



September 2008

## Limiting parallel exports may constitute abuse of a dominant position

**On 16 September 2008 the European Court of Justice ruled that it can be illegal abuse of a dominant position if a dominant pharmaceuticals producer refuses to accept orders from national distributors in order to limit parallel exports to other EU countries. The supplier can only refuse to accept such orders if these orders appear out of the ordinary in light of the market requirements in the export member state and the parties' previous business relations.**

### BACKGROUND TO THE RULING

GlaxoSmithKline ("GSK") produces, among other things, the medicines Imigran, Lamictal and Serevent. In the Greek market, distribution of these prescription medicines takes place through different Greek distributors (wholesalers) which for many years both sold the medicines on the Greek market and exported them to other EU member states, where prices for the medicines in question have typically been fixed at a higher level than in Greece. Therefore the parallel imported medicines from the Greek distributors could be sold at a lower price in the import states than the equivalent medicines which were marketed by GSK directly. GSK consequently experienced that the company was not achieving its expected earnings in the relevant import member states. To counter this, GSK reorganised its distribution system and eventually began to partially refuse to meet orders from the Greek distributors.

The Greek distributors brought a lawsuit against GSK. As part of the procedure, the Greek appellate court requested the European Court of Justice for a preliminary ruling as to whether the partial refusal to supply by a dominant pharmaceutical producer could constitute abuse of a dominant position when the refusal to supply is intended to prevent parallel exports.

### THE ASSESSMENT OF THE EUROPEAN COURT OF JUSTICE

In the introduction to the ruling, European Court of Justice states that it follows from established case law that the actions of a dominant market player that are intended to prevent parallel trading constitute abuse of a dominant position. Because it was undisputed in this case that GSK's partial refusal to supply had the explicit intention of limiting parallel exports from Greece, the primary issue to be assessed by the European Court of Justice was whether these actions were justifiable on objective grounds.

The European Court of Justice then considers whether GSK's actions may be justified by the fact that the price differentials between different member states not only benefit the end users in the import member

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states however at the same time, also benefit, to a large extent, the parallel exporters in the form of increased profits. The Court merely stated that the very purpose of parallel exports is to create price pressures in a market which is otherwise subject to governmental price setting, something which most definitely could be viewed as being of benefit to the end users. Therefore these circumstances could not justify GSK's actions.

Subsequently, the Court assesses whether the situation in which medicines are often subject to price regulating in member states is significant to the assessment of whether the refusal to supply constitutes abuse of a dominant position. The Court dismisses this by stating that the control exercised by member states over inter alia the selling prices on medicines does not entirely remove the prices of such products from the normal market related mechanisms. This is due to, among other things, the fact that the pharmaceutical producers have a certain influence on government price setting, including through participation in price negotiations with the authorities.

Importantly, the Court explicitly states that even in cases where parallel trade would effectively lead to a shortage of medicines on a given national market, it would not be for the undertakings holding a dominant position but for the national authorities to resolve the situation.

While the Court considers that the competition rules do apply to the pharmaceuticals industry, it also recognises that a dominant producer of pharmaceuticals has the right to protect its commercial interests. In this respect, the Court refers to the case law which is established by, among others, *United Brands v. Commission* (Case 27/76). This entails that a producer of pharmaceuticals has the right to refuse to supply orders that are out of the ordinary in terms of quantity. At the same time, the Court determines that it is to be decided by the national court as to whether the size of the orders, in terms of both the market requirements in the export member state and with regard to the parties' previous business relations, is ordinary or not.

## THE CONSEQUENCES OF THE RULING

For those that had hoped for a final clarification of the issue concerning the right of a dominant pharmaceutical producer to restrict parallel trading the ruling may be something of a disappointment. The European Court of Justice rejects the notion that the pharmaceutical industry is so distinctive in character that the consequences of the general competition regulations should be disregarded or significantly restricted, however nevertheless still allow a dominant pharmaceuticals producer to, without hindrance from the competition regulations, institute unilateral measures for preventing parallel exports. The latter presupposes that the refused order was out of the ordinary. However, the ruling fails to resolve the issue of what constitutes an ordinary order, and it therefore remains to be seen how significant the practical importance of this exemption will be.

## HOW CAN THOMMESSEN HELP?

Thommessen has comprehensive expertise in competition law and broad experience in advising pharmaceutical producers, distributors and other players within Life Sciences. This provides Thommessen with the best qualifications to provide advice to these market players about how the competition rules can best be used to realise commercial and strategic objectives and how actions that are in violation of these competition rules can be avoided.

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