ANALYSIS OF THE GLAXO SAGA: GSK SPAIN (COMPETITION LAW PROSPECTIVE)

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ABSTRACT

It was the time of middle 1990-s the pharmaceutical market in the European Community grieved from parallel imports initiating mainly from two countries with the prices for pharmaceuticals fixed at a considerably low level, namely – Spain and Greece. Pharmaceutical companies working in this low-priced segment of internal market were pretentious by the growing scope of parallel trade and sought therefore to restrict it by the available contractual means. GlaxoSmithKline Spain, the first landmark case to be analysed in that regard where the ECJ had to answer whether and under which situations manufacturers of medical products can legally restrict parallel trade in the internal market.

Keyword: GLAXO SAGA: GSK SPAIN, Article 101(1) TFEU, Article 101(3) TFEU.

The Case Background

One of the world's largest pharmaceuticals producers was GlaxoSmithKline Service Unlimited, the Spanish subsidiary of GlaxoSmithKline group which was being hosted by the new General sales conditions for its wholesalers in Spain (1998). According to Article 4 of these General conditions, GSK recognized the new "dual pricing" policy, which would let it charge different prices for the products to be sold on the domestic market and those for export. In particular, under the Spanish law there was maximum level are set out by the health care authorities which should not be exceed from it, prices for medicines distributed to pharmacies and hospitals located in Spain. According to real, objective and non-discriminatory economic criteria, supplies for export GSK decided that sales prices should be determined which would make them far higher and consequently eliminate parallel trade expediency. "In so doing, GSK intended to restrict parallel trade in its medicines in which Spanish intermediaries were engaging on account of the price differentials between Spain and other Member States".[1]

The Commission's Decision

GSK notified the European Commission of the new General terms in order to seek an individual exemption of such a provision from being caught by Article 101(1) TFEU. At the same time, the "dual pricing" provision was challenged by a number of wholesalers before national competition authorities. In 2001, the Commission conveyed the Decision on GSK's exemption request held that the new terms did fall within the scope of Article 101(1) and could not be released from it under Article 101(3) TFEU because of the fact that "such conditions have as their *object* and effect restriction competition and affect trade between Member States to an considerable extent within the meaning of Article 101(1)". The basis of this conclusion was made both on the existing case law and the economic analysis made by the Commission, which comes up with the opinion that "dual pricing" clause "produced in effect tantamount to that of an export ban in a significant number of cases". That decision was appealed by GSK before the Court of First Instance (the General Court).[2]

Court of the First Instance Judgment

In 2006, the CFI completely reversed Commission's decision by first pronouncing that the clause restricting parallel trade did not have an anti-competitive object per se but only had anti-competitive effect. This declaration amounted to the reassessing of the well-established policy described above. The Court reliably held that the Commission was wrong finding the restrictive object of the agreement in question due to numerous grounds. The vaguest issue, which would let it reach that decision, was the postulation that the ultimate purpose of Article 101(1) TFEU was protection of interests of final customers, i.e. consumer welfare. This lead to the inference that an agreement limiting parallel trade has the object of restricting competition in so far as it denies final customers of effective competition.

The CFI found after having analyzed the relevant market that unlike other sectors of economy, state regulation of prices on pharmaceutical products makes this market to some level shielded from "regular" supply-demand system of price determination. Consequently, it is impossible to assume that parallel trade would always lead to prices reduction and therefore increase the welfare of final consumer's. Later according to the reasoning of the Court, means that the "dual pricing" system has not the object but effect of competition restriction.

At last the Court finally ruled that the Commission was in principle right finding it in breach of Article 101(1) TFEU with the remark that an error of law was committed when declaring GSK's pricing clause anti-competitive per se. Another point of disapproval in the CFI's ruling was failure.

By the Commission to adequately examine arguments concerning exemption of the agreement from Article 101 TFEU moved forward by GSK and the issues concerning allocation of burden of proof.

> The Court observed that "in order to be capable of being exempted under Article 101(3) TFEU, an agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress".

CONCLUSION

All these conclusions were sufficient for the court to terminate the Decision of the Commission almost in all its points. Rationally, all the parties were not pleased with this result and appealed the CFI Decision to the ECJ. GSK asked the ECJ have to make sure that the agreement concerned did not fall within the scope of Article 101(1) neither as having the object nor the effect of competition restriction. The Commission accordingly required "dual pricing" to be recognized as a measure restricting competition by object and therefore falling within the scope of Article 101(1) without the option of its justification under 101(3) TFEU.

REFERENCES

[1] R. Hood and C. Hoyle, *The Death Penalty: A Worldwide Perspective*. 2012.

[2] R. Lane, "Competition law," *Int. Comp. Law Q.*, 2012.