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Press and Information

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Judgment of the Court of First Instance in Case T-168/01

GlaxoSmithKline Services Unlimited v Commission of the European Communities

THE COURT OF FIRST INSTANCE ANNULS IN PART THE DECISION PROHIBITING GLAXO FROM SELLING ITS MEDICINES AT DIFFERENT PRICES ACCORDING TO THE PLACE OF REIMBURSEMENT

Although the Commission was correct to state that GSK's General Sales Conditions restrict competition by preventing the price and the cost of medicines from falling, it did not sufficiently examine the question whether they might give rise to an economic advantage by contributing to the financing of pharmaceutical innovation

Glaxo Wellcome (GW) is a Spanish subsidiary of the GlaxoSmithKline group (GSK), one of the world's leading producers of pharmaceutical products. In March 1998 it adopted new General Sales Conditions, which stipulate that its medicines will be sold to Spanish wholesalers at prices differentiated according to the national sickness insurance scheme which will reimburse them. In practice, medicines intended to be reimbursed in other Member States of the Community will be sold at a higher price than those intended to be reimbursed in Spain. That system was introduced in order to limit parallel trade in medicines between Spain, where the administration sets maximum prices, and other Member States, in particular the United Kingdom, where prices are fixed at a higher level, with a view to allocating the surplus thus obtained to innovation.

GSK notified those General Sales Conditions to the Commission in order to obtain a decision declaring that they are not prohibited by Community competition law (Article 81(1) EC) or, failing that, a decision granting them an exemption (Article 81(3) EC) as an agreement contributing to promoting technical progress.

At the same time, the Commission received a number of complaints directed against the General Sales Conditions from a number of Spanish or European wholesalers' associations and from one Spanish wholesaler.

On 8 May 2001, the Commission decided that the General Sales Conditions were prohibited by Community competition law, because they constituted an agreement in restriction of competition. It also decided that GSK had not proved to the Commission that the conditions

necessary for such an agreement to be able to benefit from an exemption were satisfied. It therefore ordered GSK to bring the practice to an end.

GSK requested the Court of First Instance to annul the Commission decision in its entirety.

By today's judgment, **the Court of First Instance holds that the Commission's analysis is invalid in part.**

As regards, first of all, the existence of an agreement between undertakings, the Court finds that the Commission did not err in concluding that the General Sales Conditions constituted an agreement. In effect, a number of Spanish wholesalers expressly agreed to act as GW had requested.

As regards, next, the existence of a restriction of competition, the Court considers that **the Commission's main conclusion, that the General Sales Conditions have as their object the restriction of competition because they make provision for differentiated prices which seek to limit parallel trade in medicines, is incorrect.** In effect, the case-law requires the Commission to analyse agreements by reference to their legal and economic context. However, the Commission did not take proper account of the specific nature of the pharmaceuticals sector. Unlike the situation in other economic sectors, the prices of medicines reimbursed by the national sickness insurance schemes are not freely determined by supply and demand, but are set or controlled by the Member States. For that reason, **it cannot be presumed that parallel trade tends to reduce prices** and thus to increase the welfare of final consumers, as it would do in the absence of those special regulations.

However, the Court considers that **GSK has not succeeded in invalidating the Commission's subsidiary conclusion that the General Sales Conditions have as their effect the restriction of competition.** In that regard, it is not decisive that they limit the freedom of action of GW and the Spanish wholesalers. In fact, it is in the nature of any distribution agreement to limit the autonomy of the parties according to the terms which it specifies. However, regard being had in particular to the measures taken by the Member States to recover a part of the profits made by parallel traders, for the benefit of the national sickness insurance schemes and patients, **a specific examination of the situation in the sector leads to the finding that parallel trade permits a limited but real reduction in the price and the cost of medicines. In so far as they prevent that advantage from being produced, the General Sales Conditions diminish the welfare of final consumers.**

Last, the Court of First Instance finds that the Commission did not carry out an adequate examination of GSK's request for an exemption. In particular, **the question whether the General Sales Conditions might give rise to an economic advantage by contributing to innovation, which plays a central role in the pharmaceutical sector, was not examined with sufficient thoroughness.** The Commission did not validly take into account all the factual arguments and the relevant economic evidence and did not sufficiently substantiate its conclusions.

As the Commission did not further justify its position concerning the other conditions which an agreement must satisfy in order to be eligible for an exemption, the decision is annulled in that it rejects GSK's request for an exemption. As that annulment is retroactive, it puts the Commission back in the situation that existed on the date of GSK's request for an exemption. **It is therefore incumbent on the Commission to reconsider that request, in so far as it remains before it.**

REMINDER: An appeal, limited to points of law only, may be brought before the Court of Justice of the European Communities against a decision of the Court of First Instance, within two months of its notification.

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

Languages available: CS DE EN ES EL FR HU IT NL PL PT SK SL

*The full text of the judgment may be found on the Court's internet site
<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-168/01>*

It can usually be consulted after midday (CET) on the day judgment is delivered.

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*Pictures of the delivery of the judgment are available on EbS "Europe by Satellite",
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