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Comment on *GlaxoSmithKline*

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GlaxoSmithKline was not dominant, and that was not, and could not have been, suggested. However, even if it had been dominant, it would have been legal under Article 82 for it to have acted as a "discriminating monopolist", and charged lower prices in the Member State(s) in which (for reasons not brought about by the company) price levels are lower. This would have promoted consumer welfare, because consumers in the lower price States could get products at prices that they could afford.

GlaxoSmithKline is therefore entitled to prevent the benefits to consumers in the lower-price States being taken away by arbitrage, by limiting supplies there, and directing its distributors to concentrate on their customers there.

If the company tried to charge the same intermediate or average price everywhere, consumers in the high-price States would benefit, and consumers in the low-price States would suffer. There is no reason why this should be regarded as a net benefit to consumers overall.

On this view, the key feature of the case is that different price levels are not caused by the company in question or by pharmaceutical companies in general. It would be different if the different price levels had been brought about primarily or exclusively by the company involved.

If the conduct would have been lawful for a dominant company, it cannot be illegal under Article 81 for a company that is not dominant.

Under Article 82(c), discrimination is unlawful only if there is a competitive disadvantage. But that must mean a disadvantage in the market in which the buyer paying the higher price is selling. The fact that this buyer would be at a competitive advantage if it tried to sell in a lower-price market cannot be relevant.

Harm to consumers is expressly required by Article 82(b), and there are a number of arguments showing that it would be anomalous and irrational if harm to consumers was not a necessary element of abuse under Article 82(c).²

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² Temple Lang, Anticompetitive non-pricing abuses under European and national antitrust law, in Hawk (ed.), 2003 Fordham Corporate Law Institute (2004) 235-340, at 250-253; Temple Lang, Anticompetitive Abuses under Article 82 involving Intellectual Property Rights, in Ehlermann & Atanasiu (eds.), European Competition Law Annual 2003; What is Abuse of a Dominant Position? (Hart, 2006) 589-658, at 630-636; O'Donoghue & Padilla, The Law and Economics of Article 82 EC (Hart 2006) ch. 11 especially at pp. 580-585.