



Parallel trade restriction

A new European Court of Justice ruling could
change the face of parallel trade.

Dominant drug firms do not necessarily abuse their dominance when they refuse to meet wholesalers' orders in full, with a view to limiting parallel trade, say Catriona Hatton and Wim Nauwelaerts of law firm Hogan & Hartson.

With prices largely determined by national governments, the European pharmaceutical sector has proven to be fertile soil for parallel trade. Although the pharmaceutical industry has always argued that this is extremely damaging to its competitiveness and is of little benefit to consumers, European lawmakers have consistently ruled that the drug industry is no different from any other, and there is no need to apply the principle of free movement of goods with more flexibility for price-controlled medicines.

However, the recent Bayer/Adalat case forced the European Commission to fine-tune its parallel trade policy, giving so-called non-dominant pharmaceutical companies a degree of manoeuvre to manage supplies and reduce parallel trade, provided they do not sign anti-competitive agreements. Nonetheless, the supply management of a dominant pharmaceutical company could still be

challenged if its conduct constitutes an abuse of dominance, which is forbidden under EC law.

This could all change if the European Court of Justice follows Advocate-General Jacobs' recent recommendations in the Syfait/GlaxoSmithKline parallel imports case, and rules that the current parallel trade policy has no foundation when applied to pharmaceuticals. The case originally came to the ECJ after Greek wholesalers complained that GSK was breaking competition law by refusing to meet all their orders: drug prices are relatively low in Greece, making it ripe ground for parallel importing. AG Jacobs has suggested that dominant pharmaceutical companies should be able to restrict supply to limit parallel trade, without necessarily violating competition rules.

The competition authority suspended its final decision ahead of a court ruling on whether restricting the supply of pharmaceutical products automatically constituted an abuse of dominance, merely because the dominant company intended to curb parallel trade. However, AG Jacobs argues that dominant companies are only obliged to supply their products if refusal could harm competition. The criteria for determining whether certain behaviour is abusive depend on the specific economic and regulatory context. In the case of pharmaceuticals, EU regulations mean that normal competition conditions do not prevail. Given their obligation to maintain supplies in each country, manufacturers would face a disproportionate burden if forced to supply all export orders placed with them. Moreover, the incentive to invest in research and development could be reduced if companies came to lower returns as a result of unlimited parallel trade. Finally, the benefit of the parallel trade often tends to accrue mainly with the companies rather than the end consumers.

Although an advocate-general's opinion is not binding, all eyes will be on the court later this year to assess the possible impact of its ruling on the Industry.

