

The scope for restrictions on parallel trade in pharmaceutical products after two GlaxoSmithKline judgments

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In the European Union, the price levels of pharmaceutical products are different in different Member States, due to different policies of social welfare systems that bear most of the costs. Pharmaceutical companies have always tried to prevent products sold in low-price States being exported to higher-price States.

Once patented or trade marked goods have been sold with the consent of the owner of the IP right in one State, the rights are exhausted and the goods can be exported to other States in the EU.

The GlaxoSmithKline cases

GlaxoSmithKline is one of the companies that has tried to prevent this, by agreements with its buyers, and by supplying only the quantities needed in the low-price States. It was said that its agreements to discourage exports were contrary to Art. 101 (ex-81), and that limiting quantities sold was contrary to Art. 102 (ex-82). Both cases came before the European Court of Justice.

The Art 102 case (September 2008) involved a refusal to supply. In reply to a question asked by a Greek court, the Court of Justice held that a company in a dominant position for medicinal products commits an abuse if, in order to stop parallel exports, it refuses to meet ordinary orders from wholesalers. What is "ordinary" is judged in the light of the size of the orders in relation to the requirements of the national market, and the previous business relations with the wholesaler. National price regulation creates price differences, and opportunities for parallel trade. Competition law must not bring about a situation in which a company would not sell at all in a low-price State, to prevent its prices elsewhere being undermined. A company must be allowed to take reasonable and proportionate measures to protect its legitimate commercial interests. It can therefore refuse to supply quantities that are out of the ordinary.

In the Art.101 case (October 2009), the Commission had declared illegal an agreement by which GSK charged higher prices to pharmacies and hospitals for goods that were re-exported. The Court rejected GSK's argument that the agreement was not restrictive, since the object was clearly to restrict competition by discouraging exports. But the Court also rejected the Commission's argument that the agreement could not fulfil the requirements of Art.101(3). The Commission should consider whether, on balance, appreciable objective advantages are likely to result from the agreement. The specific features of the sector must be taken into account. Higher profits in higher-price countries provide funds for R & D. Even if the restriction resulted in a loss of efficiency for competition, the Commission should have considered whether there was an offsetting gain in efficiency. The Commission had not taken into account all GSK's arguments.

The Court's views

Essentially, the Court has told the Commission to consider carefully all the arguments of the pharmaceutical companies for limiting parallel imports into higher-price Member States, and not to assume that no limitations can be justified under Article 101(3). The companies are entitled to limit the quantities that they supply, to the volumes appropriate to the lower-price market (and perhaps to any well-established exports). Presumably this is now being done. Clearly the Court considers that the companies' arguments may be justified.

Economic comments

A pharmaceutical company, even if it were dominant, should be allowed to act as a "discriminating monopolist", and charge lower prices in the Member State(s) in which (for reasons not brought about by the company) price levels are lower. This would promote consumer welfare, because consumers in the lower price States could get products at prices that they could afford. (The Commission's Guidance Paper on exclusionary abuses under Article 102 unfortunately says nothing about discrimination, but economists generally agree that discrimination is often procompetitive and increases consumer welfare).

The company should therefore be 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, in particular because consumers in lower-prices would presumably be less well-off, and less able to afford the increased prices.

Parallel imports are one form of intra-brand competition, and apart from prices there is little or no scope for intra-brand competition in distribution of most pharmaceutical products. In other words, there is little or no competition to restrict.

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.

Of course, if the pharmaceutical company in question is not dominant, it has no duty to supply under Article 102, and it is free to make any agreement that is permitted under Article 101

Discrimination ?

The Court considered the Art.102 case primarily under Art.102(b) ("limiting marketing, production or technical development" of the wholesalers, if harm is caused to consumers). The other clause that might be relevant is Article 102(c) on discrimination.

Under Article 102(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 102(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 discriminatory abuse under Article 102(c), as is expressly required by Article 102(b).