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Press and Information

PRESS RELEASE No 19/08

1 April 2008

Advocate General's Opinion in Joined Cases C-468/06 to C-478/06

Sot. Lélos Kai Sia EE (and Others) v GlaxoSmithKline AEVE

ADVOCATE GENERAL RUIZ-JARABO MAINTAINS THAT A PHARMACEUTICAL COMPANY HOLDING A DOMINANT POSITION WHICH REFUSES TO MEET THE ORDERS OF WHOLESALERS, IN ORDER TO LIMIT PARALLEL TRADE, ENGAGES IN ABUSIVE PRACTICE

In this case, there are no objective reasons relating to State intervention in the market which would excuse such conduct

Through its subsidiary, GSK AEVE, GlaxoSmithKline plc distributes in Greece certain pharmaceutical products for which it holds the patent (Imigran for migraine, Lamictal for epilepsy and Serevent for asthma). For a number of years, the applicants (intermediary wholesalers) have been buying those medicinal products in order to supply the market not only in Greece but also in other countries (Germany and the United Kingdom) where the amount reimbursed per medicinal product is higher than that obtained in Greece. In 2000, GSK changed its system of distribution in Greece, no longer meeting orders from wholesalers. It supplied hospitals and pharmacies through a company called Farmacenter AE. The dispute which then arose gave rise to a first reference to the Court of Justice of the European Communities for a preliminary ruling[1].

Before the Greek civil courts, Sot. Lélos and the other wholesalers maintained that GSK's interruption of supplies, as well as its practice of trading through Farmacenter, amounted to anti-competitive conduct and abuse of dominant position. The Trimeles Efeteio Athinon (Appeal Court of Athens) therefore sought a preliminary ruling on a number of questions concerning Community competition law and the abuse of dominant position, as well as parallel exports of medicinal products from Greece to other Member States.

Advocate General Dámaso Ruiz-Jarabo points out that the Treaty provision which prohibits abuse of dominant position does not admit of any exception. Moreover, he maintains that **the Treaty does not provide a basis for attributing to undertakings in a dominant position conduct which is in itself abusive, even when the circumstances of the case leave no room**

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[1] Case C-53/03 *Syfait and Others* [2005] ECR 4609 (see also the related press release), in which the Court declared that it had no jurisdiction to reply to the body which had referred the question to it (the Epitropi Antagonismou), since the latter was not a court or tribunal.

for doubt as to its anti-competitive purpose or effect. On the contrary, such conduct may be objectively justified.

First, in the view of the Advocate General, the European pharmaceuticals market is **an imperfect market, with a low level of harmonisation**, characterised by **State intervention** in respect of pricing and public reimbursement systems and by the duty to supply and where, because of the industrial patents of pharmaceutical products, the holders of those industrial property rights can easily assume positions of dominance.

Nevertheless, the Advocate General believes that **the price regulation system is not completely free from the influence of the manufacturers**, who negotiate prices with the health authorities of the Member States. By the same token, the duty to supply does not justify cutting off supplies to rival wholesalers, because the needs of patients in a Member State are not subject to sudden changes, and the statistics for the various illnesses are reliable, offering companies a degree of predictability which enables them to adapt to the market.

Second, **protection of legitimate business interests** may justify conduct such as that of GSK, in accordance with certain case-law of the Court of Justice. However, in the present case, the Advocate General **rejects the idea of a causal link between the loss of income because of parallel trading and the producer's reduction of investment in research and development**. In fact, the European Union offers undertakings a favourable environment in that respect, encouraging them to minimise the costs entailed by research and development by means of block exemptions for horizontal agreements of that nature.

Lastly, the Advocate General suggests that undertakings in a dominant position may be entitled to demonstrate the **efficiency in economic terms** of their potentially abusive conduct. As regards the circumstances of the present case, however, the Advocate General takes the view that – apart from the description of the negative consequences of parallel trade – **GSK has not indicated any positive aspect resulting from its cutting down on medicinal supplies to wholesalers**.

In consequence, the Advocate General proposes that the Court of Justice state in reply to the questions referred for a preliminary ruling that an undertaking in a dominant position which refuses to meet in full the orders of wholesalers of pharmaceutical products, with a view to reducing the harm caused by parallel trade, thereby engages in abusive conduct. However, it is possible that the undertaking can provide an objective justification for its conduct by showing that the regulation of the market compels it to behave in that manner in order to protect its legitimate business interests (it not being possible in the present case to rely on the pricing system for medicinal products, the duty to supply or the impact on innovation incentives).

IMPORTANT: The Advocate General's Opinion is not binding on the Court. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court of Justice are now beginning their deliberations in this case. Judgment will be given at a later date.