

LIMITATION OF PARALLEL TRADE NOT NECESSARILY A RESTRICTION OF COMPETITION

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The EC Court of First Instance has recently held that an agreement that aims at limiting parallel trade does not necessarily have for its object to restrict competition.¹

Previously, the Commission had prohibited, under Article 81 (1) of the Treaty, the General Sales Conditions² of the Spanish subsidiary of the pharmaceutical lab GlaxoSmithKline (GSK). These general conditions provided that the group's medicines would be sold to Spanish wholesalers who carried out parallel imports at different prices, depending on whether these medicines were to be marketed in Spain or in another Member State (where the price of medicines is far higher).

In its analysis, the Court underlined the specificity of the pharmaceutical sector, in which prices of medicines are to a large extent shielded from the free play of supply and demand by regulatory forces. Under those circumstances it considered that the agreements limiting parallel trade in medicines do not necessarily restrict competition.

However, the Court agreed with the Commission's finding that in the present case parallel trade in the medicines concerned permitted a small but real drop in the price and cost of the medicines to the benefit of consumers. By preventing this drop in prices, the General Conditions of Sale had an anticompetitive effect and thus ran afoul of the prohibition under Article 81 (1) of the Treaty.

The Court nonetheless found that the Commission had not seriously examined the issue of whether the restrictions contained in GSK's General Conditions of Sale could be offset by, for instance, a gain in efficiency.³ As the gains derived from sales at a higher price in certain countries are allocated to finance pharmaceutical innovation, they effectively contribute to the financing of innovation. The Community court thus reversed part of the decision and invited the Commission to re-examine GSK's claim.

There is a twofold lesson to be learned from this decision: a contractual limitation on parallel trade in regulated medicines does not always have an anticompetitive object; however, it should be ensured that any possible restrictive effects on competition resulting from such limitation can be offset by real economic benefits within the meaning of Article 81 (3) of the Treaty.

¹ CFI decision, 27 September 2006, case T-168/01.

² It should be recalled that since the 1st of May 2004, the date of entry into force of Regulation 1/2003, undertakings can no longer notify their agreements to the Commission so as to obtain an individual exemption. It is up to them to prove, when prosecuted, that their agreements meet the conditions for exemption under Article 81 (3).

³ Pursuant to Article 81 (3) of the Treaty.

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