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Advocate General's Opinion in Case C-53/03

*Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v Glaxosmithkline
AEVE*

**REFUSAL BY A DOMINANT PHARMACEUTICAL UNDERTAKING TO MEET
ALL ORDERS OF ITS CUSTOMERS SO AS TO RESTRICT PARALLEL TRADE
DOES NOT AUTOMATICALLY CONSTITUTE AN ABUSE OF A DOMINANT
POSITION**

Such behaviour should not be considered abusive where the differences in prices of medicines between the Member States are the result of State intervention and in the light of the specific circumstances of the European pharmaceutical market.

Glaxosmithkline (GSK), a pharmaceutical company, supplies its products to the complainants, who are pharmaceutical wholesalers, through its Greek subsidiary. Until November 2000 GSK met all the orders placed by the wholesalers. The wholesalers then exported a large proportion of these orders to other Member States where prices were much higher. After November 2000, however, GSK stopped supplying the wholesalers and stated that it would only supply hospitals and pharmacies directly, alleging that the export of the products by the wholesalers was leading to shortages on the Greek market. GSK subsequently reinstated supplies to wholesalers, but in limited quantities.

The wholesalers complained to the Greek Competition Commission about this refusal to meet their orders. Following interim measures adopted by the Competition Commission GSK's Greek subsidiary has met the orders of the wholesalers to the extent of the supply received by it from GSK. This has been sufficient to satisfy the demands of the Greek domestic market but not the much larger orders placed by the wholesalers.

The Competition Commission has noted that the prices of medicinal products are fixed by each Member State and that those in Greece are consistently the lowest. Proceeding on the basis that GSK enjoys a dominant position in at least one of the products in question, Lamictal (an anti-epileptic drug), the Competition Commission has asked the Court of Justice of the European Communities whether and in what circumstances a dominant pharmaceutical company may refuse to meet in full the orders it receives from wholesalers in order to limit parallel trade.

Advocate General Jacobs recalls that, according to the case law of the Court, a dominant company may be obliged to supply its products or services but that this only applies in exceptional circumstances. The Advocate General notes that this would be the case where a refusal to supply would seriously distort competition on a downstream market or on the market of supply. However, a dominant undertaking is not obliged to meet orders which are out of the ordinary and is entitled to take such steps as are reasonable in order to defend its commercial interests. Moreover the Advocate General observes that the criteria for determining whether behaviour is abusive are highly dependent on the specific economic and regulatory context of each case.

Therefore Advocate General Jacobs opines that **restricting the supply of products does not automatically constitute an abuse of a dominant position** merely because the dominant undertaking intends to restrict parallel trade.

When examining whether such conduct within the pharmaceutical industry constitutes an abuse the Advocate General considers that a number of factors must be taken into account.

Firstly, the Advocate General notes it is the price differentials created by the intervention of the States in the pharmaceutical market that create the possibility for parallel trade. This coupled with the high degree of regulation of the pharmaceutical market by the Community and the Member States means that the normal conditions of competition do not prevail on this market. To require a dominant pharmaceutical undertaking to supply all export orders would in many cases impose a disproportionate burden especially given the moral and legal obligations incumbent on that undertaking to maintain supplies in all Member States.

Secondly, given the specific economic characteristics of the sector, Advocate General Jacobs states that a requirement to supply would not necessarily promote either free movement or competition and could even harm the incentive for pharmaceutical companies to innovate.

Thirdly, such parallel trade does not always produce any benefit for the consumer, or the Member State as primary purchaser. Advocate General Jacobs notes that in some circumstances the only benefit is received by those in the distribution chain, with the result that some Member States have established "claw-back" schemes in order to recover a portion of the profit.

Finally the Advocate General emphasises that his conclusions are highly specific to the pharmaceutical industry in its current situation and to the problem at issue in this specific case. In this respect he stresses that conduct by a dominant pharmaceutical undertaking that more clearly and directly partitions the common market or had negative consequences for competition arising other than as a consequence of its restriction of parallel trade could still be considered abusive.

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.

Unofficial document for media use, not binding on the Court of Justice.

Languages available: DE, EN, ES; FR, GR, IT

*The full text of the Opinion may be found on the Court's internet site
<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>
It can usually be consulted after midday (CET) on the day of delivery.*

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