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EU General Court Confirms European Commission's Discretion to Dismiss Dual-Pricing Complaint

Anne Robert (Sidley Austin LLP) · Tuesday, October 16th, 2018

The General Court (GC) ruling of September 26 in Case T-574/14 constitutes an important (and possibly final) episode in the European Union's (EU) review of the Spanish "dual pricing" and parallel trade saga. The GC found that the European Commission was not obliged to adopt a new decision as to whether an agreement GlaxoSmithKline (GSK) had put in place with its wholesalers in Spain fulfilled the conditions for exemption in Article 101(3) of the Treaty on the Functioning of the European Union (TFEU). According to the GC, the Commission had the discretion to decline a further investigation on the grounds of insufficient EU interest.

Background

The alleged anti-competitive activities began in 1998, when GSK (Glaxo Wellcome at the time) asked the Commission for a negative clearance or individual exemption for its general sales conditions to authorized wholesalers in Spain. GSK's wholesalers could resell 82 medicinal products to hospitals and pharmacies in Spain or in other Member States. However, GSK charged lower prices for medicines that were to be dispensed in Spain than for medicines meant to be exported to other Member States.

On January 19, 1999, the European Association of Euro-Pharmaceutical Companies (EAEPC) filed a complaint with the Commission, requesting it to refuse to grant negative clearance or exemption and to order GSK to abandon its pricing policy. The Commission found that the pricing policy had the object and effect of restricting competition, contrary to Article 101(1) TFEU, and that it did not meet the conditions for exemption in Article 101(3). GSK appealed and the GC partly upheld the action. The GC disagreed with the Commission that the pricing clause restricted competition "by object" but considered that GSK had not succeeded in showing that the clause did not restrict competition "by effect." The GC also held that the Commission failed to carry out an adequate examination of whether the conditions in Article 101(3) TFEU had been met. Both GSK and the Commission appealed the case to the European Court of Justice (ECJ), which agreed with the Commission's finding that the pricing clause had restricted competition "by object." However, according to the ECJ, the GC's error of law did not constitute a ground for setting the GC judgment aside. The ECJ also agreed that the Commission should have carried out a full examination of whether any of the grounds for an individual exemption provided under Article 101(3) TFEU were met. GSK subsequently withdrew its initial request for an exemption from

1998.

The EAEPC, however, asked the Commission to reassess the 1999 complaint, which the Commission refused for lack of sufficient EU interest (in essence because the conduct had ceased and there were no persisting effects). The EAEPC challenged the Commission's refusal in the GC. The recent GC judgment confirmed that as GSK had withdrawn its initial request for negative clearance and individual exemption under Article 101(3) TFEU, the Commission was not required to rule on the request for exemption. In addition, the Commission could decide to take no further action on the complaint because of an insufficient EU interest. The Commission thus was not required to make a final decision as to the existence (or non-existence) of the infringement alleged in EAEPC's complaint. The GC also emphasized that national authorities are as well placed as the Commission to review this type of conduct. Moreover, according to the GC there was no evidence that other dual-pricing strategies implemented by pharmaceutical companies in Spain were linked, or could be attributed, to GSK's conduct.

Parallel Trade Restrictions and Their Assessment Under EU Law

In the pharmaceutical sector in particular, parallel trade is incentivized because pricing regulations are not harmonized at the EU level but remain the prerogative of Member States. Parallel trade of medicinal products from "low" price countries into "high" price countries is thus driven by different national regulations as opposed to free competition in the internal market.

Potential restrictions of parallel trade (such as dual-pricing) raise a number of EU law concerns:

- Parallel imports and exports of medicinal products are protected under free movement of goods rules (set out in Article 34 TFEU).
- Article 81 of Directive 2001/83 on the community code relating to medicinal products for human use (as amended by Directive 2004/27) obliges manufacturers and wholesalers to ensure "appropriate and continued supplies" of medicinal products to the domestic market, which sets limits to parallel trade.
- Under Articles 101 and 102 TFEU, although a manufacturer is in principle free to adopt its own supply policy, the implementation of that policy must be in compliance with competition law.

Although the GSK case mainly relates to the Commission's discretion to further investigate a complaint and does not provide clarity as to the application of Article 101(3) TFEU to dual-pricing systems, it nevertheless explains that such systems may restrict competition "by object" in violation of Article 101(1) TFEU. However, not all dual-pricing strategies are problematic under competition law. The Spanish Competition Authority confirmed last year that a dual-pricing scheme implemented by another pharmaceutical company in Spain was in line with competition rules. It also closed an investigation last month that related to alleged collusion among several pharmaceutical companies to introduce a dual-pricing scheme. In addition, the Spanish Supreme Court recently rejected an appeal request by the EAEPC against a lower court ruling dismissing its allegation that another pharmaceutical company's dual-supply system breached competition law.

Another area of concern relating to potential restrictions of parallel trade is where manufacturers set up so-called "stock allocation" schemes to manage supply. Risks may arise under Article 101(1) TFEU if, under such a scheme, the manufacturer (unilaterally) limits supply to (exporting) wholesalers who acquiesce in the scheme. If such mechanisms are imposed by companies in a

dominant position, they may be in violation of Article 102 TFEU. The Greek Competition Authority, for example, fined a pharmaceutical company for having abused its dominant position by refusing to supply certain medicinal products in order to restrict parallel exports. However, the authority added that companies can restrict supplies where orders are "out of the ordinary" and go beyond what is needed on the domestic market.

Looking Ahead

For a number of years, very few new parallel trade cases were brought before the Commission and national competition authorities, but the calm was only temporary. The GSK saga in Spain may have come to an end (unless the EAEPC decides to appeal), but various other cases, including in sectors other than the pharmaceutical sector, are still ongoing. The Commission, for example, is investigating a beer company for allegedly abusing its dominant position by preventing its wholesalers from importing from lower-price countries. As a result, parallel trade restrictions will certainly remain under close scrutiny at both an EU and a national level.

Anne Robert is an associate at Sidley Austin LLP. The views expressed in this article are exclusively those of the author and do not necessarily reflect those of Sidley Austin LLP and its partners. This article has been prepared for informational purposes only and does not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers. Please let us know if you have any questions or comments.

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