Case C-118/24

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

14 February 2024

Referring court:

Conseil d'État (France)

Date of the decision to refer:

1 February 2024

Applicants:

EG Labo Laboratoires Eurogenerics SAS

Theramex France SAS

Defendants:

Agence nationale de sécurité du médicament et des produits de santé (ANSM)

Biogaran SAS

1. Subject of the case

1 On 10 June 2003, the European Commission granted a marketing authorisation to Eli Lilly Nederland B.V. for the proprietary medicinal product Forstéo 20 micrograms/80 microlitres, solution for injection in a pre-filled pen, a biological medicinal product indicated for the treatment of osteoporosis.

2 On 31 January 2019, Biogaran filed an application for a marketing authorisation for the chemically synthesised proprietary medicinal product Teriparatide Biogaran 20 micrograms/80 microlitres, solution for injection in a pre-filled pen, under Article 10(1) of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, designating Germany as the reference State under a decentralised procedure.

3 By a decision of 1 September 2020, the Director-General of the Agence nationale de sécurité du médicament et des produits de santé (National Agency for Medicines and Health Products Safety) granted a marketing authorisation for the proprietary medicinal product Tériparatide Biogaran and identified it as a generic of the proprietary medicinal product Forstéo, and then, by a decision of 10 November 2020, created a generic group with Forstéo as reference medicinal product and Tériparatide Biogaran as generic medicinal product.

4 EG Labo Laboratoires Eurogenerics and Theramex France market Movymia and Livogiva respectively, which are biosimilars of Forstéo, each with a marketing authorisation issued by the European Commission.

5 These two laboratories are seeking the annulment of the abovementioned decisions of the Director-General of the National Agency for Medicines and Health Products Safety. EG Labo Laboratoires Eurogenerics is also seeking the annulment of two opinions by which the Comité économique des produits de santé (Economic Committee for Healthcare Products) set the manufacturer's price and the public price of the proprietary medicinal product Tériparatide Biogaran and of the proprietary medicinal product Movymia.

6 These requests for annulment have been referred to the Conseil d'État (Council of State).

2. Provisions of Union law relied on

Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use

7 Article 8 stipulates that, outside the procedure for the granting of a marketing authorisation by the European Commission, applications for marketing authorisations must be submitted to the competent national authorities and must include the particulars and documents listed in that article and in Annex I to the directive, in particular the results of pharmaceutical and pre-clinical tests and clinical trials.

8 Article 10 reads:

'1. By way of derogation from Article 8(3)(i), and without prejudice to the law relating to the protection of industrial and commercial property, the applicant shall not be required to provide the results of pre-clinical tests and of clinical trials if he can demonstrate that the medicinal product is a generic of a reference medicinal product which is or has been authorised under Article 6 for not less than eight years in a Member State or in the Community.

…

2. For the purposes of this Article:

…

(b) "generic medicinal product" shall mean a medicinal product which has the same qualitative and quantitative composition in active substances and the same pharmaceutical form as the reference medicinal product, and whose bioequivalence with the reference medicinal product has been demonstrated by appropriate bioavailability studies. … Bioavailability studies need not be required of the applicant if he can demonstrate that the generic medicinal product meets the relevant criteria as defined in the appropriate detailed guidelines.

3. In cases where the medicinal product does not fall within the definition of a generic medicinal product as provided in paragraph 2(b) or where the bioequivalence cannot be demonstrated through bioavailability studies or in case of changes in the active substance(s), therapeutic indications, strength, pharmaceutical form or route of administration, vis-à-vis the reference medicinal product, the results of the appropriate pre-clinical tests or clinical trials shall be provided.

4. Where a biological medicinal product which is similar to a reference biological product does not meet the conditions in the definition of generic medicinal products, owing to, in particular, differences relating to raw materials or differences in manufacturing processes of the biological medicinal product and the reference biological medicinal product, the results of appropriate pre-clinical tests or clinical trials relating to these conditions must be provided. … .'

9 Article 28 defines the decentralised marketing authorisation procedure for a medicinal product:

'1. With a view to the granting of a marketing authorisation for a medicinal product in more than one Member State, an applicant shall submit an application based on an identical dossier in these Member States. …

The applicant shall request one Member State to act as 'reference Member State' and to prepare an assessment report on the medicinal product in accordance with paragraphs 2 or 3.

…

3. In cases where the medicinal product has not received a marketing authorisation at the time of application, the applicant shall request the reference Member State to prepare a draft assessment report, a draft summary of product characteristics and a draft of the labelling and package leaflet. The reference Member State shall prepare these draft documents within 120 days after receipt of a valid application and shall send them to the concerned Member States and to the applicant.

4. Within 90 days of receipt of the documents referred to in paragraphs 2 and 3, the Member States concerned shall approve the assessment report, the summary of product characteristics and the labelling and package leaflet and shall inform the reference Member State accordingly. The reference Member State shall record the agreement of all parties, close the procedure and inform the applicant accordingly.

5. Each Member State in which an application has been submitted in accordance with paragraph 1 shall adopt a decision in conformity with the approved assessment report, the summary of product characteristics and the labelling and package leaflet as approved, within 30 days after acknowledgement of the agreement. .'

10 Article 29 governs the procedure applicable in cases where, because of a potential serious risk to public health, a Member State is unable to approve the assessment report, the summary of product characteristics, the labelling and the package leaflet within the period laid down in Article 28(4).

Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Union procedures for the authorisation and supervision of medicinal products for human use and establishing a European Medicines Agency

11 Article 3(3) states:

'A generic medicinal product of a reference medicinal product authorised by the Union may be authorised by the competent authorities of the Member States in accordance with Directive 2001/83/EC under the following conditions:

(a) the application for authorisation is submitted in accordance with Article 10 of Directive 2001/83/EC;

(b) the summary of the product characteristics is in all relevant respects consistent with that of the medicinal product authorised by the Union except for those parts of the summary of product characteristics referring to indications or dosage forms which were still covered by patent law at the time when the generic medicine was marketed; and

... .'

3. Succinct presentation of the reasoning in the reference for a preliminary ruling

Is a court in a Member State that is not the reference Member State entitled to verify that the decentralised marketing authorisation procedure has been conducted in compliance with Directive 2001/83/EC?

12 The applicants are asking the Council of State to verify that the conditions laid down in Article 10(1) of Directive 2001/83/EC for access to the simplified marketing authorisation procedure applicable to generic medicinal products are met, and that the procedure followed in the present case does not create any risk to public health if the conditions laid down in that regard were not met.

13 The National Agency for Medicines and Health Products Safety submits in its defence that neither it, when granting marketing authorisation in accordance with the assessment report, the summary of product characteristics and the labelling and package leaflet as approved in accordance with the procedure laid down in Article 28(4) of Directive 2001/83/EC, nor the national court, in the context of an action brought against that marketing authorisation, has the possibility of calling into question the results of the decentralised procedure, and any claim of a potential serious risk to public health must be made, before the agreement of all parties is recorded, within the period referred to in that article.

14 The Court of Justice of the European Union ruled in its judgment of 14 March 2018 in *Astellas Pharma* (C-557/16, EU:C:2018:181) that:

'Article 10 of Directive 2001/83, as amended by Directive 2012/26, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a court of a Member State involved in a decentralised procedure for marketing authorisations, hearing an action brought by the holder of the marketing authorisation for the reference medicinal product against the marketing-authorisation decision for a generic medicinal product in that Member State taken by its competent authority, has jurisdiction to review the determination of the point in time from which the data exclusivity period for the reference medicinal product starts to run. …'

15 In so doing, the Court accepted that the courts of a Member State involved in a decentralised marketing authorisation procedure may hear an action brought against the marketing authorisation granted as a result of that decentralised procedure, irrespective of the Member State of reference.

16 However, in contrast to the Court's *Astellas Pharma* judgment, in the present case the applicants, which are laboratories marketing medicinal products that are biosimilars of the reference medicinal product and not the holders of the marketing authorisation for that reference medicinal product, are asking the Council of State not to review the determination of the starting point for data exclusivity of the reference medicinal product, but to verify that the medicinal

product at issue does indeed fulfil the conditions laid down in Article 10(1) of Directive 2001/83/EC for being granted a marketing authorisation as a generic medicinal product, so that its placing on the market does not give rise to a risk to public health as a result of the procedure followed.

17 The question arises whether a court of a Member State involved in a decentralised marketing authorisation procedure without being the reference Member State, seised of an action brought against the decision granting marketing authorisation in that Member State taken by the competent authority of that State, is competent to verify that the decentralised procedure was conducted in compliance with the provisions of Directive 2001/83/EC and that the placing of the medicinal product on the market does not present a potential serious risk to public health within the meaning of Article 29(1) of that directive. That is a serious question.

Can a marketing authorisation for a chemical medicinal product be granted under the simplified procedure when the reference medicinal product is a biological medicinal product?

18 The applicants submit that Article 10 of Directive 2001/83/EC provides for two mutually exclusive procedures.

19 First, the option under Article 10(1) creates a simplified marketing authorisation procedure, exempting the applicant from the requirement to produce the results of pre-clinical tests and clinical trials for generic medicinal products, since both the reference medicinal product and the generic medicinal product must, in their view, be chemical medicinal products.

20 Second, the option provided for in paragraph 4 of the same article creates another simplified marketing authorisation procedure for biosimilar medicinal products, exempting the applicant from having to produce the results of certain pre-clinical tests and clinical trials, since both the reference medicinal product and the similar medicinal product must in this case, in their view, be biological medicinal products.

21 The applicants infer that the procedure laid down for generic medicinal products cannot be followed when the reference medicinal product is a biological medicinal product, the active substances being, moreover, in their view necessarily different depending on whether they are produced using a chemical process or a biological process, owing to the variability inherent in the production of an active principle by biological means.

22 Conversely, the National Agency for Medicines and Health Products Safety and Biogaran contend that Article 10(1) of Directive 2001/83/EC does not require the reference medicinal product of a generic medicinal product to be a chemical medicinal product and that Article 10(4) of that directive, by providing for the eventuality that a biological medicinal product does not satisfy the conditions laid down for it to be classified as a generic medicinal product, implicitly provides for

the opposite eventuality in which those conditions might be satisfied and the procedure under Article 10(1) could be followed even though the reference medicinal product is a biological medicinal product.

23 The question is thus whether the provisions of Directive 2001/83/EC preclude a marketing authorisation from being granted to a chemical medicinal product in accordance with the simplified procedure laid down in Article 10(1) of that directive where the reference medicinal product is a biological medicinal product. That is a serious question.

The remaining pleas

24 The applicants also raise a plea alleging infringement of Article 3(3) of Regulation No 726/2004, which makes the authorisation of a generic medicinal product of a reference medicinal product authorised by the EU subject to the submission of an application in accordance with Article 10 of Directive 2001/83/EC and to the compliance of the summary of product characteristics with that of the medicinal product authorised by the Union '*in all relevant respects*'.

25 They also raise a plea alleging infringement of Annex I to Regulation No 726/2004, which requires certain medicinal products to be authorised by the Union, thereby precluding their authorisation under the decentralised procedure.

26 The fate of these pleas depends on the response given to the questions referred for a preliminary ruling, as that response is decisive for the resolution of the dispute.

4. Questions referred for a preliminary ruling

27 The Council of State refers the following questions for a preliminary ruling:

1. Should Articles 28 and 29 of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 be interpreted as meaning that a court of a Member State involved in a decentralised marketing authorisation procedure without being the reference Member State, which has jurisdiction to hear an action brought against that decision granting marketing authorisation taken by the competent authority of that Member State in accordance with what the Court held in its judgment of 14 March 2018, *Astellas Pharma* (C-557/16), is competent, in such a case, to verify that the decentralised procedure was conducted in compliance with the provisions of Directive 2001/83/EC and that the placing of the medicinal product on the market does not present a potential serious risk to public health within the meaning of Article 29(1) of that directive?

2. Should Article 10 of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 be interpreted as meaning that it precludes a marketing authorisation from being granted to a chemical medicinal product in accordance with the simplified procedure laid down in Article 10(1) of that directive where the reference medicinal product is a biological medicinal product?