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Advocate General delivers opinion in refusal to supply case

In Sot Lélos Kai Sia EE v GlaxoSmithKline AEVE Farmakeftikon Proionton (Joint Cases C-468/06 to C-478/06, April 1 2008), Advocate General Ruiz-Jarabo has delivered a much-anticipated opinion in a case involving GlaxoSmithKline plc's (GSK) refusal to supply Greek wholesalers with pharmaceutical products.

Until 2000, GSK supplied Greek wholesalers with patented pharmaceutical products (under the marks IMIGRAN for migraine, LAMICTAL for epilepsy and SEREVENT for asthma) through its Greek subsidiary. The wholesalers subsequently exported some of the products to other EU member states in order to benefit from higher reimbursement rates. In response, GSK started supplying Greek hospitals and pharmacies directly through a single company and refused to meet the wholesalers' orders in full.

GSK's refusal to supply Greek wholesalers was already the subject of the *Syfait Case* (Case C-53/03). In 2004 Advocate General Jacobs found that GSK's refusal to supply was objectively justifiable in view of the special characteristics of the pharmaceuticals market. The European Court of Justice (ECJ), however, did not rule on the issue as it found that the reference from the Greek competition authority was inadmissible.

The Athens Appeal Court has once again referred the issue to the ECJ for a preliminary ruling. In his opinion, new Advocate General Ruiz-Jarabo first pointed out that the most relevant cases were *Commercial Solvents* (Joint Cases C-6/73 and 7/73) and *United Brands* (Case C-27/76). These cases establish the basic rule that a dominant company that refuses to supply goods abuses its dominant position.

However, Ruiz-Jarabo recognized that no conduct can be classified as being abusive *per se*, even where the anti-competitive effect and intent are evident. He referred to recent cases (eg, *British Airways* (Case C-95/04 P)) in which the dominant company was allowed to provide an objective justification, even for conduct that was previously treated as being abusive *per se*. According to Ruiz-Jarabo, Article 82 of the EC Treaty must be interpreted as including the possibility to provide an objective justification in all cases - otherwise, dominant companies would be deprived of their right of defence. It would also be overly formalistic to treat certain conduct as being abusive *per se*.

Ruiz-Jarabo considered that there are three possible types of justification:

- the characteristics of the particular market;
- the protection of commercial interests; and
- economic efficiency.

While accepting that the EU pharmaceuticals market does not function as a normal competitive market (as it is regulated by state intervention and by the obligation to maintain sufficient stocks to satisfy national demand), Ruiz-Jarabo argued that pharmaceutical companies can nevertheless sufficiently influence the price-setting system. Accordingly, the fact that prices are fixed by member states would not be an acceptable justification. Further, the obligation to maintain stocks and guarantee supplies to the local market would not be an acceptable justification either, since patients' needs are not subject to sudden changes and the available statistics offer a degree of predictability, thereby enabling companies to adapt to market changes.

In contrast to the 2004 opinion, Ruiz-Jarabo rejected the theory of a causal link between the loss of income due to parallel trading and the producer's reduction in research and development (R&D) investment. Ruiz-Jarabo referred to the EU Block Exemption Regulation for R&D Cooperation

(2659/2000), arguing that, in light of the favourable legal environment provided within the European Union, GSK could not allege that it had legitimate commercial interests in R&D that would justify its refusal to supply. Even if such justification were acceptable in principle, GSK had acted disproportionately in trying to eliminate parallel exports from Greece.

Finally, referring to the "DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses", Ruiz-Jarabo acknowledged that economic efficiency (eg, the wellbeing of patients and the reduction of healthcare costs) may potentially justify abusive conduct. However, according to the advocate general, GSK had not provided any evidence to substantiate such a justification. Therefore, GSK's conduct could not be justified objectively and was contrary to Article 82 of the Treaty.

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