case T-74/00 R *Artegodan* v *Commission* [2000] ECR II-2583, if all the conditions for interim relief, and in particular urgency, are satisfied.

Findings of the President of the Court

29 As regards the question of a prima facie case, the pleas raised by the applicant do not prima facie appear to be entirely unfounded. First, it appears that the competence of the Commission to adopt the contested decision depends on the nature of the decision of 9 December 1996, which is open to debate. Second, the Commission has not provided any explanation, in the light of the principle of proportionality, regarding the reason for which that decision and the contested

decision reached diametrically opposed results. The pleas raised by the applicant therefore deserve detailed consideration, a consideration which, however, in fact and in law, goes beyond the scope of the present interim proceedings.

30 It must accordingly be concluded that the condition requiring a prima facie case to be made out is satisfied in the present case (order of the President of the Court of First Instance in Case T-308/94 R *Cascades* v *Commission* [1995] ECR II-265, paragraphs 49 and 50).

Urgency

Arguments of the parties

31 The applicant claims that it will suffer serious and irreparable damage if operation of the contested decision is not suspended.

32 The withdrawal of marketing authorisation for Dietil Retard, Regenon and Atractil would mean the exclusion of those medicinal products from the pharmaceutical trade lists and their removal from the lists of medicinal products used by the medical profession as a basis for advice and prescription practice. After such an extensive and lengthy withdrawal from the market, combined with a replacement of the products for buyers, any later re-introduction of such preparations to the market would be practically destined to fail. Consumer confidence and that of doctors and pharmacists in such products would be undermined once and for all.

33 The applicant adds that the withdrawal of those authorisations would destroy such a large part of its business that its existence would be threatened.

34 The Commission, in its observations of 20 September 2000, confines itself to observing that, in the present case, the President of the Court could base his decision on the same grounds as those set out in his order in *Artegodan* v *Commission*, if all the conditions for interim relief, and in particular urgency, are satisfied.

Findings of the President of the Court

35 It is settled case-law that the urgency of an application for suspension of the operation of a measure must be assessed in the light of the need for an interlocutory order in order to avoid serious and irreparable damage to the party seeking suspension. In this connection, it is enough, particularly where damage depends on the occurrence of a number of factors, for that damage to be foreseeable with a sufficient degree of probability (see, *inter alia*, the order of the Court of Justice in Case C-280/93 R *Germany* v *Council* [1993] ECR I-3667, paragraphs 32 and 34, and the order of the President of the Court of First Instance in Case T-65/98 R *Van den Bergh Foods* v *Commission* [1998] ECR II-2641, paragraph 62).

36 In the present case, immediate operation of the contested decision entails the complete withdrawal from the market of the medicinal products referred to in Article 1 of the decision. It therefore also entails exclusion of those medicinal products from the pharmaceutical trade lists and their removal from the lists of medicinal products used by the medical profession as a basis for advice and prescription practice. In addition, if operation of the contested decision is not suspended, substitute medicinal products, the existence of which is acknowledged by both parties, will very probably take the place of the products withdrawn. The confidence of consumers, doctors and pharmacists in a medicinal product is

particularly sensitive to statements that the product presents a danger to patients' health. Even if those statements are subsequently disproved, it is often impossible to restore confidence in the withdrawn product, other than in special cases where the qualities of the medicinal product are especially valued by users and there is no perfect substitute product, or where the manufacturer enjoys an exceptionally good reputation, so that it cannot be said that he will be unable to repossess the market shares he held before withdrawal. However, such circumstances are not present here.

37 Moreover, if the contested decision were to be annulled by the Court of First Instance and the applicant thus authorised to resume marketing its medicinal products, the financial damage suffered by it because of a fall in sales as a result of loss of confidence in its products could not in practice be quantified sufficiently completely for the purposes of making reparation.

38 In those circumstances, the damage which immediate operation of the contested decision could cause would be serious and irreparable.

The balance of interests

39 Since the applicant has established the existence of serious and irreparable damage, it is necessary to balance, on the one hand, the applicant's interest in obtaining suspension of operation of the contested decision and, on the other hand, the interest of the Community in the immediate withdrawal of the

marketing authorisations for the medicinal products in question and, more generally, in the protection of public health.

40 In undertaking that examination, the judge hearing the application for interim relief must determine whether later annulment of the contested measure by the Court when ruling on the main application would allow the situation which would have been brought about by the immediate operation of the measure to be reversed, and, conversely, whether suspension of operation of the measure would prevent it from being fully effective in the event of the main application being dismissed (see, in particular, the order of the President of the Court of Justice in Joined Cases 76/89 R, 77/89 R and 91/89 R *RTE and Others* v *Commission* [1989] ECR 1141, paragraph 15, the order of the Court of Justice in Case C-180/96 R *United Kingdom* v *Commission* [1996] ECR I-3903, paragraph 89, and the order of the President of the Court of First Instance in Case T-41/97 R *Antillean Rice Mills* v *Council* [1997] ECR II-447, paragraph 42).

41 In the present case the balance of interests favours suspension of operation of the contested decision.

42 It appears highly probable that the operation of the contested decision would entail the definitive loss of the applicant's position in the market, even if the court hearing the main application were to annul the decision.

43 Suspension of operation of the contested decision could nevertheless harm public health. On this point, it must be emphasised that in principle the requirements of the protection of public health must unquestionably be given precedence over economic considerations (order in *United Kingdom* v *Commission*, cited above, paragraph 93; judgment in Case C-183/95 *Affish* v *Rijksdienst Keuring Vee en Vlees* [1997] ECR I-4315, paragraph 43; order of the Court of First Instance in Case T-136/95 *Industria del Frio Auxiliar Conservera* v *Commission* [1998] ECR II-3301, paragraph 58; and order of the President of the Court of First

Instance in Case T-70/99 R *Alpharma* v *Commission* [1999] ECR II-2027, paragraph 152).

44 However, it must be noted that in this context the mere reference to the protection of public health cannot exclude an examination of the circumstances of the case, in particular of the relevant facts.

45 In the present case, the Commission has indeed established that there is uncertainty as regards the risks associated with medicinal products containing amfepramone, even if those risks are slight. Nevertheless, although the decision of 9 December 1996 and the contested decision are based on identical data, the measures taken by the Commission in 1996 and 2000 for the protection of public health with respect to those risks differ fundamentally. In those circumstances, the Commission was obliged to show that the protective measures in the decision of 9 December 1996 proved to be insufficient to protect public health, so that the protective measures it adopted in the contested decision were not manifestly excessive. However, the Commission has not been able to show this.

46 Moreover, the fact that the health risks which determined the adoption of the contested decision had already been taken into account in the Commission's decision of 9 December 1996 and had resulted in a change to the compulsory information concerning medicinal products supplied on prescription indicates that implementation of the contested decision is not urgent.

47 It follows from all the foregoing considerations that the conditions for grant of the suspension of operation sought are satisfied.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **Operation of the Commission's decision of 9 March 2000 concerning the withdrawal of marketing authorisations for medicinal products for human use which contain amfepramone (C(2000) 453) is suspended in relation to the applicant.**

2. **Costs are reserved.**

Luxembourg, 19 October 2000.

H. Jung

Registrar

B. Vesterdorf

President